Annotation of the Alberta Human Rights Act

FOURTH EDITION

Annotation of the Alberta Human Rights Act

(Fourth Edition)

by the

Alberta Civil Liberties Research Centre

Mailing Address:
2350 Murray Fraser Hall
University of Calgary
Faculty of Law
2500 University Drive NW
Calgary, AB T2N 1N4
Phone:(403) 220-2505
Fax: (403) 284-0945

Alberta Civil Liberties Research Centre's home page is located at: www.aclrc.com

ACKNOWLEDGMENTS

THE ALBERTA LAW FOUNDATION

The Alberta Civil Liberties Research Centre is supported by a grant from the Alberta Law Foundation

CONTRIBUTORS

The staff and volunteers who contributed to this edition include:
Andres Mikhail Villaruel, Student-at-Law
Olaitan Oyekunle, Student-at-Law
Hani Lee, Summer Law Student
Linda McKay-Panos, B.Ed., J.D., LL.M., Executive Director
Sharnjeet Kaur, B.Ed., Administrator

Staff and volunteers who contributed to previous editions include: Greg McMeekin, Preston Brasch, Royce Henning, Tristan Cones, Anne Jayne, Susan Radke, David Holub, Rosemary Casis, Bonnie Huemann, Margo Moyen, Mia Laister, Anthony Di Lello, Danielle Grover, Jan Goodwin, Sandra Smyth, Krishna Khoul, Lisa Marie Ellis, Michelle Lee, Rebekah Andres, Kerry Cundal, Jelena Markovic, Ronaliz Veron, Ayodeji Otiti and Maddison Canuel.

ISBN # 1-896225-68-3

Table of Contents

A Note for Readers

In 2022, the "Court of Queen's Bench" transitioned to be named "Court of King's Bench" automatically when Elizabeth II died and her son, now Charles III, became the Sovereign of United Kingdom and King of Canada. The Government of Alberta amended the *Alberta Human Rights Act* through *Bill 80: Red Tape Reduction Implementation Act, 2021 (No. 2).* The most recent amendments took effect December 8, 2021. Notes:

1. **Purpose of Bill 80**: The Red Tape Reduction Implementation Act No. 2 is part of a series of bills which was aimed to speed up regulatory processes in Alberta. The Government of Alberta announced that amendments to the *Alberta Human Rights Act*, RSA 2000, c A-25.5 [the *AHRA*] would help Albertans protect their rights by modernizing the Alberta Human Rights Commission's (Commission) processes to quickly address complaints, reduce backlogs, and make tribunal hearings more accessible.

2. **Expansion of the Commission's authority to create its bylaws:** With this amendment, the Commission now has the power to create bylaws with respect to administrative, practical and procedural matters related to the filing and handling of complaints, as well as matters which is not expressly covered or partially covered by the *AHRA*. Prior to this amendment, the Commission's power was limited to creating bylaws respecting procedural matters related to the handling of complaints.

3. **Liberal construction of the bylaws:** The power to create bylaws and the bylaws itself shall be liberally construed to permit the use of procedures that will expedite the resolutions of the merits of the complaints.

4. **Designation as deputy director:** The director of the Commission may now designate an employee as deputy director who can exercise the same powers in the absence of the director, or at the request or with approval of the director.

5. **Director's broader power over complaints:** The director may now dismiss complaints on several grounds which were not previously included in the old AHRA. Some of the grounds that were added such as dismissal for complaints which was made in bad faith and those that have no reasonable prospect of success, were already incorporated in the British Columbia Human Rights Code as early as 2002.

6. **Referral of complaint to the Chief of the Commission and Tribunals (CC&T):** Under the current amendment, the director was given the option to refer the complaint directly to the CC&T for resolution by a human rights tribunal. Previously, the CC&T can only appoint a human rights tribunal to deal with a complaint after the it receives a report from the director that the parties are unable to settle the complaint.

7. **Carriage of proceeding.** The amendment added a provision which allows the director to refuse carriage of a proceeding if it is of the opinion that

director's involvement is not necessary or consistent with the public interest in view of the likely evidence or the issues to be resolved in the proceeding. The amendment also gave the Director the capacity to determine the nature and extent of its participation in case it has carriage of a proceeding.

8. **Partial dismissal of a complaint** may be ordered by the human rights tribunal if it finds that a part of a complaint is without merit.

9. **Final and binding decision by a human rights tribunal:** The decision of a human rights tribunal appointed by the CC&T is now final and binding on the parties.

10. **Enforcement of settlement agreement:** A party may now make an application to the human rights tribunal within 6 months after another party has contravened their settlement agreement. The human rights tribunal may make any order appropriate to remedy the contravention.

11. **Removal of the Appeal to the Court of King's Bench:** Previously, parties were allowed to appeal the order of a human rights tribunal by an application filed with the clerk of the Court within 30 days after the receipt of such order. With the amendment, the order of a human rights tribunal may only be subject of judicial review.

12. **Right of appeal and appeal prior to the amendment:** A right of appeal that arose or appeals that were already commenced before the amendment shall be continued in conformity with what is provided under the previous provision.

13. **Service of documents** may now be done by electronic means such as using an email to serve a notice or a document with the Commission or on any person.

14. **Electronic proceedings** are now allowed when conducting a hearing or proceeding. It may also be a combined-in person and electronic proceeding. This includes conciliation and dispute resolution.

15. **CanLII** has all the Alberta Human Rights Tribunal decisions released after January 1, 2000, which may be accessed at https://www.canlii.org/en/.

16. **Cases: Names of the Act and the Decision-making body**

Any relevant cases decided under the *Individual's Rights and Protection Act*, RSA 1980, 1985 and 1990, c I-2 [the *IRPA*], the *Human Rights, Citizenship and Multiculturalism Act*, SA 1996, c H-11.7 [the *HRCMA*], the *HRCMA*, RSA 2000, c H-14 have been retained in this Annotated Act, and Alberta cases decided up to September 2023 have been added. Where legal decisions are based on the *IRPA* as it existed before 1996, the annotations will refer to the Act as the *IRPA*. Where legal decisions are based on the *HRCMA* as it existed before 2009, the annotations will refer to the Act as the *HRCMA*. Where decisions are based on the *Alberta Human Rights Act*, RSA 2000, c A-25.5 [the *AHRA*] the annotations will refer to the Act as the *AHRA.* The leading cases are placed at the beginning in some sections.

The *Designation of Constitutional Decision Makers Regulation*, Alta Reg 69/2006 made under the *Administrative Procedures and Jurisdiction Act*, RSA 2000, c A-3, regulates which decision-makers have jurisdiction to determine questions of constitutional law and which questions of constitutional law the decision makers have jurisdiction to determine. The *Regulation* states that a Human Rights Tribunal appointed under the *Alberta Human Rights Act* is authorized to decide questions of constitutional law arising from the federal or provincial distribution of powers under the Constitution of Canada.

17. Revisions to the Complaint resolution process. In 2019, the Commission launched the Case Inventory Resolution Project (CIRP) to streamline the process and ensure that the large volume of complaints the Commission receives are resolved in a timely, effective, and fair manner. All human rights complaints received before January 1, 2019 will be assessed by a human rights officer to determine if the complaint will be resolved through an early resolution process, the Investigation Stream, or the Conciliation Stream. The CIRP had concluded in 2021 and the Commission reported that they completed 78% of the files of the 1,715 complaints by March 31, 2021.

CONTENT OF APPENDICES

- **Availability of Unreported Decisions**
- **Resources:** Readers who are interested in the development of the human rights law in Alberta may wish to consult the following:
    - Alberta Civil Liberties Research Centre, Alberta Human Rights Act: Opportunities for Procedural and Policy Reform, 2019;
    - Alberta Civil Liberties Research Centre, *Review of the Individual's Rights Protection Act*, 1993, Calgary;
    - Human Rights Review Panel, *Equal in Dignity and Rights*, 1994;
    - Alberta Community Development, *Our Commitment to Human Rights*, 1995;
    - Alberta Civil Liberties Research Centre, *Alberta's Human Rights Legislation and Human Rights Commission: Legal Issues*, 2007, Calgary;
    - Alberta Human Rights Commission, *Human Rights in Alberta*, 2010.
    - The Human Rights Commission website https://albertahumanrights.ab.ca/contains among other things, an organizational chart of the Commission, answers to frequently asked questions, a list of publications, information sheets, information about the procedure for making a complaint, case studies and a copy of the *Act*.
- Feedback on this annotation is greatly appreciated – errors, omissions and comments can be sent to us by e-mail at aclrc@ucalgary.ca.

- **Glossary**
- **Table of Cases**
- **Table of Statutes**

ANNOTATION OF ALBERTA HUMAN RIGHTS ACT

Chapter A-25.5

Preamble

WHEREAS recognition of the inherent dignity and the equal and inalienable rights of all persons is the foundation of freedom, justice and peace in the world;

WHEREAS it is recognized in Alberta as a fundamental principle and as a matter of public policy that all persons are equal in: dignity, rights and responsibilities without regard to 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;

WHEREAS multiculturalism describes the diverse racial and cultural composition of Alberta society and its importance is recognized in Alberta as a fundamental principle and a matter of public policy;

WHEREAS it is recognized in Alberta as a fundamental principle and as a matter of public policy that all Albertans should share in an awareness and appreciation of the diverse racial and cultural composition of society and that the richness of life in Alberta is enhanced by sharing that diversity; and

WHEREAS it is fitting that these principles be affirmed by the Legislature of Alberta in an enactment whereby those equality rights and that diversity may be protected:

THEREFORE HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

INTERPRETATION OF HUMAN RIGHTS LEGISLATION

***Co-operators General Insurance Co v Alberta (Human Rights Commission)* (1993), 145 AR 132, 14 Alta LR (3d) 169 (CA), leave to appeal to SCC refused, [1994] SCCA No 22** Human rights legislation is a fundamental law requiring a fair, large and liberal interpretation.

See also: ***Singh v Royal Canadian Legion, Jasper Place (Alta), Branch No 255*** **(1990), 11 CHRR D/357 (Alta Bd of Inq)*;***

***Canadian National Railway Co v Canada (Human Rights Commission)*, [1987] 1 SCR 1114 at 1134**. Dickson CJC observed:

> Human rights legislation is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law. I recognize that in the construction of such legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact.

***Ontario (Human Rights Commission) v Simpsons-Sears Ltd*, [1985] 2 SCR 536, 23 DLR (4th) 321 at 546.** McIntyre J said:

> The accepted rules of construction are flexible enough to enable the Court to recognize in the construction of a human rights code the special nature and purpose of the enactment and to give to it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary - and it is for the courts to seek out its purpose and give it effect.

***Canadian Odeon Theatres Limited v Saskatchewan Human Rights Commission and Huck*, [1985] 3 WWR 717 (Sask CA) at 735.** Vancise JA, writing for the majority of the Saskatchewan Court of Appeal said:

> The interpretation of a statute which guarantees fundamental rights and freedoms and which prohibits discrimination to ensure the obtainment of human dignity should be given the widest interpretation possible.

***Insurance Corp of BC v Heerspink*, [1982] 2 SCR 145 at 158.** Lamer J said in the absence of "express and unequivocal language" it is intended that human rights legislation will "supersede all other laws when conflict arises." Lamer J went on to say such legislation "should be recognized for what it is, a fundamental law."

Effect of Act on provincial laws

1(1) Unless it is expressly declared by an Act of the Legislature that it operates notwithstanding this Act, every law of Alberta is inoperative to the extent that it authorizes or requires the doing of

anything prohibited by this Act.

EFFECTS OF ACT ON PROVINCIAL LAWS

***Wright v College and Association of Registered Nurses of Alberta (Appeals Committee)*, 2012 ABCA 267, leave to appeal to SCC refused, 2013 CanLII 15573 (SCC).** The Appellant (with others) was administratively tried and subsequently reprimanded for alleged misconduct by a health hearing tribunal. However, drug dependency was not ruled out to have been the cause of the misconduct for which she was reprimanded. She argued that the tribunal failed to recognize the *adverse effect discrimination* of its ruling in its equal application, to her, of the general rules without considering the circumstances concerning her issue (drug dependency leading to her misconduct) and that that failure breached the *AHRA*, which prohibits discrimination, among others, on ground of disability. The appeal court found discrimination and quashed the reprimand, and further stated that:

> [102] … *AHRA* … provides that unless the legislature has expressly stated otherwise, every law of Alberta (including the *HPA* [*Health Professions Act*, RSA 2000, c. H-7]) is "inoperative to the extent that it authorizes or requires the doing of anything prohibited by this Act." (s 1(1) of the *AHRA*). […] It follows that because the legislature has not expressly stated otherwise, s 1(1) of the *AHRA* trumps s 1(1)(pp)(ii) of the *HPA* and the Respondent's argument based on the latter provision and s 82 of the *HPA* fails […] ”

***Gwinner v Alberta (Human Resources and Employment)*, 2002 ABQB 685, aff'd 2004 ABCA 210.** The issue that came up for determination was whether the *Widow's Pension Act*, SA 1983, c W-7.5 (now RSA 2000, c-7) (*WPA*) was unreasonably and unjustifiably discriminatory against the divorced or separated by providing pension and substantial benefits to widows and widowers in the age bracket 55-59 year age group, while denying such benefits to the petitioners group (divorced, separated and never married) with the same or greater need; and whether such denial amounted to the denial of services customarily available to the public and discrimination under the *HRCMA* (now the *AHRA*).

Applying the *Oakes* test [which states that: one, the objective of the impugned legislation must be pressing and substantial. Second, the means chosen to attain this legislative end must be reasonable and justifiable in a free and democratic society. In

order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the *Charter* guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right. In all section 1 cases the burden of proof is with the government to show, on a balance of probabilities, that the violation is justifiable] and its analyses the court held at para 269 that, "the *WPA*, Regulation, and program implemented pursuant to that legislation are contrary to sections 3(a) and (b) of the *HRCMA*, in that they deny access to and discriminate with respect to the provision of the services provided by the Act, on the basis of the marital status, that is, being divorced and separated. Section 1(1) the *HRCMA* provides that '... every law of Alberta is inoperative to the extent that it authorizes or requires the doing of anything prohibited by this Act'. The *WPA* and Regulation are inoperative to the extent that they deny benefits to, and discriminate against, claimants because they are not widowed, but instead are divorced or separated."

At para 270, pursuant to s 28 of the then *HRCMA* the Court ordered the government of Alberta and the administrator of the *WPA* to "cease the contraventions complained of, that is, cease denying access to the benefits of the Widows' Pension program on the basis of marital status (being divorced or separated) (s 28(b)(i));"

***M.L. obo A.L. v Alberta Human Services*, 2021 AHRC 93.** The Director of the Commission dismissed the complaint in this case stating, *inter alia*, that while the Commission can look at whether the administration of a legislation is discriminatory, it did not have any jurisdiction to consider a direct challenge to such legislation. The Tribunal overturned the Director's decision and cited Section 1 of the AHRA which mandates and gives the power to the Alberta Human Rights Commission to consider all laws of Alberta and determine whether there are laws that are in contravention with its application. It ruled that when there are evidence and arguments that show discrimination on the basis of the protected grounds, it is the Commission's duty to make such findings and provide remedies.

***Rendle v The Crown in Right of Alberta*, 2000 AHRC 9.** The issues before the Panel were (a) whether the Alberta Human Rights Panel had the jurisdiction to rule if a complaint was made against Provincial legislation, and could the Panel declare legislation to be invalid? And, (b) whether the Single and Divorced Speak Out

Association was a *person* as defined by the *Human Rights, Citizenship and Multiculturalism Act*, RSA 1980, c H-11.7 (Note: the Act under consideration was the predecessor to the current *AHRA*, RSA 2000, c A-25.5).

The Panel ruled, *inter alia*, that the Human Rights Panel had jurisdiction pursuant to s 1(1) of the *Human Rights, Citizenship and Multiculturalism Act* of Alberta to deal with all legislation in Alberta, and that the Panel was also possessed of the power to declare inoperative any legislation of the Province of Alberta to the extent that it permitted, or required to be done, of anything prohibited by the Act. However, the Panel ruled that, the Single and Divorced Speak Out Association was not a person as defined by the Act in question.

1(2) In this Act, "law of Alberta" means an Act of the Legislature of Alberta enacted before or after the commencement of this Act, any order, rule or regulation made under an Act of the Legislature of Alberta and any law in force in Alberta on January 1, 1973 that is subject to be repealed, abolished or altered by the Legislature of Alberta.

RSA 1980, cI-2, s 1.

Alberta Heritage Day

2 In recognition of the cultural heritage of Alberta, the first Monday in August each year shall be observed as a day of public celebration and known as "Alberta Heritage Day".

1996 c 25 s 4.

Code of Conduct

Discrimination re publications, notices

3(1) No person shall publish, issue or display or cause to be published, issued or displayed before the public any statement, publication, notice, sign, symbol, emblem or other representation that

(a) indicates discrimination or an intention to discriminate against a person or a class of persons, or
(b) is likely to expose a person or a class of persons to hatred or contempt

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 class of persons.

3(2) Nothing in this section shall be deemed to interfere with the free expression of opinion on any subject.

3(3) Subsection (1) does not apply to
(a) the display of a notice, sign, symbol, emblem or other representation displayed to identify facilities customarily used by one gender,
(b) the display or publication by or on behalf of an organization that
(i) is composed exclusively or primarily of persons having the same political or religious beliefs, ancestry or place of origin, and
(ii) is not operated for private profit, of a statement, publication, notice, sign, symbol, emblem or other representation indicating a purpose or membership qualification of the organization, or
(c) the display or publication of a form of application or an advertisement that may be used, circulated or published pursuant to section 8(2),

if the statement, publication, notice, sign, symbol, emblem or other representation is not derogatory, offensive or otherwise improper.

RSA 2000 cH-14 s 3; 2009 c 26 s 4; 2015 c 18 s 3.

PUBLICATION

Publication/Race. *Kane v Alberta Report* (April 30, 2002; Alta HRP), rev'd *Alberta Report v Alberta (Human Rights and Citizenship Commission*), 2002 ABQB 1081, [2002] AJ No 1539 (QB). The Alberta Report published an article implying that North American commercial real estate was dominated by real estate firms owned by Jewish people. Mr. Kane, the Executive Director of the Jewish Defence League filed a complaint with the Alberta Human Rights Commission against the magazine.

Prior to the hearing the Panel requested the opinion of the Court on a number of questions of law pursuant to s 31 and relating to s 2 of the *HRCMA* [*AHRA*, s 3]. In ***Re Kane*, 2001 ABQB 570, 291 AR 71,** the Court noted the following:

> Opinion
> [48] It is not necessary for a statement, publication, notice, sign, symbol, or other representation to be phrased, designed or structured in any particular way in order to constitute an opinion. It is the content of the message in the context of which it is both made and received which is determinative of whether a representation is an opinion. Again, it is a question of fact in each case.
>
> …
>
> [97] Section 2(2) is an admonition to balance freedom of expression and the eradication of discrimination in the consideration of a complaint under s. 2 of the *Act.* That section is neither a defence nor a justification for a breach of s. 2(1). Justifications and defences to a breach of s. 2(1) are found at s. 2(3) and s. 11.1 of the *Act.* Balancing the eradication of discrimination and freedom of expression will occur indirectly in the consideration of a complaint under s. 2(1)(b). In relation to both s. 2(1)(a) and s. 2(1)(b) a direct balancing of these interests will occur after a *prima facie* breach of either of those sections is found.
>
> …
>
> [130] The definitions of "contempt" and "hatred", for the purposes of human rights legislation, have been settled by a majority of the Supreme Court of Canada in *Taylor.* Those definitions dictate that different considerations apply to each of those terms. The definition of "likely to expose" should focus on the impact of the communication on the target group, specifically, whether the communication makes it more likely than not that the target group will be exposed to hatred and contempt. Any test applied to determine whether a representation "is likely to expose a person or class of persons to hatred or contempt" must be highly contextual and responsive to the legislation. Further, such a test should be viewed as an analytical framework rather than as a template. In applying such a framework, the Panel should draw from the various factors and considerations used in other cases, including, but not limited to:

- the message -	content, tone, images conveyed, reinforcement of stereotypes, surround circumstances;
- the medium -	credibility, circulation, context of the publication; and
- the audience -	vulnerability of target group.

> [Likely to expose]
> [125] Accordingly, in my opinion, the test set out in *Abrams* as modified to reflect the *Act*'s requirements would be one such standard which may be applied in the context of s. 2(1)(b). Such a test might enquire:
>
> > Does the communication itself express hatred or contempt of a person or group on a basis of one or more of the listed grounds? Would a reasonable person, informed about the context, understand the message as expressing hatred or contempt?
> >
> > Assessed in its context, is the likely effect of the communication to make it more acceptable to others to manifest hatred or contempt against the person or group concerned? Would a reasonable person consider it more likely than not to expose members of the target group to hatred and contempt?

The Human Rights Panel found a violation of s 2(1)(a) [now s 3(1)(a)] of the *AHRA*]. On appeal to the Court of Queen's Bench, Alberta Report argued successfully that there had been a breach of procedural fairness with regard to the submission of evidence, and sent the matter back to the Panel for a new hearing.

At the rehearing, ***Kane v Alberta Report*** **(2002), 43 CHRR D/112 (April 30, 2002; Alta HRP),** the Panel held that Alberta Report contravened this section and that the appropriate remedy would be the publisher's offer of space in the magazine to address the impact of the article. This second decision was appealed to the Court of Queen's Bench: ***Alberta Report v Alberta (Human Rights & Citizenship Commission)*****, 2002 ABQB 1081, 333 AR 186** where once again the Court ordered a re-hearing because the Panel had not provided sufficient notice to the parties that it was going to rely on evidence from a decision of the British Columbia Human Rights Tribunal. It appears that a re-hearing was not held.

Publication/Race. See also: ***Kane v Milan Papez*, 2002 AHRC 5.**

Publication/Race. *Kane v Church of Jesus Christ Christian-Aryan Nations*, [1992] AWLD 302, (*sub nom Kane v Church of Jesus Christ Christian-Aryan Nations (No 3))* 18 CHRR D/268 (Alta Bd Inq). Seven individuals filed complaints alleging that Terry Long, Ray Bradley, and the Church of Jesus Christ Christian-Aryan Nations (an Unincorporated Association), had contravened s 2 of the *IRPA* [*AHRA*, s 3] by the display of a "Swastika flag" and a sign that read "KKK White Power", and by burning a cross during an event called the "Aryan Fest", organized by the Respondents.

The Board applied the test developed in ***R v Oakes*, [1986] 1 SCR 103, 53 OR (2d) 719** in balancing the interests of freedom of expression with the prohibition against the display of signs and symbols and found that the objective of s 2(1) [now s 3(1)] sufficiently important to limit the "free expression of opinion on any subject," and that there was a rational connection between the objective and the legislative measure. The Board held that the Respondents did not have a defence under s 2(3) of the *IRPA* [*AHRA*, s 3(3)] because they did not put forward evidence that the Swastika, KKK White Power sign and the burning cross were not derogatory, offensive or otherwise improper.

The Board also found that the definition of "person" included unincorporated associations (see s 44(1)(k)); the Respondents displayed or caused to display the signs and symbols in the sense they were shown "ostentatiously" by the Respondents and the Respondents knew the signs would be visible to the public; and finally based on the expert evidence the signs and symbols indicated discrimination and an intention to discriminate.

The Board relied on a statement made by Dickson CJC in ***Canada (Canadian Human Rights Commission) v Taylor*, [1990] 3 SCR 892, 1990 CanLII 26 at 930** where she suggested that the exemption clauses found in many human rights statutes should be regarded as an admonition to balance "eradicating discrimination with the need to protect free expression." The Board found the complaints justified in whole. The Respondents were ordered to refrain from the same or any similar public display of the Swastika, White Power signs and symbols, burning crosses and signs or symbols indicating an affiliation with the KKK.

Publication/Race *Canada (Canadian Human Rights Commission) v Taylor*, [1990] 3 SCR 892, 1990 CanLII 26. The Canadian Human Rights Tribunal found that the

Respondents violated s 13(1) of the *Canadian Human Rights Act*, SC 1976-1977, c 33 by publishing anti-Semitic telephone dial-a-messages. The Supreme Court of Canada (SCC) held that while this provision did violate s 2(b) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, it was saved by s 1 as a reasonable limitation on free speech. The Court emphasized that avoiding the propagation of hatred is a matter of pressing and substantial concern in a free and democratic society: hate propaganda undermines the dignity and self-worth of minority racial and religious groups and erodes the tolerance and open-mindedness essential in a democratic society. Further, the fact that s 13(1) addressed only messages communicated repeatedly indicated that there was minimal impairment to the freedom of expression. The Panel defined "hatred" as "active dislike, detestation, enmity, ill will, malevolence". "Contempt" was described as "the condition of being condemned or despised; dishonour or disgrace". To "expose" a person meant, "to leave without shelter or defense (to danger, ridicule, censure, etc.)." The SCC adopted these definitions and held at page 930 that the "so-called exemptions found in many human rights statues are best seen as indicating to human rights tribunals the necessity of balancing the objective of eradicating discrimination with the need to protect free expression."

Note Section 13 of the *Canadian Human Rights Act* was repealed in 2013. The *AHRA* does not have a section that correlates with [former] s 13 of the *Canadian Human Rights Act*, which prohibited the **telephonic communication** of matters likely to expose a person or group of persons to hatred or contempt on the basis of a prohibited ground of discrimination.

Publication/Religion. *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16, [2015] 2 SCR 3. One of the Appellants, Simoneau, was a resident of Saguenay and regularly attended council meetings. He was an atheist. This decision concerns the presence of prayer at municipal council meetings for the City of Saguenay that caused Simoneau "discomfort and unpleasantness" (para 93). The Quebec Human Rights Tribunal (at **2011 QCTDP 1**) found that "recitation of the prayer was in breach of the state's duty of neutrality and that it interfered in a discriminatory manner with Mr. Simoneau's freedom of conscience and religion" (SCC para 3). The Quebec Court of Appeal (at 2013 QCCA 936) overturned the decision on the belief "that the prayer was non- denominational and fundamentally inclusive" (SCC para 3). The SCC allowed the appeal, noting at para 4:

> Through the recitation of the prayer at issue during the municipal

> council's public meetings, the respondents are consciously adhering to certain religious beliefs to the exclusion of all others. In so doing, they are breaching the state's duty of neutrality. The resulting discriminatory interference with Mr. Simoneau's freedom is supported by the evidence the Tribunal accepted.

Note that this decision is based on interpretation of the language of Quebec's *Charter of Human Rights and Freedoms*, CQLR c C-12, ss 3 and 10 that includes "freedom of conscience" and "freedom of religion" and the similar language in s. 2(a) of the *Canadian Charter of Rights and Freedoms* (s. 3 of the Quebec *Charter* was interpreted based on s. 2(a) jurisprudence). The language in the *AHRA* is somewhat different, protecting against discrimination on the basis of "religious belief". These legislative differences mean that this case is not a clear fit under any section of the *AHRA*.

Publication/Religion. *Johnson v Music World Ltd*, 2003 AHRC 3. The Complainant listened to CDs in Music World and found various songs to be highly offensive to Caucasians, women and Christians. The Complainant argued that he was discriminated against and that the music made Christians vulnerable to hate because the Respondents allowed this music to be available to the public either through music booths or purchase. The Panel relied on ***Kane v Alberta Report* [*Re Kane*], 2001 ABQB 570, 291 AR 71** and held that the test for liability as a distributor was met as there was *prima facie* evidence on the face of the complaint that the Respondents were causally connected to the discriminatory practices by the display of the alleged prohibited material. The Panel considered whether the breach was justified taking into consideration the balance of the breach and the interest of prohibiting discrimination, against the interests of freedom of expression. Although the alleged discriminatory words in the music appeared to be extreme, the message conveyed did not reinforce stereotypes and was not well publicized. The target group was only made vulnerable in a limited sense, and the method of communication lacked credibility. Further, the Panel found that the music appealed to a small audience, an audience who actively sought out materials that conveyed that message. The Panel relied on the definition of likely to expose from ***Re Kane, above*** and held that the alleged discriminatory practice was not more "likely to expose" the target group to hatred. There was no breach of s 2(1) of the *HRCMA* [*AHRA*, s 3(1)] and the complaint was dismissed.

Publication/Sexual Orientation. *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11, [2013] 1 SCR 467. The definition of "hatred" set out in ***Taylor, supra***, provides a workable approach to interpreting the word "hatred" as used in provisions that prohibit hate speech. First, courts must ask whether a reasonable

person, aware of the context and circumstances, would view the expression as exposing the protected group to hatred (para 56). Second, "hatred" or "hatred or contempt" must be interpreted as being restricted to extreme manifestations of the emotion described by "detestation" and "vilification" (para 57). Third, tribunals must focus their analysis on the effect of the expression at issue; whether it is likely to expose the targeted person or group to hatred by others (para 58). In this case, the words "ridicules, belittles or otherwise affronts the dignity of" in section 14(1)(b) of Saskatchewan's *Human Rights Code* were held not to minimally impair freedom of expression or freedom of religion under the *Canadian Charter of Rights and Freedoms*, and were thus struck from the Code. ("Hatred" was upheld as constitutional.)

Note: *Alberta Human Rights Act* does not have the same wording as Saskatchewan's *Code.*

Publication/Sexual Orientation. *Lund v Boissoin*, 2009 ABQB 592, 314 DLR (4th) 70. Lund brought a complaint alleging that a letter to the editor written by Boissoin was likely to expose homosexuals to hatred and/or contempt due to their sexual orientation. The Panel held that the contents of the letter to the editor violated s 3(1)(b) of the *HRCMA.* The Court of Queen's Bench highlighted numerous errors with the Panel's decision and held that there was no violation of the *HRCMA*. The Panel had mistakenly found its jurisdiction to deal with the complaint. The test for jurisdiction is whether the letter's content ran afoul of s 3(1)(b) of the *HRCMA*. In order for a Panel to have jurisdiction to find a violation of s 3(1)(b), the message of alleged hate or contempt must be connected to the likely perpetration of acts of discrimination listed in the *HRCMA,* and in this case, there was no identification of individuals or groups who might undertake prohibited discriminatory activity. Nor was there evidence that discriminatory practices forbidden by the *HRCMA* were likely to occur. Further, even if Lund established a *prima facie* case of hatred or contempt he would have failed at "the second step in the s 3(2) balancing process": "balancing freedom of expression against the particular breach requires 'an examination of the nature of the statement in a full, contextual manner'" (para 98, citing in part from Rooke J in ***Re Kane*, 2001 ABQB 570, 291 AR 71** at para 85). The Panel's conclusion was based on misapprehension of the evidence and the Panel did not include any consideration or assessment of the writer's intent. The Panel also erred in holding that the Concerned Christian Coalition Inc, was properly before it. In *obiter*, Justice Wilson (QB) held it was within the Alberta government's jurisdiction to pass s 3(1)(b).

On appeal to the Court of Appeal Alberta (***Lund v Boissoin*, 2012 ABCA 300**), the Court, among other things, affirmed the judgment of the Queen's Bench. The Court dismissed the appeal, saying that:

> [77] It is difficult to make an objective determination of what constitutes hate speech as the perceptions of reasonable persons often differ. I have attempted to analyse the impugned speech, however, from the perspective of a reasonable reader who is aware of the context and circumstances of the letter's publication. In my view, the letter would properly be viewed as a polemic on a matter of public interest and does not qualify as reaching the extreme limits mandated by Taylor to expose persons to hatred or contempt. While expressing hostility to teaching tolerance of homosexuality in school, it does not, on the whole, elicit emotions of detestation, calumny, or vilification against homosexuals. Nor, I think, would a reasonable person, aware of the relevant context and circumstances, understand the letter as likely to expose homosexuals to hatred or contempt. It would be understood more as an overstated and intemperate opinion of a writer whose extreme and insensitive language undermines whatever credibility he might otherwise have hoped to have. It is not necessary to agree with the content of the letter to acknowledging the writer's freedom to express his views. Thus, I agree with the reviewing judge's conclusion that the letter does not breach subsection 3(1)(b) of the statute.

Publication/Race. *American Freedom Defence Initiative v Edmonton (City)*, 2016 ABQB 555. The Applicants in this case are applying for a declaration that the City's removal of advertisements advocating for more stringent surveillance of the Muslim community from the City's buses violated its right to freedom of expression under s 2(b) of the *Charter*, and that the violation was not reasonable limit under s 1 of the *Charter*. The Applicant also sought an order enjoining the City from violating their *Charter* rights in the future. The City conceded that it infringed the Applicant's section 2(b) *Charter* right to freedom of expression but asserted that in this case the Applicant's rights were limited by s 1 of the *Charter*. The Court agreed, finding that "[t]he rights and freedoms guaranteed by the *Charter* are not absolute" (para 52) and "that the limit imposed by the City was prescribed by law in furtherance of a pressing and substantial objective" (para 115). It further found that the City's decisions was "proportionate in that it was rationally connected to the City's objective and the means chosen minimally impaired the s. 2(b) right" noting that "[t]he harm caused [was] outweighed by the importance of promoting a safe and welcoming public transit system by prohibiting offensive and discriminatory advertisements on the City's public transport" (para 115). The Court dismissed the case.

Publication/Family Status. ***Lethbridge and District Pro-Life Association v Lethbridge (City)***, **2020 ABQB 654.** The applicant seeks to quash the decision of the City that refused to post five proposed advertisements relating to its pro-life advocacy on Lethbridge buses, bus shelters and bences. The City conceded the applicability of the *Charter* and that its decision infringed upon the applicant's s 2(b) right under the *Charter* but argued that the issue was whether it reasonably concluded that there was a reasonable apprehension of harm. The Court ruled that the decision of the City is unreasonable considering that it failed to conduct the required minimal impairment analysis in its consideration of the five advertisements and that the "hateful nature" and "extreme tone" as determined in *Canadian Centre for Bio-Ethical Reform v Grande Prairie (City) 2018 ABCA 154,* which has similar facts to the present case, does not exist.

Publication through social media. *Carnegie v Descalchuk,* [2022] A.J. No. 1288. Carnegie asked for several restraining orders against Descalchuk when the latter continuously posted defamatory statements on his Facebook, YouTube and Tik Tok accounts against the former and her daughter. Thereafter, both of them filed cases against each other but the Court eventually ruled in favor of Carnegie. The Court, in this case, recognized the mode and extent of publication which were made through online social media posts, portions of the decision are hereunder quoted as follows:

> [135] …At the same time, internet communications may be instantaneous and very far-reaching. Publication on social media is accordingly a serious aggravating factor, regardless of the number of people who in fact accessed the posts: Rutman v Rabinowitz, 2018 ONCA 80 at paras 67-71.
>
> [136] Courts have taken into account the "percolation phenomenon" in the assessment of damages which recognizes that online defamatory statements are easily passed around and can pop up if the subject's name is put into a search engine by, for example, a prospective employer: *Clarke (t/a Elumina Iberica UK) v Bain*, [2008] EWHC 2636 at para 55 (QB). This creates a very real potential that defamatory statements may circulate indefinitely. As was noted in *Crookes v Newton*, 2011 SCC 47 at paras 37-38, the internet has the extraordinary capacity to replicate any defamatory message almost endlessly, supporting the notion that "the truth rarely catches up with a lie". This creates a real risk that strangers unaware of the context of the statements may form a negative opinion of the person defamed. This is a concern for any victim, and particularly for a young adolescent. Canadian news in recent years has contained many examples of very devastating effects of online bullying on young persons.

Discrimination re goods, services, accommodation, facilities

4 No person shall

(a) deny to any person or class of persons any goods, services, accommodation or facilities that are customarily available to the public, or
(b) discriminate against any person or class of persons with respect to any goods, services, accommodation or facilities that are customarily available to the public,

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 class of persons or of any other person or class of persons.

RSA 2000 cH-14 s 4; 2009 c 26 s 4; 2015 c 18 s 3; 2017 c 17 s 2

SERVICE CUSTOMARILY AVAILABLE TO THE PUBLIC ("SERVICE"): GENERAL TEST

Service/General Test. In ***British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868, 181 DLR (4th) 385 [*Grismer*]**. The Supreme Court of Canada adopted the test set out in ***British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union (BCGSEU)*, [1999] 3 SCR 3, 176 DLR (4th) 1 [*Meiorin*]** from employment cases and stated that the following test should be used to determine whether a standard or policy in the public service context is reasonable or justifiable:

> 1. Was the standard or policy adopted for a purpose or goal that is rationally connected to the function being performed?
> 2. Was the standard or policy adopted in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal?
> 3. Was the standard or policy reasonably necessary to accomplish its purpose or goal in the sense that the defendant cannot accommodate persons with the characteristics of the claimant without incurring undue hardship?

Service/General. *Harder v Braun*, 2014 ABQB 479 (Master's Decision). The *AHRA* "does not protect against discrimination on the basis of age in respect of goods, services, accommodations or facilities. This is apparent from a reading of section 4 of that *Act*" (para 7). **Note: *AHRA* was amended in 2017 to include "age" as a protected ground in respect of goods, etc.**

Service/General. *Phillips v Canyon Creek Heights Condominium Board of Directors*, 2010 AHRC 8. The Tribunal lacks jurisdiction to hear a complaint against a

condominium board of directors, which is not a legal entity.

SERVICE: RACE

Service/Race. *Ross v New Brunswick School District No 15*, [1996] 1 SCR 825, *(sub nom Attis v New Brunswick School District No 15)* 171 NBR (2d) 321. A complaint was lodged against a teacher for publicly making racist and discriminatory comments against Jews during his off-duty time. The teacher expressed his anti-Semitic views in four books or pamphlets, letters to a local newspaper and in an interview with local television station. The Supreme Court of Canada held at para 45 that "where a 'poisoned' environment within the school system is traceable to the off-duty conduct of a teacher that is likely to produce a corresponding loss of confidence in the teacher and the system as a whole, then the off-duty conduct of the teacher is relevant." The teacher's off-duty conduct was found to impact his ability to be impartial and had an impact upon the educational environment in which he taught. Further, the School Board's passivity signaled a silent condonation of and support for the teacher's views. The School Board was found to have failed in its duty to provide a non-discriminatory learning environment for all its students. The SCC found that the order infringed the teacher's freedom of expression and freedom of religion under the *Charter* but that the infringement was justifiable under s 1.

Service/Race. *Simpson v Oil City Hospitality Inc*, 2012 AHRC 8. The Complainant alleged discrimination on ground of race when he was refused entry/access into a public club, which was generally accessible to other members of the public but not him, because he was of Asian descent. The Commission found his complaint proved. The Commission stated:

> [45] I find that the evidence of the complainant and the evidence of the witnesses who testified on behalf of the complainant, was credible and reliable and established that the complainant was refused admittance into the Oil City Roadhouse because of his race. The complainant has clearly established a *prima facie* case of discrimination. I reject the evidence of the respondent that Mr. Simpson was refused entry into the Oil City Roadhouse not because of his race but because of rude, aggressive or disruptive conduct by him or any member of his group. I also reject that the suggestion that the discrimination was justified due to the presence of any alleged gang members in the area. The respondent has not provided a credible explanation to refute the evidence of the complainant and the complainant's witnesses.
>
> [46] I find that the complainant has established, on the balance of probabilities, that he was discriminated against due to his race when

the respondent refused him entry to the Oil City Roadhouse.

Service/Race. *Coward v Alberta (Chief Commissioner of Human Rights and Citizenship Commission)*, 2008 ABQB 455, 455 AR 177. The Applicant, a Black male, was stopped on the street by police and was told that he matched the description of a suspect in the vicinity who was reportedly waving a knife in public. The Applicant was detained, arrested and searched after he advised the officer he did not have a knife and refused to be searched. No knife was found and he was released. The applicant filed a complaint with the Alberta Human Rights and Citizenship Commission, alleging that his treatment by police constituted discrimination on the basis of race. The complaint was investigated and then dismissed by the Director and the Chief Commissioner. The Applicant filed an application for judicial review of the Chief Commissioner's decision on the basis that the Chief Commissioner did not provide a lawful reason to dismiss the case and on the basis that critical facts were ignored. The line of analysis in the Chief Commissioner's decision in rejecting the discrimination claim was found to be clear and intelligible: while race is a prohibited ground of discrimination, it may also operate as a relevant descriptor. As such, it was reasonable for the Chief Commissioner to determine that there was no generalized heightened suspicion of Mr. Coward on the grounds he was Black.

Service/Race. *Cunningham v Bims Car Wash,* 2022 AHRC 131. Laureen Cunningham, who identifies herself as an Indigenous woman, had purchased a premium car wash for her vehicle at Respondent's car wash but she noticed several dirt spots on her vehicle after it was washed. As a result, she requested for a refund. When she spoke with the owner of Respondent, the situation escalated, and the latter began swearing at her and called her a *'Squaw'*. Cunningham then brought a complaint against Respondent alleging that the latter discriminated against her in the area of goods and services on the grounds of race, colour, ancestry, place of origin and gender. The Tribunal recognized that the term *'Squaw'* is an offensive, derogatory and racist term for Indigenous women. It even cited the Merriam-Webster and Dictionary.com descriptions of the said term which were considered as disparaging and offensive term used to refer to Indigenous women. It also found that she has a characteristic protected from discrimination under the AHRA being an Indigenous woman, and the term *'Squaw'* traumatized her and caused her to lose her dignity and self-esteem. It further stated that Cunningham's protected characteristic was at least a factor in the adverse treatment she received from Respondent which has established *prima facie* discrimination. No reasonable justification was offered by Respondent. The Tribunal

ruled that the latter discriminated against Cunningham on the basis of her race, colour, ancestry, place of origin and gender.

Service/Race. *Randhawa v Tequila Bar & Grill Ltd*, 2008 AHRC 3. The Complainant, a 33-year- old professional who wore a turban, and his friends were denied entry into the Respondent's nightclub on July 9, 2004. Just prior to going to Tequila nightclub they were denied entry into Tantra nightclub. When the Complainant arrived at the Respondent's night club they asked the bouncer if he would have a problem getting in because of his turban. The bouncer stated that he would not have a problem so the Complainant and his friends decided to stand in line. The evidence suggested that a surveillance system was viewed by management, who determined whether people in line would be allowed in the bar. After standing in line for about 10 minutes a different bouncer approached the Complainant and his friends and told them they would not be allowed into the establishment because of their ethnicity. The Complainant and his friends left without incident. The Complainant's friend corroborated this evidence at the hearing. The Panel held that Complainant established a *prima facie* case of discrimination, which the Respondent failed to address or justify.

Service/Race. *Alibhai v Tequila Bar & Grill Ltd*, 2008 AHRC 11 rev'd *Alberta (Director, Human Rights & Citizenship Commission) and Khalid Alibhai v Tequila Bar & Grill Ltd*, [2009] AWLD 3525 (Alta QB) (WL). After the Complainant and his friends, who were of East Indian ancestry, were refused entry to the Respondent's nightclub on February 21, 2004, they filed a complaint. The Panel dismissed the complaint on basis that *prima facie* discrimination was not made out. The Director appealed and applied to admit new evidence. The Court found that the Panel's decision was replete with serious errors, some of which impacted on the credibility assessment of the Complainant. The purpose and principle of human rights law is the equal guarantee, in this case, of services customarily available to the public. The Panel failed to recognize that discrimination could be established by circumstantial evidence and failed to apply the proper legal test by criticizing the absence of direct evidence of discrimination and by insisting upon the presence of racial slurs before a finding of *prima facie* discrimination could be made out. The Court allowed the appeal and sent the matter back for re-hearing with new evidence to a new Panel. The parties settled the complaint prior to the re-hearing. Additional reasons regarding costs at 2009 ABQB 226.

Service/Race. *Akena v Edmonton (City of)* (1982), 3 CHRR D/1096 (Alta Bd Inq)

(not available online). Dr. Akena complained that he was stopped by a police officer, searched, charged and harassed because of his colour. After a review of Canadian and Alberta decisions with respect to the meaning of discrimination, the Board stated the issue was whether Dr. Akena had been treated "differently" because of his colour. It is the discriminatory result, not the intent, which matters. The Board considered whether the action, when examined in its totality, was consistent with the allegation of discrimination and inconsistent with any other rational explanation and concluded that Dr. Akena was discriminated against on the basis of colour and ordered that the police officer pay the Complainant $100 as damages for the affront to his worth and dignity, and to refrain from discriminating against individuals in the future.

Service/Race. ***Weaselfat v Driscoll*** **(April 1972, Bd of Inq).** The Complainant alleged that the proprietor of a gas station only required aboriginal customers to pay for their gas before being served, which was racial discrimination in the provision of a public service customarily available to the public. The Board considered whether "services" included the manner of requiring payment and concluded that the rendering of services contemplates more than the mere exchange of goods and labour. It would include such a service as was ordinarily accorded to other customers in the place to which the public is customarily admitted. The Board recommended the publication of the outcome of the inquiry be published in the media, including native press and radio outlets and that the Commission write the Respondent a letter requesting that he desist from further discrimination and advising him that his failure to comply would result in his prosecution.

Service/Race. See also: ***Ledger v Alberta Health Services and Alberta Justice and Solicitor General*****, 2021 AHRC 95,** ***Grant MacEwan Community College v Alberta (Human Rights Commission)*** **(2000), 2000 ABQB 1015, 260 AR 111, (*sub nom Fiddler v Grant MacEwan Community College)*;** and ***McDonald v Logan*****, 2002 AHRC 4.**

See also: ***First Nations Child and Family Caring Society of Canada et al v Attorney General,*** **2016 CHRT 2.**

SERVICE: RELIGION

Service/Religion. ***Servatius v. Alberni School District No. 70*****, 2022 BCCA 421.** Alberni School District No. 70 invited guests and hosted two demonstrations of Indigenous cultural practices which were the smudging event in a classroom and the

hoop dance at a school assembly while the dancer said a prayer. Servatius alleged that the school infringed her Charter right to freedom of religion when it compelled her children to participate in the indigenous demonstrations which were contrary to their own faith. One of the issues tackled in this case was the clash of one person's rights with another's rights or when such rights conflict with what might be necessary for the good of the community, or to protect the rights of many other persons. The British Court of Appeal stated that courts sought balance in cases where state actions bring competing Charter rights into conflict as there is no hierarchy of rights in the Charter citing *Dagenais v Canadian Broadcasting Corp [1994] 3 S.C.R. 835* at 877 and *Cambie Surgeries Corporation v British Columbia (Attorney General),* 2022 BCCA 245. It discussed the s.1 analysis but did not deem it necessary as it ruled that the smudging event and hoop dance did not engage the *Charter*. The BCCA ruled that:

> [195] In summary, there was no suggestion in the evidence that the smudging demonstration was part of a belief system that sought to convert someone from one religion to the religion of the person smudging or to involve an unwilling observer by making them a participant. There was no suggestion in the evidence that anyone involved in these events had a goal to proselytize or to impose their spiritual beliefs or practices on others present, or that they believed it was possible or right to try to do so.
>
> [196] In short, there was simply no objective evidence to support the inference that merely watching the smudging demonstration and learning about its relevance to Indigenous culture amounts to some kind of involuntary participation in a ceremony akin to a "religious ceremony".
>
> [204] After considering all of the evidence, the judge concluded that mere presence at the smudging demonstration and the prayer by the hoop dancer did not interfere with Ms. Servatius's religious beliefs but, rather, were efforts to teach children about Indigenous beliefs.
>
> [205] The judge's findings are supported by the evidence and he did not make a palpable and overriding error.

Service/Religion. ***Beaudoin v British Columbia,*** **[2022] BCCA 427.** This case challenged the constitutionality of the COVID-19 public health orders that were made by the Provincial Health Officer of British Columbia between November 2020 and February 2021 for allegedly being violative of the freedom of religion, expression, assembly, association and equality rights. Although the Court decided to dismiss the appeal based on mootness, it placed emphasis on the courts' acknowledgment of specialized expertise of public health officials as administrative decision makers to determine reasonableness, especially during the pandemic. The Court echoed the

decision in *Gateway Bible Baptist Church et al. v Manitoba et al.*, 2021 MBQB 219 which involved similar facts as the present case and quoted Chief Justice Joyal in the context of an Oakes analysis:

> In the context of this deadly and unprecedented pandemic, I have determined that this is most certainly a case where a margin of appreciation can be afforded to those making decisions quickly and in real time for the benefit of the public good and safety. I say that while recognizing and underscoring that fundamental freedoms do not and ought not to be seen to suddenly disappear in a pandemic and that courts have a specific responsibility to affirm that most obvious of propositions. But just as I recognize that special responsibility of the courts, given the evidence adduced by Manitoba (which I accept as credible and sound), so too must I recognize that the factual underpinnings for managing a pandemic are rooted in mostly scientific and medical matters. Those are matters that fall outside the expertise of courts. Although courts are frequently asked to adjudicate disputes involving aspects of medicine and science, humility and the reliance on credible experts are in such cases, usually required. In other words, where a sufficient evidentiary foundation has been provided in a case like the present, the determination of whether any limits on rights are constitutionally defensible is a determination that should be guided not only by the rigours of the existing legal tests, but as well, by a requisite judicial humility that comes from acknowledging that courts do not have the specialized expertise to casually second guess the decisions of public health officials, which decisions are otherwise supported in the evidence.

Service/Religion. *Van Der Smit v Alberta (Human Rights & Citizenship Commission)*, 2009 ABQB 121, 470 AR 325. Nico Van Der Smit brought a complaint alleging that Alberta Milk discriminated against him by requiring that milk to be picked up from his property on a Sunday, which was contrary to his religious beliefs. The Panel dismissed the complaint on the basis that insufficient evidence was provided to establish a *prima facie* case of discrimination. On application for judicial review, the Court of Queen's Bench found that there was a *prima facie* case of discrimination but it was reasonable and justifiable in the circumstances (see s 11) because the Sunday pick ups were adopted for a purpose rationally connected to Alberta Milk's function and they were adopted in an honest and good faith belief that it was necessary to fulfill a legitimate purpose of Alberta Milk. Requiring Alberta Milk to provide a no Sunday pick up schedule to some of their producers would cause undue hardship to Alberta Milk. Mr. Van Der Smit had to make a choice between his religion or revenues (dump milk scheduled to be picked up on Sundays), or forgo the opportunity to be in the milk producing business.

Service/Religion. ***Amir and Nazar v Webber Academy Foundation*****, 2015 AHRC 8.** The Complainants brought this complaint on behalf of their sons [Students], who were, at one time, students at Webber Academy. The Tribunal found that the Respondent discriminated against the Students on the basis of s 4 of the *AHRA*. The Complainants had requested that Webber Academy allow the students to perform brief prayers on school grounds once or twice during the school day. While teachers had accommodated the Students for several weeks, the school eventually denied the request, stating that "school was 'non-denominational'" (para 31). Webber Academy denied the Students admission in the following year. The Tribunal found "that the only basis for refusing re-enrollment was connected to the Students' religion" (para 78). The Tribunal applied the analysis from ***British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union (BCGSEU)*****, [1999] 3 SCR 3, 176 DLR (4th) 1 [*Meiorin*]** and ***British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*****, [1999] 3 SCR 868, 181 DLR (4th) 385 [*Grismer*]**. The Tribunal found a rational purpose and good faith but that the policy was not reasonably necessary (see paras 90, 91 and 105-108). As for the "non-denominational" school argument, the decision states that "The Tribunal does not accept that being a non-denominational school can reasonably be interpreted as meaning "no prayer or religious practice will be allowed" (para 98). For the analysis of accommodation in this decision, see **Reasonable and Justifiable/Public Service/Religion** under s 11.

The Tribunal decision was appealed to the ABQB. ***Webber Academy Foundation v Alberta (Human Rights Commission Director)*****, 2016 ABQB 442.** Two Muslim students sought to perform prayer in a private setting at Webber Academy as their religious beliefs required mandatory prayers at times during the school year. The students and their families' request for these locations to perform prayers without requiring a "prayer space" was denied by the school on the basis that it is a non-denominational entity and does not permit prayers of any religious group.

The Human Rights Tribunal found that the interruption of quiet prayers by a teacher contributed to a sense of shame and humiliation of the students in attempting to fulfill their religious beliefs as they understood them. The Tribunal rejected Webber's argument that prayer space is not usually made available as supportive services are required for meaningful access to education, and *prima facie* discrimination existed against a protected characteristic of the *Act*.

The Court dismissed Webber Academy's appeal as the Tribunal had applied the correct legal tests and reached a reasonable conclusion.

The ABQB decision was appealed to the ABCA. ***Webber Academy Foundation v Alberta (Human Rights Commission Director)*, 2018 ABCA 207.** For the first time at the ABCA, Webber Academy submitted that their *Charter* rights and those of the school community were infringed on the basis that freedom of religion provides a fundamental right for all religious and non-religious individuals to attend secular schools without obligation or accommodation of religious exercises.

The Appellants challenged the constitutionality of section 4 of the *Alberta Human Rights Act*, and the ABCA held that while this was not addressed previously, the issue should be taken seriously. The ABCA ordered a new hearing before a fresh tribunal panel to review all the evidence and arguments, including the *Charter* argument raised on appeal, and the AHRT was ordered to refer any *Charter* questions by way of a stated case to the Court of Queen's Bench for resolution (Webber at para 52).

The ABCA was also persuaded that the Tribunal and the ABQB had made a number of errors (at para 52). The errors may be summarized as follows:

- The Tribunal had determined that the claim was not a request for 'prayer space' on the basis this was not factually accurate; the ABCA concluded that this was based on 'muddled thinking' (at para 52);
- While the Tribunal recognized that the students were requesting space that was large enough to allow children to bow, kneel and stand safely, it held that the students were only asking Webber Academy to honour their religious beliefs around prayer; the Tribunal specifically stated that its analysis and decision proceeded on that basis (at para 54);
- The ABQB held that there was sufficient evidence for the Tribunal to reach this conclusion, and further noted that the students were not seeking a dedicated space to pray; however, it too had concluded that the students were asking for a 'nominal space…to perform prayers' and to be excused from class if necessary (at para 55).

Leave to appeal to the SCC was refused, ***Alberta Human Rights Commission (Director), et al v Webber Academy Foundation,* 2019 CanLII 14403 (SCC), 2019 CarswellAlta 353.**

After the new hearing, in ***Amir and Siddique v Webber Academy Foundation,* 2020 AHRC 58,** the Tribunal held that the students were denied a quiet space that was customarily available to the public (the rest of the students) based on their religious belief. The Tribunal held that the Respondent's denials of such a space were not reasonable and could not be justified as they had not proven that accommodating the students' requests would constitute undue hardship. On the question of whether or not the accommodation of the students violated the school's section 2(a) Charter right to be free from religion, the Tribunal held that it did not. The Respondent had not shown that the students' request for a private space to conduct prayer would infringe on the secularity of the school. Both students were awarded damages.

Thereafter, Webber Academy filed an appeal to the Court of Queen's Bench to review the decision of the Tribunal which was ***Webber Academy Foundation v Alberta (Human Rights Commission),* 2021 ABQB 541.** In its appeal, it argued that the Tribunal made errors in finding that the denial of a quiet private place to pray fell under the denial of services contemplated under s. 4 of the AHRA. It also assigned errors in the Tribunal's findings that it had discriminated upon the students since the latter did not experience any adverse impact from it and that the accommodation of the students' request would not infringe its *Charter* rights. The ABQB ruled on the three issues as follows:

- Webber Academy proposition that providing prayer space is distinguishable from services under s. 4 of the AHRA does not satisfy the required appellate standard of review to overturn the Tribunal's finding;
- It seemed clear that the students suffered an adverse impact from Webber Academy's policy, both in the denial of the opportunity to pray and the punishment for failure to abide by its policy; and
- There was no evidence to support that allowing the students to pray in a private, quiet space would infringe the *Charter* rights of Webber Academy. The ABQB noted that Webber Academy had previously accommodated religious practices from time to time. It also noted that there was no one who noticed or felt impacted by the students' prayers during the time that they were accommodated by Webber Academy.

***This matter was dismissed on appeal to the ABCA. See:* 2023 ABCA 194.**

Service/Religion. *Singh v Royal Canadian Legion, Jasper Place (Alta), Branch No 255* (1990), 11 CHRR D/357 (Alta Bd of Inq). Mr. Singh, a member of the Sikh faith who wore a turban, planned to accompany his wife to her staff Christmas party being held at the Legion. Before the event he was advised that the Legion's dress regulations prohibited the wearing of a headdress. Mr. Singh, *because of his religious beliefs*, had no

alternative but to cancel his plans to attend the function. The Legion asserted that it was a private club and was therefore entitled to enforce a dress code even if it produced a discriminatory effect. The Board concluded private clubs were not exempted from the application of the *IRPA* and held that the Legion was providing a "service customarily available to the public" because the Legion allowed a wide range of groups and individuals to hold many "special events" on the premises and permitted headdresses to be worn in various situations, as part of ceremonial or official activities. The objectives of dress regulations in the by-laws of the Legion were not pressing and substantial enough in a free and democratic society to warrant limiting one's right not be discriminated against because of religious beliefs (see s 11). The Legion was ordered to apologize to Mr. Singh and to amend its dress regulation to comply with the law.

Service/Religion. ***Tuli v St Albert Protestant Board of Education*** **(1986), 8 CHRR D/3736 (Alta Bd of Inq)**. A Sikh student was refused permission to wear a Kirpan to school. Of all human rights legislation in Canada at that time, only the *IRPA* referred to "religious beliefs" rather than "religion" or "creed". The Board concluded that the Complainant was not treated differently as no denial of or discrimination with respect to a service or facility customarily available to the public had occurred. Denial of permission to wear a Kirpan did not constitute discrimination on the basis of religious belief, as it restricted religious practice but not belief. In ***Tuli v St. Albert Protestant Separate School District No 6*****, 1985 CarswellAlta 673, 8 CHRR D/3906** the Court of Queen's Bench granted an interim injunction pending the decision of the Board, and held that the fact that Complainant would be seen to have fallen from his faith as being sufficient to warrant relief sought until a final decision was made by the Court or the Commission under the provisions of the *IRPA.* **Note:** See s 11. The standard of proof applied in this decision was subsequently overruled.

Service/Religion. ***Law Society of British Columbia v Trinity Western University*****, 2018 SCC 32, [2018] 2 SCR 293.** The issue in this case is whether the law society was entitled under its enabling statute to consider the admissions policy in deciding whether to approve the proposed law school. The admissions policy prohibited sexual interaction except for married heterosexual couples. The application was for judicial review challenging the decision on the basis that it violated religious rights, and whether the Society's decision engages the *Charter of Rights* by limiting the freedom of religion. If so, did the decision proportionally balance limitations on the freedom of religion with law society statutory objectives, and whether the Law Society's decision

was reasonable. The application was dismissed.

The Court weighed the interests of both parties and determined that the Law Society's decision to deny accreditation significantly advanced its statutory objectives by "ensuring equal access to and diversity in the legal profession and preventing the risk of significant harm to LGBTQ people." The Law Society's argument was that the school's community members could not impose their religious beliefs on fellow students and interpreted the school's policy as an exclusionary religious practice. The Court concluded that the Law Society's decision resulted in significant benefits to its statutory objectives while having only minor implications on the school's *Charter* right of freedom of religion. (See also Religion. *Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33.)

SERVICE: GENDER

Public Service/Insurance/Gender. *Zurich Insurance Company v Ontario Human Rights Commission*, [1992] 2 SCR 321, 9 OR (3d) 224. In Ontario young, single, male drivers paid the highest car insurance premiums. The Supreme Court of Canada was asked whether the differentiation in automobile insurance rates was reasonable and *bona fide* within the meaning of s 21 [now s 22] of the *Ontario Human Rights Code*, RSO 1990, c H-19 [*OHRC*]. Section 21 of the *OHRC* exempts an insurer from liability for discrimination if based on reasonable and *bona fide* grounds. The majority held that a discriminatory practice was "reasonable" within the meaning of s 21 of the *OHRC* if:

(a) it is based on a sound and accepted insurance practice; and

(b) there is no practical alternative.

In order to meet the test of *bona fide*, the practice must be one that was adopted honestly, in the interests of sound and accepted business practice and not for the purpose of defeating the rights protected under the *OHRC*. Zurich set its premiums on the basis of the only statistics available to the insurance industry at the time in question. The statistics supported the imposition of higher premiums on certain classes of drivers whose cumulative accident history suggested an increased insurance cost. Faced with an absence of any other criteria in which to set insurance rates, the majority was satisfied that Zurich set its rates on reasonable and *bona fide* grounds as those terms are used in s 21 of the *OHRC*.

McLachlin J, in dissent, noted a distinction between the absence of a reasonable alternative and the absence of proof of a reasonable alternative and held that the effect of confusing the two resulted in removing the burden of proof from the person who

violated the *OHRC* and placed it on the person who made the complaint. McLachlin J, held that difficulties of proving the non-existence of reasonable alternatives should not stand as a defence to a charge under the *OHRC.* L'Heureux- Dubé J, also in dissent, stated that the "reasonable and *bona fide* grounds" test should include both a subjective and objective component. The subjective component identifies the distinction made in the insurance contract in terms of whether it is made honestly, in good faith and with a sincere belief that the distinction is accurate in terms of cost associated with risk. The objective component requires that the distinction be reasonably necessary to assure the proper allocation of risk among insured groups.

Service/Insurance/Gender. *Co-operators General Insurance Co v Alberta (Human Rights Commission)* (1993), 145 AR 132, 14 Alta LR (3d) 169 (CA), leave to appeal to SCC refused, [1994] SCCA No 22. A young man was quoted car insurance premiums more than double the rate quoted to a woman of comparable age and marital status. The Court found that provision of automobile insurance was a service customarily available to the public and that a gender-based classification system used to set automobile insurance premiums were *prima facie* discriminatory. However, under s 11.1 of the *IRPA* [*AHRA*, s 11] the discriminatory practice was found to be reasonable and justifiable: reasonable in that it was based on a sound and accepted insurance practice and there was no practical alternative which would produce the same result; and justifiable in that the objective of fairness was met. The Court held that it was not fair to require young females to pay the same premiums as young males in spite of their superior driving record. Gender-based rating classification was not unfair to young males because the rates charged were an attempt to fairly reflect the number and severity of accidents involving them.

Service/Gender. See also: ***Payne v Sheraton Summit Hotel* (1975), (Alta Bd of Inq) (note: pre-*Andrews, infra*);** and ***Yurchak v Frank Cairo Enterprises Ltd*, 2006 AHRC 7**.

SERVICE: SEXUAL ORIENTATION

Service (Education)/Sexual Orientation. Religion. *Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33, [2018] SCR 293. This was a case about a law society denying the accreditation to a proposed law school which had a mandatory covenant prohibiting sexual intimacy except between married heterosexual couples. The case presented the issue as to whether the law society was entitled under its enabling statute to consider this admissions policy in deciding whether to approve the proposed law school. The application was for judicial review challenging the decision

on the basis that it violated religious rights, and whether the Society's decision engages the *Charter of Rights* by limiting the freedom of religion. If so, did the decision proportionally balance limitations on the freedom of religion with law society statutory objectives, and whether the Law Society's decision was reasonable.

The application was dismissed. The Court weighed the interests of both parties and determined that the Law Society's decision to deny accreditation significantly advanced its statutory objectives by "ensuring equal access to and diversity in the legal profession and preventing the risk of significant harm to LGBTQ people." The Law Society's argument was that the school's community members could not impose their religious beliefs on fellow students and interpreted the school's policy as an exclusionary religious practice. The Court concluded that the Law Society's decision resulted in significant benefits to its statutory objectives while having only minor implications on the school's *Charter* right of freedom of religion. (See also *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32, [2018] 2 SCR 293).

Service/Sexual Orientation. *Manitoba (Human Rights Commission) et. Al. v Government of Manitoba*, 2021 MBQB 122. The applicant, Richard North, alleged that he was discriminated based on his sexual orientation when the Government of Manitoba refused to register his 1974 ceremony as a marriage. The County Court of Manitoba previously ruled that North and his partner's ceremony was not a ceremony of marriage. In the present case, the Court dismissed the application for judicial review and found that there was no discrimination, stating that North was treated identically to all other persons whose ceremony of marriage had been the subject of a court decision and abiding by the rule of law does not amount to discrimination. It also ruled that the Civil Marriage Act, which allowed for same sex marriage, has no retroactive application.

SERVICE: PHYSICAL DISABILITY

Service/Physical Disability/Accommodation. *Laidlaw Transit Ltd v Alberta (Human Rights & Citizenship Commission)*, 2006 ABQB 874, 410 AR 234, aff'g *Martyn v Laidlaw Transit Ltd*, 2005 AHRC 12. The Complainant, who was physically disabled, called for a wheelchair accessible taxi but Yellow Cab and Alberta Co-op Taxi told her that there were no accessible taxis available. The Complainant filed a complaint with the Commission alleging discrimination on basis of physical disability in that the City of Edmonton, the Edmonton Taxi Commission and both taxi companies failed to provide sufficient accessible taxi services. The Panel found evidence of *prima*

facie discrimination on the grounds of physical disability because the Complainant was denied the benefit of a 24-hour taxi service that was customarily available to the public and also found that the taxicab scheme systemically discriminated against persons with disabilities. The Panel applied the three-part test in ***British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868, 181 DLR (4th) 385 [*Grismer*]** and held that the discrimination was not reasonable and justifiable in the circumstances as accommodation was not made to the point of undue hardship. The Panel found no discrimination on the part of Alberta Transportation. The Alberta Court of Queen's Bench upheld the Panel's findings. For the decision on remedy, see **2008 AHRC 2** (below).

Service/Education/Physical Disability. ***Alberta (Department of Education) v Alberta (Human Rights Commission)* (1986), 71 AR 253, 9 CHRR D/4979, (*sub nom Alberta (Department of Education) v Deyell*) 27 DLR (4th) 735 (CA).** The parents of a handicapped child alleged discrimination on the basis that only half of the tuition for attendance at a private school in Calgary for learning-disabled children was covered by a government grant. The Court of Queen's Bench held that the provision of education to school-age children was a service customarily available to the public, however, the program providing discretionary grants to enable learning- disabled children to benefit from certain private school opportunities was not. The Alberta Court of Appeal agreed that the complaint addressed the Department of Education's policy dealing with grants and not the department's policy dealing with handicapped children. The appeal was dismissed. The *IRPA* does not necessarily give a handicapped child the right to private education nor financial aid if a private school is chosen. Any deficiency in the grants policy was not based on the fact that the child was handicapped and was therefore not a fit subject for inquiry by the Commission.

Service/Healthcare/Age/Mental/Physical Disability. ***Elder Advocates of Alberta Society v Alberta*, 2018 ABQB 37.** The plaintiffs claimed that accommodation fees charged to residents of nursing homes and auxiliary hospitals improperly subsidized medical expenses that are the provincial government's responsibility. The Plaintiffs submitted, among other claims, that the government violated section 15(1) of the *Charter*.

The Plaintiffs alleged that they were required to pay an accommodation charge based on their age and mental and/or physical disability that other Albertans were not required to pay, namely people treated in acute care facilities. The distinguishing factors between those treated in long- term care facilities and those treated in acute

care facilities were age and disability. The Plaintiffs argued that this infringement was not justified under section 1 of the *Charter* and that, to the extent that the challenged legislation was inconsistent with the *Charter*, it was of no force or effect. Plaintiffs also sought damages under section 24(1) of the *Charter.* The Defendants submitted that the Plaintiffs were not treated any differently than other Albertans of long term-care facilities and had access to the same acute care treatment scheme as any other Albertan, free of charge.

In addition, the Province created continuing care schemes in long-term care facilities, in which residents contribute to their cost of housing as they would in other settings. These schemes are based on the understanding that a long-term care facility functions as the residents' home, where in comparison a hospital would function as a temporary site of acute care treatment. The Court considered whether the accommodation charge perpetuated disadvantage or prejudice, and also incorporated the nature of the interest affected as a significant factor. The Court determined that the Plaintiffs had not provided evidence that persons in need of chronic institutional care, or elderly disabled persons, suffer disadvantage in terms of either the quality of health care services that they receive or the quantity of health care resources devoted to them. The Court concluded that all applications under section 15(1) of the *Charter* were dismissed.

Service/Disability: *Condominium Corp No 052 0580 v Alberta (Human Rights Commission)*, 2016 ABQB 183 Mr. Goldsack is confined to a wheelchair and alleges that the developer assigned him the parking stall nearest to the elevator and believes it is designated as a handicapped stall. The stall was redesignated for bicycle parking and storage, forcing him to park in a much smaller stall allocated to his unit.

Mr. Goldsack applied to the Human Rights Commission on the basis of being discriminated against because of his disability, and the Commission initiated an investigation. The condominium corporation argued the Commission had no jurisdiction and submitted an application to quash the decision to investigate. The Commission believed the standard of review is reasonableness, and that the application brought by the Corporation is premature and should have waited for a decision to be rendered on the merits of the matter after allowing the investigation to proceed.

The Court agreed that questions of law concerning interpretation of the Act inside the regulator's area of expertise are only subject to reasonableness. No body is more

capable of determining what constitutes discrimination and services available to the public than the Commission. The court should hold off any review until the process has run its course.

The decision to investigate was reasonable and made by the most appropriate authority so no reviewable error was made. The Commission was to proceed with the investigation as Mr. Goldsack is a member of the public, and they must then decide whether there has been unlawful discrimination and determine the appropriate remedy.

Service/ Physical Disability. See also: *Cush v Condominium Corporation No. 7510322 o/a Renfrew House*, 2022 AHRC 87.

Service/Physical Disability/Mental Health. ***Thompson v Space Lab Industries Ltd. o/a Broken City Social Club*, 2022 AHRC 92.** Jenn Thompson filed a complaint against Broken City Social Club alleging that she was discriminated in the area of goods, services, accommodation or facilities on the ground of mental disability when the latter required her to wear a mask while inside its premises or she would be asked to leave. In support of her complaint, she submitted a medical note which stated that she was not able to tolerate using a face mask due to mental health concerns. The Director of the Commission dismissed the complaint and found that the club had health and safety obligations associated with COVID-19 and accommodating Thompson would have created risks for the latter's staff and other customers. Upon review of the Chief of the Commission and Tribunals, the dismissal was upheld. It concluded that Thompson has not provided sufficient facts that would reasonably suggest that the club did not implement its COVID policy for a legitimate business purpose. It relied on the case of *Beaudin v Zale Canada Co. o/a Peoples Jewellers*, 2021 AHRC 155, where the Commission did an analysis to determine whether a policy was reasonable and justifiable in the given situation. In that case, Commission Chief Gottheil posed the question: "whether the policy was introduced for a valid and legitimate business purpose, was introduced in good faith, and there were no alternatives available to accommodate those negatively affected without incurring undue hardship."

Service/Mental Disability/Physical Disability. See also: *Coelho v. Lululemon Athletica Canada Inc.,* 2021 BCHRT 156 and *Callahan v Alberta Health Services and Alberta Justice and Solicitor General,* 2019 AHRC 58.

SERVICE: MENTAL DISABILITY

Service/Education/Mental Disability. *Moore v British Columbia (Education)*, 2012 SCC 61, [2012] 3 SCR 360. Moore suffered from severe dyslexia for which he received special education at a public school. He was transferred in Grade 2 to a local Diagnostic Centre upon the recommendation of a school psychologist. The Diagnostic Centre was closed by the School District and Moore had to transfer to a private school for his education. His father complained to the British Columbia Human Rights Tribunal that Moore had been denied a service customarily available to the public on the basis of mental disability discrimination. The BC Tribunal concluded that there was discrimination and ordered a wide range of sweeping systemic remedies against both the province and the school district. It also ordered that Moore's parents be reimbursed for the private school tuition. The British Columbia Supreme Court set aside the Tribunal's decision, finding there was no discrimination. A majority of the British Columbia Court of Appeal dismissed Moore's appeal. The Supreme Court of Canada allowed the appeal.

The Supreme Court of Canada held that the service to which Moore is entitled is education generally, rather than special education, as Moore would be only compared to other special education students. To demonstrate that there is a *prima facie* case of discrimination, the Complainant must show that they have a characteristic protected from discrimination; that they have experienced an adverse impact with respect to a service customarily available to the public; and that the protected characteristic was a factor in the adverse impact. The District's decision to close the Diagnostic Centre without considering the needs of the special education students, amounted to a failure to meet Moore's educational needs and thus constituted *prima facie* discrimination based on disability. The Tribunal had found that the District had failed to justify the discrimination because of its reliance on a budgetary crisis without assessing alternatives that were or could be reasonably available to accommodate special needs students once the Diagnostic Centre was closed. The Tribunal's finding that there was discrimination against Moore was restored.

Service/Education/Mental Disability. *University of British Columbia v Berg*, [1993] 2 SCR 353, 102 DLR (4th) 665. A graduate student with a history of mental illness was denied a key to the premises, even though all other graduate students were provided with one. A key was subsequently provided. Later a faculty member refused to complete a rating sheet that was needed to apply for a hospital internship. The British Columbia Human Rights Council found that the school had contravened s 3 of the *British Columbia Human Rights Act (BCHA)*, SBC 1984, c 22 [*AHRC*, s 4] by denying her

the key and rating sheet based on a mental disability. The BCSC set aside the decision, ruling that the provision of a key and rating sheet did not constitute "services customarily available to the public". The BCCA affirmed that judgment. The Supreme Court of Canada overturned the BCCA decision, holding that the student body was a public and that the key and rating sheet were customarily available to the public. The SCC expanded upon the definition of "customarily available to the public" provided in ***Gay Alliance Toward Equality v Vancouver Sun*, [1979] 2 SCR 435, 97 DLR (3d) 577**. The word "public" in s 3 of the *BCHA* does not include every member of the community. "Every service has its own public, and once that 'public' has been defined through the use of eligibility criteria, the Act prohibits discrimination within that public" (para 68). Eligibility criteria, provided they are non-discriminatory, are a necessary part of most services in that they ensure that the service reaches only its intended beneficiaries (para 70). In determining those activities of an accommodation, service or facility provider that are subject to scrutiny under the *BCHA*, a principled approach which looks to the relationship created between the user and the provider is called for. The decision maker must examine the reasons for the denial, of in this case, the rating sheet and the key. The Complainant, by virtue of having passed through the admissions process, became a member of the "public" to which the school provided educational services and facilities. The key and the rating sheet were incidents of the public relationship between the school and its students and they were "customarily available" to the school's public.

Service/Mental Disability/Accommodation. *Dewart v Calgary Board of Education (CBE)*, 2004 AHRC 8, 50 CHRR D/174 (Alta HRP), rev'd *Calgary Board of Education v Dewart*, (2005), CHRR Doc. 05-312 (Alta QB). The Complainant's son had Attention Deficit Hyperactivity Disorder and suffered from brain damage due to an accident. Because of her son's special needs, the Complainant asked the CBE to provide a one on one education program for him. The CBE did not accommodate the request and the Complainant enrolled her son into a private school. The Complainant submitted that her son was discriminated against on the basis of mental disability because the Respondent failed to provide him with the requested educational program, a service that was customarily available to the public. The Complainant sought reimbursement for three years of tuition in the private school. The Panel held that the Complainant's son did in fact have a mental disability, he was *prima facie* discriminated against on the grounds of mental disability and the CBE failed to accommodate her son's unique educational needs. The Complainant was awarded partial tuition fees in the amount of $25,000.00. The actual tuition fees were $30,000.00. The Panel held the Complainant

partly responsible for her deteriorating relationship with the CBE. The decision was overturned by the Court of Queen's Bench.

Service/Mental Disability/Accommodation. *Jobb v Parkland School Division No. 70*, 2017 AHRC 3. The Applicant brought a complaint Parkland School Division No. 70 alleging discrimination based on mental disability in the provision of services that are customarily available to the public contrary to section 4(a) and (b) of the *Alberta Human Rights Act*. The Applicant alleged that in failing to provide an educational method purportedly better suited to the Applicant, that the Respondent failed in its public duty and breached the Act insofar as it had not met its duty to accommodate. The Commission found that even though discrimination had occurred, the evidence indicated that the Applicant was accommodated to the point of undue hardship. Further, evidence showed that the school did try and accommodate the student. Therefore, the Commission concluded that the Respondent did not breach the Act.

Service/Mental Disability/Accommodation. *Zhou v University of Calgary*, 2021 AHRC 67. Chang Zhou was a student in the Faculty of Veterinary Medicine at the University of Calgary. She alleged that the University of Calgary discriminated her on the grounds of mental disability when it failed to accommodate her despite her mental disability which resulted to her failing two subjects. After which, she was required to withdraw from the Doctor of Veterinary Medicine Program. The Director dismissed the complaint which was overturned by the Tribunal. The latter reasoned out that the issue of whether the University met its duty to accommodate to the point of undue hardship needs an assessment of evidence and there is a reasonable basis to proceed to a hearing.

Service/Mental Disability/Employment. *Hadi v Group Source*, 2022 AHRC 114. The Complainant brought a complaint against his employer, Enviros Wilderness School Association, alleging that the latter discriminated against him by terminating his Extended Benefits while he was on an unpaid medical leave. The Commission found that the actions of his employer satisfied the requirements of the *Moore* test and were discriminatory upon the Complainant. The employer was unable to offer any valid justification to discontinue said benefits or provide any reasons in its refusal to accommodate the Complainant.

Service/Mental Disability. See also: ***Martin v. E.C. Wellness Centre Inc.*, 2021 CanLII 60990 (NB LEB), *Heck obo Heck v University of Alberta,* 2021 AHRC 85 and *Howard***

***v Service Alberta and Robbie Robertson,* 2019 AHRC 63.**

SERVICE: ANCESTRY/PLACE OF ORIGIN

Service/Ancestry/Place of Origin. *Han v Chief of Police, Calgary Police Service,* 2021 AHRC 62. The Complainant alleged that the Calgary Police Service discriminated against her on the ground of ancestry and/or place of origin when one of the latter's officers told her, 'Go back to China if you want to play this game'. The statement was allegedly made when the officers responded to a call from a restaurant in downtown Calgary reporting the Complainant of meal fraud. The Tribunal upheld the Director's decision to dismiss the complaint and found that the officers had corroborated their version of events and the Complainant was not able to prove her allegation.

***Echavarria v The Chief of Police of the Edmonton Police Service*, 2016 AHRC 5.** The Complainants were from Columbia. They alleged discrimination on the basis of ancestry and place of origin under s 4(b) of the *AHRA*. "It was alleged that Cst. Tagg addressed Anderson using the phrase, 'Do you remember me, Columbiano'? Further, it was alleged that he told Ms. Sanchez, 'This is Canada not Columbia' and lastly that he said to Mr. Sanchez, 'Move your foot, Columbian'" (para 4). The Tribunal found that discrimination on the basis of ancestry or place of origin was not proven and the complaint was dismissed.

Service/Ancestry. See also: ***Cunningham v Bims Car Wash,* 2022 AHRC 131, *Krishna-Barry v Condominium Corporation No. 8911028,* 2022 AHRC 29, *Cruz v Alberta Children's Services*, 2021 AHRC 44, and *Benjamin v 1906408 Alberta Ltd. o/a Tim Hortons*, 2019 AHRC 29.**

SERVICE: MARITAL STATUS

Service/Marital Status. *Gwinner v Alberta (Human Resources and Employment)*, 2004 ABCA 210, 354 AR 21, aff'g *Gwinner v Alberta (Human Resources and Employment)*, 2002 ABQB 685, 321 AR 279. Gwinner and four other women filed complaints under the *HRCMA* claiming that the *Widows Pension Act*, RSA 2000, c W-7 [*WPA*] discriminated against them on the basis of their marital status because the *WPA* made pensions available to persons who were married at the date of their spouse's death but did not make pensions available to persons who were divorced or separated at the date of their former spouse's death. They claimed the denial of the pension was contrary to s 4 of the *HRCMA*. The Panel relied on the definition of discrimination in ***Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 56 DLR (4th) 1**

[*Andrews*] and found the *WPA* was *prima facie* discriminatory in the case of two of the Complainants (Rusinek and Bolin) on the basis of marital status. Next the Panel applied the test set out in ***British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union (BCGSEU)*, [1999] 3 SCR 3, 176 DLR (4th) 1 [*Meiorin*]** and held that the discrimination was reasonable and justifiable under the s 11.1 of the *HRCMA* [*AHRA*, s 11].

The Director of the Human Rights and Citizenship Commission appealed the Panel's decision. The Court of Queen's Bench held that the Panel should not have adopted the test derived from *Meiorin*. Although McLachlin J endorsed a wide application of *Meiorin* in ***British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868, 181 DLR (4th) 385 [*Grismer*],** the issue in this case was not a *BFOR* but whether provincial legislation and government action was *prima facie* contrary to the *HRCMA* and if so, whether it was reasonable and justifiable. The challenge raised in this case was of quasi- constitutional proportions, and therefore, directly analogous to a s 15(1) *Charter* challenge and therefore, the Court of Queen's Bench applied the analysis from ***Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, 170 DLR (4th) 1.** The Court held that the *WPA*, in purpose or effect, perpetuated the view that people who were divorced, separated or single, who were older and in need, were less capable or less worthy of recognition or value as human beings or as members of Canadian society, as compared to those who were widowed and found that the *WPA* and the program were contrary to the *HRCMA.* The Court of Queen's Bench held that the *WPA* and regulations were inoperative to the extent that they denied benefits to, and discriminated against, claimants because they were not widows, but instead were divorced or separated. The Crown appealed to the Alberta Court of Appeal on the basis that the Chambers Judge erred in concluding that the Respondent's exclusion for the pension scheme was demeaning to their human dignity and in directing how the legislation should be applied in the future rather than crafting a remedy specific to the Respondents. The Court of Appeal dismissed the Crown's appeal.

SERVICE: FAMILY STATUS

Service/Family Status. *Alberta (Minister of Human Resources and Employment) v Weller*, 2006 ABCA 235, 391 AR 31, leave to appeal to SCC refused, [2006] SCCA No 396, 423 AR 395. The Complainant was denied the shelter allowance portion of social assistance on the basis that he resided with his mother, although he paid his mother room and board. The issue in the appeal to the ABCA was whether s 14(4)(a)(i) of the *Social Allowance Regulation*, Alta Reg 213/93 (repealed), denying a social assistance shelter allowance to a person living in the home of a close relative was discriminatory

and, if so, whether it was reasonable and justifiable in the circumstances. The Panel found that the Complainant had been *prima facie* discriminated against on the basis that he was treated differently than others who also qualified for shelter allowance on the sole basis that he chose to reside with his mother. The Respondent did not provide adequate evidence to establish that the denial of shelter benefits was reasonable or justifiable. The Court of Queen's Bench upheld the Panel's decision, but the Court of Appeal reversed the decision finding that there was no *prima facie* discrimination.

The Court of Appeal stated that legislators are entitled to proceed on informed general assumptions provided that the assumptions are not based on arbitrary and demeaning stereotypes (see ***Gosselin v Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 SCR 429**) and that the purpose of the scheme and its effect must be considered, which the Panel and the lower Court failed to do. In order to constitute discrimination, the difference must come within the purview of the statue and consideration must be given as to whether the provision sought to be impugned violates essential human dignity. The Court applied ***Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, 170 DLR (4th) 1** to determine whether the claimant's human dignity was demeaned by the legislative distinction. The Court of Appeal held that the distinction in the regulation did not directly pertain to the claimant's family status, but rather the requirement to pay rent and there were strong policy reasons for why social assistance should not replace the normal expectations of mutual obligations that exist amongst family. Further, the denial of the shelter allowance did not impact the Complainant's dignity. The Court of Appeal held that no substantive discrimination occurred in denying the Complainant the benefit of shelter allowance. "Absent a discriminatory purpose, policy or effect, the government is free to make choices when providing benefits and the *Act* is not infringed" (para 67).

Service/Family Status. *Pringle v Alberta (Human Rights, Citizenship & Multiculturalism Commission)*, 2004 ABQB 821, 372 AR 154. The Complainant, who was adopted in the 1960s, applied to Alberta Municipal Affairs for a photographic print of her certificate of birth pursuant to s 32(2) of the *Vital Statistics Act*, RSA 2000, c V-4. Her request was denied because under the legislation in force at the time her adoption records were sealed. The Complainant submitted that she was discriminated against on the grounds of family status in the area of provincial government services that are customarily available to the public. The Respondent argued that the legislative scheme was necessary to protect the confidentiality and privacy rights of the birth parents and to attain the social goal behind the adoption process. The Panel applied

the three-part test for discrimination set out in ***Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, 170 DLR (4th) 1 [*Law*]** and found that the Complainant met the first two branches of the test but that the third part of the test was not satisfied, as the Complainant had not provided compelling objective evidence to demonstrate that the differential treatment violated her human dignity and the Complainant failed to consider the interests of the birth parents, which required protection.

The Panel did not need to consider whether the discrimination was reasonable and justifiable, but it applied the justification test set out in ***R v Oakes*, [1986] 1 SCR 103, 53 OR (2d) 719 [*Oakes*]** and found that the impugned legislation governing the release of original registrations of birth to adult adoptees was in pursuit of a pressing and substantial objective that was rationally connected to the purpose of respecting rights of the parties which was important to facilitate the adoption process and allow the parties to move on with their lives. Under the proportionality test, the Panel held that the scheme was rationally connected because it protected the anonymity of birth parents, there was minimal impairment because the scheme balanced the rights of the parties and was reasonable and the effects were proportional because only identifying information was denied to the Complainant. Therefore, even if there had been discrimination, it would have been justified under s 11.

On appeal to the Court of Queen's Bench, McIntyre J stated that the Panel was correct in finding that the first two parts of the *Law* test were satisfied but that the Panel erred in its application of the third part of the *Law* test in reasoning that the Complainant had not provided compelling objective evidence demonstrating that the differential treatment violated her human dignity and in prematurely considering the interests of birth parents in its analysis of s 4 of the *HRCMA*. McIntyre J agreed with the Panel's application of the *Oakes* analysis and held that the fairness to birth parents who relied on assurances and expectations of privacy and confidentiality was supportive of finding that the discrimination under the impugned legislation was reasonable and justifiable. The Court held that the legislation was discriminatory but that it was reasonable and justifiable under s 11 of the *HRCMA*.

Service/Family Status. *M.L. obo A.L. v Alberta Human Services*, 2021 AHRC 93. The Complainant alleged that the Alberta Human Services discriminated against her and her child on the grounds of source of income and family status because she was receiving less from Income Support benefits. This was because the child support

received was deducted or clawed back from the Complainant's benefits. The Tribunal stated that the information supports that the complainant, due to her status as a mother, receives adverse treatment regarding income received as child support as compared to a single adult whose income is not clawed back 100% for purposes of determining the amount of Income Support a person is entitled to. It overturned the Director's decision to dismiss the complaint stating that the latter failed to consider whether the administration of the Income and Employment Support Act is discriminatory under the AHRA on the basis of family status.

Service/Family Status. *F v Cochrane Brazilian Jiu Jitsu,* 2019 AHRC 44. TF brought a complaint on behalf of her children, alleging that they were denied service at the Jiu Jitsu studio on the grounds of their family status. She also sought to add the grounds of disability and race to the complaint. The Respondent stated that the children were denied service due to abrasive behaviour from TF at the studio. The Director refused to add the other two grounds of discrimination and dismissed the complaint. On review, the Chief of the Commission and Tribunals held that the fact that the children were denied service based on their mother's behaviour was a *prima facie* case of discrimination. However, since the children's attendance at the classes was dependent on the Respondent having a workable relationship with TF, it was reasonable for the Respondent to deny service to the children. The decision to dismiss the complaint was upheld.

***Mattern v Spruce Bay Resort*, 2000 AHRC 4.** The Complainants were refused accommodation at a family campground, as they did not meet the Respondent's definition of a family and because there was a two-night minimum stay policy on weekends and the Complainants only wanted to stay for one night. The Panel found that there was a *prima facie* case of discrimination, but it was reasonable and justifiable as the policy was imposed in good faith and in the interest of sound and accepted business practices and not for the purpose of defeating the rights protected by the *HRCMA.* The Complainants were ambiguous regarding how many others would join them, when the others would be arriving and requested exemption from the two-night minimum stay policy. The two-night stay policy was necessary to ensure the efficient and economical provision of the service. According to the Alberta Human Rights Commission's website, this decision was appealed and upheld at the Court of Queen's Bench. The appeal is unreported.

SERVICE: SEXUAL ORIENTATION

Service/Sexual Orientation. ***Anderson v Alberta Health & Wellness*****, 2002 AHRC 16, 45 CHRR D/203 (Alta HRP).** The Panel held that the denial of Alberta Health Care benefits to same-sex partners, dependents and children was discrimination in a service customarily available to the public based on sexual orientation. (The decision was appealed to the Court of Queen's Bench and the matter was settled.)

Benefit based on age

4.1 Section 4 as it relates to age does not apply with respect to the conferring of a benefit on

(a) minors or any age-based class of minors, or
(b) individuals who have reached a specified age not less than 55.

2017 c 17 s 2.

Minimum age for occupancy

4.2(1) Section 4 as it relates to age and family status does not apply with respect to a minimum age for occupancy that applies to

(a) a residential unit as defined in the *Condominium Property Act*,
(b) a housing unit as defined in the *Cooperatives Act*, or
(c) a mobile home site as defined in the *Mobile Homes Sites Tenancies Act*,

If that minimum age for occupancy was in existence before January 1, 2018.

4.2(2) Section 4 as it relates to age and family status does not apply with respect to a minimum age for occupancy that applies to accommodation at premises in which every unit or site is reserved for occupancy by one individual who has reached a specified age not less than 55 or by two or more individuals at least one of whom has reached a specified age not less than 55.

4.2(3) A minimum age for occupancy under subsection (2)

(a) must not prevent occupancy by a prescribed class of individuals or in the prescribed circumstances, and
(b) may permit occupancy by a prescribed class of individuals or in the prescribed circumstances.

4.2(4) If a minimum age for occupancy is adopted in accordance with subsection (2), the minimum age for occupancy shall not be

considered to be non-compliant with subsection (2) by reason of continued occupation by individuals who were resident in the premises before that minimum age for occupancy was adopted and who do not conform to the minimum age for occupancy to subsection (2) or to the regulations referred to in subsection (3).

2017 c 17 s 2 s 3.

Note: See also *Alberta Regulation* 252/2017 (below).

Minimum age for occupancy. ***Condominium Plan No. 7220764 (c.o.b. Essex House) v Bundi*, 2020 ABQB 757.** The Condominium Board applied to terminate the residence of Bundi and her four-year-old child since the bylaws of the Board prohibited residence by a minor. The bylaws were amended in March 2020 which were patterned on the minimum age occupancy restrictions exceptions in *Alberta Regulation 252/2017 (Sec. 1)* that applied to Sec, 4 of the *AHRA*. The bylaws copied the exception in the said regulation which allowed minors to reside in the condominium as long as they are related by blood to the occupant of the unit and the latter has been the primary caregiver of the minor due to an unforeseen event. The ABQB ruled that the exceptions in the bylaws applied, finding that Bundi indeed became the primary caregiver of his minor child due to an unforeseen event, his ex-wife leaving for Arizona without giving any details of her location.

Discrimination re tenancy

5(1) No person shall

(a) deny to any person or class of persons the right to occupy as a tenant any commercial unit or self-contained dwelling unit that is advertised or otherwise in any way represented as being available for occupancy by a tenant, or

(b) discriminate against any person or class of persons with respect to any term or condition of the tenancy of any commercial unit or self-contained dwelling unit,

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 class of persons or of any other person or class of persons.

5(2) Subsection (1) as it relates to age and family status does not apply with respect to a minimum age for occupancy for premises that contain a unit or site to which section 4.2(1) applies.

5(3) Subsection (1) as it relates to age and family status does not apply with respect to a minimum age for occupancy that applies to a unit or site at premises in which every unit or site is reserved for occupancy by one individual who has reached a specified age not less than 55 or by two or more individuals at least one of whom has reached a specified age not less than 55.

5(4) A minimum age for occupancy under subsection (3)

(a) must not prevent occupancy by a prescribed class of individuals or in the prescribed circumstances, and

(b) may permit occupancy by a prescribed class of individuals or in the prescribed circumstances.

5(5) If a landlord adopts a minimum age for occupancy in accordance with subsection (3), the minimum age for occupancy all not be considered to be non-compliant with subsection (3) by reason of continued occupation by individuals who were resident in the premises before that minimum age for occupancy was adopted and who did not conform to the minimum age for occupancy, to subsection (3) or to the regulations under subsection (4).

RSA 2000 cH-14 s 5; 2009 c 26 s 45; 2015 c 18 s 3; 2017 c 17 s 3; 2018 c 11 s 3.

Tenancy/Physical Disability/Mental Disability/Source of Income. *Stewart v Jordan*, 2023 AHRC 4. Monique Stewart brought a complaint against her landlord alleging that the latter discriminated against her when he refused to accommodate her mental and physical disability by failing to deal with her noise complaints and raised her rent exponentially to end her tenancy. Stewart leased a basement suite from her landlord from 2011 to 2018. At that time, she already had several medical conditions which were exacerbated when she lacked sleep at night. In 2015, she started receiving the Assured Income for the Severely Handicapped (AISH) program of the Alberta Government. In January 2018, Stewart sent an email to her landlord detailing various noise disturbances coming from the Upstairs suite. She then requested for a rent abatement which was responded to by the landlord by serving a Notice of Rent Increase to her effective at the end of May 2018. Thereafter, she notified her landlord that she intended to vacate the basement suite by the end of April 2018. She also sent her landlord a medical note stating that she required sleep from 11:00 p.m. to 7:00 a.m. due to her medical condition, yet the noise issues persisted throughout her last month's tenancy. The Director found that Steward has established *prima facie* discrimination and her landlord was not justified in his discriminatory conduct. The Tribunal agreed with the Director citing that the complaint met the requirements set in the case of

Moore. It noted that the circumstances of the rent increase, on the same day that Stewart provided her landlord with a list of noise disturbances and sought for rent abatement, was a direct response against the former, and such circumstances created a direct link between the noise complaints and the rent increase. It also found that the landlord frustrated Stewart's tenancy. He was aware that Stewart was on a fixed income and would not be able to afford the rent he set. The Tribunal also ruled that the principle of 'duty to inquire' applies in the area of tenancy in Alberta to refute landlord's indication that he was unaware of any connection between Stewart's disability and the noise complaints when he raised the rent. It agreed with the Director that the landlord ought to have known that Stewart's disabilities may have affected her reactions to noise from the Upstairs suite's tenants especially since he has knowledge that Stewart complained frequently to him about the noises in addition to the fact that he was also provided with a medical note of Stewart's disabilities. The Tribunal noted that the failure of the landlord to make inquiries about how Stewart's disabilities impacted her ability to withstand the noise was fatal to his defense and found that Stewart has met the burden of proof to establish that her disabilities were a factor in the termination of her tenancy. It further stated that the landlord failed to demonstrate that he accommodated Stewart to the point of undue hardship and the landlord's discriminatory conduct was not reasonable and justified in the circumstances.

Tenancy/Source of Income. ***Miller v 409205 Alberta Ltd,*** **2001 AHRC 8, 42 CHRR D/311, aff'd in part** ***409205 Alberta Ltd v Alberta (Human Rights & Citizenship Commission),*** **2002 ABQB 681, 319 AR 352**. The Complainant, who suffered from bi-polar disorder and lived on Assured Income for the Severely Handicapped (AISH), the Canada Pension Plan (CPP) and a rental subsidy from the Capital Region Housing Corporation (CRHC) for rent and living expenses, claimed discrimination by his landlord on the basis of mental disability and source of income pursuant to s 4 of the *HRCMA* [*AHRA*, s 5]. The Respondent landlord argued that the Complainant's four cats caused property damage and the tenant was given notice to vacate the premises. After the eviction attempt was unsuccessful, the Respondent increased the Complainant's rent and refused to sign a subsidy renewal agreement with the government. As a result, the Complainant's subsidy was terminated. There was no evidence indicating that the Respondent discriminated against the Complainant on the basis of mental disability and the evidence regarding property damage caused by the Complainant's cats was inconclusive. The Panel accepted the Respondent's submission that "source of income" is not to be equated with "amount of income." The Panel stated that the raising of rent selectively, could be a defense on the property damage argument. However, the

cancellation of the subsidy amounted to discrimination since the Respondent was clearly responsible for having the subsidy cancelled by not bringing the rent in line with CRHC guidelines. The Panel found that the discrimination was not reasonable and justifiable under s 11.1 of the *HRCMA* [*AHRA*, s 11]. The Panel also found that the Respondent made an effort to accommodate, but that the Complainant did not make a reasonable effort to accept. The Panel ordered general damages in the amount of 60% of the original request and found the Complainant 40% responsible for the poor relationship. An additional $5890.00 was ordered for specific damages arising from the rent increase and the loss of the Complainant's subsidy. The Court of Queen's Bench held that the Panel did not err in finding discrimination based on source of income but the Panel did err in its decision on accommodation. However, the error did not displace its finding of discrimination and the relief granted was within the Panel's jurisdiction.

Tenancy/Source of Income/Physical Disability. See also**: *Miller v Capital Management Ltd*., 2021 AHRC 38.**

Tenancy/Mental Disability. *Beaverbone v Sacco*, 2009 ABQB 529, 480 AR 198. The Applicants appealed the decision of a Tenancy Dispute Officer (TDO) under the *Residential Tenancies Act*, SA 2004, c R-17.1. Mr. Beaverbone suffered from post-traumatic stress disorder and the medical evidence established that he was angry, hostile, irritable, moody and suicidal, and that he suffered from high anxiety, poor concentration, short-term memory loss, poor appetite, insomnia, and nightmares. The Court found that the TDO erred in law in failing to address what accommodation was required of a landlord in favour of a tenant who suffered from a mental disability and in failing to consider the issue of whether, in light of the standards established in the provincial human rights legislation in respect of tenancies, the landlord accommodated the tenant's mental disability: ***Miller v 409205 Alberta Ltd*, 2001 AHRC 8, 42 CHRR D/311, aff'd in part *409205 Alberta Ltd v Alberta (Human Rights & Citizenship Commission)*, 2002 ABQB 681, 319 AR 352**. The fact that the regulation specifically mentioned that a TDO may be asked to determine a question of human rights established that human rights issues may have to be resolved in tenancy disputes; therefore, it was an error of law for the TDO to say that human rights issues should be raised with the human rights body.

Tenancy/Physical Disability. *Fitzhenry v Schemenauer*, 2008 AHRC 8. The Complainant, who was legally blind, was denied rental accommodation by the Respondent because he required the services of a working dog to assist with his ability to live and function independently. The Panel found that the Complainant was

subjected to *prima facie* discrimination on the grounds of his physical disability by the Respondent. The Panel awarded the Complainant $2500.00 for the emotional hurt, injury to dignity and self-respect and the Respondent was ordered to participate in an education seminar conducted by the Commission within three months of the date of the decision.

Tenancy/Physical Disability. *Cush v Condominium Corporation No 7510322,* 2019 AHRC 25. Cush was a condo owner who had physical and mobility disabilities. In order to accommodate this, she requested that the condo corporation make changes or repairs to the building, including recarpeting, installing automatic doors, installing a ramp, and providing her with an indoor parking stall. The corporation claimed that they could not give her an indoor stall, as they could not take away a stall from another condo owner, and that the cost of the automatic doors and ramp was too much, amounting to undue hardship. The Director dismissed Cush's claim on the basis that 1) she had not proven that the requested accommodations were medically required, that 2) the corporation was not obligated to provide her with perfect accommodation but need only to take reasonable measures to accommodate, and that 3) regarding the parking space, the duty to accommodate did not mean that the corporation could interfere with the rights of others. The Chief of the Commission and Tribunals overturned this decision. He held firstly that not only medically verified disabilities require accommodation. Accommodation may be required before a complainant provides medical verification of their disability. As well, accommodation does not only include medically supported accommodations. Evidence of what accommodation is needed comes from not only the medical professional, but the complainant and others. The Chief held that the Director was incorrect in finding that the "reasonable measures" taken by the corporation fulfilled their obligation to accommodate Cush. He restated the law that accommodation must be given to the point of undue hardship. Finally, he stated that one cannot make a definitive conclusion when determining if accommodation can interfere with the rights of others, and held that in many cases, accommodation will indeed interfere. The Chief sent the complaint to a new tribunal for determination.

In the subsequent case of ***Cush v Condominium Corporation No. 7510322 o/a Renfrew House*, 2022 AHRC 87,** the Tribunal used the 3-prong test outlined in the case of *Grismer* in assessing whether the corporation has accommodated Cush. The *Grismer* test consists of determining whether the corporation has: 1) adopted the standard for a purpose rationally connected to the function being performed; 2)

adopted the standard in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal; and 3) whether the standard is reasonable necessary to accomplish its purpose or goal, in the sense that the defendant cannot accommodate the persons with the characteristics of the claimant without incurring undue hardship. As for the request of Cush for the assignment of an indoor parking stall, the Tribunal ruled that the corporation has provided reasonable accommodation to accommodate her as it met the *Grismer* test. However, with regard to the construction of a ramp at the front entrance of the building, the Tribunal stated that the corporation failed to meet the second and third prong of the *Grismer* test. It cited that the corporation's lack of commitment to construct the ramp, from the time it intended to construct such, showed that the respondent did not adopt the standard in good faith. It also stated that the corporation failed to meet the test of 'undue hardship' as there is no credible evidence to support such assertion.

Tenancy/Physical Disability/Mental Disability. *Zahorouski v Accredited Condominium Management,* 2019 AHRC 41. The Complainant had been fined $50.00 for breach of a condo bylaw that requires unit owners to ensure they do not disturb other residents or interfere with the reasonable enjoyment of their units. He had been smoking marijuana in his unit for medical purposes, the smoke of which had seeped into common areas and other units. He claimed that the $50.00 fine was discrimination on the basis of physical and mental disability in the area of tenancy and services. The Director, and the Chief of the Commission and Tribunals, dismissed the complaint on the grounds that the Complainant had not participated in reasonable accommodation, as he refused to use a different form of cannabis that would not create smoke. His attempt at participating in accommodation was to smoke on his balcony, an activity which had been a source of complaints from neighbours in the past. The Chief stated that although he had a medical prescription for the use of cannabis, he did not have an unfettered right to smoke in his unit in a way that affected others.

Tenancy/Ancestry/Religious Belief. *Abel v Faraja Mwenebembe*, 2021 AHRC 5. The Complainant and her family, who identifies themselves as Indigenous, were evicted by their landlord accusing them of violating the no-smoking provision in their tenancy agreement when the latter received complaints from other residents that they were smoking marijuana. The Complainant stated that the smoke was coming from sage and sweetgrass which were used in traditional ceremonies of Indigenous people such as smudging. The Director dismissed the complaint but was reversed by the Tribunal. The Tribunal found that there is a reasonable basis to proceed to a hearing stating that there are questions of fact that should be threshed out in a hearing. It

further stated that Director focused only on an alleged failure to accommodate when in fact the Complainant alleged adverse treatment from her landlord based on the latter's comments and conduct which embarrassed and demeaned her father, who allegedly held a special status as a Dene Elder of an Indigenous group.

Tenancy/Gender (Sexual harassment). See also: ***Health-Engel v Sidestreet Properties Ltd*., 2022 AHRC 34.**

Regulations

5.1 The Lieutenant Governor in Council may make regulations

(a) Respecting the classes of individuals and the circumstances referred to in sections 4.2(3)(a) and 5(4)(a);

(b) Respecting the classes of individuals and the circumstances referred to in sections 4.2(3)(b) and 5(4)(b);

(c) Determining or respecting the determination of whether and when a minimum age for occupancy is in existence for the purposes of section 42(1) or deeming a minimum age for occupancy to be in existence.

2017 c 17 s 4.

Equal pay

6(1) Where employees of both sexes perform the same or substantially similar work for an employer in an establishment the employer shall pay the employees at the same rate of pay.

6(2) No employer shall reduce the rate of pay of an employee in order to comply with this section.

6(3) When an employee is paid less than the rate of pay to which the employee is entitled under this section, the employee is entitled to recover from the employer by action the difference between the amount paid and the amount to which the employee was entitled, together with costs, but

(a) the action must be commenced within 12 months from the date on which the cause of action arose and not afterward,

(b) the action applies only to the wages of an employee during the 12-month period immediately preceding the termination of the employee's services or the commencement of the action, whichever occurs first,

(c) the action may not be commenced or proceeded with when the employee has made a complaint to the

Commission in respect of the contravention of this section, and

(d) no complaint by the employee in respect of the contravention shall be acted on by the Commission when an action has been commenced by the employee under this section.

RSA 1980 cI-2 s 6; 1990 c 23 s 2; 1996 c 25 s 8.

Equal Pay/Gender. ***Walsh v Mobil Oil Canada*****, 2008 ABCA 268, 440 AR 199.** The Complainant, a female land agent employed by Mobil Oil Canada, alleged that she was paid less, and not promoted as quickly as male land agents. The Panel found that the employer discriminated as to the Complainant's pay and job designation but that the conduct of the employer which resulted in the Complainant being held back from field jobs was not discriminatory as the employer was well intentioned. The Alberta Court of Queen's Bench held that the supervisor's actions were discriminatory. The Court of Appeal agreed, stating that despite the Complainant's ongoing efforts and consistently good performance evaluations, the Complainant was held back from field jobs where similarly situated men were not. The fact that the employee was ultimately given a job in field did not justify differential treatment based on her gender up to that time.

Pension/Gender. ***Fraser v Canada (Attorney General)***, **2020 S.C.J. No. 28.** The RCMP introduced a job-sharing program in which members could split the duties and responsibilities of one full-time position. The applicants, who were women with children, enrolled in the job-sharing program. According to the pension plan, RCMP members can treat certain gaps in full-time service, such as leave without pay, as fully pensionable. The applicants expected that job-sharing would be eligible for full pension credits, but they were later informed that they would not be able to purchase full-time pension credit for their job-sharing service, which were treated as part-time work. The Federal Court and Court of Appeal dismissed their claim. They relied on the fact that the applicants chose to work part-time and that any adverse impact to them flowed from their choice. The SCC reversed the decision of the Federal Court of Appeal held that differential treatment can be discriminatory even if it is based on choices made by the affected individual or group. It further stated that full-time RCMP members who enrolled in the job-sharing agreement must sacrifice pension benefits because they are classified as part-time workers and are unable to acquire full-time pension credit for their services. It ruled that such job-sharing arrangement had a disproportionate impact on women and perpetuated their historical disadvantage stating that:

> The use of an RCMP member's temporary reduction in working hours as a basis to impose less favourable pension consequences plainly has a disproportionate impact on women. The relevant evidence showed that RCMP members who worked reduced hours in the job-sharing program were predominantly women with young children. These statistics were bolstered by compelling evidence about the disadvantages women face as a group in balancing professional and domestic work. This evidence shows the clear association between gender and fewer or less stable working hours, and demonstrates that the RCMP's use of a temporary reduction in working hours as a basis for imposing less favourable pension consequences has an adverse impact on women.
>
> This adverse impact perpetuates a long-standing source of disadvantage to women: gender biases within pension plans, which have historically been designed for middle and upper-income full-time employees with long service, typically male. Because the RCMP's pension design perpetuates a long-standing source of economic disadvantage for women, there is a *prima facie* breach of s. 15 based on the enumerated ground of sex.

Equal Pay/Gender. *Paul v Power Comm Inc*, (June 24, 1999; Alta HRP). The Panel found no discrimination in the area of employment based on gender where a female employee alleged she was being paid less than her male counterpart. The issue was whether the employees were employed for similar work under similar working conditions and whether their work performance required similar skill, effort and responsibility. The case law reflects the following:

1) To establish *prima facie* discrimination the complainant must provide that their work was similar or substantially similar to work performed by a person of the opposite sex;
2) Similar or substantially similar work does not require the work to be identical and it is the job content not classification that is a determining factor;
3) The concepts of "skill, effort and responsibility" must be taken into account. Skill is a learned ability involving experience, training education and ability. Effort includes the quality and quantity of physical or mental exertion. Responsibility is the measurement of the importance of the duties and the degree of accountability required; and
4) The Panel must look objectively at the skills required to perform the job, not at the individual personal skills of the occupant of the position.

Equal Pay/Gender. *Alberta (AG) v Gares*, [1976] AJ No 360, 67 DLR (3d) 635 (Alta SC (TD)). The Complainant made a complaint on the basis of sex under s 5 of the *IRPA* [*AHRA*, s 6] after it was discovered that female employees were being paid a lower rate of pay than their male counterparts. McDonald J held that relief in the form of compensation for lost wages should ordinarily be granted to a Complainant whose

complaint as to unequal pay has been found to be justified, even in the absence of present or past intent to discriminate on the ground of sex. It is the discriminatory result that is prohibited and not a discriminatory intent (para 123).

Equal Pay/Gender. See also**: *Hosu v University of Calgary*, 2021 AHRC 9 and *Thomas v Stony Plain Chrysler Ltd.*, 2020 AHRC 29.**

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.

EMPLOYMENT: GENERAL PRINCIPLES

Elements Necessity for an Employment Relationship. *Schrenk v British Columbia (Human Rights Tribunal)*, 2016 BCCA 146. The Appellant was a site foreman who made derogatory statements about a subordinate's place of birth, religion and sexual orientation to the employee and other coworkers. When the subordinate complained to the BC Human Rights Tribunal, the Appellant applied to have the complaint dismissed as his remarks were not "regarding employment". The appeal was granted as the Court of Appeal held that the Tribunal had no jurisdiction and while the remarks were offensive, they were not discrimination regarding employment as the elements of control and dependency were absent. This decision was reversed by the Supreme Court (***British Columbia Human Rights Tribunal v Schrenk,* 2017 SCC 62**), where the Court held that:

> The scope of s. 13(1)(b) of the Code is not limited to protecting employees solely from discriminatory harassment by their superiors in the workplace. Rather, its protection extends to all employees who suffer discrimination with a sufficient connection to their employment context. This may include discrimination by their co-workers, even when those co-workers have a different employer." (para 3)

To determine if discrimination occurred in the employment context, the Court stated:

> …the Tribunal must conduct a *contextual* analysis that considers all relevant circumstances. Factors which may inform this analysis include: (1) whether the respondent was integral to the

> complainant's workplace; (2) whether the impugned conduct occurred in the complainant's workplace; and (3) whether the complainant's work performance or work environment was negatively affected. These factors are not exhaustive and their relative importance will depend on the circumstances." (para 67)

The Court found that as the foreman of the jobsite, Schrenk was an "integral and unavoidable part of [the Complainant's] work environment", and therefore his conduct fell within the definition of the employment context (para 69). The conclusion of the Tribunal was restored.

Direct and Adverse Effect Discrimination. ***Ontario (Human Rights Commission) v Simpsons- Sears Ltd*****, [1985] 2 SCR 536, 23 DLR (4th) 321 [*****O'Malley*****] and *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union (BCGSEU)*, [1999] 3 SCR 3, 176 DLR (4th) 1 [*****Meiorin*****].** In *O'Malley* the SCC distinguished between adverse effect and direct discrimination. "Direct discrimination" occurs when an employer adopts a practice or rule that on its face discriminates on a prohibited ground. "Adverse effect discrimination" occurs when the 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.

In *Meiorin* the SCC stated that the distinction between a standard that is discriminatory on its face and a neutral standard that is discriminatory in its effect is difficult to justify as few cases can be so neatly characterized. The Court noted that different remedies should not depend on the stream of inquiry the analysis is placed into. The distinctions between the elements an employer must establish to rebut a *prima facie* case of direct or adverse effect discrimination are difficult to apply in practice. The Court developed a unified approach with a three-part test for determining if a discriminatory standard or policy is either a *BFOR* in the area of employment or reasonable and justifiable in the area of services (see ***British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*****, [1999] 3 SCR 868, 181 DLR (4th) 385 [*****Grismer*****]).**

Prima Facie **Discrimination.** ***Ontario (Human Rights Commission) v Simpsons-***

***Sears Ltd*, [1985] 2 SCR 536, 23 DLR (4th) 321 [*O'Malley*].** The burden of proof rests with the Complainant to establish a *prima facie* case of discrimination. Such a case is made out if the Complainant established on the balance of probabilities that the acts of discrimination occurred in the circumstances of the case. Discrimination does not have to be intentional to find a violation of the human rights legislation has occurred. It is the result or the effect of an act which is important in determining whether discrimination has occurred. An employment rule, neutral on its face and honestly made, can have discriminatory effects.

***Prima Facie* Discrimination. *Alberta Health Services v United Nurses of Alberta,* 2021 ABCA 194.** Nurse Daigle worked the required shift rotations of four 12-hour shifts, followed by four days off. This schedule benefited her as she only had a few difficulties coordinating and sharing childcare for her two infant children. After two years, she was informed by her employer, Alberta Health Services (AHS), that a new rotating shift would be put into place in order to comply with their Collective Agreement. She then requested to keep her current rotation two times, one of which she requested under a Family Status Accommodation, both of which were denied by AHS as non-compliant with the Collective Agreement. Thereafter, she requested that her full-time status be dropped to casual status due to her childcare issues.

The Board, who heard her grievance, concluded that she was not able to establish a *prima facie* case of discrimination. It used the test set down in the case of *Canada (Attorney General) v Johnstone*, 2014 FCA 110 (*Johnstone*) to determine whether there was discrimination based on family status. The test in *Johnstone* added a fourth requirement, aside from those set in *Moore*, which requires the grievor to prove that the latter exerted efforts for self-accommodation in the circumstances.

Upon judicial review, ABQB, in ***United Nurses of Alberta v Alberta Health Services*, 2019 ABQB 255**, quashed the Board's decision and remitted the entire matter to a rehearing. It ruled that SCC's jurisprudence "leaves no room for an articulation of the *prima facie* discrimination test that imports or adds an additional evidentiary requirement on a complainant. The analysis of self-accommodation is not irrelevant – it just belongs elsewhere".

The ABCA held that while the SCC has not specifically applied the *Moore* test to the protected ground of family status, the test has been adopted in Canada as the leading framework for establishing *prima facie* discrimination and until SCC expressly alters such, the *Moore* test governs in family matters. It further held that there is no justification for requiring a family status claimant to prove an additional element of self-accommodation at the

prima facie stage of the inquiry. It ruled that in Alberta, the test for *prima facie* discrimination ought to be exactly the same whether in the context of direct or adverse effects discrimination based on prohibited grounds, or in cases advanced under human rights legislation or under a collective agreement or otherwise, or before the courts on review.

***Prima Facie* Discrimination. *EL v The City of Calgary,* 2020 AHRC 72.** The Complainant alleged that the Respondent discriminated against him on the basis of mental disability. The Complainant was diagnosed with several mental disabilities that meant he had to take more time to understand instructions than others. Due to these disabilities, the Respondent's employees at times would get aggravated that the Complainant could not communicate quickly. This resulted in a 2-day suspension for insubordination. The Respondent alleged that the Complainant did not suffer adverse treatment as he was still employed by them. The Director accepted this argument and dismissed the complaint. On review, the Chief of the Commission and Tribunals stated that:

> "The purposes of the Act certainly include addressing claims of discriminatory dismissals and discipline, but also include claims seeking to ensure workplaces are free from harassment and bullying where, amongst other grounds, disability is a factor. It has long been held that the Act is meant to be remedial and serve an educational function. Complainants may properly address systems, policies, practices or actions which have the effect of disadvantaging persons with disabilities, and which create barriers to full participation in the workplace. It is for this reason that Courts and Tribunals have acknowledged the potential for wide ranging remedies, including training for staff and managers regarding sensitivity to the experiences of persons with disabilities and other traditionally marginalized groups." (para 23)

The Chief went on to state:

> "To argue that there is no adverse treatment absent termination or discipline is to require individuals, particularly individuals with certain types of mental illness, to endure harmful working environments until the situation explodes, discipline is imposed, and only then seek access to redress. This approach would put the protections afforded by the *Act* out of reach for the very persons it was designed to assist. The *Act* would wind up tending to impose harm, rather than alleviating it." (para 24)

The Chief held that there was a reasonable basis to proceed to a hearing for this matter.

Burden of Proving Discrimination. *Communications, Energy, and Paperworkers Union, Local 707 (the Union) v SMS Equipment Inc (the Employer), RE: GRIEVANCE OF RENEE CAHILL- SAUNDERS (the "Grievor")*, 238 LAC (4th) 371, 2013 CanLII

71716 (AB GAA). Proof of discrimination on family status should not be higher than that permitted to prove other grounds of discrimination.

In the application for judicial review, ***SMS Equipment Inc v Communications, Energy and Paperworkers Union, Local 707*****, 2015 ABQB 162, aff'g *Communications, Energy, and Paperworkers Union, Local 707 (the Union) v SMS Equipment Inc (the Employer), RE: GRIEVANCE OF RENEE CAHILL-SAUNDERS (the "Grievor")*****, 238 LAC (4th) 371, 2013 CanLII 71716 (AB GAA)**, Ross J relied on the test from *Johnstone v Canada (Border Services)*, 2014 FCA 110 (decided subsequent to the Arbitrator's decision), writing at paras 60-61:

> [60] There is no suggestion that the Arbitrator did not appreciate the range in the case law of the tests to establish a *prima facie* case of discrimination based on family status. In this application, SMS relies on a subsequent statement of the test by the Federal Court of Appeal in Johnstone CA at para 93:
>
> > [In] order to make out a *prima facie* case where workplace discrimination on the prohibited ground of family status resulting from childcare obligations is alleged, the individual advancing the claim must show (i) that a child is under his or her care and supervision; (ii) that the childcare obligation at issue engages the individual's legal responsibility for that child, as opposed to a personal choice; (iii) that he or she has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible, and (iv) that the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation.
>
> [61] Assuming that this is the correct test, it does not change in substance the law reviewed by the Arbitrator.

Onus. *Re Gadowsky* (1980), 26 AR 523, (*sub nom Gadowsky v Two Hills School Committee No 21)* 1 CHRR D/184 (QB). The Complainant has the initial burden of establishing a *prima facie* case, and once this is done then the evidentiary burden must be taken up by the employer, who must then show a legitimate non-discriminatory reason for its actions.

Duty to Accommodate. (See also **Bona Fide Occupational Requirement) *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union (BCGSEU)*, [1999] 3 SCR 3, 176 DLR (4th) 1 [*Meiorin*].** Once the Complainant establishes that *prima facie* discrimination

has occurred, the onus shifts to the Respondent to prove, on a balance of probabilities, that the contravention was reasonable and justifiable in the circumstances (s 7(3)). An employer may justify the impugned standard by establishing on the balance of probabilities that the:

1) Employer adopted the standard for a purpose rationally connected to the performance of the job;
2) Employer adopted the particular standard in and honest and good faith belief that is was necessary to the fulfillment of the legitimate work related purpose; and
3) Standard is reasonably related 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 on the employer.

Who is an Employer? *McCormick v Fasken Martineau DuMoulin LLP*, 2014 SCC 39. McCormick was an equity partner in Fasken Martineau DuMoulin LLP. The partnership agreement provided that equity partners would no longer remain as partners at the end of the year they turned 65. On an exceptional, individual basis, continued employment could be negotiated afterward. McCormick argued that the partnership agreement discriminated against him on the ground of age in the area of employment under British Columbia's *Human Rights Code*, RSBC 1996, c 210.

In order to determine whether the BC Human Rights Commission had jurisdiction to address this complaint, the SCC had to "examine the essential character of the relationship and the extent to which it is a dependent one" (para 4). In order to determine this issue, the British Columbia Human Rights Tribunal (Tribunal) had relied on ***Crane v British Columbia (Ministry of Health Services (No.1))*, 2005 BCHRT 361, 53 CHRR D/156, rev'd on other grounds 2007 BCSC 460, 60 CHRR D/381 (BCSC)** and applied the factors as follows (para 13):

- Utilization: Fasken utilized McCormick to provide legal services to clients and to generate intellectual property;
- Control: Fasken's managing partners directed the partners, and client and file managers;
- Financial burden: While partnership involves sharing profits rather than paying fixed wages, the firm must determine and pay compensation; and
- Remedial purpose: McCormick was treated differently because of his age and this involved the broad, remedial purpose of the *Human Rights Code.*

The Tribunal concluded that McCormick was in an employment relationship. The

British Columbia Supreme Court dismissed Fasken's application for judicial review. The British Columbia Court of Appeal disagreed with the lower court and the Tribunal, and concluded that McCormick was not in an employment relationship because a partnership is not a separate legal entity from its partners; thus it is a legal impossibility for a partner to be employed by his/her partnership (para 14).

Justice Abella wrote the judgment and the rest of the bench of the SCC concurred. All parties had agreed that the standard of review in the case should be correctness. British Columbia's *Human Rights Code* defines "employment" and "person" as follows (para 20):

> "employment" includes the relationship of master and servant, master and apprentice and principal and agent, if a substantial part of the agent's services relate to the affairs of one principal, and "employ" has a corresponding meaning;
> . . .
> "person" includes an employer, an employment agency, an employers' organization, an occupational association and a trade union;

Justice Abella noted that statutory interpretation principles require that the definition of "employment" includes these relationships (e.g., master and servant) but is not restricted to them (para 21). She held that while the court should not rely on a "formalistic" approach to the relationship, the types of relationships to be included should be analogous to those found in the definition (para 21).

Justice Abella also noted that independent contractors had been found to be employees for the purposes of human rights legislation, even though they might not be in other contexts (para 22). She held that the test for "employment" involves (para 23):

> "examining how two synergetic aspects function in an employment relationship: control exercised by an employer over working conditions and remuneration, and corresponding dependency on the part of a worker. In other words, the test is who is responsible for determining working conditions and financial benefits and to what extent does a worker have an influential say in those determinations?"

Justice Abella held that the test in *Crane* (set out above) applied by the Human Rights

Tribunal is in essence a control/dependency test (para 24). If a worker has the "ability to influence decisions that critically affect his or her working life", this is the "compass for determining the true nature of the relationship" (para 27). The key is the degree of control or the "extent to which the worker is subject and subordinate to someone else's decision-making over working conditions and remuneration" (para 28, citation omitted). Justice Abella also noted that partnerships have distinctive features such as "the right to participate meaningfully in the decision-making process that determines their workplace conditions and remuneration" (para 31, citations omitted). Usually Partnership Agreements "create a high threshold for expulsion" (para 32). Thus, "control over workplace conditions and remuneration is with the partners who form the partnership" (para 33).

Justice Abella concluded that even though it is the case that partnerships are often not covered under human rights laws, the court must still look at the substance of the actual relationship at issue and the role of control and dependency in it (para 38). In this case, McCormick had control of decisions about workplace conditions because he had ownership, profit and loss sharing and the right to participate in management (para 39). He was therefore a part of the "group that controlled the partnership, not a person vulnerable to its control" (para 39).

Further, Fasken's administrative rules did not transform its relationship with McCormick to one of subordination or dependency (para 40). Fasken's board, regional managing partners and compensation committees were "directly or indirectly accountable to, and controlled by the partnership as a whole, of which McCormick was a full and equal member" (para 40). McCormick even had an equal say in the mandatory retirement policy (para 40).

McCormick was not "dependent on Fasken in a meaningful sense" (para 42). He was not working for the benefit of someone else; he was in "a common enterprise with his partners for profit, and was therefore working for his own benefit" (para 42).

The SCC concluded that the Tribunal had paid insufficient attention to whether McCormick was subject to the control of others and dependent on them (para 45). Thus, the Tribunal had erred when it concluded that it had jurisdiction over McCormick's partnership relationship (para 45).

Who is an Employer? ***Lockerbie & Hole Industrial Inc v Alberta (Human Rights and***

***Citizenship Commission, Director)*, 2011 ABCA 3, 329 DLR (4th) 76**. The Complainant, Donald Luka, was denied access to the Syncrude site in Fort McMurray because he failed a drug test. He filed a complaint with the Human Rights and Citizenship Commission alleging discrimination. The central issue was whether Syncrude was Mr. Luca's employer within the meaning of the *AHRA.* The Court of Appeal conducted a thorough review of the case law defining "employer" and "employment" and stated that a contextual approach is required to decide whether a particular relationship qualifies as "employment" under the *AHRA*. A number of factors must be taken into consideration including:

1. Whether there is another more obvious employer involved;
2. The source of the employee's remuneration, and where the financial burden falls;
3. Normal indicia of employment, such as employment agreements, collective agreements, statutory payroll deductions, and T4 slips;
4. Who directs the activities of, and controls the employee, and has the power to hire, dismiss and discipline;
5. Who has the direct benefit of, or directly utilizes the employee's services;
6. The extent to which the employee is a part of the employer's organization, or is a part of an independent organization providing services;
7. The perceptions of the parties as to who was the employer;
8. Whether the arrangement has deliberately been structured to avoid statutory responsibilities.

Where it is alleged there is more than one co-employer, the following factors are also relevant, although this is not an exhaustive list:

1. The nexus between any co-employer and the employee, including whether there is a direct contractual relationship between the complainant and the co-employer;
2. The independence of any alleged co-employer from the primary employer, and the relationship (if any) between the two;
3. The nature of the arrangement between the primary employer and the co-employer, for example, whether the co-employer is merely a labour broker, compared to an independent subcontractor;
4. The extent to which the co-employer directs the performance of the work.

The Court of Appeal held that Mr. Luka had no contractual relationship with Syncrude, he was not functionally a part of its organization, he did not report to it, and Syncrude did not direct his work. Therefore, Mr. Luka's relationship with Syncrude was too remote to justify a finding of employment.

Who is an Employer? *Re Prue* (1985), 57 AR 140, (*sub nom Prue v Edmonton (City*) [1984] 35 Alta LR (2d) 169 (ABQB)). The Complainant's application for employment

as a police officer was never considered because she was 48 years old and a Collective Agreement between the City of Edmonton and the Edmonton Police Association stipulated that new recruits had to be under the age of 35. The Court of Queen's Bench considered whether police officers were employees within the meaning of human rights legislation and whether the City of Edmonton, the Board of Police Commissioners, the Chief of Police of the City of Edmonton or the Edmonton Police Association were employers or persons acting on behalf of an employer under the *IRPA.* The Respondent argued that police officers were routinely referred to as holders of a public office and not as employees. The Court held that the *IRPA* was remedial legislation and as such it was entitled to a fair, broad and liberal definition and that the Police Chief and the Board of Police Commissioner were employers within the meaning of the *IRPA* and that members of the Edmonton City Police Force were employees. The City of Edmonton was found not to be an employer in this context.

Who is an employer? See also: ***Ayris v Volker Stevin Contracting Ltd*, 2005 AHRC 11; *Jurek v Rocky View School Division* No 41, 2011 AHRC 6 (Preliminary Matters Decision); *375850 Alberta Ltd v Noel*, 2011 ABQB 218, aff'd 2012 ABCA 372; *Candler v Capital Health*, 2012 AHRC 5; *Green v Kee Management Solutions Inc*, 2014 AHRC 11; *Ullah v Hertz Young Motors (1971) Ltd*, 2015 AHRC 17; *Goossen v Summit Solar Drywall Contractors Inc*, 2016 AHRC 7; *Jounge v Fluor Canada Ltd,* 2020 AHRC 80; *Baraby v SGS Canada Inc.*, 2021 AHRC 157; *Brar and Saini v Divine Hardwood Flooring Ltd.,* 2021 AHRC 151.**

Are workplaces governed by collective agreements included? ***Northern Regional Health Authority v Manitoba Human Rights Commission et al*, 2017 MBCA 98.** The issue in this appeal is whether a human rights tribunal can adjudicate a complaint of discrimination in a workplace governed by a collective agreement. The appeal arises from a judicial review of the Adjudication Panel of the Manitoba Human Rights Commission. The first decision was set aside on judicial review where it was concluded that the underlying character of the dispute was to terminate employment within the exclusive decision of the labor arbitrator, and not related to a discriminatory intention.

The Court held that the reviewing judge erred in overturning the chief adjudicator's adjudication as to the character of the dispute underlying the discrimination complaint. The complaint was one which fell within the statutory scheme of the Human Rights Code for an adjudicator to hear and determine. The two reports which were received of the Complainant being intoxicated led to a settlement agreement during which the

Complainant was expected to remain abstinent under random testing and counselling. The Board had a duty to accommodate, but with additional complaints the company elected to terminate employment as a breach of the settlement agreement.

No grievance of the second termination was filed. The Commission investigated the complaint and requested it proceed to arbitration before being heard by the adjudication panel. The Court found that the appeal turns on whether the reviewing judge erred on applying the correct standard on determining the essential standard of the dispute between the complainant and respondent. The question must be resolved on the principles set out in *Weber*. The Court found that the Complainant had an individual right under the Code to make a claim of discrimination apart from any other rights she enjoyed as a unionized worker under the collective agreement. The human rights issues are broader than whether there is just cause to terminate employment even in the context of a collective agreement. (See also ***Amalgamated Transit Union, Local 583 v Calgary (City of)*, 2007 ABCA 121**).

Upon appeal, the SCC in **Northern Regional Health Authority v Horrocks, 2021 SCC 42,** held that the human rights tribunal did not have jurisdiction over the complaint. It stated that the labour arbitrator has exclusive jurisdiction under the *Labour Relations Act* over disputes that arise, in their essential character, from the application, or alleged violation of the collective agreement. It found that since the essential character of the complaint arises from the employer's exercise of its rights under, or from its alleged violation of, the collective agreement, the dispute is outside the jurisdiction of the human rights tribunal. The SCC explained that concurrent or overlapping jurisdiction may only be applicable where there is a clear legislative intent expressed to that effect, or in some cases, implied from intention of the legislation, or its legislative history. It clarified that *Weber* does not stand for the proposition that labour arbitrators always have jurisdiction in employer-union disputes as it would depend on the legislation applicable and nature of the dispute. The SCC set a two-step analysis to resolve jurisdictional contests between labour arbitrators and competing statutory tribunals as follows:

> First, the relevant legislation must be examined to determine whether it grants the arbitrator the exclusive jurisdiction and, if so, over what matters.
>
> Secondly, if it is determined that the arbitrator has exclusive jurisdiction, the next step is to determine whether the dispute falls within the scope of that jurisdiction.

EMPLOYMENT PRACTICES: RACE

Employment/Race. *Workeneh v 922591 Alberta Ltd*, 2009 ABQB 191, 67 CHRR D/190. The Complainant discovered that co-workers who were performing substantially similar work to her were being paid significantly more that she was. The Complainant was African Canadian and alleged that she was discriminated on the basis of her race. The Panel found that the Complainant was not credible as her evidence was contradictory and dismissed the complaint. The Court of Queen's Bench overturned the Panel's decision. The Panel erred in finding that the Complainant's evidence was inconsistent. In fact, the evidence demonstrated a *prima facie* case of discrimination based on circumstantial evidence. Once a *prima facie* case was established, a legal onus fell upon the Respondent to provide a reasonable explanation for the otherwise discriminatory behaviour. The Respondent did not provide an explanation and the Panel erred in failing to require this from the Respondent. The Court held that "without any conflicting evidence or explanatory testimony from [the Respondent], the inference that was more probable than not, was that [the Complainant] was taken advantage of due to her colour and/or race" (para 27).

Employment/Race, Colour. *Wint v Alberta (Human Rights Commission),* 2022 ABQB 87. Kameron Wint, a black man, alleged that he was discriminated by his employer, Suncor Energy Inc. (Suncor), in the area of employment practices on the protected grounds of race and colour. He said that he was discriminated when he was singled out and required to sign a letter confirming that he is in a safety sensitive position was subject to Suncor's random drug and alcohol testing. He also alleged that he was subjected to an investigation relating to a safety incident where in fact he was not working that shift and another employee was responsible. The Director of the Commission dismissed Wint's complaint. The Commissioner upheld the decision of the Director to dismiss the complaint in ***Wint v Suncor Energy Inc.***, **2020 AHRC 61**. The Commissioner found that Wint has not provided direct evidence that he was treated in an arbitrary fashion, and it was unclear whether he experienced adverse treatment when Suncor sent him the letter in question. The Commissioner pointed out that Wint was not required to take a drug or alcohol test nor was he prevented from working or told that his job was at risk if he refused to sign the letter. The Commissioner also found that even though Wint can establish that he experienced adverse treatment, the information before him does not support that race or colour were factors. As for the safety investigation, the Commissioner explained that there is little basis for Wint's claim that his race and colour were factors in the initiation or continuation of the safety investigation.

Upon judicial review with the ABQB, Wint contended that the decision of the Tribunal was unreasonable. The ABQB dismissed the application for judicial review. It agreed with the Commissioner's reason on the issue of the letter sent to Wint which is that it holds no probative value with respect to the discrimination issue. It accepted Suncor's explanation why the same letter to Wint's was not received by his co-workers. With regard to the investigation against Wint, the ABQB ruled that such was a case of mistaken identity and the belief that Wint was responsible was refuted immediately by Suncor when the correct information was revealed.

Employment/Race, Religious Beliefs, Colour, Ancestry, Place of Origin/Poisoned Work Environment. *Lalwani v ClaimsPro Inc*, 2016 AHRC 2. The Complainant (Lalwani) alleged discrimination under *AHRA* s 7 by his supervisor (Purdy). In determining whether there was a poisoned work environment, the Tribunal relied (at paras 109), *inter alia* on the ABQB decision of ***Bobb*** (below). The Tribunal noted at para 110 that:

> in assessing whether a poisoned work environment exists, all of the circumstances must be taken into consideration (including severity and persistence). The standard is what the perception of a "reasonable person" would be, considering the perspective of both a reasonable person in the complainant's position, and a reasonable person in the respondent's position. See also *Ghosh* [*Ghosh v Domglas Inc* (No 2), (1992), 17 CHRR D/216 (Ont Bd Inq)], *supra* at paras 43 to 48.

Regarding the decision at hand, the Tribunal wrote at para 133:

> The series of negative comments and treatment by Mr. Purdy towards Mr. Lalwani because of his race, religious beliefs, colour, ancestry and place of origin created a poisoned work environment which Mr. Lalwani was forced to endure as a term or condition of employment. That Mr. Purdy was Mr. Lalwani's superior in the workplace, and the respondent knew about the allegations regarding discrimination yet took no effective action, further supports my view that a poisoned work environment existed contravening the Act.

However, the Tribunal also dismissed the part of the claim relating to termination of employment, holding that the decision to terminate the Complainant's employment was not made on discriminatory grounds for a variety of reasons, including that the supervisor was not involved in the decision.

Employment/Race. *Coward v Tower Chrysler Plymouth Ltd,* 2007 AHRC 7. "The law is clear in recognizing that racial slurs and insults constitute discrimination in and of themselves. Additional factors such as incitement to hatred or violence constitute a further additional factor to consider in the full context of discrimination" (para 147).

Employment/Race. *Haineault v Kzam Farms Ltd*, 2005 AHRC 5. The Complainant was Métis, and employed as a casual labourer by the Respondent, who also provided the Complainant with room and board. The Complainant alleged that the living conditions were unsanitary, causing him to become sick. When he asked the manager, Kenneth Wegner, if he could see a doctor, Wegner directed profanity and racial comments towards him and as a result the Complainant resigned. The Panel dismissed the complaint as it did not find the Complainant to be a credible witness. The Panel accepted the Respondent's testimony that no derogatory comments were made and that the Complainant suffered from his medical condition prior to his employment on the farm. The Complainant failed to establish that he was *prima facie* discriminated against on the basis of race, ancestry and place of origin and there was no poisoned work environment.

Employment/Race. *Rubin Bobb v Alberta (Solicitor General/Edmonton Remand Centre)*, 2004 AHRC 4, rev'd in part *Bobb v Alberta (Human Rights and Citizenship Commission)*, 2004 ABQB 733, 370 AR 389. The Complainant, a corrections officer, alleged that after co-signing a letter of complaint in 1997, alleging sexual and workplace harassment by his co-workers, which resulted in their suspension, the relationship between him, his fellow co-workers and employer became tense. The Complainant was called a "black bastard" and a "rat" by his co-workers, derogatory statements were written next to his name on the sign in sheet, he was harassed at home with phone calls and was told by an inmate that one of his co-workers called him a "black bastard". He subsequently took a stress leave. He also alleged that his manager monitored him more closely and he was sanctioned more strongly than his co-workers. The Panel applied a preponderance of probabilities as the standard of proof. Since the reputation of the Respondent was at stake, the higher standard was commensurate with the occasion. The Panel held that the Respondent dealt with the name-calling incident sufficiently by transferring the employee who called the Complainant offensive names to another floor. Further, they explained that the racial discrimination was isolated to that one incident and that any differential treatment that the Complainant experienced was not racially motivated, but rather, it was based on his complaint made in 1997, personal behavioral problems, conflicts and his abilities as an employee. The Panel also found that there was no evidence that the Respondent's work environment was poisoned.

The Court of Queen's Bench allowed the appeal in part, holding that the Panel erred in applying a higher standard of proof. The Panel may raise the standard of proof only in

certain limited circumstances where the alleged conduct if found to be true would lead to extreme stigma or penalty to the individuals involved. In determining the standard, the Panel must look at the nature of the complaint, the rights or equities of the individuals involved, the ramifications that could result from a finding of the alleged discrimination, and the evidence available. The Court held that there were no good policy reasons that would justify providing the Edmonton Remand Centre with greater protection from a finding of discrimination and applied the balance of probabilities standard of proof. The Court nonetheless upheld the Panel's finding as there was no evidence of discrimination or that the employer condoned a poisoned work environment.

Employment/Race. *Fazal v Chinook Tours Ltd* (1981), 2 CHRR D/472 (Alta Bd of Inq). The Complainant, a native of Pakistan who lived in Tanzania for 22 years, was fired from her job as a travel consultant because of her accent. The employer said that customers had difficulty understanding her over the phone. The Complainant alleged discrimination in employment because of race, ancestry, and place of origin. The Board held that there was no specific evidence that related accent to race, ancestry or place of origin and that the Complainant's communication problem (accent) was a legitimate, non-discriminatory reason for dismissing the Complainant.

Employment/Race. *Landry v Vegreville Autobody (1993) Ltd.*, 2017 AHRC 19. Complainant alleged that he was discriminated against on the basis of race, religious beliefs, marital status, and sexual orientation, based on sections 7(1)(a) and 8(1) of the *Alberta Human Rights Act* after he did not secure a job for which he interviewed. Complainant is an individual of Dene First Nations heritage and was married to his husband living in Mundare, Alberta. Respondent was an auto body shop in the nearby town of Vegreville, Alberta, owned and largely operated by that town's mayor. The Commission found that the Respondent did not breach section 8(1)(a) of the Act, but found that he did contravene sections 8(1)(b) and 7(1)(a) of the Act. The Commission found that the Complainant's race, sexual orientation and marital status were factors in the Respondent's decision not to hire him and that the Respondent's actions could not be justified under sections 8(2) or 7(3) of the Act. The Commission awarded the Complainant $20,000 in general damages for loss of dignity and $36,000 for lost wages, plus interest.

Employment/Race. *Cardinal v City of Edmonton,* 2022 AHRC 100. The Complainant, who identifies as Aboriginal, brought a complaint alleging discriminatory comments were made by his coworkers, including his supervisor, to him during an

investigation, such as calling him as "Crazy Horse", among others. The City of Edmonton admitted liability and all the parties involved adopted a joint submission which was adopted by the Tribunal and the former was ordered to pay the Complainant the amount of $30,000.00.

Employment/Race. See also: ***Henry v School Board of the County of St Paul, No 19*****, July 1977, (Bd of Inq - ACL Sims);** ***L Borys Professional Corp v Joshi*****, 1998 ABQB 775, 235 AR 82;** ***Hermine Cazeley v Intercare Corporation Group Inc*** **(June 9, 1999; Alta HRP);** ***Cabalde v City of Calgary*****, 2004 AHRC 3;** ***Popescu v Schlumberger Canada*** **Ltd, 2005 AHRC 4;** ***Chieriro v Michette*****, 2013 AHRC 3;** ***Mohamud v Canadian Dewatering (2006) Ltd*****, 2015 AHRC 16;** ***Kowtook v Carillion Canada Inc,*** **2017 AHRC 14;** ***Facey v Bantrel Management Services Co*****, 2018 AHRC 9; .** ***Ahmad v CF Chemicals Ltd,*** **2019 AHRC 5;** ***Dhaliwal v Loblaws Inc o/a Real Canadian Superstore,*** **2019 AHRC 23;** ***Saeed v Alberta Health Services,*** **2019 AHRC 52;** ***Sharma v Cando Rail Services Ltd,*** **2019 AHRC 51** ***Badejo v The Cadillac Fairview Corporation Limited,*** **2019 AHRC 67;** ***Nor v Horizon North Manufacturing,*** **2020 AHRC 5;** ***Gabow v Bird Construction Company Inc,*** **2020 AHRC 12;** ***Napio v Horizon North Camp & Catering Inc,*** **2020 AHRC 19;** ***Moon v Her Majesty the Queen in Right of Alberta (Justice and Solicitor General)*****, 2020 AHRC 38;** ***Kahin v Construction & General Workers' Union, Local 92,*** **2020 AHRC 68;** ***Stephen and Julien v Brazeau Seniors Foundation,*** **2021 AHRC 153;** ***Moon v Her Majesty the Queen in Right of Alberta (Justice and Solicitor General),*** **2021 AHRC 56;** ***Sooch v University of Calgary*****, 2021 AHRC 20.**

EMPLOYMENT PRACTICES: RELIGION

Employment/Religion. ***Central Okanagan School District No 23 v Renaud*****, [1992] 2 SCR 970, 95 DLR (4th) 577.** The Complainant was a unionized custodian whose collective agreement required him to work Monday to Friday. The Complainant's religion prevented him from working Friday evenings. To accommodate, the School Board created a Sunday to Thursday shift, but the Union objected. The Complainant's employment was terminated, and he filed a complaint against both the employer and the Union. The Board of Inquiry found adverse effect discrimination without a fulfillment of the duty to accommodate. The Supreme Court of Canada held that the employer must make reasonable measures short of undue hardship to accommodate an employee's religious beliefs and practices. The use of the term "undue" infers that some hardship is acceptable. The Court also held that private arrangements must give way to the requirements of the *IRPA*. The Union had a shared duty to accommodate the

Complainant.

Employment/Religion. ***Andric v 585105 Alberta Ltd o/a Spasation Salon & Day Spa*****, 2015 AHRC 14.** Andric was physically assaulted by another employee (Amazu) of Spastation. While Andric was recovering from her injuries, she was informed that she was going to be transferred to another Spastation location, but the specific location, position and salary were unknown. Amazu and Rahal (owner of Spastation) "shared a Muslim religious belief and Ms. Andric did not" (para 29). The Tribunal found that Amazu and Rahal's having the different religious beliefs from Andric was a factor behind the transfer of Andric, which was a breach under s 7 of the *AHRA*. Andric received compensation for loss of earnings and general damages.

Employment/Religion. See also: ***Burgess v Stephen W Huk Professional Corp*****, 2010 ABQB 424, 5 Alta LR (5th) 262;** ***Mohamud v Canadian Dewatering (2006) Ltd*****, 2015 AHRC 16;** ***Ullah v Hertz Young Motors (1971) Ltd*****, 2015 AHRC 17; ,** ***Ibrahim v Tracker Logistics Inc,*** **2020 AHRC 13;** ***Gure v Safeway Services Canada, ULC,*** **2020 AHRC 15; and** ***Ewing v Canadian Corps of Commissionaires (Southern Alberta),*** **2021 AHRC 143.**

EMPLOYMENT PRACTICES: GENDER

Employment/Gender. ***Burgess v Stephen W Huk Professional Corp*****, 2010 ABQB 424, 5 Alta LR (5th) 262.** A dental assistant claimed that she was terminated from her employment because of her gender (pregnancy) and her religion. The Respondent argued that the Complainant's employment was terminated because she was not doing an adequate job. The Tribunal held that Respondent's knowledge or imputed knowledge of the circumstances giving rise to the claim of discrimination must be established by the Complainant as part of its *prima facie* case, although this is not specifically referred to as part of the test for a *BFOR* set out in ***British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union (BCGSEU)*****, [1999] 3 SCR 3, 176 DLR (4th) 1 [*****Meiorin*****]** and the evidence did not demonstrate that the Respondent had knowledge or imputed knowledge of the Complainant's pregnancy or her religion. The Court of Queen's Bench upheld the Tribunal's decision. The Tribunal correctly recognized that discrimination on the basis of pregnancy is a form of gender discrimination **(*****Brooks v Canada Safeway Ltd*****, [1989] 1 SCR 1219, 58 Man R (2d) 161)** and that it is not necessary to prove the discrimination was intentional **(*****Ontario (Human Rights Commission) v Simpsons-Sears Ltd*****, [1985] 2 SCR 536, 23 DLR (4th) 321 [*****O'Malley*****])**. The Complainant had the onus to establish on a balance of probabilities that her pregnancy

was a factor in the termination of her employment, although it need not be the only or even the primary factor in the Respondent's decision to terminate her employment.

Employment/Gender. ***Guay v Alberta (Human Rights Commission),*** **2022 ABQB 36.** Yvonne Guay, a Correctional Peace Officer (CPO) at the CPO2 level, working at a correctional institution operated by Alberta Justice and Solicitor General, filed an application for judicial review of two decisions of the Chief of Commission and Tribunals. The first complaint stemmed from her assignment to the Book and Court List (BCL) duties which she objected as being degrading and discriminatory. She alleged that there was systemic discrimination against female CPOs as BCL duties were generally assigned only to female CPOs. The second complaint that she filed was in relation to her unsuccessful application for a promotion to a CPO3 position.

The BCL Complaint was investigated by a Human Rights Officer which recommended that there was a "reasonable basis to proceed" with respect to the assignment to a BCL duty role. However, the Director dismissed the complaint, and the Chief upheld the dismissal stating, among others, that the complaint did not provide sufficient information that links the treatment Guay received with the alleged systemic discrimination. The ABQB disagreed with the findings of the Chief on this issue. It stated that the plain wording of Guay's complaint makes it clear that it relates to the systemic assignment of BCL duties to female CPOs. It held that even if the complaint related to a single assignment, such would not relieve the Commission from performing a reasonable investigation or for the Chief to consider whether there was a basis for a hearing given the relevant historical background. The ABQB ruled that the Chief's decision to dismiss the complaint was unreasonable as it ought to have considered the discriminatory assignment practices and the historical context.

The Promotion Complaint arose as a result of Guay's unsuccessful application for a CPO3 position. She made a complaint to the Commission alleging that she was discriminated due to her gender, sexual orientation and age. She also alleged that female CPOs were prevented from gaining skills which would benefit them in job competitions. The Director dismissed the complaint which was upheld by the Chief. The Chief ruled that the complaint did not support concerns about the unfairness of the competition nor Guay's age, gender, sexual orientation or prior complaints played a role in the way her application was assessed. The Chief concluded that Guay only provided bald assertions while the Respondent provided substantial materials establishing the basis upon which it chose the successful candidates. The ABQB agreed with the Chief's decision finding that her lack of success in the promotion was clearly

tied to her failure to sign off on the Respondent's policies and procedures. The application for judicial review was allowed in part only as to the BCL Complaint and it was remitted back to the Chief for reconsideration.

Employment/Gender. ***MacKay v Dominion Fruit Division of Westfair Foods Ltd*** **(January, 1974; Bd of Inq).** The Complainant alleged discrimination on the basis of sex and age, where female employees had to retire at age 60, while male employees had to retire at age 65. The Board found discrimination on the basis of gender (sex) but not on the basis of age. Compensation was awarded for six months of lost wages, less earnings which amounted to $1346.20.

Employment/Gender. ***SGEU v Saskatchewan (Environment)*****, 2018 SKCA 48.** The Government of Saskatchewan implemented a test for all its firefighters working within the province. The Applicants made an application arguing that the cut-off score test discriminated against female firefighters and older men and that it contravened *The Saskatchewan Human Rights Code*, SS 1979, c S-24.1, and its collective agreement, which prohibit discrimination against employees on the basis of any prohibited ground, including gender and age. The arbitrator that heard the application did not find any *actual* adverse effect discrimination based on the eight female and older male firefighters, but did find that the test was *prima facie* discriminatory because of its potential impact on females and older males" (emphasis added by the Court). Saskatchewan sought judicial review of the arbitrator's decision, and the reviewing court found that the arbitrator had applied the wrong legal tests and that he reached an unreasonable conclusion. The Court here found that the arbitrator applied settled principles in arriving at his conclusion, and his decision was reasonable. The Court, therefore, allowed the appeal and restored the arbitrator's decision finding that the Complainants proved that the Government had adopted a *prima facie* discriminatory practice. **Employment/Gender.** See also: ***Nolting v 847012 Alberta Ltd (Prime West Contracting)*****, 2017 AHRC 12.**

EMPLOYMENT PRACTICES: GENDER/PREGNANCY

Note: s 44(2) of the *AHRA* states that protection from adverse treatment on the basis of gender includes protection on basis of pregnancy.

Employment/Gender/Pregnancy. ***Brooks v Canada Safeway Ltd*****, [1989] 1 SCR 1219, 58 Man R (2d) 161.** The Safeway disability plan provided that pregnant employees who were unable to work, either because of pregnancy-related complications or because of non-pregnancy health problems, were not eligible for

benefits under the plan. They were expected to collect Unemployment Insurance Maternity Benefits, which provided less money for a shorter time and required a longer work period for eligibility. The SCC held that distinctions or discriminations based upon pregnancy are discriminations based upon sex. The Court concluded that the disability plan discriminated against pregnant employees on the basis of their sex.

Employment/Gender/Pregnancy. ***Baker v Crombie Kennedy Nasmark Inc*****, 2006 AHRC 4**. The Complainant was hired by the Respondent. During the interview process the Complainant was asked when she planned to have children, but she chose not to disclose the fact that she was pregnant. Three months after she was hired, the Complainant wore maternity clothing for the first time at the office and many co-workers asked if she was pregnant. She was called into the boss's office the following day to discuss her probationary period, at which time she was given a letter of termination which stated that she did not perform at the level that the company required in administrative assistants. The Complainant stated that her probation period ended three days prior and she refused to sign the termination letter. The evidence showed that the Complainant's pregnancy was a factor in her termination of employment, and the Panel found she was discriminated against on the basis of gender. The Complainant was awarded $3000.00 in damages for injury to self-respect and dignity, $2437.50 for the difference in wages between the time of her termination and working for a temp agency before maternity leave, and $3310.50 for the difference in benefits between what she would have received with the Respondent and Baker what she did receive.

Employment/Gender/Pregnancy. ***Woo v Alberta (Human Rights and Citizenship Commission)*****, 2003 ABQB 632, 336 AR 152, aff'd in part** ***Woo v Fort McMurray Catholic Board of Education*****, 2002 AHRC 13** and ***Jahelka v Fort McMurray Catholic Board of Education*****, 2002 AHRC 12.** The Complainants, Jennifer Woo and Gwen Jahelka, filed complaints on the grounds of employment discrimination on the basis of gender (pregnancy). Ms.. Woo was hired as Vice Principal for the Fort McMurray Catholic Board of Education on a probationary one-year contract. The Complainant became pregnant and notified her employer of her start date for maternity leave. Her contract was terminated effective on that date. Ms. Jahelka was hired to replace Ms. Woo and subsequently went on maternity leave five months later. After going on maternity leave Ms. Woo and Ms. Jahelka both applied for the permanent Vice Principal's position and Ms. Woo also applied for the Program Coordinator's position. The evidence before the Panel related to three incidents of alleged discrimination,

those being, Ms. Woo's termination of employment as the temporary Vice Principal, the failure to fairly consider Ms. Woo and Ms. Jahelka for the permanent Vice Principal's position and the failure to fairly consider Ms. Woo for the Program Coordinator's position.

The Panel held that the Ms. Woo's termination was *prima facie* discriminatory since it was related solely to her pregnancy and that the hiring of a male teacher with no administrative experience, over Ms. Woo, for the Program Coordinator's position was not a violation of s 7 of the *HRCMA* since the decision was based on the fact that the male teacher scored higher than Ms. Woo in the interview. Finally, the Panel held that the Board's refusal to hire Ms. Woo for the position of Vice Principal was not a violation of s 7 the *HRCMA* as it was a function of the management's prerogative and not related to gender. The Panel found that Ms. Jahelka's gender and pregnancy were factors in the Board's decision not to consider her for the Vice Principal position and found that she would have been given the position but for her unavailability resulting from pregnancy and maternity leave.

On appeal, the Alberta Court of Queen's Bench upheld the Panel's decision on all grounds except one. The Court found that the Board of Education did in fact discriminate against Ms. Woo in its failure to consider her for the Vice Principal's position.

Employment/Gender/Pregnancy. *Hansen v Big Dog Express Ltd*, 2002 AHRC 18. The Complainant was a shipping and receiving clerk at the Respondent company. The Complainant's good working environment deteriorated after she told the Respondent she was pregnant. Her work hours were reduced and her employment was terminated after three months of employment, which resulted in her not qualifying for maternity benefits. The Panel found that the Respondent failed to accommodate the Complainant to the point of undue hardship and that the Complainant was fired mainly because of her pregnancy. The Complainant was awarded $5,000.00 for injury to dignity and self-respect and $8791.26 for lost wages. The Respondent appealed to the Court of Queen's Bench. The matter was settled.

Employment/Gender/Pregnancy. *Alberta Hospital Association v Parcels* (1992), 129 AR 241, 90 DLR (4th) 703 (ABQB). A nurse alleged discrimination where the terms of the collective agreement required that she pay 100% of the premiums in advance for certain benefits while on maternity leave. An employee absent on sick leave was required to pay only 25%. On appeal the Court of Queen's Bench upheld the

Board of Inquiry's decision that the unemployment insurance plans, which compensated more for sick leave than maternity leave amount to direct discrimination. Maternity leave is a hybrid that includes both health-related and non-health- related components. The health-related component must be treated in a similar manner to sick leave. The Court relied on ***Brooks v Canada Safeway Ltd*, [1989] 1 SCR 1219, 58 Man R (2d) 161** and held that benefits available through employment must be disbursed in a non- discriminatory manner, but this does not mean they must be identical. If the variation between the compensation of employees on maternity leave and sick leave is not more than 5%, so that the benefits are substantially the same, then there is no discrimination. Although the parties did not raise the defence of s 11.1 of the *IRPA* [*AHRA*, s 11], the Court said that it was likely that an employer would have a defence under s 11.1 if the variation between the compensation was minor.

Employment/Gender/Pregnancy). *Pelchat v Ramada Inn and Suites (Cold Lake)*, 2016 AHRC 11. The Complainant filed a complaint with the Commission alleging that during her employment she suffered discrimination due to her gender, in the nature of: (1) sexual harassment in the form of two unwelcome comments of a sexual nature and unwelcome touching in one instance from her general manager, and (2) discrimination on the ground of pregnancy in the form of a written warning and termination of her employment, both of which she alleged were unjustified. Respondent terminated her employment while she was eight months pregnant. The Commission found that the Complainant had established gender discrimination in both sexual harassment and pregnancy, contrary to s. 7(1) of the Act. For quantification see also ***Pelchat v Ramada Inn and Suites (Cold Lake)*, 2016 AHRC 17.**

Employment/Gender/Pregnancy. See also: ***Repas-Barrett v Canadian Special Service Ltd*, 2003 AHRC 1; *Serben v Kicks Cantina Inc*, 2005 AHRC 3; *Somarribe v Alberta Justice and Solicitor General,* 2019 AHRC 46; *Bauknecht v 1055791 Alberta Ltd o/a Elkwater Lake Lodge & Resort,* 2020 AHRC 16; *Parker v Vapex Electronics Ltd,* 2020 AHRC 32; *Turnbull v Edmonton Pipe Trades Educational Fund o/a Alberta Pipe Trade College,* 2021 AHRC 172; *McPherson v 557466 Alberta Ltd o/a LDV Pizza Bar,* 2023 AHRC 36.**

EMPLOYMENT PRACTICES: GENDER/SEXUAL HARASSMENT

Employment/Gender/Sexual Harassment. *Robichaud v Canada Treasury Board*, [1987] 2 SCR 84, 40 DLR (4th) 577. Distinctive characteristic of sexual encounters which are prohibited by s 7(1)(b) of the *Canadian Human Rights Act*, SC 1976-77, c 33 [*AHRA*, s 7] include:

> 1) The conduct was unsolicited and unwelcome by the complainant, and expressly or explicitly known to be unwelcome by the respondent;
> 2) The conduct complained of must be persisted in the face of protest by the subject of the sexual advances, or in the alternative, though the conduct was not persistent, the rejection of the conduct had adverse employment consequences; and
> 3) If the complainant cooperates with the alleged harassment, sexual harassment can still be found if such compliance is shown to be secured by employment-related threats or, perhaps promises.

Employment/Gender/Sexual Harassment Definition. *Janzen v Platy Enterprises Ltd*, [1989] 1 SCR 1252, 59 DLR (4th) 352. Two female waitresses made complaints on the basis that they were subjected to sexual harassment by the cook, and the owner and manager of the restaurant refused to act when informed about the situation. The main issue before the Court was whether sexual harassment in the workplace was discrimination on the basis of sex and therefore prohibited by s 6(1) of the *Manitoba Human Rights Act*, SM 1974, c 65. At paragraph 56 Dickson CJ stated, "sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment." Relying on ***Robichaud v Canada Treasury Board*, [1987] 2 SCR 84, 40 DLR (4th) 577** the Court concluded that Respondent was liable for the actions of the cook.

The legal test for sexual harassment may be summarized as follows:

> 1. Is the conduct desired or welcomed?
>
> 2. Is the conduct sexual in nature?
>
> 3. What is the gravity and frequency of the conduct?
>
> 4. Was the employer notified of the conduct by the affected employee so remedial action could be taken?

Employment/Gender/Sexual Harassment. *Schofield v AltaSteel Ltd*, 2015 AHRC 15. The Complainant (Schofield) was "was inappropriately touched by a co-worker" (Keller) at a union meeting (para 1). This incident was reported to the Respondent soon after the incident and the Respondent attempted to limit contact between Schofield and Keller. Although the Tribunal held that the incident did amount to sexual harassment, it was not discrimination on the part of the Respondent because the harassment took place at the union meeting (off site) that "did not fall within the scope of an authorized work activity" (para 32). As such, "[t]he company's responsibility to provide

employment free of discrimination does not extend to liability for Mr. Keller's behaviour at the Union meeting" (para 32). In determining whether the events occurred in the course of employment, the Tribunal referred at para 31 to ***Cluff v Canada (Department of Agriculture)*** **[[1994] 2 FC 176, 1993 CanLII 3027, [1993] FCJ No 1337 (FC) (QL) at para 17]** where the Federal Court quoted the Canadian Human Rights Tribunal as follows:

> An employee is in the course of employment when, within the period covered by the employment, he or she is carrying out:
> (1) activities which he or she might normally or reasonably do or be specifically authorised to do while so employed;
> (2) activities which fairly and reasonably may be said to be incidental to the employment or logically and naturally connected with it;
> (3) activities in furtherance of duties he or she owes to his or her employer; or
> (4) activities in furtherance of duties owed to the employer where the latter is exercising or could exercise control over what the employee does.

The Tribunal in *Schofield* does stress at para 31 that the language in the *Canadian Human Rights Act* (RSC 1985 c H-6) on which these factors are based does differ from the relevant language in the *AHRA*.

Employment/Gender/Sexual Harassment. *Ayris v Volker Stevin Contracting Ltd*, 2005 AHRC 11 (CanLII), 54 CHRR 456. The Complainant was employed by All Canadian Excavating and was contracted to work as a backhoe operator at the Respondent's work site. While on the job site, the Complainant was subjected to inappropriate comments and was propositioned in a sexual manner. When the Complainant complained to the head supervisor, he told her that she would not work at his job sites anymore. Based on the evidence the Panel found that the Complainant was afforded the protection of the *HRCMA* even though she was not a direct employee of the Respondent because the Respondent had control over the Complainant's employment conditions, including approval of competency prior to working on-site, control over hours and location of work and control over "effective termination" of the Complainant's employment by refusing access to the work-site. The Panel quoted ***McNulty v GNF Holdings Ltd*** **(1992), 16 CHRR D/418 (BCHRT)**, where the BC Human Rights Tribunal stated that "actions made 'in fun' are not relevant to determining whether a violation of the law occurred... Express objection need not be shown to establish that the behaviour is unwelcome where a reasonable person knew or ought to have known that it was unwelcome" (para 47).

Employment/Gender/Sexual Harassment. ***Hayes v Alberta Justice and Attorney General*****, 2004 AHRC 5.** The Complainant worked as an office assistant to the Public Trustee Office and was employed as a temporary wage employee by the Respondents. The Complainant claimed she was sexually harassed by her co-worker, Richard Wylie, and supervisor, Gordon Cuff, through inappropriate touching, lewd jokes and comments about her appearance. The Complainant told the office manager and the perpetrators that their actions made her feel uncomfortable, especially given her experience of sexual abuse in the past. The sexual harassment continued and the Complainant discussed the issue with the Public Trustee. After that meeting, her relationship with the perpetrators and other supervisor became strained. Her physician suggested that she leave her employment, but the Complainant felt she could not do this because she needed the income. The Complainant applied for three full time positions, one of which she had occupied for two years. One of perpetrators was part of the interview and the Complainant was unsuccessful. The Panel relied on ***Simpson v Consumers' Assn of Canada*** **(2001), 57 OR (3d) 351, 209 DLR (4th) 214**, where the trial judge acknowledged that there may be a prevailing culture in the workplace that allows for the tolerance of certain sexual conduct. However, the Panel noted that while Mr. Wylie's behaviour may have been well intentioned and even accepted by people within the culture of this workplace, the Complainant expressed her discomfort with his conduct. The Department's sexual harassment policy stated "the results of the behaviour rather than the intention behind them are what matters. If your behaviour is unwelcome by the victim and causes the person to feel uncomfortable, embarrassed or degraded, then it is harassment" (para 122). The Department's policy also made it clear that "what is harassment to one person may not be to another" (para 123). The Panel found that Mr. Cuff's conduct created an environment that allowed for the tolerance of gender or sexually based comments and actions and it was in that context that the Complainant was subjected to sexual harassment. Further, the Panel found the sexual discrimination suffered by the Complainant did contribute to her failure to secure her position. The Complainant was awarded $4000.00 for injury to self-respect and dignity.

Employment/Gender/Sexual Harassment. ***Kennedy v Save-On-Auto Limited and First Class Limo Service Limited*****, 2002 AHRC 11 (CanLII).** The Panel found the Complainant suffered sexual harassment in the workplace. While alcohol was found to be a factor in the harassment, it did not negate the fact that the harassment occurred. The Complainant was awarded $4000.00 in general damages for the pain, anguish and suffering from the physical and verbal sexual harassment she endured and $1293.00

in lost wages.

Employment/Gender/Sexual Harassment. ***McCharles v Jaco Line Contractor's Ltd.,*** **2022 AHRC 115.** The Complainant alleged that the sole director and shareholder of Jaco Line, James Hogg, sexually harassed her by touching her breast and hip without her consent while they were on a business trip. Thereafter, her employment was terminated. The Tribunal awarded $13,150.68 for loss of income and $50,000.00 for general damages for injury to dignity.

Employment/Gender/Sexual Harassment. ***Linzmeyer v*** **Polos, 1998 31 CHRR D/339.** Ms. Linzmeyer alleged she was sexually harassed by her employer, Dr. Polos. The Panel relied on ***McNulty v GNF Holdings Ltd*** **(1992), 16 CHRR D/418 (BCHRT)** and held that in sexual harassment cases expressed objection need not be shown to establish that the behaviour is unwelcome where a reasonable person knew or ought to have known that it is unwelcome and that the absence of intent to discriminate is not a defence to a complaint of discrimination. It is the result or effect of conduct that is important in determining whether discrimination has occurred. Similar fact evidence can be considered in cases of sexual harassment as corroborating the Complainant's story or showing what the working conditions were, where its probative value outweighs the possibility that it will create undue prejudice. However, when the Complainant's story can be established on the strength of her own evidence and where there is no denial of the alleged sexual encounters, and no real attempt to say that the Complainant is concocting her story, the Tribunal should refrain from relying on the similar fact evidence. The Complainant's employment was found to be terminated because she took exception to Dr. Polos' sexual comments and behavior. The Panel found that Dr. Polos interfered with the Complainant's efforts to find other employment by speaking to other dentists about her. Dr. Polos was ordered to pay Ms. Linzmeyer $29,900.00 for lost wages, to pay costs and to attend a sexual harassment educational session.

Employment/Gender/Sexual Harassment. ***JR and SS v Kamaleddine*****, 30 CHRR D/290 (April 2, 1997; Alta HRP), (*****sub nom Redekop v Kamaleddine*****) 1997 CarswellAlta 1263.** JR and SS, who were 15 and 14 years old, respectively at the time of the complaint, alleged that their employer, Mr. Kamaleddine, part owner of the Burger Baron, sexually harassed them on an ongoing basis until they quit their job. The Panel applied ***Janzen v Platy Enterprises Ltd*****, [1989] 1 SCR 1252, 59 DLR (4th) 352** and ***Robichaud v Canada Treasury Board*****, [1987] 2 SCR 84, 40 DLR (4th) 577** and

concluded the Complainants were discriminated against in the workplace and that the sexual harassment led to the termination of their employment. In determining a remedy, the Panel considered the seven non-exhaustive considerations to be taken into account when determining compensation for injury to dignity in sexual harassment cases as set out in ***Torres v Royalty Kitchenware Ltd*** **(1982), 3 CHRR D/858 (Ont Bd of Inq)** and ordered the Respondents, Mr. B. Kamaleddine, the Burger Baron, and Walid Kamaleddine (the other 50% shareholder) jointly and severally to pay JR. $700.00 in lost wages and $5,000.00 for injury to dignity and self- respect. SS received lost wages in the amount of $2000.00 and $3,000.00 for injury to dignity and self-respect. Mr. Kamaleddine was ordered to attend a session on gender harassment and to keep posted at all times, in a prominent place, in all workplaces owned or operated by him, a sexual harassment policy approved by the Alberta Human Rights and Citizenship Commission. He was also ordered to pay the costs for the hearing.

Employment/Gender/Sexual Harassment. ***McLeod v Bronzart Casting Ltd,*** **29 CHRR D/173, 1997 CarswellAlta 1264 (May 12, 1997 Alta HRP).** The Panel found discrimination based on gender, in the form of sexual harassment when the poster of a scantily clad woman was prominently displayed even after one female employee asked that it be removed. The Panel found that the drastic reduction of hours worked by Ms. McLeod after she complained about the poster was tantamount to a constructive dismissal. The Panel took note of two cases that dealt particularly with gender discrimination and sexually suggestive posters or pictures: ***Burton v Chalifour Bros Construction*** **(1994), 21 CHRR D/501 (BC Council of Human Rights)** and ***Pond v Canada Post Corporation*****, (1994), 94 CLLC 17, 024 (CLLR)**. The Respondent was ordered to establish a sexual harassment policy for its business, to pay the Complainant compensation for 16 weeks of lost wages and to pay the costs for the hearing.

Employment/Gender/Sexual Harassment. ***Torres v Royalty Kitchenware Ltd*** **(1982), 3 CHRR D/858 (Ont Bd of Inq)).** Relevant Factors in determining appropriate compensation for injury to dignity in sexual harassment cases include (para 775):

1. the nature of the harassment. Was it simply verbal or was it physical as well;
2. the degree of aggressiveness and physical contact in the harassment;
3. the ongoing nature, that is, the time period of the harassment;
4. its frequency;

5. the age of the victim;

6. the vulnerability of the victim; and

7. the psychological impact of the harassment upon the victim.

Employment/Gender. ***Pham v Vu's Enterprises Ltd*****, 2016 AHRC 12.** Complainant alleged that Respondent discriminated against her on the basis of gender (sexual harassment) contrary to s 7(1)(b) of the *Alberta Human Rights Act*. The Complainant stated that she had to quit her job due to sexual harassment that included jokes, comments, physical touching and threats. The Commission found that the Complainant established discrimination contrary to the Act and held the Respondents jointly and severally liable for general damages of $15,000. See also: ***Mandziak v Taste of Tuscany Ltd,*** **2017 AHRC 7.**

Employment/Gender/Sexual Harassment. See also: ***Splett v Sum's Family Holdings Ltd,*** **13 CHRR D/119, (September 27, 1990, Alta HRP)** (not available online); ***Lonie Contenti v Gold Seats Inc,*** **20 CHRR D/74 (September 29, 1992, Bd of Inq)** (not available online); ***Kathy Lalonde v Hamid, and Al Sultan Restaurant*** **(March 18, 1997, Alta HRP)*; Anjie Browne v Dan Dekort and Temple Hair Design*** **(November 19, 1997, Alta HRP);** ***Penelope Timleck v Habib Monaghi, Radio Guide*****, (December 22, 1998, Alta HRP);** ***Rayanna King v Rick St Denis and Universal Maps of Canada Inc*** **(October 4, 1999, Alta HRP);** ***Vanderwell Contractors (1971) Ltd v C(J)*****, 2001 CLLC 230-019, 40 CHRR D/505, (*sub nom Chartrand v Vanderwell Contractors (1971) Ltd*), 2001 AHRC 1, aff'd (1971), 2001 ABQB 512, 294 AR 71;** ***Lays v Daryl Remus Professional Corporation*****, 2001 AHRC 9;** ***Chase v Condic*****, 2002 AHRC 15;** ***McLean v Market Place Restaurant & Spock's Bar*****, 2004 AHRC 13, aff'd** ***Yee v McLean*****, 2005 ABQB 470, 381 AR 148;** ***Sawyer v Alberta Transportation*****, 2005 AHRC 6;** ***Carr v Humpty's Family Restaurant*****, 2006 AHRC 10;** ***Hostland v Abbott Laboratories Limited*****, 2006 AHRC 14;** ***Harvey v WWDI Wireless Inc*****, 2009 AHRC 5,** ***Malko-Monterrosa v Conseil Scolaire Centre-Nord*****, 2014 AHRC 5;** ***Labbe v Calgary Co-operative Association Limited*****, 2015 AHRC 4;** ***Pelchat v Ramada Inn and Suites (Cold Lake)*****, 2016 AHRC 11;** ***Mandziak v Taste of Tuscany Ltd,*** **2017 AHRC 7;** ***Mandziak v Taste of Tuscany Ltd*****, 2017 AHRC 10;** ***Penner v Irish Pub Holdings Inv o/a Molly Malone's Irish Pub*****, 2017 AHRC 15;** ***YG v Alberta Justice and Solicitor General,*** **2020 AHRC 10.**

EMPLOYMENT PRACTICES: SEXUAL ORIENTATION

Employment/Sexual Orientation. *Vriend v Alberta*, [1998] 1 SCR 493, 212 AR 237. Mr. Vriend was asked to resign from his employment after it became known to his employer that he was homosexual. Mr. Vriend refused to resign and he was terminated from his position. The sole reason given for his dismissal was his non-compliance with the college's policy on homosexual practice. Mr. Vriend appealed and applied for reinstatement but was refused. When he attempted to file a complaint with the Alberta Human Rights Commission, he was advised that sexual orientation was not a protected ground. Mr. Vriend filed a motion in the Court of Queen's Bench for declaratory relief. The trial judge found that the omission of sexual orientation as a protected ground against discrimination violated section 15 of the *Charter*. The trial judge ordered that "sexual orientation" be read into ss 2(1), 3, 4, 7(1), 8(1) and 10 of the *IRPA* as prohibited grounds of discrimination. The Alberta government appealed and was successful. The matter went to the Supreme Court of Canada. The Court held that the preamble, and ss 2(1), 3, 4, 7(1), 10 and 16(1) of I*RPA* infringed s 15(1) of the *Charter* and the infringement is not justifiable under s 1. The Court ordered the words "sexual orientation" be read into the *IRPA.* The *AHRA* was amended in 2009 to include "sexual orientation".

See also: ***Guay v Alberta (Human Rights Commission),* 2022 ABQB 36; *Landry v Vegreville Autobody (1993) Ltd.*, 2017 AHRC 19.**

EMPLOYMENT PRACTICES: PHYSICAL DISABILITY

Employment/Physical Disability. *Tolko Industries Limited v Industrial, Wood and Allied Workers of Canada, (Local 1-207)*, 2014 ABCA 236. Gordon Winsor was terminated by Tolko for "excessive absenteeism" (para 1). This was due to several medical conditions, including hernia problems. The Arbitrator ordered reinstatement. That ruling was upheld on judicial review. The Court of Appeal held that the Arbitrator's finding that a current assessment be performed was supported by evidence, that the findings of fact relating to Winsor's restrictions were reasonable and that the law relating to accommodation was correctly applied. Regarding the collective agreement in place, the Court of Appeal also wrote at para 33 that:

> [33] While this collective agreement did not expressly impose a duty to accommodate on the Employer, it was imposed by human rights law. The *Alberta Human Rights Act*, RSA 2000, c A-25.5 prohibits discrimination in employment on the basis of several "protected grounds", including, most relevant to this appeal, physical and mental disability: s 7(1). The duty is triggered where an employer "seeks to apply a standard that is prejudicial to an employee on the basis of specific characteristics that are protected by human rights

> legislation": *McGill University Health Centre (Montreal General Hospital) v Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4, [2007] 1 SCR 161 at para 11.

The Arbitrator's decision was upheld and the appeal dismissed.

Employment/Physical Disability. *Goossen v Summit Solar Drywall Contractors Inc*, 2016 AHRC 7, aff'd in part *Summit Solar Drywall Contractors Inc v Alberta (Human Rights Commission),* 2017 ABQB 215. The Complainants, Mr. and Mrs. Goossen (husband and wife), were contracted as drywall tapers by the Respondent (considered to be an employment relationship by the Tribunal). In the course of her employment, Mrs. Goossen was injured. Mr. Goossen reported the injury to the Respondent within 24 hours but Mrs. Goossen did not make a claim with the Workers' Compensation Board (WCB) for several months, fearing that Mr. Goossen would lose his job if a claim was filed. The Respondent failed to file a report of the injury with the WCB within 72 hours and discouraged the Complainants from filing a claim, fearing that their insurance premiums would increase. The Respondent terminated Mr. Goossen's employment soon after Mrs. Goossen's injury to avoid WCB penalties. The Commission held that the Respondent discriminated against Mrs. Goossen on the basis of disability and failed to demonstrate that it accommodated Mrs. Goosen to the point of undue hardship. The Commission held that the Respondent discriminated against Mr. Goossen on the basis of marital status without justification. Although it was not raised in the complaint, the Commission noted that Mr. Goossen's dismissal may have also been discrimination on the basis of disability stemming from the language in *AHRA* s 7(1) ("physical disability … of that person or of any other person"). The findings of the Tribunal were upheld by the Queen's Bench (***Summit Solar Drywall Contractors Inc v Alberta (Human Rights Commission)* 2017 ABQB 215**), however the matter was remitted to the Tribunal to rectify errors made in the assessment of damages (para 53). For additional background see ***Goossen v Summit Solar Drywall Contractors Inc*, 2014 AHRC 7 (Preliminary Matters Decision); *Goossen v Summit Solar Drywall Contractors Inc*, 2016 AHRC 10 (Decision Regarding Quantification of Lost Wages);** and ***Goossen v Summit Solar Drywall Contractors Inc*, 2017 AHRC 20**.

Employment/Physical Disability. *Perera v St. Albert Day Care Society*, 2014 AHRC 10. In determining whether the level of accommodation offered by the Respondent was reasonable, the Tribunal wrote about returning an employee to their previous position at para 38:

> [38] I accept that there was some accommodation by the Society. I

> also accept that a return of the employee to a previous position may not always be possible. However, the starting point for exploration of accommodation options should be an assessment of a return to work in the employee's previous position. Employers cannot just place the returning employee into a position which is most convenient for the employer. The Society has not proven that it has accommodated to the point of undue hardship.

Employment/Physical Disability. *Saunders v Syncrude Canada Ltd*, 2013 AHRC 11 rev'd *Syncrude Canada Ltd v Saunders*, 2015 ABQB 237. The Applicant was an employee-trainee of the Respondent's important project, who was absent from work for a considerable length of time due to illnesses and injuries. Subsequently, he was relieved of his employment without cause and he was given two-week pay in lieu of notice. The Commission held that Syncrude discriminated against Saunders contrary to section 7 of the Act. The discrimination could not be justified as a *bona fide* occupational requirement, because it was not inevitable that the disabilities, which affected Saunders and which were the reason for his poor attendance, would be affecting his attendance in the future.

This decision was reversed by the ABQB. Mahoney J held at para 101 that:

> [101] The Tribunal erred in finding that Saunders established a *prima facie* case of discrimination. The evidence before the Tribunal could not reasonably support the conclusion that Saunders suffered from a disability or a perceived disability requiring accommodation. An appellate court will intervene where the Tribunal's decision is unreasonable in the sense that, having regard to all the evidence, no other reasonable fact-finder would have arrived at the same outcome.

Regarding Saunders' absenteeism, the ABQB wrote at para 85 that:

> [85] There was a pattern to Saunders' absences that was briefly mentioned but overlooked by the Tribunal. The evidence before the Tribunal demonstrated that all of Saunders' absences prior to October 24th when he broke his hand took place either immediately prior to or following scheduled days off. Case law has recognized that a series of absences that coincide with scheduled days off is patterned absenteeism. A point made by Syncrude.

Employment/Physical Disability. *Schulz v Lethbridge Industries Limited*, 2012 AHRC 3, aff'd in part *Lethbridge Industries Ltd v Alberta (Human Rights Commission)*, 2014 ABQB 496. The Grievor/Applicant worked for the Respondent for twenty-five years. Over certain periods in the course of the Applicant's employment, he suffered bouts of illnesses, which led to absenteeism because he had to attend to

medical appointments and had medically-related issues. It was in the course of returning to work from one of his medical related absences that the Respondent informed him of his employment termination. He complained to the Alberta Human Rights Commission about discrimination on the ground of disability.

The Commission considered and analyzed all the facts and held the Respondent had discriminated against the Applicant on ground of disability. The Commission held that Schulz had mental and physical disabilities during at least the last six years of his employment. He had chronic depression, debilitating migraine headaches, as well as a recurring hernia problem. These medical problems together resulted in a significant number of planned and unplanned absences from work. Further, the Respondent could not say that it did not know or could not reasonably have known that Schulz had a disability. The Respondent should have enquired as to the reason for Schulz's poor attendance, if it was considering terminating Schulz. Discrimination need not be the sole reason for one's actions before a complaint can succeed. It is sufficient if the disability was a factor in the decision to terminate. Because Schulz was terminated largely because of disability related absences, a *prima facie* case for discrimination had been made out. Further, the Respondent had not established the defence of *bona fide* occupational requirement.

On application for judicial review and appeal to the Alberta Court of Queen's Bench**,** ***Lethbridge Industries Ltd v Alberta (Human Rights Commission)*****, 2014 ABQB 496,** the Commission's decisions on discrimination were upheld. However, some of the remedies granted (see below under section 32) were set aside. For additional reasons, see **2015 ABQB 32** (collateral benefits), **2015 ABQB 179** (costs) and **2015 ABQB 760** (quantum of damages).

Employment/Physical Disability. *York v Line West Ltd.,* 2022 AHRC 51. The Complainant worked as a laborer for approximately 4 months before sustaining a back injury and before being cleared for his injury, he developed hemorrhoids which almost led to his death. His employer sent him a modified job offer when he was still unable to work because of his ailments. Subsequently, he was terminated. The Tribunal held that the employer failed to accommodate the Complainant. It explained that where an employee is unable to respond to an accommodation as a result of his physical disability, an employee must be protected provided he responds as soon as he is able. In this case, the Complainant reached out to his employer to request the necessary forms to access disability insurance where he learned he had already been terminated.

Employment/Physical Disability. ***Morris v Kingsway Asset Management Ltd and Elsafadi*****, 2012 AHRC 9.** The Complainant petitioned the AHRC claiming discrimination, among others, on the ground of disability, against her employer. The Commission found her complaint on discrimination on ground of disability [physio-medical conditions] proven. On how discrimination on ground of disability proved, the Commission stated that:

> [58] Specifically, a complainant may establish an allegation of *prima facie* discrimination on the basis of a disability by proving that:
> (a) the complainant had a disability which is protected under the Act, or the respondent perceived the complainant to have a disability protected by the Act;
> (b) the respondent refused to continue to employ the complainant or adversely treated the complainant with regard to her employment or a term of employment; and
> (c) it is reasonable to infer that the complainant's disability, or perceived disability, was a factor in the refusal to employ or the adverse treatment. [citation omitted]

Employment/Physical Disability. ***Shimp v Livingstone Range School Division #68*****, 2010 AHRC 11.** The Complainant alleged that her employment as a teaching assistant with the Respondent was terminated on the basis of her physical disability. The Complainant told her supervisor that she was suffering from an unknown health condition that made it difficult for her to work full-time and that she would keep him informed regarding developments in her diagnosis. The Complainant never provided any additional information or medical documentation. The Tribunal concluded that the Complainant failed to demonstrate that the Respondent had the requisite knowledge regarding the Complainant's *bona fide* physical disability. The Tribunal held at para 7 that:

> [a]n employer cannot be expected to make specific accommodations unless they are provided with some type of substantive evidence, such as medical letters from the treating physician… It would be patently unreasonable to expect an accommodation without some specific evidence to support the reason for why such a request has been made.

Employment/Physical Disability. ***Berridge v City of Calgary*****, 2007 AHRC 9.** The Complainant was a seasonal employee of the Respondent and underwent surgery and treatment for cancer in 2001 and 2002. At that time the Complainant was on short term and long-term disability before returning to work in 2003. The Panel agreed that the Complainant's cancer was a physical disability within the meaning of the *HRCMA.* The Complainant was dismissed due to absenteeism in 2003 and 2004. The Complainant

filed a complaint in 2005 alleging discrimination based on physical disability after the Complainant returned to work in 2003. The Panel held that although cancer may be an on-going illness in some circumstances it was not in these circumstances as there was no medical evidence that the Complainant's cancer was on-going. In fact, the evidence suggested that recurrence was unlikely. It was the City's policy to inform seasonal employees that after four absences, an employee would not be recommended for re-hire. The Complainant did not have a physical disability within the meaning of the *HRCMA* when he returned to work in 2003, and if he did, he failed to inform his employer of this fact. It was open to the employer to believe the Complainant was fit to return to work since the Complainant did not declare a disability when he returned to work, nor did he make a request for accommodation at that time. The Complainant failed to establish a *prima facie* case of discrimination as a result of any real or perceived physical disability. The Panel dismissed the complaint.

Employment/Physical Disability. *Abrams v Calgary Board of Education*, 2007 AHRC 2. The Complainant was a teacher who had an injury from a car accident that left him unable to safely drive a car for more than 15 minutes at a time. He was transferred to teach at a school that was a 35-minute drive away from his home. The Complainant alleged employment discrimination on the basis of physical disability. In dismissing the complaint, the Panel held that the Complainant failed to establish a *prima facie* case of discrimination because he failed to establish a connection between his employment and the requirement to travel to employment. The issue was whether the individual's mode of transportation formed part of his employment or part of a term or condition of employment. The Complainant's travel to work was personal in nature and outside the scope of his employment. There was nothing preventing him from moving closer to the work site or finding other ways to get to work.

Employment/Physical Disability. *Gariano v Fluor Constructors Canada Ltd*, 2006 AHRC 6, 57 CHRR D/43. The Complainant, a carpenter, injured his hand while working. After seeing the company doctor, the Complainant's employer offered him a modified work order (MWO), outlining lighter duties The Complainant later attended his family doctor and obtained a Workers' Compensation Board (WCB) assessment of his injury. The WCB found that the Complainant had suffered a compensable injury. After failing to attend work for three days, the Complainant was terminated from his position. The Complainant alleged that he was discriminated against on the basis of his physical disability and that he was forced to sign the MWO without his injury being properly diagnosed. The Panel allowed the complaint on the basis that it was

inappropriate for the Respondent to determine the extent of the Complainant's workplace injury and limitations, without input from WCB. The company should not have applied their absentee policy as strictly to an employee who had a compensable workplace injury in the same way as they would have with a healthy employee. Further, there was no evidence to suggest that the Respondent accommodated the Complainant's absence. The Complainant was awarded $10,000.00 in general damages for pain and suffering. Assessment for loss of wages was reserved pending submissions by the parties.

Employment/Physical Disability. *Vantage Contracting Inc v Marcil*, 2003 AHRC 4, aff'd 2004 ABQB 247, 370 AR 191. The 70-year-old Complainant was employed as a carpenter-locksmith by Vantage Contracting Inc. The Complainant injured his back, was hospitalized, and underwent rehabilitation. The Complainant attempted to return to work with light duties after one month but was not able to because of the pain he experienced. The Complainant received a letter from the Workers' Compensation Board, which stated that he was assessed to be fit to fulfill duties; however, his position had been filled and there were no positions available for him. The Panel found the Complainant's evidence to be more credible than the Respondent's and held the Complainant had established on a balance or probabilities that he was discriminated against on the grounds of age and perceived physical disability. The Panel found that the Complainant's disability was only temporary as stated by his physician and that his employer filled his position with a younger person who was paid less as a cost saving mechanism. Further, the Respondent failed to make any attempts to accommodate the Complainant's perceived disability. The Complainant was awarded $1,500 in damages for injury to self-respect and dignity and $28,000.00 for loss of income. This decision was upheld at the Court of Queen's Bench.

Employment/Physical Disability. *Masters v Willow Butte Cattle Co Ltd*, 2002 AHRC 3, 42 CHRR D/321. Acute illness constitutes physical disability. The statutory definition of "physical disability" refers to "any degree of physical disability". The definition does not require a certain level of severity or specific duration of disability. Consequently, the Respondent failed to meet the duty to accommodate.

Employment/Physical Disability. *Berry v Farm Meats Canada Ltd*, 2000 ABQB 682, 274 AR 186. The Complainant suffered from a mild heart attack after two months of employment with Farm Meats and was ordered by his doctors to refrain from working for three weeks. He was also prohibited from driving for a period of one month.

During his absence from work the Complainant attempted to make arrangements to work from home but the company did not approve. The Complainant was terminated from his employment five days before the identified return date with the stated reason being that his position had become redundant due to an internal reorganization. The Panel's decision to allow the complaint was upheld by the Court of Queen's Bench. The Complainant established a *prima facie* case of discrimination on the basis of a disability and the Appellant's reasons for terminating the Complainant's employment were not supported by the evidence. The burden of proof is on the Complainant (or the Director) to establish a *prima facie* case. Once that is done, the burden then shifts to the Respondent to provide a reasonable explanation for the conduct in issue. A *prima facie* case is one "which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainants favour in the absence of an answer from the respondent-employer" (para 24, quoting ***Ontario (Human Rights Commission) v Simpsons-Sears Ltd*, [1985] 2 SCR 536 at 538 [*O'Malley*]).** The Court of Queen's Bench clarified that it is not necessary to find that the Complainant's employment was terminated *while* physically disabled. Rather, one must find termination *because* of a physical disability for there to be discrimination.

Employment/Physical Disability. *STE v Bertelsen* (1989), 10 CHRR D/6294 (Bd of Inq) (not available online). The Complainant, a musician, was not allowed to return to his employment after he was hospitalized with a rare form of pneumonia seen in persons with AIDS. The employer said the Complainant's employment was terminated because the Complainant displayed untrustworthiness in failing to disclose that he was HIV positive and the employer was concerned about exposure to the virus. The Board, relying on ***Re Gadowsky* (1980), 26 AR 523, (*sub nom Gadowsky v Two Hills School Committee No 21*) 1 CHRR D/184 (QB)** said that the presence of one discriminatory reason is sufficient for the inquiry to find that the *IRPA* was contravened. The employer terminated the employment of the Complainant because he had AIDS, which the Board said was a discriminatory act, contrary to the *IRPA,* and the employer did not have a defence under s 11.1 of the *IRPA* [*AHRA*, s 11]. The employer had a subjective fear of AIDS, but there was no rational basis for fearing the band members were subjected to an increased risk of infection.

Employment/Physical Disability. *Lidkea v Edmonton Public School Board,* 2016 AHRC 20. Complainant alleged that her employer, the Board of Trustees of Edmonton School District No. 7, discriminated against her on the ground of physical disability. Complainant was diagnosed with a profound hearing loss, for which she required a

service dog. The Board assigned her to different rooms that were significantly smaller than the normal classrooms, changed the courses she taught, reassigned her students, and restricted her service dog's mobility for the first five months that she brought it to school. The Commission found that the Board had discriminated against her contrary to s. 7(1)(b) of the Act and awarded the Complainant $15,000 plus interest for mental anguish, injury to dignity and injury to self-respect. It declined to award a letter of apology, finding that such an award would lack the sincerity necessary to convey a sense of accountability and responsibility.

Employment/Physical Disability/Perceived Disability. ***Boehnisch v Sunshine Village Corporation,*** **2019 AHRC 55, upheld** ***Sunshine Village Corporation v Boehnisch,*** **2020 ABQB 692.** The Complainant worked for the Respondent from 1991 to 2002 and 2007-2013 as a Ski Patroller and Snow Safety Technician. In 2013, she was not re-hired as a Ski Patroller. The Respondent had concern that the Complainant could not perform the tasks required by the job and asked her to take a physical demands assessment. Their concern was based on a previous injury that the Complainant had sustained to her shoulder. They also offered her a position in the office, which she declined. The Complainant alleged that she was not granted the opportunity to take a physical demands assessment and did not inquire into whether or not she needed any accommodation. She also stated that she did not have a disability, yet the Respondent treated her as though she did. The Tribunal held that a perceived disability is protected under the *AHRA.* The Respondent's decision not to rehire the Complainant, along with the offer or an office position, amounted to discrimination. Since the Respondent had not taken steps to determine if the Complainant actually had a disability, the decision to not rehire her could not be found to be due to a *bona fide* occupational requirement.

Employment/Physical Disability/Perceived Disability. See also: ***Frauenfeld v Covenant Health,*** **2021 AHRC 8.**

Employment/Physical Disability/Duty to Accommodate. ***University of British Columbia v Kelly*****, 2016 BCCA 271.** The Appellant dismissed the Respondent from his job as a resident in its post-graduate family medicine training program. The Respondent complained to the Human Rights Tribunal that found that the Appellant had discriminated against the student based on learning disabilities. The Tribunal ordered the Respondent to reinstate the student and awarded damages for lost earnings and injury to dignity.

The Appellant sought judicial review. The reviewing judge upheld the decision, but reduced the award for loss of dignity. On appeal, the Appellant alleges errors of fact and law in the Tribunal's analysis of *prima facie* discrimination, and in its analysis of whether the school had met its duty to accommodate. The school argued that the damages award for loss of future earnings was unreasonable. The student cross appealed the reduction in the award for loss of dignity. The appeal was dismissed, and the cross appeal was allowed. The Court here found that the Tribunal correctly analyzed *prima facie* discrimination, and in refusing to prematurely weigh accommodation evidence, and reasonably found a nexus between the student's disability and his adverse treatment.

The Tribunal did not err in using a holistic analysis to the duty to accommodate, and reasonably found the school had not met its duty. The Court concluded that there was a clear causal link between the discrimination and the Respondent's delayed entry into the profession. It further concluded that the reviewing judge erred in reducing the loss of dignity award. It stated that the student's position was unique and that the Tribunal had the discretion to make an award outside the range of past awards for loss of dignity.

Employment/Physical Disability/Duty to Accommodate. *Duncan v Alberta Health Services*, 2017 AHRC 4. Complainant was a nurse working for the Respondent who injured her back performing job duties. The Respondent employer refused to grant her nearly dozen requests for workplace accommodation and modified job duties. The Respondent conceded that it failed to accommodate her to the point of undue hardship, and prior to the hearing, it was accepted that the Responded discriminated against the Complainant contrary to s. 7 of the *Alberta Human Rights Act.* The sole issue here was for the Commission to determine the appropriate remedy, which it found to be lost wages, accrued vacation, benefit premiums, pension replacement, and general damages in the amount of $10,000.

Employment/Physical Disability/Duty to Accommodate/Job Elimination. *Wang v Alberta (Human Rights Commission),* 2021 ABQB 780. The Complainant was employed by the Alberta Energy Regulator (AER) as a geologist. He was the only geologist in his work group. He was terminated by AER allegedly due to job elimination. In his complaint, he alleged that the reason for his termination, among others, is his physical disability which required him to sit in a hard wooden chair to alleviate his hip and leg pain. AER refused the complainant's request to bring a chair

from home or AER to provide a similar chair but allowed him to work from home one day per week. He was then terminated thereafter. After his termination, he later learned that another geologist had taken his place. The Director dismissed the complaint, and the Commissioner upheld the dismissal. The Commissioner found that there is no reasonable basis to proceed with the complaint since there were terminations of other employees at the same time as the Complainant, and that the Complainant had not provided other proof of a discriminatory connection between the termination and his disability. The ABQB held that the Commissioner's decision was unreasonable. It found that AER and the Commissioner had failed to explain why the Complainant could not have a chair for use in his office similar to what he had used at home. That although the Complainant did not provide a medical assessment that a hard surface chair was appropriate for him, it seemed to be working for him at home. It also asked the question "Does he need to?" referring to Complainant's absence of presentation of direct evidence that suggested that his disability was a factor in his termination, It emphasized the duty of the investigators of the Commission to establish the facts and make recommendations. It also mentioned that the Commissioner did not explicitly address the Complainant's allegation that he was simply replaced by another geologist for no good reason. It ruled that the Complainant's termination was unlawful and set it aside and remitted the matter to the Commissioner for redetermination.

Note: This case was used as the argument of Kameron Wint in the case of *Wint v Alberta* when he was unable to produce evidence in his favor. However, in the case of *Wint*, the ABQB held that the facts of this case were not analogous from *Wint*,

Employment/Physical Disability. *Summit Solar Drywall Contractors Inc v Alberta (Human Rights Commission)*, 2017 ABQB 215. This case is about an application to the Alberta Human Rights Commission Tribunal (the "Tribunal") based on discrimination against the Applicants on the grounds of disability. The Tribunal found that Summit Solar Drywall Contracts ("Summit") wrongfully terminated the Respondents, a husband and wife, after the wife experienced an injury. The Tribunal also found that Summit wrongfully terminated the husband's contract to avoid incurring costs and dealing with the Workers Compensation Board issues pertaining to the injury. The Court confirmed the findings of discrimination as being within the range of reasonable outcomes and upheld the Tribunal's award of general damages, but set aside the award of wage lost earnings to the husband based on a calculation of three years as being outside of the range of acceptable outcomes based on evidence before the Tribunal. The Court remitted the case to the Tribunal to reassess damages after

finding two errors in the Tribunal's calculations.

Employment/Physical Disability. *Hogan v Syncrude Canada Ltd,* 2019 AHRC 32. The Complainant worked for Syncrude. He had a serious medical condition that required a period of absence for treatment. When he returned to work, he advised Syncrude that he would need time off for monthly follow up appointments regarding his condition. Upon his return, he was reassigned to a different position for business reasons. As well, some training that he was scheduled to do was cancelled due to budgetary reasons. The Complainant requested to remain in the previous position, as this position's schedule was better suited to his medical appointment schedule, but Syncrude refused. They requested he schedule his appointment on days off or take absences to go to these appointments. The complaint alleged that the cancellation of training and the reassignment amounted to discrimination on the basis of disability. In dismissing this complaint, the Tribunal stated:

> However, in advancing a claim of discrimination, in which the complainant seeks to have a decision maker draw an inference, the complainant must do more than establish that he has a disability, that certain adverse actions were taken, and he believes that his disability was a factor in those actions. There must be some facts alleged, which the complainant proposes to prove through the calling of evidence, which can reasonably be taken to show a link between the adverse treatment and a ground of disability. This is not a high standard, but it requires more than an assertion or even a sincere belief."(para 19)

Employment/Physical Disability/Drug Addiction. *Walsh v Canada (Attorney General)*, 2017 FC 451. The Applicant alleges he was discriminated against by Transport Canada on the basis of disability resulting from an alcoholic dependence condition. The Applicant was refused a Marine Medical Certificate (Certificate) that would have allowed him to be employed as a seafarer, and then being issued a restricted certificate which prevented the Applicant from being eligible for other employment. The *Canadian Human Rights Act* prohibits discriminatory practices based on prohibited grounds. According to s. 3 of the *Act* and s. 25, a disability is defined as include a "previous or existing dependence on alcohol."

Section 5 of the *Act* makes it a discriminatory practice in the provision of a service generally available to the general public to deny such service or access to it or to differentiate adversely in relation to any individual on a prohibited ground of discrimination. Section 5 of the *Act*, however, must be read together with paragraph 15(1)(g) of the *Act*, which provides that such denial or differentiation is not a discriminatory practice if there is a justification for it. According to paragraph 15(2) of

the *Act*, a justification is a *bona fide* if it is established that the needs of the affected individual cannot be accommodated without imposing "undue hardship on the person who would have to accommodate those needs, considering health, safety and costs."

In this case, the Court decided to grant the Applicant's judicial review application. The Court was not prepared to accept that the case raised a reasonable apprehension of bias as contended by the Applicant and the Court referred the case back to the Commission for reconsideration, finding that the Commission failed to consider Transport Canada's alleged impossibility to accommodate the Applicant further than by a "No Watchkeeping" restriction on his Certificate.

Employment/Physical Disability/Mandatory Drug Testing. *Chiasson v Kellogg Brown & Root (Canada) Co*, 2007 ABCA 426, 425 AR 35, leave to appeal to SCC refused, [2008] SCCA No 96. The Complainant was hired as a receiving inspector with the Respondent's oil sands project and was required to undergo a pre-employment medical and drug test as a condition of his employment. The Complainant tested positive for the presence of marijuana and was subsequently fired. The Panel dismissed the complaint on the basis that there was no evidence that the Complainant suffered from a real or perceived disability, as he was only a recreational drug user, and thus was unable to substantiate a case of *prima facie* discrimination on the basis of physical disability. The Panel held that drug impairment of any kind would impact the Complainant's performance, and as such the pre-employment drug test was a reasonable requirement for the position for which the Complainant was applying. The trial judge allowed the Complainant's appeal and found that the Panel erred with respect to perceived disability and that the effect of employer's policy was to treat recreational cannabis users as if they were addicted to cannabis and to thereby exclude employees from employment based on perceived disability.

The Court of Appeal restored the Panel's decision on the basis that evidence disclosed that the effect of casual use of cannabis sometimes lingers for several days after its use and some of the lingering effects raised concerns regarding the user's ability to function in a safety challenged environment. The purpose of the Respondent's policy was to reduce workplace accidents by prohibiting workplace impairment and there was a clear connection between policy and its purpose. The policy was directed at actual effects suffered by recreational cannabis users, not perceived effects suffered by cannabis addicts. The employer's policy perceived that persons who use drugs at all were a safety risk in an already dangerous workplace. The Court of Appeal did not

consider the question of accommodation or whether the Respondent's policy constituted *BFOR* since there was no breach and therefore nothing to accommodate.

Employment/Physical Disability/Mandatory Drug Test. *Stewart v Elk Valley Coal Corporation*, 2015 ABCA 225, aff'g in part *Bish v Elk Valley Coal Corporation*, 2013 ABQB 756, aff'g in part *Bish v Elk Valley Coal Corporation*, 2012 AHRC 7, affirmed by SCC *Stewart v Elk Valley Coal Corp.*, 2017 SCC 30. Stewart was terminated when he tested positive for cocaine after a work-related accident. The union argued that Stewart was disabled by an addiction to cocaine and was thus fired on account of his disability. The Tribunal found that the evidence supported the conclusion that Stewart was not fired because of his disability (drug addiction) but because of his failure to stop using drugs, failure to stop being impaired in the workplace and failure to disclose his drug use. Further, the termination did not perpetuate historical stereotypes or disadvantages against employees with addictions. In the alternative, the Tribunal held that the termination was justified due to the need for strict deterrence in safety-sensitive environments. The employer's policy ("Policy") that provided for rehabilitation of employees with a dependency or addiction by seeking rehabilitation before a work-related accident without fear of discipline or termination demonstrated an attempt to accommodate to the point of undue hardship. The Court of Queen's Bench agreed that no *prima facie* discrimination existed but disagreed that Stewart was reasonably accommodated. This is because there was an absence of evidence that Stewart knew, on or before the date of the accident in question, that he needed treatment under the Policy. Bish appealed to the ABCA. Elk Valley cross-appealed. The Majority dismissed the appeal by Bish, agreeing with the Tribunal and the ABQB that the termination of employment did not involve discrimination on the basis of disability (at para 5) and finding that the Tribunal applied the correct test for *prima facie* discrimination even though it was decided after the SCC decision in ***Moore* (*supra*)**. However, the Majority allowed the cross-appeal by Elk Valley. On the point of accommodating to undue hardship, the Majority found that Michalyshyn J "erred in either applying correctness or in finding unreasonableness as he did" (para 90). In dissent, O'Ferrall JA found that "both the Tribunal and the reviewing judge erred in finding that a *prima facie* case of discrimination had not been made out. Furthermore, I find the Tribunal erred in finding the employer had accommodated the complainant to the point of undue hardship" (para 92). Decision upheld on appeal to the SCC ***Stewart v Elk Valley Coal Corp.*, 2017 SCC 30.**

Employment/Physical Disability/Mandatory Drug Test. *Grey v Albian Sands*

***Energy Inc*, 2007 ABQB 466, 424 AR 200, aff'g *Grey v Tracer Field Services Canada Ltd*, 2006 AHRC 11.** The Complainant worked as an electrician for Tracer, which was an electrical subcontractor for Albian Sands Energy Inc. After refusing to submit to a workplace site access drug and alcohol test to Albian, the Complainant was dismissed from his position and alleged it was because he had not submitted to the drug test. The Respondent argued that the Complainant was one of 52 workers laid off due to work shortage, and that some of the workers who had submitted to the drug test were also among those laid off.

The Panel held that no *prima facie* case of discrimination was established in part because there was no causal link between the Complainant's termination and the impugned drug-testing policy. As such, the Panel ruled that it was unnecessary to decide whether or not the drug and alcohol testing policy violated s 7(1) of the *HRCMA* and whether it was a *BFOR.*

Employment/Physical Disability/Mandatory Drug Test. *Maude v NOV Enerflow ULC,* 2019 AHRC 54. The Complainant tested non-negative during a random drug test. In order to return to work, he was required to attend a residential treatment program after an assessment by a Substance Abuse Professional. The Complainant did not believe that he had a substance use problem but applied to the treatment program so he could go back to work. The Complainant was rejected from the treatment program due to his denial of having a problem with substance abuse. As well, the cost of the program was prohibitive to the Complainant's attendance. The Respondent company refused the Complainant's request to attend an outpatient program instead. This resulted in a 16-month period where the Complainant was not able to work for the Respondent. The Tribunal held that whether or not the Complainant believed he had a disability regarding substance abuse, the Respondent's refusal to accept other forms of treatment meant that he was not accommodated to the point of undue hardship. They stated that if this was considered reasonable accommodation, it "would be equivalent to the notion that an employer is entitled to select and insist on one of many forms of treatment, irrespective of whether such treatment is actually available." The Complainant was awarded damages for injury to dignity and self-respect as well as lost wages.

Employment/Physical Disability/Family Status. *Canada v Bodnar*, 2017 FCA 171. The Applicant sought judicial review to set aside a decision from the Public Service Labour Relations and Employment Board (PSLREB). The Board had allowed the

Respondents' grievances and found that the employer had discriminated through the application of its National Attendance Management Policy (NAMP) by including absences due to a disability. The application amounted to discrimination based on family status and disability and violated the non-discrimination article in the collective agreement between the employer and the Respondents' agent.

The judge believed that the Board erred in reaching its conclusions, and the Court decided that it would grant the application with costs and set aside the decision of the Board and remit the Respondents' grievances to a differently-constituted panel of the Board for re-determination in accordance with its reasons. The relevant issues were: 1) whether the Board erred in concluding that a *prima facie* case of discrimination arose merely from the inclusion of certain types of absences in the NAMP's calculations, and 2) whether Board conflated family-related leave under the collective agreement with the sorts of leave employees were entitled to under the CHRA due to their family status responsibilities. The Court set aside the Board's decision because it determined that the Board had ignored one of the essential pre-requisites for a *prima facie* case of discrimination, namely, proof of adverse impact by a claimant, and that the Board committed a reviewable error in conflating the types of leave.

Employment/Physical Disability. see also: ***Susan L'Archeveque v City of Calgary*, 43 CHRR D/219 (May 17, 2002; Alta HRP), aff'd in part 2003 ABQB 220, 337 AR 381; *Cross v International Paper Canada Inc*, 2003 AHRC 6; *Gladu v Suncor Energy Inc*, 2003 AHRC 8; *Baum v City of Calgary*, 2007 AHRC 4; *Jodoin v City of Calgary*, 2008 AHRC 13; *Horvath v Rocky View School Division No 41*, 2016 AHRC 19; *Devine v IS2 Staffing Services Inc*, 2016 AHRC 16; *Johnsen v Pro Line Property Maintenance Ltd*, 2017 AHRC 18; *Custer v Bow Valley Ford Ltd*, 2017 AHRC 21; *Brothers v Shippers Supply Inc*, 2018 AHRC 2; *McLaughlan v Lakeland College*, 2018 AHRC 4; *Smylie v Sani-Tech Mechanical Ltd*, 2018 AHRC 6; *Carswell v Rocky View County*, 2018 AHRC 8; *Sutherland v Apollo Sunrooms Inc,* 2018 AHRC 13; *Bourassa v Trican Well Service Ltd,* 2019 AHRC 13; *Mangua v Alberta Union of Provincial Employees (AUPE) Local 048 Chapter 015,* 2019 AHRC 14; *Balfour v ADT Security Services Canada Inc,* 2019 AHRC 16; *Kada v Calgary V GP Inc,* 2019 AHRC 20; *Dhaliwal v Loblaws Inc o/a Real Canadian Superstore,* 2019 AHRC 23; *Holmstrom v Alberta Justice and Solicitor General,* 2019 AHRC 21; *Everitt v Homewood Health Inc,* 2019 AHRC 36; *Dahl v Cosmos Community Support Services Ltd,* 2019 AHRC 42; *Randall v Sobeys (Stettler),* 2019 AHRC 50; *Hurst v Barnwell of Canada,* 2019 AHRC 59;**

***Cunnison v City of Red Deer,* 2019 AHRC 65; *Thesen v Northern Gateway Public School Division,* 2020 AHRC 2; *Fermaniuk v City of Edmonton and CannAmm Occupational and Bruce Demers,* 2020 AHRC 3; *McIntaggart v Construction & General Worker's Union, Local 92 and Homewood Health Inc,* 2020 AHRC 4; *Daniels v Coca-Cola Refreshments Canada Company,* 2020 AHRC 20; *Lang v Nation-Wide Home Services Corp,* 2020 AHRC 34; *Mysko v Red Deer County,* 2020 AHRC 53; *Connolly v SNC-Lavalin Operations & Maintenance Inc,* 2020 AHRC 67; *Krause v Thompson Bros (Constr) Ltd,* 2020 AHRC 75; *Greidanus v Inter Pipeline Limited,* 2023 AHRC 31.**

EMPLOYMENT PRACTICES: MENTAL DISABILITY

Employment/Mental Disability. *Battlefords and District Co-operative Ltd v Gibbs*, [1996] 3 SCR 566, 140 DLR (4th) 1. The Complainant became mentally disabled and was no longer able to perform her duties at work. Once her sick leave days were used up, she was paid benefits under an insurance policy offered by her employer to all employees. The policy provided a replacement income to employees who were unable to work; however, if the disability was a mental illness, a clause in the policy provided that the replacement income would terminate after two years unless the person remained in a mental institution. A Saskatchewan Board of Inquiry held the policy to be discriminatory and referred the matter back to the employer for remedial action. The Court of Queen's Bench and the Saskatchewan Court of Appeal upheld the ruling. The Supreme Court of Canada held that a contract that provides for distinctions on prohibited grounds is contrary to the objects of human rights legislation. A distinction between insurance benefits offered to those who cannot work because of a physical disability over those with a mental disability was found to be discriminatory.

Employment/Mental Disability. *Telecommunications Workers Union v Telus Communications Inc*, 2014 ABCA 154. The Grievor had Asperger's Syndrome. He applied for a position at a Telus call centre and was hired on a probationary basis. However, his customer satisfaction scores did not meet Telus' standards and he was terminated. The Arbitrator found that no *prima facie* discrimination was proven. The ABQB upheld the Arbitrator's decision (**2013 ABQB 298**). The ABCA upheld the ABQB decision on the outcome but found that "the judicial review judge was wrong in determining that the Arbitrator applied the correct test for demonstrating a *prima facie* case" of discrimination (para 30). The test applied by the Arbitrator required that the Grievor demonstrate that Telus had knowledge of his disability. As the ABCA held at para 29, demonstrated knowledge (intention) is not a requirement for adverse effect

discrimination:

> [29] Demonstrating an employer's knowledge of an employee's disability is unnecessary, in a case alleging adverse-effect discrimination. By definition, adverse-effect discrimination is the uniform application of a seemingly neutral employment policy to all employees, regardless of whether some employees have protected characteristics. The impugned policy applies to a disabled employee whether or not the employer knows about the disability. The basic three-part test is sufficient to accommodate cases where an employer's knowledge is relevant to a *prima facie* case, and thus "knowledge" should not be added as a fourth element of the *prima facie* case test.

Employment/Mental Disability. *Martin v Sphere Environmental Ltd.*, 2017 AHRC 11. Complainant had gone on medical leave and alleged that she was going to be cleared to return to work, but that the Respondent employer informed her that there was not enough work. Complainant alleged that her employer discriminated against her on the grounds of mental disability after the Respondent employer hired a new person to do her job while she was on medical leave. The Commission found that the Respondent had contravened section 7 of the *Alberta Human Rights Act* and awarded the Complainant $18,000 in general damages for injury to dignity plus lost wages and interest.

Employment/Mental Disability. *Calgary (City) Electric System v Weitmann*, 2001 ABQB 181, 292 AR 295, rev'g *Calgary (City) Electric System v Weitmann,* 2000 AHRC 1, 38 CHRR D/71. The Complainant suffered from a mental disability as defined in the *HRCMA.* The Complainant asked the City to rescind his decision to accept an early departure offer. The question arose as to whether the Complainant's mental disability affected his original decision to take a buy-out from his employer. The Panel found that the City's failure to accommodate the employee was discrimination based on mental disability and ordered his reinstatement. The Court of Queen's Bench held that an employer's duty to accommodate does not arise absent a complaint demonstrating *prima facie* case of discrimination and that the Panel failed to illustrate the how City's conduct in offering voluntary departure program to all employees and accepting the Complainant's application was discriminatory. If the City had found that the Complainant was incapable of accepting the package or required the employee to provide medical evidence attesting to his mental competence, then the City's conduct would have been *prima facie* discriminatory. However, the City did not exercise control over the employee's choice and did not compel the employee to accept the voluntary

departure offer.

Employment/Mental Disability/Duty to Accommodate. ***Salazar v JSL Investments Corporation,*** **2020 AHRC 8.** The Complainant alleged that her employment was terminated on the basis of her mental disability and that the Respondent had failed to fulfil its duty to accommodate. After a major depressive episode which caused her to miss work, the Complainant requested that she return to work 2 days a week, instead of her usual full-time hours. The Respondent replied that they were unable to keep her on for only 2 days a week as they had already hired a full-time position to cover her hours. She was subsequently terminated. The Tribunal established that this was a *prima facie* case of discrimination. They went on to describe that there is both a procedural and substantive aspect in the duty to accommodate. Part of the procedural aspect is that the employer must communicate with the employee to better understand the accommodation request. In this case, the Respondent's failure to inquire for more information regarding the Complainant's accommodation request meant that they did not fulfil the procedural aspect of the duty to accommodate. The Respondent also failed to fulfil the substantive aspect of the duty to accommodate, as many of the options they had considered to accommodate the Complainant would not have constituted undue hardship.

Employment/Mental Disability. ***Redhead v Pillar Resource Services Inc,*** **2018 AHRC 7.** Redhead was working for Pillar Resources. At the time, he was suffering from depression and alcoholism. He had missed several days of work without first informing his employer that he would not be there, which was required by the company's policy. He was later terminated. Redhead claimed that the termination was due to his mental disability of depression and alcoholism. The Commission found that a *prima facie* case of discrimination was not made as Redhead was aware of Pillar's policy that he had to inform them of absences, and he failed to do so. His mental disability was not a factor in his failure to infom Pillar, and so the complaint was dismissed.

Employment/Mental Disability. ***Pratt v University of Alberta,*** **2019 AHRC 24.** Pratt worked at the University of Alberta Book and Record Depository as an assistant. Shortly after beginning this position, she learned that her brother had died by suicide. After this, the University began to have concerns about Pratt's performance, to which she responded that due to the loss of her brother, she was only able to do tasks that did not require sustained concentration. Her employment was terminated about 3 months later. Pratt alleged that she was discriminated against on the basis of mental

disability. The University denied such discrimination, claimed that Pratt was terminated for poor performance, and that they had no knowledge of her mental disability. The Tribunal held that Pratt had established a *prima facie* case of discrimination on the basis of mental disability. They held that the University made no effort to accommodate Pratt, and that they had a duty to make an inquiry into her capability to work. After Pratt asked to not do any tasks that required sustained concentration, the University should have asked Pratt to provide evidence from a healthcare professional regarding her mental disability in order to properly accommodate her. Pratt was awarded damages for injury to dignity, self respect and pain and suffering, lost wages, and was ordered to be reinstated to an equivalent position at the University.

Employment/Physical and Mental Disability. *Collins v Elizabeth Métis Settlement*, 2005 ABQB 225, [2005] AWLD 1661. The Complainant was employed as an addictions counselor by the Respondent. When the Complainant openly criticized the Respondent's lack of response to the addiction and social problems on the settlement at a public meeting, she was suspended for 5 days and her return was contingent upon submitting medical tests and obtaining psychological counseling. The Complainant refused to comply with the conditions and the Complainant's employment was subsequently terminated. The Panel found that the Complainant was discriminated against but concluded that the Complainant's employment was terminated because of absenteeism and not as a result of the acts that the Panel had found to be discriminatory.

The Director appealed the decision on the basis that the evidence demonstrated that the reason for termination was discrimination. The Respondent did not cross appeal, therefore, the issue on appeal was whether the conduct of the Respondent was the cause of the Complainant's termination and not whether the Respondent's conduct amounted to discrimination. The Court of Queen's Bench held that the Panel erred in their decision not to award the Complainant damages for loss of wages In the case of constructive dismissal, an employee is entitled to a reasonable time in which to consider whether to treat the employment contract as being at an end when faced with a fundamental breach of the employment contract **(*Farquhar v Butler Brothers Supplies Ltd*, [1988] 3 WWR 347, 23 BCLR (2d) 89 (BCCA)**. The Complainant was constructively dismissed due to the unreasonable conditions that were imposed on her and by the threats of termination for failure to comply and she was not given adequate time to reply. Further, the Respondent failed to clarify whether or not the conditions

were required for her return and they did not allow the Complainant to appropriately address her concerns, which made it difficult for her to return to her position after the confusion and tense relationship created by the Respondent. The Complainant was awarded $14,500.00 for loss of wages.

Employment/Physical and Mental Disability. *Christopher v Chinook's Edge School Division*, 2004 AHRC 6. The Complainant was employed by the Respondent as a teacher at the River Valley School in Sundre. The Complainant took sick leave because of back problems and fibromyalgia but agreed to finish the year-end grading and marking of her classes. During her leave, the Complainant stated that the Respondent harassed her, which exacerbated her condition, attempted to bring criminal harassment charges against her, threatened to conduct performance evaluations, initiated her transfer to another school and forced her to complete various teaching tasks. As a result of this, the Complainant filed professional misconduct complaints against the Principal and Vice Principal at her school. The Panel dismissed the complaint because the Complainant was not able to establish that she was *prima facie* discriminated against in the area of employment practices on the basis of physical and mental disability. The Panel found that the Complainant was not treated differently because of her medical disability since the Respondent's actions were pursuant to their statutory obligations The Complainant volunteered to finish her grading tasks for the school year, she submitted contradictory medical information, contact from the school, and the request for a transfer was appropriate in the circumstances. The Panel held that the Respondent had concerns about the Complainant's job performance arising from parental concerns prior to the events leading up to the complaint. In addition, the Panel found that the difficulties that arose between the Complainant and Respondent were based on personal issues, not on discrimination and human rights.

Employment/Physical and Mental Disability. *Kovacevic v City of Red Deer,* 2018 AHRC 1. The Applicant alleges discrimination based on the grounds of physical disability, mental disability and religious beliefs contrary to section 7 of the Alberta Human Rights Act. The Applicant argues that she was discriminated against by her employer, the City of Red Deer, on the basis that the city failed to pay her medical benefits and terminated her despite her being on medical leave with valid medical reasons. Further, she alleged that the City discriminated against her on the basis of religious reasons when it denied her permission to visit her father's grave in Serbia. The Commission found that there was a *prima facie* case of discrimination based on mental disability. The Commission, however, determined that the Applicant did not

submit enough evidence to warrant a finding of discrimination based on religious beliefs in part because the Respondent did not know about the religious nature of the funeral. The Applicant had merely asked for permission for the funeral due to a "tradition." The Commission also found that the Respondent had not fulfilled its duty to accommodate the Applicant to the point of undue hardship. **For Settlement Agreement** see also ***Kovacevic v City of Red Deer,* 2016 AHRC 18;** and ***Kovacevic v City of Red Deer,* 2017 AHRC 2.**

Employment/Physical and Mental Disability. ***Gregg v CanWel Building Materials Ltd.,* 2022 AHRC 28.** The Complainant disclosed to his employer that he had an alcohol addiction. He admitted that he missed work because he was drinking. However, the employer and the Complainant agreed that the latter did not go to work under the influence of alcohol during his employment. The Complainant was then terminated allegedly for his absenteeism. The Tribunal held that although the Complainant failed to produce any medical or documentary evidence to support his disability, the Complainant's consistent history with alcoholism and his supervisor's belief that he was an alcoholic put on notice of a potential disability which the employer has the duty to inquire. It awarded general damages, lost wages and judgment interest.

Employment/Mental Disability. ***Kvaska v Gateway Motors (Edmonton) Ltd,* 2020 AHRC 94.** The Complainant alleged that he was terminated from his employment on the basis of mental and physical disability. He alleged that he had an addiction to alcohol and was fired after an incident where he was intoxicated at work. In determining if the Complainant had a disability, the Tribunal applied law from the British Columbia Court of Appeal in ***Misisco v Small,* 2001 BCCA 576 at para 2,** stating that medical evidence is not necessary to establish a disability, and that the evidence of a whole must be considered in making this determination. In this case, it was established that the Complainant had a disability. He had been drinking 26-40 ounces of alcohol a day, other employees had observed that he was intoxicated at work, and other evidence suggested he had a disability by way of alcohol addiction.

Employment/Mental Disability. see also: ***Fuernkranz v Smurfit-MBI*, 2004 AHRC 11; *Warren v West Canadian Industries Group*, 2007 AHRC 3, 60 CHRR D/473; *Cooper v 133668899 Ltd (o/a Best Western Strathmore Inn)*, 2015 AHRC 6; *Olsen v Hi-Tech Assembly Systems Inc*, 2015 AHRC 10; *Pelletier v Timberwolf Health Products (1979) Ltd*, 2017 AHRC 1; *Lima v Her Majesty the Queen in Right of Alberta,* 2019 AHRC 15; *Legada v AMA Agencies Ltd o/a AMA Insurance Agency,***

2019 AHRC 43; *Kebede v SGS Canada Inc*, 2019 AHRC 45; *Allen v The City of Calgary,* 2019 AHRC 49; *Wood v Calgary Co-operative Association Limited,* 2019 AHRC 61; *Poohkay v City of Edmonton,* 2020 AHRC 14; *Peake v Prairie Erectors International Inc,* 2020 AHRC 17; *Cryderman v Time to Play ECS (and individual respondents),* 2020 AHRC 26; *Euchner v EZ Motors Ltd.,* 2022 AHRC 111.

EMPLOYMENT PRACTICES: AGE

Employment/Age. *Dickason v University of Alberta*, [1992] 2 SCR 1103, (*sub nom University of Alberta v Alberta (Human Rights Commission*)), 4 Alta LR (3d) 193 [cited to SCR]. Professor Dickason filed a complaint of discrimination on the basis that she was forced to retire at age 65 under a mandatory retirement clause in the collective agreement between the University and its academic staff. The Panel found in the Complainant's favour and ordered her reinstatement. The Court of Queen's Bench dismissed the University's appeal. The Court of Appeal relied upon ***McKinney v University of Guelph*, [1990] 3 SCR 229, 76 DLR (4th) 545 [*McKinney*] and *R v Oakes*, [1986] 1 SCR 103, 53 OR (2d) 719 [*Oakes*]** and concluded that the University's retirement policy was *prima facie* discriminatory but that it was reasonable and justifiable pursuant to s 11.1 of the *IRPA* [*AHRA*, s 11] in that the mandatory retirement policy was rationally connected to the objectives of protecting academic tenure and ensuring faculty renewal by the infusion of new faculty. The majority of the Supreme Court of Canada held that the Court of Appeal's reliance on *McKinney* was an error and found that the fact that s 1 of the *Charter* and s 11.1 of the *IRPA* were remarkably similar and the fact that they fulfill comparable roles should be taken into account when interpreting them. However, the SCC cautioned that "there is a crucial difference between human rights legislation and constitutional rights" (at 1122) and that "the inquiry into what is reasonable and justifiable within the meaning of s 11.1 should not be rigidly constrained by the formal categories of set out in the *Oakes* test" (at 1124). The Majority also noted that "[h]uman rights legislation is aimed at regulating the actions of private individuals. The *Charter's* goal is to regulate and, on occasion, to constrain actions of the state" (at 1122).

The SCC found that the policy was rationally connected to its objectives, that it impaired the right as little as possible and was proportional in its effects. Cory J noted at 1133 that "[t]he terms of the collective agreement pertaining to compulsory retirement …. represent a carefully considered agreement that was negotiated with the best interests of all members of the faculty association in mind." Cory J continued at 1138, writing that:

> No obvious alternative policy exists which would achieve the same results without restricting the individual rights of faculty members. The fact that the practice is the result of a fair and freely negotiated collective agreement supports the conclusion that the practice was reasonable and justifiable within the meaning of s. 11.1.

Employment/Age. *Brawn v Profile Seismic Ltd*, 2009 AHRC 3. The Complainant, who was 68 years old, alleged she was fired from her employment after nine years because of her age and her gender. The replacement supervisor made derogatory and abusive age-based and gender-based comments referring to the Complainant and he wrote an offensive memorandum, which suggested the Respondent's workplace, was a day care for senior citizens. The Complainant and director relied on ***Re Gadowsky* (1980), 26 AR 523, (*sub nom Gadowsky v Two Hills School Committee No 21*) 1 CHRR D/184 (QB)** for the proposition that it is not necessary that discriminatory considerations be the sole reason for the impugned actions in order for there to be a contravention of the *Act* (para 71). The Respondent argued the Complainant's employment was terminated because of the Complainant's lack of cooperation in the workplace regarding the introduction of new technology and because of the Complainant's poor performance. The Respondent also argued that any allegedly derogatory comments made regarding the Complainant were made in private conversations and were not intended to be heard by the Complainant. The evidence suggested that the Complainant was uncooperative in the workplace and her behaviour undermined the authority of her supervisor and impeded the Respondent's attempts to introduce new technology into the workplace. The Panel found the Director and Complainant gave contradictory or conflicting evidence which affected the Complainant's credibility. While the Complainant's supervisor's conduct and comments were poorly judged and unfortunate, there was insufficient evidence to show the Complainant's employment was terminated because of her gender or age. The Panel held that the Director and Complainant failed to establish a *prima facie* case of discrimination.

Employment/Age. *Bugis v University Hospitals* (1990), 106 AR 224, 74 Alta LR (2d) 60 (CA), aff'g (1989), 95 AR 45, 65 Alta LR (2d) 274 (QB). The hospital's medical staff by-law provided that doctors were to be transferred from active staff to consulting staff when they reached 65. Dr. Bugis was granted some extensions but was eventually transferred to consulting staff when he was 67. Six months later, he asked to be returned to active staff, but his request was denied. He filed a complaint against the hospital, alleging age discrimination in employment. The Court of Queen's Bench held that the relationship between a doctor with admitting privileges and the hospital

is not one of employment, as the doctor executes work for his or her patients and not for the hospital. Secondly, Dr. Bugis had not filed his complaint within the six-month deadline, as the six-month period was measured from the date he was transferred to consulting staff. The Court of Appeal upheld the lower Court's finding that the arrangement in question did not amount to the employment of the doctor by the hospital within the meaning of the *IRPA.*

Employment/Age. *Re Gadowsky* (1980), 26 AR 523, (*sub nom Gadowsky v Two Hills School Committee No 21*) 1 CHRR D/184 (QB). Mrs. Gadowsky complained that she was discriminated against on the basis of age after the school committee, faced with declining enrollment, was required to cut one teaching position from the elementary school. The school committee gave the Complainant the choice of teaching at a junior high level or retiring early since she was the teacher closest to retirement age. The Panel found that the Complainant was discriminated against on the basis of age. The Court of Queen's Bench upheld the Board's decision stating that the teacher's age was either the main reason for her forced retirement or was incidental to it. The actions of the school committee offended her dignity and equality and were discriminatory. The Complainant was awarded wages lost during two years between her forced retirement, and the date of normal retirement, less income from substitute teaching.

Employment/Age. *Gerlitz v Edmonton (City of)* (1979), 11 Alta LR (2d) 176, 1979 CanLII 1100 (QB). Mandatory retirement of employees in accordance with the provisions of a collective agreement and a pension plan was held not to constitute discrimination on the basis of age. The mandatory retirement was a contravention of s 6(1) of the *IRPA* [*AHRA*, s 7(1)] but was overcome by s 6(2) or s 6(3) [*AHRA*, s 7(2) or s 7(3)].

Employment/Age. See also: ***Vantage Contracting Inc v Marcil*, 2004 ABQB 247, 370 AR 191; *Cowling v Alberta Employment and Immigration*, 2012 AHRC 12; *SGEU v Saskatchewan (Environment)*, 2018 SKCA 48; *Corbett v Her Majesty the Queen in Right of Alberta,* 2019 AHRC 22; *O'Neill v Mount Royal University*, 2020 AHRC 6; *Aziz v Calgary Firefighters Association,* 2020 AHRC 40; *Aziz v Calgary Firefighters Association,* 2020 AHRC 66; *Hansen v Lorneville Mechanical Contractors Ltd.,* 2022 AHRC 31.**

EMPLOYMENT PRACTICES: PLACE OF ORIGIN

Employment/Place of Origin. ***Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc (Bombardier Aerospace Training Center)*****, 2015 SCC 39, [2015] 2 SCR 789.** Latif, a Canadian pilot born in Pakistan, was denied permission to train at the Bombardier facility in Texas because the US Department of Justice denied him security clearance. Bombardier also would not carry out the training at its Montreal facility. Latif went to the Quebec Human Rights Tribunal. Bombardier was to pay damages to Latif and cease applying US security standards. The Quebec Court of Appeal overturned the decision, finding that "because Bombardier's decision had been based solely on the decision of the U.S. authorities, the Tribunal could not find that Bombardier had discriminated against Mr. Latif without proof that the decision in question was itself based on a ground that is prohibited under the [Quebec] *Charter*" (SCC para 27). The SCC found at para 98 that:

> In our opinion, the evidence available to the Tribunal -- indeed the absence of evidence -- was such that it could not reasonably hold that there was a connection between Mr. Latif's ethnic or national origin and the decision of the U.S. authorities, and therefore Bombardier's decision to deny Mr. Latif's training request. As a result, it was not open to the Tribunal to conclude that Bombardier's decision constituted *prima facie* discrimination under the *Charter*.

Employment/Place of Origin. ***Association of Professional Engineers and Geoscientists of Alberta*** **v** ***Mihaly*****, 2016 ABQB 61.** This is an appeal by the Association of Professional Engineers and Geoscientists of Alberta against a decision of the Alberta Human Rights Tribunal. The complainant alleged that Mihaly was discriminated against in relation to the application to be registered as a professional engineer. The Tribunal found that the engineering association discriminated against him in relation on the grounds of his place of origin by refusing to recognize his education as the equivalent of an engineering degree from an accredited Canadian University and by requiring him to write exams confirming his academic credentials. The Respondent then cross-appealed the Tribunal's refusal to award him damages for loss of income and sought an award of either $1,000,000.00 and registration with the association or $2,000,000.00 if he was not granted membership in the association. The decision of the Tribunal was reversed, and the Court found that there was no need to send the case back to the Tribunal to hear the case further. The Court dismissed the cross-appeal for damages. Application to restore the appeal was dismissed ***Mihaly v Association of Professional Engineers and Geoscientists of Alberta,*** **2017 ABCA 15.**

EMPLOYMENT PRACTICES: MARITAL OR FAMILY STATUS

Employment/Marital Status and Family Status. ***B v Ontario (Human Rights***

***Commission)*, [2002] 3 SCR 403, (*sub nom A v B*) 2002 SCC 66.** The Complainant, A, lodged a complaint that his termination constituted employment discrimination on the grounds of "family status" and "marital status" contrary to s 5(1) of the *Ontario Human Rights Code*, RSO 1990, c H-19 [*AHRA*, s 7(1)]. A worked for a company that was owned by two of his brothers-in-law. Brother-in-law B was the Vice-President and Manager of the company and B fired A the day after A's wife and daughter confronted B with allegations that he sexually abused A's daughter. At that time, A was 56 years old, had worked the company for 26 years and was only four years away from retiring on a full pension. The Board of Inquiry found that A was terminated from his employment solely as a result of the actions of his wife and daughter and held the brother-in-laws and the company liable.

On appeal, the Ontario Divisional Court found that the Board had erred. The Court of Appeal allowed the appeal, set aside the decision of the Divisional Court and remitted the matter to the Board of Inquiry to determine the outstanding issue of remedy. The brothers-in-law appealed and the Supreme Court of Canada dismissed their appeal.

The SCC considered whether the discrimination on the grounds of marital and/or family status are broad enough to encompass a situation where an adverse distinction is drawn based on the particular identity of a Complainant's spouse or family member, or whether the grounds are restricted to distinctions based on the mere fact that the Complainant has a certain type of marital or family status. The SCC held that based on the factual findings of the Board of Inquiry, A was discriminated against on the basis of marital and/or family status. The essence of the dispute centered on whether those grounds are broad enough to encompass a situation where an adverse distinction is drawn based on the *particular identity* of a Complainant's spouse or family member, or whether the grounds are restricted to distinctions based on the mere fact that the Complainant has a certain *type* of marital or family status. The SCC reiterated the importance of recognizing the unique quasi-constitutional nature of human rights legislation and the need to use a liberal and purposive interpretation approach in order to advance the broad policy considerations underlying it (para 44). At para 57 the SCC stated: “it is sufficient that an individual experience differential treatment on the basis of an irrelevant personal characteristic that is enumerated in the grounds provided in the *Code*.” The SCC found that the broad goal of anti-discrimination statutes, namely, preventing the drawing of negative distinctions based on irrelevant personal characteristics, was furthered by embracing the more inclusive interpretation put forward by the Complainant and dismissed the appeal.

Note: "family status" and "marital status" are defined in s 44(1)(f) and (g) of the *AHRA*. The definitions are similar to, but not identical to the definitions in the *Ontario Human Rights Code.*

Employment/Marital Status and Family Status. *Fisher (Marshall) v Devolbren Property Services Inc.,* 2022 AHRC 67. The Complainant was removed from her administrative role and thereafter fired after her husband resigned as one of the shareholders in the company as a result of an argument with another shareholder. The Tribunal cited the case of B v Ontario in upholding that the Complainant has a protected status, which is her marital and family status, and that her relationship with her husband was a factor in the adverse treatment she received. It found that the Complainant was discriminated upon based on her marital and family status and awarded lost wages, general damages and pre-judgment interest.

Employment/Marital Status. *Goossen v Summit Solar Drywall Contractors Inc*, 2016 AHRC 7, aff'd in part *Summit Solar Drywall Contractors Inc v Alberta (Human Rights Commission)* 2017 ABQB 215. The Complainants, Mr. and Mrs. Goossen (husband and wife), were contracted as drywall tapers by the Respondent (considered to be an employment relationship by the Tribunal). In the course of her employment, Mrs. Goossen was injured. Mr. Goossen reported the injury to the Respondent within 24 hours but did not make a claim with the Workers Compensation Board (WCB) for several months, fearing that he would lose his job if a claim was filed. The Respondent failed to file a report of the injury with the WCB within 72 hours and discouraged the Complainants from filing a claim, fearing that their insurance premiums would increase. The Respondent terminated Mr. Goossen's employment soon after Mrs. Goossen's injury to avoid WCB penalties. The Commission held that the Respondent discriminated against Mrs. Goossen on the basis of disability and failed to demonstrate that it accommodated Mrs. Goosen to the point of undue hardship. The Commission held that the Respondent discriminated against Mr. Goossen on the basis of marital status without justification. Although it was not raised in the complaint, the Commission noted that Mr. Goossen's dismissal may have also been discrimination on the basis of disability stemming from the language in *AHRA* s 7(1) ("physical disability … of that person or of any other person"). For additional background see: ***Goossen v Summit Solar Drywall Contractors Inc*, 2014 AHRC 7 (Preliminary Matters Decision)** and ***Goossen v Summit Solar Drywall Contractors Inc*, 2016 AHRC 10 (Decision Regarding Quantification of Lost Wages)**.

Employment/Family Status. ***SMS Equipment Inc v Communications, Energy and Paperworkers Union, Local 707*****, 2015 ABQB 162, aff'g** ***Communications, Energy, and Paperworkers Union, Local 707 (the Union) v SMS Equipment Inc (the Employer), RE: GRIEVANCE OF RENEE CAHILL-SAUNDERS (the "Grievor")*****, 238 LAC (4th) 371, 2013 CanLII 71716 (AB GAA).** The Grievor was a single mother of two children under the age of six, with no ready childcare support from anyone. She was working a non-traditional job (female welder) on a non-traditional shift (nights) in a non-traditional pattern (rotating). She requested to be accommodated to work straight day shifts because of her childcare issues and the health and financial problems she encountered trying to deal with them. The employer refused. The Union brought on her behalf petition of discrimination on ground of family status. The Arbitrator found the employer in breach of s 7(1) of the *AHRA*, specifically discrimination on the ground of family status. The ABQB held that the Arbitrator's findings were reviewable on the reasonableness standard and found that the Arbitrator's first two decisions were reasonable and, alternatively, correct, and that the ruling on occupational requirement was reasonable (no debate over standard of review on this point). For further discussion of childcare being included under "family status" see s 44, below.

Employment/Family Status. ***Rawleigh v Canada Safeway*** **Ltd, 2009 AHRC 6.** The Complainant was employed by the Respondent as a general clerk. The Complainant's wife suffered from loss of eyesight and was eventually deemed legally blind. The Collective Agreement stated that part of the requirements of full-time general clerks was that they rotated through all shifts, which included night shifts. The Complainant requested an exemption from the night shift requirement because of his wife's medical condition and believed his request was granted until the fall of 2004 when it became an issue, at which time the Complainant requested a transfer to another store. The only proposed accommodation put forward by the Respondent was a transfer from the position of a full-time general clerk to that of a full-time cashier since cashiers did not have to work the night crew. This would have resulted in a decrease in pay. The Panel found that the actions of the Respondent directly led to the *prima facie* discrimination against the Complainant. There was *prima facie* discrimination on the basis of family status and Safeway did not accommodate the Complainant to the point of undue hardship.

Employment/Family Status. ***Rennie v Peaches and Cream Skin Care Ltd*****, 2006**

AHRC 13. The Complainant was an esthetician and was terminated from her employment after refusing to work a weekly evening shift following her return from maternity leave. The evidence showed that she was unable to find suitable childcare and her husband was unwilling to assist in providing childcare during the evening shift. The Panel relied on ***British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union (BCGSEU)*****, [1999] 3 SCR 3, 176 DLR (4th) 1 [*Meiorin*]** and found that while a *prima facie* case of discrimination had been made out, the Respondent demonstrated that it was impossible to accommodate the Complainant without imposing undue hardship on the Respondent's business.

Employment and Pension/Family Status. *Fraser v Canada (Attorney General)*, 2017 FC 557, aff'd *Fraser v Canada (Attorney General),* 2018 FCA 223, overturned *Fraser v Canada (Attorney General)*, 2020 SCC 28, The Applicants are retired members of the Royal Canadian Mounted Police [RCMP], and they all allege that the [RCMPSA] discriminates against them on the basis of sex and parental status contrary to subsection 15(1) of the *Canadian Charter of Rights and Freedoms* [The *Charter*]. The Applicants submitted that these acts and regulations failed to provide equality under the law to women with childcare responsibilities since they did not permit RCMP employees participating in job-sharing arrangements – predominantly women with parental status – to contribute to their pensions in the same way as members working full-time or who took Leave Without Pay (LWOP). The Applicants argued that this violation was not justifiable under the *Charter*. The Court disagreed with these arguments. In so holding, the Court applied a two-part test to determine if the RCMPSA infringed upon equality rights: first, whether the RCMPSA established "a distinction based on an enumerated or analogous ground," and second, whether "the distinction create[d] a disadvantage by perpetuating prejudice or" stereotypes. The Court found that the vast majority of the female members of the RCMP who participated in job- sharing or worked part-time were women, and that at least 60% of these members did so for the purpose of meeting childcare responsibilities. However, the Court concluded that the impact on their pension benefits was due to their status as part-time workers and not their sex or parental status. Therefore, the application was denied.

A majority of the Supreme Court of Canada overturned the ruling of the FCA, holding: Adverse impact discrimination occurs when a seemingly neutral law (one not plainly discriminatory on its face) has a disproportionate impact on a protected group. In order

to achieve what the Supreme Court calls true "substantive" equality, adverse impact discrimination must be protected against by the *Charter*. Per Chief Justice Wagner, Abella, Moldaver, Karakatsanis, Martin and Kasirer JJ: Full-time RCMP members who job-share must sacrifice some pension benefits because of a temporary reduction in working hours. This arrangement has a disproportionate impact on women. It is a clear violation of their equality rights under s. 15(1) of the *Charter*.

The distinction made is between RCMP members who work regular hours and go on unpaid leave. These members can obtain full pension credit for those periods of service under the pension plan. However, full-time members who temporarily reduce their hours under a job-sharing agreement are classified as part-time workers and unable to acquire full-time pension credit.

The evidence showed that this had a negative impact on women specifically. The RCMP members who worked reduced hours in the job-sharing program were predominantly women with young children. These statistics were bolstered by evidence about the disadvantages women face as a group in balancing professional and domestic work. There was a clear association between gender and fewer or less stable working hours.

Pension plans have been a long-standing source of disadvantage to women. Historically, these plans have been designed for middle and upper-income full-time employees with long service, who were typically male. Because the RCMP's pension design further perpetuates this source of economic disadvantage for women, there is a breach of s. 15(1) on the basis of sex.

The government had not offered a compelling objective for this differential treatment, and so the s. 1 justification failed. The Court commented that the limitation was in fact entirely detached from the purpose of the job-sharing scheme. It was clearly intended as a substitute for leave without pay for members who could not take a leave due to personal or family circumstances.

The violation of s. 15(1) therefore could not be justified under s. 1. The Court's remedy was to declare there had been a breach of the s. 15(1) rights of full-time RCMP members who temporarily reduced their working hours under a job-sharing agreement, because of the inability of those members to buy back full pension credit for that service.

Employment/Family/Marital Status. See also: ***Yurkowski v MJT Food Service Ltd*, 2001 AHRC 2; *Brown v Canada (Department of National Revenue, Customs and Excise)*, [1993] CHRD No 7, 1993 CanLII 683; *Hoyt v Canadian National Railways*,**

2006 CHRT 33, 57 CHRR D/437; *Johnstone v Canada (Attorney General)*, 2007 FC 36, 306 FTR 271, aff'd 2014 FCA 110; *Canada v Bodnar*, 2017 FCA 171, *Millbrook First Nation v Tabor*, 2016 FC 894, *Landry v Vegreville Autobody (1993) Ltd.*, 2017 AHRC 19; *Mosell Renauer v Community Futures Lesser Slave Lake Region,* 2019 AHRC 19; *Graf v Carpet Supermarket Sales Ltd,* 2019 AHRC 62; *United Nurses of Alberta v Alberta Health Services,* 2021 ABCA 194.

EMPLOYMENT PRACTICES: SEVERANCE AGREEMENT

Employment/Severance Agreements. *Chow v Mobil Oil Canada*, 1999 ABQB 1026.

As part of a severance package from her employer, the Complainant signed a settlement and release and subsequently made a complaint of discrimination to Human Rights Commission. The Panel sought the opinion of the Court of Queen's Bench under s 27 of the *HRCMA* [*AHRA*, s 31] on three questions:

> 1. Whether one can release a current or future complaint for an alleged past act of discrimination under the *HRCMA.*
> Contracting out of human rights legislation is generally prohibited, except in those instances where it would result in greater protection than that which is afforded under the *Act.* This principle was developed largely to protect parties who have unequal bargaining power, which is frequently the situation between employers and employees. However, where a release only relates to past acts of alleged discrimination, and does not seek to limit or suspend prospective rights, the Court found that many of the same considerations do not apply.
> 2. Whether the Human Rights, Citizenship and Multiculturalism Commission has jurisdiction to determine a complaint where a release has been executed, and to determine whether it is a valid and enforceable release; and
> 3. Where there is a valid release the Director has the jurisdiction to dismiss the complaint for lack of merit. However, where the complainant reasonably objects to the validity of a purported release, only a Panel has the jurisdiction to determine the matter. In making its determination a Panel must consider the same factors, which would be considered by a court of competent jurisdiction.
>
> The Court of Queen's Bench outlined seven relevant criteria to determine whether a release is valid and enforceable. These include:
>
> 1) The language of the release as to what is included, explicitly or implicitly;
> 2) Unconscionable conduct
> 3) Undue Influence
> 4) Existence of Independent legal advice
> 5) Duress
> 6) Knowledge of the Party executing the release
> 7) Other considerations: capacity, timing, mutual mistake, forgery, or fraud.

> 4. Whether the Commission has any remaining jurisdiction to determine any other issue, if the release is valid and enforceable?
> The Commission does not have any remaining jurisdiction to determine any other issue if the release is valid and enforceable.

Employment/Severance Agreements. *Quirk v Border Credit Union Limited*, 2000 AHRC 7 The Complainant signed a release of claim in December 1997 and subsequently brought complaint under the *HRCMA* claiming the release was signed under economic distress. The Respondent argued the release was valid and that it barred the Complainant from advancing her claim under the provisions of the *HRCMA*. The Panel relied on ***Chow v Mobil Oil Canada*, 1999 ABQB 1026** for the proposition that only the Panel had jurisdiction to determine whether the severance agreement was valid and enforceable. The Commission was not at liberty to make such a determination.

The Panel referred to ***Stott v Merit Investment Corporation* (1988), 63 OR (2d) 545, 48 DLR (4th) 288 (CA)** and ***Gordon v Roebuck* (1989), 71 OR (2d) 201, 64 DLR (4th) 568 (SC)** and stated that the test for economic distress requires:

> 1) pressure amounting to compulsion of the will of the victim which includes the absence of any practical choice other than of submission to the threat of the other party, proved by protest and by the absence of independent advice; and
> 2) the element of illegitimacy of the pressure exerted.

There was no evidence that the Credit Union did anything to coerce the Complainant into signing the release, nor was there any evidence that any pressure, if exerted, was in any way illegitimate.

Employment/Severance Agreements. See also: ***Don Cooper v Nowsco Well Service Ltd* (September 9, 2000, Alta HRP); *Fred Williams v Core-Mark International Inc* (January 2, 2001, Alta HRP); *John Stratichuk v Opsco Energy Industries Ltd* (January 2, 2001, Alta HRP); *Perviz Wallimohamed v Allianz Canada* (January 2, 2001, Alta HRP); *Denza Poole v Matrick Logistics Services Ltd* (April 2, 2001, Alta HRP); *Lovell v Acklands-Grainger Inc*, 2001 AHRC 3; *Hanlin v M-I Drilling Fluids Canada Inc*, 2001 AHRC 6; *O'Brien v TransAlta Utilities Corporation*, 2001 AHRC 7; *Parveena Singh v Nortel Networks Corporation* (July 23, 2001, Alta HRP); *Lorraine Fuhrman v Alberta Energy and Utilities Board* (August 10, 2001, Alta HRP); *LaCerte v Canadian Enterprise Gas Products Ltd*, 2002 AHRC 9; *England v The Calgary Sun*, 2002 AHRC 10; *Halfyard v Enmax Corporation*, 2004 AHRC 15; *Landsiedel v Pedersen Transportation Ltd*, 2004 AHRC 1; *James Wild v Pason Systems Corp* (August 1, 2005, Alta HRP); *Pryce v IG Machine & Fibers Ltd*, 2006**

AHRC 1; *Plettell v Youville Residence Society of Alberta*, 2006 AHRC 8; *McMow v Coverall Pipeline Construction Ltd*, 2007 AHRC 10; *Rogerson v Burnet Duckworth & Palmer LLP*, 2008 AHRC 12; *Loimand v Syncrude Canada Ltd*, 2009 AHRC 1; *Davidson v HSE Integrated Limited*, 2009 AHRC 2; *Kohut v North American Construction Group Inc*, 2009 AHRC 4; *Grindlay v Calgary Telus Convention Centre*, 2009 AHRC 7; *Redshaw v CCI Thermal Technologies Inc*, 2010 AHRC 2; *Yakimchuk v Northern Alberta Institute of Technology*, 2011 AHRC 2 (Preliminary Decision on Severance Agreement); *Heil v Canada Safeway Limited*, 2011 AHRC 7 (Preliminary Matters Decision); *Marquardt v Strathcona County*, 2014 AHRC 3 (Preliminary Matters Decision); *Stergiou v Apache Canada Ltd*, 2015 AHRC 1 (Preliminary Matters Decision); *Hutton v ARC Business Solutions Inc*, 2015 AHRC 7 (Preliminary Matters Decision); *Kalinowski v Nexen Inc*, 2015 AHRC 12 (Preliminary Matters Decision); *Rosadiuk v Altex Energy Ltd*, 2015 AHRC 13; *Chugg v Brooks Industrial Metals Ltd*, 2015 AHRC 18 (Preliminary Matters Decision); *Quraishi v Calgary Islamic School*, 2016 AHRC 3 (Preliminary Matters Decision); *Sylven v A.B.W. Management Ltd*, 2016 AHRC 8 (Preliminary Matters Decision); and ***Raboud v International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local 720,* 2021 AHRC 90.**

EMPLOYMENT PRACTICES: VICARIOUS LIABILITY

Liability of Employer/Race. *Hayes v Central Hydraulic Manufacturing Co* (January, 1973, Bd of Inq). The Complainant was denied employment on the basis of race and three days later he found another job. The Respondents were ordered to pay lost wages for those three days and for time spent at the hearing of this matter. The Board found that an employer cannot justify discriminatory actions on the ground that other employees are unwilling to work with a person of that race any more than a landlord can refuse to rent an apartment to someone because other tenants threaten to leave. It is not necessary to find that the employer is personally prejudiced.

Liability of Employer/Race. See also: ***Rubin Bobb v Alberta (Solicitor General/Edmonton Remand Centre)*, 2004 AHRC 4, rev'd in part *Bobb v Alberta (Human Rights and Citizenship Commission)*, 2004 ABQB 733, 370 AR 389**.

Liability of Employer/Sexual Harassment. *Robichaud v Canada Treasury Board*, [1987] 2 SCR 84, 40 DLR (4th) 577. An employer can be held responsible for the unauthorized discriminatory acts of its employees, in the course of their employment under the *Canadian Human Rights Act*, whether the employer had actual knowledge of

occurrences of sexual harassment in the workplace or not. An employer who responds quickly and effectively to a complaint by instituting a scheme to remedy and prevent recurrence will not be liable to the same extent, if at all, as an employer who fails to adopt such steps. These matters, however, go to remedial consequences, not liability. This liability flows to the employer as it is the entity that can take effective steps to remedy discriminatory conduct in the workplace. The Respondent in this case failed to act quickly or effectively. However, the Complainant also failed to mitigate the situation, and this was reflected in the damages awarded. A purposive approach must be taken in interpreting the human rights legislation. The purpose of human rights legislation is not to punish the discriminator, but rather to provide relief for the victims of discrimination.

Liability of Employer/Sexual Harassment. See also: ***Janzen v Platy Enterprises Ltd*, [1989] 1 SCR 1252, 59 DLR (4th) 352; *Kathy Lalonde v Hamid, and Al Sultan Restaurant* (March 18, 1997, Alta HRP); *Vanderwell Contractors (1971) Ltd v C(J)*, 2001 CLLC 230-019, 40 CHRR D/505,** (***sub nom Chartrand v Vanderwell Contractors (1971) Ltd*) 2001 AHRC 1, aff'd, 2001 ABQB 512, 294 AR 71; *Malko-Monterrosa v Conseil Scolaire Centre-Nord*, 2014 AHRC 5;** and ***Schofield v AltaSteel Ltd*, 2015 AHRC 15.**

Liability of Employer/Extra-territorial jurisdiction. See also**: *Luchak v Primary Flow Signal Canada Inc. et al.*, 2022 AHRC 101 (*Interim Decision)*.**

EMPLOYMENT PRACTICES: EFFECT OF A COLLECTIVE AGREEMENT

Employment/Collective Agreement. *Parry Sound (District) Social Services Administration Board v OPSEU, Local 324*, 2003 SCC 42, [2003] 2 SCR 157. The substantive rights and obligations of the *Ontario Human Rights Code* are incorporated into each collective agreement over which an arbitrator has jurisdiction. Under a collective agreement, the broad rights of an employer to manage the enterprise and direct the work force are subject not only to the express provisions of the collective agreement, but also to statutory provisions of the *Ontario Human Rights Code* and other employment-related statutes. The absence of an express provision that prohibits the violation of a particular statutory right is insufficient to conclude that a violation of that right does not constitute a violation of the collective agreement. Rather, human rights and other employment-related statutes establish a floor beneath which an employer and union cannot contract.

Employment/Collective Agreement. ***McGill University Health Centre (Montreal General Hospital) v Syndicat des employés de l'Hôpital général de Montréal*****, 2007 SCC 4, [2007] 1 SCR 161.** The right to equality is a fundamental right, and the parties to a collective agreement cannot agree to a level of protection that is lower than the one to which employees are entitled under human rights legislation.

Employment/Collective Agreement. ***Newfoundland Association of Public Employees v Newfoundland (Green Bay Health Care Centre)*****, [1996] 2 SCR 3, 140 NFLD & PEIR 63.** Although the Supreme Court of Canada held that this case did not necessarily involve a "contracting out" issue, it stated that contracting out of human rights legislation is not permitted. The only way that parties can contract out of human rights legislation is if the effect is to raise and further protect the human rights of those affected. The Court held that it was permissible for the parties to contract out of the *bona fide occupational requirement* of the Code – in such a case the employer may agree to refrain from discriminating against women despite the existence of a *bona fide occupational requirement* for a male attendant. Collective agreements must be read in harmony with human rights legislation. Therefore, a "no discrimination" clause must be read in conjunction with the Code, which recognizes bona fide occupational requirements.

Employment/Collective Agreement. ***Central Alberta Dairy Pool v Alberta (Human Rights Commission)*****, [1990] 2 SCR 489, 111 AR 241 [cited to SCR].** Factors relevant in determining undue hardship include "disruption of a collective agreement" (Wilson J at 521).

Employment/Collective Agreement. ***Northern Regional Health Authority v Horrocks*****, 2021 SCC 42,** held that the human rights tribunal did not have jurisdiction over the complaint. It stated that the labour arbitrator has exclusive jurisdiction under the *Labour Relations Act* over disputes that arise, in their essential character, from the application, or alleged violation of the collective agreement. It found that since the essential character of the complaint arises from the employer's exercise of its rights under, or from its alleged violation of, the collective agreement, the dispute is outside the jurisdiction of the human rights tribunal. The SCC explained that concurrent or overlapping jurisdiction may only be applicable where there is a clear legislative intent expressed to that effect, or in some cases, implied from intention of the legislation, or

its legislative history. It clarified that *Weber* does not stand for the proposition that labour arbitrators always have jurisdiction in employer-union disputes as it would depend on the legislation applicable and nature of the dispute.

Employment/Collective Agreement. See also: ***Tolko Industries Limited v Industrial, Wood and Allied Workers of Canada, (Local 1-207)*, 2014 ABCA 236; *Alberta Hospital Association v Parcels* (1992), 129 AR 241, 90 DLR (4th) 703 (QB);** and ***Rawleigh v Canada Safeway Ltd*, 2009 AHRC 6.**

7(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.

***Bona Fide* Collective Agreement and Pension Plan/Age. *Gerlitz v Edmonton (City of)* (1979), 11 Alta LR (2d) 176, 1979 CanLII 1100 (QB).** Mandatory retirement of employees in accordance with the provisions of the collective agreement and pension plan was held not to constitute discrimination on the basis of age. The mandatory retirement was a contravention of s 6(1) of the *IRPA* [*AHRA*, s 7(1)] but was overcome by s 6(2) or s 6(3) of the *IRPA* [*AHRA*, s 7(2) or s 7(3)].

***Bona Fide* Plan/Age. *Potash Corporation of Saskatchewan Inc v Scott*, 2008 SCC 45, [2008] 2 SCR 604 [*Potash*].** The Complainant, Scott, was forced to retire at age 65 pursuant to his employer's pension plan. The Complainant alleged discrimination on the basis of age in the area of employment. The Board, concluded that once a *prima facie* case of age discrimination was made out, the employer must satisfy the three-part test from ***British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union (BCGSEU)*, [1999] 3 SCR 3, 176 DLR (4th) 1 [*Meiorin*]** in order to show that the pension plan was *bona fide.*

After appealing the decision of the lower courts, the reviewing judge and the Court of Appeal agreed that the test under s 3(6)(a) of the *Human Rights Act*, RSNB 1973, c. H-11 [*AHRA*, s 7(2)] was different from the test under s 3(5) [*AHRA*, s 7(3)]. The reviewing court stated that the appropriate test to pension plans was the test set out in ***Zurich Insurance Company v Ontario (Human Rights Commission)*, [1992] 2 SCR 321, 9 OR (3d) 224**. The SCC in ***Potash*** quoted from the Reasons of Robertson JA (**2006 NBCA 74**, para 80) at para 10 writing that:

> The applicable test was, instead, the one stated in the legislation: the *bona fides* of the plan. Concluding that this was a test with both a subjective *and* objective component, Robertson J.A. explained:
>
> > It is possible to inject an objective component into the bona fides test without reading in a reasonableness test. It is not simply a question of whether an employer honestly believes that . . . the plan was not adopted for purposes of defeating protected rights. That belief has to be measured against an objective standard in the sense that the belief is reasonable in the circumstances of a particular case. For example, if the employer's pension plan could not be registered under the *Pensions Act* of New Brunswick, the objective component of the bona fides test might be difficult to satisfy. But this is a far cry from reading into s. 3(6)(a) of the *Human Rights Act* a reasonableness test as formulated in *Zurich Insurance*. [para. 80]

The Supreme Court of Canada upheld the Court of Appeal decision. The fact that the statutes treat pension plans differently from *bona fide* occupational requirements was confirmation that the provisions were intended to perform different protective functions and were subject to different analytic frameworks. The SCC held that "for a pension plan to be found to be '*bona fide*' within the meaning of s 3(6)(a), it must be a legitimate plan, adopted in good faith and not for the purpose of defeating protected rights" (para 41).

***Bona Fide* Plan/Age. *Younger v Gulf Canada Resources Ltd*, 10 CHRR D/6114 (November 9, 1988; Alta Bd of Inq).** The Complainants took early retirement, choosing to receive discounted pensions immediately rather than defer receipt of full pensions until they reached the age of 60. The pensions were discounted approximately five percent for each year of difference between their retirement ages and the age of 60. The Complainants argued that these age discounts were excessive and discriminatory. The Board disagreed, holding that age-discounting pension plans for early retirees is not discriminatory *per se*, since it ensures equality of pension benefits over time between early and normal retirees. Further, the plan was approved and registered by neutral experts under Alberta's *Employment Pension Plans Act*. Even if this was age discrimination, it was saved under s 7(2) as necessary for the operation of a *bona fide* pension plan. To be *bona fide* a pension plan must be formulated in good faith and be objectively reasonable in its terms. This plan was *bona fide*, particularly since it complied with Alberta pension plan laws. The Board stated that discriminatory terms and conditions in a *bona fide* pension plan were only valid if they were necessary

to the plan's operation. While mandatory retirement provisions might be invalid because they are not essential to a plan's operation, early retirement age-discounting provisions, such as Gulf Canada's provisions, were valid because they were essential to the plan's survival and operation.

***Bona Fide* Plan/Age: *Rein v Alberta (Human Rights Commission)*, 2016 ABQB 386**
This case centered on an appeal of a decision by the Commissioner of the Alberta Human Rights Commission to dismiss the complaint of a unionized employee that she had lost her health benefits as a result of age discrimination. The Applicant is making the application under s 7(1) of the *AHRA* as it relates to age discrimination. Under s 22(1) the Director may dismiss the complaint if they feel there is no reasonable basis in evidence, but the Complainant may request that the Chief Commissioner review the Director's decision under ss 22(1) and 26(1) which limits this process to 30 days of appeal. The standard of review of such decisions by the Court is reasonableness.

At issue was whether the Chief Commissioner's decision was reasonable under the circumstances. The Applicant argued that the Chief Commissioner erred in determining what evidence she should rely upon to determine that the plan was *bona fide*, and erred in interpretation of case law. The Applicant claimed that documentation supported that it was not *bona fide*, and that the certified record does not disclose any information or documentation that could have been relied upon to reach the conclusion that the plan was *bona fide* and falls within s 7(2) of the Act. The Court concluded that the Chief Commissioner's decision was reasonable as a broader interpretation of *bona fides* is required, and this was within the range of acceptable outcomes having regard to the facts and the law. Therefore, the appeal was dismissed.

***Bona Fide* Plan/Age. *International Brotherhood of Electrical Workers Local 1007 v Epcor Utilities Inc*, 2017 ABCA 314.** This case was centered on an appeal by the Union of the decision of an arbitration panel that the expiry of a long-term disability plan when workers reached pensionable age was discriminatory based on age but saved under the exception in section 7(2). The issue in this case is whether the long-term disability insurance plan purchased by employees falls within the listed exception for a *bona fide* insurance plan. The insurance policy must be a *bona fide* policy honestly adopted as a legitimate plan, and not selected for the purpose of defeating the rights protected under the Act. This is objectively determined based on the policy as a whole. The present formula is that the benefits stop at the earlier of age 65 or the entitlement to a full pension.

The possibility of a more generous benefits plan does not mean that the existing one is not *bona fide* as this would disqualify all but the most generous possible plan. It is not required that actuarial evidence be used to established *bona fides* of every insurance plan. This plan is designed to prevent interruption of employment income prior to retirement. The transition from long-term disability to pension income at a particular point in time is analogous to the more usual transition from employment income to pension income, usually around age 65. As such, there is nothing questionable or objectionable in this transition. The Court found that the Board's decision that the Sun Life disability insurance policy complied with the requirements of the AHRA was correct. The appeal was dismissed.

***Bona Fide* Pension Plan/Age.** See also: ***Aziz v Calgary Firefighters Association,* 2020 AHRC 66.**

7(3) Subsection (1) does not apply with respect to a refusal, limitation, specification or preference based on a *bona fide* occupational requirement.

RSA 2000 cH-14 s 7; 2009 c 26 s 6; 2015 c 18 s 3.

BFOR GENERAL:

BFOR/Employment/General. ***British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union (BCGSEU)*, [1999] 3 SCR 3, 176 DLR (4th) 1 [*Meiorin*].** The Supreme Court struck down the distinction between direct and adverse effect discrimination as it created an artificial distinction and spurious results, writing at para 54:

> [54] … 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.

BFOR/Employment/General. ***Hydro Quebec v Syndicates des employees de***

***techniques professionanelles et de bureau H'Hydro-Quebec, section locale 2000*, 2008 SCC 43.** The test for undue hardship is not total unfitness for work in the foreseeable future. If the characteristics of the illness are such that the proper operation of the business is harmed excessively, or if an employee 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 for undue hardship (para 18).

BFOR/General. *Central Alberta Dairy Pool v Alberta (Human Rights Commission)*, [1990] 2 SCR 489, 111 AR 241. In the area of human rights, the term "*bona fide* occupational qualification" is used, as well as "*bona fide* occupational requirement". These terms are equivalent and co- extensive and can be used interchangeably.

BFOR/General. *Ontario (Human Rights Commission) v Etobicoke (Borough of)*, [1982] 1 SCR 202, 132 DLR (3d) 14. Mandatory retirement provisions agreed upon in a collective agreement are discriminatory, even where there is no evidence to indicate that the motives of the employer are other than honest and in good faith. Once a Complainant has established before a Board of Inquiry a *prima facie* case of discrimination, in this case proof of a mandatory retirement at a fixed age as a condition of employment, the Complainant is entitled to relief in the absence of justification by the employer. To be a *BFOR:*

> a limitation, such as a mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety, and economy…In addition it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job (para 8).

A subjective-objective test should be used to determine the existence of a *BFOR*. The subjective test requires the employer to hold a sincere belief that the age requirement is reasonably necessary. The objective test obliges the employer to show the requirement, although not necessarily justifiable with respect to each individual, is reasonably justified in general application in the limited circumstances in which this defence applies. The Panel found that it was reasonably justified in general application to have a mandatory age retirement for school bus drivers. Given the present state of available testing, no adequate screening device to test individual driver performance existed, and in balancing the risk of crash with the need of those 65 and older to earn a

living, avoiding the risk of crash was more important to society.

BFOR/Employment/General. ***Ontario (Human Rights Commission) v Simpsons-Sears Ltd*****, [1985] 2 SCR 536, 23 DLR (4th) 321 [*****O'Malley*****].** Ms' O'Malley, a Sears employee, joined the Seventh-Day Adventist Church and refused to work on the Sabbath. She was fired from her full- time position and offered part-time employment. The Supreme Court of Canada considered whether a general employment condition which is established without a discriminatory motive and for legitimate business reasons, can be discriminatory where that condition applies equally to all employees but has the practical consequence of discriminating against one or more of those employees on a prohibited ground such as religion? The Court held that proof of intent should not be a governing factor in construing human rights legislation aimed at the elimination of discrimination and therefore, an intention to discriminate was not an essential requirement for a contravention of s 4(1)(g) of the *Ontario Human Rights Code* [*AHRA*, s 7(1)(b)]. The Court applied the *BFOR* test established in ***Ontario (Human Rights Commission) v Etobicoke (Borough of)*****, [1982] 1 SCR 202, 132 DLR (3d) 14** and stated:

> where adverse effect discrimination on the basis of creed is shown and the offending rule is rationally connected to the performance of the job… the employer is not required to justify it but rather to show that he has taken such reasonable steps toward accommodation of the employee's position as are open to him without undue hardship (para 28).

In this case the Respondent failed to produce evidence on which the Board could have concluded that further steps to accommodate the religious observance of the Complainant would have caused undue hardship. Therefore, the employer failed to show that it had discharged its duty to accommodate the Complainant. The Complainant was entitled to receive compensation for the diminution in earnings caused by her transfer to part-time employment.

Note. In ***British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union (BCGSEU)*****, [1999] 3 SCR 3, 176 DLR (4th) 1 [*****Meiorin*****] t**he SCC stated that the distinction between adverse effect and direct discrimination in ***Ontario (Human Rights Commission) v Simpsons-Sears Ltd*****, [1985] 2 SCR 536, 23 DLR (4th) 321 [*****O'Malley*****]** is not helpful or necessary.

BFOR/Employment/General: See also ***Callan v Suncor Inc*****, 2006 ABCA 15.**

BFOR EMPLOYMENT PRACTICES: RELIGION

BFOR/Employment/Religion. ***Central Alberta Dairy Pool v Alberta (Human Rights Commission)*****, [1990] 2 SCR 489, 111 AR 241.** Mr. Christie requested two days unpaid leave to observe a religious holiday. His employer agreed to one day but refused it for the other, a Monday, because Mondays were especially busy. Mr. Christie was absent that Monday without permission and his employment was terminated. The Board held that the employer failed to accommodate the Complainant's religious beliefs. The Supreme Court of Canada held that the employer had the onus of showing that it made efforts to accommodate Mr. Christie's religious beliefs, up to the point of undue hardship.

Factors relevant in determining undue hardship include: financial cost, disruption of a collective agreement, problems of morale of other employees, and interchangeability of work force and facilities. Here, the employer was able to cope with employees' absences due to illness or vacation. The SCC held that the employer could have accommodated the Complainant's absence on one Monday for religious reasons. The award of the Board of Inquiry was restored.

Note The *BFOR* test in this case assumed a distinction between adverse effect and direct discrimination. ***British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union (BCGSEU)*****, [1999] 3 SCR 3, 176 DLR (4th) 1 [*Meiorin*]** should be relied on for the *BFOR* test.

BFOR/Employment/Religion. ***Casagrande v Hinton Roman Catholic Separate School District No 155*** **(1987), 79 AR 241, 51 Alta LR (2d) 349 (QB).** A teacher in a separate high school was dismissed from her position after she had her second child out of wedlock. The school board required teachers to follow a lifestyle consistent with the teachings of the Catholic church. After she was granted maternity leave when her first child was born, she was told that she should refrain from premarital sex in the future. The teacher said that the dismissal constituted sexual discrimination, as she was dismissed for being pregnant. The Court did not agree. Relying on ***Caldwell v Stuart*****, [1984] 2 SCR 603, 15 DLR (4th) 1,** the Court held that a denominational cause could constitute a BFOR for employment of a teacher in a separate school. The separate school board had the right to insist that teachers follow a lifestyle consistent with Catholic teachings and both men and women were expected to refrain from premarital

sex. The Court held that the teacher was dismissed for a *bona fide* denominational cause.

BFOR EMPLOYMENT PRACTICES: GENDER

BFOR/Employment/Gender. *Newfoundland Association of Public Employees v Newfoundland (Green Bay Health Care Centre)*, [1996] 2 SCR 3, 140 NFLD & PEIR 63. The Green Bay Health Care Centre posted a job for a personal care attendant but failed to specify that the applicant must be male. A male attendant was preferred and hired because the job involved intimate personal care of elderly male residents. The Grievor who was a female union member filed a complaint alleging that the Health Care Centre discriminated against her on the basis of sex, contrary to article 4.01 of the collective agreement which stated that the employer should not discriminate against employees on the basis of sex, age, race, creed, etc. The collective agreement did not contain a *BFOR* provision, but the Newfoundland *Human Rights Code*, SN 1988, c 62 did and the employer relied on it in hiring the male attendant. The Arbitration Board held that the employer was allowed to rely on a BFOR to excuse the discrimination in hiring. This decision was reversed on judicial review but restored by the Newfoundland Court of Appeal (**1994 CanLII 9741 (NLCA), 125 NFLD & PEIR 271 rev'g 1990 CanLII 7190 (NL SC), 81 NFLD & PEIR 201**).

BFOR/Employment/Gender. *McKale v Lamont Auxiliary Hospital* (1987), 78 AR 98, 51 Alta LR (2d) 1 (QB). An auxiliary hospital offered the position of nursing aide to a male applicant who was less qualified than the Complainant, a female applicant. The Board concluded that this did not violate the *IRPA*, as the hospital needed a certain number of male staff as well as a certain number of female staff. Thus, the requirement of "being male" did constitute a *BFOR*. The Court of Queen's Bench upheld the decision of the Board of Inquiry.

BFOR/Employment/Gender: *Cyrynowski v Alberta (Human Rights Commission)*, 2017 ABQB 745. The Applicant alleges discrimination based on gender as he was denied employment as a babysitter in a private home after responding to an online ad as the parents stated they were looking only for a female babysitter. The Applicant argues that discrimination based on gender in advertisement for employment under s 8 of the *AHRA* occurred and seeks judicial review of the Commission's decision. The complaint was investigated, despite the Respondent not providing any response or further information. The AHRC concluded on the basis of a documentary review that employment advertisement for a babysitter is a private relationship between parties and not an employment relationship within the scope of the Act.

Alternatively, the refusal was a *bona fide* occupational requirement as parents have final say in who babysits their children. The central issue is whether *AHRA* s 8 applies to advertisements of employment in a private home which restrict on the basis of gender. The Commission determined this to be a matter of statutory interpretation of the home statute and within their area of expertise. The Court dismissed the appeal, concluding that the Chief Commissioner's decision was reasonable and falls within the range of acceptable outcomes. Although no specific exemption for personal services in a private home exists, it falls under *bona fide* occupational requirements to determine who will provide these services. The Chief Commissioner found that preference as to who provides personal services in a home should be accorded utmost deference and is a *bona fide* occupational requirement. The reasons for this decision were reiterated and used as basis in the subsequent case of ***Cyrynowski v Dye***, **2021 AHRC 72.**

BFOR EMPLOYMENT PRACTICES: PHYSICAL DISABILITY

BFOR/Employment/Disability. *Prescot v Alberta Health Services*, 2023 AHRC 30. The Complainant was diagnosed with Chronic Inflammatory Response Syndrome, a condition caused by sensitivity to certain environmental elements, such as mold. As such, she required testing to determine where she could work safely. Her employer refused to allow testing in the workplace. The Complainant and her employer were unable to agree with the measures suggested by both of them. Thereafter, she was terminated. The Tribunal held that there is no evidence that the discrimination the Complainant experienced was based on a *BFOR*. It stated that the termination of Complainant's employment was not necessary when the respondent had not shown any evidence of hardship that it might suffer if it had adopted the offers put forward by the Complainant.

BFOR/Employment/Disability. *Schulz v Lethbridge Industries Limited*, 2012 AHRC 3, aff'd *Lethbridge Industries Ltd v Alberta (Human Rights Commission)*, 2014 ABQB 496. The Commission considered and analyzed all the facts and held the Respondent had discriminated against the Applicant on the ground of disability. Further, the Respondent had not established the defence of *bona fide* occupational requirement. Applying the three-part test for BFOR as established in ***Meiorin, supra***, the Tribunal held that a reasonable standard of attendance is rationally connected to the job. There was no argument that the Respondent had adopted the standard in bad faith. However, the Tribunal also noted that changing the standard of what constituted

acceptable attendance without notice to Schulz and then dismissing him for failing to meet that standard, might be viewed as bad faith, particularly if Schulz was the only employee affected by the new standard. Finally, the standard was not reasonably necessary. Schulz's health related absences could be accommodated without imposing undue hardship on the Respondent. The Respondent did not inquire into the reasons for Schulz's absences, even though it knew he had unresolved heath issues. It did not request medical information with respect to his capacity to attend regularly in the future, nor did it explore how or whether his attendance might be improved or accommodated through telecommuting, alternative work or a modified work schedule. While standards of reasonable accommodation will vary depending on the size and resources of the employer, among others, the Respondent has not met the standards appropriate for an employer of its size and circumstances.

On application for judicial review and appeal to the Alberta Court of Queen's Bench**,** ***Lethbridge Industries Ltd v Alberta (Human Rights Commission)*****, 2014 ABQB 496** the Commission's decisions on discrimination were upheld. However, some of the remedies granted were set aside. For additional reasons, see **2015 ABQB 32** (collateral benefits), **2015 ABQB 179** (costs) and **2015 ABQB 760** (quantum of damages).

BFOR/Employment/Physical Disability. *Kuehn v Town of Granum*, 2006 AHRC 2. The Complainant, a town foreman on employment probation, fell down a flight of stairs while at work and sustained a back injury. As a result of his injuries, he was forced to take a leave from work and was advised by his doctor that he could gradually return to work with modified, lighter duties. The Complainant was temporarily laid off, and when his return to work was delayed, the town terminated his employment on the grounds that he had not completed his probationary employment period and that he had failed to meet job performance expectations. The Panel held that the Complainant established a *prima facie* case of discrimination, as the back injury constituted a physical disability. The Respondent failed to adequately accommodate the Complainant to the point of undue hardship or to establish that the basis of termination was a *BFOR*. The Complainant was awarded $3,000 in general damages for pain and suffering, and nine months' salary, commencing from the date of the Complainant's temporary layoff.

BFOR/Employment/Physical Disability. *Smith v Fawcett Truck Stop*, 2005 AHRC 9. After being employed as a cashier for five years, the Respondent changed the cashier's job duties to include maid service, which was more strenuous. The

Complainant suffered from osteoarthritis and obtained a physician's note explaining that maid duties would aggravate her condition. The Respondent gave her a three-month medical leave of absence to recover, after which she would be dismissed from employment if she was unable to perform her job duties. The Panel held that osteoarthritis is a physical disability under the *HRCMA*, and that forcing the Complainant to perform tasks that aggravated her condition, constituted discrimination. Consequently, the employer had a duty to accommodate the Complainant's disability. The Complainant was constructively dismissed from her employment as she was forced to continue to perform work that she was unable to perform due to her disability. The Respondent also failed to establish a *BFOR*. The standard was not applied in good faith because the Respondent unilaterally changed the job description of the Complainant and the intimidating manner of the suspension/termination demonstrated malice. The Respondent did not demonstrate any type of accommodation to the point of undue hardship, since the modified duties were considered to be final and without recourse, and the deadlines inflexible. The Panel awarded $7500.00 in damages for pain and suffering, plus interest, and asked the parties for submissions on lost wages.

BFOR/Employment/Physical Disability. *Repas v Albert's Family Restaurant and Lounge (Red Deer)*, 2004 AHRC 2. The Complainant was employed as a kitchen manager by the Respondent. The Complainant alleged that when she told her supervisor she had contracted Hepatitis C from a blood transfusion she was told to obtain medical documentation to confirm her condition. When she returned with a medical certification that confirmed her condition, she was dismissed from her employment. The Respondent submitted that the Complainant resigned. The Panel found that Hepatitis C constituted a disability as defined in the *HRCMA* and found the Complainant's testimony to be more credible than the Respondent's. As a result, the Panel found that the Complainant had established that she was *prima facie* discriminated against on the grounds of physical disability and that the Respondent failed to accommodate her disability to the point of undue hardship. Further, the Panel held that the Respondent did not establish that the discrimination was part of a *BFOR*. The Complainant was awarded $3000.00 in damages for pain and suffering and $1915.30 for loss of income plus interest.

BFOR/Employment/Physical Disability. *Starzynski v Canada Safeway Ltd*, 2003 ABCA 246, 330 AR 340, leave to appeal to SCC refused, [2003] SCCA No 448. Safeway wished to replace senior high wage employees with new hires at lower wages

through a buyout plan, which had a disproportionate effect on fifteen employees on disability leave. The Court of Appeal held that *prima facie* discrimination had occurred and relied on ***British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union (BCGSEU)*, [1999] 3 SCR 3, 176 DLR (4th) 1 [*Meiorin*]** to determine whether the employer could justify the *prima facie* discrimination as a *BFOR*. The employer failed on the third stage of the test because they did not accommodate the Complainants to the point of undue hardship (See also ***Central Okanagan School District No 23 v Renaud*, [1992] 2 SCR 970, 95 DLR (4th) 577 and *Central Alberta Dairy Pool v Alberta (Human Rights Commission)*, [1990] 2 SCR 489, 111 AR 241)**. The Court of Appeal held that the Panel and the Chambers Judge properly concluded that the employer did not establish that the eligibility requirement in the buyout was reasonable and justifiable in the circumstances either under s 11.1 of the *IRPA* [*AHRA*, s 11] or pursuant to the third stage of the ***British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union (BCGSEU)*, [1999] 3 SCR 3, 176 DLR (4th) 1 [*Meiorin*]** test. The Court of Appeal found the Union liable on the basis that the evidence established that the Union participated in the formulation of the discriminatory buyout provision and that it failed to accommodate the Complainants.

BFOR/Employment/Physical Disability. *Hudec v Larko and The Big Muffin* (November 20, 1997, Alta HRP). The Complainant could only hear in one ear and filed a complaint claiming that she was discharged from her employment as counter help because of her hearing impairment. The Panel found that the Respondent discriminated against the Complainant on the grounds of physical disability in the area of employment and no *BFOR* existed. The Panel stated that the employer must establish that the discrimination is justified in the interest of public safety to meet the *BFOR* test. The Respondents were ordered to compensate the Complainant $3,360.00 plus interests for lost wages, to pay costs, and to participate in educational session approved by the Alberta Human Rights and Citizenship Commission regarding discrimination.

BFOR/Physical Disability/Masking requirement. *Szeles v Costco Wholesale Canada Ltd.*, 2021 AHRC 154. The Complainant brought a complaint for discrimination against Costco for denying entry to him since he refused to wear a face mask. The Tribunal upheld the Director's decision to dismiss the complaint. It ruled that Costco met the *Meiorin* test. It ruled that the Costco's policy to refuse entry to unmasked persons are based on mandatory public health regulations, both on the

municipal and provincial level, which constitute a valid business purpose. It also agreed that the same policy was reasonably necessary to achieve a legitimate business purpose.

BFOR/Employment/Perceived Disability. *Sunshine Village Corporation v Boehnisch*, 2020 ABQB 692. The Complainant was let go by her employer as she was allegedly no longer fit to work as a ski patroller because of her likelihood of being injured. She was offered a patroller position contingent on passing a physical demands analysis (PDA). The Tribunal ruled in favor of the Complainant and awarded damages. Her employer appealed the ruling and contends that the Tribunal should have performed the *Meiorin* test to determine whether it established a *BFOR.* The ABQB held that the *Meiorin* test has no applicability on the facts since the employer discriminated against the Complainant by refusing to even try to meet the standard by taking the PDA.

BFOR EMPLOYMENT PRACTICES: PHYSICAL DISABILITY/MANDATORY DRUG TESTING

BFOR/Employment/Physical Disability/Mandatory Drug Testing. *Halter v Ceda-Reactor Limited*, 2005 AHRC 8. The Complainant was employed by the Respondent as a dredge operator and was informed of the drug testing policy, which outlined the consequences of a failed drug test. While the Complainant signed the policy, he failed to read it carefully. The Respondent company imposed a random drug test, on suspicion that some of their employees were using drugs. The Complainant's test showed the presence of marijuana and he was suspended from work for two weeks. A second test continued to show the presence of marijuana and he was terminated from employment after refusing to take a third test at his own expense. The Panel found that the Respondent failed to establish that drug testing was a *BFOR* under the test set out in ***British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union (BCGSEU)*, [1999] 3 SCR 3, 176 DLR (4th) 1 [*Meiorin*]**. The drug testing was not rationally connected as it did not prove present impairment, only past use and the Respondent did not take further steps to determine the level of the Complainant's dependency in order to establish that it was required for safety concerns. The Respondent did not apply the discriminatory practice in good faith because it was only implemented to comply with the requests of their clients and to meet industry protocol and was not applied with the employees in mind. Finally, the Respondent did not accommodate the Complainant's disability to the

point of undue hardship because he was not offered any assistance to deal with his dependency and he was not transferred to a position that was not safety sensitive until he was able to show that he was drug free.

BFOR/Employment/Physical Disability/Mandatory Drug Testing. *Jacknife v Elizabeth Metis Settlement*, 2002 AHRC 17, aff'd 2003 ABQB 342, 336 AR 343, rev'd 2005 ABCA 173, 367 AR 142, rehearing 2006 AHRC 5. The Elizabeth Métis Settlement implemented a drug testing policy and mandated that all employees be tested. The Complainants' employment was terminated when they refused to be tested. The Complainants alleged discrimination on the grounds of physical disability. The Panel held that *prima facie* discrimination occurred, but that it was *bona fide* justified since the Métis Settlement was an Aboriginal Community with the authority to implement a substance abuse policy and that substance abuse was a major problem on the Elizabeth Settlement. This decision was upheld at the Court of Queen's Bench.

The Court of Appeal ruled that the reviewing judge and the Panel failed to address whether, assuming the Settlement's drug and alcohol policy was valid, it was properly applied to Collins and Jacknife. The Court of Appeal found that the policy did not include a provision to implement blanket testing of all employees, but rather required testing under certain defined circumstances and the administrative duties carried out by the Complainants did not bring them within the scope of the policy. Therefore, the policy did not authorize the impugned testing demand. The Appeal was allowed, and the matter was remitted back to a new Panel.

The Court of Appeal tasked the Settlement to argue before a new Panel, whether there was any other basis upon which the Settlement could insist on the testing. The Panel held a hearing *de novo* and ruled that the Settlement had no jurisdiction to demand mandatory testing. Drug and alcohol testing of employees in administrative positions was found to be *prima facie* discriminatory when done without cause and did not fall within the scope of the policy. According to the Alberta Human Rights Commission's website, this Panel decision was appealed to the Court of Queen's Bench, but the matter was settled.

BFOR EMPLOYMENT PRACTICES: MENTAL DISABILITY

BFOR/Employment/Mental Disability. *Trick v Federated Co-operatives Limited*, 2005 AHRC 1, rev'd *Alberta (Human Rights and Citizenship Commission) v Federated Co-operatives Limited*, 2005 ABQB 587, 383 AR 341. The Complainant,

Gary Trick, was employed by the Respondent and was on long-term disability for bipolar disorder. When he attempted to return to work after treatment, he was told that he had been replaced and the employer refused to accommodate him in another position until the Complainant provided further documentation of his readiness to return to work. The Complainant alleged discrimination on the grounds of physical or mental disability contrary s 7(1) of the *HRCMA*. The Panel found that while the Complainant showed *prima facie* discrimination, the employer was justified in not accommodating the Complainant until he provided further medical evidence. On judicial review, the Court of Queen's Bench held that the Panel's decision was not supported by the evidence and could not stand. First, there was no evidence to support the Panel's conclusion that the employer required more information about the Complainant's ability to drive. Secondly, the evidence did not support the Panel's conclusion that further medical information was requested on several occasions. Thirdly, the evidence did not support the Panel's conclusion that the Complainant refused to provide medical information to his employer. Rather, the evidence demonstrated that the Complainant did his best to provide the employer with the medical information they requested. The Court applied the test set out in ***British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union (BCGSEU)*, [1999] 3 SCR 3, 176 DLR (4th) 1 [*Meiorin*]** to determine if the requirement to determine the Complainant's fitness for work constituted a *BFOR* and held that the requirement was rationally connected to the performance of the job and was applied in good faith for a legitimate work related purpose. However, the Court ruled that the Respondents failed to accommodate the Complainant to the point of undue hardship because they failed to specifically request further information after they received notice that he was medically cleared to return to work. Thus, the Respondents failed in establishing a *BFOR*.

BFOR/Employment/Mental Disability. *Wearmouth v West Fraser LVL,* 2021 AHRC 203. The Tribunal held that the respondent cannot meet its obligations to provide reasonable accommodation, as part of the third requirement of the *Meiorin* test, if the Complainant does not release reasonably necessary medical information. In this case, the Tribunal found that the Complainant did not provide sufficient medial information which made it difficult for the respondent to explore alternative measures to accommodate her. It finally stated that in the absence of reasonably necessary medical information, it was not possible for the respondent to accommodate her without imposing undue hardship on itself.

BFOR EMPLOYMENT PRACTICES: AGE

BFOR/Employment/Age. ***Mortland and VanRootselaar v Peace Wapiti School Division No 76*****, 2015 AHRC 9.** The Complainants argued that the Respondent's policy of terminating the employment of school bus drivers at age 65 was discriminatory. After ruling on a variety of preliminary matters, the Tribunal found that the policy was *prima facie* discriminatory. The Respondent argued that the policy was a BFOR and that the Tribunal should follow the earlier decision in ***Gordon Ensign v Board of Trustees of Clearview Regional School Division #24; Dennis Hanrahan and Ray Lavalley v Leroy Larson, Superintendent of Schools and Northern Gateway Regional SD #10 Edmonton*** **(February 19, 1999, Alta HRP) [*Ensign*] (below)**. The Tribunal declined to follow *Ensign*, noting that the *Ensign* decision predated the SCC ruling in ***British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union (BCGSEU)*****, [1999] 3 SCR 3, 176 DLR (4th) 1 [*Meiorin*]**, and thus did not follow the current BFOR analysis. The Tribunal heard evidence from experts about risks for drivers over age 65 but found that no "sufficient risk" was proven (para 404). Though the policy met the first two steps of the *Meiorin* test, it was not reasonably necessary under the third step. As such, the Respondent was ordered to cease its policy of terminating employment for bus drivers at age 65. The Respondent was ordered to offer the Complainants reinstatement, and pay damages for lost wages and benefits, general damages, and interest.

BFOR/Employment/Age. ***Gordon Ensign v Board of Trustees of Clearview Regional School Division #24; Dennis Hanrahan and Ray Lavalley v Leroy Larson, Superintendent of Schools and Northern Gateway Regional SD #10 Edmonton*** **(February 19, 1999, Alta HRP).** The Complainants alleged that the Respondent Board of Trustee's policies requiring school bus drivers to retire at age 65 was discriminatory. The Panel heard expert testimony on the safety record of drivers as they age and found that although the policy was *prima facie* discriminatory it was a *BFOR*. In reaching its decision the Panel considered the subjective-objective test set out in ***Ontario (Human Rights Commission) v Etobicoke (Borough of)*****, [1982] 1 SCR 202, 132 DLR (3d) 14** to determine the existence of a *BFOR*. The Panel found that it was reasonably justified in general application to have a mandatory age retirement for school bus drivers; given the state of available testing, no adequate screening device to test individual driver performance existed; based on the evidence a significant risk of crash existed for drivers over age 65; and when balancing the risk against the interests of 65-year olds

and older to earn a livelihood avoiding the risk of crash was more important to society.

BFOR EMPLOYMENT PRACTICES: FAMILY STATUS BFOR/Employment/Family Status. *Clark v Bow Valley College*, 2014 AHRC 4. Bow Valley College disputed the HRT's finding of discrimination, relying on the *Alberta Human Rights Act*, RSA c A-25.5, section 11, reasonable and justifiable discrimination, and section 7(3) *bona fide* occupational requirement. Bow Valley College argued that there was a shortage of nursing faculty at the time and that they believed that Clark was abandoning her position because she believed she had no childcare options (paras 66, 67).

The Chair noted that when Clark communicated her childcare problem, she was, for all practical purposes, requesting an accommodation. In this situation, Bow Valley College did not seek any information upon which they could conduct an assessment; nor was there any consideration of the information provided by Clark at the time. No collaboration or alternative approach was explored with Clark. Clark had 35 days of accrued vacation and granting her vacation leave would have been a possible accommodation (paras 70-75).

Although Bow Valley College submitted that its operational requirements did not permit any additional absence, there was no demonstrated undue hardship for Bow Valley College to have implemented a shared instructor situation as they did for other situations. Further, Bow Valley located an instructor to replace Clark without even advertising for one (paras 77, 78). Thus, Bow Valley College failed to accommodate Clark to the point of undue hardship, and the defences failed.

BFOR/Employment/Family Status. *SMS Equipment Inc v Communications, Energy and Paperworkers Union, Local 707*, 2015 ABQB 162, aff'g *Communications, Energy, and Paperworkers Union, Local 707 (the Union) v SMS Equipment Inc (the Employer), RE: GRIEVANCE OF RENEE CAHILL-SAUNDERS (the "Grievor")*, 238 LAC (4th) 371, 2013 CanLII 71716 (AB GAA). The Arbitrator found the employer in breach of s 7(1) of the *AHRA*, specifically discrimination on the ground of family status. The employer called no evidence to justify its rule requiring the Grievor and other employees to work rotating night and day shifts or any evidence that accommodating her by permitting her to work nights exclusively would cause the employer undue hardship. Thus, the employer had not established that its rule is a *bona fide* occupational requirement, and the requirement of working rotating night and day shifts discriminates against the Grievor. The ABQB upheld the Arbitrator's decision on

BFOR, writing at paras 92-93:

> [92] The Arbitrator acknowledged that self-accommodation is relevant in determining what reasonable accommodation an employer is required to provide, as a part of a "multi-party" search for accommodation: Arbitrator's Decision, at para 69, citing *Central Okanagan* at 994. The extent of the Grievor's self-accommodation efforts might have been found insufficient had the Employer provided some evidence in support of its rule, or some evidence of undue hardship, but there was no such evidence from the Employer. Further, there was evidence that the Grievor had found another employee in the same classification who was prepared to work exclusively night shifts; and that the Employer had previously permitted other employees to work exclusively night shifts. The Employer provided no reasons for rejecting her request for accommodation: Arbitrator's Decision, para 56.
>
> [93] The Arbitrator's Decision on this issue, and globally, meets the reasonableness review standard.

BFOR/Employment/Family Status. *Rawleigh v Canada Safeway Ltd*, 2009 AHRC 6. The Complainant was employed by the Respondent as a general clerk. The Complainant's wife suffered from loss of eyesight and was eventually deemed legally blind. The Collective Agreement stated that part of the requirements of full-time general clerks was that they rotated through all shifts, which included night shifts. The Complainant requested an exemption from the night shift requirement because of his wife's medical condition and believed his request was granted until the fall of 2004 when it became an issue, at which time the Complainant requested a transfer to another store. The director referred to the cases of ***Van Der Smit v Alberta (Human Rights & Citizenship Commission)*, 2009 ABQB 121, 470 AR 325, *Workeneh v 922591 Alberta Ltd*, 2009 ABQB 191, 67 CHRR D/190; *Alibhai v Tequila Bar & Grill Ltd*, 2008 AHRC 11, rev'd *Alberta (Director, Human Rights & Citizenship Commission);*** *and* ***Khalid Alibhai v Tequila Bar & Grill Ltd*, [2009] AWLD 3525 (Alta QB) (WL);** and ***Walsh v Mobil Oil Canada*, 2008 ABCA 268, 440 AR 199** and argued that in each of these cases the Panel's finding that there was no *prima facie* discrimination was overturned on appeal, indicating that the Human Rights Panels were using too high of a standard in determining *prima facie* discrimination. The only proposed accommodation put forward by the Respondent was a transfer from the position of a full-time general clerk to that of a full-time cashier since cashiers did not have to work the night crew. This would have resulted in a decrease in pay. The Panel found that the actions of the Respondent directly led to the *prima facie* discrimination against the Complainant and that in the application of the three-part test set out in

***British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union (BCGSEU)*, [1999] 3 SCR 3, 176 DLR (4th) 1 [*Meiorin*],** the Respondent met the first two parts of the test. The employer adopted the rotation for genuine business reasons and noted that this policy was echoed in the terms of the Collective Agreement. The standard was found to be neutral in its face and was applied equally to all the employees who were in the same job classification as the Complainant. However, the Complainant had a unique family status situation, which made the implementation of this standard discriminatory to the Complainant's unique needs and the Respondent failed to accommodate to the point of undue hardship. It is not necessary to prove that discrimination was intentional to find a violation of the human rights legislation has occurred. An employment rule, neutral on its face and honestly made, can have discriminatory effects It is the result or the effect of an act which is important in determining whether discrimination has occurred (see ***Ontario (Human Rights Commission) v Simpsons-Sears Ltd*, [1985] 2 SCR 536, 23 DLR (4th) 321 [*O'Malley*]**). If such a burden is met, the onus shifts to the Respondent to prove, on a balance of probabilities, that the contravention was reasonable and justifiable in the circumstances. The Panel found in favour of the Complainant. There was *prima facie* discrimination on the basis of family status and Safeway did not accommodate the Complainant to the point of undue hardship.

BFOR/Employment/Family Status. See also: ***Rennie v Peaches and Cream Skin Care Ltd*, 2006 AHRC 13.**

Applications and advertisements re employment

8(1) No person shall use or circulate any form of application for employment or publish any advertisement in connection with employment or prospective employment or make any written or oral inquiry of an applicant

(a) that expresses either directly or indirectly any limitation, specification or preference indicating discrimination on the basis 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 any other person, or

(b) that requires an applicant to furnish any information concerning race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry,

place of origin, marital status, source of income, family status or sexual orientation.

8(2) Subsection (1) does not apply with respect to a refusal, limitation, specification or preference based on a *bona fide* occupational requirement.

RSA 2000 cH-14 s 8; 2009 c 26 s 7; 2015 c 18 s 3.

Membership in trade union, etc.

9 No trade union, employers' organization or occupational association shall

(a) exclude any person from membership in it,

(b) expel or suspend any member of it, or

(c) discriminate against any person or member, 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 member.

RSA 2000 cH-14 s 9; 2009 c 26 s 8; 2015 c 18 s 3.

Union/Gender/Pregnancy/Parental Benefits. *British Columbia Teachers' Federation v British Columbia Public School Employees' Association*, 2014 SCC 70, [2014] 3 SCR 492. The Union filed a grievance because the terms of the collective agreement gave different benefits to birth mothers as compared to fathers and adoptive parents. The Arbitrator ruled in favour of the Union [**No A-106/12, [2012] BCCAAA No 138 (QL)**]. The BC Court of Appeal [**2013 BCCA 405**] overturned the decision. In a brief oral judgment, the SCC found that the Court of Appeal "erred in failing to give deference to the arbitrator's interpretation of the collective agreement and in failing to recognize the different purposes of pregnancy and parental benefits" (para 1). The Arbitrator's award was restored. Note that this decision relied on British Columbia legislation.

Trade Union/Gender/Pregnancy. *Alberta Hospital Association v Parcels* (1992), 129 AR 241, 90 DLR (4th) 703 (QB). A nurse alleged discrimination where the terms of the collective agreement required that she pay 100% of the premiums in advance for certain benefits while on maternity leave. An employee absent on sick leave was required to pay only 25%. On appeal the Court of Queen's Bench upheld the Board of Inquiry's decision that the unemployment insurance plans, which compensated more for sick leave than maternity leave amount to direct discrimination. Maternity leave is a hybrid that includes both health-related and non-health- related components. The

health-related component must be treated in a similar manner to sick leave. The Court relied on ***Brooks v Canada Safeway Ltd*, [1989] 1 SCR 1219, 58 Man R (2d) 161** and held that benefits available through employment must be disbursed in a non-discriminatory manner, but this does not mean they must be identical. If the variation between the compensation of employees on maternity leave and sick leave is not more than five percent, so that the benefits are substantially the same, then there is no discrimination. Although the parties did not raise the defence of s 11.1 of the *IRPA* [*AHRA*, s 11], the Court said that it was likely that an employer would have a defence under s 11.1 if the variation between the compensation was minor.

Occupational Association/Place of Origin. *Mihaly v The Assn of Professional Engineers, Geologists and Geophysicists of Alberta*, 2014 AHRC 1, rev'd *Assn of Professional Engineers and Geoscientists of Alberta v Mihaly*, 2016 ABQB 61, application for appeal denied *Mihaly v Assn of Professional Engineers and Geoscientists of Alberta*, 2017 ABCA 15. The Applicant, Ladislav Mihaly, brought a complaint of discrimination, against the Respondent, essentially on the ground of place of origin of his professional qualifications and skills. The Commission found for, and agreed with, the Applicant and rejected the Respondent's argument that the *Alberta Human Rights Act* did not protect against discrimination based upon place of origin of academic qualifications. The Commission found that there was a clear link between Mihaly's place of origin, the origin of his foreign credentials and whether he was granted admission to APEGA. "Place of Origin" is broad enough to include any adverse treatment based on one's foreign credentials. In particular, the imposition of additional exams and/or requirements for engineers from certain countries without appropriate individual assessment restricts immigrants from working in their professions and perpetuates disadvantage in these groups. This decision was reversed by the ABQB. Regarding adverse impact on the basis of place of origin, the ABQB stated at para 103:

> [103] Mr. Mihaly had no such options, no way of avoiding the adverse impact of having to write confirmatory examinations or the FE Exam, aside from leaving his place of origin to pursue his education. In view of the close link between Mr. Mihaly's place of origin and the place of his education, and the lack of any real opportunity for him to avoid the adverse impact that arose from being educated in his place of origin, I conclude that Mr. Mihaly's place of origin was a factor in the adverse impact.

In reversing the Tribunal's decision, Ross J wrote at paras 149-150 that:

> [149] The Tribunal's reasons leading to his conclusion that APEGA could have accommodated Mr. Mihaly and others sharing his

> characteristics are rife with logical errors, findings of fact that are not supported by the evidence, and failures to take into account relevant considerations. From the Tribunal's unreasonable interpretation of the EGPR, to his unsupported assumption that the FE Exam disproportionately excludes foreign trained engineers from being registered with APEGA, to his failure to appreciate that demonstrated entry level engineering competence is reasonably necessary to safe practice as a professional engineer, and his failure to consider relevant factors in the assessment of undue hardship, it is clear that his conclusion regarding accommodation falls outside the range of acceptable outcomes that are defensible in light of the facts and law; and as such was unreasonable: ***Dunsmuir*** at para 47.
>
> [150] While the Tribunal reasonably concluded that Mr. Mihaly had established prima facie discrimination with regard to APEGA's requirement that he complete confirmatory examinations or the FE Exam; his conclusion that APEGA had failed to justify these requirements under s 11 of the *AHRA* was unreasonable. APEGA's undisputed evidence clearly met the onus to establish the "reasonable and justifiable" defence: ***Wright*** at paras 127-29.

(See Also: ***Keith v Canada (Human Rights Commission)*****, 2018 FC 645, aff'd *Keith v Canada (Human Rights Commission)* 2019 FCA 251, leave to appeal refused 2020 CanLII 29396 (SCC)**, especially paragraph 76, which applies and confirms ***Mihaly*** in that no discrimination occurs in requiring individuals to pass licencing exams regardless of their location of education).

Occupational Association/Place of Origin. *Gersten v College of Physicians and Surgeons of Alberta*, 2004 AHRC 16, 51 CHRR D/191. The Complainant was born and received his medical education in Israel. He subsequently trained in South Africa and Israel and specialized in obstetrics and gynecology. The Complainant continually contacted the College of Physicians and Surgeons in Alberta to find out the requirements to obtain a license to practice, but he was told that he would not be able to practice. In 2001 he received a letter outlining the requirements for the Special Register. It stated that he could apply for Part 5 of the Special Register, but it would only last for 30 months. The Complainant had to complete Licentiate of the Medical Council of Canada, a preliminary assessment, write the Medical Council of Canada evaluating exam and answer specialty specific questions. There was also a requirement that anyone who had not practiced for more than three years must undergo training to the satisfaction of the Registrar. Further, in order to get an assessment, the Complainant would need a Regional Health Authority to sponsor him. The Complainant applied to the Specialty Register and received an assessment in March 2001 on what he thought was for obstetrics and gynecology and he passed the assessment and exam.

The Complainant was able to work at the Palliser Health Region and was contacted by the Cold Lake Region who needed someone in the area of obstetrics and gynecology. The Complainant purchased property in Cold Lake because he was expecting to practice there. However, he was later told that the first assessment was only for obstetrics and that he needed to complete another assessment for gynecology. The Complainant did not pass the gynecology assessment and his name was taken off the Special Register.

The majority Panel found that the Complainant failed to establish on a balance of probabilities that he was treated differently than other foreign trained doctors with his qualifications because of his place of origin and ancestry. The evidence showed that the recruitment drive was for general practitioners, not for specialists, with the exception of one psychiatrist. The majority noted that there was clearly an apparent lack of understanding as to what assessors would be doing and that Dr. Gersten was treated poorly throughout this process. However, the unfortunate circumstances did not amount to discrimination. The majority found the Respondent's evidence more credible than the Complainant's and dismissed the complaint.

Occupational Association/Place of Origin. *Dickenson v Law Society (Alberta)* (1978), 10 AR 120, 5 Alta LR (2d) 136 (SC (TD)). The Complainant alleged discrimination on the basis that Canadian citizens and British subjects were eligible for admission to the Law Society, but citizens of other countries were not. The Court said that discrimination against individuals because they are not Canadian citizens or British subjects does not constitute discrimination on the basis of place of origin. However, this decision is no longer of any force and effect in light of ***Andrews, supra***, where the SCC held that s 42 (citizenship requirement as a prerequisite to the practice of law) of the *British Columbia Barristers and Solicitors Act*, infringed s 15 equality rights under the *Charter* and was not justified under s 1. Containing citizenship requirement as prerequisite to practice of law is "a rule which bars an entire class of persons from certain forms of employment solely on the ground that they are not Canadian citizens violates the equality rights of that class and discriminates against them on the ground of their personal characteristics."

Note: see section 40(2) of the *Legal Professions Act*, RSA 2000, c L-8. There is no citizenship requirement for admission to the Law Society of Alberta.

Occupational Association/Substance Use Monitoring Program. *C.K. v College of Physicians and Surgeons of Alberta*, 2021 AHRC 165. The Complainant, a physician,

was required by the Respondent to a substance abuse treatment and monitoring. The Director dismissed the complaint stating that the monitoring programs exists to protect public safety and is not unreasonable. The Respondent suggests that there was no adverse impact on the Complainant as the latter's scope of practice and license to practice were not affected. The Tribunal reversed the decision of the Director as it found that there was prima *facie* discrimination based on the monitoring program and treatment required by the Respondent. It stated that there is reasonable basis to proceed to a hearing and that further inquiry is necessary to determine whether the requirements imposed by the Respondent are reasonably necessary.

Prohibitions regarding complaints

10(1) No person shall retaliate against a person because that person

(a) has made or attempted to make a complaint under this Act,

(b) has given evidence or otherwise participated in or may give evidence or otherwise participate in a proceeding under this Act,

(c) has made or is about to make a disclosure that person may be required to make in a proceeding under this Act, or

(d) has assisted in any way in

(i) making or attempting to make a complaint under this Act, or

(ii) the investigation, settlement or prosecution of a complaint under this Act.

10(2) No person shall, with malicious intent, make a complaint under this Act that is frivolous or vexatious.

RSA 1980 cI-2 s 11; 1990 c 23 s 7; 1996 c 25 s 13.

Retaliation. *Walsh v Mobil Oil Canada*, 2008 ABCA 268, 440 AR 199. The Complainant filed a human rights complaint ("initial complaint") against her employer alleging sex discrimination with respect to pay, job designations, and other conduct. The Complainant was dismissed by her employer on same day that she was notified her complaint had been dismissed. The Complainant filed a new complaint alleging retaliation.

The Panel found that the Respondent discriminated against the Complainant with regard to pay and designations but did not find retaliation. The Complainant appealed

to the Court of Queen's Bench and the appeal was allowed on the basis that the Panel's decision on retaliation was unreasonable and that employee was dismissed at least in part due to her refusal to withdraw the initial complaint. The majority at the Court of Appeal held that the Panel and the reviewing Court applied the wrong test for retaliation. Ritter JA stated at para 80-81:

> I conclude that the test for retaliation is composed of two parts. The first part of the test involves ascertaining whether there is a link between the alleged conduct and one of the actions enumerated in ss 10(1), in this case the filing of a complaint. Factors such as coincidental timing may be considered in relation to this part of the test, and in most cases, human rights tribunals will be called on to draw inferences of linkage from the proven facts. The second part of the test involves establishing that the alleged conduct was, at least in part, a deliberate response by the employer to one of the actions enumerated in ss 10(1). It will often be evident from the facts and inferences that establish the first part of the test. A complainant need not show malice on the part of the employer. This part of the test addresses the element of intent that is inherent in the term retaliate and is therefore in keeping with the wording of the statute.

Intent was held to be a necessary aspect of test for retaliation. Retaliation requires nexus between impugned conduct and complaint, and some evidence that impugned conduct was a deliberate response to the complaint. The Court of Appeal held that the only possible conclusion was that employer, through its supervisors, retaliated against employee for her complaint.

M. Paperny JA (dissenting in part) agreed with Ritter JA's conclusion on retaliation but not with his analysis and conclusion on the legal requirements necessary to establish retaliation. At para 116, 149 and 150, M. Paperny JA stated:

> retaliation can be established by the surrounding circumstances ...while evidence of intent is sufficient to establish a *prima facie* case, it is not necessary...A link between the prejudicial conduct and the complaint will be sufficient to establish a *prima facie* case [of discrimination].

Retaliation. *Karch v Appeals Commission, Workers' Compensation Board*, 2008 AHRC 5. The Applicant, Ms. Lynne Karch, complained of alleged retaliation against the Respondent, contrary to section 10 (1) of the *Human Rights Citizenship and Multiculturalism Act* (now *Alberta Human Rights Act*). The Applicant formerly worked for the lower rung of the Workers' Compensation Board (WCB). She filed a complaint of discrimination on the grounds of both physical and mental disability against WCB. Subsequently, she was hired as an Appeals Commissioner by the WCB, which had no knowledge of her complaint against them. Certain persons in the WCB raised issue of

bias against her as an Appeals Commissioner of a part of an organization she filed a complaint against. She was later removed due to the issue of potential bias, and she filed complaint with the Commission. The Commission dismissed her complaint of retaliation and stated that:

> 99. The Panel agrees with the submission of the Appeals Commission that in order for retaliation to be found in a human rights context, there must be "some form of conduct meant to harm or hurt the person who filed the human rights complaint for having filed the complaint."
>
> …
>
> 101. Section 10 of the Act requires a nexus between a complaint under the Act and the retaliatory conduct on the part of the decision maker. In other words, the retaliation must be tied to a complaint made under the Act.
>
> 102. The *Gerin* case and *Entrop* case further interpret the term retaliation in human rights matters and termination of employment. The case law provides as follows:
>
> a. Retaliation must be part of the reason for termination, it need not be the only reason;
> b. There must be a linkage between the dismissal and the complainant's human rights complaint;
> c. The proper standard of proof is based on "the reasonable Human Rights complainant", and
> d. Intention and motivation of the respondent are important factors which need not be directly proved, but which may be inferred from the respondent's actions and/or the actions' affect [sic] on the complainant.
>
> 103. Ms. Karch must prove that a reasonable complainant in her situation would perceive that she was dismissed as a result of retaliation and she must prove on the balance of probabilities that there was an act of retaliation for her filing her human rights complaint against the WCB.
>
> 104. … the mere perception of reprisal by Karch is not sufficient to constitute reprisal under the Act, and that there must be evidence that retaliation was intended and that a reasonable human rights complainant with her characteristics would perceive retaliation. [citations omitted]

Retaliation. See also**: *Mohamud v Canadian Dewatering (2006) Ltd*, 2015 AHRC 16; *Bigcharles v Statoil Canada Ltd,* 2018 AHRC 5; *Hogan v Syncrude Canada Ltd,* 2019 AHRC 32; *Baranowski v FourQuest Energy Inc,* 2019 AHRC 48; *Way-Patenaude v Clean Harbors Energy and Industrial Services Corp,* 2020 AHRC 41; *Jaco Line Contractors Ltd. v Christina McCharles,* 2021 AHRC 127.**

Ameliorative policies, programs and activities

10.1 It is not a contravention of this act to plan, advertise, adopt or implement a policy, program or activity that

(a) has as its objective the amelioration of the conditions of disadvantaged persons or classes of disadvantaged persons, including those who are disadvantaged because of their 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, and

(b) achieves or is reasonably likely to achieve that objective.

2017 c 17 s 5.

Reasonable and justifiable contravention

11 A contravention of this Act shall be deemed not to have occurred if the person who is alleged to have contravened the Act shows that the alleged contravention was reasonable and justifiable in the circumstances.

RSA 2000 cH-14 s 11; Alta Reg 49/2002 s 4; 2002 c 30 s 15.

REASONABLE AND JUSTIFIABLE: GENERAL TEST

General Test. *Dickason v University of Alberta*, [1992] 2 SCR 1103, (*sub nom University of Alberta v Alberta (Human Rights Commission*)) 4 Alta LR (3d) 193 [cited to SCR]. Dickason challenged the mandatory retirement policy of his employer. The majority of the Supreme Court of Canada applied the ***R v Oakes*, [1986] 1 SCR 103, 53 OR (2d) 719** s 1 *Charter* criteria to determine whether the mandatory retirement age was reasonable and justifiable under s 11.1 of the *IRPA* [*AHRA*, s 11] with some caution. At 1124 Cory J stated:

> …the *Oakes* model is only appropriate if it is applied without any trace of deference to a private defendant such as the employer or landlord. Secondly, only with a large measure of flexibility and due regard to the context should it be applied to the regulation of private relationships. The inquiry into what is reasonable and justifiable within the meaning of s 11.1 should not be rigidly constrained by the formal categories set out in the *Oakes* test.

The SCC considered the following questions:

1. Were the objectives of the policy pressing and substantial?
2. Was the policy proportional to the objective?
    (a) Rational Connection
    (b) Minimal Impairment
    (c) Proportionality of Effects

The SCC dismissed Dickason's appeal and concluded that the University demonstrated that the impugned practice of mandatory retirement was reasonable and justifiable within the meaning of s 11.1 of the *IRPA.*

REASONABLE AND JUSTIFIABLE: PUBLIC SERVICE (S 4)

Reasonable and Justifiable/Public Service/General Test. In ***British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868, 181 DLR (4th) 385 [*Grismer*].** The Supreme Court of Canada adopted the ***British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union (BCGSEU)*, [1999] 3 SCR 3, 176 DLR (4th) 1 [*Meiorin*]** from employment cases and stated that the following test should be used to determine whether the standard or policy in the public service context is reasonable or justifiable under s 11:

> 1. Was the standard or policy adopted for a purpose or goal that is rationally connected to the function being performed?
> 2. Was the standard or policy adopted in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal?
> 3. Was the standard or policy reasonably necessary to accomplish its purpose or goal in the sense that the defendant cannot accommodate persons with the characteristics of the claimant without incurring undue hardship?

Reasonable and Justifiable/Public Service/Religion. *Amir and Nazar v Webber Academy Foundation*, 2015 AHRC 8. Two students at Webber Academy were not allowed to pray on campus because the school was "'non-denominational'" (para 31). (see **Service/Religion**, *supra* s 4, for additional background on the circumstances). Webber Academy argued that the only way it could accommodate the students was as follows: "they could pray off-campus, they could be given permission to miss school in order to drive to the Mosque to pray, or the Students could find a nearby neighbour who would allow them to pray at their house" (para 112). The Tribunal spoke to reasonableness at para 117:

> [117] The crucial aspect of accepting a proposed accommodation or cooperating in the accommodation process requires that the proposed arrangement be reasonable in all the circumstances. We do not agree that Webber Academy's proposals meet the threshold of reasonableness in all the circumstances in that Webber Academy:
>
> - failed to acknowledge the minimal space taken to conduct the Students' prayers;
> - failed to account for the minimal time the Students would take to pray on campus as opposed to the significant school time they would miss in order to pray at the Mosque;
> - was inconsistent in stating that they would allow covert prayer, but that overt prayer was prohibited;
> - was inconsistent in accommodating head coverings and facial hair on campus for religious reasons, but outright refusing prayer on campus;

- did not take into account how demeaning and unsafe it was for two teenage boys to pray outside in the cold; and
- failed to acknowledge that the Students had indeed been accommodated in the first two and a half weeks on campus, without incident or interference in the educational services being offered.

At para 123 and 124, the Tribunal speaks to the various SCC decisions that informed its analysis [footnotes omitted]:

> [123] Supreme Court of Canada jurisprudence formed the bedrock of legal application to the facts of this human rights complaint and the Tribunal's resulting analysis and conclusions. While drafting this decision, the Supreme Court of Canada issued *Loyola High School v Quebec* [2015 SCC 12]. The Tribunal reviewed the decision but did not rely on it in its analysis as it was interpreted as having confirmatory comments consistent with the analysis of this decision. In addition to the jurisprudence, we are cognizant of the Preamble to the Act, which sets out the governing fundamental principles of equality and dignity that are enshrined in the Alberta legislation. This includes a recognition that all Albertans are equal in regard to religious beliefs and we should all share in an awareness and appreciation of our diverse cultural composition in Alberta.
>
> [124] The following Supreme Court of Canada decisions were central to our deliberations:
>
> - the decisions of, *Multani* [*Multani v Commission Scolaire Marguerie- Bourgeoys*, 2006 SCC 6, [2006] 1 SCR 256], *supra*, *Ross* [*Ross v New Brunswick School District No 15*, [1996] 1 SCR 825, 171 NBR (2d) 321], *supra* and *Chamberlain* [*Chamberlain v Surrey School District No 36*, 2002 SCC 86], *supra* provided context and guidance in addressing the right to freedom of religion and the concomitant right to not be discriminated against because of religious beliefs;
> - the decisions of *Berg* [*University of British Columbia v Berg*, [1993] 2 SCR 353, 1993 CanLII 89 (SCC)], *supra* and *Moore* [*Moore v British Columbia (Ministry of Education)*, 2012 SCC 61, [2012] 3 SCR 360], *supra* were relied on for our interpretation and application of the Act to the provision of services and facilities "customarily available to the public" in this education-based circumstance;
> - the *Amselem* [*Syndicate Northcrest v Amselem* 2004 SCC 47, [2004] 2 SCR 551], supra decision informed our analysis of the religious beliefs in issue;
> - the *Moore*, *supra* decision was relied on as establishing the requirements of prima facie discrimination;

The evidence demonstrated that the Students later attended another private school that was able to accommodate their need to pray at school.

Reasonable and Justifiable/Public Service/Religion. See also: ***Singh v Royal Canadian Legion, Jasper Place (Alta), Branch No 255*** **(1990), 11 CHRR D/357 (Alta Bd of Inq)*; Van Der Smit v Alberta (Human Rights & Citizenship Commission)*, 2009 ABQB 121, 470 AR 325;** and ***Webber Academy Foundation v Alberta (Human Rights Commission),*** **2021 ABQB 541.**

Reasonable and Justifiable/Public Service/Gender. See also: ***Co-operators General Insurance Co v Alberta (Human Rights Commission)*** **(1993), 145 AR 132, 14 Alta LR (3d) 169 (CA), leave to appeal to SCC refused, [1994] SCCA No 22;** and ***Zurich Insurance Company v Ontario (Human Rights Commission)*, [1992] 2 SCR 321, 9 OR (3d) 224.**

Reasonable and Justifiable/Public Service/Physical Disability. See also: ***Ganser v Rosewood Estates Condominium Corp*, 2002 AHRC 2;** and ***Laidlaw Transit Ltd v Alberta (Human Rights & Citizenship Commission)*, 2006 ABQB 874, 410 AR 234, aff'g *Martyn v Laidlaw Transit Ltd*, 2005 AHRC 12.**

Reasonable and Justifiable/Public Service/Family Status. See also**:** ***Mattern v Spruce Bay Resort*, 2000 AHRC 4.;** and ***Pringle v Alberta (Human Rights, Citizenship & Multiculturalism Commission)*, 2004 ABQB 821, 372 AR 154.**

REASONABLE AND JUSTIFIABLE: TENANCY (section 5)

Reasonable & Justifiable/Tenancy/Source of Income. See also: ***Miller v 409205 Alberta Ltd*, 42 CHRR D/311, 2001 AHRC 8, aff'd in part *409205 Alberta Ltd v Alberta (Human Rights & Citizenship Commission)*, 2002 ABQB 681, 319 AR 352.**

REASONABLE AND JUSTIFIABLE: EMPLOYMENT (section 7)

Reasonable and Justifiable/Employment/Age. ***Webber v Canadian Forest Products Ltd*, 2008 AHRC 7.** The Complainant was forced to retire at age 65 pursuant to the Respondent's mandatory retirement policy. The Respondent argued the retirement scheme was reasonably justified for economic reasons and that the policy was a provision of the collective agreement between the Complainant's union and the Respondent. The Respondent did not argue a *BFOR.* The Panel found that mandatory retirement constituted *prima facie* discrimination and then applied a modified s 1 ***R v Oakes*, [1986] 1 SCR 103, 53 OR (2d) 719** analysis as set out in to determine whether the discrimination was reasonable and justifiable under s 11 of the *HRCMA:*

1) the restriction of the right must be undertaken in the pursuit of a pressing and substantial objective, and;

2) the impugned restrictive measure must be proportional to the pressing and substantial objective as evidenced by the fact it is:
   a) rationally connected to the objective as stated;
   b) when viewed objectively, constitutes a minimal impairment of the right being abridged, and;
   c) is proportional in its effects.

The Panel found that the mandatory retirement policy was not reasonable and justifiable under s 11 of the *HRCMA.* Although the Respondent's deferred compensation goal was pressing and substantial, the evidence before the Panel indicated that there was no logical or economically- based thought process in deciding the number 65. In addition, both employee and employer were not aware of the terms of the Pension Plan, which was specifically referenced in the collective agreements and the Union did not support the mandatory retirement policy. The negative effects of this policy on Mr. Webber were significant and the evidence did not support any significant salutary effects of the policy; therefore, the policy was not proportional in its effects.

Reasonable and Justifiable/Employment/Gender/Pregnancy. See also: ***Alberta Hospital Association v Parcels*** **(1992), 129 AR 241, 90 DLR (4th) 703 (QB).**

Reasonable and Justifiable/Employment/Race. See also: ***L Borys Professional Corp v Joshi*****, 1998 ABQB 775, 235 AR 82.**

Reasonable and Justifiable/Employment/Physical Disability. See also: ***STE v Bertelsen*** **(1989), 10 CHRR D/6294 (Bd of Inq)**

Reasonable and Justifiable/Trade Unions and Professional Bodies/ Place of Origin Occupational Association/Place of Origin. ***Mihaly v The Assn of Professional Engineers, Geologists and Geophysicists of Alberta*****, 2014 AHRC 1, rev'd** ***Assn of Professional Engineers and Geoscientists of Alberta v Mihaly*****, 2016 ABQB 61**. Because the Human Rights Tribunal found that a prima facie case of discrimination was made out, APEGA was able to rely on the general test (above). First, the Examination Standard and the Experience Standard adopted by APEGA was rationally connected to APEGA's function of education and experience assessment. Second, these standards were adopted in good faith. Third, in deciding the standard was <u>not</u> reasonably necessary to protect the public and ensuring competent

performance, the Tribunal found that APEGA had not considered appropriate alternative approaches, nor had it "properly considered alternatives or that it would suffer undue hardship by exploring or implementing alternatives to the Examination Standard" (para 234). For these, and other reasons, the standards used by APEGA could not be justified. (Remedies are discussed below.)

The ABQB reversed the Tribunal's decision. Regarding the justification analysis, Ross J wrote at para 113 that "[n]o issue is taken with the Tribunal's application of the test in relation to the first two elements of the test." As for the third element, Ross J found that "possession of entry level engineering competence is, obviously, reasonably necessary to safe practice as a professional engineer" (para 135). An additional factor in finding the Tribunal's decision unreasonable was the Tribunal's "failure to consider relevant factors in the assessment of undue hardship" (para 149).

11.1 Repealed 2015 c1 s4.

Crown is bound

12 The prohibitions contained in this Act apply to and bind the Crown in right of Alberta and every agency and servant of the Crown in right of Alberta.

RSA 1980 cI-2 s 12.

Crown is Bound. *Laidlaw Transit Ltd v Alberta (Human Rights & Citizenship Commission)*, 2006 ABQB 874, 410 AR 234, aff'g *Martyn v Laidlaw Transit Ltd*, 2005 AHRC 12. Human rights legislation in Alberta specifically binds the Crown. If the legislation was not intended to bind the Crown, s 12 would have been worded differently.

Crown is Bound *Anderson v Alberta Health & Wellness*, 2002 AHRC 16, 45 CHRR D/203 (Alta HRP). It is very clear that Alberta Health & Wellness is a person within the meaning of the Act. Section 12 applies to and binds the Crown, in the right of Alberta, and every agency and servant of the Crown in the right of Alberta.

Fund continued

13(1) The Multiculturalism Fund established under the *Alberta Multiculturalism Act*, SA 1984, c A-32.8, is continued as the Human Rights Education and Multiculturalism Fund.

13(2) The following money shall be deposited into the Fund:

(a) money voted by the Legislature for the purpose of

the Fund;

(b) money received by the Government pursuant to agreements with the Government of Canada or with a province or territory or any agency of the Government of Canada or of a province or territory, pertaining to matters related to the purposes of this Act;

(c) money from fees for programs or services provided pursuant to this Act.

13(3) The Minister

(a) shall hold and administer the Fund, and

(b) may be a participant under section 40 of the *Financial Administration Act* on behalf of the Fund.

13(4) The income of the Fund accrues to and forms part of the Fund.

13(5) The Minister may pay money from the Fund

(a) for educational programs and services related to the purposes of this Act, and

(b) to make grants pursuant to section 14.

RSA 2000 cH-14 s 13; 2004 c 7 s 19; 2006 c 23 s 43; 2009 c 26 s 10.

Grants

14(1) The Minister may make grants if

(a) the Minister is authorized to do so by regulations under this section, and

(b) there is money available in the Fund.

14(2) The Lieutenant Governor in Council may make regulations authorizing the Minister to make grants and, for that purpose, section 13(2), (3) and (4) of the *Government Organization Act* apply.

1996 c 25 s 14.

ALBERTA HUMAN RIGHTS COMMISSION

Commission continued

15(1) The Alberta Human Rights and Citizenship Commission is continued under the name "Alberta Human Rights Commission" and consists of the members appointed by the Lieutenant Governor in Council.

15(2) The Lieutenant Governor in Council may designate one of the

members as Chief of the Commission and Tribunals.

15(3) The Minister may designate one of the members of the Commission as Acting Chief of the Commission and Tribunals, and the Acting Chief so designated has, during the absence of the Chief of the Commission and Tribunals, the powers and duties of the Chief of the Commission and Tribunals.

15(4) The Chief of the Commission and Tribunals and other members of the Commission shall receive remuneration and expenses for their services as prescribed by the Minister.

RSA 2000 cH-14 s 15; 2009 c 26 s 12.

Functions of Commission

16(1) It is the function of the Commission

(i) **to forward the principle that all persons are equal in: dignity, rights and responsibilities without regard to 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,**

(ii) **to promote awareness and appreciation of and respect for the multicultural heritage of Alberta society,**

(iii) **to promote an environment in which all Albertans can participate in and contribute to the cultural, social, economic and political life of Alberta,**

(iv) **to encourage all sectors of Alberta society to provide equality of opportunity,**

(v) **to research, develop and conduct educational programs designed to eliminate discriminatory practices related to 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,**

(vi) **to promote an understanding of, acceptance of and compliance with this Act,**

(vii) **to encourage and co-ordinate both public and private human rights programs and activities, and**

(viii) **to advise the Minister on matters related to this Act.**

16(2) The Commission may delegate in writing to a member or to a person referred to in section 18 any of its functions, powers or duties.

RSA 2000 cH-14 s 16; 2009 c 26 s 13; 2015 c 18 s 3.

***Webber Academy Foundation v Alberta (Human Rights Commission),* 2021 ABQB 541.** "While the Alberta Human Rights Commission does not have a mandate to protect and enforce the Charter rights of Albertans, it is empowered, like other administrative tribunals, to decide questions of law before it. In the course of administering its home statute, it is obligated to have due regard for the values underlying the Charter."

By-laws

17(1) The Commission may make bylaws respecting

(a) the carrying out of its powers, duties and functions under this Act,

(b) administrative, practical and procedural matters related to the filing and handling of complaints under this Act, including but not limited to

(i) complaints and the director's exercise of functions, duties and powers with respect to complaints

(ii) appeal proceedings referred to in Section 26, and

(iii) proceedings before a human rights tribunal,

and

(c) administrative, practical and procedural matters for which no express or only partial provision has otherwise been made in this Act, including but not limited to bylaws authorizing the director, Chief of the Commission and Tribunals or a human rights tribunal to

(i) waive or vary the application to a proceeding of a bylaw or of a time limit established by a bylaw, so long as the Act is complied with,

(ii) define or narrow the issues required to dispose of a complaint and limit the evidence and submissions of the parties on issues,

(iii) determine the order in which the issues and evidence in a proceeding will be considered,

(iv) establish forms, guidelines, practice directions and procedures in respect of this Act and the bylaws, and

(v) with respect to a human rights tribunal, perform the functions and exercise the powers and duties

of the tribunal as if its proceeding were an inquiry under the Public Inquiries Act.

17(2) The *Regulations Act* does not apply to bylaws of the Commission.

17(3) Bylaws of the Commission are not effective until they have been approved by the Minister.

17(4) This section and the bylaws shall be liberally construed to permit the use of policies, practices, hearings and other procedures, including alternatives to traditional adjudicative or adversarial procedures that, in the opinion of the Commission, will facilitate fair, just and expeditious resolutions of the merits of complaints under this Act.

RSA 2000 cH-14 s 17; 2009 c 26 s 14; 2021 c25 s2

Current bylaws are found below.

Director and Staff

18(1) The Lieutenant Governor in Council may appoint a director for the purpose of the administration of this Act.

18(2) The Minister may appoint any employees that the Minister considers necessary for the purpose of the administration of this Act.

18(3) The director may in writing designate an employee as deputy director.

18(4) The deputy director may exercise

(a) in the absence of the director, the functions, powers and duties conferred or imposed on the director in accordance with this Act, or

(b) at the request or with the approval of the director, the functions, powers and duties conferred or imposed on the director in accordance with this Act that are specified by the director.

RSA 2000 cH-14 s18;2009 c26 s15;2021 c25 s2.

***Chak v Alberta (Human Rights Commission)*, 2017 ABCA 88.** The Applicant sought

an order quashing his without-cause termination as legal counsel at the Alberta Human Rights Commission. The chambers judge concluded that this was a contractual employment relationship and did not engage issues of public law, and all remedies could be granted through contract and employment law. The appeal was dismissed.

Annual report

19 The Commission shall after the end of each year prepare and submit to the Minister a report of its activities during that year, including a summary of the disposition of complaints under this Act and any other information that the Minister may require.

RSA 1980 cI-2 s 18; 1996 c 25 s 21.

ENFORCEMENT

Who may make a complaint

20(1) Any person, except the Commission, a member of the Commission and a person referred to in section 18, who has reasonable grounds for believing that a person has contravened this Act may make a complaint to the Commission.

General. If the Complainant is not the victim of the discriminatory behaviour, the Commission normally will not proceed with an investigation unless it has the consent of the person named as the victim in the complaint.

Who may make a complaint? *Gwinner v Alberta (Human Resources and Employment)*, 2004 ABCA 210, 354 AR 21, aff'g *Gwinner v Alberta (Human Resources and Employment)*, 2002 ABQB 685, 321 AR 279. Greckol J (ABQB) stated at para 83:

> …Anyone has standing to bring a complaint if he or she has reasonable and probable grounds to believe that a contravention of the *Act* has occurred. Accordingly, it is not a pre-condition that the Claimants in this case personally were subject to the prohibited discrimination. Trade unions on behalf of their members or citizens on behalf of others may, for example, bring complaints.

Who may make a complaint? *Grey v Albian Sands Energy Inc*, 2007 ABQB 466, 424 AR 200, aff'g *Grey v Tracer Field Services Canada Ltd*, 2006 AHRC 11, 60 CHRR D/263. On appeal, Albian suggested that the wording of s 20(1) requires an actual contravention of the *HRCMA*, and further contended that the *HRCMA* does not confer any declaratory authority on the Panel. Albian suggested that the statement in ***Ontario (Human Rights Commission) v Simpsons-Sears Ltd*, [1985] 2 SCR 536, 23 DLR (4th) 321 [*O'Malley*]** regarding the aim of the *HRCMA* to be relief for discrimination rather

than punishment meant that there must be an aggrieved party for the available remedies to be triggered and that the language of s 7 required a tangible act of discrimination. The Director relied on ***North American Construction Group Inc v Alberta (Human Rights & Citizenship Commission)*, 2003 ABQB 755, 362 AR 29 [*Construction*]**, for the proposition that the *HRCMA* has both a public policy aspect and an individual rights protection aspect, and argued that the Panel erred by failing to address whether the drug testing policy was discriminatory in and of itself, irrespective of whether it discriminated against the particular Complainant. Although no individual remedy was available, Cooke J agreed that the Panel had jurisdiction to consider whether a particular policy was discriminatory in and of itself and to consider public interest aspect of the complaint, particularly as it would help to establish the parameters of the *BFOR* exemption and stated that the spirit of the legislation and *O'Malley* identified the "removal of discrimination" as the primary purpose of the legislation. The Court relied on ***Alberta (Human Rights and Citizenship Commission) v Kellogg Brown & Root (Canada) Company*, 2006 ABQB 302, 399 AR 85** [this decision was overturned by the ABCA (2007 ABCA 426), leave to appeal to the SCC denied (2008 CanLII 32723) after *Grey* was released] and held that discrimination includes practices or attitudes that have, whether by design or impact, the effect of limiting individual's or group's rights. A discriminatory employment policy can be challenged under section 20(1) of the *HRCMA*, even if it has not discriminated against a specific individual or group. As in *Construction* there must be evidence that the policy was actually implemented. The Albian drug and alcohol policy was never implemented at Tracer. The Court upheld the Panel's refusal to scrutinize the Albian policy since the Director failed to establish a *prima facie* case of discrimination, as the policy was not implemented.

Who may make a complaint? *Alberta (Human Rights Commission) v Mynarski Park School District No 5012*, 1983 ABCA 260 (CanLII), [1983] AJ No 36, aff'g *Bouten v Mynarski Park School District No 5012* (1982), 21 Alta LR (2d) 20, *(sub nom Re Bouten)* 37 AR 323 (QB). A teacher, Mr. Bouten, sought the right to pursue a complaint that his employment was terminated, contrary to the *IRPA* after appealing to the Board of Reference on the same issue under the *School Act*. The Court of Appeal ruled that the issue was *res judicata*, as the Board of Reference could, and did, deal with the issue of discriminatory treatment. Bouten was estopped from seeking redress through the Alberta Human Rights Commission.

20(2) A complaint made pursuant to subsection (1) must
(a) be in a form acceptable to the Commission, and

(b) be made within one year after the alleged contravention of the Act occurs.

RSA 1980 cI-2 s 19; 1985 c 33 s 8; 1996 c 25 s 22.

General Statement/Limitation Period. *Novak v Bond*, [1999] 1 SCR 808, 172 DLR (4th) 385. At para 67 the majority of the Court held that limitation statutes:

> … are intended to: (1) define a time at which potential defendants may be free of ancient obligations, (2) prevent the bringing of claims where the evidence may have been lost to the passage of time, (3) provide an incentive for plaintiffs to bring suits in a timely fashion, and (4) account for the plaintiff's own circumstances, as assessed through a subjective/objective lens, when assessing whether a claim should be barred by the passage of time. To the extent they are reflected in the particular words and structure of the statute in question, the best interpretation of a limitations statute seeks to give effect to each of these characteristics.

Limitation Period/Discoverability. *Rivard v Alberta (Human Rights Commission)*, 2014 ABQB 392. Rivard applied for judicial review of the Director's decision that her complaint was brought after the one-year limitation period had expired. Rivard's fixed term contract ended and was not renewed on June 30, 2011. The complaint was brought on January 9, 2013. Rivard did not discover the cause of her physical disability until she was diagnosed with hyperparathyroidism in April 2012. Rivard raised the issue of discoverability given that she was not diagnosed until almost one year after her employment was terminated and argued that the one-year limitation period should start at the point of diagnosis. Lee J reviewed the Director's decision on the reasonableness standard and held that the Director's decision not to apply the discoverability principle was reasonable, and indeed, correct. Although the application for judicial review was dismissed, the Court declined to award costs against Rivard, writing at para 39:

> [39] However I conclude that Dr. Rivard's application was somewhat unique and had some merit for the reasons previously described, even though it was ultimately unsuccessful. Furthermore, Dr. Rivard's situation is truly tragic. When Dr. Rivard had a disability, she could not prove it; and by the time she had a diagnosis proving her disability, she no longer had a disability claim or a discrimination claim against the University and ASSUA, or under the AHRA. Dr. Rivard is a nearly 63 year old widowed single mother, who has a remarkable CV, but she is also as a result of this situation, destitute. Her legal counsel from Gowlings is acting in this matter pro bono. I conclude that awarding costs in these circumstances would not be appropriate.

Limitation Period. *Echavarria v The Chief of Police of the Edmonton Police Service*, 2016 AHRC 5. The Complainants wished to amend their complaints to bring new

allegations against a new party. The Tribunal declined to allow this, noting that the amendments did not disclose human rights discrimination. Additionally, the Tribunal spoke to the limitation period as follows at para 16:

> The Act provides in section 20(2)(b) that a complaint to the Commission must be made within one year of the alleged contravention of the Act. The original complaints do not sufficiently link Sgt. Wozniak to the events such that he would have had prior notice of the complaints within the time frame provided by the Act. If I were to allow an amendment to the complaints to add another respondent to the style of cause and new allegations concerning his conduct more than nine years after the event, I would effectively be allowing the circumvention of the limitation expressed in the Act. Moreover, to do so at the hearing stage of this proceeding without any prior notice or indication to Sgt. Wozniak would be unduly and unfairly prejudicial to him[.]

Limitation Period. *Sheskey v Optima Living Alberta Ltd.* 2022 AHRC 9. The court held that:

> **"**[9] Section (2)(b) provides that a complaint "must … be made within one year after the alleged contravention of the *Act* occurs." In *Rivard v Alberta (Human Rights Commission)* cited above, the Court of Queen's Bench of Alberta noted that the Commission cannot extend this limitation period and that there is no period of discoverability. The plain language of section 20(2)(b) is that a complaint must be made within one year of when the alleged discrimination occurred.
>
> [10] The limitation period is not dependent on the conclusion of the grievance process or the respondent's conduct in that process. The limitation period started when the alleged discrimination happened, and the complainant had one year from that date to make her Complaint. This was a legislative policy choice where the Legislature put a premium on the timely bringing of complaints. The only nuance to this strict limitation period is when evidence outside the limitation period is required for context, or when continuing contraventions occur. Neither of those nuances apply here."

Limitation Period. *Cowling v Alberta Employment and Immigration*, 2012 AHRC 4 (Preliminary Decision on Limitations Issue). The Respondent took the decision not to renew the contract of the Applicant, Joan Cowling, on the 11th of April, 2006, informing her that she would no longer be working for the Respondent as of May 4th, 2007. On the 1st of May, 2008, the Applicant brought a discrimination complaint on the ground of age against the Respondent. The Human Rights Tribunal dealt with the issue of whether Ms. Cowling's age discrimination complaint was made within the one-year period required by section 20(2)(b). While acknowledging that ***St Albert & Area Student Health Initiative v Polczer,* 2007 ABQB 692** held that the one-year limitation period is an absolute bar with no discretion for a tribunal to extend the date, the Tribunal noted that the limitation period started running from the date the

employment ended and not the date that the decision to terminate was made. In this case, the decision was part of a continuing contravention with the latest act occurring on the date that Cowling's employment ended. The Respondent's application to dismiss the complaint on the basis of the limitation period was dismissed.

Limitation Period. *Mitchell v. Edmonton Public School Board,* 2023 AHRC 16. The complainant, Erin Mitchell, suffered workplace harassment and went on medical leave for a resulting mental issue. She instituted an action, but the tribunal could only consider it for context and not for the merits of the Complaint as it was time-barred by the limitation period in section 20(b) of the *Alberta Human Rights Act* and the only relevant time for this complaint was while the complainant was on medical leave. The respondent approved her medical leave and accepted her medical notes, but the complainant alleged that how the employer communicated with her caused further psychological injury. The Tribunal found that the actions were not harassment and did not otherwise constitute an adverse impact.

Limitation Period. *Walsh v Mobil Oil Canada*, 2007 ABQB 305, 2007 Alta LR (4th) 88, rev'd on other grounds, 2008 ABCA 268, 440 AR 199. The Court of Queen's Bench overturned the Panel's interpretation of s 20(2)(b) of the *HRCMA.* The Panel held that Walsh's damages were limited to the time period up until the date she made her complaint. The *HRCMA* does not state that assessment of damages or the review of the parties' conduct should end on the date of the filing of the complaint. The limitation period is the period within which the complaint must be filed and nothing more. Damages, and the time period for their assessment, are unrelated to the limitation period set out in the *Act*. The Court held that Ms. Walsh filed her complaint within the relevant limitation period.

Limitation Period. *Allen v Alberta (Human Rights Commission)*, 2005 ABCA 436, 376 AR 199. The Appellant filed a complaint on October 30, 1999, against the University of Calgary and the Alberta Teachers' Association alleging discrimination on the grounds of race, ancestry and place of origin. The evidence showed that the last or final decision made by the University respecting the Appellant's dispute of assessment of credits was made on June 15, 1998. The Court of Appeal considered whether the University's continuing denial of further course credits, as a result of the Appellant's repeated requests for reconsideration, constituted a "continuing contravention" or a "continuing consequence" of the original decision. The Court of Appeal referred to ***Greenwood* (below)**, ***Galbraith* (below)** and ***Bugis* (above/below)** and held that the latest that a contravention could have occurred was June 15, 1998, when the earlier decision was upheld. The Appellant's complaint dated October 30, 1999 was out of

time.

Limitation Period. ***Gersten v College of Physicians and Surgeons of Alberta*****, 2004 AHRC 16, 51 CHRR D/191.** A preliminary issue of whether the complaint was made within the one-year limitation period was addressed by the Panel. Dr. Gersten alleged discrimination on the basis that he was denied licensing. The College of Physicians and Surgeons argued that the alleged ground of discrimination was a statement made by Dr. Ohlhauser on November 19, 1999, which occurred more than one year prior to the lodging of the complaint by Dr. Gersten on November 24, 2000. Dr. Gersten argued that the statement made on November 19, 1999 was simply an incident in a series of discriminatory events that pre-dated and post-dated the complaint. The Panel relied on ***Bugis v University Hospitals*** **(1989), 95 AR 45, 65 Alta LR (2d) 274 (QB)** and ***Greenwood, below*** and held that the statement alleged to have been made on November 19, 1999 was not a single act of discrimination. Rather it was an act of discrimination with continuing consequences: "there was nothing final and conclusive about the statements alleged to have been made in 1999, as the relationship between Dr. Gersten and the College continued well after that date, and Dr. Gersten thereafter continued to be denied licensure" (page 45). The Panel held that the alleged acts of discrimination occurred between 1999 up until May 13, 2002, when Dr. Gersten was removed from the Register, and therefore the complaint was filed within the one-year limitation period.

Limitation Period. ***Greenwood v Alberta (Workers' Compensation Board)*****, 2000 ABQB 827, 275 AR 1 [*****Greenwood*****].** The denial of benefits following an alleged discriminatory decision was found to be "continuing consequences", not another contravention. Justice McBain relied on ***Galbraith, above*** and ***Bugis v University Hospitals*** **(1989), 95 AR 45, 65 Alta LR (2d) 274 (QB)** for the concept of a continuing contravention. The Court reviewed the intentions of the words "final and conclusive" in the legislation to provide closure to claims adjudicated and as in that case under the *Workers' Compensation Act*.

Limitation Period. ***Bugis v University Hospitals*** **(1989), 95 AR 45, 65 Alta LR (2d) 274 (QB) aff'd on other grounds [1990] AJ No 445 [*****Bugis*****].** A doctor's unsuccessful application for reinstatement, following mandatory retirement, was found not to be an independent incident of discrimination. In ***Galbraith, below*** the Court identified a useful distinction between an act of discrimination and its continuing consequences and a continuing course of a series of action. In ***Galbraith*** there was one refusal whereas in this case there were a number of refusals. The [then] 6-month limitation period [*AHRA*, s 20(2)(b) one-year limitation period] under the *IRPA* started from the time of the last contravening act.

Limitation Period. See also: ***Sereditch v Ukrainian Canadian Congress – Alberta Provincial Council*, 2012 AHRC 1; *Sarhan v JBS Food Canada ULC,* 2019 AHRC 39; *Penate v City of Calgary*, 2019 AHRC 53.**

Continuing Contravention. *Galbraith v Manitoba (Human Rights Commission)*, (1984), 5 CHRR D/1885, *(sub nom Manitoba v Manitoba (Human Rights Commission)* 25 Man R (2d) 117 [*Galbraith*]. A continuing contravention of the *Act* involves a continued course of conduct, renewed periodically, which is capable of being considered as a series of consecutive separate actions. A single act possessing substantial finality, such as a discharge or promotion, is only one contravening act, notwithstanding that consequences flowing from that one act continue. The contravention is the starting point from which the time for filing a complaint begins. As the employees did not file their complaints within six months [*AHRA*, s 20(2)(b) one-year limitation period] from their retirement, they were not within time, there being no continuing contravention of the *Act*.

Director's powers and duties re complaint

21(1) If the Commission receives a complaint made in accordance with section 20 and the bylaws, the director may at any time

- **(a) dismiss the complaint, in whole or in part, if the director determines that the complaint or part of the complaint**
  - **(i) is without merit,**
  - **(ii) was made in bad faith for an improper purpose or motive,**
  - **(iii) has no reasonable prospect of success, or**
  - **(iv) is a complaint or part of a complaint that is being, has been, will be or should be more appropriately dealt with in another forum or under another Act,**
- **(b) attempt to effect a settlement of the complaint by one or more of the following means:**
  - **(i) conciliation;**
  - **(ii) the appointment of a person to investigate the complaint, or**
- **(c) refer the complaint to the Chief of the Commission and Tribunals for resolution by a human rights tribunal.**

21(2) For greater certainty, the director may at any time

- **(a) refuse to accept or dismiss a complaint or part of a complaint that**
  - **(i) is not within the jurisdiction of the Act,**

(ii) is not in accordance with the Act or the bylaws,

(iii) is being, has been, will be or should be more appropriately dealt with in another forum or under another Act,

and

(b) accept a complaint or part of a complaint referred to in subsection (1)(a)(iv) pending the outcome of the matter in the other forum or under the other Act.

21(3) The director may dismiss a complaint or part of a complaint if the director is of the opinion that the complainant has refused to accept a proposed settlement that is fair and reasonable.

21(4) The director shall forthwith serve notice of a decision under this section on the complainant and the person against whom the complaint was made.

RSA 2000 cH-14 ss21,22;2021 c25 s2

Standard of Review. ***X v Alberta Human Rights Commission,*** **2022 ABKB 659.** The Court held that pursuant to the amendment of Section 21 that allows the Director to dismiss a complaint because it "has no reasonable prospect of success": HRA s. 21(1)(iii). The reasonable prospect of success standard should be used instead of the reasonable basis in the evidence to proceed standard after December 8, 2021.

22 Repealed

2021 c25 s2.

Investigator's powers

23(1) For the purposes of an investigation under section 21, an investigator may do any or all of the following:

(a) subject to subsection (2), enter any place at any reasonable time and examine it;

(b) make inquiries orally or in writing of any person who has or may have information relevant to the subject-matter of the investigation;

(c) demand the production for examination of records and documents, including electronic records and documents, that are or may be relevant to the subject-matter of the investigation;

(d) on giving a receipt for them, remove any of the things referred to in clause (c) for the purpose of making copies

of or extracts from them.

23(2) An investigator may enter and examine a room or place actually used as a dwelling only if

(a) the owner or person in possession of it consents to the entry and examination, or

(b) the entry and examination is authorized by a judge under section 24.

1996 c 25 s 22.

Investigator's Powers. *Brewer v Fraser Milner Casgrain LLP*, 2008 ABCA 435, 446 AR 76. The Complainant alleged discrimination in the area of employment on the basis of physical disability after she developed allergies, which she alleged her employer did not accommodate. The Panel held that the employee had a responsibility to cooperate with the accommodation process and that the evidence showed that the Complainant did not provide such cooperation, in part because she denied the investigator "direct access to her doctors" (para 8). Upon judicial review, the Court of Queen's Bench held that it was reasonable for the Complainant to deny the Investigator direct access to her doctors, and that the Chief Commissioner was not justified in categorizing that as a failure to co-operate, nor in drawing any adverse inference from it. The Court of Appeal stated that: "Once a complainant puts a matter in the hands of the Commission, the Commission is entitled to expect full co-operation in the resulting investigation. The Commission is entitled to conduct an independent and even-handed inquiry into the complaint" under s 23 (para 20). The Court of Appeal held that Complainant did not have a right to screen the evidence available to the Commission, nor direct how the investigation was to be conducted. Specifically, 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.

Investigator's Powers. *Alberta (Human Rights Commission) v Alberta Blue Cross Plan* (1983), 48 AR 192, 28 Alta LR (2d) 1 (CA) [*Blue Cross*]. The Complainant alleged discrimination on basis of gender after she was dismissed from her job because of her pregnancy. The Court of Queen's Bench refused to order production of all personnel files of Alberta Blue Cross. The Court found that the *IRPA* did not permit the Court to compel production of relevant documents; for example, personnel files of pregnant employees. The interest in protecting the confidentiality of all employees outweighed the interest of the Commission in seeing all files. The Alberta Court of Appeal upheld the decision and stated that the Commission had an obligation to inform the party with

documents that under s 22 of the *IRPA* [*AHRA*, s 23(1)] they retain the right to refuse the production request until a court so orders.

Investigator's Powers. *Kovacs v Horne & Pitfield Foods Ltd* (1982), 3 CHRR D/894 (Bd of Inq). The Complainant alleged discrimination on the basis of gender, in employment, when she was not allowed to complete the "head of household declaration" (used by the employer to determine benefits) for full company benefits because she was not the principal wage earner in her family. The Commission sought an order for the production of application forms of some employees for the "head of household" designation. The Respondent argued that the applications were confidential and should not be disclosed. Relying on ***Blue Cross, above*** the Board refused to order production of privileged documents even though they were potentially relevant.

Judge's order

24(1) Where a judge of the Provincial Court is satisfied on an investigator's evidence under oath that there are reasonable grounds for an investigator to exercise a power under section 23(1) and that

> **(a) in the case of a room or place actually used as a dwelling, the investigator cannot obtain the consent under section 23(2) or, having obtained the consent, has been obstructed or interfered with,**
>
> **(b) the investigator has been refused entry to a place other than a dwelling,**
>
> **(c) a person refuses or fails to answer inquiries under section 23(1)(b), or**
>
> **(d) a person on whom a demand is made under section 23(1)(c) refuses or fails to comply with the demand or to permit the removal of a thing under section 23(1)(d),**

the judge may make any order the judge considers necessary to enable the investigator to exercise the powers under section 23(1).

24(2) An application under subsection (1) may be made with or without notice 2000 cH-14 s 24; 2008 c 32 s 16.

Copies of documents

25 If an investigator removes anything referred to in section 23(1)(c), the investigator may make copies of or extracts from the thing that was removed and shall return the thing to the place from which it was removed within 48 hours after removing it.

1996 c 25 s 22.

Appeal to Chief of the Commission and Tribunals

26(1) The complainant may, not later than 30 days after receiving notice of dismissal of the complaint or notice of discontinuance under section 22, by notice in writing to the Commission request a review of the director's decision by the Chief of the Commission and Tribunals.

26(2) The Commission shall serve a copy of a notice referred to in subsection (1) on the person against whom the complaint was made.

26(3) The Chief of the Commission and Tribunals shall

- **(a) review the director's decision and decide whether**
  - **(i) the complaint should have been dismissed, or**
  - **(ii) the proposed settlement was fair and reasonable, as the case may be, and**
- **(b) forthwith serve notice of the decision of the Chief of the Commission and Tribunals on the complainant and the person against whom the complaint was made.**

26(4) The Chief of the Commission and Tribunals may delegate the functions, powers and duties set out in subsection (3) to another member of the Commission.

RSA 2000 cH-14 s 26; 2009 c 26 s 17; 2021 c25 s2.

30-Day Limitation Period. *Alberta (Mental Health Board) v Martin*, 2003 ABCA 127, 327 AR 366, leave to appeal to SCC refused, [2003] SCCA No 468, 363 AR 199. The Appellant filed a complaint with the Alberta Human Rights and Citizenship Commission on February 5, 1998. Under s 20 of the *HRCMA* [*AHRA*, s 22] the Director sent the Appellant a notice of discontinuance of her complaint on January 19, 2000, by way of registered mail addressed to the Appellant at the address provided by her. The Appellant received the notice and signed the receipt for the registered mail on January 28, 2000. She sent a written request to the Director for review of the notice on February 28, 2000 and the request was received on the same day. Under s 22(1) of the *HRCMA* [*AHRA*, s 26(1)] a request for review or appeal had to be made within 30 days.

The Court of Appeal considered the issue of statutory interpretation respecting the time limit for filing a request for review or appeal under the *HRCMA* and also considered whether the Court should exercise its *parens patriae* jurisdiction where a Complainant has failed to meet a statutory time limit for appealing a decision made by the Director or Board. The Appellant argued that service was not engaged as s 22(1) of the *HRCMA* referred to the Complainant "receiving" notice rather than being served with it.

The Court held that the purpose of s 36.3(3) of the *HRCMA* [*AHRA*, s 43(3)] dealing with Service of Documents, is to create a mechanism whereby time will start running even when the party to whom a document or notice is sent does not collect his or her mail, or attempts to avoid service. This purpose applies to service of all required notices and documents, regardless of who is being served. Proof, by the person served, that he did not receive the notice or document until sometime after the 7 days does not provide him with additional time to react to the fact of service. The legislators provided a grace period of up to 7 days where a document is mailed, after which time commences to run, regardless of when the notice or document was actually received by the affected party. The majority held that the interpretation urged by the Appellant would permit her to defer her time for appeal for months, by not picking up a registered letter, or having someone else sign for it. The majority held that notice was not filed within 30 days and therefore the appeal was dismissed.

Note: The wording of s 22(2) of the *AHRA* now reads:

> The director shall forthwith *serve* notice of a decision under subsection (1) or (1.1) on the complainant and the person against whom the complaint was made [emphasis added].

Review of Director's Decision. *Greater St Albert Roman Catholic Separate School, District No 734 v Buterman*, 2014 ABQB 14. Jan Buterman had his substitute teacher employment discontinued by the Appellant, on account of the fact that the transgender medical condition that he had was not in line with the teachings of Catholic Church, which they argued could confuse the students and parents. A complaint of discrimination was instituted at the AHRC on the basis of gender and physical disability, contrary to s 7(1) of the *Alberta Human Rights Act*, RSA 2000, c A-25.5. The Director dismissed the complaint on the ground that there was no reasonable prospect for success. The Chief of the Commission and Tribunals (the Chief) reversed the Director's decision and sent the complaint down for hearing by the Tribunal. The Appellant brought the matter to the Court of Queen's Bench for a judicial review and an order to quash the order of the Chief. The Court dismissed the Appellant's application, holding that the decision of the Chief in exercising his gatekeeper's function

to determine whether there is a reasonable basis on the evidence to proceed to a hearing, attracts judicial review on the standard of reasonableness (para 47).

Review of Director's Decision. *Coward v Alberta (Chief Commissioner of Human Rights and Citizenship Commission)*, 2008 ABQB 455, 455 AR 177. The Applicant, a Black male, was stopped on the street by police and was told that he matched the description of a suspect in the vicinity who was reportedly waving a knife in public. The Applicant was detained, arrested and searched after he advised the officer he did not have a knife and refused to be searched. No knife was found, and he was released. The Applicant filed a complaint with the Alberta Human Rights and Citizenship Commission, alleging that his treatment by police constituted discrimination on the basis of race. The complaint was investigated and then dismissed by the Director and the Chief Commissioner. The Applicant filed an application for judicial review of the Chief Commissioner's decision on the basis that the Chief Commissioner did not provide a lawful reason to dismiss the case and on the basis that critical facts were ignored. The line of analysis in the Chief Commissioner's decision in rejecting the discrimination claim was found to be clear and intelligible: while race is a prohibited ground of discrimination, it may also operate as a relevant descriptor. As such, it was reasonable for the Chief Commissioner to determine that there was no generalized heightened suspicion of Mr. Coward on the grounds he was Black.

Review of Director's Decision. *Ledger v. Alberta Health Services and Alberta Justice and Solicitor General,* 2021 AHRC 95. The complainant, an Indigenous woman, alleged that the respondent, Alberta Health Services (AHS) discriminated in the area of employment on the grounds of race. After she attended a demonstration protesting systemic racism and bias towards Indigenous peoples in the Canadian justice system, she was subjected to threats and abuse by other employees at the facility. She was removed from her position and placed on temporary administrative leave. She was later offered alternate work that the respondent AHS determined would be appropriate to ensure her safety. The essence of the complaint was whether the treatment the complainant experienced – the threats and abuse, and the respondents' actions in response, constitutes discrimination based on race.

The director found that the change in the complainant's work were unlikely related to her race. The Chief of the Commission and Tribunal ("the chief") overturned the director's decision in accordance with Section 26(3) of the Act. The chief held that the director did not apply the reasonable test, which is the appropriate test in this case. It was held that race was in fact a major factor in the adverse treatment of the complainant and that the respondent did not take reasonable and appropriate steps in response to this treatment.

Review of Director's Decision. See also: ***X v Martin Davies Professional Corporation,*** **2019 AHRC 56;** ***X v Mount Royal University,*** **2019 AHRC 57;** ***Hancock v SE Johnson Management Ltd,*** **2019 AHRC 60;** ***O'Neill v Mount Royal University,*** **2020 AHRC 6;** ***Chadha v Ken Harrison Clinical & Counselling Psychologists Ltd and Kenneth Harrison,*** **2020 AHRC 11;** ***Yang v Alberta New Home Warranty Program,*** **2020 AHRC 18;** ***Connolly v SNC-Lavalin Operations & Maintenance Inc,*** **2020 AHRC 23;** ***Thomas v Stony Plain Chrysler Ltd,*** **2020 AHRC 29;** ***Cook v Larlyn Property Management Ltd,*** **2020 AHRC 30;** ***Caster v Hope Mission,*** **2020 AHRC 33;** ***Tallman v Tribal North Energy Services Corp,*** **2020 AHRC 36;** ***Owusu v Columbia College Corp,*** **2020 AHRC 37;** ***Van Nostrand v McBride Career Group Inc,*** **2020 AHRC 39;** ***Mercier v Stuart Olson Contracting Inc,*** **2020 AHRC 43;** ***De La Cuesta v Horton CBI, Limited,*** **2020 AHRC 44;** ***Poon v Covenant Health,*** **2020 AHRC 45;** ***Gearey v CIMS Limited Partnership,*** **2020 AHRC 47;** ***AD v Alberta Health Services,*** **2020 AHRC 49;** ***Stevens v Sureway Construction Management Ltd,*** **2020 AHRC 54;** ***Robert Sabine v Municipal District of Opportunity No 17,*** **2020 AHRC 55;** ***Sherick v The City of Calgary,*** **2020 AHRC 56;** ***Heinrich v Condo Corporation 0514146 AND KayVee Management Inc,*** **2020 AHRC 57;** ***Wint v Suncor Energy Inc,*** **2020 AHRC 61;** ***Hicks v Loblaws Inc o/a Real Canadian Superstore,*** **2020 AHRC 62;** ***Sydora v Village of Innisfree,*** **2020 AHRC 64;** ***McNichol v Pidherney's Inc*****, 2020 AHRC 65;** ***Mar v Edmonton Police Service,*** **2020 AHRC 70;** ***Wang v Alberta Energy Regulator,*** **2020 AHRC 71;** ***Shaw v Sobeys West Inc o/a Safeway,*** **2020 AHRC 77;** ***Guenthner v 543077 Alberta Ltd o/a Sil Industrial Minerals,*** **2020 AHRC 81;** ***Pearn v Alberta Health Services,*** **2020 AHRC 82;** ***Zupcic v Saputo Foods Limited,*** **2020 AHRC 84;** ***Krunek v 0904442 BC Ltd,*** **2020 AHRC 85;** ***Caster v Crunch Canada West Inc o/a Crunch Fitness,*** **2020 AHRC 86;** ***Douglas v Ducharme Motors Ltd,*** **2020 AHRC 87;** ***Sinha v Memorial Square Dental,*** **2020 AHRC 90;** ***Saul v Clean Harbors Industrial Services Canada Inc,*** **2020 AHRC 91;** ***Vass-Dezso v Sobeys West Inc o/a Safeway,*** **2020 AHRC 88;** ***Northrup v Noralta Lodge Ltd,*** **2020 AHRC 93;** ***Poaps v IKEA Canada Limited Partnership,*** **2020 AHRC 96;** ***TF obo RF v Rocky View School Division No 41,*** **2020 AHRC 97;** ***Afifi v Wal-Mart Canada Corp,*** **2020 AHRC 98;** ***Wingert v Potential Place Society,*** **2020 AHRC 99;** ***Hamodah v Reitmans (Canada) Limited,*** **2021 AHRC 1;** ***Poddubneac v Alberta Health Services,*** **2021 AHRC 2;** ***Beart v Edmonton Public School Board,*** **2021 AHRC 3;** ***Mitchell v McKenzie Decorators Ltd,*** **2021 AHRC 6;** ***Stephen v Alberta Union of Provincial Employees (AUPE),*** **2021 AHRC 4;** ***Heath v Bouchier Contracting Ltd,*** **2021 AHRC 7;** ***Arden v East Central Alberta Catholic Separate Schools Division No 16,*** **2021 AHRC 11;** ***Fleck-Brezinski v Edmonton Police Service,*** **2021 AHRC 10;** ***Hosu v University of Calgary,*** **2021 AHRC 9;** ***Pounall v The City of Calgary,*** **2021 AHRC 12;** ***Abel v Faraja Mwenebembe,*** **2021 AHRC 5;** ***Frauenfeld v Covenant Health,*** **2021 AHRC 8;** ***Coombs v Homewood Health Inc,*** **2021 AHRC 15;** ***DeSalegn v Chief of Police, Calgary Police Service,*** **2021 AHRC 17;**

***Grienke v Bethany Care Society,* 2021 AHRC 22; *Lee v Compass Group Canada Ltd,* 2021 AHRC 19; *Zahra v Kids & Company Ltd,* 2021 AHRC 23; *Sooch v University of Calgary,* 2021 AHRC 20; *Osman v Diversified Transportation Ltd,* 2021 AHRC 25; *Samuel Taler v Wal-Mart Canada Corp,* 2021 AHRC 28; *Seales v Lineman's Testing Laboratories of Canada Limited,* 2021 AHRC 26; *Cherkas v Shell Energy North America (Canada) Inc,* 2021 AHRC 27; *Badri v University of Alberta,* 2021 AHRC 29.**

Referral to human rights tribunal

27(1) The Chief of the Commission and Tribunals shall appoint a human rights tribunal to deal with a complaint in the following circumstances:

> **(a) where the director refers the complaint for resolution by a tribunal under section 21(1)(c);**
>
> **(b) where the Chief of the Commission and Tribunals or another member of the Commission decides under section 26(3) that the complaint should not have been dismissed or that the proposed settlement was not fair and reasonable.**

Legislative Intent. ***Ceresne v Crosby, 2022*** **AHRC 138.** The Director screened the Complaint under section 21 of the *Act* and referred the Complaint to the Chief of the Commission and Tribunals (the Chief Commissioner) for resolution by a human rights tribunal (the Tribunal). The respondent brought an application to remit the Complaint back to the Director to have her screen the Complaint again because the Director was not provided access to and could not have considered fully the offers to settle which were proposed by the Alberta Human Rights Officer. The court held that Section 27(1)(a) states that the Chief Commissioner must appoint a Tribunal to resolve the Complaint. The legislative intent is to proceed directly to the Tribunal following a Director's referral under section 21(4).

Genuine Effort. ***Kane v Church of Jesus Christ Christian-Aryan Nations*****, [1992] AWLD 302, (*****sub nom Kane v Church of Jesus Christ Christian-Aryan Nations (No 3))*** **18 CHRR D/268 (Alta Bd Inq).** Commission staff wrote letters to the Respondents and attempted to contact them by telephone. The Respondents were unwilling to meet with Commission staff. The Board held that the Commission could reasonably conclude that it would be unable to effect a settlement and so had a reasonable basis for proceeding to the appointment of a Board of Inquiry. The Board had jurisdiction to hear the matter.

Genuine Effort. ***Alberta (Human Rights Commission) v Pro Western Plastics Ltd*** **(1983), 46 AR 264, 27 Alta LR (2d) 47 (CA).** Before a Board of Inquiry [Human Rights Tribunal] can be appointed, the Commission must make a genuine effort to achieve a settlement of the complaint. If it has not done so, the court may grant *certiorari* to quash the appointment of the Board of Inquiry.

Duty vs Discretion. ***Zahorodny v Alberta (Human Rights Commission)*** **(1987), [1988] AWLD 139, 9 CHRR D/5137 (ABQB).** The Applicant sought an order of *mandamus* from the Court of Queen's Bench, compelling the Alberta Human Rights Commission to appoint a Board of Inquiry. The Court ruled that in order for the Court to grant a *mandamus*, the legislation must impose a duty. Section 20(1) [s 21 and 22(1)(a)] required the Commission to investigate the complaint to determine if there was merit. If the legislation merely grants a power of discretion, the Court will not grant *mandamus.* The power to appoint a Board of Inquiry [s 27(1)] was found to be discretionary. The Commission investigated, as required by the *Act*, but found no basis for the complaint, therefore, *mandamus* was not available to compel the Commission to appoint a Board of Inquiry.

Appointment to Panel. ***Whitnack v Alberta Bingo Supplies Ltd*****, 2003 AHRC 2.** The Complainant was before a Labour Relations Board (LRB) regarding her termination by the Respondent. The LRB decided that she was to be reinstated and paid for lost wages. As a result, she had signed a release for outstanding matters including the human rights complaints of October 15, 1998 and December 3, 1999. The Respondent argued that the release applied to this human rights proceeding and that the appointment of this matter before the Panel was inappropriate because the Commissioner failed to mention the release during the investigation and settlement process. Since the release was not signed with respect to a severance package, the Panel held that it had jurisdiction to hear this matter. The Panel held that there are two separate processes to ensure justice and fairness. The Commissioner is involved in the first intake process and the Panel has no prior knowledge of what happens in those preliminary stages. Because, in this case, a settlement was not reached, the Commissioner correctly directed the matter to the Panel pursuant to s 27(1)(a) of the *HRCMA*.

Review of decision to appoint a Panel: see: ***Halifax v Nova Scotia (Human Rights Commission)*****, [2012] 1 SCR 364, 2012 SCC 10.**

27(2) A human rights tribunal shall consist of one or more members of the Commission, one of whom may be the Chief of the Commission and Tribunals.

27(3) Where the Chief of the Commission and Tribunals or another member of the Commission has conducted a review under section 26(3) in respect of a complaint, the Chief of the Commission and Tribunals or the other member, as the case may be, is not eligible to sit as a member of a human rights tribunal dealing with that complaint.

27(4) A human rights tribunal and each member of the tribunal have all the powers of a commissioner under the *Public Inquiries Act*.

Production of Evidence. *Goossen v Summit Solar Drywall Contractors Inc*, 2014 AHRC 7 (Preliminary Matters Decision). Regarding the production of evidence, the Tribunal wrote at paras 8-9 [footnotes omitted]:

> [8] Subsection 27(4) of the *Alberta Human Rights Act*, confers the following authority and powers upon a Tribunal: "A human rights tribunal and each member of the tribunal have all the powers of a commissioner under the Public Inquiries Act." Section 4 of the *Public Inquiries Act* [RSA 2000, c P-39] states:
>
> > *Evidence*
> > *The commissioner or commissioners have the power of summoning any persons as witnesses and of requiring them to give evidence on oath, orally or in writing, and to produce any documents, papers and things that the commissioner or commissioners consider to be required or the full investigation of the matters into which the commissioner or commissioners are appointed to inquire.*
>
> [9] The Tribunal has the authority to compel the production of evidence that is relevant to the issues in dispute in any matter before it.

As to production of the Complainant's Workers' Compensation Board (WCB) records, the Tribunal wrote at para 14 that:

> In his application, counsel did not think it necessary to ask the WCB to produce Ms. Goossen's full WCB file. He indicated that it was not needed because "Summit understands that Mrs. Goossen has all the WCB records." He suggested that all that is needed is for the Tribunal Chair to "sanctify" the production of the WCB records. I disagree. In order to ensure that we have all the records, we need to obtain Ms. Goossen's entire file from the WCB.

For additional factual background, see also the related decision: ***Goossen v Summit Solar Drywall Contractors Inc*, 2016 AHRC 7** [*supra*] and ***Goossen v Summit Solar Drywall Contractors Inc*, 2016 AHRC 10 (Decision Regarding Quantification of Lost Wages)**.

27 (5) If a human rights tribunal consists of more than one member, the decision of the majority is the decision of the tribunal.

RSA 2000 cH-14 s27; 2009 c26 s18; 2021 c25 s2.

Parties

28 The following persons are parties to a proceeding before a human rights tribunal:

(a) the director;

(b) the person named in the complaint as the complainant;

(c) any person named in the complaint who is alleged to have been dealt with contrary to this Act;

(d) any person named in the complaint who is alleged to have contravened this Act;

(e) any other person specified by the tribunal, on any notice that the tribunal determines, and after that person has been given an opportunity to be heard against being made a party.

RSA 2000 cH-14 s 28; 2009 c 26 s 19.

Director or Officer of an Entity/Vicarious Liability. *Kane v Alberta Report* [*Re Kane*], 2001 ABQB 570, 291 AR 71 . Because the intention of the *HRCMA* is remedial and preventative, an individual who is a Director or Officer of an entity that is alleged to have breached s 2(1) of the *HRCMA* [*AHRA*, s 3(1)] may be named as a Respondent where there is *prima facie* evidence on the face of the complaint, or upon investigation, which demonstrates that he or she is causally connected, directly or indirectly, to the publication, issuance, or display, of the allegedly prohibited material. In so doing, the term "cause" should be given a broad definition.

Liability of a Distributor/Vicarious Liability. *Johnson v Music World Ltd*, 2003 AHRC 3. The Panel relied on ***Kane v Alberta Report* [*Re Kane*], 2001 ABQB 570, 291 AR 71** and held that the test for liability as a distributor was met as there was *prima facie* evidence on the face of the complaint that the Respondents were causally connected to the discriminatory practices by the display of the alleged prohibited material.

Public Service/Vicarious Liability. See also: ***Ross v New Brunswick School District No. 15*, [1996] 1 SCR 825, *(sub nom Attis v New Brunswick School District No 15)* 171 NBR (2d) 321.**

Addition of Party. *Abdulkadir v Creative Electric Co Ltd and McEwan*, 2012 AHRC 11. The Complainant sought an order to add McEwan, the sole shareholder and a director of Creative Electric personally as a Respondent. In allowing the application, the Chair held that the addition of McEwan as a party would not cause substantial prejudice to McEwan to make full answer and defence to the allegations of discrimination. The Tribunal set out the test for adding a party at para 12 (citation omitted):

> [12] The legal principle to be applied in the context of applications to add respondent parties to a proceeding that has already been commenced, is comprised of a two part test. The first part of this test considers whether there are facts alleged that, if proven, could support a finding that the proposed respondent violated the complainant's rights. The second part of the test is whether the addition of the proposed respondent would cause substantial prejudice to the respondent's ability to make full answer and defence to the allegations that cannot be alleviated by procedural orders of the Tribunal.

Addition of Party. *Egan v Accurate Glass & Storefront Ltd*, 2013 AHRC 9 (Preliminary Matters Decision) (not available on CanLII). Egan brought a claim of discrimination against Accurate Glass on the basis of physical disability under s 7(1)(a) and (b) of the AHRC when her employment was terminated, after working from home for several months, following knee surgery. Accurate Glass was struck as a company because it did not file annual returns. Egan sought and was granted the ability to add a third party (Tancowny) as a Respondent per s 28(e) of the *AHRA*. Tancowny was the only director and shareholder of Accurate Glass. In adding Tancowny as a Respondent, the Tribunal relied on the test laid out in para 12 of ***Abdulkadir v Creative Electric Co Ltd and McEwan*, 2012 AHRC 11 (*supra*)**. Note that the present decision is not available on CanLII as of 20 July 2020.

Addition of Party. See also: *BL v International Brotherhood of Boilermakers, Local Lodge 146*, 2018 AHRC 14; *Bauknecht v 1055791 Alberta Ltd (Elkwater Lake Lodge & Resort)*, 2019 AHRC 35; *Berg v Thompson Court Homeowners Association*, 2019 AHRC 66.

Carriage of proceeding

29(1) The director has carriage of a proceeding before a human rights tribunal except

(a) where the Chief of the Commission and Tribunals or a member of the Commission has made a decision under section 26(3) that the complaint should not have been dismissed or that the proposed settlement was not fair and reasonable, or

(b) where, in the opinion of the director, the director's involvement is not necessary or consistent with the public interest in view of the likely evidence or the issues to be resolved in the proceeding, in which case the complainant has carriage of the proceeding.

(2) The director shall not have carriage of a proceeding before a court without the approval in writing of the Chief of the Commission and Tribunals.

(3) Where the director has carriage of a proceeding, the director may determine the nature and extent of the director's participation in the proceeding.

RSA 2000 cH-14 s29;2009 c26 s20;2021 c25 s2

Carriage of Proceeding. ***Latkolik v Laebon Rental Communities Ltd*****, 2023 AHRC 8**. The court at paragraph 23 stated that: "… Carriage of the complaint, as stated in the Bylaws of the Alberta Human Rights Commission, means "having primary responsibility for conducting a tribunal hearing."[6] Carriage does not provide the Director with a general right to proceed to a hearing in the absence of the complainant."

Carriage of Proceeding See also: ***Anjie Browne v Dan Dekort and Temple Hair Design*** **(November 19, 1997, Alta HRP).**

Procedural rules

30(1) The parties to a proceeding before a human rights tribunal are entitled to appear and be represented by counsel at a hearing held by the tribunal.

30(2) Evidence may be given before a human rights tribunal in any manner that the tribunal considers appropriate, and the tribunal is not bound by the rules of law respecting evidence in judicial proceedings.

Not Bound by Rules of Law Respecting Evidence. ***Saunders v Syncrude Canada Ltd*****,**

2013 AHRC 11 rev'd *Syncrude Canada Ltd v Saunders*, 2015 ABQB 237. The Complainant's employment was terminated, according to the Respondent, due to poor attendance. However, it was shown that the termination was linked to the absences due to chronic headaches the Complainant suffered, which the Respondent could not deal with. In the result the Tribunal found that the Complainant was discriminated against on ground "of physical disability and perceived physical disability" contrary to the *AHRA*. The Respondent raised the argument that the Complainant's doctor was not called in evidence and that the Tribunal should make an adverse finding to that effect. The Tribunal declined and held that: [68] "Section 30(2) of the Act states that a human rights tribunal is not bound by the rules of law respecting evidence in judicial proceedings. In any event, the decision whether to draw an adverse inference is discretionary."

The Tribunal's decision was reversed by the ABQB. Regarding the finding of an adverse inference, Mahoney J wrote at para 67 that "[b]y deciding not to draw an adverse inference against Saunders, I find the Tribunal committed a reviewable error when it did not properly apply the test set out in *Howard* [*Howard v Sandau*, 2008 ABQB 3]." The factors from para 44 of *Howard* for deciding whether an adverse inference will be drawn are quoted in the present decision at para 66:

> In their book Witnesses Toronto: Thompson Carswell, 2007, Mewett and Sankoff identify at page 2-23 the following circumstances as particularly significant:
>
> - whether there is a legitimate explanation for the failure to call the witness
> - whether the witness has material evidence to provide
> - whether the witness is the only person or the best person who can provide the evidence.
> - whether the witness is within the "exclusive control" of the party, and is not "equally available to both parties"

Regarding the rules of evidence and duty of fairness, the Court found at para 78 that: "[t]he Tribunal herein is also bound by a duty of fairness, even if it is not 'bound by the rules of law respecting evidence,' as it stated at para 68 of its decision. By failing to afford Syncrude the opportunity to cross-examine Dr. Day, the Tribunal erred and the duty of fairness was breached."

General Principle. *Prassad v Canada (Minister of Employment & Immigration)*, [1989] 1 SCR 560, 57 DLR (4th) 663. Tribunals are masters of their own process. "As a general rule...tribunals are considered to be masters of their own house. In the absence of specific rules laid down by statute or regulation, they control their own

procedures subject to the proviso that they comply with the rules of fairness and where they exercise judicial and quasi-judicial functions, the rules of natural justice" (para 46).

See also: ***Mihaly v The Assn of Professional Engineers, Geologists & Geophysicists of Alberta and Naveed v The Assn of Professional Engineers, Geologists & Geophysicists of Alberta*, 2013 AHRC 1.**

Extent of Panel's right to use evidence submitted to another tribunal. ***Alberta Report v Alberta (Human Rights & Citizenship Commission)*, 2002 ABQB 1081, 333 AR 186.** The Alberta Report published an article implying that North American commercial real estate was dominated by real estate firms owned by Jewish people. Mr. Kane, the Executive Director of the Jewish Defence League filed a complaint with the Alberta Human Rights Commission against the magazine. The Panel relied on expert evidence tendered before another tribunal and held that the article violated s 2(1)(a) of the *HRCMA* [*AHRA*, s 3(1)(a)]. The Alberta Report appealed the Panel's decision pursuant to s 33 of the *HRCMA* [*AHRA*, s 37(1)]. At issue was the extent to which the Panel could take notice of evidence introduced before other tribunals, and whether, in this instance, the Panel violated the Appellants' right to know the case to be met. The appeal was allowed on the basis that the Panel had not provided sufficient notice to the parties that it was going to rely on evidence from a decision of a BC Human Rights Tribunal and the Panel went beyond its authority by taking notice of factual findings. While tribunals have more latitude in gathering evidence, this does not permit them to circumvent the requirement that they inform parties of the evidence on which they intend to rely. The matter was remitted back to the Panel for a rehearing. There is no record of a rehearing.

Broad Discretion. ***Grey v Albian Sands Energy Inc*, 2007 ABQB 466, 424 AR 200, aff'g *Grey v Tracer Field Services Canada Ltd*, 2006 AHRC 11**. The Court of Queen's Bench held that s 11(2) of the Human Rights Commission by-laws gave the Human Rights Panel broad discretion to accept or reject document or evidentiary matters beyond the timelines set out in s 11(1) of the by-laws (para 45). The Panel was said to retain broad unfettered discretion to decide evidentiary issues under the authority granted to it in section 30(2) of the *HRCMA*. The Panel's discretion is bound to the duty of procedural fairness and rules of natural justice, but there was no prejudice resulting from the Panel's decision to let the Respondent file late documents and its decision to

refuse the affidavit from Mr. Grey's co-worker. Tracer notified the Commission that it might be looking for an adjournment and the Director made it clear prior to the hearing that he was opposed to any such adjournment. The Respondent's late disclosure included written arguments and case law, not evidentiary documents that could prejudice the Applicant and the Applicant had the opportunity for cross-examination. The Court found that there was no breach of the rules of natural justice.

Bifurcation of hearings. *Downes v On Side Restoration Services Ltd*, 2012 AHRC 6. Counsel for the Complainant requested that the hearing be bifurcated with the issue of liability decided first, the issue of remedy heard and decided separately in a later decision. Chair S. Heafy denied the request, as she was not convinced that, on a balance of probabilities, bifurcation would 1) save time and expense, 2) avoid duplication of evidence, or 3) serve justice well, overall.

Evidence/Dismissal/Preliminary Matters Decision. *White v Lethbridge Soccer Association*, 2016 AHRC 1. The Respondents requested dismissal on the basis of preliminary objections. Argument was on the basis of written submissions only. There was insufficient evidence before the Tribunal to make a decision without a full hearing. Even with flexibility in admitting evidence provided by *AHRA* s 30(2), the Tribunal "continue[s] to be bound by the rules of fair procedure" (para 37). To dismiss a claim at the preliminary stage, the Tribunal must be convinced "that the complaints are without merit and to the extent that facts are necessary, that the facts are established without the need for any sworn evidence on those facts and for any cross examination on that evidence" (para 38). See also: ***White v Lethbridge Soccer Association*, 2017 AHRC 8.**

Evidence/Use of Videoconference due to COVID-19. *Penate v The City of Calgary,* 2020 AHRC 89. The Complainant opposed the Respondent's request to have an important witness attend and testify by video conference. Out of concern for the spread of COVID-19, the Tribunal announced that all hearings would proceed via videoconference. There was no way to know how much longer travel bans would be in effect, and the Tribunal did not wish to delay the hearing any longer. They allowed the witness to give evidence by videoconference.

30(3) A human rights tribunal, on proof of service of notice of a hearing in accordance with this Act on the person against whom a complaint was made, may proceed with the hearing in the absence

of that person and decide on the matter being heard in the same way as though that person were in attendance.

Proceeding with a hearing after notice. See also: ***Fitzhenry v Schemenauer*, 2008 AHRC 8; *Hansen v Big Dog Express Ltd*, 2002 AHRC 18;** and ***Repas-Barrett v Canadian Special Service Ltd*, 2003 AHRC 1.**

30(4) A hearing before a human rights tribunal shall be open to the public unless, on the application of any party, the human rights tribunal decides that it would be advisable to hold the hearing in private

(a) because of the confidential nature of the matter to be heard, or

(b) because of the potential adverse effect on any of the parties, other than the person against whom the complaint was made.

RSA 2000 cH-14 s 30; 2009 c 26 s 21.

Anonymity of Complainant. *X v Mount Royal University,* 2019 AHRC 31. X was a student at Mount Royal University who had several mental illnesses requiring accommodation from the University. Due to the amount of personal information that was required to assess the complaint, the Chief of the Commission and Tribunals determined, "on the Tribunal's own initiative" to use the Complainant's initials instead of her full name in order to protect her privacy.

Question of law

31 A human rights tribunal may, at any stage of the proceedings before it, state in the form of a special case for the opinion of the Court of King's Bench any question of law arising in the course of the proceedings, and may adjourn the proceedings for the purpose.

RSA 2000 cH-14 s31;2009 c26 s22;AR 217/2022.

***Res Judicata. Greenwood v Alberta (Workers' Compensation Board)*, 2000 ABQB 827, 275 AR 1.** A preliminary question was referred to the Court pursuant to s 27 of the *HRCMA* [*AHRA*, s 31] to determine whether the Human Rights Commission had jurisdiction, based on the investigator's report, to appoint a Panel to hear allegations of discrimination as alleged by the Complainant, or whether the doctrine of *res judicata* applied since the matter was already heard and adjudicated by the Worker's Compensation Board (WCB). McBain J held that the issue dealt with by the WCB, namely, whether there was a causal connection between the Complainant's disability

and his employment was not the same question considered by the Human Rights Panel, namely, whether the WCB discriminated against the Complainant. Therefore, *res judicata* did not apply. The Court further held that the Commission did not have jurisdiction to hear the complaint alleging discrimination on the basis of physical and mental disability after the WCB dismissed the Complainant's claim. Allegations of errors made by the WCB in its disposition of a claim, without more, were found not to be a basis for a finding of discrimination made on a suggestion that there may be decisions of the WCB where, in similar cases, a causal connection was found, and any errors made by the Board in making its decision were made within its jurisdiction and were not subject to judicial review.

Note see ***Greenwood v Workers' Compensation Board*, 2000 AHRC 10** for the substantive human rights decision.

***Res Judicata*. *Saggers v Alberta (Human Rights Commission)*, 2000 ABCA 259, *(sub nom Saggers v Calgary (City of))* 271 AR 352, leave to appeal to SCC refused, 293 AR 332, 2001 CarswellAlta 819.** The Complainant, Saggers, was employed by the City of Calgary from July 2, 1984 to January 8, 1992. He went on disability during his employment and on January 13, 1992, the Complainant was advised that unless he was able to report to work on January 14, 1992 with a medical return to work certificate allowing him to return to his former position, the City would assume that he resigned and his employment with the City of Calgary would be terminated effective January 17, 1992. Saggers lodged a grievance claiming discrimination on the basis of physical and mental disability. The majority of the Arbitration Board concluded that the City did attempt to accommodate the Complainant to the point of undue hardship and therefore the Complainant's dismissal was upheld. The Complainant brought a complaint before the Human Right Board of Inquiry and the Commissioners concluded that the case was *res judicata* since the issues of discrimination and accommodation had already been dealt with by the Arbitration Board.

On review, Hutchinson J found that although the Arbitration Board was aware of the Complainant's mental problems, it limited its consideration to his physical disability and therefore, discrimination on the ground of mental disability *per se* was not specifically addressed by the Arbitration Board. He also found that the legal and factual issues were not the same in the arbitration proceedings and the complaint before the Alberta Human Rights Commission. He held that the Complainant should be free to pursue his complaint under the *IRPA* and directed the Commission to hear the

Respondent's complaint "on its merits". The Court of Appeal upheld the reviewing court's decision and stated at para 23 that:

> [23] In this case, neither the "mere existence" of a Collective Agreement nor resort to the grievance procedure, deprive the Alberta Human Rights Commission of jurisdiction. The relevant inquiry is:
>
> > 1) whether the complainant had full participation in the grievance procedure.
> >
> > 2) whether the Collective Agreement or the applicable labour relations legislation *specifically* prohibited discrimination on the ground alleged by the complainant.
> >
> > 3) whether the ground alleged by the complainant was fully dealt with in the arbitration.

The Court of Appeal held that the anti-discrimination clause in the Collective Agreement did not empower the Arbitration Board to grant a remedy on the grounds of discrimination based on mental disability, and therefore, the Arbitration Board has no jurisdiction to address a grievance of discrimination on the ground of mental disability, and the decision of the Board of Inquiry under the *IRPA* was not *res judicata*. Relying on ***420093 BC Ltd v Bank of Montreal*, 1995 ABCA 328, 34 Alta LR (3d) 269 (Alta CA),** the Court of Appeal held at para 29 that:

> [29] An estoppel by *res judicata* cannot be raised unless:
>
> > (i) there was a final decision pronounced by a court of competent jurisdiction over the parties and the subject matter,
> >
> > (ii) the decision was, or involved, a determination of the same issue or cause of action as that sought to be controverted or advanced in the present litigation, and
> >
> > (iii) the parties to the prior judicial proceeding or their privies are the same persons as the parties to the present action or their privies.

In this case the first two criteria were not met. The Court of Appeal concluded that the Commissioners were in error in holding that the issues of discrimination by reason of mental disability under the *IRPA* and accommodation were already dealt with by the Arbitration Board and upheld the reviewing Court's decision.

Res Judicata. See also: ***Saskatchewan (Workers' Compensation Board) v Saskatchewan (Human Rights Commission)* (1998), 169 Sask R 316, 163 DLR (4th) 336 (Sask QB); *Mortland and VanRootselaar v Peace Wapiti School Division No 76*,**

2015 AHRC 9; and *Kebede v SGS Canada Inc,* 2019 AHRC 3.

Questions of Law. See also: ***Chow v Mobil Oil Canada*, 1999 ABQB 1026; *Kane v Alberta Report* [*Re Kane*], 2001 ABQB 570, 291 AR 71;** and ***Re Prue* (1985), 57 AR 140, (*sub nom Prue v Edmonton (City of)*) 35 Alta LR (2d) 169 (QB).**

Powers of tribunal

32(1) A human rights tribunal

(a) shall, if it finds that

(i) a complaint is without merit, order that the complaint be dismissed, or

(ii) a part of a complaint is without merit, order that the part be dismissed, and

(b) may, if it finds that a complaint has merit in whole or in part, order the person against whom the finding was made to do any or all of the following:

(i) to cease the contravention complained of;

(ii) to refrain in the future from committing the same or any similar contravention;

(iii) to make available to the person dealt with contrary to this Act the rights, opportunities or privileges that person was denied contrary to this Act;

(iv) to compensate the person dealt with contrary to this Act for all or any part of any wages or income lost or expenses incurred by reason of the contravention of this Act;

(v) to take any other action the tribunal considers proper to place the person dealt with contrary to this Act in the position the person would have been in but for the contravention of this Act.

Dismissal/Preliminary Matters Decision/Evidence. *White v Lethbridge Soccer Association*, 2016 AHRC 1. The Respondents requested dismissal on the basis of preliminary objections. Argument was on the basis of written submissions only. There was insufficient evidence before the Tribunal to make a decision without a full hearing. Even with flexibility in admitting evidence provided by *AHRA* s 30(2), the Tribunal "continue[s] to be bound by the rules of fair procedure" (para 37). To dismiss a claim at the preliminary stage, the Tribunal must be convinced "that the complaints are without merit and to the extent that facts are necessary, that the facts are established

without the need for any sworn evidence on those facts and for any cross examination on that evidence" (para 38).

Preliminary Matters. See also ***Bruehl v Oasis Medical Clinic Ltd*, 2016 AHRC 15; *White v Lethbridge Soccer Association*, 2016 AHRC 14;** and ***Redhead v Pillar Resource Services Inc*, 2017 AHRC 16.**

Complaint Dismissed. *M v Town of D*, 2011 AHRC 4. The Tribunal granted the Town's non-suit application after careful consideration of the evidence presented to the Tribunal by the Complainant. The Complainant failed to present sufficient evidence from which the Tribunal could base a finding of *prima facie* discrimination in her favour.

Remedies/Contempt of Court. *Tremaine v Canada (Human Rights Commission)*, 2014 FCA 192. The Respondent was ordered by a Canadian Human Rights Tribunal to remove certain messages from the internet "that constituted discrimination on the grounds of religion, national or ethnic origin, race or colour" (para 4). The Respondent failed to do so, and indeed, posted additional problematic content. The FCA dismissed the Respondent's appeal of his sentence of 30 days imprisonment for being in contempt of court. The FCA in the present decision also referenced an earlier ruling (**2011 FCA 297**) to note "that knowledge of the Tribunal order, in itself, was sufficient to give rise to a finding of contempt" (para 10). Note that this decision stems from a complaint under the Canadian Human Rights Act.

Remedies. *Mihaly v The Assn of Professional Engineers, Geologists and Geophysicists of Alberta*, 2014 AHRC 1, rev'd *Assn of Professional Engineers and Geoscientists of Alberta v Mihaly*, 2016 ABQB 61. The Human Rights Tribunal ordered APEGA to comply with the following remedies under *AHRA* s 32 (at para 249):

> (a) Review Mr. Mihaly's transcripts and experience in direct consultation with the Slovak University of Technology, the Institute of Chemical Technology and any of his references who may still be available, to better identify Mr. Mihaly's skills and qualifications and to identify core areas of engineering from which Mr. Mihaly could be exempted;
>
> (b) Grant Mr. Mihaly the option to challenge specific examinations in areas where he is not granted an exemption by APEGGA;
>
> (c) Within three months of the date of this decision, establish a committee that preferably includes engineers who received their qualifications in institutions and countries outside of Canada and who have successfully integrated themselves into the engineering

> profession, to specifically explore and investigate options to appropriately and individually assess the qualifications of Mr. Mihaly with a view to correcting any perceived academic deficiencies. Once these options have been evaluated, APEGGA shall apply these individual assessment options to Mr. Mihaly with a view to correcting any perceived academic deficiencies. These options may include exemptions from the Fundamentals of Engineering exam or the NPPE combined with the implementation of a different method of assessment, such as some type of graduated or modular approach which would provide Mr. Mihaly assistance and guidance to progress gradually in the engineering profession. Other explorations could include a possible collaboration of APEGGA with Alberta's post-secondary institutions in terms of offering programs or courses which could be offered to foreign trained engineers to correct any perceived academic deficiencies;
>
> (d) Use its best efforts to match Mr. Mihaly with a Mentor who has a similar background and who can provide him the necessary guidance to approach his challenges as an engineer and gradually integrate himself into the profession;
>
> (e) Direct Mr. Mihaly to resources within the profession which will allow him to network with other foreign engineering graduates facing similar challenges; and
>
> (f) Direct Mr. Mihaly to community resources which would assist him to increase his fluency and facility in the use of the English Language.

This decision was reversed at the ABQB. Regarding the remedies imposed by the Tribunal, Ross J wrote at paras 146-148 that:

> [146] These directions go beyond the scope of any discriminatory conduct found or even alleged. But even in relation to alternatives to examinations, the appointment of a committee to assess an applicant and provide individual "assistance and guidance to progress gradually in the engineering profession" would appear to entail a significant dedication of resources. As the Tribunal contemplated that APEGA could be called upon to provide this assistance for approximately 375 applicants a year, his assessment that this "would not cause undue hardship to the engineering profession nor does it appear to be cost prohibitive with all the dues-paying members" (Tribunal Decision at para 231) is questionable, to say the least. The assessment of the Appeal and Review Board in LPG that individual testing would be costly and inefficient (and would not provide a consistent, standardized and objective evaluation) is much more realistic.
>
> [147] More significant than the Tribunal's assessment of cost, is his failure to consider the impact that this form of accommodation would have on APEGA, fundamentally altering its standards and being required to act outside of its regulatory role. As Hydro-Québec makes clear, employers do not have a duty to change working

> conditions in a fundamental way. Even more so, regulatory bodies should not be expected to change their mandate in a fundamental way.
>
> [148] Finally, the Tribunal failed to consider Mr. Mihaly's obligation to assist in the search for possible accommodations. The Tribunal contemplated that Mr. Mihaly should be granted "the option to challenge specific examinations in areas where he is not granted an exemption by [APEGA]" (para 249) but did not consider the fact that Mr. Mihaly had failed to even attempt either the three confirmatory examinations or the FE Exam.

Remedies. ***Walsh v Mobil Oil Canada*****, 2013 ABCA 238**. The Appellant was both discriminated and retaliated against by the Respondent. However, the AHRC-Tribunal twice dismissed her complaints. On appeal, her complaints were upheld, and the issue of remedies were returned to the AHRC-Tribunal to deal with. The Appellant was awarded damages in a variety of forms. However, she felt that the awards of damages did not reflect what was proper and she appealed. The Court of Appeal dismissed her appeal, holding that the proper standard of review regarding a tribunal interpretation of its own home statute was reasonableness. Furthermore, the Court held that the Tribunal was empowered to use discretion concerning award of remedies. The Court held that the Tribunal's authority to provide remedies for discriminatory and retaliatory conduct is found in ss 32(1)(b), 32(2) and 34. Sub-paragraph 32(1)(b)(iv) specifically permits an award for compensation for wages or income lost as a result of discriminatory or retaliatory conduct. The Tribunal is thus given the discretion to award "all or any part" of the wages so lost.

Remedies. ***Cowling v Alberta Employment and Immigration*****, 2012 AHRC 12.** The Complainant worked as a contract employee for the Government of Alberta. Her initial contract as a labour relations officer began in 1999, when she was 59 years old, and ran for two years. It was renewed several times until 2007 when the Complainant was 67. At that time, the Respondent converted the position to a permanent one at a lower pay level. The Complainant applied for the new position but was not chosen even though the position was substantially similar to the one that she had previously held. The Tribunal found discrimination in employment based on age. Regarding the remedy, the Tribunal first turned to mitigation and found that even though she was unsuccessful, the Complainant had mitigated her loss, writing at para 220:

> [220] I am satisfied that Ms. Cowling attempted to appropriately mitigate her losses by seeking employment. Ms. Cowling's experiences did not show lack of effort or diligence in attempting to reenter the workforce. Rather her experiences emphasize the challenges faced by mature workers such as Ms. Cowling.

The Tribunal ordered the somewhat unconventional remedy of reinstatement (in her

prior position or a comparable position), considering various factors at length at paras 221-231, with paras 222-228 quoted here:

> [222] The traditional inclination would be that reinstatement is not a workable solution. However, the particular facts of this case support that reinstatement is appropriate and the best way, consistent with human rights principles, to satisfactorily place Ms. Cowling in the position she would have been in but for the discrimination.
>
> [223] First, despite the fact that Ms. Cowling was hurt by the actions of Alberta, she does not seem to harbor any ill will to the extent that it would affect her being employed once again for Alberta. Similarly, Alberta's witnesses do not seem to harbor any animosity towards Ms. Cowling by virtue of the litigation. The trust essential in employment relationships does not appear to be irrevocably damaged by this litigation.
>
> [224] Secondly, the evidence indicated that there is currently an opening in the Mediation Services Branch. Ms. Cowling's LRO 3 position was reengineered by the Mediation Services Branch into a management position designated as labour relations advisor after her employment ended in May 2007. The evidence indicates that this position is currently open.
>
> [225] Thirdly, even if there was ill will towards Ms. Cowling in the Mediation Services Branch, the government has a large and varied workforce and there is opportunity for Ms. Cowling to be placed in a setting outside the Mediation Services Branch.
>
> [226] Fourthly, there were no work performance issues with Ms. Cowling. Ms. Cowling received very strong performance assessments.
>
> [227] Lastly, Ms. Cowling continues to be unemployed at the time of the hearing. Every indication is that Ms. Cowling is an excellent candidate to continue to be engaged in the Alberta government workforce. Ms. Cowling is clearly willing, able and very capable of working still today.
>
> [228] I am further supported in my decision that reinstatement is appropriate given the information tendered at the hearing regarding the Alberta government's initiative "Engaging the Mature Worker." This research initiative encourages mature workers to continue to contribute to the province's workforce as part of Alberta's ten-year strategy in "Building and Educating Tomorrow's Workforce." (Exhibits 7 and 8).

The Tribunal also ordered an award of lost wages from the date that the Complainant's employment ended until the date of the hearing (approximately five years). However, the Tribunal "discounted the award by 30 per cent to recognize the more tenuous nature of a contract position" (para 233). General damages were also ordered in the amount of $15,000 along with interest for the full five years and party/party costs.

For additional background on this decision see: ***Cowling v Alberta Employment and Immigration*, 2012 AHRC 4 (Preliminary Decision on Limitations Issue)**.

Remedies. ***Simpson v Oil City Hospitality Inc*, 2012 AHRC 8.** The Complainant alleged discrimination on ground of race when he was refused entry/access into a public club, which was generally accessible to other members of the public but not him, because he was of Asian descent. The Commission found his complaint proved. On affirming that the objective of human rights code is remedial and punitive the Commission stated:

> [63] Recent decisions have also emphasized other factors relevant to the assessment of general damages. There is clear authority that an award of damages must be high enough to encourage respect for the legislative decision that certain kinds of discrimination are unacceptable in our society and should not be so low as to amount to a mere 'license fee' for continued discrimination.

Remedies. ***Bodnar v Jurassic Vac Ltd,* 2020 AHRC 74.** The Complainant alleged that the Respondent had terminated his employment while he was on medical leave, and that this amounted to discrimination on the grounds of physical disability. The Respondent company had since been dissolved, and it was known to the Tribunal and Complainant that a monetary award of damages would be unlikely to be satisfied. A principal for the Respondent responded to an attempt by the Tribunal for set up Tribunal Dispute Resolution (TDR) by stating that since the company had been "struck", he would not be participating in the TDR. However, the Tribunal Chair held that human rights legislation not only provides for monetary awards, but educational purposes and validation of the harm caused to the Complainant, and that these remedies can be meaningful too. As well, the situation of the company did not automatically mean that the principal of the Respondent or other former shareholders would not be liable for the discrimination. The Tribunal Chair held that the pre-hearing should continue with the Respondent informed that their lack of participation would not stop the Tribunal from proceeding.

Remedies. *See also:* ***Schulz v Lethbridge Industries Limited*, 2012 AHRC 3, aff'd *Lethbridge Industries Ltd v Alberta (Human Rights Commission)*, 2014 ABQB 496 (reversing the remedy); *Morris v Kingsway Asset Management Ltd and Elsafadi*, 2012 AHRC 9.; *Balsara v Zellers Inc*, 2013 AHRC 7;** and ***Carriere v Boonstra Trucking Ltd*, 2013 AHRC 10.**

Remedies/ Damages. *Torres v Royalty Kitchenware Ltd* (1982), 3 CHRR D/858 (Ont Bd of Inq). Relevant factors in determining the appropriate compensation for injury to dignity in sexual harassment cases are (para 775):

1. the nature of the harassment. Was it simply verbal or was it physical as well;
2. the degree of aggressiveness and physical contact in the harassment;
3. the ongoing nature, that is, the time period of the harassment;
4. its frequency;
5. the age of the victim;
6. the vulnerability of the victim; and
7. the psychological impact of the harassment upon the victim.

Remedies/ General Damages. *Berry v Farm Meats Canada Ltd*, 2000 ABQB 682, 274 AR 186. The Court considered whether the Panel had jurisdiction to award general damages and stated that "human rights have been recognized by the Supreme Court of Canada as 'almost constitutional'. In light of the importance that should be afforded to the legislation designed to protect these rights, a wide remedial power is appropriate" (para 9). The statute does not grant an express authority to award general damages. The Panel's authority to award general damages comes from s 28(1)(b)(v) of the *HRCMA* [*AHRA*, s 32(1)(b)(v)] which stated the Panel "may … order the person against whom the finding was made to … take any other action the panel considers proper..." (para 13). In ***Robichaud v Canada Treasury Board*, [1987] 2 SCR 84, 40 DLR (4th) 577**, the SCC indicated that the purpose for the legislation as a whole must be factored into the analysis of an individual provision and that any remedy must be effective and the main purpose of human rights legislation is compensatory. The goal is to place the aggrieved individual in the same position they would have been in but for the contravention of the *Act*. Any remedial powers must be sufficiently broad to satisfy this purpose that includes being "effective". The Court considered case law that supported the position that monetary awards do not compensate a Complainant, but are designed to punish the offender and held that such an interpretation of s 28 *HRCMA* [*AHRA*, s 32] strained the language beyond the limits of the words used and concluded that to continue a narrow interpretation of the legislation could mean that many acts of discrimination would not result in effective remedies and that a review of current Human Rights Panel decisions indicated that general damages

were awarded as a matter of course. The Panel's award of damages in the amount of $7,500.00 for pain and suffering was upheld.

Remedies/ Damages. In ***Martyn v Laidlaw Transit Ltd*, 2008 AHRC 2,** the Court relied on ***Berry v Farm Meats Canada Ltd*, 2000 ABQB 682, 274 AR 186** and ordered general damages be paid. The Court held that the Panel had the authority to award general damages akin to the award of general damages for negligence actions. Although the primary focus of human rights legislation is remedial in nature, it does carry with in an obligation to compensate the injured party and s 32 clearly confers on the Panel the ability to attempt to put the discriminated against party in the same position that he or she would have been if not for the contravention of the *Act.* The Complainant was awarded general damages in the sum of $10,000.00 to be paid severally and equally by the Respondents. The Court also awarded 50% of the Complainant's solicitor client costs to be paid equally and severally by the Respondent given the particular difficulty that the Complainant had in prosecuting her complaint and given all of the circumstances.

Remedies/ Damages. See also: ***Walsh v Mobil Oil Canada*, 2007 ABQB 305, rev'd on other grounds 2008 ABCA 268, 440 AR 199; *Serben v Kicks Cantina Inc*, 2005 AHRC 3; *JR and SS v Kamaleddine*, 30 CHRR D/290 (April 2, 1997; Alta HRP), (*sub nom Redekop v Kamaleddine*) 1997 CarswellAlta 1263; *Dayna McLeod v Bronzart Casting Ltd*, 29 CHRR D/173, 1997 CarswellAlta 1264 (May 12, 1997 Alta HRP); *Hudec v Larko and The Big Muffin* (November 20, 1997, Alta HRP); *Linzmeyer v Polos*, 31 CHRR D/339 April 3, 1998, #S9401242 (Alta HRP - M. Stones); *Jahelka v Alberta (Human Rights and Citizenship Commission)*, 2008 ABCA 266, 92 Alta LR (4th) 232, aff'g *Fort McMurray Catholic Board of Education v Alberta Human Rights and Citizenship Commission*, 2005 ABQB 165, (*sub nom Woo v Alberta (Human Rights and Citizenship Commission) (No 2)* (2005), 52 CHRR D/122, rev'd *Woo v Fort McMurray Catholic Board of Education*, 2002 AHRC 13; *Jahelka v Fort McMurray Catholic Board of Education*, 2002 AHRC 12; *Malko-Monterrosa v Conseil Scolaire Centre-Nord*, 2014 AHRC 5; *Horvath v Rocky View School Division No 41*, 2015 AHRC 5; *Amir and Nazar v Webber Academy Foundation*, 2015 AHRC 8; *Mortland and VanRootselaar v Peace Wapiti School Division No 76*, 2015 AHRC 9;** and ***Andric v 585105 Alberta Ltd o/a Spasation Salon & Day Spa*, 2015 AHRC 14.**

32(2) A human rights tribunal may make any order as to costs that it considers appropriate.

Costs. ***Malko-Monterrosa v Sheet Metal Workers' International Association Local Union No 8,*** **2012 AHRC 13.** The Complainant alleged discrimination in the area of goods, services and membership in a trade union on the basis of gender and pregnancy. Her claims were dismissed, and the Respondents sought costs. The Tribunal held that awards of costs were not appropriate in this case:

> The legislation provides a human rights tribunal with the discretion to award costs that it considers appropriate and in my view, an award of costs against a complainant would be appropriate only in circumstances where the complainant had, during the investigation or the hearing, engaged in conduct which was dishonest or significantly prejudicial to a party or the integrity of the process. In other words, although not expressly stated in the legislation, costs should be awarded against a complainant only where the complainant has engaged in improper conduct. (para 83)

Costs/Breach of Settlement Agreement. ***Spears v Aldergrove Child Care,*** **2020 AHRC 50.** The parties came to a settlement agreement, however the Respondent failed to pay the Complainant the settled amount on time. The Tribunal awarded the Complainant costs as a sanction to the Respondent.

Costs: See also: ***Canada (Canadian Human Rights Commission) v Canada (Attorney General)*****, 2011 SCC 53, [2011] 3 SCR 471;** ***Rivard v Alberta (Human Rights Commission)*****, 2014 ABQB 392;** ***Alberta (Human Rights and Citizenship Commission Panel) v Tequila Bar & Grill Ltd*****, 2009 ABQB 226, 470 AR 265;** ***Boissoin v Lund*****, 2010 ABQB 123, 22 Alta LR (5th) 253;** ***Lund v Boissoin*****, 2012 ABCA 300, 69 Alta LR (5th) 272;** ***Walsh v Mobil Oil Canada Ltd*****, 2011 AHRC 3;** ***Walsh v Mobil Oil Canada Ltd*****, 2012 AHRC 10,** ***Walsh v Mobil Oil Canada (Exxmobil Canada Ltd)*****, 2012 ABQB 527,** ***Walsh v Mobil Oil Canada Ltd (Exxmobil Canada Ltd)*****, 2013 ABQB 101, rev'd on costs:** ***Walsh v Mobil Oil Canada*****, 2013 ABCA 238;** ***Visser v FortisAlberta Inc*****, 2014 AHRC 6;** ***Visser v FortisAlberta Inc*****, 2015 AHRC 11;** ***Facey v Bantrel Management Services Co,*** **2019 AHRC 4;** ***Bauknecht v 1055791 Alberta Ltd o/a Elkwater Lake Lodge & Resort,*** **2020 AHRC 52;** ***Kahin v Construction & General Workers' Union, Local 92,*** **2020 AHRC 76.**

32(3) A human rights tribunal shall serve a copy of its decision, including the findings of fact on which the decision was based and the reasons for the decision, on the parties to the proceeding.

RSA 2000 cH-14 s32;2009 c26 s23;2021 c25 s2.

Reconsideration

33(1) If there is new evidence available that was not available or

that for good reason was not presented before the human rights tribunal in the first instance, the tribunal may, on the application of any of the parties or on its own motion, reconsider any matter considered by it and for that purpose has the same power and authority and is subject to the same duties as it had and was subject to in the first instance.

33(2) A human rights tribunal may not reconsider a matter under subsection (1) more than 30 days after the date of the decision on the matter in the first instance.

RSA 2000 cH-14 s33; 2009 c 26 s 24.

Retroactive compensation limit

34 No settlement effected under this Act and no order made by a human rights tribunal may compensate a person for wages or income lost or expenses incurred prior to 2 years before the date of the complaint under section 20.

RSA 2000 cH-14 s 34; 2009 c 26 s 25

Effect of decision

35 A decision of the Chief of the Commission and Tribunals, another member of the Commission or a human rights tribunal is final and binding on the parties, subject to a party's right to judicial review of the decision.

RSA 2000 cH-14 s35; 2009 c26 s26; 2021 c25 s2.

Judicial Review/Standard of Review. *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16, [2015] 2 SCR 3. Discussing the standard of review, Gascon J wrote that "[w]here, as in this case, a statute provides for an appeal from a decision of a specialized administrative tribunal, the appropriate standards of review are, in light of the principles laid down by this Court, the ones that apply on judicial review, not on an appeal" (para 29). Gascon J also noted at para 43 that:

> …the existence of a right to appeal with leave does not mean that the Tribunal's specialized administrative nature can be disregarded. Nor is the fact that the Tribunal does not have exclusive jurisdiction in discrimination cases and that a complainant can also turn to the ordinary courts determinative. Although the scope of a right to appeal and the absence of exclusive jurisdiction may sometimes affect the deference to be shown to decisions of a specialized administrative tribunal, this does not justify replacing the standards of review applicable to judicial review with the appellate standards (*Tervita Corp. v Canada (Commissioner of Competition)*, 2015 SCC 3 (CanLII), [2015] 1 SCR 161, at paras 35-39; *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 (CanLII), [2013] 3 SCR 895, at paras 23-24; *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC

35 (CanLII), [2012] 2 SCR 283, at paras 14-15; *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 (CanLII), [2011] 3 SCR 471 ("*Mowat*"), at para. 23).

Judicial Review/Standard of Review. *Association of Professional Engineers and Geoscientists of Alberta v Mihaly*, 2016 ABQB 61. Ross J summarized the various standards of review as follows at paras 46-53:

> [46] In the time between the original briefs and the appeal hearing, the Supreme Court of Canada released decisions in ***Mouvement laïque québécois v Saguenay (City)***, 2015 SCC 16, 382 DLR (4th) 385 [***Saguenay***]; and ***Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc***, 2015 SCC 39, [2015] SCJ No 39 [***Bombardier***], and the Alberta Court of Appeal issued its decision in ***Stewart v Elk Valley Coal Corporation***, 2015 ABCA 225, [2015] AJ No 728 [***Stewart***]. The parties addressed these decisions in oral submissions.
>
> [47] With the release of ***Saguenay***, ***Bombardier*** and ***Stewart***, many of the previously contentious issues regarding standard of review were conceded by the parties. The governing standards of review are set out below.
>
> [48] Questions of procedural fairness are reviewed on the basis of whether the proceedings met the level of fairness required by law: ***Wright v College and Association of Registered Nurses of Alberta (Appeals Committee)***, 2012 ABCA 267 at para 31, 355 DLR (4th) 197 [***Wright***].
>
> [49] Questions of law concerning the interpretation of the *Alberta Human Rights Act*, RSA 2000, c A-25.5 [*AHRA*] are reviewed for reasonableness, unless they are "of central importance to the legal system and fall outside the adjudicator's specialized area of expertise": ***Saguenay*** at paras 46-48.
>
> [50] The test for prima facie discrimination is reviewed on the correctness standard: Stewart at paras 47, 56-57, citing ***Saguenay*** at paras 46-48.
>
> [51] A lack of evidence in the record to support a Tribunal's decision is reviewed on the reasonableness standard: ***Bombardier*** at paras 70-73. This issue encompasses findings of fact based on (a) no evidence, (b) irrelevant evidence,
> (c) disregard for relevant evidence, or (d) irrational inferences of fact.
>
> [52] Findings of fact and questions of mixed fact and law are subject to the reasonableness standard: Saguenay at para 46, ***Stewart*** at para 58.
>
> [53] In ***Dunsmuir v New Brunswick***, 2008 SCC 9 at para 47, [2008] 1 SCR 190 [***Dunsmuir***], the Supreme Court indicates: A court conducting a review for reasonableness inquiries into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review,

> reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

Judicial Review/Jurisdiction. *Condominium Corp No 052 0580 v Alberta (Human Rights Commission)*, 2016 ABQB 183. The Corporation sought judicial review of a decision made by the Commission to investigate a complaint made by a condo owner. Graesser J put the issue as follows: "Does the Commission have jurisdiction over complaints made to it by owners of condominium corporations concerning the actions of the condominium corporation affecting the complainant?" (para 10). The Corporation argued that this matter should be dealt with using s 67 of the *Condominium Property Act* [RSA 2000, c C-22] and that the Commission did not have jurisdiction to investigate this matter (para 11). The Commission argued that it did have jurisdiction, relying on its earlier decision ***Ganser v Rosewood Estates Condominium Corp*, 2002 AHRC 2** and that the Court should decline to intervene at this early stage. Regarding the Court's ability to rule on this issue, the Court wrote at paras 56-57:

> [56] While there are good arguments that the application is premature, there is also merit in determining this threshold issue. If indeed the Commission has no jurisdiction in matters such as this, it would be a waste of scarce government and court resources to proceed further, and would be an unnecessary expense for the Corporation if it were required to respond to the complaint, continue to make jurisdiction arguments, and potentially proceed through the Commission's processes to a hearing on the merits before it could get a court decision on threshold jurisdiction.
>
> [57] In the circumstances of this case, I consider it appropriate to exercise a discretion to consider the Corporation's application.

The Court found that this was "a situation where there is likely concurrent jurisdiction" (para 75). In coming to this decision, Graesser J stressed the differences in proceeding using the *AHRA* as compared to s 67 of the *Condominium Property Act* at paras 71-73:

> [71] That being said, the process under Section 67 is to commence an action in the Court of Queen's Bench and proceed through civil litigation processes.
>
> [72] That process is a difficult and expensive process that would be difficult for an unrepresented party. A disabled party may have even more difficulty with such a process. The conduct of the process is the responsibility of the applicant. The application or trial would ultimately be heard by a judge who likely has no specialized expertise in human rights. The applicant may find it especially galling when the board approves a special levy on all owners to pay the legal costs of

> defending itself against the application. The disabled party must pay his proportionate share or run the risk of proceedings being brought against him for non-payment. I recognize Mr. Noce's argument that the Courts have dealt with such issues creatively, but court remedies are slow, uncertain and long after the fact.
>
> [73] Contrast this with a complaint to the Commission. There is specialized expertise there at all levels of the process. The complaint process is essentially free to the complainant. Safeguards remain in place by way of an appeal of the ultimate decision to the Court of Queen's Bench.

Amongst other arguments also addressed by the Court, Graesser J also commented on deference to condo boards at para 86: "Mr. Noce argues that the Court should give deference to the decisions of the democratically elected board of a condominium corporation. No deference is due to a body that discriminates under the *Alberta Human Rights Act*. The tyranny of the majority does not withstand unlawful discrimination. This argument is without merit."

In the end, the Court found that the Commission has jurisdiction (per the *AHRA*) to investigate the complaint (para 93).

Judicial Review/Missed Deadline. *Ruhl v Alberta (Human Rights Commission)*, 2015 ABQB 513. Ruhl's complaint based on mental disability in employment under s 7 of the *AHRA* was dismissed by the Director and by the Chief of the Commission. Ruhl then missed the six-month deadline per Rule 3.15 [*Alberta Rules of Court*, Alta Reg 124/2010] to file for judicial review, claiming that he "erroneously diarized the six month deadline as July 15, 2015" (para 1). Arguing that "he suffers from mental incapacity, arising from medically treated depression and anxiety," (para 1) Ruhl sought an extension of the time limit to file from July 5 to July 30. Veit J denied the request. The Court discussed the ability to extend a deadline at paras 22-23:

> [22] It may be that, even if a real incapacity over the entirety of the time period were proved, a court could still not extend the time period: ***Jablonski*** [*Jablonski v Canada*, 2012 TCC 29]**.** While, at first blush, that result may seem harsh, it must be remembered that judicial review is itself an equitable and discretionary remedy; in other words, judicial review - complete with its 6 month time limitation - already provides equitable relief from any harshness resulting from the strict application of law. The law would hold that the Chief's review of the Director's decision is binding and final. Judicial review provides a mechanism for having that decision reviewed. Adding a mechanism to the existing mechanism isn't called for.
>
> [23] This court does not discount the possibility that, if a real

> incapacity for the entire period were proved by an applicant, relief from injustice might be found by applying the disability approach found elsewhere in the law, e.g. that the time limit under the Rule might be suspended as in s. 5 of the *Limitations Act* [RSA 2000, c L-12].

Judicial Review/Missed Deadline/Service of Documents/Self-Represented Litigant.

***Raczynska v Alberta (Human Rights Commission)*, 2015 ABQB 494.** The Complainant sought judicial review of the discontinuation of her claim by the Director (upheld by the Chief Commissioner). However, she failed to serve the Respondent (Yousif Chaaban Professional Corporation) in time to have the Corporation added as a party within the six-month limit provided by Rule 3.15 [*Alberta Rules of Court*, Alta Reg 124/2010]. The Complainant argued that she was unfamiliar with proper procedure as a self-represented litigant. Graesser J spoke to this issue at paras 65-67:

> [65] In answer to these submissions, being self-represented does not provide any lesser standard of compliance with the *Rules of Court*. There is only one set of rules and they apply equally to represented litigants and self-represented litigants. Time limits cannot be extended merely because of a lack of familiarity with those requirements. Health issues may be a factor where time limits are capable of being extended, but Rule 3.15 provides a deadline which is essentially "absolute", just like the time requirements for issuing a statement of claim under the *Limitations Act*.
>
> [66] As a result, Ms. Raczynska's application to add the Professional Corporation as a party to the application is denied.
>
> [67] Ms. Raczynska's submission that "the fact that I did not deliver proper form at the time should not matter at all" fails. Adherence to legislated process matters a great deal.

As to whether it was necessary to include the Respondent as a party for judicial review of an AHRC decision, the Court clarified at paras 76-77:

> [76] ***Heikkila*** [*Heikkila v Alberta (Workers' Compensation Board, Appeals Commission)*, 2003 ABQB 544] and ***Miller*** [*Miller v Chief of the Commission and Tribunals, Alberta Human Rights Commission and The Workers' Compensation Board* (unreported) January 27, 2015, Action 1401 045218] are clear on the requirement to include the respondent to the human rights complaint as a party to any judicial review of a decision of the Commission. Those cases are also clear that the time for serving the respondent is a firm deadline that cannot be extended. These Court of Queen's Bench decisions make the service requirement like the limitation period for commencing proceedings under the *Limitations Act*, RSA 2000, c L-12. That may be viewed as a harsh position, but I see no reason to depart from the logic in those cases.
>
> [77] As a result, Ms. Raczynska's application must be dismissed.

> No remedy is possible against the Professional Corporation, and any decision relating to the Chief Commissioner's decision is moot.

Judicial Review/Director's Standing/Remedy Against Director. *Greater St Albert Roman Catholic Separate School, District No 734 v Buterman*, 2013 ABQB 485. This preliminary application for judicial review considered several issues including the Director's standing at a judicial review proceeding and whether a remedy can be granted against a Director. About the Director's standing, Greckol J wrote at paras 49-50:

> [49] I am satisfied that the Director should have standing to argue the narrow issues that concern his role in the administration of the Act and, specifically, whether he was required to consider the settlement issues when dismissing the complaint as a condition precedent to the Chief's jurisdiction to advance the complaint to tribunal. The Director may also make submissions on the question of whether the application by the School Board was filed within the six month time limit prescribed by the Rules, a question inextricably bound up with what he was or was not required to do concerning settlement at the time of dismissal of the complaint. However, if the time limits argument succeeds, the other issues may be moot.
>
> [50] The Director also has standing to make submissions on the issue raised by Mr. Buterman as to whether any of his decisions or actions are amenable to judicial review at all. If the originating application against the Director is time- barred, this question too may be moot.

As to whether a remedy can be granted against a Director, the Court wrote at paras 67-69:

> [67] The Act gives the complainant the right to request a review of the Director's decision to dismiss a complaint. However, there is no express right given to the person named in the complaint who is alleged to have contravened the Act to have the Chief review any actions or inaction by the Director.
>
> [68] In my view, it is not plain and obvious in the circumstances that jurisdiction does not exist in the Court to make an order in the nature of mandamus requiring the Director to make the determinations sought by the School Board.
>
> [69] The question of whether a decision by the Director or his failure to determine issues is amenable to judicial review is properly dealt with when the merits of the originating application are considered.

For the reasons for judgment of the actual judicial review see ***Greater St Albert Roman Catholic Separate School, District No 734 v Buterman*, 2014 ABQB 14.**

Judicial Review. *Walsh v Mobil Oil Canada (Exxmobil Canada Ltd)*, 2012 ABQB 527. A judicial review of the Human Rights Tribunal's award relating to remedies, costs and interest. The Court of Queen's Bench dismissed Mobil's appeal and also Ms. Walsh's appeal except for the issue of her personal costs, which was referred back to the Tribunal chair. An appeal to the Alberta Court of Appeal was dismissed: ***Walsh v Mobil Oil Canada*, 2013 ABCA 238.**

Judicial Review. *Silverman v Alberta (Human Rights Commission)*, 2012 ABQB 152. Silverman filed a complaint to the Commission that the Minister Responsible for Children's Services discriminated against him on the ground of gender in the provision of goods, services, accommodation or facilities. He complained that he was denied domestic violence services that were available to others. After an investigation, the Director dismissed the complaint and Silverman requested the Chief Commissioner to review the dismissal. The Chief Commissioner upheld the dismissal and Silverman applied for judicial review of the Chief's decision. The Court of Queen's Bench held that the standard of review of the Chief's decision was reasonableness.

Taking into account the reasons and findings of fact of the Chief Commissioner, the Court determined that the Chief's decision was reasonable and dismissed the application for judicial review. Note: this matter was appealed, and the Alberta Children and Youth Services was added as a party to the appeal. See: ***Silverman v Alberta (Human Rights Commission)*, 2012 ABCA 276.**

Judicial Review. *McClary v Geophysical Services Inc*, 2011 ABQB 112. McClary filed a complaint to the Commission that he was discriminated against on the ground of physical disability in the area of employment. The Chief Commissioner upheld the decision of the Commission to dismiss the complaint. McClary, who was self-represented, filed an application for judicial review of this decision, asking that a Tribunal be ordered to hear his complaint, and requesting other damages and relief. The Chief Commissioner was permitted to provide limited written submissions on his legislative authority, the procedure followed in the decision-making process, and the standard of review. The standard of review of a decision of the Chief Commissioner on a question of fact or mixed fact and law is reasonableness. This standard is further supported by the fact that the decision maker is interpreting his own statute. The Commissioner fairly and reasonably reviewed and upheld the dismissal of the complaint. There is justification, transparency and intelligibility within the Chief Commissioner's decision-making process, and it falls within the range of possible,

acceptable outcomes and which are defensible under the Act. McClary's application for judicial review was dismissed.

Judicial Review. ***Mis v Alberta (Chief Commissioner of Human Rights and Citizenship Commission)*****, 2000 ABQB 860, (*****sub nom Mis v Alberta (Human Rights and Citizenship Commission)*****) 279 AR 168, remitting case to the Chief Commissioner, 2002 ABQB 570, 326 AR 99.** The Applicant alleged he was discriminated against on the basis of gender and marital status as a result of his employer's pension policies. An investigator's report concluded that there was discrimination, that it was neither reasonable nor justifiable and included various recommendations. The matter was submitted to the Director who concluded that the discrimination was reasonable and justifiable. The matter was then submitted to the Chief Commissioner who upheld the Director's decision. The Complainant made an application for judicial review of the Chief Commissioner's decision. The Court of Queen's Bench relied on ***Baker v Canada (Minister of Citizenship and Immigration)*****, [1999] 2 SCR 817, 174 DLR (4th) 193**, in which the Supreme Court took the position that "discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the Charter" (para 56). Under the *HRCMA*, the Director and Chief Commissioner were empowered to consider whether there was any merit to the complaint. If not, the Director and Chief Commissioner should dismiss the complaint. If there was merit, the complaint should go forward to a full hearing. The Court found that the Director and the Chief Commissioner failed to ask whether there was any merit to the complaint. Rather, the Director concluded on a balance of probabilities that the discriminatory use of gender specific tables was reasonable and justifiable. However, it was not the Director's role to be a substantive decision maker balancing the probabilities. The Court of Queen's Bench directed that the complaint be returned to the Director to be considered in accordance with the proper application of the principles involved. The matter proceeded to the Court of Appeal, which concluded that neither the Director nor the Chief Commissioner asked the correct question. The matter was returned to the Chief Commissioner to determine whether the complaint was with or without merit.

Standard of Review. ***Edmonton (City) Police Service v Alberta (Human Rights and Citizenship Commission)*****, 2003 ABCA 40, 320 AR 347.** The Complainant applied to the Edmonton Police Service for employment. He complained that he was refused a position because of his sexual orientation and religious beliefs. Section 8 prohibits

discriminatory inquiries and s 7 prohibits discriminatory employment-related decision-making. The Chief Commissioner referred the matter to a Panel, because the Respondent may have an argument under s 8, although the complaint was brought only under s 7. The apparent oversight was brought to the attention of the Complainant's counsel. The Court of Queen's Bench quashed the decision of the Chief Commissioner. The Alberta Court of Appeal upheld the Chambers Judge's decision that the "Commissioner lacked jurisdiction to expand the complaint beyond the issues defined by the parties." The standard of review was correctness.

Standard of Review. See also**: *Commission scolaire de Laval v Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8.**

Reconsideration. See also: *Gushnowski v Edmonton Police Service,* 2020 AHRC 21; *Jounge v Fluor Canada Ltd,* 2021 AHRC 14.

Enforcement of settlement agreement

35.1(1) In the case of a settlement agreement in respect of a proceeding before a human rights tribunal, a party who believes that another party has contravened the settlement agreement may make an application to the tribunal within 6 months after the contravention to which the application relates.

(2) If, on an application under subsection (1), the human rights tribunal determines that a party has contravened the settlement agreement, the tribunal may make any order that it considers appropriate to remedy the contravention.

2021 c25 s2.

Entry of Order

36 An order made by a human rights tribunal may be filed with the clerk of the Court of King's Bench at the judicial centre closest to the place where the proceeding was held, and on being entered it is enforceable in the same manner as an order of the Court of King's Bench.

RSA 2000 cH-14 s36;2009 c26 s27;2009 c53 s84;AR 217/2022.

Effect of Order. *Pelley and Albers v Northern Gateway Regional School Division*, 2012 AHRC 2. The Respondent applied to the AHRC's Tribunal to have its name

removed from the discrimination proceeding brought by the Complainants. The Tribunal declined the application and stated at para 63 that: "An order of the Tribunal is enforceable in the same manner as an order of the Court of Queen's Bench (s. 36 of the Act)."

Appeal

37 Repealed.

2021 c25 s2.

Order after inquiry

38(1) If the order of a human rights tribunal under section 32 did not direct a person to cease the contravention complained of, the Minister of Justice may apply to the Court of King's Bench for an order enjoining the person from continuing the contravention.

38(2) The Court, in its discretion, may make the order, and the order may be enforced in the same manner as any other order of the Court of King's Bench.

2000 cH-14 s38;2009 c26 s29;2013 c10 s34;2021 c25 s2;
AR 217/2022;2022 c21 s5.

Proceedings against trade unions, etc.

39(1) Any proceedings under this Act may be instituted against a trade union or employers' organization or occupational association in its name.

39(2) Any act or thing done or omitted by an officer, official, or agent of a trade union or employers' organization or occupational association within the scope of that person's authority to act on its behalf shall be deemed to be an act or thing done or omitted by the trade union or employers' organization or occupational association, as the case may be.

RSA 1980 cI-2 s 35.

Protection from giving evidence

40(1) No member of the Commission, nor the director of the Commission or any other employee mentioned in section 18, shall be required by any court to give evidence relative to information obtained for the purposes of this Act.

***Hamilton v Alberta*, 2014 ABCA 103.** The Appellant's complaint and a part of the basis for his appeal was that he was not permitted to call the Chief Commissioner of the AHRC as a witness, because the Commissioner had statutory immunity, which the

Appellant considered a denial to avail him of evidence he wanted and which was prejudicial to natural justice to which he was entitled. The Alberta Court of Appeal dismissed his appeal as lacking in merit. In addition, the Court of Appeal held that it was also within the jurisdiction of Mahoney J to disallow evidence on the grounds of irrelevance.

40(2) No proceeding under this Act shall be deemed invalid by reason of any defect in form or any technical irregularity.

RSA 1980 cI-2 s 36.

***375850 Alberta Ltd v Noel*, 2012 ABCA 372.** The Complainant successfully complained of sexual discrimination in the area of employment to the AHRC. However, the Respondent appealed the decision of the Tribunal, pointing out that it was not the employer of the Complainant. The Tribunal's decision was overturned based on the fact that the complaint related more to the discrimination concerning public accommodation services of the *AHRA*: s 4(a); the complaint was dismissed. The Complainant appealed to the Alberta Court of Appeal and urged the Court to substitute the complaint since the same facts could support the subject of the substitution. The Appeal Court dismissed the appeal, holding among other things, that it was too late in time for a substitution because it would violate the limitation period of one year (s 20(2) *AHRA*) and would create an awkward situation. Further, (at para 27) "Section 40(2) of the *Alberta Human Rights Act* provides that no proceeding shall be deemed invalid by reason of any defect in form or any technical irregularity, but a missed limitation period hardly falls within either of those categories". The Court held at paras 28-30:

> [27] Doubtless complaints before the Commission can be amended, especially at a fairly early stage before evidence is closed. But other cases where a complaint has been amended during a first hearing are not much help here. The amendment was first suggested here years after all the time to give evidence ended at the first hearing and its decision was issued.
>
> [28] None of that means that courts or the Commission should look only at the interests of the complainant, and disregard any unfairness or prejudice concerning the person accused. The need for substantial notice is not removed. The rules of natural justice apply to those accused too. One such rule is that someone has the right to know what the matter alleged against him or her is, and have a reasonable chance to defend himself or herself against it, by calling evidence.
>
> [29] We have shown above the prejudice that would be caused to the respondent if at this late date, and long after the time limit expired, public accommodation could first be added as a new basis for the complaint.

Protection from liability

41 No action lies against a member of the Commission or any person referred to in section 18 for anything done or not done by that person in good faith while purporting to act under this Act.

1996 c 25 s 24.

Offence

42(1) No person shall hinder, obstruct or interfere with the Commission or any person referred to in section 18 in the exercise of a power or the carrying out of a duty under this Act.

42(2) A person who contravenes subsection (1) is guilty of an offence and liable to a fine of not more than $10 000.

42(3) Where

(a) a corporation, or

(b) an employment agency, employers' organization, occupational association or trade union that is not a corporation

contravenes subsection (1), any director, officer or agent of the corporation or other body who directed, authorized, assented to, acquiesced in or participated in the contravention is guilty of the offence and liable to the penalty provided for the offence, whether or not the corporation or other body has been prosecuted for or convicted of the offence.

1996 c 25 s 24.

Service of documents

43(1) Unless the bylaws require otherwise, a notice or other document required by this Act or the bylaws to be filed with the Commission is deemed to be properly filed if it is

(a) left in person with the Commission at one of its offices,

(b) sent by electronic means in accordance with the bylaws, or

(c) sent to any office of the Commission by registered mail.

43(2) A notice or other document required by this Act or the bylaws to be served on any person is deemed to be properly served if it is

(a) served personally on the person,

(b) sent by email to the email address provided by the

person for the purpose of receiving the notice or other document, or

(c) sent by registered mail to the last address for that person known to the Commission.

43(3) Where it is necessary to prove filing or service of any notice or document,

(a) if filing or service is effected personally, the actual date on which it is filed or served is the date of filing or service,

(b) if filing or service is effected by email, the time provided for in the bylaws is the time of filing or service, and

(c) if filing or service is effected by registered mail, filing or service shall be deemed to have been effected on the earlier of

(i) the date of receipt, or

(ii) 7 days after the date on which it was mailed.

RSA 2000 cH-14 s43;2021 c25 s2.

Service by email. *Penaverde v Alberta Health Services*, 2023 AHRC 52. The court held that Section 43 of the Act allows service by email and "[11] Section 10.7(e) of the Alberta Human Rights Commission Bylaws then sets out the time deemed for email service: A document delivered to... a party will be deemed to have been served… by email, on the date and time the document is sent to the email address specified by… the party."

30-day Limitation Period. *Alberta (Mental Health Board) v Martin*, 2003 ABCA 127, 327 AR 366, leave to appeal to SCC refused, [2003] SCCA No 468, 363 AR 199. The Appellant filed a complaint with the Alberta Human Rights and Citizenship Commission on February 5, 1998. Under s 20(2) of the *HRCMA* [*AHRA*, s 22(2)] the Director sent the Appellant a notice of discontinuance of her complaint on January 19, 2000, by way of registered mail addressed to the Appellant at the address provided by her. The Appellant received the Notice and signed the receipt for the registered mail on January 28, 2000. She sent a written request to the Director for review of the Notice on February 28, 2000 and the request was received in the same day. A request for review or appeal had to be made within 30 days. The Court of Appeal considered the issue of statutory interpretation respecting the time limit for filing a request for review or appeal under the *HRCMA* and also considered whether the court should exercise its *parens patriae* jurisdiction where a Complainant has failed to meet a statutory time limit for appealing a decision made by the Director or Board. The Appellant argued that service was not engaged as s 22(1) of the *HRCMA* [*AHRA*, s 26(1)] referred to the Complainant "receiving" notice rather than being served with it.

The Court held that the purpose of s 36.3(3) *HRCMA* [*AHRA*, s 43(3)] is to create a mechanism whereby time will start running even when the party to whom a document or notice is sent does not collect his or her mail or attempts to avoid service. This purpose applies to service of all required notices and documents, regardless of who is being served. Proof, by the person served, that he did not receive the notice or document until sometime after the seven days does not provide him with additional time to react to the fact of service. The legislators provided a grace period of up to seven days where a document is mailed, after which time commences to run, regardless of when the notice or document was actually received by the affected party. The majority held that the interpretation urged by the Appellant would permit her to defer her time for appeal for months, by not picking up a registered letter, or having someone else sign for it. The majority held that notice was not filed within 30 days and therefore the appeal was dismissed.

Note: The wording in s 22(2) now reads:

> The director shall forthwith *serve* notice of a decision under subsection (1) or (1.1) on the complainant and the person against whom the complaint was made [emphasis added].

Electronic proceedings

43.1 A hearing or other proceeding, including conciliation and dispute resolution, may be conducted as

(d) an electronic proceeding, or

(e) a combined in-person and electronic proceeding.

2021 c25 s2.

GENERAL

Interpretation

44(1) In this Act,

(a) "age" means, except for the purposes of sections 4.1, 4.2, 5(2) to (5) and 5.1, 18 years of age or older;

(a.1) "benefit" means, under section 4.1, preferential access, preferential terms, or conditions or any form of preferential treatment in respect of goods, services, accommodation or facilities but does not include a minimum age for occupancy of accommodation;

(b) "commercial unit" means a building or other structure or part of it that is used or occupied or is intended, arranged or designed to be used or occupied for the

manufacture, sale, resale, processing, reprocessing, displaying, storing, handling, garaging or distribution of personal property, or a space that is used or occupied or is intended, arranged or designed to be used or occupied as a separate business or professional unit or office in a building or other structure or in a part of it;

(c) "Commission" means the Alberta Human Rights Commission;

(c.1) "electronic proceeding" means a proceeding that is held using electronic means such as a teleconference or videoconference, where each participant is able to hear and respond to the comments of the other participants at the time the comments are made;

(d) "employers' organization" means an organization of employers formed for purposes that include the regulation of relations between employers and employees;

(e) "employment agency" includes a person who undertakes with or without compensation to procure employees for employers and a person who undertakes with or without compensation to procure employment for persons;

(f) "family status" means the status of being related to another person by blood, marriage or adoption;

(g) "marital status" means the state of being married, single, widowed, divorced, separated or living with a person in a conjugal relationship outside marriage;

(h) "mental disability" means any mental disorder, developmental disorder or learning disorder, regardless of the cause or duration of the disorder;

(i) "Minister" means the Minister determined under section 16 of the *Government Organization Act* or the Minister responsible for this Act;

(j) "occupational association" means an organization other than a trade union or employers' organization in which membership is a prerequisite to carrying on any trade, occupation or profession;

(k) "person", in addition to the extended meaning given it by the *Interpretation Act*, includes an employment agency, an employers' organization, an occupational association and a trade union;

(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;

(m) "religious beliefs" includes native spirituality;

(m.1) "settlement agreement" means a written agreement, signed by the parties, that provides for the final resolution disposing of a matter before a human rights tribunal;

(n) "source of income" means lawful source of income;

(o) "trade union" means an organization of employees formed for purposes that include the regulation of relations between employees and employers.

44(1.1) In this Act, a reference to accommodation includes occupancy of

(a) a residential unit as defined in the *Condominium Property Act*,
(b) a housing unit as defined in the *Cooperatives Act*, and
(c) a mobile home site as defined in the *Mobile Home Sites Tenancies Act*.

44(2) Whenever this Act protects a person from being adversely dealt with on the basis of gender, the protection includes, without limitation, protection of a female from being adversely dealt with on the basis of pregnancy.

RSA 2000 cH-14 s 44; 2007 cS-7.5 s 7; 2009 c 26 s 30; 2017 c 17 s 7.

Family Status. ***SMS Equipment Inc v Communications, Energy and Paperworkers Union, Local 707*****, 2015 ABQB 162, aff'g** ***Communications, Energy, and Paperworkers Union, Local 707 (the Union) v SMS Equipment Inc (the Employer),***

***RE: GRIEVANCE OF RENEE CAHILL-SAUNDERS (the "Grievor")*, 238 LAC (4th) 371, 2013 CanLII 71716 (AB GAA).** The Complainant had difficulty operating on a rotating day/night schedule due to difficulties obtaining childcare. The Union requested that she be placed on a dayshift only schedule (in concert with another employee who would move to a nightshift only schedule). The Employer denied the request, arguing that no accommodation was necessary because family status did not include childcare. The matter went to an Arbitrator. The Arbitrator found that family status did include childcare, that *prima facie* discrimination was established and that the policy was not a *bona fide* occupational requirement. The Court held that the Arbitrator's findings were reviewable on the reasonableness standard and found that the Arbitrator's first two decisions were reasonable and, alternatively, correct, and that the ruling on occupational requirement was reasonable (no debate over standard of review on this point). In reviewing the Arbitrator's decision on whether "family status" in the *AHRA* included the provision of childcare, on the reasonableness standard the Court stated at paras 46 and 50:

> [46] The Arbitrator concluded that "family status" in the *AHRA* includes childcare responsibilities because "[i]t is within the scope of the ordinary meaning of the words; it is in accord with decisions in related human rights and labour forums; it is in keeping with the jurisprudence; and it is consistent with the objects of the *Act*."
>
> ….
>
> [50] I conclude that the Arbitrator's determination, that the term "family status" in the AHRA includes childcare responsibilities, clearly falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law, and his written reasons demonstrate the existence of justification, transparency and intelligibility within the decision-making process. I am not sure that SMS has even reached the point of establishing that its competing interpretation of family status is reasonable; I have no doubt that SMS has not demonstrated that the Arbitrator's interpretation was unreasonable.

In the alternative, the Court reviewed the decision on the correctness standard, writing at para 70:

> [70] I find that the Arbitrator's decision that "family status" under the *AHRA* includes childcare obligations is not only reasonable, but correct, for the reasons provided by the Arbitrator. In addition to the Arbitrator's review of the law, I note that the Federal Court of Appeal came to the same conclusion in *Johnstone CA* at paras 59, 66, that "judges and adjudicators have been almost unanimous in finding that family status incorporates parental obligations such as childcare obligations" and that "[t]here is no basis for the assertion that requiring accommodation for childcare obligations overshoots the

> purpose of including family status as a prohibited ground of discrimination." The Employer's narrow interpretation of "family status" would limit this ground of discrimination to direct discrimination only. There is nothing in the *AHRA* to support such restrictive treatment of this prohibited ground of discrimination.

Family Status. *Canada (Attorney General) v Johnstone*, 2014 FCA 110. The Canadian Border Services Agency (CBSA) refused to provide Johnstone with static shifts (instead of variable shifts) on a full-time basis after her maternity leave. Her husband also worked variable shifts. She was not able to make reasonable childcare arrangements with family members. The CBSA's position was that it did not have a legal duty to accommodate Johnstone's childcare responsibilities. The Federal Court of Appeal held at para 93:

> [93] I conclude from this analysis that in order to make out a *prima facie* case where workplace discrimination on the prohibited ground of family status resulting from childcare obligations is alleged, the individual advancing the claim must show (i) that a child is under his or her care and supervision; (ii) that the childcare obligation at issue engages the individual's legal responsibility for that child, as opposed to a personal choice; (iii) that he or she has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible, and (iv) that the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation.

Family Status. *Closs v Fulton Forwarders Incorporated and Stephen Fulton*, 2012 CHRT 30. The Complainant brought a complaint on the grounds of family status and disability discrimination. In the course of the Tribunal's ruling, it dealt with the fact that the Act under which the Tribunal operated did not provide for definition of the term, family status, as did other provincial human rights laws. At para 27 the Tribunal stated:

> While the requirements outlined in *Johnstone* are instructive, they cannot automatically be applied in a rigid or arbitrary fashion in every case. Rather, the circumstances of each case must be considered to determine if the Complainant has established a *prima facie* case pursuant to the test established in *O'Malley*. I would add that the Act does not define the term "family status" as some provincial legislatures have chosen to do under their respective human rights schemes (see for example the definition of "family status" at subsection 10(1) of the *Human Rights Code* of Ontario; and, paragraph 44(1)(f) of the *Alberta Human Rights Act*). Therefore, Parliament has left it to the Tribunal to ascertain the meaning of the term "family status". I have also not been referred to any jurisprudence that restricts the definition of "family status" under the *Act* to being a parent or being in a parent-child relationship. As was stated above, in determining the scope of the protection against discrimination on the ground of family status, the focus is on the harm

> suffered by the individual, regardless of whether that individual fits neatly into an identifiable category of persons similarly affected ….

Physical Disability. ***Balsara v Zellers Inc*, 2013 AHRC 7.** The Complainant was injured in a vehicle accident while in the course of his employment with the Respondent. The Complainant had his job terminated subsequently and he brought a complaint of discrimination on the ground of physical disability contrary to section 7(1)(a) *AHRA*. On what is physical disability and its nature, the Tribunal stated, at paras 79-82, that:

> [79] The definition of disability under section 44(1)(l) does not require that a disability is permanent or that it lasts a specific amount of time. It states "…any degree of physical disability, infirmity, malformation or disfigurement." The list of potential disabilities is preceded by the words: "without limiting the generality of the foregoing." This indicates that the list is not exhaustive.
>
> [80] The Supreme Court of Canada in *Boisbriand, supra* addressed the definition of 'handicap' under the *Quebec Charter* and found:
>
> > *The rules of interpretation do not support the appellants' argument that the word "handicap" must mean a physical or mental anomaly that necessarily results in functional limitations. The liberal and purposive method of interpretation along with the contextual approach, which includes an analysis of the objectives of human rights legislation, the way in which the word "handicap" and other similar terms have been interpreted elsewhere in Canada, the legislative history, the intention of the legislature and the other provisions of the* Charter, *support a broad definition of the word "handicap", which does not necessitate the presence of functional limitations and which recognizes the subjective component of any discrimination based on this ground* [citation omitted]
>
> [81] L'Heureux-Dubé, J., writing on behalf of the Court, examined the definition of "disability" and "handicap" in international documents and found that there was no consistent definition. The Court found that a narrow definition would be too constrictive and instead suggested some guidelines to facilitate interpretation of whether a complainant has a "handicap." The Court held:
>
> > *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. Indeed, it is the combined effect of all these circumstances that determines whether the individual has a "handicap" for the purposes of the [Quebec] Charter* [citation omitted]
>
> [82] Given this case law, the threshold that must be met in this initial stage is whether the complainant had a physical disability as demonstrated by medical information, functional limitations, or a

> social construct or limitation resulting from a perception of an ailment. Whether or not the complainant could fulfill regular work duties (physical limitation) is not the sole factor in determining whether he, in actuality, had a physical disability.

Physical Disability. *Saunders v Syncrude Canada Ltd*, 2013 AHRC 11 rev'd *Syncrude Canada Ltd v Saunders*, 2015 ABQB 237. The Tribunal found that excessive absenteeism may be the result of disability and a complaint of discrimination on this basis may be substantiated. The ABQB found that the absenteeism at issue in this case was not due to disability. The Court clarified the "threshold" for a physical disability at paras 57 and 58:

> [57] I agree with Syncrude's submission that to meet the "disability threshold", a complainant's condition must entail "a certain measure of severity, permanence, and persistence". A person must have a substantial limiting and ongoing physical condition to invoke the statutory protection against discrimination. In contrast, a "disparate, unrelated and temporary episode of injury" is not a disability under the *Act*: *Human Rights Commission v Health Care Corp of St. John's*, 2003 NLCA 13, ("*Health Care Corp*") at para 32; *Nielson v Sandman Four Ltd*, 1986 CarswellBC 1502 at para 16; James A. D'Andrea, *Illness and Disability in the Workplace: How to Navigate Through the Legal Minefield* (looseleaf), (Aurora, ON: at Canada Law Book, 1995) at s 4:3100.
>
> [58] A transient illness which may result in an employee accessing available sick leave will not ordinarily constitute a disability, though it may be possible that use of sick leave demonstrates a frailty of health which may result in a disability. See *Nahal v Globe Foundry Ltd*, [1993] 21 CHRR D/136 at para 55; quoted with approval in *Health Care Corp*:
>
> > Not every absence from work for a medical reason constitutes a physical disability within the meaning of the *Act*. Among the factors commonly taken into account in determining whether a given illness or medical condition amounts to a disability are the following. The condition must entail a certain measure of severity, permanence and persistence (*Ouimette v Lily Cups Ltd* (1990), 12 C.H.R.R. D19 (Ont. Bd.Inq.); *DeJong v Horlacher Holdings Ltd* (1989), 10 C.H.R.R. D/6283 (B.C.H.R.C.)). In my view, the series of unrelated episodes of temporary but disabling injuries in this case does not constitute a disability within the meaning of the *Act*.

Physical Disability. *Carriere v Boonstra Trucking Ltd*, 2013 AHRC 10. The Tribunal, while analyzing the subject of disability in the context of its interpretation, stated at para 154:

> [154] The definition of disability under section 44(1)(l) of the Act

does not require that a disability be permanent, have a specified level of severity or last a specific amount of time. The definition states "any degree of physical disability" falls under the section. The list of possible disabilities is preceded by the words "without limiting the generality of the foregoing, includes …" which suggests that the list is not exhaustive.

Transitional matters

45 A human rights panel that was appointed under section 27 to deal with a complaint before the coming into force of this section remains appointed as a human rights tribunal, and the members of the human rights panel continue to serve as members of the human rights tribunal, in respect of the complaint.

2009 c 26 s 31.

Transitional - Appeals

45.1 (1) In this section, "appeal" means an appeal under section 37 of this Act as it read immediately before the coming into force of this section.

(2) If an appeal has commenced but is not concluded before the coming into force of this section, the appeal is to be continued under and in conformity with section 37 of this Act as it read immediately before the coming into force of this section.

(3) If a right of appeal arose before the coming into force of this section but an appeal has not commenced before the coming into force of this section, the appeal is to be continued under and in conformity with section 37 of this Act as it read immediately before the coming into force of this section.

2021 c25 s2.

Repeal

46 The following provisions are repealed on December 31, 2032:

(a) Section 4.2(1);
(b) Section 5(2);
(c) Section 5.1(c).

2017 c17 s8.

MISCELLANEOUS

Discrimination:

No Statutory Definition. The *Act* does not contain a definition of discrimination, so the Commission relies on legal decisions for assistance in defining discrimination.

Definition. ***Andrews v Law Society of British Columbia*****, [1989] 1 SCR 143, 56 DLR (4th) 1, at para 19:**

> [D]iscrimination 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.

Definition. In order to establish discrimination "there must be a distinction based on an enumerated or analogous ground" between the complainant and the comparator group, and "the distinction must create a disadvantage by perpetuating prejudice or stereotyping": ***R v Kapp*****, 2008 SCC 41, [2008] 2 SCR 483,** paraphrased in ***Van Der Smit v Alberta (Human Rights & Citizenship Commission)*****, 2009 ABQB 121** at para 62**.**

Discrimination. ***Moore v British Columbia (Education)*****, 2012 SCC 61, [2012] 3 SCR 360.** To demonstrate that there is a *prima facie* case of discrimination, the Complainant must show that they have a characteristic protected from discrimination; that they have experienced an adverse impact with respect to a service customarily available to the public; and that the protected characteristic was a factor in the adverse impact.

Facially Neutral Discrimination. ***Canada (Attorney General) v Shakov,*** **2017 FCA 250.** The Court stated: "Now to substantive equality. Substantive equality recognizes that facially neutral conduct that treats individuals identically "may frequently produce serious inequality": *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30, [2015] 2 SCR 548 at para. 17, citing *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 56 D.L.R. (4th) 1 at p. 164. Substantive equality asks whether there is a disproportionate or adverse impact on a particular group in light of that group's background and characteristics. To take cognizance of substantive equality, one must dig beneath the surface and consider the "actual impact [of an impugned measure or decision]…taking full account of social, political, economic and historical factors": ***Withler v Canada (Attorney General)*****, 2011 SCC 12, [2011] 1 SCR 396** at para. 39." (para 114)

Adverse Effects Discrimination: ***Fraser v Canada (Attorney General),*** **2020 SCC 28.**

The current test has two steps: [1] Does the impugned law, on its face or in its impact, create a distinction based on enumerated or analogous grounds? [2] If so, does the law impose "burdens or den[y] a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating . . . disadvantage." (Alliance at para 25, emphasis added) In her reasons in *Fraser,* Justice Abella noted that although it is preferable to keep these two steps distinct, they may overlap in adverse effects cases and should not be treated as "two impermeable silos" (at para 82).

Supreme Court of Canada definitions of discrimination. For a discussion of how discrimination is determined under the *Charter of Rights and Freedoms*, s 15(1), please refer to ***R v Kapp*, 2008 SCC 41, *Withler v Canada (Attorney General)*, 2011 SCC 12, [2011] 1 SCR 396; *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, 170 DLR (4th) 1, *Quebec (AG) v A*, 2013 SCC 5, [2013] 1 SCR 61; *Fraser v Canada (Attorney General),* 2020 SCC 28.**

Systemic Discrimination. *Grover v Alberta (Human Rights Commission)*, 1999 ABCA 240, aff'g *Grover v Alberta (Human Rights Commission)*, [1996] AJ No 677 (QB). It is not every kind of discrimination that is prohibited in Alberta. Only discrimination in certain kinds of activities and only discrimination based on certain grounds is prohibited by law. The Alberta Human Rights Commission does not have the jurisdiction to investigate allegations of systemic discrimination against Canadian-trained Ph.D.'s in areas of human psychology. While the Alberta legislation prohibits both direct and systemic discrimination, the grounds of discrimination must be specially enumerated.

Degree of Proof. *Vancouver Area Network of Drug Users v Downtown Vancouver Business Improvement Association*, 2018 BCCA 132. The Tribunal may require a "link or connection" between the activities claimed to be discriminatory and the protected ground. The impugned program sought to move the homeless population away from areas of businesses. The Vancouver Area Network of Drug users filed a representative complaint alleging that a program discriminated against Aboriginal persons and persons of disabilities. The Human Rights Tribunal dismissed the complaint because it found that the Complainant had failed to show a "connection or link" between adverse treatment and a prohibited ground of discrimination. On review, the trial judge quashed the dismissal, finding that a prohibited ground need only a be a "factor" in the analysis. The Appellate Court overruled the reviewing judge's holding, finding that the Tribunal had made no error in the test it had applied. It further

concluded that the Tribunal was entitled to require a "link or connection" between the activities in question and the protected grounds.

Degree of Proof/Liability of 3rd Parties. *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2 SCR 789 [*Bombardier*]. The Plaintiff must prove each "'connection'" or "'factor'" that constitutes *prima facie* discrimination "on a balance of probabilities" (para 56). The decision also confirms at para 99 that "our conclusion in this case does not mean that a company can blindly comply with a discriminatory decision of a foreign authority without exposing itself to liability under the *Charter*. Our conclusion flows from the fact that there is simply no evidence in this case of a connection between a prohibited ground and the foreign decision in question." The Alberta HRT in ***White v Lethbridge Soccer Association*, 2016 AHRC 1, *supra***, noted at para 43 that *Bombardier at* paras 80, 89, 98 and 100 "indicates that the conduct of one party (LSA) may be discriminatory if that party (LSA) in carrying out its conduct relies on the discriminatory conduct of another party (LFC)." The SCC also clarifies at para 88 that:

> It cannot be presumed solely on the basis of a social context of discrimination against a group that a specific decision against a member of that group is necessarily based on a prohibited ground under the [Quebec] *Charter*. In practice, this would amount to reversing the burden of proof in discrimination matters. Evidence of discrimination, even if it is circumstantial, must nonetheless be tangibly related to the impugned decision or conduct.

Tort of Discrimination. *Seneca College of Applied Arts and Technology v Bhadauria*, [1981] 2 SCR 181. The Supreme Court of Canada concluded that there was no tort in common law and no civil right of action flowing from a breach of a Human Rights Code; the Complainant must seek a remedy under the code.

Federal and Provincial Jurisdiction:

Non-application of provincial human rights codes. *Canadian Pacific Ltd v Attorney General of Alberta* (1979), 100 DLR (3d) 47, 9 Alta LR (2d) 97 (Alta SC), rev'd *Canadian Pacific Ltd v Attorney General of Alberta* (1980), 108 DLR (3d) 738, 11 Alta LR (2d) 200 (Alta CA). With respect to a complaint of discrimination in employment on the basis of sex, the Court of Appeal held that the IRPA had no application in this case to a federal work or undertaking. The Complainant was employed in a shop operated by C.P. Railroad in Lethbridge.

Federal or Provincial Human Rights Tribunals. ***Mortland and VanRootselaar v Peace Wapiti School Division No 76*****, 2015 AHRC 9 [see BFOR/Employment/Age above for additional background.** The Respondent School Division also operated a bus service for its students. The Complainants were bus drivers employed by the Respondent. The Respondent argued that the proper forum for this complaint would be the Canadian Human Rights Tribunal because "its transportation operations are a federally regulated undertaking" (para 12). The preliminary jurisdiction issue is discussed at length at paras 12-71. The Tribunal found (at paras 68-71):

> [68] In conclusion, the School Division has not established any reason to depart from the presumption that the employment and labour relations of Peace Wapiti are subject to provincial jurisdiction. Peace Wapiti, a statutory corporation, exercises its provincial statutory powers in carrying out its local, public function. It educates students enrolled in its Alberta schools. Incidentally; it buses students in relation to student and school activity. There is no separate transportation undertaking. There is no local work or undertaking connecting the province with any other province or extending beyond the limits of the province within the meaning of s. 92(10) of the *Constitution Act, 1867*.
>
> [69] Evidence emerging in cross examination of Ms. Karpisek, about Peace Wapiti's intraprovincial transportation of firefighters for Alberta Forestry during fire season, does not affect this Tribunal's conclusion that Peace Wapiti comprises a single undertaking, and is subject to provincial jurisdiction in the regulation of human rights matters.
>
> [70] The Tribunal concludes, as a matter of property and civil rights under the *Constitution Act, 1867* that the *Alberta Human Rights Act* applies to the School Division and its employees. This result is consistent with the School Act provision that Alberta's Labour Relations Code applies to the Board of Trustees and its employees.
>
> [71] The Tribunal has jurisdiction to determine both the Mortland and VanRootselaar complaints. The School Division's application to dismiss the complaints on this basis is refused.

See also: ***Green v Kee Management Solutions Inc*****, 2014 AHRC 11**

Jurisdiction of Human Rights Tribunal and Labour Arbitrators/ Other Tribunals:

British Columbia (Workers' Compensation Board) v Figliola**, 2011 SCC 52.** Generally, the human rights tribunal is not invited to judicially review another tribunal's decisions or to consider an already legitimately decided issue in order to explore whether it might yield a different outcome.

***Tranchemontagne v Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 SCR 513.** Statutory tribunals empowered to decide questions of law are presumed to have the power to look beyond their enabling statutes in order to apply the whole law (including human rights codes) to a matter properly before them.

***Quebec (Commission des droits de la personne et des droits de la jeunesse) v Quebec (Attorney General*), 2004 SCC 39, [2004] 2 SCR 185 [*Quebec v Quebec*].** Labour arbitrators do not always have exclusive jurisdiction in employer-union disputes. Depending on the legislation and the nature of the dispute, other tribunals may possess overlapping jurisdiction, concurrent jurisdiction, or themselves be endowed with exclusive jurisdiction. The question in each case is whether the relevant legislation applied to the dispute at issue, taken in its full factual context, establishes that the labour arbitrator has exclusive jurisdiction over the dispute. The first step is to look at the relevant legislation and what it says about the arbitrator's jurisdiction. The second step is to look at the nature of the dispute and see whether the legislation suggests it falls exclusively to the arbitrator.

***Amalgamated Transit Union, Local 583 v Calgary (City of)*, 2007 ABCA 121.** Both a labour arbitration board under the *Alberta Labour Relations Code* and the Human Rights Commission have concurrent jurisdiction to determine issues discrimination related to employment termination. In following the two-part test set down in ***Quebec v Quebec,* above**, the Alberta Court of Appeal held that where neither applicable legislative regime expressly precludes access to the other forum, and particularly where one of those fora is not entitled to decline to hear a matter, the jurisdiction over the matter is concurrent. The matters raised in the grievance should be determined by the labour arbitrator and the human rights complaint issues not raised in the grievance should be determined by the Commission.

Calgary Health Region v Alberta (Human Rights and Citizenship Commission)*, 2007 ABCA 120** (released concurrently with ***Amalgamated Transit Union case above). The Alberta Court of Appeal applied the two-part test set down in ***Quebec v Quebec* above**, and held that the arbitration board was the correct forum to hear and determine human rights issues, because the factual context was different from the ***Amalgamated Transit Union*** case. In this case, the human rights issues raised by the employee's termination were clearly included in the grievance before the arbitration

board.

***AUPE v Alberta*, 2013 ABCA 212, leave to appeal to SCC refused, 2013 CanLII 74523 (SCC), 599 AR 399.**The Alberta Court of Appeal held that the adjudication of a grievance arising from the alleged breach of human rights legislation can be resolved by an adjudicator, who is an employee of one of the parties, as is permitted by the *Labour Relations Code*, RSA 2000 c L-1, section 135.

***Bouten v Mynarski Park School District No 5012* (1982), 21 Alta LR (2d) 20, *(sub nom Re Bouten)* 37 AR 323 (QB).** A Board of Inquiry was appointed to hear the complaint of discrimination in employment on the basis of age and sex, in a situation where the Complainant had been released from his job as a teacher at a school located on an army base. Before the Board began its hearing, the question of jurisdiction (federal or provincial?) was referred to the Court of Queen's Bench. The judge ruled that the matter could not be heard by a Board of Inquiry because the Complainant had already appealed the decision of the school to a Board of Reference convened under the *Alberta School Act*. The Court of Appeal upheld the decision of the Court of Queen's Bench in ***Alberta (Human Rights Commission) v Mynarski Park School District No 5012*, 1983 ABCA 260; [1983] AJ No 36, aff'g *Bouten v Mynarski Park School District No 5012* (1982), 21 Alta LR (2d) 20, *(sub nom Re Bouten)* 37 AR 323 (QB)**.

***Calgary (City) v Alberta (Human Rights and Citizenship Commission)*, 2011 ABCA 65.** The Alberta Court of Appeal stated with respect to overlapping jurisdiction of a labour arbitration board and the HRT (para 42):

> The Human Rights Panel is not entitled to proceed with the complaints as they relate to the terminations arising from the operation of the Supplementary Pension Plan, as all those issues have already been decided. It would be an abuse of process to allow the re-litigation of those issues, even if the mutuality of parties required to raise an issue estoppel is absent. Further, it is equally unacceptable to allow an attack on the previous decisions, by allowing proceedings that assume the possibility of "accommodation" that is inconsistent with the previous decisions. Considerations of economy, consistency, finality and the integrity of the system of administration of justice require that this long running dispute be brought to an end.

See also: ***Halfyard v City of Calgary*, 2011 AHRC 5.**

Jurisdiction of Arbitrator. *Canada (Procureur général) c. Lussier*, 2017 FC 528. Other adjudicators and independent reviewers may have jurisdiction to hear a human rights matter depending on the circumstances in which it arises. This case involves a

judicial review of a decision rendered by an independent reviewer. The relevant issue on appeal was whether the reviewer had the jurisdiction to rule on whether the Applicant was wrongfully demoted after she experienced reduced productivity as a result of a medical condition. The Applicant argued that the reviewer did not have jurisdiction to hear the claim because it involved issues relating to the Canadian Human Rights Act. The Court found that the independent reviewer did have jurisdiction under the circumstances involved in the case.

Jurisdiction of Tribunal/Employment Law. *Andric v 585105 Alberta Ltd o/a Spasation Salon & Day Spa*, 2015 AHRC 14. The Respondent argued "that this matter belonged in an employment law forum, not before a human rights tribunal. It submitted: 'If Andric had an issue with her transfer and saw this as a 'constructive dismissal', then her resort is to employment law, not a Human Rights complaint'" (para 24). The Tribunal held at para 25 that:

> An employer is subject to statutory obligations under the Act, irrespective of whether there may be a separate common law action in an employment law forum. The complaint was filed with the Commission as a human rights complaint. I was appointed pursuant to section 27 of the Act and this Tribunal has jurisdiction to hear and decide the complaint.

Application of AHRA to Disciplinary Proceedings:

***Braile v Calgary (City) Police Service*, 2017 ABCA 144.** This case determines whether the Board erred in holding that the *Alberta Human Rights Act* does not apply to disciplinary processes under the *Police Act.* Sgt Braile admitted that dismissal would have been an appropriate penalty if not for his mental health disorder. He argued that dismissal would not be appropriate if the mental disorder played a significant part in the misconduct, and treatment would eliminate likelihood of future misconduct arising from the same cause. It was found that Braile was suffering a mental disorder at the relevant time, but it was impossible to conclude whether it contributed to his misconduct.

The Court found that Sgt. Braile application did not meet the test for permission to appeal. Had there been discrimination in the accommodation of his position during the proceedings then the *AHRA* would apply, but instead he sought to use to legislation to support a variation of the appropriate burden of proof, which is subsumed by other questions.

There is no basis for appeal under the *AHRA,* but appeal was granted on other grounds

regarding the appropriate burden and standard of proof.

Evidentiary Burden:

***Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30, [2015] 2 SCR 548.** Before the Respondent is required to justify a *Charter* breach, "there must be enough evidence to show a *prima facie* breach. While the evidentiary burden need not be onerous, the evidence must amount to more than a web of instinct." (para 34).

***IAFF, Local 268 v Adekayode*, 2016 NSCA 6.** The Appellant filed a statutory complaint under the *Human Rights Act*. His complaint initiated a statutory exercise, meaning "the object is to seek the intent" by reading the words of the provision in their entire context and harmoniously in the Act (para 60). The starting point of analysis is the definition of discrimination in s. 4 of the Act. The Court found that the Tribunal properly found that, in order to demonstrate *prima facie* discrimination, complainants are required to show that they have a characteristic protected from discrimination under the *Code*; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. After the plaintiff establishes a *prima facie* case, the respondent has the burden of justifying its conduct of practice within the framework of exemptions found in the applicable human rights statutes. If it cannot be justified, courts should find discrimination. Here, the Court dismissed the appeal relating to s. 5(1) of the *Human Rights Act*, but allowed the appeal relating to s. 6(i) of the *Human Rights Act* and overturned the Human Rights Board of Inquiry order and dismissed the Plaintiff's complaint under the *Act.*

Evidentiary Burden on Respondent. *Echavarria v The Chief of Police of the Edmonton Police Service*, 2016 AHRC 5. At para 66, the Tribunal considered the impact of the Respondent calling evidence in human rights cases:

> [66] In arriving at this decision, I have referred to the Ontario Court of Appeal decision in *Peel Law Association v. Pieters,* [2013 ONCA 396 at paras 82 and 83] where Juriansz, J.A. discussed the method of analysis employed in a human rights case and distinguished cases where a respondent calls no evidence from those cases which are "fully contested." He held that:
>
> *[82] ... A prima facie case framework in the discrimination context is no different than that used in many other contexts. Its function is to allocate the legal burden of proof and the tactical obligation to adduce evidence. It governs the outcome in a case where the respondent declines to call evidence in response to the application.*

> *[83] On the other hand, in a case where the respondent calls evidence in response to the application, the prima facie case framework no longer serves that function. After a fully contested case, the task of the tribunal is to decide the ultimate issue whether the respondent discriminated against the applicant. After the case is over, whether the applicant has established a prima facie case, an interim question, no longer matters. The question to be decided is whether the applicant has satisfied the legal burden of proof of establishing on a balance of probabilities that the discrimination has occurred.*

Standard of Proof:

***Rubin Bobb v Alberta (Solicitor General/Edmonton Remand Centre)*, 2004 AHRC 4, rev'd in rev'd in part *Bobb v Alberta (Human Rights and Citizenship Commission)*, 2004 ABQB 733, 370 AR 389.** In this case the burden of proof required by the Applicant is to establish on the balance of probabilities that the acts of discrimination occurred. Justice Verville suggested that before applying a higher standard of proof to a complaint, a human rights panel should engage in a principled consideration of the issue by assessing the following:

> (i) the nature of the allegations;
> (ii) the relevant rights of all individuals involved;
> (iii) the nature of the potential liabilities flowing from a finding that discrimination occurred; and
> (iv) the evidence presented by the parties.

***Grey v Albian Sands Energy Inc*, 2007 ABQB 466, 424 AR 200, aff'g *Grey v Tracer Field Services Canada Ltd*, 2006 AHRC 11.** The ABQB held that the ordinary civil standard of proof (balance of probabilities) was applicable in Mr. Grey's case. A somewhat more contextualized or principled approach may be applicable in some cases where there is significant stigma that would flow to the Respondent from the allegations of discrimination, but this is not the case here. The ABQB states, "The most pernicious ramification flowing from a finding of discrimination in this case would be a ruling that the Albian drug and alcohol policy is invalid and inoperable, or should be modified" (para 102). The ABQB highlights the fact that the Panel found that the Director had failed to establish a *prima facie* case even on the ordinary civil standard of proof and there was no reviewable error.

Standard of Proof/Test for Discrimination. *Canadian Elevator Industry Welfare Trust Fund v Skinner*, 2018 NSCA 31. The Applicant experienced chronic pain

following an automobile accident and received a prescription for medical marijuana, which was the only effective treatment. The Respondent rejected his request for reimbursement since the Welfare Plan did not cover prescriptions that Health Canada did not approve, including medical marijuana. Applicant brought a human rights complaint based on his disability, and the Human Rights Board of Inquiry found that he had been discriminated against. The Trustees appealed and the appeal was allowed. The Court found that the Board erred in applying the three-part *prima facie* discrimination test from the Supreme Court case *Moore v British Columbia (Education)*, 2012 SCC 61, insofar as the Board determined that non-coverage discriminated "based on" Applicant's disability. The Court concluded that the Welfare Plan only denied the claim because Health Canada did not approve it, and not because of his disability.

Legal Assistance and Duty to Accommodate:

***GNWT v Portman*, 2018 NWTCA 4.** The Respondent challenged that the Legal Aid Commission's policy of not funding legal counsel for human rights complaints discriminated against disabled complainants. The Court held that legal assistance to pursue human rights complaints was not within their purview of "service customarily available to the public" and that the Legal Aid Commission was not required to provide legal representation, but that there was a duty to accommodate that rests with the Human Rights Commission. The Court reasoned that "the key to the outcome of these appeals is the definition of the 'service customarily available to the public'. The Legal Aid Commission does not provide legal assistance to pursue human rights complaints. The service [the Complainant] asked for was not one customarily available to the public. In any event, any duty to accommodate rested primarily on the Human Rights Commission." (para 45).

ALBERTA HUMAN RIGHTS COMMISSION BYLAWS

Pursuant to s 17(1) of the *Alberta Human Rights Act*.

Part 1: Common Bylaws of the Director and Tribunal

1.0 Definitions

"Act" means the Alberta Human Rights Act, RSA 2000 c A-25.5;

"authorized representative" means a person who is not licensed to act as a lawyer in Alberta, but who has been authorized by a party to act on the party's behalf in a Commission proceeding;

"bylaw" refers to these bylaws made as per section 17 of the Act;

"carriage" means having primary responsibility for conducting a hearing;

"Chief Commissioner" means the Member of the Commission designated by the Lieutenant Governor in Council as Chief of the Commission and Tribunals and includes an Acting Chief Commissioner;

"Commission" means the Alberta Human Rights Commission and includes the Director and Tribunal;

"complaint" means a complaint that has been accepted by the Director under the Act and these bylaws;

"complainant" means a person who has made a complaint under the Act;

"Director" includes the Director of the Commission appointed by the Lieutenant Governor in Council, a deputy Director, and staff in the Director's office who have been granted authority by the Director to act on behalf of the Director;

"Director of the Commission" means the person appointed by the Lieutenant Governor in Council as the Director, and includes a deputy Director;

"electronic proceeding" means a proceeding that is held using electronic means such as a teleconference or videoconference, where each participant is able to hear and respond to the comments of the other participants at the time the comments are made.

"electronic signature" means a signature through electronic means that is part of a document;

"file" means to submit a document to the applicable office, the Tribunal or Director, for it to be placed on the record;

"hearing" means a hearing before the Tribunal including a hearing that is oral, in person, virtual or by way of written submissions, and includes a pre-hearing and hearing on a preliminary matter;

"human rights officer" means a person who works for the Commission at the Director's level to resolve, investigate, and

make recommendations on complaints;

“inquiry” means a complaint form that has been received by the Director but has not been accepted as a complaint under the Act;

"lacks mental capacity" in relation to the bylaw on litigation representative means a person who cannot understand information needed to make decisions about the case or who cannot appreciate the reasonably foreseeable consequences of such decisions;

“legal counsel” means a legal representative licensed or authorized to practice law in Alberta, representing a party to a complaint;

“litigation representative” is a person who represents a minor under the age of 18, or who represents a person who lacks mental capacity to participate in the proceedings before the Commission;

“order” refers to a legal order or decision of the Tribunal;

“party” means any person entitled under the Act to participate as a party to a Commission process or any person who the Director or Tribunal determines to be a party to a complaint;

"proceedings" means the procedures and processes that the Director and Tribunal use to address a complaint;

“represented person” in relation to the bylaw on litigation representative means the person who a litigation guardian is representing;

“respondent” means a person named in the complaint, or added as a respondent by the Director or Tribunal, who is alleged to have contravened the Act;

"Tribunal Member" means a Member of the Commission appointed by an Order in Council under the Act;

“Tribunal Registrar” means the person responsible for keeping and managing records of the Tribunal, and who is the main contact for complaints that are before the Tribunal;

2.0 Exercise of powers

2.1 These bylaws will:

a) be interpreted and applied in a manner consistent with the purposes of the Act;

b) be liberally and purposively interpreted;

c) promote the fair, just and expeditious resolution of disputes;

d) allow parties to participate effectively in the proceedings, whether or not they have representation; and

e) ensure that all procedures, orders, and directions are proportionate to the importance and complexity of the issues in the particular proceeding.

2.2 The Tribunal and the Director may exercise their powers under the Act and these bylaws at the request of a party, or on their own initiative.

2.3 The Tribunal or Director may at any time, without providing written reasons, waive or vary the application of a bylaw, and may lengthen or shorten any time limit unless it is prohibited by legislation.

2.4 The Commission may establish procedures to fulfill its mandate and its duties under the Act and these bylaws, including setting out practice directions, policies, guidelines, and forms.

2.5 A party shall not use a document obtained under these bylaws in another legal forum, except with the consent of all parties to the complaint and the agreement of the Commission.

3.0 Accommodation

3.1 A party to a complaint, a witness, an authorized representative, or legal counsel may request an accommodation based on a protected ground under the Act.

3.2 A person who requires a human rights related accommodation should inform the Commission prior to a proceeding as soon as the person is aware of the need for accommodation.

3.3 A witness may request that they give their evidence under oath, rather than affirmation.

4.0 Good faith and civility

4.1 A party to a complaint, and any other person appearing before or participating in a Commission proceeding must:

a) follow provisions under the Act and bylaws;

b) respond to the Commission in a timely manner;

c) act in good faith; and

d) act in a manner that is courteous and respectful of those involved in Commission proceedings.

4.2 The Director or Tribunal may deem the failure to adhere to these expectations as an abuse of process.

5.0 Abuse of process

5.1 The Director and Tribunal, as they deem necessary, may make orders and directions in matters before the Commission to prevent an abuse of process.

5.2 Where the Director finds that a person is repeatedly filing or attempting to file complaints with the Commission that are frivolous or vexatious, the Director may refuse to accept the complaint or refuse to proceed further with a complaint.

6.0 Recording proceedings

6.1 No person is permitted to record any conversations, conciliations, investigations, or proceedings of the Director or the Tribunal, including on the phone, in person, or in a virtual proceeding, without prior written consent of the Commission.

7.0 Litigation representative

7.1 A person may seek to be a litigation representative for a party who lacks mental capacity to participate in a Commission process, or for a minor who is under the age of 18 years.

7.2 The Commission presumes that people have the mental capacity to manage and conduct their matter with the Commission and to appoint and instruct an authorized representative or legal counsel. This bylaw does not apply where a litigation representative is not required as a result of the nature of the proceedings.

7.3 A potential litigation representative is required to file a signed declaration in the form designated by the Commission.

7.4 The Commission may ask for submissions on whether to refuse the litigation representative, and may nevertheless refuse or remove a litigation representative because:

a) the litigation representative has an interest that conflicts with the interests of the represented person;

b) the appointment conflicts with the decision-making authority of another person;

c) the represented person has capacity to engage or continue in the proceedings;

d) the litigation representative is unable or unwilling to continue in this role;

e) a more appropriate person seeks to be litigation representative; or

f) a litigation representative is not needed in the matter, or at that stage of the proceedings.

7.5 A litigation representative will attend to and represent the interests of the represented person in the matter before the Commission, and take all steps necessary for the protection of those interests including:

a) to the extent possible, keeping the represented person informed of all decisions made by the Director and Tribunal and consulting with the represented person about the proceedings;

b) considering the impact of the proceedings on the represented person;

c) deciding whether to retain an authorized representative or legal counsel and providing instructions to them;

d) gathering information that is requested by the Commission and putting forward the best possible case to the Commission;

e) responding promptly to Commission communications;

f) acting in a manner that is courteous and respectful of those involved and in compliance with these bylaws;

g) participating in good faith in settling the complaint, including consideration of a reasonable settlement offer; and

h) immediately updating the Commission if contact information changes or the litigation representative is no longer representing the party to a complaint.

7.6 When a minor who is represented by a litigation representative turns 18, the role of the litigation representative will automatically end, except in the case where the minor continues to require a litigation representative because the represented person lacks mental capacity to participate in a Commission proceeding.

7.7 Where a party to a complaint has diminished capacity but does not require a litigation representative, the Commission may allow another person to provide support and assistance to that party to facilitate their full participation in the Commission proceedings.

8.0 Authorized representative

8.1 This bylaw on authorized representatives does not apply to legal counsel retained to represent a party.

8.2 A party is required to file a signed declaration in the form designated by the Commission to provide permission for an authorized representative to communicate with the Commission and represent the party named in a complaint.

8.3 The Director or Tribunal may disqualify or remove an authorized representative at any time if they do not act in accordance with these bylaws.

8.4 A represented party must inform the Commission promptly when their authorized representative is no longer representing the party.

8.5 An authorized representative will attend to and represent the interests of the represented party in the matter before the Commission, and take all steps necessary for the protection of those interests including:

a) keeping the represented party informed of all Commission decisions and correspondence regarding the complaint and consulting with the represented party about the proceedings;
b) gathering information that is requested by the Commission and putting forward the best possible case to the Commission;
c) responding promptly to Commission communications;
d) acting in a manner that is courteous and respectful of those involved and in compliance with these bylaws;
e) participating in good faith in settling the complaint, including consideration of a reasonable settlement offer; and
f) immediately updating the Commission if contact information changes or the authorized representative is no

longer representing the party to a complaint.

Part 2: Bylaws of the Director

9.0 Application of this part

9.1 Part 2 outlines the bylaws of the Director, but is not applicable to tribunal proceedings that are in Part 3 of these bylaws.

10.0 Director's process for filing documents

10.1 As soon as a party is aware of a change in their contact information, or that of their authorized representative or legal counsel, they must notify the Director.

10.2 Parties must file all written communications, including electronic documents, with the Director, using one of these methods:

a) in-person delivery;
b) courier;
c) regular, registered or certified mail;
d) fax;
e) email; or
f) as directed by the Director.

10.3 The parties must include the following legible information when filing documents with the Director:

a) name of the complainant and respondent;
b) name of the person filing the document and, if applicable, the name of their authorized representative or legal counsel;
c) mailing address, telephone number and, if available, email address and fax number of the person filing the document; and
d) inquiry or complaint number, if assigned.

10.4 A party who indicates that they agree to be contacted by email understands and consents to receive and be served future documents and correspondence by email.

10.5 The Director may determine that:

a) electronic documents are accepted in a proceeding;
b) parties use a particular electronic format; and
c) parties sign a document by electronic signature.

10.6 A party filing a document regarding a complaint must file it with the Director. The Director may instruct that documents be provided directly to the other parties.

10.7 A document delivered to the Director or a party will be deemed to have been delivered:

a) in-person, on the date the document is left with the Director's office or the party's last known address;
b) by regular mail on the date it is received;
c) by registered mail on the date it is received, as outlined in section 43(3)(c) of the Act;
d) by fax, when the party sending the document receives a fax confirmation receipt; and
e) by email, on the date and time the document is sent to the email address specified by the Director or the party.

10.8 Notwithstanding Bylaw 10.7, a document that is served on the Director after 4:30 p.m. will be deemed to have been filed on the next day that the Director's office is open.

11.0 Filing a complaint

11.1 Any person who has reasonable grounds for believing that a person contravened the Act may file a complaint with the Commission. The Director will consider if this inquiry to make a complaint complies sufficiently with the Act to allow it to be processed as a complaint.

11.2 A complaint must be complete, including that it must be in a form acceptable to the Commission and must be made within one year after the alleged contravention of the Act occurred.

11.3 A complaint is complete when it is legible and:

a) provides the information requested in every applicable section of the Commission's complaint form;
b) sets out all the facts that describe each allegation of discrimination, including how the complainant's rights have been violated under the Act;
c) provides the name and contact information of each respondent; and
d) is signed by the complainant.

11.4 Where an inquiry to make a complaint is incomplete or lacking

information, the Director may return the inquiry to the person and request that it be amended with the missing information. The inquiry will be accepted as a complaint for processing if it is returned to the Director, with the missing information, no later than 30 days after the Director's request, or such further time the Director permits.

11.5 Where the party does not provide the requested information to the Director, within the time provided, the Director may decide to refuse the inquiry as a complaint.

11.6 Where the Director accepts an inquiry as a complaint, including when amendments were made under bylaw 10.4, the filing date shall be the date the complaint was originally received by the Director.

11.7 The Director may also not accept an inquiry as a complaint to be processed if:

a) the inquiry is not within the Commission's jurisdiction;
b) the full name and address of the respondent has not been provided;
c) it does not comply sufficiently with the Act and these bylaws;
d) a similar inquiry or complaint was previously received and addressed by the Director's office;
e) the inquiry is deemed to be frivolous or vexatious; or
f) the inquiry is being, has been, will be or should be more appropriately dealt with in another forum or under another Act.

11.8 Where the Director does not accept an inquiry, a person may make an application to reconsider the Director's decision no later than 30 days after the decision was made. The inquiry will be reviewed by a person in the Director's office who did not originally refuse the inquiry.

11.9 A complaint may be closed if the respondent can not be contacted at the address provided by the complainant.

11.10 A complainant may withdraw a complaint by giving notice to the Director.

12.0 Complaints on behalf of

12.1 A person may file a complaint on behalf of another person or group of people and in such cases the person filing the complaint will be the complainant and have all the rights and responsibilities set out in the Act and these bylaws.

12.2 A person who files a complaint on behalf of a person or group must provide signed consents, in the form prescribed by the Commission, from each individual on behalf of whom the complaint is being filed.

12.3 A person who has consented to a complaint brought on their behalf may withdraw their consent at any time.

12.4 The Commission may refuse to permit a person to file a complaint on behalf of a person or group where the Commission decides it is not in the public interest or does not advance the purposes of the Act.

13.0 Responding to a complaint

13.1 A respondent must file a complete response to a complaint no later than 30 days after receiving a copy of the complaint.

13.2 A complete response must include:

a) the full legal name and contact information of the respondent;

b) the name, business address and telephone number of the contact person for a corporation or other entity;

c) a detailed response to the allegations contained in the complaint, including a statement of whether the respondent agrees or disagrees with each allegation;

d) an outline of any additional facts or allegations on which the respondent relies, including, where the respondent disagrees with allegations set out in the complaint and the respondent's version of the relevant facts; and

e) the authorized signature for the respondent.

13.3 Where the Director returns an incomplete response to the respondent, requesting additional information, the respondent may resubmit the response no later than 30 days after the request was made.

13.4 Where the respondent does not file a response, or does not amend its incomplete response within the time period allowed, the complaint may proceed and be decided based only on the information provided by the complainant, and without further input from the respondent.

13.5 The respondent does not need to provide a detailed response to

the allegations in a complaint where the issues in dispute are the subject of:

a) a full and final signed release between the parties that covers the allegations in the complaint;
b) a separate complaint that was already filed with the Director; or
c) exclusive federal jurisdiction.

In these cases, the respondent must attach a copy of the applicable information and include with the response a complete argument in support of its position that the complaint should be dismissed or not accepted. The respondent may be asked to file a complete response where the Director considers it necessary to the fair, just and expeditious resolution of the matter.

14.0 Amendments

14.1 The Director, on the request of a party or on its own motion, may amend a complaint or response including:

a) adding or removing a party, area, ground or allegation;
b) separating complaints that name multiple respondents;
c) severing a complaint; or
d) combining two or more complaints.

14.2 A party requesting an amendment shall provide:

a) submissions on the requested amendment, including the legal basis for making the amendment;
b) details regarding the amendment; and
c) reasons that an amendment would assist in the fair, just and expeditious resolution of the complaint.

14.3 The Director does not need to provide written reasons for accepting or refusing to make an amendment.

14.4 Parties have a responsibility to protect against the disclosure or release of private or personal information of their own, of another party, or of another person who is not a party to the complaint.

14.5 The Director may modify a complaint, response, or other document to protect against an unnecessary breach of privacy or to cure a minor irregularity or defect.

15.0 Conciliation

15.1 Where the Director appoints a conciliator, the parties will in good faith take all reasonable steps to:

a) be available for conciliations, meetings, or discussions;
b) provide background information and supporting documents as requested;
c) consider all reasonable settlement offers; and
d) meet timelines outlined by the Director.

15.2 Any person participating in conciliation is under an obligation to keep all information received during conciliation confidential between the parties, and shall not discuss the information with anyone other than their family or support person, authorized representative, legal counsel, or financial representative.

15.3 Conciliations may proceed in the manner chosen by the Director, including in-person meetings, or by electronic proceeding.

15.4 A human rights officer may make a recommendation to the parties of an appropriate remedy to resolve the complaintThe Director may proceed with the final consideration of a complaint at any time, including where a party refuses to participate in a conciliation.

16.0 Investigation

16.1 Where the Director investigates the complaint, the parties will, in good faith, take all reasonable steps to:

a) be available for interviews and meetings;
b) provide background information, supporting documents, and further submissions;
c) respond promptly to written or oral inquiries from the Director;
d) provide requested information and respond promptly to Commission communications;
e) arrange for witnesses to be interviewed; and
f) meet timelines outlined by the Director.

17.0 Complaint consideration

17.1 The Director may exercise its power to consider a complaint by using conciliation, investigation, immediate consideration of a complaint, or any other means that is fair, just, and expeditious.

17.2 Under section 22(1) of the Act, the Director may at any time:

a) dismiss a complaint where it:
    (i) is without merit;
    (ii) was made in bad faith for an improper purpose

or motive;

(iii) has no reasonable prospect of success; or iv. is being, has been, will be or should be more appropriately dealt with in another forum or under another Act.

b) attempt to effect a settlement of the complaint by conciliation or investigation; or

c) refer the complaint to the Chief Commissioner for resolution by a human rights tribunal.

17.3 A complaint may at any point in the process be referred directly to the Director to make a final determination. Upon notice that a complaint has been referred directly to the Director, the parties may provide:

a) submissions on why the consideration of the complaint at that point in the process would be unfair or prejudicial;

b) additional information for the Director to consider in making a final decision; and

c) submissions on whether the complaint should be dismissed or referred to the Chief Commissioner.

17.4 Where a respondent proposes a settlement offer to the complainant, and requests that the Director discontinue the complaint, as per section 22(1)(b) of the Act:

a) the respondent may provide submissions, including documentation on the specifics of the proposed settlement, how the offer was delivered, and how the complainant responded; and

b) the complainant may respond to the respondent's submissions, providing information on whether the offer was received, and why the complainant refused the offer.

17.5 The Director may refuse to consider multiple applications, by a respondent, to dismiss a complaint on the basis of a fair and reasonable offer that was made by the respondent to the complainant.

17.6 Where the Director is considering whether a matter could or should be dealt with, has already been dealt with, or is scheduled to be heard in another forum or under other legislation, under section 22(1.1) of the Act, the Director may consider submissions

from:

a) the potential respondent;
b) the complainant; and
c) an affected party such as a trade union.

17.7 A complaint may be closed as having been abandoned, where a complainant cannot be contacted through reasonable efforts or fails to respond within the time limits provided by the Director.

18.0 Referral to the Chief Commissioner

18.1 Where the Director refers the complaint to the Chief Commissioner for resolution by a human rights Tribunal, the Director will provide the following information to the Tribunal Registrar:

a) a copy of the complaint and response;
b) a copy of the investigation report or an outline of the particulars of the complaint that the Director intends to rely upon to demonstrate a contravention of the Act;
c) the order or remedy requested by the Director; and
d) any other relevant information.

Part 3: Bylaws of the Tribunal

19.0 Application of this part

19.1 Part 3 outlines the bylaws of tribunal proceedings, but is not applicable to the Director's proceedings in Part 2 of these bylaws.

20.0 Powers of the Tribunal

20.1 The Tribunal will determine how to address a matter before it, and may use procedures other than traditional adjudicative or adversarial procedures.

20.2 Proceedings, including a Tribunal Dispute Resolution (TDR), pre-hearing or hearing, may be held in-person, in writing, virtually, or via any other means for the fair, just, and expeditious resolution of the matter.

20.3 The Tribunal may finally determine a complaint without further notice to any party who cannot be contacted through reasonable efforts, using the contact information provided to the Tribunal.

20.4 On request of a party or on its own motion, the Tribunal may make

an order or direction to:

a) lengthen or shorten any time limit in these bylaws;
b) add or remove a party;
c) allow any filing to be amended;
d) hear complaints together or separately;
e) direct that notice of a proceeding be given to any person or organization;
f) schedule hearing dates or other dates in a proceeding;
g) determine the format, including written or electronic format, in which documents are provided;
h) direct the dates for providing documents;
i) require a party or person to provide a report, statement, oral or affidavit evidence;
j) make an examination of records or make other inquiries;
k) direct the order in which issues in a proceeding, including preliminary issues, will be considered;
l) define and narrow the issues in order to decide a complaint;
m) direct the order in which evidence will be presented;
n) exclude a witness from the hearing room until called upon to give evidence;
o) limit the evidence or submissions on any issue;
p) direct a party to adduce evidence or produce a witness where such evidence or witness is reasonably within the party's control;
q) direct that the deponent of an affidavit be cross-examined before the Tribunal;
r) permit a party to give a narrative before questioning commences;
s) question a witness, and advise when additional evidence or witnesses may assist the Tribunal;
t) dismiss part or all of a complaint where the Tribunal determines that another proceeding has appropriately dealt with the substance of those allegations;
u) give effect to an order or direction;
v) consider public interest remedies after providing the parties an opportunity to make submissions; and
w) take any other action that the Tribunal determines is appropriate.

21.0 Tribunal process for filing documents

21.1 Parties must file all written communications, including electronic documents, with the Tribunal Registrar, and serve the other parties, using one of these methods:

a) in-person delivery;
b) courier;
c) registered mail;
d) email; or
e) as directed by the Tribunal.

21.2 The parties must include the following legible information when filing documents:
a) complaint number;
b) name of the complainant and respondent;
c) name of the person filing the document and, if applicable, the name of their authorized representative or legal counsel;
d) mailing address, telephone number and, if available, email address and fax number of the party filing the document; and
e) that the document has been served to all other parties, including the date and method by which the document was served.

21.3 A party who indicates that they agree to be contacted by email understands and consents to receive and be served future documents and correspondence by email.

21.4 The Tribunal Registrar may determine that:

a) electronic documents are accepted in a proceeding;

b) parties use a particular electronic format; and

c) parties sign a document by electronic signature.

21.5 Where a document was filed with the Tribunal, but not delivered to the other parties, a party will not be permitted to present the document at a proceeding, except with leave of the Tribunal.

21.6 A party must deliver documents to the authorized representative or legal counsel of another party, where one has been named.

21.7 A document delivered to the Tribunal or a party will be deemed to have been delivered:
a) in-person, on the date the document is left with the Tribunal Registrar or the party's last known address;
b) by registered mail on the date it is received, as outlined in section 43(3)(c) of the Act; or
c) by email, on the date and time the document is sent to

the email address specified by the Tribunal or the party.

21.8 Notwithstanding Bylaw 21.7, a document that is served on the Tribunal after 4:30 p.m. will be deemed to have been filed on the next day that the Tribunal office is open.

22.0 Appeal of the Director's decision

22.1 The complainant may file an appeal, under section 26 of the Act, to request a review of the Director's decision, no later than 30 days after receiving a notice of dismissal or discontinuance. To file an appeal, the complainant must file with the Tribunal Registrar the following:

a) written reasons as to why the complainant is requesting a review of the Director's decision; and

b) any further information that the complainant believes is relevant to the review.

22.2 The Tribunal Registrar will forward the appeal to the respondent, which may file a response no later than 30 days after receiving notice of the appeal of the Director's decision. The response may contain further information that the respondent believes is relevant to the original complaint, and the respondent must file and serve the response with the Tribunal Registrar and the other parties.

22.3 The complainant and respondent will provide a citation of each case or piece of legislation referred to in the appeal submissions, but need not provide hardcopies of cases or legislation, unless requested to do so by the Tribunal Registrar.

23.0 Carriage of a complaint

23.1 The Director has carriage of a complaint before the Tribunal except where

a) the complaint has been received by the Tribunal as a result of an appeal of the Director's dismissal; or

b) in the opinion of the Director, the Director's involvement is not necessary or consistent with the public interest.

23.2 Where the Director has carriage before a Tribunal, the Director

may determine the nature and extent of their participation in the Tribunal proceedings.

23.3 The complainant has carriage of the proceeding before a Tribunal where the Director does not otherwise take carriage.

24.0 Tribunal dispute resolution (TDR)

24.1 Once the complaint has been referred to the Tribunal for determination, the parties may be assigned a date and location for mediation through TDR.

24.2 The TDR may be held in-person, as a virtual TDR, or via any other means the Tribunal considers appropriate for the fair, just and expeditious resolution of the complaint.

24.3 Parties, including the Director, a party's authorized representative or legal counsel, and all other people attending a TDR must sign a Mediation Agreement, in hardcopy or electronic format, prior to the commencement of the TDR.

24.4 No later than 7 days before a scheduled TDR, the Director and/or the complainant shall file with the Tribunal Registrar and deliver to each party the remedy that is requested to resolve the complaint.

24.5 No later than 7 days before a scheduled TDR, the parties may file information or documents they wish to rely upon in the TDR.

24.6 A person with authority to settle the complaint on the party's behalf must be present at the TDR.

24.7 A party shall not use documents or statements, obtained in a TDR, in another legal forum, except with the consent of all parties to the complaint, and the agreement of the Tribunal.

24.8 The Tribunal may determine that an affected person or organization receive notice and participate in the TDR.

24.9 Where the parties enter into a settlement agreement as a result of the TDR, the complainant and the Director, if involved, shall file the signed settlement agreement or a *Notice of withdrawal* with the Tribunal Registrar, indicating that the complaint has been settled and the parties have agreed to close the complaint.

24.10 A party who believes that another party has contravened a settlement agreement in relation to a proceeding before a human rights tribunal, may apply for a remedy to the Tribunal within 6 months of the contravention. Upon application, the Tribunal may make any order it considers appropriate to remedy the contravention.

25.0 Appointment of Tribunal Member

25.1 The Chief Commissioner may appoint one or more Tribunal Members to hear a complaint or a preliminary matter.

25.2 All Members of the Tribunal appointed under the Act must possess a law degree, and have experience, knowledge and training in human rights or administrative law.

26.0 Pre-hearing

26.1 The Tribunal Registrar may schedule a pre-hearing conference or hearing on a preliminary matter by telephone, in person or as a virtual proceeding.

26.2 A Tribunal Member who conducts a pre-hearing conference or is appointed to hear a preliminary matter is not seized in the matter, unless otherwise indicated.

26.3 Before the pre-hearing conference each party will attempt to discuss and agree on:

a) any preliminary or procedural matters, including whether the matter should be determined orally, in writing, or by other means;
b) the names and number of witnesses and expert witnesses the party proposes to call;
c) the number of days the party estimates it will take to present their case;
d) a list of dates on which each party and their witnesses are available;
e) deadlines for exchange of relevant documents between the parties;
f) any requested accommodations that the parties or their witnesses will need; and
g) any other matters stipulated by the Tribunal.

26.4 Unless otherwise determined by the Tribunal, not later than 21 days following the pre hearing conference, each party shall disclose to the other parties all documents ordered to be disclosed at the pre-hearing conference.

27.0 Tribunal Hearings

27.1 The date and location of a hearing may be determined by the Tribunal Registrar.

27.2 The parties shall file hearing submissions with the Tribunal Registrar and serve them on the other parties within the following timelines, unless otherwise determined by the Tribunal:

a) for the Director, 30 days prior to the first scheduled day of the hearing;
b) for the complainant who has carriage of a matter, 30 days prior to the first scheduled day of the hearing;
c) for a complainant who wishes to make additional submissions to those of the Director, 30 days prior to the first scheduled day of the hearing; and
d) for the respondent, 21 days prior to the first scheduled day of the hearing.

27.3 The hearing submissions shall include:

a) an agreed statement of facts, if available;

b) a witness list including the names of each witness to appear at the hearing;

c) a brief statement summarizing each witness' expected evidence; and

d) any documents the party intends to rely upon at the hearing, including a joint book of documents, if available.

27.4 Where a party will be calling an expert witness the party shall file a copy of the expert witness' resume and written report or a summary of their proposed evidence 45 days prior to the hearing, or as determined by the Tribunal.

27.5 Without the permission of the Tribunal no party may present:

a) a witness at a hearing, including an expert witness, whose name and summary of expected evidence was not included in a witness list filed with the Tribunal, and served on the parties, in accordance with these bylaws; and

b) documents at a hearing that were not filed with the Tribunal, and served on the parties, in accordance with these bylaws.

27.6 Where a fact or issue was not raised in the complaint, in the

response, or in the Director's process, the Tribunal may refuse to allow a party to present or make submissions about this evidence. Such evidence and submissions may only be allowed where the Tribunal is satisfied that there would be no prejudice to a party and no undue delay to the proceedings.

27.7 A person giving evidence to the Tribunal will make an affirmation that their evidence is true.

27.8 On the request of a party, the Tribunal Registrar will provide a notice to attend for a witness, which is dated and signed by a Tribunal Member. The requesting party is responsible for delivering the notice to the witness at least 21 days prior to the hearing and for payment of the attendance money and any other expenses.

27.9 Where a complainant has been notified of a hearing and fails to respond to the Tribunal, attend a hearing, or fails to comply with an order of the Tribunal, the complaint may be dismissed.

27.10 Where a respondent has been notified of a hearing and fails to respond to the Tribunal, attend a hearing, or fails to comply with an order of the Tribunal, the Tribunal may:

a) proceed in the respondent's absence;
b) determine that the respondent is not entitled to further notice of the proceedings, except as determined by the Act;
c) determine that the respondent is not entitled to present evidence or make submissions to the Tribunal;
d) deem the respondent to have accepted all facts alleged by the other party;
e) decide the matter solely on the materials before the Tribunal; and
f) take any other action the Tribunal considers appropriate.

27.11 Where a party commences an appeal of an interim decision of the Tribunal, the Tribunal may proceed with hearing the complaint unless otherwise ordered by the Tribunal or the Court.

28.0 Stated case

28.1 The Tribunal may state a case on a question of law for the opinion of the Alberta Court of Queen's Bench, at any stage in the proceedings before the Tribunal.

28.2 Upon deciding to state a case, the Tribunal will provide the Court

with the stated question of law. The Tribunal may also provide the Court with:

a) the record of the complaint;
b) factual findings based on the hearing of the complaint;
c) a determination of the legal and human rights issues that the complaint engages; and
d) any legal findings of the Tribunal Member regarding the complaint, including the issues outlined and the evidence heard.

28.3 The Tribunal may adjourn a hearing for the purpose of making the stated case to the Court.

29.0 Public hearings, anonymization and recordings

29.1 Hearings are open to the public, except as may be determined by the Tribunal in order to protect the privacy interests of parties, or in other exceptional circumstances.

29.2 Any party may request that the Tribunal hold a hearing in private because of the confidential nature of the matter.

29.3 Written decisions of the Tribunal are posted in the public domain. In exceptional circumstances, the Tribunal may make an order to protect the confidentiality of personal or sensitive information in a written decision.

29.4 Tribunal decisions will use initials to identify children under age 18. Tribunal decisions may use initials to identify other parties and participants in a hearing, where it is necessary to protect the identity of minors or of an individual's health or other sensitive information.

29.5 The Tribunal may record a hearing to fulfill the requirements under the Act. No other person or party may record a hearing, without the advance permission of the Tribunal.

30.0 Withdrawal of a complaint

30.1 A complainant wishing to withdraw a complaint, must file with the Tribunal Registrar and serve the parties a completed, *Notice of Withdrawal.*

30.2 A respondent may respond or object to a Notice of Withdrawal no later than 5 days after it is delivered to them.

30.3 Where there is no objection to the withdrawal from another party, the Tribunal will accept the withdrawal and the complaint will be

closed on such terms the Tribunal deems appropriate.

30.4 Where there is an objection to the withdrawal from another party, a complaint may only be withdrawn upon such terms as the Tribunal determines.

31.0 Reconsideration

31.1 On its own motion or at the request of a party, the Tribunal may reconsider a decision including where there is evidence that:

a) is new and was not available at the initial hearing; and
b) for good reason, was not presented before the Tribunal.

31.2 The Tribunal will only reconsider its decision where the proposed new evidence is likely to be determinative of the outcome of the complaint.

31.3 A reconsideration is an extraordinary remedy, and is not an appeal of a Tribunal decision, nor can it be used to repair the deficiencies of a party's case.

31.4 A party may request a reconsideration of a Tribunal decision no later than 30 days after the decision was made.

31.5 The Tribunal will determine whether the circumstances warrant reconsideration and may ask for submissions from the parties. The other parties need not provide a response to a request for reconsideration unless directed to do so by the Tribunal.

31.6 A reconsideration may be assigned to the Tribunal Member who made the original decision or to another Tribunal Member.

32.0 Costs

32.1 A party who, prior to the conclusion of a hearing, has given notice that costs will be requested, may no later than 7 days following the release of the Tribunal's decision, file with the Tribunal Registrar and deliver to the parties:

a) written submissions outlining the reasons an award of costs is warranted; and
b) the amount of costs requested.

32.2 The other parties are not required to respond, unless requested to do so by the Tribunal.

32.3 Where the Tribunal requests a response from a party against a costs order, the party shall, no later than 7 days after the request

is made from the Tribunal, file a response, including reasons why they believe a costs order is not appropriate.

These bylaws are in accordance with section 17 of the Act. Approval by the Minister rescinds any previous bylaws.

Editor's *Note: Last updated: May 12, 2023*

PROCEDURAL MATTERS

Appointment of Litigation Representative. *N v Grant MacEwan University*, 2014 AHRC 9 (Preliminary Matters Decision). This decision raises two issues: 1) the ability of the Tribunal to appoint a litigation representative; and 2) determining the suitability of the proposed candidate. The Tribunal found that they had the ability to appoint a litigation representative for the Complainant. At para 11, the Tribunal stated that:

> [11] The appointment of a litigation representative is, in my view, a procedural matter within the purview of the Tribunal. Whether it flows from the Bylaws and the Procedural Manual or from the Tribunal's authority as master of its own process, it rests within the authority of the Tribunal to appoint a litigation representative.

In reaching that conclusion, the Tribunal made use of (at paras 7-10) ***Prassad v Canada (Minister of Employment & Immigration)*, [1989] 1 SCR 560, 57 DLR (4th) 663** and ***Yuill v Canadian Union of Public Employees*, 2011 HRTO 126**.

The Tribunal then moved on to the matter of assessing the suitability of a proposed representative. At paras 18-20, the Tribunal wrote [footnotes omitted]:

> [18] A number of factors come into play in evaluating the appointment of a litigation representative in this case. The list below is drawn from Rule A10.4 of the *Social Justice Tribunals Ontario (SJTO) Common Rules of Procedure.* It sets out a number of factors to consider in assessing a person for such an appointment:
>
> > *a. the litigation guardian's consent to serve in this role;*
> > *b. the nature of the litigation guardian's relationship to the person represented;*
> > *c. reasons for believing that the person is mentally incapable of participating in the proceeding;*
> > *d. the nature and extent of the disability causing the mental incapacity;*
> > *e. that no other person has authority to be the person's litigation guardian in the proceeding;*
> > *f. that any person who holds power of attorney or guardianship for the person for other matters has been provided with a copy of the materials in the proceeding and a copy of the SJTO practice direction on litigation guardians;*
> > *g. that the litigation guardian has no interest that conflicts with the interests of the person represented;*
> > *h. an undertaking to act in accordance with the responsibilities of a litigation guardian as set out in*

> *Rule A10.8; and*
> *i. that the litigation guardian is at least 18 years of age and understands the nature of the proceeding.*
>
> [19] Some of these points, particularly (e), (f) and (h) have no application in this matter. The Tribunal has not been advised of any person who serves or has authority to serve as Mr. N.'s trustee or representative and the provisions of paragraph (h) are specific to an Ontario context.
>
> [20] The remaining elements provide a methodical framework of reference points for analyzing this application…

See also the related decision: ***Hoang Nguyen v Grant MacEwan University*, 2016 AHRC 9 (Preliminary Matters Decision) (below)** concerning the inability of the Complainant to testify.

Assessment of credibility and reliability of witnesses. ***Echavarria v The Chief of Police of the Edmonton Police Service*, 2016 AHRC 5.** The Complainants failed to prove discrimination with respect to services customarily available to the public (*AHRA* s 4(b)) on the basis of ancestry and place of origin. Much of the analysis centered on assessing the credibility of the witness. At para 68, the Tribunal quoted several factors from ***McKay v Toronto Police Services Board* [2011 HRTO 499** at para 11] to use when considering credibility and reliability:

- the internal consistency or inconsistency of evidence
- the witness's ability and/or capacity to apprehend and recollect
- the witness's opportunity and/or inclination to tailor evidence
- the witness's opportunity and/or inclination to embellish evidence
- the existence of corroborative and/or confirmatory evidence
- the motives of the witnesses and/or their relationship with the parties
- the failure to call or produce

material evidence [citations omitted]

The Tribunal also quoted and relied on the test in ***Faryna v Chorney,* [1952] 2 DLR 354, [1951] BCJ No 152 (BC CA)** at para 11] regarding credibility at para 69:

> The credibility of interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

Complainant not testifying/medical condition/adjournment. *Hoang Nguyen v Grant MacEwan University*, 2016 AHRC 9 (Preliminary Matters Decision). The Complainant was in poor health and medical evidence indicated that testifying in this matter would worsen his condition. Not having the Complainant testify would not allow the Tribunal Commission to hear all evidence. The proceeding was adjourned *sine die* (to a non-specified time in the future) with either party able to bring the matter before the Tribunal if the situation changed.

See also the related decision: ***N v Grant MacEwan University*, 2014 AHRC 9 (Preliminary Matters Decision)** (below) concerning the appointment of a litigation representative for the Complainant.

Complainant unavailable to testify. *Broich v Alstom Power Canada Inc*, 2013 AHRC 6. According to the Complainant's mother, the Complainant was reported missing to the police and was unavailable to testify. Regarding the ability of the Tribunal to proceed without the Complainant's evidence, para 8 states:

> [8] I have not received any submissions on whether the unexplained absence of the complainant renders the complaint moot. The Act does not preclude complaints proceeding in the absence of a complainant. There may be situations when additional witnesses or documentary evidence could result in a hearing proceeding on the merits. The question is whether or not evidence required in order to establish a prima facie case of discrimination can be tendered.

Here, the Director required the Complainant's evidence to proceed and no other evidence or witnesses were put forward so, after several adjournments, the matter was dismissed.

Death of Complainant. *Eheler v LL Enterprises Ltd*, 2013 AHRC 5. Regarding the continuation of a Complaint even though the Complainant has died, the Tribunal wrote at para 7:

> [7] I accept the above position that human rights jurisdiction can survive the complainant's death. In my view, it is a question of whether or not evidentiary thresholds can be met, while balancing other considerations such as prejudice to the respondent, which determines whether or not the complaint continues to a hearing. Accordingly, while it may be unusual for a complaint to continue to a full hearing in the absence of the complainant's direct evidence, there may be circumstances where the presence of other witness or documentary evidence, could result in the matter proceeding.

See also: ***Echavarria v The Chief of Police of the Edmonton Police Service*, 2016 AHRC 5.**

Delay. *Mortland and VanRootselaar v Peace Wapiti School Division No 76*, 2015 AHRC 9. In ruling on a preliminary objection by the Respondent concerning delay, the Tribunal found at paras 107-108 that:

> [107] The law concerning inordinate delay is as set out by the *Blencoe* [*Blencoe v British Columbia (HRC)*, 2000 SCC 44, [2000] 2 SCR 307] majority, not the minority. In *Blencoe*, the Supreme Court of Canada considered delay in a provincial human rights commission's processing of complaints. Bastarache, J. for the Court majority stated:
>
> > *[101] . . . there are appropriate remedies available in the administrative law context to deal with any state-caused delay in human rights proceedings. However, delay, without more, will not warrant a stay of proceedings as an abuse of process at common law. Staying proceedings for the mere passage of time would be tantamount to imposing a judicially created limitation period. ...*
> >
> > *In the administrative law context, there must be proof of significant prejudice which results from an unacceptable delay.* [underlining added for emphasis] [underlining and italics added by Tribunal]
> >
> > ...
>
> [108] *Blencoe* established that if delay is inordinate and significant prejudice is shown, then there is a remedy. It is the two together which allow for conclusions about disrepute of the system, community sense of fairness and oppression. The mere passage of time, without more, will not warrant a stay of proceedings. Peace Wapiti provided no evidence of significant prejudice. The application for dismissal based on delay is dismissed.

Delay. See also: *Maude v NOV Enerflow ULC,* 2018 AHRC 15.

Jurisdiction/*functus officio*. *Goossen v Summit Solar Drywall Contractors Inc*, 2016 AHRC 10 (Decision Regarding Quantification of Lost Wages). The Tribunal spoke to the concept of jurisdiction and *functus officio* at paras 6-9 (footnoted content enclosed in brackets):

> [6] The March Decision, at paragraph 162, states: "If the parties are not able to agree on costs, I retain jurisdiction to hear this matter within 45 days of this award."
>
> [7] The principle of *functus officio* favours finality of proceedings, and does not allow a hearing body to revisit a decision because it has changed its mind, made an error within jurisdiction, or because there has been a change of circumstance [*Chandler v Alberta Association of Architects*, [1989] 2 SCR 848 at p. 2-3]. However, it is applied more flexibly and less formalistic when it comes to administrative tribunals [*Ibid* at p. 3].

> [8] Where there are calculations to be made which are not expressed in a dollar amount, the Tribunal often retains jurisdiction to address disputes between the parties. That has certainly been my approach. In this instance, I did not perform calculations to assess whether Mr. Goossen had worked 52 weeks per year at 40 hours per week. I relied on Mr. Goossen's submission that he obtained "full time" work at a lower wage with new companies to replace the "full time" work he had lost with the respondent. Mr. Goossen did not make any submissions regarding what was meant by "full time" work at the original hearing or at the April 19, 2016 hearing.
>
> [9] In my view, the principle of *functus officio* has no application in this circumstance. I am not revisiting the March Decision for any of the prohibited reasons set out by the Supreme Court of Canada. Rather, I am addressing the quantification of wage loss pursuant to the March Decision. It is properly within the Tribunal's jurisdiction to assess both the impact of vacation pay, and to resolve the parties' dispute regarding the quantification of lost wages.

For additional background on this decision see ***Goossen v Summit Solar Drywall Contractors Inc*, 2014 AHRC 7 (Preliminary Matters Decision)** and ***Goossen v Summit Solar Drywall Contractors Inc*, 2016 AHRC 7.**

Loss of Jurisdiction/Settlement/Acceptance/Repudiation. *Buterman v Greater St Albert Regional Division No 29*, 2015 AHRC 2 (Preliminary Matters Decision) [*Buterman 2015*] and ***Buterman v Greater St Albert Regional Division No 29*, 2014 AHRC 8 (Preliminary Matters Decision [*Buterman 2014*], aff'd *Buterman v Board of Trustees of the Greater St Albert Roman Catholic Separate School District No 734*, 2016 ABQB 159.** The parties were involved in settlement negotiations. In the divided *Buterman 2014* decision, the Tribunal discussed the elements of a valid contract and the Majority found that the contract had not been rejected by the Complainant in this case:

> [38] The focus of this passage is clear: rejection of an offer "generally" extinguishes the offeree's right to accept it. In this way, the offeror is freed from holding it open and available for acceptance and is then able to make the offer elsewhere without risk of being bound to that original offer if the offeree reverses his rejection.
>
> [39] In our view, this is not a case where the offeror would take its offer elsewhere. There was only one person to whom the offer could be made: Mr. Buterman. The offer addressed Mr. Buterman's human rights complaint and it proposed means to settle it. Further, there is no express term or implicit suggestion in the offer to suggest that the respondent wished to be freed of the offer if or when it was rejected. It was not stated to be a time-limited offer and no risk could befall either party if the offer remained open and available for acceptance.

The Majority also found at para 48 that "[a] settlement may be reached by parties before they complete settlement documentation." They viewed "the provision of draft documents to Mr. Buterman and his counsel was an effort to minute the agreement the parties had reached" (para 59). As such, the Majority wrote at para 69 that:

> we conclude that the parties before the Tribunal are at the stage of documenting their settlement agreement. Neither party has insisted on the execution of the documents in any particular form. The draft documents prepared by the respondent are no more than a contribution to the discussion of how to record the settlement agreement. It remains within the purview of the parties to take the steps that will determine the way forward, whether that is to execute the settlement or otherwise.

As to future matters related to this settlement, the Majority decided at para 71 that:

> Given the unique nature of a human rights complaint and the overarching principle that this Tribunal is master of its own process, we have determined that we will remain seized of this matter pending that outcome and to permit it to address any further issues that may arise in the execution of the settlement agreement. In the event that the parties are unable to complete the settlement agreement, the parties are advised that hearing of this complaint remains scheduled to commence on December 3, 2014.

In *Buterman 2014*, the Dissent held at para 162 that:

> There was no meeting of minds on essential terms creating a binding settlement agreement. Alternatively, I find that, the actions of GSACRD in tendering the
>
> > Written Documents in the manner it did, where no final agreement was established on the terms contained in the Written Documents, and asking that they be signed and returned, amounts to a counter offer which Mr. Buterman was entitled to reject. The complainant's communication of the rejection was clearly understood by GSACRD. No final settlement agreement is currently in place between these parties and the application is dismissed on this alternative basis.

In *Buterman 2015*, the Tribunal was again divided. The question was whether the Tribunal continued to have jurisdiction over this matter. The Majority found at para 20 that:

> Mr. Buterman earlier disputed whether he had entered a settlement agreement. That issue was before the Tribunal and decided in the majority decision of October 30, 2014 which found that the parties had entered into a settlement agreement. The executory settlement agreement has, in our view, now been fully executed. Accordingly, we can proceed no further with this matter. To paraphrase the words of Justice Rooke, when the parties' settlement agreement was fully executed, the effect in law was that Mr. Buterman relinquished his complaint in favour of a settlement.

The Majority 2014 and 2015 Tribunal decisions were both upheld on appeal: ***Buterman v Board of Trustees of the Greater St. Albert Roman Catholic Separate School District No. 734*, 2016 ABQB 159.** Lee J held that the Tribunal's 2014 and 2015 decisions were reasonable, but did go on to "supplement" them, clarifying that "'[r]easonableness' in this context means the Tribunal majority reasons support their conclusions. Deference allows the Court to supplement the Tribunal's reasoning as long as their reasoning, taken as a whole, is tenable" (para 138). The Court also noted that "[t]he Tribunal had not exceeded its jurisdiction when it remained seized of the Complaint at the conclusion of the October 2014 decision" (para 134).

Recusal of Tribunal Chair. *Jones v Peace Wapiti School Division NO 76*, 2016 AHRC 6 (Preliminary Matters Decision). The Tribunal Chair was to lead a teleconference with the parties as part of the Tribunal Dispute Resolution (TDR) process. Respondent counsel noted that the Complainants did not consent to the process. The Registrar notified the parties that the teleconference would proceed with the new purpose being pre-hearing matters. The teleconference went ahead but the topic of discussion was the recusal of the Tribunal Chair. The Respondent argued that the Chair should recuse herself because she became involved in the process before her appointment was formalized. The Complainants argued that the Chair should remain in her position. The Director argued that there was no "reasonable apprehension of bias" (citing at para 15 the test from the dissent of deGrandpré J in ***Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 319, 1976 CanLII 2 (SCC)** at 394). The Tribunal Chair ordered that another Tribunal member should be appointed, noting that she had received some information that she normally would not have known, writing at para 24:

> However, mere knowledge that a party may or may not wish to participate in settlement is unlikely, in most circumstances, to influence a decision maker's ultimate decision on the merits of the complaint. Nonetheless, I am resolved to completely address any apprehension that is held among the parties about my ability to preside over this matter and fairly decide the outcome. Therefore, and strictly limited to the unique circumstances that have arisen in the matter now before me, in the interest of ensuring that the integrity of the Tribunal's hearing of these complaints is not marred or unnecessarily delayed by any further pre- hearing concerns about my participation as the Tribunal member to hear them, I have determined that I will recuse myself from hearing the matter.

Recusal of Tribunal Chair. See also: *Swist v Edmonton Police Service,* 2020 AHRC 42; *Miller v Capital Management Ltd,* 2020 AHRC 78.

Settlement/Set Aside. ***Caron v City of Edmonton*****, 2015 AHRC 3.** The Complainant's counsel indicated that the Complainant agreed to terminate his complaint in exchange for a financial settlement. The Complainant then indicated that he felt "stressed by the offer and felt that he was under undue duress to accept it" (para 35). In declining to set aside the settlement, the Tribunal utilized the principles outlined in ***Chow v Mobil Oil Canada*****, 1999 ABQB 1026** at para 104 [a list of the factors is included above under **Employment/Severance Agreements**], commenting at para 36 that:

> … the decision sets out some criteria for determining the validity and enforceability of an agreement. While the decision addresses the matter of a release given in the context of a human rights complaint, the principles concerning validity and enforceability are no less applicable when considering the validity and enforceability of the purported settlement agreement in the present case. The list provided by Justice Rooke is not intended to be exhaustive of the grounds of challenge. Nonetheless, it includes many pertinent considerations on which I have relied …

For additional background, see ***Caron v City of Edmonton*****, 2014 AHRC 2 (Preliminary Matters Decision)** at which point that Tribunal found that "there was no final and binding settlement" (para 58).

Parties to a complaint.

Pelley and Albers v Northern Gateway Regional School Division, **2012 AHRC 2.** Both Complainants had their employment terminated by their respective employers. However, in bringing the complaints of discrimination concerning employment on ground of age contrary to section 7(1)(a) of the *AHRA*, the School Division was included as a party. The latter brought an application to dismiss the complaints on the ground that it was not the employer to either of the Complainants. The Tribunal dismissed the application and explained that if the act complained of was found to be discriminatory it would be impossible to give effect to the remedy to remove the discrimination if the School Division, the source of the discrimination, was excluded as a party to the proceedings.

Prehearing Teleconference.

Stemme v Autolife Global Corp, **2020 AHRC 22.** The registrar attempted to set a pre-hearing teleconference date with the Respondent. They did not respond to the registrar. The Respondent then objected to the date set by the registrar. The Tribunal Chair held that the teleconference would go ahead on that date. He stated that the Tribunal must balance the parties' right to participate with the need for issues to be settled in a timely,

proportionate, and fair matter. The Tribunal is not obligated to consult with parties before scheduling hearings.

ALBERTA HUMAN RIGHTS ACT: REGULATIONS

ALBERTA REGULATION 252/2017

Alberta Human Rights Act

HUMAN RIGHTS (MINIMUM AGE FOR OCCUPANCY) REGULATION

Required occupancy

1 For the purposes of sections 4.2 and 5(4) of the Act, a minimum age for occupancy must not prevent occupancy of a unit or site by the following other individuals:

(a) individuals providing home-based personal or health care services to an occupant of the unit or site;

(b) minors related, by blood, adoption, marriage or by virtue of an adult interdependent partnership, to an occupant of the unit or site, of whom the occupant has, since commencing occupancy of the unit or site, become the primary caregiver due to an unforeseen event;

(c) a surviving spouse or adult interdependent partner of a deceased former occupant of the unit or site who, at the time of death, was cohabiting with the deceased former occupant.

Allowed occupancy

2 For the purposes of sections 4.2 and 5(4) of the Act, a minimum age for occupancy may permit occupancy of a unit or site by any other individual whose occupancy is reasonable and appropriate in the circumstances.

Determining whether a minimum age for occupancy exists

3(1) Words or expressions used in this section and not defined in the Act, have the meanings assigned to them in or under the *Condominium Property Act*.

(2) For the purposes of section 4.2(1) of the Act, a minimum age for occupancy is deemed to be in existence prior to January 1, 2018, for all residential units in a condominium plan or proposed residential units in a proposed condominium plan, if prior to that date

(a) a purchase agreement existed in respect of a unit or proposed unit in that condominium plan or proposed condominium plan, and

(b) that minimum age was set out in proposed bylaws delivered to the purchaser of that unit or proposed unit in accordance with the requirements of the *Condominium Property Act*.

Coming into force

4 This Regulation comes into force on January 1, 2018.

ALBERTA REGULATION **157/2013**

Alberta Human Rights Act

HUMAN RIGHTS EDUCATION AND MULTICULTURALISM FUND GRANT REGULATION

Definition

1 In this Regulation, "Minister" means the Minister of Justice and Solicitor General.

Delegation

2 The Minister may delegate in writing any power, duty or function under this Regulation to any employee of the Government.

General authority to make grants

3 The Minister may make grants, in accordance with this Regulation, for any purpose related to the *Alberta Human Rights Act*.

Eligibility criteria

4 The Minister may establish eligibility criteria for grants.

Applications for grants

5 An application for a grant must be made in a manner and form satisfactory to the Minister.

Conditions

6 The following conditions apply to a grant:

(a) that the recipient

(i) use the grant only for the purpose for which it is made,

(ii) account to the Minister, in the manner required by the Minister, for the way in which the grant is spent in whole or in part,

(iii) permit a representative of the Minister or the Auditor General to examine any books or records that the Minister or the Auditor General considers necessary to determine how the grant has been or is being spent, and

(iv) provide to the Minister, on request, any information the Minister considers necessary for the purpose of determining whether or not the recipient has complied or is complying with the conditions of the grant;

(b) any other conditions imposed by the Minister.

Variation

7 The Minister may vary

(a) the eligibility requirements for a grant,

(b) the purpose of a grant, or

(c) a condition on which a grant is made.

Repayment of grant

8(1) Subject to subsection (4), a recipient of a grant shall repay a grant or part of a grant

(a) that the recipient receives for which the recipient is not eligible,

(b) where the recipient provided false, inaccurate or misleading information to obtain the grant, or

(c) where the recipient fails to comply with a condition on which the grant or part of the grant is made.

(2) Subject to subsection (4), a recipient of a grant shall repay any unused portion of the grant.

(3) A grant or part of a grant that is required to be repaid under this section constitutes a debt due to the Government and is recoverable by the Minister in an action in debt against the recipient of the grant.

(4) Where the Minister varies

(a) the eligibility criteria for,

(b) the purpose of, or

(c) the conditions applicable to

a grant to allow the recipient to retain the grant or to use the grant for the varied purpose or under the varied conditions, subsections (1) and (2) do not apply to the extent of the variation.

(5) Where a grant is required to be repaid under this section, a certificate signed by the Minister stating that a grant was made and that the Minister has required repayment of the grant in accordance with this Regulation is, unless the contrary is proved, proof of the debt due from the recipient to the Government.

Payment

9 The Minister may provide for the payment of any grant in a lump sum or by way of instalments and may determine the time or times at which the grant is to be paid.

Agreements

10 The Minister may enter into agreements with respect to any matter

relating to the payment of a grant.

Refusal to provide grant

11 The Minister may refuse to make a grant under this Regulation to an applicant who

(a) makes or has made a false or misleading statement in an application under this Regulation or in any other document required by the Minister or who furnishes or has furnished the Minister or the Government of Alberta or the Government of Canada with any false or misleading information that, in the opinion of the Minister, materially affects the applicant's eligibility to receive a grant under this Regulation, or

(b) if the Minister, in the Minister's discretion, considers it appropriate to refuse to make the grant.

Report

12 The recipient of a grant must provide the Minister with a report within 3 months after completion of the work and activity in respect of which the grant was made.

Transitional

13(1) In this section, "former regulation" means the *Human Rights Education and Multiculturalism Fund Grant Regulation* (AR 13/2000).

(2) The repeal of the former regulation does not affect

(a) any duties or liabilities of a person or organization that received a grant under the former regulation, or

(b) any of the Minister's rights or powers with respect to a person or organization that received a grant under the former regulation.

Repeal

14 The *Human Rights Education and Multiculturalism Fund Grant Regulation* (AR 13/2000) is repealed.

Expiry

15 For the purpose of ensuring that this Regulation is reviewed for ongoing relevancy and necessity, with the option that it may be repassed in its present or an amended form following a review, this Regulation expires on March 31, 2022.

AR 157/2013 s15; 155/2019.

ADMINISTRATIVE PROCEDURES AND JURISDICTION ACT, RSA 2000, C A-3 (EXCERPT)

16. The Lieutenant Governor in Council may make regulations
(a) designating decision makers as having jurisdiction to determine questions of constitutional law;
(b) respecting the questions of constitutional law that decision makers designated under a regulation made under clause (a) have jurisdiction to determine;
(c) respecting the referral of questions of constitutional law to the court;
(d) respecting the form and contents of the notice under section 12(1).

RSA 2000 cA-3 s10; 2005 c4 s8.

DESIGNATION OF CONSTITUTIONAL DECISION MAKERS REGULATION, ALTA REG 69/2006

(Consolidated up to 245/2017)

1. Definitions

In this Regulation,
(a) "Charter" means the *Canadian Charter of Rights and Freedoms*;
(b) "labour arbitrator" means
(i) an arbitrator or arbitration board referred to in Part 2, Division 14.1 of the *Labour Relations Code;*
(i.1) a voluntary arbitration board appointed under Part 2, Division 15 of the *Labour Relations Code*;
(ii) a compulsory arbitration board appointed under Part 2, Division 16 of the *Labour Relations Code*;
(iii) a public emergency tribunal established under Part 2, Division 18 of the *Labour Relations Code*;
(iv) an arbitrator, arbitration board or other body referred to in Part 2, Division 22 of the *Labour Relations Code*;
(v) a construction industry disputes resolution tribunal under Part 3, Division 6 of the *Labour Relations Code*;
(vi) a compulsory arbitration board established under Part 6 of the *Public Service Employee Relations Act*;
(vii) an arbitrator appointed under Part 7 of the *Public Service Employee Relations Act*,
(viii) an interest arbitration board established under Part 3 of the *Police Officers Collective Bargaining Act*;
(ix) an arbitrator, a grievance arbitration board or other body

referred to in Part 4 under the *Police Officers Collective Bargaining Act*;

(c) "Law Society entity" means the Benchers or a panel, committee or subcommittee of the Benchers or any other entity established, by or under the *Legal Profession Act*.

2. Authorization

The decision makers listed in column 1 of the Schedule have jurisdiction to determine the questions of constitutional law set out opposite them in column 2.

3. Form of notice

The notice for the purpose of section 12(1) of the Act is set out in Schedule 2.

4. Repealed AR 245/2017 s 3.

5. Coming into force

This Regulation comes into force on the coming into force of section 8 of the *Administrative Procedures Amendment Act, 2005*.

Schedule 1

Column 1	**Column 2**
Decision Maker	Jurisdiction
Labour Relations Board	all questions of constitutional law
Law Society entity	all questions of constitutional law
a human rights tribunal appointed under the *Alberta Human Rights Act*	questions of constitutional law arising from the federal or provincial distribution of powers under the Constitution of Canada
labour arbitrators	all questions of constitutional law
Workers' Compensation Board	questions of constitutional law arising from the federal or provincial distribution of powers under the Constitution of Canada

Appeals Commission established under the *Workers' Compensation Act*	questions of constitutional law arising from the federal or provincial distribution of powers under the Constitution of Canada
Law Enforcement Review Board	questions of constitutional law relating to the Charter
Alberta Securities Commission	questions of constitutional law that relate to the Charter or arising from the federal or provincial distribution of powers under the Constitution of Canada
Alberta Utilities Commission	all questions of constitutional law
Alberta Energy Regulator	all questions of constitutional law

AR 69/2006 Sched.1;254/2007;89/2013;189/2015

Schedule 2

(Administrative Procedures and Jurisdiction Act (section 12))

Notice of Question of Constitutional Law

To: The Minister of Justice of Alberta:

To: The Attorney General of Canada:

AND

To: (decision-maker before which question will be raised)

From: _____

Address: _____

Phone: _____

Lawyer (if any): _____

Date of hearing: _____

I intend to raise the following question(s) of constitutional law. Attached are the details of my argument:

Question(s): _____

I intend to seek the following relief: _____

_____

Estimated time needed to call evidence and make arguments before the decision-maker: _____

Dated: _____

Signed: _____

Details of Argument

Details are to include:

- The grounds to be argued and reasonable particulars of the proposed argument, including a concise statement of the constitutional principles to be argued, references to any statutory provision or rule on which reliance will be placed and any cases or authorities to be relied upon.
- The law in question, the right or freedom alleged to be infringed or denied or the aboriginal or treaty right to be determined, as the case may be.
- The material and documents that will be filed with the decision-maker.
- List of witnesses intended to be called to give evidence before the decision-maker and the substance of their proposed testimony.

APPENDICES

AVAILABILITY OF UNREPORTED DECISIONS

Nearly all human rights cases decided in Alberta in 1980, or later, are reported in the Canadian Human Rights Reports. Decisions made by courts in human rights cases prior to 1980 are usually reported in other report series. However, decisions made by boards of inquiry prior to 1980 are generally unreported and may be more difficult to locate. Incomplete sets of these decisions may be found at the University of Calgary Law Library and the Court of Queen's Bench Library. You may also contact the Alberta Human Rights Commission for copies. If you are having trouble finding an unreported decision, please contact the Alberta Civil Liberties Research Centre at c/o University of Calgary, Faculty of Law, 2500 University Drive N.W., Calgary, Alberta T2N 1N4 (tel (403) 220-2505). If the Centre has a copy of the decision, staff will be glad to provide a photocopy of a decision for a small charge to cover copying and postage costs.

"In 1994 C.H.R.R. made the decision to stop publishing the full text of every human rights decision. From 1994 to 1999 decisions not published in full text were digested in the Not Published section of the Supplement Binder. Beginning in 2000 these digests appear in the Briefly Noted section of the *Human Rights Digest* and then reprinted in the bound volumes. These decisions are also included in the Case Name Index of the *Revised Consolidated Index*. Each entry consists of a style of cause, court and/or board level, followed by the year. Not Published decisions are identified by NP and the C.H.R.R. Order No. (which includes the year of the Not Published section). To find the corresponding digest, go to the Not Published section of the Supplement Binder for the year indicated in the cite. The Briefly Noted digest entries are the same as Not Published entries, except that the bound volume number and page in which they can be found identify them. The Case Name indexes are arranged alphabetically."[1]

[1] "How to Use this Index" p.iv "Canadian Human Rights Reports – Revised Consolidated Index Volumes 1-41 1980-2001".

RESOURCES

Recommended for historical insight and evolution of Human Rights law:

- Alberta Human Rights Journal, Edmonton: Alberta Human Rights Commission, 1983-89.
- Canadian Human Rights Advocate, Maniwaki, Que. Nov. Dec 1984 – Dec 1990. Current Materials:
- Canadian Bar Review Toronto: Carswell, 1923 --.
- Canadian Human Rights Report, Online: http://www.cdn-hr-reporter.ca/ (Contains links to federal and provincial human rights commissions, pertinent organizations and current case law.)
- Canadian Journal of Administrative Law and Practice, Toronto: Carswell, vol.1 no.1, Sept 1980.
- Canadian Journal of Rehabilitation, Edmonton: Canadian Association for Research in Rehabilitation, Vol. 1 no. 1, Sept 1987-.
- Canadian Labour and Employment Law Journal, Scarborough: Carswell, 1994-.
- Constitutional Forum, Edmonton: Alberta Law Foundation, Centre for Constitutional Studies, vol.11 no.1, Oct 1989-.
- Education and Law Journal, Toronto: Carswell, 1988--.
- Employment and Labour Law Reporter, Vancouver: Butterworths, vol.2 no. 1, May 1991-

http://www.canlii.org/en/	Canadian Legal Information Institute
http://www.chrc-ccdp.ca Commissionustice.gc.ca/en/H-6/	Canadian Human Rights Justice Canada, Canadian Human Rights Act

Alberta Human Rights Commission
Southern Regional Office

200 JJ. Bowlen Building 620
7th Avenue SW Calgary,
Alberta T2P 0Y8 Phone (403)
297–6571
Fax (403) 297–6567

Alberta Human Rights Commission
Northern Regional Office

800 Standard Life Centre
10405 Jasper Avenue
Edmonton, Alberta T5J 4R7
Phone (780) 427–7661
Fax (780) 427–6013

Glossary

Balance of Probabilities – a greater likelihood of an act occurring than not.

***Bona Fide* Occupational Requirement (BFOR)** – the *Act* allows an employer to select employees on one of the prohibited grounds, if that selection constitutes a *bona fide* occupational requirement imposed honestly, in good faith and is necessary to ensure adequate job performance. For example, it is legitimate for a church to expect that its leaders ascribe to the faith. For example, a minimum height requirement of 5'10" for a job has the effect of excluding most women and an employer in this situation may be required to make reasonable accommodation. For example, see: *Cyrynowski v Alberta (Human Rights Commission),* 2017 ABQB 745.

Burden of Proof – the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court.

Certiorari – an order issued by a higher court to an inferior court requiring the latter to produce a certified record of a particular case tried therein. The order is issued so the higher court may inspect the proceedings and determine whether there have been any irregularities.

Collective Agreement – an agreement between an employer and a labour union which regulates terms and conditions of employment.

Consent – voluntary agreement by a person in the possession and exercise of sufficient mental capacity to make a choice to do, or not do, something proposed by another.

Constructive Dismissal – when an employer or co-worker makes the work environment so difficult for an employee that it effectively forces the individual to leave the job; the employee is not fired from the position.

Damages – financial compensation which may be received by any person who has suffered a loss, detriment or injury, to his person, property or rights, through the unlawful act or omission or negligence of another person or group.

General Damages – flow directly from the harm that has been caused and could include wages and benefits lost as a result of being dismissed from a job.

Exemplary or Punitive Damages – used to punish the wrongdoer or to set an example to others.

Discrimination – the effect of a statute or established practice that confers particular privileges on a class arbitrarily selected from a large number of persons. Unjust treatment or denial of "normal" privileges to persons because of their race, religious beliefs, colour, gender, physical or mental disability, age, ancestry, place of origin, marital status, source of income, family status, or sexual orientation of a person or class of persons may be construed as discrimination. See discussion of caselaw under "Miscellaneous".

Dress Code – an employer has the right to establish the appearance, grooming and dress standards believed necessary for the safe or effective conduct of business.

Employee – a person in the service of another under a variety of types of contracts of hire, where the employer has the power or right to control and direct the employee in the material details of the work to be performed.

Employer – one for whom employees work and who, in return, pays their wages or salaries.

Gender Expression – "refers to the varied ways in which a person expresses their gender, which can include a combination of dress, grooming, demeanour, social behaviour and other factors." (AHRC)

Gender Identity – "refers to a person's internal, individual experience of gender, which may not coincide with the sex assigned to them at birth. A person may have a sense of being a woman, a man, both, or neither. Gender identity is not the same as sexual orientation, which is also protected under the *Alberta Human Rights Act*." [Quoted from: "Notice of Changes to Alberta's Human Rights Legislation", *Alberta*

Hatred – a deep personal feeling of dislike or animosity.

Intent – a mental attitude that can seldom be proven by direct evidence but must ordinarily be proven by circumstance from which it may be inferred.

Mandamus – an order issued from a court commanding an inferior tribunal, board, corporation, or person to perform an act that is part of the public or official duties of that body or individual.

Mandatory Retirement – refers to the practice by certain employers of terminating the employment of staff members who reach a specific age, usually 65.

Place of Origin – the human rights commission defines "place of origin" to mean "country of origin".

Reading-In – the act of adding words into a piece of legislation to confer a new meaning, power or responsibility.

Reasonable Accommodation – used to describe the duty of employers to attempt to accommodate the special needs of employees or applicants, often in situations involving religious beliefs or physical disabilities.

Religious Beliefs – a particular system of faith and worship recognized and practiced by a particular church, sect, or denomination. The Constitution embraces the right to worship God according to the dictates of one's conscience and also the right to do, or forbear to do, any act not inimical to the peace, good order, and morals of society.

Res Judicata – a point or question or subject matter which was in controversy or dispute and has been authoritatively and finally settled by the decision of a court and subsequently cannot be visited again.

Sexual Harassment – Sexual harassment is a form of gender discrimination. The Human Rights and Citizenship Commission in its information sheet on Sexual Harassment (January 1997) defines sexual harassment as:

> Any unwelcome behaviour, sexual in nature, that adversely affects, or threatens to affect directly or indirectly, a person's job security, working conditions or prospects for promotion or earnings; or prevents a person from getting a job, living accommodations or any kind of public service.

This definition is consistent with the definition of sexual harassment provided by the Supreme Court in *Janzen v Platy Enterprises Ltd*, [1989] 1 SCR 1252, 59 DLR (4th) 352 at para 56:

> "…sexual harassment in the work place may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of harassment."

Severance Agreements – an agreement between parties relieving an

employer's obligation to an employee and vice versa. Employees who feel that the agreement was unfair and invalid due to its discriminatory nature may lodge complaints against employers.

Source of Income - "Source of income" for purposes of the *Act* would not include employment income where there is no social stigma attached to receiving that income.

Subpoena Duces Tecum – a court or tribunal order compelling an individual to produce documents or appear in person to the court or tribunal in question.

Substantially Similar Work – the *Alberta Human Rights Act* requires employers to pay male and female staff the same salary for similar or "substantially similar" work. To gauge what constitutes substantially similar work the Alberta Human Rights Commission looks at such qualities as: equal skill, equal effort, equal responsibility, and similar working conditions.

Systematic Discrimination – occurs when a limitation or preference policy is adopted, which is neutral on its face, but has a disproportionately adverse impact on members of a specific group. For example, the requirement of a certain kind of headgear be worn by employees will have the effect of excluding Sikhs. Sometimes the rule in question will be considered a *bona fide* occupational requirement or qualification.

Vicarious Liability – indirect legal responsibility, for example the liability of an employer for the acts of an employee.

TABLE OF CASES

Q

R

T

U

V

Z

ANNOTATION OF ALBERTA HUMAN RIGHTS ACT

TABLE OF STATUTES

Alberta Human Rights Act, RSA 2000 c A-25.5

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11

Canadian Human Rights Act, RSC 1985, c H-6