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# Stewart v. Elk Valley: The Case of the Cocaine-Using Coal Miner

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# **HOW TO NAVIGATE HUMAN RIGHTS ISSUES RELEVANT IN TODAY'S WORKPLACE**

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CONSTITUTIONAL, CIVIL LIBERTIES AND HUMAN RIGHTS LAW /  
LABOUR AND EMPLOYMENT LAW

February 6, 2018

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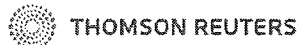
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# HOW TO NAVIGATE HUMAN RIGHTS ISSUES RELEVANT IN TODAY'S WORKPLACE

February 6, 2018

## PROGRAM CHAIRS

**Kiran Kang**, Goldblatt Partners LLP

**Brooke Stewart**, Davenport Law Group

## AGENDA

- 9:00 am Welcome and Opening Remarks from the Co-Chairs
- 9:05 am **Exploring the Evolving Definition of Disability and the Evidence to Support It**  
**Faisal Bhabha**, Osgoode Hall Law School  
**Michelle Henry**, Borden Ladner Gervais LLP  
**Kerri Joffe**, ARCH Disability Law Centre  
**Moderator: Richa Sandill**, MacDonald & Associates
- 9:55 am **What You Need to Know About Bill 148**  
**Adrian Ishak**, Goodmans LLP  
**Jodi Martin**, Paliare Roland Rosenberg Rothstein LLP  
**Bonny Mak Waterfall**, Fasken Martineau DuMoulin LLP  
**Moderator: Sharaf Sultan**, Sultan Employment Law and Workplace Immigration
- 10:45 am Networking Break
- 11:00 am **Key Developments, Trends and Opportunities in Remedies**  
**Michelle Flaherty**, Faculty of Law, University of Ottawa  
**Daniel Pugen**, Torkin Manes LLP  
**Bay Ryley**, Ryley Law  
**Moderator: Fiona Campbell**, Goldblatt Partners LLP
- 11:50 am Questions and Closing Remarks
- 12:00 pm Program Concludes



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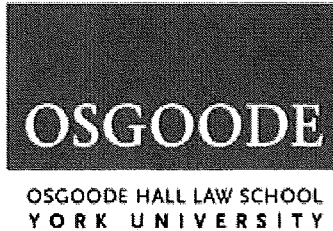
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***Stewart v. Elk Valley:***  
**The Case of the Cocaine-Using Coal Miner**

**Faisal Bhabha, Associate Professor**  
**Osgoode Hall Law School, York University**

**Prepared for:**

**OBA Institute 2018**  
**Exploring the Evolving Definition of Disability**  
**and Evidence to Support It**

**January 19, 2018**

It has for some time been settled under section 15 of the *Charter* and within anti-discrimination code definitions that “disability” includes “addictions”. Labour boards and human rights tribunals have long accepted that “alcohol and drug addiction are illnesses and are physical and mental disabilities for the purposes of the *Human Rights Code*. There are no reasons to consider them any less an illness or disability than any other serious affliction.”<sup>1</sup> The shift in expert consensus led to notable changes to the key American diagnostic instrument, the DSM 5, adopted in 2013 with a completely revised approach to addictions. What is significant for the purposes of disability law is that addiction, including both substance and behavioural addictions (e.g. gambling), is now broadly accepted as a mental illness.

The definition of disability, roughly similar in domestic human rights codes and the international Disability Convention, includes: any condition, dysfunction, disorder or impairment, regardless the cause, and whether physical or mental.<sup>2</sup> This last distinction has been effectively erased with a legal principle rejecting any hierarchy as between physical and mental disabilities.<sup>3</sup> No matter the disability, all are worthy of inclusion. Disability human rights mean little if it does nothing to protect those with disabilities most despised or feared by the majority. If addictions are indeed a mental disability, then a person with an addiction should be treated as just as “deserving” of legal protection as any other person with any other kind of physical or mental disability.

In *Tranchemontagne*, Ontario’s Court of Appeal outlined an analysis that applied this analysis in a manner that required recognizing that two alcoholic claimants who were explicitly excluded from a statutory benefit on account of their condition were “persons with disabilities”.<sup>4</sup> The statutory exclusion was discriminatory and the claimants were

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<sup>1</sup> *Mainland Sawmills v. Industrial Wood and Allied Workers of Canada, Local 2171 (Kandola Grievance)*, [2002] B.C.C.A.A. No. 69 at para. 69

<sup>2</sup> Under the *Human Rights Code*, RSO 1990, c H.19 [Code], s. 10(1) “disability” is defined as any degree of physical disability, infirmity, malformation or disfigurement; a condition of mental impairment; a learning disability; a mental disorder; or a workplace injury within the meaning of workers’ compensation legislation

<sup>3</sup> *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 S.C.R. 566.

<sup>4</sup> *Ontario (Disability Support Program) v. Tranchemontagne*, 2010 ONCA 593



entitled to the income support benefit. According to the Court, the exclusion of substance dependence from the statutory definition of “disability” resulted in an unjustifiable denial of a benefit that offended the guarantee of equal treatment with respect to services within the meaning of Ontario’s *Human Rights Code*. The exclusion explicitly disqualified a person with a particular type of illness. The facts in *Tranchemontagne* were simple and straightforward, and the Court had little difficulty treating serious alcohol addiction as a disability.

However, commentators have noted that although the case was relatively straightforward, the courts required such a voluminous record of evidence that it presented a “risk going forward... that the Court’s decision will be interpreted to require proof of the very amorphous aspects of discrimination that have proven so difficult to demonstrate and to make proceedings more complex instead of more accessible.”<sup>5</sup> There may be legitimate concern that this particular expansion of disability human rights is too contingent on relying on medical experts and “expertise”. Critical disability scholars and activists have challenged the dominant medical discourse that grounds disability in the language of illness and impairment, rather than focusing on difference and disadvantage. Yet, for the purpose of defining what is a disability who qualifies, there is no question that medical expertise offers unmatched empirical rigour. This is especially valuable when dealing with hinterland disabilities – those which are only emerging or are so socially sensitive as to be forced to the margins. Social stigma, moral judgment and shame can distort the way the public, and in turn, public policy, treats such disabilities. The purpose of the law is to ensure that there is no creating uneven playing fields.

The strength of a human rights law approach to disability rights enforcement has been compelling boards, tribunals and courts to apply purposive discrimination analysis to factual situations where there is medical evidence to support claims related to a variety

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<sup>5</sup> Lesli Bisgould, “Human Rights Code v. Charter: Implications of *Tranchemontagne* Twists and Turns and Seventeen Volumes of Evidence, or How Procedural Developments Might Have Influenced Substantive Human Rights Law”, (2012) 9 JL & Equality at 33

of substance and behavioural addictions including alcohol, drugs, gambling, sex, internet gaming, and food, among others. Perhaps for that reason, Bisgould reads between the lines of *Tranchemontagne*, and argues that the case transcended its own facts and “became much more about the test for discrimination and the evidence tendered in an effort to ‘justify’ it”. One might be more specific and say that it was about applying the test for discrimination when dealing with the case of a difficult disability that is associated with people and behaviours that are generally despised and viewed as personal moral failure. In *Tranchemontagne*, this issue never made it to the Supreme Court of Canada. The missed opportunity might be one of a variety of reasons the Court decided to grant leave to hear *Elk Valley*.<sup>6</sup> In any event, the Court’s judgment in *Elk Valley* can only be viewed as the next, important chapter in the emergent story of addictions disability law. A close read of the three distinct judgments reveals how deep differences of opinion can run when it comes to identifying and justifying discrimination.

### ***Elk Valley* Facts—Cocaine in the Coal Mine**

Stewart worked in a coal mine driving a loader. He had been with the company for more than a decade in a job that there was little controversy was safety-sensitive. Mining operations are known to be among the most precarious workplaces of all, with comparatively higher risk of injury or death than most other workplaces.

The mine operators who employed Stewart had an “Alcohol, Illegal Drugs and Medication Policy” (the ‘Policy’). The Policy created a zero tolerance rule for “illegal drugs”, meaning any employee could be terminated for any drug use. The Policy created an exception whereby an employee could offer prior disclosure of any dependence or addiction issues and benefit from opportunities for rehabilitation in the event of substance-related conduct. Instead of dismissal, an employee could go into treatment

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<sup>6</sup> *Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30 (“*Elk Valley*”).

and come back to a job. This would only be available to someone who had self-identified as an addict prior to the incident.

Stewart was aware of this policy, which was adopted five months before the incident. He did not disclose to his employer that he was addicted to cocaine, despite the fact that he used cocaine regularly on his days off. The Tribunal accepted that he was not, at that time, aware of his addiction. One day, near the end of a long shift, Stewart was involved in an accident while operating the vehicle. No one was injured and there was minimal damage, but the employer required him to undergo a drug test. Stewart tested positive for cocaine. He was in breach of the Policy.

Stewart immediately told his employer that he believed he may be addicted to cocaine. However, because he had not disclosed this prior to the incident, the employer did not consider his possible addiction or accommodate him with respect to the workplace Policy. The employer essentially refused to consider his addiction as a factor in its employer obligations to him. Because he had failed to comply with the disclosure requirement in the Policy, Stewart was not eligible for any disability accommodation under the Policy. His disability was treated as irrelevant, a non-fact, because it was not disclosed prior to the incident. Because his addiction was a non-fact, there was no justification for Stewart's drug use and he was thus terminated from his employment—not because of his drug *addiction*, but because of his drug *use*.

The majority of the Supreme Court of Canada ultimately agreed that the employer was entitled to terminate Stewart. For six justices, there was no need to consider the duty to accommodate because there was no *prima facie* discrimination (i.e. there was no connection between Stewart's drug addiction and the termination of his employment); while for two concurring justices, there was discrimination but it was accommodated to the point of undue hardship.

In a sole dissent, Gascon J. gave weight to four additional facts that he deemed relevant to the analysis in the case, and on which he concluded the termination was both discriminatory and without justification:

- Firstly, Stewart was a longstanding employee with Elk Valley and had a clean disciplinary record for the last nine years, and had gained seniority and benefits as a result.<sup>7</sup>
- Secondly, the Policy which the employer relied on was unilaterally imposed on the employees well into Stewart's employment.<sup>8</sup>
- Third, the drug test that Stewart underwent did not conclude that he was under the influence during the accident, only that he had used cocaine in the past 21 hours.<sup>9</sup>
- Lastly, the Policy states that disciplinary action against an employee who tests positive for drugs "will be based on all relevant circumstances", including deterrence of such behaviour but also the employee's employment record, the circumstances surrounding the positive drug test and the pattern of usage.<sup>10</sup>

### **History of the Case**

The case originated in 2012 in the Alberta Human Rights Tribunal (AHRT). The Tribunal decision, authored by Mr. Justice Paul Chrumka of the Alberta Court of Queen's Bench, accepted with no difficulty, that Stewart had a disability protected by human rights legislation. Applying the two-part test for discrimination in the workplace, the Tribunal found that *prima facie* discrimination was not established because Stewart was terminated for failing to comply with the workplace Policy, not because of his cocaine addiction.<sup>11</sup> Even if *prima facie* discrimination was established, the Tribunal stated alternatively that the employer could not have accommodated Stewart because

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<sup>7</sup> Ibid. at para 64.

<sup>8</sup> Ibid. at para. 65.

<sup>9</sup> Ibid. at para. 66.

<sup>10</sup> Ibid. at para. 67.

<sup>11</sup> *Bish [o.b.o. Stewart] v. Elk Valley Coal Corporation*, 2012 AHRC 7 (CanLII)\

accommodating his addiction would have so diluted the deterrence capacity of the Policy that it would be rendered ineffective.<sup>12</sup> It would be unduly hard.

Yet, the principal finding that there was insufficient connection between the addiction and the termination hinged on the weight the Tribunal put on its factual finding that Stewart was not rendered *incapable* of making behavioural choices by virtue of his drug dependence. The Tribunal cited affirmatively the British Columbia Court of Appeal in a case where an alcoholic employee was dismissed for theft from the liquor store in which he worked: “The fact that alcohol dependent persons may demonstrate ‘deterioration in ethical or moral behaviour’ and may have a greater temptation to steal alcohol from their workplace if exposed to it, does not permit an inference that the employer’s conduct in terminating the employee was based on or influenced by alcohol dependency.”<sup>13</sup>

The BC Court of Appeal also found in that case that it is not discriminatory for an employer to consider irrelevant the fact that it operates a workplace that presents increased temptation to steal (for an addict). Similarly, the Alberta Human Rights Tribunal found that Stewart is not subjected to a unique burden when a workplace rule subjects only persons with his type of disability to a unique set of conditions and burdens in order to be entitled to accommodation. The logic is not self-evident. If the Policy is the only thing obstructing the drug-dependent worker from accessing accommodation, then how can the Policy legitimately serve as the sole basis for termination of employment? The Tribunal also failed to note a salient factor distinguishing Stewart’s case from the BC case: namely, that only one involves culpable conduct – stealing. In the case of Stewart, there was no culpable conduct other than breaching the no drugs policy. His termination “was due to the failure of Mr. Stewart to stop using drugs and failing to disclose his use prior to the accident”.<sup>14</sup> The fact the Tribunal viewed Stewart’s case as analytically analogous to the case of a worker who

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<sup>12</sup> *Ibid.* at paras. 149-152.

<sup>13</sup> *British Columbia (Public Service Agency) v. British Columbia Government and Service Employees’ Union* [2008] B.C.J. No. 1760 (*Gooding*) (BCCA).

<sup>14</sup> *Bish, supra*, at para. 20.

steals to support an addiction suggests a significant shortcoming in the contextual understanding of the facts. However, it also appears to have set the tone for the reviewing courts' consideration of the facts as found by the Tribunal.

In a 2013 appeal to the Alberta Queen's Bench, the case was dismissed on the basis that the Tribunal had correctly concluded that the reason for termination was the breach of the Policy, not the addiction.<sup>15</sup> The court observed, incidentally, that if a case of *prima facie* discrimination was in fact made out, then the Tribunal was unreasonable in concluding that Stewart was accommodated since he was unaware of his addiction and therefore could not be fairly expected to self-report as required. However, the court found that the mere existence of a nexus between the addiction and the Policy was not sufficient to discharge Stewart's preliminary onus of establishing a *prima facie* case of discrimination. He had to also show additionally that the adverse treatment was based on "stereotypical or arbitrary assumptions", which he had not done.<sup>16</sup>

This reasoning echoed what the 2010 Ontario Court of Appeal judgment did in *Tranchemontagne*, including as a condition of establishing a *prima facie* case of discrimination "demonstrating a distinction that creates a disadvantage by perpetuating prejudice or stereotyping".<sup>17</sup> The question of whether perpetuation of prejudice or stereotyping is properly considered a condition rather than an indication of discrimination remained contested until the Supreme Court addressed it in the final judgment in the present case. The majority left no question: "The existence of arbitrariness or stereotyping is not a stand-alone requirement for proving *prima facie* discrimination. Requiring otherwise would improperly focus on 'whether a discriminatory attitude exists, not a discriminatory impact', the focus of the discrimination inquiry" [emphasis in original].<sup>18</sup>

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<sup>15</sup> *Bish v. Elk Valley Coal Corporation*, 2013 ABQB 756

<sup>16</sup> *Ibid.* at para. 38.

<sup>17</sup> *Tranchemontagne*, *supra*.

<sup>18</sup> *Elk Valley*, SCC at para. 45.

In 2015, a majority of the Alberta Court of Appeal dismissed Stewart's appeal and found that no *prima facie* discrimination could be found in the case because the addiction was not a 'real' factor in the adverse impact of the termination. The Tribunal had stated that "the adverse effect must be *causally* linked, in some fashion, to the disability."<sup>19</sup> Because it found no causal link between Stewart's cocaine addiction and his termination, the decision to terminate could not have been discriminatory on the basis of disability and there was no duty to accommodate Stewart's drug use. One dissenting judge, O'Ferrall J., concluded that the addiction was clearly a factor in Stewart's termination and was thus discriminatory, and that he was not accommodated to the point of undue hardship.

With multiple judgments, a variety of analytical approaches, and a strong dissenting view on appeal, the case was ripe for further appeal to the Supreme Court of Canada.

### **Majority Judgment at the SCC**

What made the case unique and valid for appeal were questions of national importance related to discrimination law and the administrative review of human rights tribunal decisions. Yet, the majority of the Court, led by then-Chief Justice, McLachlin, resolved early in the judgment to limit its scope to a reaffirmation of the application of "settled principles on workplace disability discrimination" whereby the findings of first-instance fact-finders are shown high deference. The standard of review was reasonableness, not correctness, as Stewart had argued.

Six of nine justices found the Tribunal's decision to be reasonable, meaning that it fell within a range of reasonable conclusions to reach on the basis of the facts found. Three judges agreed with Stewart that his termination was *prima facie* discriminatory, but two went on to justify the discrimination on the basis of workplace safety and the need to deter dangerous practices in safety-sensitive workplaces. Only one justice found the Tribunal's conclusion unreasonable and the discrimination unjustifiable because it

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<sup>19</sup> Ibid.

rewarded the employer for having no discriminatory intent despite the fact that its workplace policy directly caused Stewart, an addict, to be dismissed for drug use. The dissent highlighted the disregard for obvious adverse effects caused by a zero-tolerance drug policy on an individual who, as a drug addict, fits squarely within the protected category of disability.

The central question of the appeal concerned the third step of the test for *prima facie* discrimination. Adopting the language of the Court in *Moore*, the question in this case was whether Stewart's disability was "a factor" in the termination of his employment. The Tribunal had found that Stewart's addiction was not a factor in the termination. It concluded that he was dismissed because he failed to comply with the Policy by using drugs and failing to disclose his addiction. Pointing to the termination letter, which emphasized how Stewart's actions were contrary to the Policy, the majority accepted that the employer was concerned with enforcing workplace policies, not with unfairly targeting addicts.<sup>20</sup> The majority accepted the Tribunal's finding that "Stewart had the capacity to comply with the terms of the Policy" and concluded that it "was therefore not unreasonable for the Tribunal to conclude that there was no *prima facie* discrimination in this case."<sup>21</sup>

The Court noted that the Tribunal had acknowledged "that people with addictions may experience denial and that the distinction between termination due to disability and termination due to the failure to follow a policy may appear 'superficial' given that the failure to follow a policy may be a symptom of an addiction or disability", but the fact that Stewart still maintained some capacity to control his addiction and knew he should not be taking drugs meant that he could be terminated for his failure to comply with the Policy.<sup>22</sup>

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<sup>20</sup> Elk Valley, SCC at paras. 28-31.

<sup>21</sup> *Ibid.* at para. 35.

<sup>22</sup> *Ibid.* at paras. 32, 38.



The second reason the Tribunal gave for upholding the termination was that even if the Policy discriminated against Stewart, it accommodated him up to the point of undue hardship. Where personal control was not completely lost, it was not unreasonable to require prior disclosure. The majority emphasized that addiction impacts people in different ways and, thus, a case by case analysis would be required to assess the degree of control any given addict may have:

In some cases, a person with an addiction may be fully capable of complying with workplace rules. In others, the addiction may effectively deprive a person of the capacity to comply, and the breach of the rule will be inextricably connected with the addiction. Many cases may exist somewhere between these two extremes.<sup>23</sup>

While Stewart was found to have been able to comply with the Policy, the majority's reasoning gives little indication as to the future application of the judgment. It may be that most addicts will be presumed to exercise sufficient choice with respect to their behaviour, which could make human rights protections essentially unavailable. If many of the cases exist between clear extremes of choice and no choice, it is impossible to predict how justified other employers will be in terminating addicts' employment for non-culpable policy breaches, let alone for culpable conduct.

It is also not clear what evidence will suffice to demonstrate loss of control, which is a common symptom of addiction. What is clear from the majority's reasoning is that the mere existence of an addiction does not by itself establish *prima facie* discrimination on the ground of disability. If that were the case, the court worried it could stand to reason that workplaces may never limit any form of addictive behaviour. What would become of no-smoking policies that impede the needs of nicotine addicted employees?<sup>24</sup> Because the Tribunal found as fact that Stewart had a degree of control over his use of drugs that

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<sup>23</sup> Ibid. at para. 39

<sup>24</sup> Ibid. at para. 42.

would have enabled him to follow the Policy, his disability could not be considered a factor in the adverse impact that he suffered.<sup>25</sup>

The majority further noted that the Tribunal had considered whether the Policy itself adversely impacted Stewart. Because the Policy affected both recreational drug users and drug addicts in the same way, it could not be said to be targeting Stewart on account of his disability.<sup>26</sup> The majority did acknowledge that the opposite conclusion, namely that Stewart's disability was a factor in his termination, could also be reasonably drawn from the facts. The role of appellate courts, according to the Chief Justice, was not to reassess evidence, but instead to review whether the conclusion of Tribunal fell within a reasonable range.<sup>27</sup> On that measure, six judges agreed the decision was reasonable.

The majority judgment also addressed two points which it identified as *obiter*, but which necessitated some comment. First, the Court was clear in dispelling once and for all the notion that there is a condition or requirement to show stereotypical or arbitrary decision making in order to prove a *prima facie* case of discrimination. It offered a restatement of the existing test.<sup>28</sup> Secondly, the majority emphasized that the third part of the test requires only that disability be a *factor* in the adverse impact. No qualifiers such as "significant", "causal" or "material" should be added to this part of the test.<sup>29</sup>

### **Minority Judgment, Concurring Result**

For the minority justices, Moldaver and Wagner JJ., the reasoning of the majority was too implausible to adopt, though the pair agreed with the majority's result. For the minority, both the Tribunal and the majority put far too much weight on assumed facts about Stewart's capacity to "choose" his behaviour. The problem for them was the assumption "that because Mr. Stewart had a limited ability to make choices about his drug use, there

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<sup>25</sup> Ibid.

<sup>26</sup> Ibid. at para. 34.

<sup>27</sup> Ibid. at para. 41.

<sup>28</sup> Ibid. at para. 45.

<sup>29</sup> Ibid. at para. 46.

was no connection between his dependency on cocaine and his termination on the basis of testing positive for cocaine”.<sup>30</sup> The minority could not accept the majority’s reasoning on this point.

Just as there is a spectrum of “ability” with respect to Stewart’s agency and choice, there may also have been a spectrum of degrees of “connection” between his cocaine habit and the termination of his employment. It need not be an all-or-nothing analysis. Yet, it appears that the fact that there was not a *significant* connection or a *direct causal* connection, the majority were content to dismiss the existence of Stewart’s right. It is difficult to explain or justify this analysis given the current state of the law on this subject and the explicit statements in the majority judgment with respect to the “factor” test.

On this point, the minority pair agreed with the dissenter and found that even if the Tribunal concluded that Stewart had some control over his use of drugs, this “merely reduced the *extent* to which his dependency contributed to his termination — it did not eliminate it as a ‘factor’ in his termination”.<sup>31</sup> Even with diminished choice control, Stewart was still a person experiencing the disabling effects of his condition in a way which both made him vulnerable by virtue of stigma, and which caused him direct harm and disadvantage by operation of the workplace Policy. The minority found that the Tribunal failed to acknowledge the obvious fact that Stewart’s disability was, at minimum, one factor among others in his termination.<sup>32</sup>

## **A Deep Dissent**

The dissenting reasons of Gascon J. adopted a very different tone and context for considering the relevant legal issue. The judgment begins with a discussion of the stigmatization of people with drug dependencies. Common stereotypes include the view

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<sup>30</sup> Ibid. at para. 49.

<sup>31</sup> Ibid. at para. 50 (referencing para. 120, dissenting reasons)

<sup>32</sup> Ibid.

that they are “the authors of their own misfortune.”<sup>33</sup> As a result of stigma, such individuals can be “caught in a majoritarian blind spot in the discrimination discourse”, meaning they fail to be included within “the scope of human rights protections”.<sup>34</sup> Without saying it directly, Gascon makes a damning accusation against his colleagues on the bench.

In evaluating the Tribunal’s decision on the issue of whether *prima facie* discrimination was established, Gascon J. found that the conclusion reached by the Tribunal was unreasonable because even though the Tribunal applied the correct test, it misunderstood a key discrimination law principle: namely the distinction between direct and indirect discrimination.

The Tribunal’s analysis emphasized Stewart’s choice to take drugs and examined whether he exercised control over his actions. In so focusing, the Tribunal only considered one form of discrimination, namely “direct” discrimination. The Policy, which seeks to regulate the act of taking drugs, ignored the motivation for taking drugs – the addiction. In failing to consider the motivation to take drugs, the Policy makes drug addiction an indirect cause of termination. In other words, the neutral rule against taking drugs has an adverse effect on people who take drugs because of a dependency. It imposes a burden that is not imposed on others who do not share their dependency.

On the issue of the majority’s focus on the degrees of impairments and the aspect of control, he wrote that every addict except those who have not been impacted at all by their drug addiction, should benefit from the scope of what constitutes a ‘factor’ in terms of the test for *prima facie* discrimination.<sup>35</sup> He built on the point made by the majority that the protected ground need only be one factor, with no qualifying language to be read into that test. For Gascon J., demands for more onerous burdens were to be faulted

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<sup>33</sup> *Ibid.* at para. 58.

<sup>34</sup> *Ibid.* at para. 59.

<sup>35</sup> *Ibid.* at para. 89.

for creating a “choice threshold”, which shifts the “burden on complainants to avoid discrimination, rather than on employers not to discriminate”.<sup>36</sup>

He criticized the majority’s approach for attributing choices that are significant to one’s identity, effectively removing rights holders from protected grounds, with no justification. He highlighted the hypocrisy in the majority’s judgment in light of the fact that the Court has always refused to draw distinctions between protected grounds and conduct inextricably linked to those grounds.<sup>37</sup> Similar analyses distinguishing between same-sex action and same-sex people, between being a woman and getting pregnant,<sup>38</sup> and between holding and manifesting religious beliefs,<sup>39</sup> have been roundly rejected by the Court. Yet, the majority’s judgment in this case hinged on upholding a clear and illogical distinction between being an addict and taking drugs. Finally, Gascon J. noted that choice thresholds tend to result in blaming members of marginalized groups for their choices, which reinforces the stigma they already experience in society.<sup>40</sup>

Gascon J. found that the “factor” test was misapplied by both the Tribunal and the majority to the extent that it considered only whether Stewart’s addiction was “not a factor” in the employer’s intention to fire him, rather than the proper question of whether his addiction was a factor in the termination of his employment. The distinction is an important one:

If discriminatory intent were dispositive of contribution, the relevant relationship would be that between an employee’s protected ground and the corporation’s intent to harm that employee. But contribution emphasizes discriminatory effect. Indeed, for human rights legislation

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<sup>36</sup> Ibid. at para. 99.

<sup>37</sup> Ibid. at paras. 99-100.

<sup>38</sup> See *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219 (“Discrimination on the basis of pregnancy is a form of sex discrimination because of the basic biological fact that only women have the capacity to become pregnant.”)

<sup>39</sup> See *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698 at para. 57 (“The right to freedom of religion enshrined in s. 2(a) of the *Charter* encompasses the right to believe and entertain the religious beliefs of one’s choice, the right to declare one’s religious beliefs openly and the right to manifest religious belief.”)

<sup>40</sup> *Elk Valley SCC* at para. 101.

to protect against “indirect discrimination” — i.e. neutral rules with adverse consequences for certain groups — intent cannot be a requirement for *prima facie* discrimination.<sup>41</sup>

Gascon J. concluded that the Tribunal constructed “a false dichotomy”, i.e. Stewart must have been “terminated because of either his addiction or the Policy”. This, despite the fact that all of the evidence supported the conclusion that Stewart’s termination was related to both the Policy *and* his addiction.<sup>42</sup> While the Tribunal repeated that Stewart’s addiction was “not a factor” in his termination, its reasoning could only support the more narrow conclusion that his addiction was not a factor *in his employer’s intention* to dismiss him.<sup>43</sup> The proper question to ask, however, was whether the addiction was a factor in the termination of employment broadly understood.

Citing the Court’s definitive judgments on the subject, Gascon J. noted that *Meiorin* (1999), *Moore* (2012) and *Bombardier* (2015) all support the basic assertion that intent is irrelevant to the question of whether discriminatory considerations were likely a factor at play in the termination of employment.<sup>44</sup> For Gascon J., the Tribunal’s interpretation of what constitutes a “factor” was flawed because it failed to look at adverse effects.<sup>45</sup> The Tribunal made several key findings to support a claim of adverse effects discrimination: Stewart was dependent on cocaine; he was unaware of his dependence; and addiction necessarily means impaired control over drug use.

Thus, while the Policy may have applied to all workers equally, Stewart clearly had an impaired ability to comply with its zero tolerance of illegal drugs due to his cocaine dependence. Furthermore, Gascon J. noted the employer was not unaware or unconscious of Stewart’s addiction, and therefore could not claim to have given no consideration whatsoever to Stewart’s disability in the course of dismissing him. On the

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<sup>41</sup> *Ibid.* at para. 80.

<sup>42</sup> *Ibid.* at para. 111.

<sup>43</sup> *Ibid.* at paras. 71, 112.

<sup>44</sup> *Ibid.* at paras. 82-84.

<sup>45</sup> *Ibid.* at para. 118.

contrary, in the termination letter itself, the employer stated, “we are hopeful you will find the personal resolve that is necessary to overcome an addiction”. With this back-hand slap, the employer at once terminated a vulnerable, loyal employee, while at the same time insulting him for being disabled. It is bewildering that eight justices of the Supreme Court were content to uphold a decision as reasonable that was so clearly laced with prejudice and contempt for the afflicted worker. It is worth recalling that Stewart had not done anything wrong except for taking drugs in contravention of the Policy. There was no independent culpable action.

Gascon J. examined the evidentiary record relied upon by the Tribunal and focused on the post-incident interview transcript between the employer and Stewart. This is the record of the interview completed as part of the employer’s investigation into the workplace accident. It showed that the employer was clearly interested in Stewart’s drug use/dependence. Numerous questions focused on his patterns of use, his subjective perception of whether he is an addict, and what his intentions are with respect to treatment.<sup>46</sup> Gascon J. found that it was unreasonable, on this evidence, to conclude that the employer was not “at least interested in whether Mr. Stewart was drug-dependent, if not primarily motivated by that concern. This was not a mere fact in the background.”<sup>47</sup> The only reasonable conclusion on the evidence was that Stewart had an impaired ability to comply with the terms of the workplace Policy because he was an addict.<sup>48</sup> Everybody, including the employer, were aware that there was a connection between Stewart’s drug dependence and his likelihood and ability to comply with the Policy. Merely establishing this connection should have been sufficient to satisfy the *prima facie* case. Since the Tribunal wrongly applied legal principles and legal tests, and the record established that Stewart’s addiction was a factor in his termination, Gascon J. found the Tribunal’s decision to be unreasonable.

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<sup>46</sup> Ibid. at para. 121

<sup>47</sup> Ibid. at para. 122.

<sup>48</sup> Ibid. at paras. 117-118.

### ***Duty to Accommodate – When and How (Much)?***

The majority judgment, finding no *prima facie* discrimination, sidestepped the issue of accommodation.<sup>49</sup> The duty to accommodate is not a freestanding, positive right. Rather, it is triggered as a function of the right to be free from discrimination. Only when a claimant can establish a *prima facie* infringement of the freedom to be free from discrimination does the question of accommodation arise. Cases mostly concern neutral workplace rules that have a disparate impact on members of certain groups protected by anti-discrimination law; or, in some cases, directly discriminatory rules that expressly include or exclude members of protected groups. When triggered, accommodation is a mandatory reconciliation exercise designed to test the possibility for compromise, failing which, to establish reasonable justification for permitting discrimination.

For the two minority justices, it was not difficult to see that discrimination occurred, but that nothing more could be done to protect Stewart from the consequences of his disability. They agreed that the employer could not have accommodated Stewart in any better or different fashion without encountering undue hardship. The basis for this conclusion was, first, safety, which is a relevant consideration when assessing undue hardship in the context of safety-sensitive workplaces. Moldaver and Wagner JJ. gave considerable weight to the fact that mining operations are notoriously dangerous.<sup>50</sup> While disciplinary measures short of termination were available to the employer, in these conditions, the minority were not convinced that anything short of immediate termination would not “undermine the Policy’s deterrent effect” and therefore constitute undue hardship.<sup>51</sup>

Invoking an old rule taken completely out of context, the minority pointed out that an “employee is not entitled to perfect accommodation, but rather to accommodation that

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<sup>49</sup> Ibid. at para. 47.

<sup>50</sup> Ibid. at para 55 [relying on *Central Alberta Dairy Pool v Alberta (HRC)*]

<sup>51</sup> Ibid. at para. 55.



is *reasonable* in the circumstances”.<sup>52</sup> They pointed to the employer’s offer for Stewart to reapply for employment after six months provided he enter rehabilitation, and the employer’s commitment to reimburse him 50% of the cost of rehabilitation (under some conditions) should he be re-hired.<sup>53</sup> Given these measures, Moldaver and Wagner JJ. were persuaded that immediate termination was not an unduly harsh way to treat a disabled employee and was therefore reasonable in circumstances.

In dissent, Gascon J. applied a different analysis and reached a different conclusion on the question of accommodation. Applying the three-part justificatory test from *Meiorin*, he agreed that the only part of the test that was in dispute was the third part – what constitutes “undue hardship”? Disagreeing with the minority, however, Gascon J. stated that the only way to “reasonably accommodate” an employee is to examine that person as an individual, citing both *Meiorin* and *Martin* (SCC 2003) in support of this doctrine.<sup>54</sup> By not undertaking an individualized assessment, the employer “made no effort to specifically accommodate Mr. Stewart as an individual, contrary to the guidance of this Court”, according to Gascon J.<sup>55</sup> He found the alternative conclusion reached by the Tribunal—that because Stewart did not fulfil his own duty to request accommodation, his employer did not have any duty to accommodate him—to be unreasonable and “indefensible” in light of the fact that the Tribunal acknowledged Stewart was unaware of his addiction prior to the incident.

Gascon J. points out that his colleagues have found the employer did enough to accommodate Stewart when, in fact, the evidence showed the employer did absolutely nothing to accommodate Stewart. The only “accommodation” the employer could be said to have offered is the permission to employees to disclose their addictions without penalty as long as it is prior to any incident. This “pre-incident accommodation” was not available to Stewart given his inability to come to terms with his own disability according to the employer’s schedule. Because denial is itself a symptom of the disability

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<sup>52</sup> See *Central Okanagan School District No. 23 v. Renaud*

<sup>53</sup> *Ibid.* at para. 56.

<sup>54</sup> *Ibid.* at paras. 126, 129.

<sup>55</sup> *Ibid.* at para. 130.

of substance dependency, the rigid schedule imposed by the Policy required flexibility in order to include accommodation options for Stewart. The employer's approach to accommodation meant that Stewart was completely excluded from its reach. On the issue of deterrence, Gascon J. was not convinced by the minority's acceptance that termination of employment is the only result that can achieve the deterrent goal. He opined that deterrence could still be accomplished through suspension-without-pay.<sup>56</sup> Gascon thus found the Tribunal decision on these points to be unreasonable.

## Conclusion

It is difficult to square the majority judgment in *Elk Valley* with the Court's long standing disability equality and workplace anti-discrimination jurisprudence. While couched in the deferential language of reasonableness administrative review, the majority were content to endorse what is at its core a formal equality frame and an underlying decision that in many ways mischaracterizes addictions disability. One must consider the inescapable fact that addictions remain a highly stigmatized behaviour and this may account for jurisprudential distortions and inconsistencies. Addicts receive little of the sympathy and compassion society reserves for other socially vulnerable groups who are systemically excluded from opportunities. Consider a similar case decided nearly two decades earlier dealing with the status of women in the workplace. In *Meiorin*,<sup>57</sup> McLachlin J. (as she then was) wrote for a unanimous Court holding that even if a workplace policy is neutral in language, if it disproportionately affects members of one protected group over others, it is producing an indirect form of discrimination which must be addressed by human rights laws.<sup>58</sup>

In *Elk Valley*, McLachlin CJ made passing reference to *Meiorin* but failed to adequately respond to the inescapable vulnerability in the majority judgment: How does the Policy's ban on drug use and requirement of prior disclosure of an addiction not

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<sup>56</sup> *Ibid.* at para. 144.

<sup>57</sup> *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 ("*Meiorin*")

<sup>58</sup> Stewart, SCC at paras. 104-105.

constitute an unequal burden on individuals who are drug dependent? Just as strenuous physical testing did not directly target female firefighters, a strict drug policy need not directly target drug addicts. It only needs to have an acute, indirect impact on members of the protected group to be considered discriminatory. Because women are less likely to meet the strenuous physical standard, the firefighting standard was *prima facie* discriminatory. It requires no logical leap to similarly consider that because a drug addict is less likely to meet the zero-tolerance drug policy, the policy is *prima facie* discriminatory. There appears no explanation for the Court's departure from the established equality framework except that the majority simply chose not to view addicts in the same light as other equality seekers.

Commentators have mostly noted the limited applicability of the *Elk Valley* judgment. The rules and reasoning are so unique to the safety-sensitive context, that it is unclear what guidance a wider spectrum of employers can take from the case. In the absence of mandatory drug testing, which most workplaces do not practice, it is difficult to see how an employee in Stewart's circumstances would otherwise come to the attention of employers. The question of whether employers can take from the judgment a general permission to require prior disclosure as a condition for disability accommodation in the case of drug (and other?) addicts is not clearly settled. The judgment best stands as a reaffirmation of foundational principles concerning the protection of addiction as a disability within the human rights framework and for the further clarification of the requirements of the *prima facie* test for discrimination. Given that only three justices addressed the question of undue hardship, it is not evident that the case offers as much as it might have by way of clarification of principles governing the undue hardship analysis. The only conclusion to draw is that undue hardship analysis involves difficult decision making and does not offer a predictable course to an acceptable result.

Regarding the limits on preventative workplace drug testing, it is important to note that the Ontario Court of Appeal decision in *Entrop*<sup>59</sup> has not been overruled by *Elk Valley*.<sup>60</sup>

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<sup>59</sup> *Entrop v Imperial Oil*, (2000) 50 OR (3d) 18 (CA).

In *Entrop*, the Court determined that it was reasonable and *bona fide* for an employer to practice randomized drug tests only on employees in safety-sensitive jobs, and that automatic dismissal for a breach was inconsistent with the employer's duty to accommodate. Sanctions had to be tailored to the employee's particular circumstances. Similarly, Entrop's policy mandating disclosure of current or past substance use problems, and automatic reassignment to a non-safety sensitive position, was found to discriminate against recovering addicts, who would be unfairly disadvantaged by "prevention" regardless of any actual risk. As for addicts still using substances, disclosure under the policy would lead to a mandatory two years of rehabilitation followed by a five-year waiting period before they would be considered for reinstatement to a safety-sensitive position. The Court found this to be discriminatory because such conditions were not reasonably necessary to ensure that employees in safety-sensitive positions were not impaired on the job.

Despite distinguishing facts and legal issues, it is nonetheless surprising that the Court in *Elk Valley* did not engage with any of the discrimination analysis in *Entrop*. It will remain to be seen how the growing body of binding and persuasive jurisprudence with respect to dealing with addictions disabilities in the workplace will shape future employment practices. No doubt, the landscape of this area is bound to continue to evolve as courts and tribunals grapple with rapidly changing social realities and emerging medical evidence.

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<sup>60</sup> It is rather surprising that the Court in *Elk Valley* did not mention *Entrop*.