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Accommodating Complex Disabilities: Chronic Pain Disorders in the Canadian Workplace

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Abstract

The duty of accommodation has enabled great progress in Canadian human rights law for persons with disabilities, particularly in the workplace. However, persons with chronic pain disorders have faced greater challenges in accessing the accommodation duty's promise of equality, which is demonstrated through caselaw analysis. To assess the efficacy of the accommodation of persons with chronic pain disorders, we must answer three questions: (1) what is the theoretical understanding of disability and chronic pain disorders; (2) how are chronic pain disorders accommodated practically (using the workplace as our social illustration); and, (3) what happens after accommodation fails. A hierarchy of disabilities in terms of legitimacy and access to rights has developed, in which chronic pain disorders fall lower than "mainstream" disabilities, primarily due to a lack of medical legitimacy. Thus, persons with chronic pain disorders are subject to differential treatment on the basis of their disability, which is potentially discriminatory.

Keywords

Disability, Labour, Employment, Accommodation, Undue Hardship, Equality, Human Rights, Chronic pain disorders, Fibromyalgia, Chronic Fatigue Syndrome, Multiple Chemical Sensitivity

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Table of Contents

List of Tables

Chapter 1

1 Introduction

Accommodation has become one of the primary legal and social policy tools to achieve equality and freedom from discrimination for persons with disabilities in the workplace. Given the wide range of needs and wants of persons with disabilities on account of their individual impairments, it is likely that accommodation is not equally effective for all disabilities. Consider this case. After 17 years of employment, a legal secretary sought medical attention for an asthma-like condition. Her doctor suspected that she had a condition called multiple chemical sensitivity (MCS), which is a chronic pain disorder. It has an unknown etiology and manifests as a response to exposure to a range of unrelated chemicals, commonly paints, personal fragrance, and/or cleaning supplies. As such, he recommended a variety of accommodations, including allowing her to work from home, providing respiratory protective equipment, and controlling chemical exposure with a glass barrier around her. The employer implemented some of these accommodations to set up a fragrance-free policy, provide access to a private washroom, and place air cleaners and charcoal masks around her. However, these accommodations were, for the most part, limited in scope to individual changes, rather than the more systematic approach that the doctor had recommended. The accommodations were individualized because there were no policy changes or widespread environmental changes, with the exception of the fragrance-free policy. Even accommodations that are typically systemic, such as allowing employees to work from home, were only available in a limited capacity to this employee.

After a series of renovations, she was relocated to a different floor but the chemicals and products left behind by the renovation caused an MCS reaction and she left work on a short-term disability leave. While she was off, the employer advised that her work assignment would be changed to include reduced contact with others. Determining her accommodation needs was not a collaborative effort between the employer and the employee, but rather a unilateral decision by the employer. She did not return to work but instead applied for long-term disability benefits, which was denied, and then she was terminated from her position. She complained to the human rights commission against her

termination on the grounds that it was discriminatory with respect to her disability. The investigator for the commission found that the employee had frustrated the employer's attempts at accommodating up to the point of undue hardship by refusing to cooperate with the new work assignment and not providing access to her doctors. As such, the Chief Commissioner upheld the dismissal as well as finding that she did not even have a physical disability because the MCS had not been firmly diagnosed and surveillance evidence conducted by the insurer showed some daily activity that belied her claims of incapacitation.

The employee appealed this decision. The trial judge overturned this decision and found that the Chief Commissioner had given inappropriate emphasis to the lack of a firm diagnosis because the impairment had been confirmed by the doctor: the fact that MCS is not fully understood by medicine does not bar its status as a disability. Furthermore, the trial judge found that the lack of cooperation cited as frustrating the employer's duty to accommodate was not actually a lack of cooperation. Rather, she was refusing unreasonable requests to participate in a new position with no examination of how it actually accommodated her symptoms and to allow the investigator communication with her doctors *without* her being present. As such, the trial judge found that the employer did not reasonably accommodate her.

The employer appealed this decision. The Court of Appeal reversed the trial decision and reinstated the Commissioner's finding that the duty of accommodation had been discharged. The Court of Appeal determined that the accommodations provided had been sufficient, even if the employer believed that she was not disabled. Instead, the Court of Appeal deferred to the reasoning of the Commissioner by applying the standard of reasonableness in judicial review. In doing so, the court avoided engaging with the issue of whether the employer had satisfied the duty of accommodation and instead allowed the broad discretion of the Commissioner.

This is *Brewer v Fraser Milner Casgrain LLP* [*Brewer*].[1] This case demonstrates some of the common problems in dealing with chronic pain disorders in the workplace for employees, employers, and courts. Employers are sceptical and overly-scrutinize the employee to the point of discrimination. Employees are frustrated and sometimes uncooperative because the requests for information and confirmation of disability are so frequent. Chronic pain disorders are misunderstood and invisible, lack medical legitimacy, and have an unclear etiology. As such, courts, tribunals, and some arbitrators do not know how to deal with them. Instead, the mess of *Brewer* occurs where some decision-makers recognize the limitations of medical evidence whereas others find that the individual is uncooperative. This inconsistent and unpredictable approach characterizes the majority of the caselaw dealing with chronic pain disorders.

1.1 Centrality of accommodation

Accommodation is one of the principal tools used to enable equality and freedom from discrimination but with varying degrees of success. For complex disabilities that are chronic, invisible, and misunderstood, with an unclear etiology and lack of objective evidence, accommodation may not be as successful compared to "mainstream" disabilities. Chronic pain disorders and mental illnesses clearly fall into this group of complex disabilities. Mental illnesses, while contentious and subject to high amounts of stigma, have carved out a place in accommodation and human rights assessments, generally. As a result, disabilities fall under either a physical or psychological heading. Chronic pain disorders are not as well-established and as yet medical science has not determined whether it is of psychological or physical etiology. Additionally, there is very limited legal research examining how the law handles chronic pain disorders.

Human rights law has rapidly progressed over the past 20 years. Accommodation is a key part of this progression. Chronic pain disorders represent an area of the law that is still lacking: accommodation of complex disabilities. Although chronic pain disorders seem to affect a small portion of the population, recognition of these disorders both in medicine

[1] 2008 ABCA 435, reversing 2006 ABQB 258.

and law is growing. Unfortunately, as demonstrated in *Brewer*, it is apparent that both medicine and law are failing persons with chronic pain disorders. Medical professionals struggle with the diagnosis and clearly communicating the limitations of chronic pain disorders. The law depends on medicine as proof, even where it is not necessary, regardless of whether medicine can actually answer the legal questions. At some point, medical research may be able to answer questions of etiology, diagnosis, and prognosis, but not yet. As such, the law needs to apply human rights principles to be flexible and adaptable and recognize the limitations of medicine for chronic pain disorders and other disabilities that struggle with medical legitimacy. A flexible and adaptable approach is, in fact, the only way for the law to achieve equality and freedom from discrimination, using accommodation as its main mechanism. However, it is not clear what the approach is for chronic pain disorders because there is virtually no legal research, despite the recurring problems in the caselaw with medical evidence, absenteeism, and scrutiny.

Chronic pain disorders present unique obstacles as complex disabilities that lack definitive medical support and do not easily fit into the conventional process for accommodation. Thus, this research seeks to assess the efficacy of the accommodation of persons with chronic pain disorders in Canada. In order to do this, three questions must be answered: (1) what is the theoretical understanding of disability and chronic pain disorders; (2) how are chronic pain disorders accommodated practically (using the workplace as our social illustration); and (3) what are the legal options available after accommodation fails. The first question is addressed in Chapter 2. Chapters 3 and 4 deal with the second question. The third question is explored in Chapter 5. It is expected that persons with chronic pain disorders experience less access to their human rights, in particular the benefits of accommodation, due to the unique barriers presented by these disabilities, which are discussed throughout. These questions are answered through a combination of caselaw analysis and consideration of academic sources that examine disability more generally. Although there is very limited research on chronic pain disorders in the workplace, there is a growing amount of caselaw. The chronic pain disorders of interest are chronic fatigue syndrome (CFS), fibromyalgia (FM), and MCS.

1.2 Chapter overview

Chapter 2 sets out the theoretical foundation of this research by asking how to define disability. Given that this is a theoretical question, it is mostly answered using the wealth of disability literature available. Critical Disability Theory (CDT) is the modern and primary approach used to understand disability. The main mechanism of CDT is the social model which understands disability to be a social construct that is separate from impairment and exists outside of the individual. For example, the impairment of a person in a wheelchair is the inability to walk, whereas the disability is the lack of ramps into the workplace. CDT and the social model are the theoretical bases to which this research ascribes. CDT seeks to attain the goal of substantive equality, wherein every individual has what he or she needs to perform equally to every other individual, compared to formal equality, which only requires that each individual is given the same aid regardless of need. When substantive equality is achieved, it is possible to attain citizenship—full participation in society. In order to define disability, the models of disability, equality, and citizenship must be examined.

Not only is disability a complex concept, but it is also something that nearly every person will experience in some way throughout his or her lifetime, which is demonstrated through a brief statistical portrait of disability in Canada. With this understanding of disability generally, it becomes evident why chronic pain disorders require a separate consideration. There is such a range of needs and wants for different kinds of disabilities. This range means that the disability rights movement is not unified. Chronic pain disorders stand out even further than this range for several reasons. First, it is relatively unestablished compared to other much more understood disabilities. Second, there is a lack of medical consensus regarding the existence, diagnosis, etiology, and prognosis, as well as a lack of objective medical evidence. Third, chronic pain disorders are difficult to deal with because symptoms are fluctuating, chronic, and unpredictable. Fourth, as a result of the above reasons and the invisibility of the symptoms, these disabilities are subject to a relatively high amount of scrutiny and disbelief, and, ultimately, stigma. A theoretical understanding of disability helps to illuminate the separate standing of chronic pain disorders, but a

practical examination is also warranted. However, there are several steps involved in a practical examination and these are found in Chapters 3, 4, and 5.

In order to assess how chronic pain disorders are accommodated, the general approach to accommodation must be understood. Chapter 3 is a foundational chapter that attempts to answer what is accommodation. First, the purpose and intention of accommodation must be assessed—this requires an examination of the human rights legislation, including the Ontario *Human Rights Code*[2] and the *Canadian Human Rights Act*,[3] and the *Canadian Charter of Rights and Freedoms*.[4] Second, key caselaw must also be considered, particularly the Supreme Court of Canada (SCC) 1999 decisions *British Columbia (Public Service Employee Relations Commission) v BCGSEU (Meiorin Grievance*) (*Meiorin*) and *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)* (*Grismer*).[5] The inclusive vision set out in *Meiorin* complements the United Nations' *Convention on the Rights of Persons with Disabilities*, which Canada ratified in 2010,[6] by endorsing institutional accommodation, wherein the workplace and society are changed to eliminate the systemic problem and establish a more inclusive standard. This is in comparison to individual accommodation, which only deals with the individual problem without addressing the systemic issues.[7]

However, it appears that recent caselaw has narrowed the accommodation duty in Canada. Since *Meiorin* and *Grismer*, the SCC has released a trilogy of cases dealing with disability and the duty of accommodation: *McGill University Health Centre (Montréal General Hospital) v Syndicat des employés de l'Hôpital general de Montréal* (*McGill University*),[8] *Honda Canada Inc v Keays* (*Honda Canada*),[9] and *Hydro-Québec v Syndicat des*

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[2] RSO 1985, c H-19.
[3] RSC 1985, c H-6.
[4] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982.
[5] [1999] 3 SCR 3; [1999] 3 SCR 868.
[6] 30 March 2007, GA Res 61/106; Library of Parliament, News Release, *Canada and the Convention on the Rights of Persons with Disabilities* (5 December 2012) Parliament of Canada online: <http://www.parl.gc.ca/Content/LOP/ResearchPublications/2012-89-e.htm>.
[7] Dianne Pothier, "How Did We Get Here? Setting the Standard for the Duty to Accommodate" (2009) 59 UNB LJ 95 at 105.
[8] 2007 SCC 4.
[9] 2008 SCC 39 [*Honda Canada*].

employés-e-s de techniques professionnelles et de bureau d'Hydro Québec, section local 2000 (SCFP-FTQ) (*Hydro-Québec*).[10] The *McGill University* decision considered non-culpable absenteeism and automatic termination clauses to uphold termination of an employee with a chronic illness. In *Honda Canada*, a wrongful dismissal case of an employee with CFS, the SCC did not significantly consider human rights principles in the analysis. Although this is a common failing in wrongful dismissal cases, it is still a disappointing result. In *Hydro-Québec*, the SCC restated the undue hardship test, which sets a limit to accommodation, but did so with weak reasoning and perhaps narrowing of the accommodation duty. This trilogy of cases provided thin reasoning on disability meaning that the courts failed to engage with human rights principles by only providing a cursory application of the accommodation analysis, where it was appropriate. As such, these cases have not been particularly influential and many arbitrators and tribunals have largely ignored them. However, these cases are evidence of the struggle by the SCC with the high standard set for disability in *Grismer*, *Meiorin*, and *Eldridge v British Columbia (Attorney General)*.[11] It is likely that tribunals and arbitrators ignore some of these troubling higher court decisions to apply their expertise for a broader and more nuanced approach. Having said that, Canada may have a broader approach to accommodation than that of the US and the EU. The EU's approach draws from the US but is relatively undeveloped still. The US initially influenced the Canadian approach to disability, but now appears to have a narrower approach because of the higher threshold required to qualify as disabled under the *Americans with Disabilities Act*.[12] With the organizational principles of the accommodation duty set out, the practical ramifications for accommodation of chronic pain disorders can be examined.

Chapter 4 examines how chronic pain disorders are accommodated. First, the scene must be set. Medical literature for CFS, FM, and MCS is examined as well as how these disabilities are commonly accommodated to understand why these syndromes are different from other disabilities. A combination of caselaw, particularly from tribunals and

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[10] 2008 SCC 43.
[11] [1997] 3 SCR 624.
[12] 42 U.S.C. §12101 et seq (2011). See also *ADA Amendments Act*, 42 U.S.C.A. §12101 (2011).

arbitrations, and social science literature illustrates the practicalities of accommodation of chronic pain disorders. Second, a variety of factors that influence accommodation must be discussed. This includes the human aspect of the process—supportive supervisors and cooperative employees—which influences the success of the return to work process. It is likely that the most significant factor for chronic pain disorders is the medical evidence or rather the lack of objective medical evidence and of medical consensus regarding existence, diagnosis, etiology, and prognosis. It is expected that medical evidence is one of the most significant barriers to the accommodation of chronic pain disorders and perhaps other legal avenues. Without definitive medical evidence, how can employers and courts accept that the disability has been proved? If disability is not proved, then there is no duty to accommodate nor can there be compensation for the disability.

Finally, undue hardship factors for the accommodation of chronic pain disorders must be examined. This includes safety, interference with the collective agreement, financial cost, and legitimate operational requirements—by far the most significant because of the extremely common problem of innocent absenteeism for persons with chronic pain disorders. Additionally, categorizing absenteeism requires more consideration than it seems. Absenteeism could serve to frustrate the employment contract because attendance at work is an essential term or it could be a *bona fide occupational requirement* as it is reasonably necessary that employees attend work. However, in both cases, human rights principles should apply so that employers are required to accommodate and tolerate absenteeism up to the point of undue hardship. Although it is less than perfect, the approach in Canada is expected to provide better access to rights than that of the US and the EU because of the more stringent gatekeeper aspects in the latter's approach wherein the medical evidentiary problems are not just an obstacle but a barrier.

With these issues, it is likely that persons with chronic pain disorders will need to consider other options outside of accommodation. However, accommodation is the only option that enables them to continue to work. Chapter 5 provides an overview of other legal options after accommodation fails. It is expected that these other options will be plagued with some of the same issues, particularly the lack of objective medical evidence. This chapter relies on caselaw and statute. There are two options before dismissal that the person with a

chronic pain disorder can pursue: long-term disability benefits and workers' compensation. Because workers' compensation can be a strict scheme, it is expected that there will not be a lot of understanding and benefits for persons with chronic pain disorders. Long-term disability benefits are essential for persons with chronic pain disorders because of the frequency with which it is claimed, due to the high level of absenteeism. It is expected that entitlement to the benefits is difficult to prove because of the medical evidentiary problems. The process to obtain benefits both at the first request and after denial by the insurer must be considered. There are also options available after dismissal including complaints to human rights commissions and common law litigation, namely wrongful dismissal by the employer. It seems likely that persons with chronic pain disorders will complain of discrimination and harassment for their disability at human rights commissions. Again, they may encounter problems proving discrimination because it requires proof of disability. Persons with chronic pain disorders can also pursue an action against the employer for wrongful dismissal in common law courts, but it seems likely from *Honda Canada Inc v Keays* that human rights principles will not receive much consideration from courts. Thus, it is expected that accommodation provides the most benefits for persons with chronic pain disorders because it enables them to continue working.

Finally, the range of caselaw considered above must be analyzed as a whole to ascertain how the law deals with chronic pain disorders. A more traditional approach fails to recognize chronic pain disorders as disabilities because of the lack of medical support, both in terms of evidence and agreement from the medical community. This traditional approach applies an outdated and narrow understanding of disability that continues to be applied by some courts, despite expansive human rights principles. On the other hand, a human rights approach applies these principles as set out by law, calling for an inclusive and adaptive approach to accommodation and human rights, but it is likely that this is rarely achieved, perhaps for disabilities generally and especially for chronic pain disorders. The majority of caselaw is expected to fall into a middle ground or hybrid approach wherein courts and tribunals recognize some of the issues but do not fully engage with them, instead inconsistently and inadequately applying human rights principles. Progress has undoubtedly been made since the advent of the accommodation duty in Canada, but there is still room to improve. Chronic pain disorders, as a complex disability with unique

barriers, are one of these areas ripe for improvement. First, however, the unique barriers and particular challenges must not only be recognized but also understood.

1.3 Goals of this research

This research intends to provide a comprehensive account of how persons with chronic pain disorders are accommodated in the workplace. It seems that chronic pain disorders fall lower on a hierarchy of disabilities in terms of legitimacy.[13] This is largely due to the problems of medical evidence but is also related to the fluctuating and invisible symptoms and high level of scrutiny. This lack of legitimacy hinders access to the benefits of accommodation and human rights generally. Thus, chronic pain disorders also fall lower on a hierarchy of disabilities with regards to access to rights. However, the law must pay attention to, but not ultimately be ruled by medical legitimacy. The duty of accommodation only requires proof of impairment, not disability, in order to be activated. Proof of impairment for chronic pain disorders still depends on subjective medical evidence but should not bar access to rights. Requiring objective evidence of disability is a standard that adversely affects persons with chronic pain disorders and, as such, is discriminatory.

[13] Judith Mosoff, "Lost in Translation? The Disability Perspective in *Honda v Keays* and *Hydro-Québec v Syndicat*" (2009) 3 McGill JL & Health 137 at 141.

Chapter 2

2 The Disability Landscape

What is disability? It is a concept that has been subject to many different perspectives and understandings. Disability should be considered in a range of contexts, including, but not limited to, health care, transportation, social programs, education, and work. Critical disability theory (CDT) is the foremost approach to understanding disability, but it is in no way a unified school of thought. Instead, CDT seems to be a reaction to its forerunner, which is usually referred to as the biomedical model.[1] This model demonstrates a positivistic understanding of disability that sees disability as an anomaly that needs to be cured or eliminated, an approach that still exists and can be found in legislation and case law.[2]

The main mechanism of CDT is the social model,[3] which differentiates between impairment, or the functional limitation, and disability. The social model understands disability as existing outside of the individual as a consequence of the interaction of the individual with the social environment.[4] Disability is a social construct separate from the impairment. This differentiation arises from the World Health Organization's 1980 definition of disability as "any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being."[5] CDT seeks not merely formal equality, where every individual is given the same aid, but rather substantive equality, where every individual has what he or she needs to perform equally to every other individual. Substantive equality is necessary to attain

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[1] Marcia H Rioux & Fraser Valentine, "Does Theory Matter? Exploring the Nexus between Disability, Human Rights, and Public Policy" in Dianne Pothier & Richard Devlin, eds, *Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law* (Vancouver: UBC Press, 2006) 47 at 50-51 [Rioux & Valentine].

[2] See e.g. the *Workplace Safety and Insurance Act, 1997*, SO 1997, c 16, Schedule A s 2 [WSIA].

[3] The social model has many variations and is known by several different names including the socio-political model and the social-political model. It will be referred to as the social model here.

[4] Rioux & Valentine, *supra* note 1.

[5] World Health Organization, *International Classification of Impairments, Disabilities and Handicaps* (Geneva: WHO, 1980) at 27-29. See the new definition in World Health Organization, *International classification of functioning, disability and health* (Geneva: WHO, 2001) at 3 where disability is "an umbrella term for impairments, activity limitations or participation restrictions" [ICF].

citizenship—the ultimate goal of CDT. Citizenship is about "the capacity to participate fully in all the institutions of society—not just those that fit the conventional definitions of the political, but also the social and cultural."[6] It is unclear whether the social model can attain substantive equality and citizenship, particularly for disabilities that are subject to a lack of understanding and stigma, like chronic pain disorders. Indeed, the lesser access to rights experienced by persons with chronic pain disorders suggests that the social model cannot.

In order to ask and answer any questions about disability, the concept must be defined, but it cannot be defined in one sentence. Thus, several aspects must be examined, including statistics, theoretical underpinnings, and the models of disability. In Part I of this chapter, a statistical portrait of disability is provided in order to understand the significance of disability in our society. Part II examines the many models of disability to evaluate CDT's progress and future. The social model appears to have exhausted itself so there is a call for either a new model or an integration of old models to provide a more complete and nuanced understanding of disability; regardless, progress is needed. In Part III, the theoretical underpinnings of disability are analyzed including the frames through which disability is understood, models of equality, and citizenship. This theoretical foundation is essential to understanding and evaluating CDT and the disability movement. Conclusions will be drawn in Part IV regarding the future of disability, particularly in the case of "non-mainstream" disabilities like chronic pain disorders, which struggle with legitimacy and discrimination due to the lack of objective medical evidence, invisibility of symptoms, and fluctuation of symptoms.

2.1 A statistical portrait of disability

Persons with disabilities require consideration in education and training, healthcare and social assistance, accessibility of public services, and the workplace. Persons with disabilities form a significant portion of the population. According to the World Health

[6] Richard Devlin & Dianne Pothier, "Introduction" in Pothier & Devlin, *supra* note 1, 1 at 1 [Devlin & Pothier].

Organization, over a billion people, which amounts to about 15% of the world's population, has some form of disability.[7] Among these people, between 110 million and 190 million adults have significant difficulties in functioning.[8] Furthermore, as the population ages, the rates of disability are increasing with more chronic health conditions in particular.[9] In order to understand the scope of disability in Canada, statistics regarding employment, participation, disability, barriers, accommodations, and training will be provided as well as some discussion as to the more problematic disabilities—chronic pain disorders and mental illnesses. It must be noted that although the sources are reputable and reliable, they often rely on self-reporting; in the area of disability, it seems likely that some people will not report either due to lack of knowledge or fear of stigma.

In Canada, 14 per cent, or an estimated 3.8 million people, reported having a disability that limited some functioning.[10] The prevalence of disability rises with age with women reporting higher rates.[11] The Canadian Survey on Disability, conducted in 2012, determined that the total labour force amounted to 23,187,350 people, of which 2,338,240 were disabled.[12] Within this labour force, the overall participation rate was 76.9 per cent compared to a significantly lower 53.6 per cent participation rate for persons with disabilities.[13] The participation rate reflects the amount of people who were in the labour force. The per cent that are not participating are not in the labour force—they were not employed or unemployed, instead they were unwilling or unable to work. In other words, "444,000 people aged 15 to 64 with disabilities were unemployed or not in the labour force, and were not permanently retired or completely prevented from working."[14] However, the

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[7] World Health Organization, Media Release, "Disability and health, Fact sheet N°352" (December 2015), online: WHO <http://www.who.int/mediacentre/factsheets/fs352/en/>.
[8] *Ibid*.
[9] Rubab Arim, *Canadian Survey on Disability, 2012: A profile of persons with disabilities among Canadians aged 15 years or older, 2012* (Ottawa: StatCan, 13 March 2015) at 3 [Arim].
[10] *Ibid*.
[11] *Ibid* at 8.
[12] Statistics Canada, *Table 115-0005 – Labour force status for adults with and without disabilities, by sex and age group, Canada, province and territories, occasional (number unless otherwise noted)*, (Ottawa: StatCan, 3 December 2014) (CANSIM) [*Table 115-0005*].
[13] *Ibid*.
[14] Matthew Till, Tim Leonard, Sebastian Yeung, & Gradon Nicholls, *Canadian Survey on Disability: A Profile of the Labour Market Experiences of Adults with Disabilities among Canadians aged 15 years and older, 2012* (Ottawa: StatCan, 3 December 2015) at 8 [Till].

difference between persons without disabilities compared to persons with disabilities persists in the employment rate and the unemployment rate. Persons without disabilities had an employment rate of 73.6 per cent, persons with disabilities reported a 47.3 per cent employment rate.[15] In terms of unemployment, a greater proportion of persons with disabilities were unemployed at 11.8 per cent unemployed, while only 7.1 per cent of persons without disabilities were unemployed.[16] Furthermore, nearly a quarter of employed persons with disabilities worked in more precarious part-time positions because of their disability and inability to find a full-time position.[17] Barriers to employment for persons with disabilities are well-documented and so lower employment and participation rates of persons with disabilities are not surprising but still disappointing.

Statistics Canada also looked at the employment rates for different disability groups marked as mild, moderate, severe, and very severe. However, more than three-quarters of persons with disabilities had more than one disability.[18] Furthermore, persons with "developmental, cognitive, and mental health-related disabilities face greater employment challenges than people with sensory or physical disabilities."[19] As the severity of the disability increases, the participation and employment rates decreases.[20] More severe disabilities would presumably result in more severe impairments and functional limitations. Under the category "pain," which likely includes chronic fatigue syndrome and fibromyalgia among others, the average participation rate was a mere 52.7 per cent, almost 30 per cent lower than that of persons without disabilities.[21] For persons with mild pain disabilities, the participation rate was 71.5 per cent, but this dropped to 32.3 per cent for persons with very severe pain disabilities.[22] The employment rate for persons with pain disabilities showed a similar trend as it was 47.3 per cent for all, 65 per cent for those with

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[15] *Table 115-0005, supra* note 12.
[16] *Ibid.*
[17] Till, *supra* note 14 at 11.
[18] Arim, *supra* note 9 at 3.
[19] Till, *supra* note 14 at 5.
[20] Statistics Canada, *Table 115-0006 – Labour force status for adults with disabilities by disability type and global severity, sex and age group, Canada, provinces and territories, occasional (number unless otherwise noted)*, (Ottawa: StatCan, 18 December 2014) (CANSIM) [*Table 115-0006*].
[21] *Ibid*; *Table 115-0005*, *supra* note 12.
[22] *Table 115-0006, supra* note 20.

mild pain disabilities, and 25.9 per cent for persons with very severe pain disabilities. These lower rates of employment and participation are significant considering "about 1.3 per cent of the adult Canadian population reported having chronic fatigue syndrome…and 1.5 per cent reported having fibromyalgia;" however, an additional consideration is the high co-occurrence of mental illness with chronic pain disorders.[23]

Statistics Canada also looked at mental illnesses. The World Health Organization estimated that 350 million people worldwide are affected by depression.[24] The Mental Health Commission of Canada reported that in any given year, "one in five people in Canada experiences a mental health problem or illness, with a cost to the economy of well in excess of $50 billion."[25] Furthermore, only one in three report that they have sought and received services and treatment for a mental health problem.[26] The Centre for Addiction and Mental Health reported unemployment rates as high as 70-90 per cent for persons with severe mental illnesses.[27] Statistics Canada supported these findings with a 25.7 per cent employment rate for persons with very severe mental or psychological disabilities compared to 60.2 per cent for persons with mild mental disabilities.[28] The participation rate was on average 44.7 per cent, but with a significant difference between mild and severe mental disabilities.[29] Persons with mental illness seem to have lower participation and employment rates than persons with pain disabilities, but this measurement does not take into account the co-occurrence of the two disabilities.

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[23] C Rusu, M E Gee, C Lagacé, & M Parlor, "Chronic fatigue syndrome and fibromyalgia in Canada: prevalence and associations with six health status indicators" (2015) 35:1 Health Promotion & Chronic Disease Prevention in Can 3 at 3; Niloofar Afari & Dedra Buchwald, "Chronic Fatigue Syndrome: A Review" (2003) 160:2 American J Psychiatry 221 at 222 [Afari].
[24] World Health Organization, Media Release, "Mental Disorders, Fact sheet N°396" (April 2015), online: WHO <http://www.who.int/mediacentre/factsheets/fs396/en/>.
[25] Mental Health Commission of Canada, News Release, "The Facts – Mental Health Strategy" (2012) online: <http://strategy.mentalhealthcommission.ca/the-facts/>.
[26] *Ibid*.
[27] Centre for Addiction and Mental Health, News Release, "Mental Illness and Addictions: Facts and Statistics" (2012) online: CAMH <http://www.camh.ca/en/hospital/about_camh/newsroom/for_reporters/Pages/addictionmentalhealthstatistics.aspx>.
[28] *Table 115-0006*, *supra* note 20.
[29] *Ibid*.

Persons with disabilities clearly make up a significant portion of the workforce. What kind of employment are persons with disabilities actually getting? They are getting lesser paying employment as the "median total income of persons with disabilities [was] $10,000 less than median for those without disabilities."[30] The two industries that employed the most persons with disabilities are retail and health care and social assistance, employing 26.6 per cent and 25 per cent, respectively.[31] Industries that require the most physical labour and training such as mining, utilities, and agriculture employed the lowest proportion of persons with disabilities.[32] This is unsurprising considering that the more common barriers in the workplace for adults with disabilities were identified as merely the condition of the person and prevention from taking work-related training courses.[33] Having said that, sometimes accommodations are available, even in more physically demanding roles. However, a noteworthy amount of modifications required to work were not made by employers. For example, 173,030 persons with disabilities required job redesign in order to participate in the labour force, but 43.4% of those persons did not receive a job redesign.[34] It must be noted, however, that job redesign can be quite onerous on the employer. For potentially less difficult modifications like reduced work hours and human support, 29 per cent and 55.3 per cent of the required modifications were not made.[35] Thus, the workplace is not always a hospitable place for some persons with disabilities but most employers are trying to meet their legal obligations to satisfy the duty to accommodate as indicated by some provision of the requested accommodations. Accommodation may be hindered because persons with disabilities do not request accommodations due to fear of discrimination. In fact, 11.5 per cent of persons with disabilities reported experiencing

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[30] Arim, *supra* note 9 at 20.
[31] Statistics Canada, *Table 115-0012 – Industry of employment for adults with disabilities by age, group and sex, Canada, occasional (number unless otherwise noted)* (Ottawa: StatCan, 3 December 2014) (CANSIM).
[32] *Ibid*, all three of these industries employed less than 4 per cent.
[33] Statistics Canada, *Table 115-0010 – Barriers in the workplace for adults with disabilities, by age group, Canada, provinces and territories, occasional (number unless otherwise noted)* (Ottawa: StatCan, 3 December 2014) (CANSIM).
[34] Statistics Canada, *Table 115-0008 – Modifications for labour force participation for adults with disabilities, Canada, occasional (number unless otherwise noted)*, (Ottawa: StatCan, 3 December 2014) (CANSIM).
[35] *Ibid*. Use caution regarding human support findings.

discrimination in the workplace.[36] This is on top of the 5.6 per cent who received discouragement from family and/or friends and the 19.5 per cent whose past attempts at employment were unsuccessful.[37]

The World Health Organization describes disability as "part of the human condition. Almost everyone will be temporarily or permanently impaired at some point in life, and those who survive to old age will experience increasing difficulties in functioning."[38] Persons with disabilities constitute a sizeable portion of our society but are disproportionately unemployed. This is likely due to barriers and limitations as a consequence of their own impairments, but also due to lack of social supports and discrimination, employer failure to provide the required modifications, and insufficient training, all of which also bar entrance to certain industries, thus limiting opportunities. With this practical understanding of the scope of disability in Canada and the limitations of persons with disabilities in the workforce, the theoretical definition of disability can now be examined.

2.2 Defining disability

Disability has been defined in a variety of ways. CDT defines it using models. A dichotomy between the two primary models—the biomedical model and the social model—has developed, but this does not provide a true picture of disability. The influence of both of these models can be seen in case law and legislation. A more accurate portrayal of disability requires a more nuanced understanding, one which integrates aspects of the biomedical and social models as well as others like the functional, economic, and biopsychosocial models. Having said that, there is such a range of models of disability that it can be overwhelming.[39]

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[36] Statistics Canada, *Table 115-0007 – Limitations and barriers to employment for adults with disabilities, by age group, Canada, provinces and territories, occasional (number unless otherwise noted)* (Ottawa: StatCan, 3 December 2014) (CANSIM).
[37] *Ibid*.
[38] World Health Organization, *World Report on Disability*, (Malta: WHO, 2011) [WHO, *World Report on Disability*].
[39] AJ Withers, *Disability Politics and Theory* (Black Point, Nova Scotia: Fernwood Publishing, 2012) at 3 [Withers]. There are many models of disability including the rehabilitation model, radical model, economic/functional model, bio-psycho-social model, and human rights paradigm. The rehabilitation model is a derivative of the medical model wherein the aim is to adapt or conceal disability while relying on

In order to understand disability, this part will discuss the biomedical model, the social model, how disability is defined in legislation and case law, models in between, and the future of models of disability.

2.2.1 The biomedical model

The *biomedical model* is the traditional model that demonstrates a positivistic understanding of disability by depending on medical evidence. Here, disability is the functional impairment and that is all that is relevant.[40] Disability is seen as the consequence of biological characteristics that must be treated through medical means with the goal of elimination or cure.[41] Disabled people are "that group who experience a significant level of physical, sensory or mental incapacity which affects their daily life in some way."[42] Due to the prestige and deference towards medicine, this model does have some credibility.[43] Under this model, persons with disabilities are seen as victims or a "sick person" who is incompetent, blameworthy, vulnerable, weak, and fallible.[44] Furthermore, disability is an individual pathology rather than social, so it exists within the individual.[45] The *rehabilitation model* is sometimes described as a derivative of the medical model; it focuses on "diminishing, adapting or concealing disability."[46] Regardless, the rehabilitation model,

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rehabilitation experts. The radical model is the newest addition evolving from the social model to reject norms and recognize systemic inequality and barriers and intersectionality of oppressions. The economic/functional model focuses on normality to determine the costs and functional capabilities of persons with disabilities and ascertain economic efficiency, while recognizing the relation with social context in assessing costs. The bio-psycho-social model seeks to compromise between the biomedical and social models by recognizing the interaction between the person, the environment, and individual capabilities. The human rights paradigm is a more recent addition that seeks to combine positive entitlements with the social model to provide an enforcement mechanism for human rights. Here, the focus is on the two primary models: the biomedical model and the social model.

[40] Jerome E Bickenbach, *Physical disability and social policy* (Toronto: University of Toronto Press Incorporated, 1993) at 61 [Bickenbach].

[41] Rioux & Valentine, *supra* note 1 at 49.

[42] Tom Shakespeare, "What is a Disabled Person?" in Melinda Jones & Lee Ann Basser Marks, eds, *Disability, Divers-Ability and Legal Change* (The Hague, Netherlands: Kluwer Law International, 1999) 25 at 26.

[43] Bickenbach, *supra* note 40 at 63.

[44] *Ibid* at 82.

[45] Rioux & Valentine, *supra* note 1 at 50.

[46] Withers, *supra* note 39 at 4.

like the biomedical model, fails to give a voice to persons with disabilities and instead defers only to rehabilitation experts.[47]

The biomedical model can be seen still in some legislation, such as in the Ontario *Workplace Safety and Insurance Act, 1997*, in which the definition of an "occupational disease" is limited to a disease or medical condition.[48] This medicalization of disability creates eligibility requirements, which can manufacture concerns about fraud and deception.[49] There are, however, some advantages to using the biomedical model as it provides tangible characteristics to measure and can be used to determine some of the needs of persons with disabilities.[50] This empirical and biological understanding of disability is necessary sometimes in order to determine the appropriate accommodations for persons with disabilities. But it does not wholly explain disability. It also generates a view of persons' with disabilities limitations as "inherent, naturally and properly excluding her from participating in mainstream culture."[51] It is particularly problematic when applied to chronic pain disorders that do not have objective medical proof of existence and are subject to a lack of medical consensus regarding existence, diagnosis, etiology, and prognosis—under this model, they do not qualify as disabled.

If we consider the more limited use of the biomedical model in the 19th and 20th centuries, it becomes clear that the biomedical model can lead the law to exclude those persons who are not seen as "being able to control and hold property or to exercise independent agency," such as "women, children, lunatics, idiots."[52] The modern use of the biomedical model "individualized disability by treating it as a personal tragedy. It encouraged dependence on doctors, rehabilitation professionals, and charity. And it stigmatized people with

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[47] Ruth O'Brien, *Crippled Justice: The History of Modern Disability Policy in the Workplace* (Chicago: The University of Chicago Press, 2001) at 29 [O'Brien].
[48] WSIA, *supra* note 2; but see Ontario, The Workplace Safety and Insurance Board, *Document 15-04-03 Chronic Pain Disability Operational Policy* (Toronto, 15 February 2013), the Ontario WSIB applies this policy to allow compensation of some chronic pain disorders, which is discussed in Chapter 5.
[49] Bickenbach, *supra* note 40 at 71-72.
[50] *Ibid* at 69.
[51] Michael Ashley Stein, "Disability Human Rights" (2007) 95:1 Cal LRev 75 at 86 [Stein, "Disability Human Rights"].
[52] Melinda Jones & Lee Ann Basser Marks, "Law and the Social Construction of Disability" in Jones & Basser Marks *supra* note 42, 3 at 5 [Jones & Basser Marks].

disabilities by defining them as something less than normal."[53] Thus, it is clear that the biomedical model is not appropriate to completely explain disability. Furthermore, any future use of it must recognize the potential for discrimination and harmful individualization.

2.2.2 The social model

The *social model* makes up the other end of the dichotomy of disability. In creating the social model, the disability rights movement was "rejecting approaches based upon the restoration of normality and insisting on approaches based upon the celebration of difference."[54] The social model differentiates between impairment and disability. Impairment is a functional limitation whereas disability is a "consequence of the social structure."[55] Furthermore, disability exists outside of the individual, where it is a difference rather than an anomaly that needs to be cured.[56] Thus, instead of biological limitations creating disability, disability barriers are a result of social conditions.[57] These social conditions include environmental barriers like lack of ramps into buildings and more social barriers like discriminatory attitudes or stigma. Michael Prince posited that "with various attitudinal and environmental barriers removed, more than half of working age persons with disabilities could enter paid employment on a part-time or full-time basis."[58] Accommodation itself flows from the social model, in that accommodation seeks to change the social environment to reduce the effect of functional limitations.

Proponents of the social model often remove the biomedical understanding of disability entirely, which creates the potential of "reducing disablement to a political symbol or token to be moved back and forth."[59] Mike Oliver attempts to defend the social model by arguing

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[53] Bagenstos, *supra* note 40 at 6.
[54] Mike Oliver, "Defining Impairment and Disability: Issues at stake" in Elizabeth F Emens & Michael Ashley Stein, eds, *Disability and Equality Law* (Farnham, Surrey, England: Ashgate Publishing Limited, 2013) 3 at 8 [Oliver].
[55] Rioux & Valentine, *supra* note 1 at 51.
[56] *Ibid* at 51.
[57] Stein, "Disability Human Rights", *supra* note 51 at 85.
[58] Michael J Prince, *Absent Citizens: Disability Politics and Policy in Canada* (Toronto: University of Toronto Press, 2009) at 25 [Prince].
[59] Bickenbach, *supra* note 40 at 174.

that pain and impairments belong to the social model of impairment rather than the social model of disability.[60] This is a weak defense as it merely confirms the supposition that the social model of disability is incomplete to define disability. Michael Ashley Stein argues that the social model only brings about formal equality through equal treatment not equal outcome, failing to amount to substantive equality.[61] The social model sets out accommodation as the solution to many obstacles of disability. Stein posits that "[p]roviding accommodations in the workplace changes existing hierarchies, ultimately suggesting a lack of inevitability in the structure and conception of particular occupations. By removing unnecessary barriers to participation, accommodation brings about equality as conceived by formal justice."[62] Thus, the social model can only achieve formal equality so its use for human rights is limited.[63] Even if Stein's argument is rejected, the social model alone does not seem capable of changing the structure of the society to remove discrimination and barriers for persons with disabilities.[64]

It is apparent from this discussion of the biomedical and social models that these two models do not provide a comprehensive definition of disability. Bickenbach argues that these two models are actually similar in structure as they "both deny the *interactional* character of disablement."[65] As such, other models of disability need to be explored.

2.2.3 Disability in the law

The social model has been hugely influential. It can be seen in legislation such as the *Canadian Charter of Rights and Freedoms* (*Charter*),[66] the Ontario *Human Rights Code* (OHRC),[67] and in the United Nations' *Convention on the Rights of Persons with Disabilities* (CRPD), which Canada has ratified.[68] In the preamble of the CRPD, disability

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[60] Oliver, *supra* note 54 at 13.
[61] Michael Ashley Stein & Penelope JS Stein, "Beyond Disability Civil Rights" (2006-2007) 58 Hastings LJ 1203 at 1209 [Stein, "Beyond Disability Civil Rights"].
[62] Stein, "Disability Human Rights", *supra* note 51 at 91.
[63] *Ibid* at 85.
[64] Withers, *supra* note 39 at 86.
[65] Bickenbach, *supra* note 40 at 178.
[66] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982 s 15.
[67] RSO 1990, C H 19, s 10(1) [OHRC].
[68] 30 March 2007, GA Res 61/106 [CRPD]. The CRPD was ratified in Canada on March 11, 2010. See Library of Parliament, News Release, *Canada and the Convention on the Rights of Persons with*

is specifically recognized as "result[ing] from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others."[69] However, disability is not specifically defined in the CRPD.[70] Perhaps this omission is in recognition of the social model perspective that disability is a socially-based functional limitation, separate from medical definitions and the impairment. As such, a specific definition is unnecessary and likely to be too limiting. Alternatively, this may be an attempt to avoid the problem of defining disability in a way that is broad yet meaningful enough that has been faced by legislatures. The *Canadian Human Rights Act* (CHRA) defines disability as "any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug."[71] This is a relatively brief definition but it is not particularly broad or clear. The OHRC provides a far longer definition that includes:

> (a) 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 diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,
> (b) A condition of mental impairment or a developmental disability,
> (c) A learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
> (d) A mental disorder, or
> (e) An injury or disability for which benefits were claimed or received under the insurance plan established under the *Workplace Safety and Insurance Act, 1997*.[72]

This definition is much longer than others and so is likely intended to be broad. The provisions relevant to disability in the CHRA and the OHRC follow the social model in the prohibitions of discrimination and harassment and imposition of accommodation and

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Disabilities (5 December 2012) online: Parliament of Canada <http://www.parl.gc.ca/Content/LOP/ResearchPublications/2012-89-e.htm>.

[69] *Ibid* at Preamble e.

[70] *Ibid* at Article 2.

[71] RSC 1985, c H-6 s 25 [CHRA].

[72] OHRC, *supra* note 67 at s 10(1).

equality. However, the actual definitions of disability seem to rely somewhat on a medical understanding with the use of medical terminology and thus likely requiring medical evidence. For "mainstream" disabilities, this reliance is probably not problematic, but for chronic pain disorders and sometimes mental illness, which struggle with medical legitimacy, this use of medical definitions may be problematic in their recognition as disabilities.

Courts have also been influenced by the social model, although this has not been explicitly acknowledged. For instance, the Supreme Court of Canada allowed the idea of impairment without actual impairment to constitute disability when interpreting the *Charter*.[73] Given that the *Charter* is binding on other legislation, the definitions of disability above should be interpreted as broadly as possible, which will enable the social model's influence. The social model "clearly displays, in its genesis and evolution, the need to abandon, both in theory and in practice, normative neutrality."[74] However, the social model does have some shortcomings, particularly for mental illnesses and chronic pain disorders that are invisible, chronic, and subject to disagreement from the medical field.[75] The difficulty integrating these particular disabilities may depend on the context, as they are invisible and limiting in some contexts and the opposite in others.[76] These problems were identified by Harlan Hahn in 1985,[77] but still no significant changes have been made for these invisible disabilities.

2.2.4 Models in between the biomedical model and the social model

There are numerous models of disability that could be discussed, but this section will focus on the economic/functional model, radical model, bio-psycho-social model and the human rights paradigm. These models help to fill in the gaps left by the dichotomy of the

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[73] See *Québec (Commission des droits de la personne et des droits de la jeunesse) v Montréal (City)*, 2000 SCC 27, three different people had spinal abnormalities that were asymptomatic, but two were not hired and one was fired because of the possibility that they might develop a disability. Although this is a case dealing with Québec human rights legislation, the *Charter* applies and the principle applies across Canada.
[74] Bickenbach, *supra* note 40 at 161.
[75] Devlin & Pothier, *supra* note 6 at 5.
[76] *Ibid* at 14.
[77] Harlan Hahn, "Disability Policy and the Problem of Discrimination" (1985) 28:3 Am Behav Sci 293 at 309.

biomedical model and social model. Having said that, these models may also be incomplete explanations of disability. However, the ideas in these models will hopefully contribute to a fuller understanding of disability.

The *economic model* seems to have developed from a social understanding of the biomedical and rehabilitation models.[78] Under this model, "the 'problem' of disablement has become the problem of the costs of disablement" wherein disability policy seeks to redistribute and reduce these costs.[79] In addition, the economic models depends on "its conception of normality—namely, a specified repertoire of productive capabilities."[80] The functional model similarly views disability in terms of the functional capabilities of each person so that disability exists within the individual.[81] Because disability is considered an individual condition, governments are justified in limiting state action for prevention and comfort for persons with disabilities.[82] The economic model, however, recognizes that disability is not located entirely within the individual and instead there is a relational problem depending on social context;[83] limitation on state action can be justified with a cost-benefit analysis instead.

Economic interpretation of issues of disability allows more empirical examination.[84] The model does not just consider monetary costs, it evaluates economic efficiency considering social costs and social benefits, like productivity and participation. However, evaluation of these social instances is not easy and, as such, some non-pecuniary losses like pain and suffering are excluded from schemes that demonstrate an economic understanding of disability, like many workers' compensation programs.[85] Most problematically, the economic model leads to use of welfare programs for persons with disabilities rather than seeking equality and independence. Having said that, there is clearly an economic component of disability because the improvement of circumstances of persons with

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[78] *Ibid* at 95-99.
[79] *Ibid* at 101.
[80] *Ibid* at 131.
[81] Rioux & Valentine, *supra* note 1 at 49.
[82] *Ibid* at 51.
[83] Bickenbach, *supra* note 40 at 103.
[84] *Ibid* at 106.
[85] *Ibid* at 110.

disabilities requires money. Furthermore, due to limited funding, governments and other institutions want to fund the most efficient programming for helping the most persons with disabilities—economic efficiency is a guiding principle.

The *radical model* was created by AJ Withers. It "defines disability as a social construction used as an oppressive tool to penalize and stigmatize those of us who deviate from the (arbitrary) norm."[86] Instead of being an anomaly, disability is part of a spectrum of health. This model addresses the intersectionality of multiple oppressions such as race, gender, and sexuality so that persons who are oppressed do not need to be classified into a group; the labelling process is eliminated.[87] This is particularly useful considering the higher rates of disability among women and certain racial groups like First Nations people and the higher rates of chronic pain disorders reported by women.[88] This model is distinctive in several ways. First, it does not separate impairment from disability—"[d]isability, which includes impairment, is a social construct."[89] Second, the radical model takes issue with capitalist values, "[r]ather than arguing that disabled people can be productive in a capitalist paradigm."[90] Third, the model posits that all people are interdependent on each other—for food, transportation, construction of home and clothing, etc.—not independent.[91] Fourth, this model seeks radical access, which "means acknowledging systemic barriers that exclude people, particularly certain kinds of people with certain kinds of minds and/or bodies, and working to ensure not only the presence of those who have been left out, but also their comfort, participation and leadership."[92] Ultimately, Withers explains that his radical model is "about fighting to redistribute power and resources and creating accessible spaces and communities."[93]

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[86] Withers, *supra* note 39 at 98.
[87] *Ibid* at 101-105.
[88] *Ibid* at 107; Statistics Canada, *Canadians reporting a diagnosis of fibromyalgia, chronic fatigue syndrome, or multiple chemical sensitivities by sex, household population, aged 12 and over*, (Ottawa: StatCan, 25 June 2015).
[89] *Ibid* at 108.
[90] *Ibid* at 109.
[91] *Ibid* at 109.
[92] *Ibid* at 118.
[93] *Ibid* at 119.

Although the radical model seems promising, it also seems like a variation of the social model, despite claims to the contrary. It takes a broader perspective to defining disability to ultimately argue that the social environment needs to change to accommodate disability and others outside of the norm. Its most valuable contribution is the recognition of the intersectionality of multiple oppressed groups and the fact that people often belong to several of these groups. Although the intersection of minority identities has been discussed elswhere,[94] seldom are solutions provided. Furthermore, typically when multiple oppressed groups are addressed, it is only across two groups, rather than more than two, and the most common example is gender and disability.[95]

The *bio-psycho-social model* was put forth by the World Health Organization in the *International Classification of Functioning, Disability and Health* (ICF).[96] This model seeks to "represent a workable compromise between medical and social model."[97] Under this model, disability is an umbrella term for functional limitations, participation restrictions, and impairments to recognize the interaction between the person and the environment and individual capabilities.[98] The interactional understanding of this model is very helpful, but it does not provide a clear method of how this compromise could be achieved. Regardless, this more universalist approach should not be dismissed.

The *human rights paradigm* was suggested by Michael Ashley Stein. This paradigm "combines the type of civil and political rights provided by antidiscrimination legislation (also called negative or first-generation rights) with the full spectrum of social, cultural, and economic measures (also called positive or second-generation rights)."[99] This is in line with what is set out in the UN CRPD. The human rights paradigm is an attempt to combine aspects of the social model with more positive entitlements for "a holistic and

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[94] See e.g. Carolyn Tyjewski, "Ghosts in the Machine: Civil Rights Laws and the Hybrid 'Invisible Other'" in Pothier & Devlin, *supra* note 1, 106.
[95] See e.g. Fiona Sampson, "Beyond Compassion and Sympathy to Respect and Equality: Gendered Disability and Equality Rights Law" in Pothier & Devlin, *supra* note 1, 267.
[96] ICF, *supra* note 5; WHO, *World Report on Disability*, *supra* note 38 at 4.
[97] WHO, *World Report on Disability*, *ibid*.
[98] *Ibid* at 4.
[99] Stein, "Beyond Disability Civil Rights", *supra* note 61 at 1205.

comprehensive rights theory."[100] More specifically, this paradigm attempts to address individuals' needs and talents rather than comparing them to a norm.[101] Stein argues that this goes beyond the social model "because it is not contingent on the extent that particular individuals are able to achieve function at a level of either sameness or threshold levels." States are thus obligated to ensure that all disabled people have the freedom to work and contribute to society.[102] Personal dignity is the ultimate goal rather than changing functioning to match the norm.[103] The human rights paradigm also has potential for application to other minority groups.[104]

The human rights paradigm is ambitious to say the least. The imposition of positive rights requires the state to provide entitlements that ensure freedom and participation of persons with disabilities. This seems to be the next step that the disability rights movement needs to take to actually enforce entitlements and move forward with their agenda. By framing the ultimate goal as human dignity, Stein sidesteps welfare as a potential source of entitlement. This paradigm will likely not replace the social model, but the imposition of positive rights should be added to the social model.

2.2.5 The future of models of disability

The models in between the social model and biomedical model serve to enrich our understanding of disability by offering different perspectives and mechanisms. These models provide four contributions that should be adopted by CDT. First, economic limitations and factors cannot be ignored and should instead be dealt with to justify spending. Many expensive endeavors that could improve the participation of persons with disabilities can be justified with a long term economic view: training, transportation, and accommodation could increase and stabilize the labour force; more consistent preventative health care could reduce the need for expensive treatments; and better training for all could reduce discrimination and negative attitudes towards persons with disabilities. Second,

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[100] *Ibid* at 1221.
[101] *Ibid* at 1222.
[102] *Ibid* at 1223.
[103] Stein, "Disability Human Rights", *supra* note 51 at 110.
[104] *Ibid* at 121.

recognition of the intersectionality of oppressed groups is necessary because many persons with disabilities are also part of other minority groups like women or racial groups. Third, the social and biomedical models both fail to recognize the interactional element of persons with disabilities with their environment and their own capabilities, but recognition of the relationship of these factors is essential for disabilities. Fourth, the imposition of positive entitlements could lead to changes in the structure of society by requiring state support for persons with disabilities beyond their basic needs.

CDT needs to take the "critical" part of its name and apply it to its own theory. The dichotomy that has developed between the biomedical model and the social model needs to be eliminated from CDT. Despite the social model's rejection of the biomedical model, it depends on the medical diagnoses of impairments to determine the appropriate accommodation. Judith Mosoff suggests that "[d]isabilities that are poorly understood, or do not fit neatly into a medical model are considered less legitimate than others" creating a hierarchy of disabilities.[105] Thus, neither the biomedical model nor the social model are sufficient to describe disability. The social model needs to integrate the four ideas that have been put forth by other models of disability in order to move beyond its current conception. This may generate a more comprehensive understanding of disability that does not ignore other minority groups and some "non-mainstream" disabilities like chronic pain disorders and mental illnesses.

2.3 Theoretical underpinnings to define disability

Disability is a complex concept. Its definition depends on the context and how other related concepts are defined. It also depends on the framework or theoretical approach. Even within the school of thought of CDT, there is great variance regarding the approach and understanding of related concepts. This part seeks to clarify the theoretical underpinnings necessary to understand disability. First in this part, a brief discussion of the disability rights movement highlights the difficulties particular to persons with

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[105] Judith Mosoff, "Lost in Translation?: The Disability Perspective in *Honda v Keays* and *Hydro-Québec v Syndicat*" (2009) 3 McGill JL & Health 137 at 141.

disabilities both as a group and as a theoretical movement. Second, the meaning and many different models of equality are investigated. Third and finally, the meaning of citizenship, the ultimate goal of CDT, is explored.

2.3.1 The disability rights movement

The disability rights movement arose from the civil rights movement of the 1960s, along with some forms of feminism and critical race theory.[106] However, persons with disabilities are different from other minorities like women or racial minorities because of the wide range of needs and goals of persons with disabilities. The disability rights movement "includes people with a range of disabilities (and even people with no disability at all), different life experiences, different material needs and different ideological perspectives."[107] As such, the disability rights movement is by no means a unified movement; due to the wide range of disabilities, there is also a wide range of goals, some of which may conflict. However, the movement is united in working towards the goal of full citizenship. Many persons with disabilities support "opposition to the paternalism of parents, professionals, and bureaucrats telling people with disabilities what they can and cannot do."[108] The disability rights movement looks to CDT as its theoretical approach to achieving the wide range of goals.

CDT, similar to feminism and critical race theory, draws on its jurisprudential predecessor, American Realism, to reject the traditional definition of disability and liberalism, which failed to go beyond formal equality to the ultimate goal of substantive equality.[109] This rejection of the traditional definition may have warranted the "critical" aspect of CDT. The goal of critical disability theory is not theorization or even understanding, but "the pursuit of empowerment and substantive, not just formal, equality."[110] In this pursuit, CDT employs many models to describe the related concepts in defining disability. However,

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[106] Devlin & Pothier, *supra* note 6 at 9.
[107] Samuel R Bagenstos, *Law and the Contradictions of the Disability Rights Movement* (New Haven: Yale University Press, 2009) at 3 [Bagenstos].
[108] *Ibid* at 4.
[109] Devlin & Pothier, *supra* note 6.
[110] *Ibid* at 8.

Jerome Bickenbach noted that "no one model alone is capable of underwriting an integrated and coherent disablement policy" and instead these models are "presumptions and background beliefs that interact with and are shaped by policy and social conditions."[111]

There are two highly controversial tools endorsed by many within the disability rights movement: integration and welfare. Integration calls for limitation of disability-only services and instead serves persons with disabilities the same way as persons without disabilities. A common example would be keeping a child with a disability in mainstream education, rather than special education. Ruth Colker suggests that "integration can be an important tool in our attempts to attain substantive equality…but I simply do not presume that integration is the same as equality."[112] Instead, Colker calls for an anti-subordination approach where the value of integration is actually assessed rather than assumed.[113] The goal of the anti-subordination approach is ending subordination rather than achieving formal or substantive equality.[114] Anti-subordination is a more nuanced and deliberate approach that may have the same outcome as integration but with confidence that this outcome has proven to be the best option rather than assumed.

The more controversial of the tools is welfare. Many members of the disability rights movement oppose charity and welfare on the grounds that "fully equal citizenship requires 'independence' from those sorts of interventions."[115] Samuel Bagenstos, an American scholar who supports integration, suggests that social welfare programs are "important tools for achieving disability equality"[116] because persons with disabilities are the "deserving poor."[117] The use of welfare is something that appears across discussions of disability, equality, and citizenship. Although Bagenstos's argument has merit, it is problematic, particularly when one of the only goals that members of the disability rights movement can agree on is independence for persons with disabilities. Needless to say,

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[111] Bickenbach, *supra* note 40 at 182.
[112] Ruth Colker, *When is separate unequal?: A disability perspective* (New York, Cambridge University Press, 2009) at 1-2 [Colker].
[113] *Ibid* at 26.
[114] *Ibid* at 33.
[115] Bagenstos, *supra* note 107 at 6.
[116] *Ibid* at 149.
[117] *Ibid* at 144.

independence seems to be the opposite of welfare. However, disability policy often seems to run into the issue of what mechanism or tool should be used to attain substantive equality; often the simpler answer is welfare.

Interestingly, it is Bagenstos who suggests an independence frame as the lens through which to create a collective identity for persons with disabilities. Through this frame, "people in all of these groups sought 'independence' from the control of professionals, welfare bureaucracies, and charity. And people in all of these groups sought the opportunity to succeed or fail according to their own choices."[118] Ultimately, however, Bagenstos supports a universalist approach to disability rights, which he deems "much more challenging to the status quo than are the minority-group model and the independence frame."[119] Hahn originated the minority-group model and he continued to support it throughout his career. Hahn "lumps the biomedical and economic models together into a functional limitation model and holds it in opposition to the minority-group analysis of the social model."[120] The minority-group model is based on three major ideas:

(a) That the primary source of the major problems confronted by persons with disabilities can be traced to unfavorable attitudes;
(b) That all aspects of the environment are fundamentally shaped by public policy; and
(c) That policies tend to reflect pervasive social attitudes and values.[121]

This minority-group model sees persons with disabilities as a separate disadvantaged group that requires protection from arbitrary limitations on opportunities. Proponents of the minority-group model usually depend on anti-discrimination laws as the main mechanism to attain equality.[122]

Many American scholars seem to ascribe to the minority-group model; the *Americans with Disabilities Act* (ADA) is antidiscrimination legislation and is the main legislation enacted

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[118] *Ibid* at 32.
[119] *Ibid* at 53.
[120] Bickenbach, *supra* note 40 at 173. See Harlan Hahn, "Antidiscrimination Laws and Social Research on Disability: The Minority Group Perspective" (1996) 14 Behav Sci L 41 at 45 [Hahn, "Antidiscrimination Laws"].
[121] Hahn, "Antidiscrimination Laws", *ibid* at 53.
[122] Jones & Basser Marks, *supra* note 52 at 16.

in the United States to protect persons with disabilities. However, the minority group model has come under fire. Tobin Siebers, in his discussion of disability identity, posits that a minority identity perpetuates the suffering that led to its minority status so that this pain "soon comes to justify feelings of selfishness, resentment, bitterness, and self-pity."[123] Bagenstos argues that this model "makes the law more vulnerable to political attack, stigmatizes its supposed beneficiaries (just as disability welfare does) and encourages judges to see their job as vigorously policing the line between those who are in and those who are out of the protected class."[124] Thus, it is problematic for both theoretical and legal considerations. Furthermore, antidiscrimination laws do not include positive rights such as equality measures.[125] Positive rights usually require governmental redistribution of resources such as employment or training.[126] Bickenbach argues that the "denial of opportunities and resources is an issue, not of discrimination, but of distributive injustice,"[127] which the minority-group model does not consider.

The universalist approach, on the other hand, seeks "justice in the distribution of resources and opportunities."[128] Instead of disability existing as a minority, disability is seen on a spectrum of needs for all people—the range of "normal" is widened. As such, the universalist approach looks to constitutional law to draft general legislation ensuring rights for persons with and without disabilities.[129] Specifically, a universalist approach "would demand that employers design physical and institutional structures…in a way that reasonably takes account of the largest possible range of physical and mental abilities, and that they provide reasonable flexibility to all potential employees."[130] Although much has been gained from the minority-group approach to enhance the rights of persons with disabilities as a minority, it is a short-term fix. In order to truly change the attitudes

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[123] Tobin Siebers, *Disability Theory* (Ann Arbor, Michigan: The University of Michigan Press, 2008) at 13.
[124] Bagenstos, *supra* note 107 at 46.
[125] Stein, "Beyond Disability Civil Rights," *supra* note 61 at 1209
[126] Lisa Waddington, "Fine-tuning non-discrimination law: Exceptions and justifications allowing for differential treatment on the ground of disability" (2015) 15:1-2 IJDL 11 at 14 [Waddington].
[127] Jerome E Bickenbach, "Minority Rights or Universal Participation: The Politics of Disablement" in Jones & Basser Marks, *supra* note 42, 101 at 110.
[128] *Ibid* at 112.
[129] Jones & Basser Marks, *supra* note 52 at 16.
[130] Bagenstos, *supra* note 107 at 53.

entrenched in the general population and institutions, both medical and social, society needs to recognize the facts that disability is not limited to a small group but can affect anyone and that the issue of disability is not wholly medical.[131] The universalist approach seems to be the most promising way of supporting the rights of persons with disabilities, while avoiding the limitations of anti-discrimination law and the potentially discriminating effects of welfare and a minority identity. The universalist approach means to essentially provide equality to all people, including persons with disabilities. But what is equality?

2.3.2 Understanding equality through the prism of disability

Equality seems like it should be easy to define—it is when everyone is treated the same, but the same how? Is equality found in equal treatment, opportunity, respect, outcome, or capacity? Is formal equality enough? Disability has been left out of some theories of equality likely because the disability rights movement developed later than other civil rights movements.[132] Perhaps, persons with disability are also more problematic than other historically disadvantaged groups. Ruth O'Brien suggests that persons with disabilities "have been seen not only as a threat to the workplace hierarchy but also to the principle of business rationality underlying American capitalism."[133] Persons with disabilities cannot and should not be measured against "normal" functioning nor should their value be calculated based on their functioning and employability. Regardless of the past, disability must now be understood within theories of equality. Equality is a central tenet of disability. Most disability scholars advocate for substantive equality but the details of how to achieve it are not always elucidated. This section will discuss the dilemma of difference, distributive justice briefly, and finally the models of equality.

According to Sandra Fredman, there are four central aims of equality: (1) break the cycle of disadvantage for minority groups; (2) promote respect for all to eliminate stigma; (3) "positive affirmation and celebration of identity within community," and; (4) achieving

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[131] Irving Kenneth Zola, "Toward the Necessary Universalizing of a Disability Policy" (1989) 67:2 Milbank Q Part 2 401 at 401.
[132] Colker, *supra* note 112 at 11.
[133] O'Brien *supra* note 47 at 4.

full participation in society.[134] There are three types of law that can be used for persons with disabilities and these include welfare legislation, anti-discrimination law, and rights-based legislation.[135] Welfare legislation leads to a conflict between paternalism and empowerment by attempting to rehabilitate disability.[136] Anti-discrimination law is "generally asymmetrical in nature, meaning that it only protects persons with disabilities and persons who experience discrimination on the ground of disability from discrimination."[137] Anti-discrimination law, in particular, struggles with the dilemma of difference: when should differences be considered and when should they be ignored.[138] Depending on the context and nature of the disability, a disability may or may not have significance. By recognizing differences, society may be able to address specific needs better, but it also provides opportunity for discrimination by emphasizing distinctness.[139] On the other hand, ignoring disability means that the rights and needs of persons with disabilities may not be met. Yet, CDT posits that disabilities cannot be ignored and that in order to achieve substantive equality, the disability must be considered to "both identify the systemic nature of inequality and pursue solutions tailored to the goals of full inclusion and participation."[140] Thus, it is a dilemma. Rights-based laws may create entitlements for persons with disabilities, but often do not include an enforcement mechanism.[141] Despite this, rights-based laws may be the only way to actually achieve substantive equality for persons with disability because of the short-comings of welfare and anti-discrimination legislation.

Equality for persons with disabilities requires some sort of distributive justice; "disablement policy is in large part policy regarding the economic problem of 'spreading' the costs of disablement so that they do not all fall on the shoulders of individuals with

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[134] Sandra Fredman, "Disability Equality: A Challenge to the Existing Anti-Discrimination Paradigm?" in Emens & Stein, *supra* note 54, 123 at 138 [Fredman].
[135] Jones & Basser Marks, *supra* note 52 at 17.
[136] *Ibid* at 18.
[137] Waddington, *supra* note 126 at 13.
[138] Devlin & Pothier, *supra* note 6 at 11.
[139] Fredman, *supra* note 134 at 130.
[140] Devlin & Pothier, *supra* note 6 at 12.
[141] Jones & Basser Marks, *supra* note 52 at 20.

disabilities."[142] There are two main types of distributive justice that are relevant: welfare maximization, a descendent of utilitarianism, and egalitarianism. Utilitarianism seeks to help those who can most benefit whereas egalitarianism seeks to help those who are worse off.[143] Welfare maximization provides entitlements to persons with disabilities, but only those entitlements. These entitlements may not actually be linked to disability and may not deal with the "inequities of social organization" that include too costly training, stigma, and discrimination.[144] Ravi Malhotra provided a transformed Rawlsian framework for distributive justice in which justice or fairness must be prioritized over efficiency and welfare, and knowledge of all contracting parties' identities, including the existence of disability, should be known.[145] The models of equality seem to support egalitarian approaches but also seem to recognize the difference of disability and prioritize justice over efficiency and welfare.

Bickenbach suggests that only a few differences among people must actually be considered, "they are differences that make us unequal. Disablement is just such a difference."[146] He posits that equality can serve as a unifying normative basis for disablement policy to enable the goals of respect, accommodation, and participation with the necessary fundamental entitlements.[147] However, only some of the many different models of equality can achieve these goals. Equality of respect assumes that everyone is the same and deserves the same respect.[148] The equal treatment model assumes that equality is sameness and that likes be treated alike, but this leaves persons with disabilities at a disadvantage because they are "unalike" the norm.[149] Both of these models are essentially formal equality models and cannot achieve substantive equality for persons with disabilities.

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[142] Bickenbach, *supra* note 40 at 214.
[143] Mark S Stein, *Distributive Justice & Disability: Utilitarianism against Egalitarianism* (New Haven: Yale University Press, 2006) at 1.
[144] Bickenbach, *supra* note 40 at 215, 217.
[145] Ravi Malhotra, "Justice as Fairness in Accommodating Workers with Disabilities and Critical Theory: The Limitations of a Rawlsian Framework for Empowering People with Disabilities in Canada" in Pothier & Devlin, *supra* note 1, 71 at 83.
[146] Bickenbach, *supra* note 40 at 231.
[147] *Ibid* at 224-229.
[148] *Ibid* at 243.
[149] Rioux & Valentine, *supra* note 1 at 53.

Other models are more promising. Equal opportunity requires an egalitarian redistribution of resources to enable participation while assuming that this is valuable because it allows competition, without actually ensuring that persons with disabilities will be competitive.[150] Equality of opportunity can be distilled further into fair competition and equality of prospects. Fair competition attempts "to ensure that social inequalities follow directly from differences in ability, talent, and motivation (the so-called natural inequalities),"[151] which is not particularly sensitive to the needs of persons with disabilities. Equality of prospects, on the other hand, uses state intervention, namely redistribution, to prohibit unfair social inequalities flowing from these natural inequalities. Bickenbach questions whether any type of egalitarianism can solve equality without a clear idea about the desired result,[152] particularly when some interpretations of this type of equality read in meritocratic principles.[153] Rioux and Valentine clearly prefer the equal outcome model which "takes into account the conditions and means of participation that may vary for each individual, entailing particular accommodation to enable that participation."[154] However, this model, as they have presented it, does not seem to call for any positive action from the government except for accommodation. Finally, equality of capability seeks to achieve the goal of positive freedom for all, wherein each person has functionings that he or she can do and capabilities, the set of functionings, so that "the set of a person's capabilities constitute his or her actual freedom of choice over alternative lives that he or she can lead."[155] In other words, each person is equally capable of making choices in terms of participation in society. There is no clear winner for which model best provides equality for persons with disabilities, but arguments could be made for equal outcome and equality of capacity.

The most successful models of equality share some similarities: they demand an egalitarian redistribution of resources that takes into account each person's needs and means so that every person has what he or she needs to choose a way to participate. These models also

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[150] *Ibid* at 54.
[151] *Ibid* at 250.
[152] Bickenbach, *supra* note 40 at 258.
[153] *Ibid* at 251.
[154] Rioux & Valentine, *supra* note 1 at 54.
[155] Bickenbach, *supra* note 40 at 266.

usually require some positive entitlements, likely from rights-based legislation rather than anti-discrimination law. These entitlements are strongly related to citizenship.

2.3.3 Citizenship

Citizenship is the ultimate goal of the disability rights movement and of CDT. Citizenship is "a *practice* that locates individuals in the larger community," but "persons with disabilities are disabled citizens on both the formal and substantive levels."[156] Prince suggests that "absent citizens" are "not those struggling on the social margins but those living in the 'mainstream,' a place taken for granted as supportive and caring, thus obscuring the privileges and power relations in broader social systems."[157] Prince posits that there are five elements of citizenship: "discourse of citizenship, legal and equality rights, democratic and political rights, fiscal and social entitlements, and economic integration," and that employment is a building block for achieving full citizenship.[158] Lynne Davis conceived of citizenship as a way of "conceptualizing the relationship between the individual and the social, especially the state…it provides a basis for the way in which individuals can understand their relationship to the generalized Other."[159] Rioux and Valentine suggest three dimensions of citizenship including, "rights and responsibilities, access, and belonging."[160]

Rioux and Valentine propose that there are three types of entitlement that arise from different conceptions of disability and equality models: citizenship, charitable privilege, and civil disability. Civil disability sets out a "social responsibility to protect individuals with disabilities, both legally and socially, [which] flows from the presumption that disablement is a consequence of an individual's largely unchanging pathology."[161] This type of entitlement only seeks equal treatment and thus leaves persons with disabilities out of the mainstream as "unalike" the norm. Civil disability seems to be the traditional

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[156] Devlin & Pothier, *supra* note 6 at 1-2 & 17.
[157] Prince, *supra* note 58 at 12.
[158] *Ibid* at 17, 23.
[159] Lynne Davis, "Riding with the Man on the Escalator: Citizenship and Disability" in Jones & Basser Marks, *supra* note 42, 65 at 66 [Davis].
[160] Rioux & Valentine, *supra* note 1 at 55.
[161] *Ibid* at 57.

approach to disability which is paternalistic in terms of laws, programs, services, and politics. Charitable privilege is based on benevolence and paternalism wherein equality of opportunity is sought. Prince rejected this kind of approach where persons with disabilities are considered the "worthy poor" because it places them as objects of charity at the cost of basic citizenship rights.[162] Finally, citizenship seems to aspire to equal outcome or equal capacity. Citizenship requires some understanding of disability through the social model. In order for persons with disabilities to exercise their rights, they need to understand citizenship with its civil and political rights.[163]

2.3.4 Moving forward

With an understanding of the theoretical framework and development of the disability rights movement, the theoretical underpinnings required to define disability were clarified. It is apparent from this discussion that a nuanced approach that assesses the specific needs of persons with disabilities is the most successful. This is the anti-subordination approach. A universalist understanding of disability must be adopted in order to move forward with disability rights, rather than the limited minority-group approach and use of welfare. With this universalist approach, positive entitlements from constitutional law and human rights legislation must be provided, rather than through anti-discrimination law or welfare legislation. This will make the ultimate goal of citizenship more reachable, particularly with an egalitarian distribution of resources that takes into account each person's means and needs to enable full participation, either through equal outcome or equal capacity.

2.4 Conclusion

It is evident that disability is a complex concept. Persons with disabilities make up a sizeable portion of the Canadian population, yet they still have lower employment and participation rates, particularly for mental illness. Persons with disabilities deserve to have dignity, which can be gained through employment and the removal of arbitrary socially constructed barriers. The disability rights movement seeks to achieve this dignity through

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[162] Prince, *supra* note 58 at 15.
[163] Davis, *supra* note 159 at 70.

equality and citizenship, but has often struggled with establishing a collective identity. Moving forward, the disability rights movement may benefit from the widespread adoption of several concepts. Welfare programming should be rejected as it undermines the dignity of its receivers. The anti-subordination approach can provide a more nuanced and deliberate approach to determining programming, rather than assuming integration. A universalist approach should be adopted over the insufficient independence frame and the limited minority-group approach to understand persons with disabilities as part of society within the range of normal. This could lead to more substantive equality, which can be achieved through rights based laws rather than anti-discrimination and welfare legislation for an egalitarian approach to equality like equal outcome and equal capacity. Full citizenship may be in reach then, even for "non-mainstream" disabilities like chronic pain disorders.

This universalist, egalitarian, and anti-subordination approach to equality can only be effective with a more comprehensive understanding of disability. This means that the dichotomy that has developed between the biomedical and social model must be eliminated. Instead, a more nuanced and comprehensive model should be developed or several additions should be made to the social model. The additions include: consideration of economic efficiency and limitations in inputting programming for persons with disabilities; recognition of the intersectionality of minority identities; inclusion of the interactional element between the individual, the individual's capabilities, and the environment; and imposition of positive entitlements for all people, including persons with disabilities. Having said all of this, Bickenbach noted that these models of disability are not shaping policy and social conditions, instead these models were created to explain the presumptions and beliefs that lead to society's perception of disability and its reality.[164] So although this is the approach that we should take moving forward, it cannot create change on its own. Instead, this approach can be used to justify recognition of disability issues from the courts and the legislature, recognition which could create change. Chronic pain disorders that are, at times, undervalued, dismissed, scrutinized, and discriminated against,

[164] Bickenbach, *supra* note 40 at 182.

would greatly benefit from recognition of the these disability issues as “non-mainstream” disabilities that struggle for access to what is now the norm for other disabilities.

Chapter 3

3 Organizing Principles of Accommodation of Disabilities

What is accommodation? It is a legal duty, a tool, and a human right. Accommodation "is meant to be a win-win situation that retains a skilled worker, reduces productivity losses, builds workplace diversity and social integrity, and honours the individual workers' right to an earned livelihood and social contribution."[1] Employers have a duty to accommodate employees up to the point of undue hardship. Accommodation is a tool used by various civil rights movements to attain substantive equality for individuals. It is also a statutory ground of human rights in Canada. The Ontario *Human Rights Code* (OHRC)[2] purpose is as follows:

> to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of every person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province.[3]

The *Canadian Human Rights Act* (CHRA) sets out a similar purpose with the "principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated."[4] This dignity and equality is intended for all people, including minorities such as racialized groups, women, and persons with disabilities. Accommodation is one way to achieve this purpose.

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[1] Rosemary Lysaght & Terry Krupa, "Employers' Perspectives on Workplace Accommodation of Chronic Health Conditions" in Sharon-Dale Stone, Valerie A Cross, & Michelle Owen, eds, *Working bodies: chronic illness in the Canadian workplace* (Montréal & Kingston: McGill-Queen's University Press, 2014) 91 at 91.
[2] RSO 1990, c H-19 [OHRC]
[3] *Ibid* Preamble.
[4] RSC 1985, c H-6 s 2 [CHRA]

The accommodation duty exists in some form around the world. In Canada, the accommodation duty is set out in both the OHRC[5] and the CHRA,[6] as well as in the right to equality found in the *Canadian Charter of Rights and Freedoms* (*Charter*).[7] It is also found in human rights legislation across Canada. The *Charter* only applies to government actions whereas human rights legislation has a broader application. These duties have formally existed in Canada since the 1980s. Canada is also subject to more recently enacted responsibilities to persons with disabilities stemming from the United Nations' *Convention on the Rights of Persons with Disabilities* (CRPD), which Canada has ratified.[8] The European Union (EU) has also ratified the CRPD.[9] The CRPD was strongly influenced by the *Americans with Disabilities Act of 1990* (ADA)[10] which ascribes to a similar theoretical approach to Canada. The EU, Canada, and the US are shifting to the social model of disability, which differentiates between impairment—the functional limitation—and disability. Disability is a social construct that exists outside of the individual as a consequence of the interaction of the individual with the social environment.[11] Although Canada, the US, and the EU have a similar understanding of disability and impose a duty to accommodate, they differ in the practical application. Having said that, the practical implications of the accommodation duty are not always clear at face value. In Canada, courts and, far more importantly, tribunals and arbitrators are responsible for interpreting the details of the accommodation duty while upholding the stated purpose of furthering dignity and equality.

In order to evaluate the accommodation of persons with disabilities in the Canadian workplace, the current practical application must be examined. In Part I, a brief history of

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[5] OHRC, *supra* note 2 s 17.
[6] CHRA, *supra* note 4 s 5, 15.
[7] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982 c 11 s 15.
[8] 30 March 2007, GA Res 61/106 [CRPD]. The CRPD was ratified in Canada on March 11, 2010. See Library of Parliament, News Release, *Canada and the Convention on the Rights of Persons with Disabilities* (5 December 2012) online: Parliament of Canada <http://www.parl.gc.ca/Content/LOP/ResearchPublications/2012-89-e.htm>.
[9] *Ibid*.
[10] 42 U.S.C. §12101 et seq (2011) [ADA].
[11] Marcia H Rioux & Fraser Valentine, "Does Theory Matter? Exploring the Nexus between Disability, Human Rights, and Public Policy" in Dianne Pothier & Richard Devlin, eds, *Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law* (Vancouver: UBC Press, 2006) 47.

the accommodation duty in Canada and some related aspects in the US are elucidated. This part provides an understanding of the foundation of the accommodation duty, including the intention of the duty. Part II examines what accommodation is, in particular the framework, purpose, and use. Part III clarifies the meaning of undue hardship. This is the most controversial aspect of the accommodation duty in Canada; the majority of the disagreement in courts and tribunals revolves around determining undue hardship in each case. In Part IV, the accommodation duty in Canada is compared with that of the US and the EU, as well as what is set out in the CRPD. This comparison serves to evaluate Canada's approach. The duty to accommodate is an essential tool in the progress of human rights generally and for persons with disabilities; however, it is not a perfect tool because it depends on a broad application with the goals of equality and dignity at the forefront. Where accommodation has been interpreted narrowly in Canada and, to a far greater extent, in the US, its impact has been severely hampered.

3.1 A brief history of accommodation

Both Canada and the US developed the duty of accommodation with the goals of dignity and equality. Despite similar theoretical foundations, accommodation differs between Canada and the US. In order to understand the current approach to accommodation, a brief history of how the duty developed in both Canada and the US is set out here.

3.1.1 Legal inception of accommodation

In the early 1970s, US courts were struggling with interpreting provisions of the *Civil Rights Act 1964*[12] and guidelines that had been provided by the Equal Employment Opportunity Commission that dealt with accommodation.[13] *Griggs v Duke Power Co.* is a breakthrough US Supreme Court from 1971 ruling on indirect discrimination and substantive equality, which was later cited approvingly in Supreme Court of Canada (SCC)

[12] 42 U.S.C.S. 2000-e(j) (2011).
[13] See *Reid v Memphis Publishing Co*, 468 F.2d 346 (US CA 6th Cir. 1972); *Riley v Bendix Corp*, 464 F.2d 1113 (US CA 6th Cir. 1972); *Trans World Airlines Inc v Hardison*, 432 US 63 (1976).

decisions.[14] It is the first case dealing with workplace discrimination, in this case against black employees, wherein the US Supreme Court held that qualifications required for employment must be reasonably related to the job, thus barring arbitrary barriers to employment that discriminate, regardless of any intent to discriminate.[15] Canada, on the other hand, has a relatively short history of accommodation both in regards to legislation and jurisprudence. With the enactment of the *Charter* in 1982, persons with disabilities received constitutional protection for the first time.[16] Canada was the first country to protect the rights of persons with disabilities in the Constitution. Shortly after, in November 1984, the *Royal Commission report on Equality in Employment*,[17] chaired by Justice Abella, recommended that some US concepts be brought into Canadian law.[18] Thus, in 1985, the SCC drew on these US cases to import the duty of accommodation into Canadian Law when interpreting the OHRC for religious discrimination. In *O'Malley v Simpson Sears Ltd* (*O'Malley*),[19] the SCC understood the US approach as "where it is shown that a working rule has caused discrimination, it is incumbent upon the employer to make a reasonable effort to accommodate the religious needs of the employee, short of undue hardship to the employer in the conduct of his business."[20]

The SCC also imported the distinction between direct discrimination and adverse effect discrimination. Direct discrimination is found where a practice or rule is discriminatory on a prohibited ground on its face and so it can be struck down if it cannot be statutorily justified.[21] Adverse effect discrimination, on the other hand, "arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which

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[14] 401 US 424 (1971); see *O'Malley v Simpson Sears Ltd*, [1985] 2 SCR 536 [*O'Malley*] and *Central Alberta Dairy Pool v Alberta*, [1990] 2 SCR 489 [*Central Alberta Dairy Pool*].
[15] See R Belton, *The Crusade for Equality in the Workplace: The Griggs v. Duke Power Story* (Lawrence, Kansas: University Press of Kansas, 2014).
[16] Michael Lynk, "Disability and Work: The Transformation of the Legal Status of Employees with Disabilities in Canada" in R Echlin & C Paliare, eds, *Law Society of Upper Canada Special Lectures 2007: Employment Law* (Toronto: Irwin Law, 2008) 189 at 192 [Lynk, "Disability and Work"]
[17] Canada, Royal Commission on Equality in Employment, *Equality in Employment* by Justice Rosalie Silberman Abella (Ottawa: Minister of Supply and Services Canada, 1984).
[18] Lynk, "Disability and Work" *supra* note 16 at 205.
[19] *O'Malley*, *supra* note 14.
[20] *Ibid* at para 20.
[21] *Ibid* at para 18, 20.

will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground" to impose a condition that disproportionately affects an individual or group of employees.[22] In dealing with adverse effect discrimination, the condition is not struck down but instead some accommodation must be provided by the employer.[23] This duty to accommodate is limited by undue hardship: where the employer's business would be unduly interfered with or the accommodation would create an expense to the employer, it may amount to undue hardship.[24] Shortly after, the SCC in *Bhinder v Canadian National Railway* (*Bhinder*) determined that the CHRA set out a bona fide occupational requirement (BFOR) defence.[25] Where a working condition is proven to be a BFOR or reasonably necessary for the operation of the business, then it is not considered discriminatory and so the duty to accommodate is not even triggered.[26] From the beginning, courts and legislatures have sought to balance the rights and needs of the employee and the employer.

3.1.2 Developing the duty to accommodate

With the duty to accommodate set out, the courts and tribunals now had to deal with the details of the practical application. In *Andrews v Law Society (British Columbia),*[27] the SCC expanded the definition of discrimination in the *Charter* to encompass the idea of substantive equality as the ideal wherein to prove discrimination, the standard must have a "differential impact on him or her in the protection or benefit accorded by law" and that this impact is discriminatory.[28] With this in mind, the SCC rejected the approach in *O'Malley* and *Bhinder* in *Central Alberta Dairy Pool v Alberta* (*Central Alberta Dairy Pool)*[29] in 1990 and articulated a new discrimination test. In this test, first, it must be determined whether the discrimination was direct or adverse effect. If it was direct, then the discrimination can only be justified as a BFOR; if the discrimination was adverse effect,

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[22] *Ibid* at para 18.
[23] *Ibid* at para 20.
[24] *Ibid* at para 23.
[25] *Bhinder v Canadian National Railway*, [1985] 2 SCR 561 at para 16. The SCC also confirmed that anti-discrimination legislation applies to both direct and adverse effect discrimination.
[26] *Ibid* at para 13. The dissent argued that the duty to accommodate should be incorporated into the BFOR whereupon the impact of the requirement on the individual should be assessed at paras 33-34.
[27] [1989] 1 SCR 143.
[28] *Ibid* at para 28; see also Lynk, "Disability and Work" *supra* note 16 at 207.
[29] *Central Alberta Dairy Pool*, *supra* note 14.

then the rule will be upheld generally and accommodated individually up to the point of undue hardship.[30] Although this test was more expansive than the prior approach, "its application was unduly hampered by its complicated structure."[31] The SCC also set out a non-exhaustive list of factors that should be considered when determining undue hardship: "financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of work force and facilities" as well as size of the operation and safety.[32]

In the same year, the US enacted the ADA, which deals specifically with issues affecting persons with disabilities. The ADA "explicitly endorses equal opportunities for individuals with disabilities."[33] The ADA sought to create "universal accessibility in the social and physical environment,"[34] but instead was interpreted so narrowly and conservatively by requiring a certain gradation of limitation to qualify as disabled that people who would be considered disabled in Canada were excluded in the US.[35] In a trilogy of cases in 1999,[36] the US Supreme Court "concluded that the plaintiffs were not 'individuals with disabilities' because the determination of whether they were 'substantially limited' should be made *after* a court considered the effect of mitigating measures such as medication, assistive technology, accommodations, or modifications on the individual."[37] Although disability rights advocates criticized this approach, the US Supreme Court further limited the application of the ADA by requiring substantive limitation to include only severe restriction of centrally important activities to daily life.[38] Thus, the gatekeeper aspect in the US approach was to qualify as a person with a disability, which was a narrow test, whereas

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[30] *Ibid* at para 63.
[31] Lynk, "Disability and Work" *supra* note 16 at 210.
[32] *Central Alberta Dairy Pool*, *supra* note 14 at para 74.
[33] CGK Atkins, "A Cripple at a Right Man's Gate: A Comparison of Disability, Employment and Anti-discrimination Law in the United States and Canada" (2006) 21:2 CJLS 87 at 93 [Atkins].
[34] *Ibid* at 107.
[35] *Ibid* at 108; Ravi Malhotra, "The Law and Economics Tradition and Workers with Disabilities" (2008) 39 Ottawa L Rev 249 at 258. The ADA is federal legislation that applies across the US. Canada cannot federally regulate labour issues as it falls within provincial powers.
[36] *Sutton v United Air Lines, Inc*, 527 US 471 (1999); *Albertson's Inc v Kirkingburg*, 527 US 555 (1999); *Murphy v United Parcel Service, Inc*, 527 US 516 (1999).
[37] Ruth Colker, *The Law of Disability Discrimination*, 7th ed, (San Francisco: Matthew Bender & Company, LexisNexis Group, 2009) at 29 [Colker].
[38] *Toyota Motor Mfg., Kentucky, Inc v Williams*, 534 US 184 (2002); See also *ibid* at 29-30.

in Canada, there were lesser limitations including proving discrimination, establishing a BFOR, and undue hardship, but no qualifying requirement to bring a claim. Canadians had to prove disability to succeed in the claim, but not as a prerequisite to bringing a claim. Despite formalizing disability rights in federal legislation, the US accommodation duty provided less access because of the rigid application and limitations, whereas Canada had more flexibility in the development and application of the duty to accommodate.

3.1.3 A unified approach: the *Meiorin* test

In Canada, around the same time, the SCC diverged even more from the US approach. In 1999, the SCC decided two major cases: *Law v Canada (Minister of Employment & Immigration)* (*Law*)[39] and *British Columbia (Public Service Employee Relations Commission) v BCGSEU (Meiorin Grievance)* (*Meiorin*).[40] In *Law*, the SCC articulated a complex test for determining a *prima facie* breach of the *Charter*'s equality provision.[41] In *Meiorin*, the SCC set out a new discrimination test. The SCC rejected prior tests completely and removed the distinction between direct and adverse effect discrimination because it was "difficult to justify."[42] The SCC criticized the prior approach as it may "legitimize systemic discrimination"[43] and accommodation was limited to a formal model of equality.[44] The new unified approach contains three steps, wherein the employer may defend the impugned rule by establishing on a balance of probabilities:

> (1) That the employer adopted the standard for a purpose rationally connected to the performance of the job;

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[39] [1999] 1 SCR 497 [*Law*].
[40] [1999] 3 SCR 3 [*Meiorin*].
[41] *Law*, *supra* note 39 at para 39. The test is as follows: Step 1: "does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics? If so, there is differential treatment for the purpose of s 15(1)." Step 2: "was the claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds? Step 3: "does the differential treatment discriminate in a substantive sense, bringing into play the *purpose* of s 15(1) of the *Charter* in remedying such ills as prejudice, stereotyping, and historical disadvantage?"
[42] *Meiorin*, *supra* note 40 at para 27.
[43] *Ibid* at para 39
[44] *Ibid* at para 41.

(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.

The first two steps deal with the BFOR requirement and the accommodation duty is found in the third step, limited by undue hardship. This approach was confirmed in *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)* (*Grismer*).[45] *Grismer* is one of the most important disability in the workplace cases decided by the SCC because of its creative application of the *Meiorin* test. Here, despite having a condition that affected his eyesight, the claimant continued to drive well at work and on public roads with the use of special glasses. However, he was refused individual assessment and was not allowed to receive a license, thus was unable to complete his job duties. The blanket prohibition against licenses for persons with this eyesight condition barred individual assessment, despite the fact that an absolute ban was not reasonably necessary, as required by the third step of the *Meiorin* test. The SCC found that the British Columbia government discriminated against the claimant because it was unable to meet the test for reasonable necessity or undue hardship as set out in the *Meiorin* test. The impugned standard was not justified. Given that this was a government policy, not a workplace one, the reach of accommodation was extended to apply beyond the workplace. *Grismer* demonstrated a flexible and sensitive approach to accommodation with a social model influence by considering which functional limitations could or could not be accommodated.

Although the *Meiorin* test was positively received, the details of the accommodation duty still required clarification. Courts have made decisions using this test to establish High Law, which have been at times "overly cautious and logically inconsistent" whereas others have been "aspirational."[46] Tribunals and boards have been responsible for the heavy lifting

[45] [1999] 3 SCR 868 [*Grismer*].
[46] Lynk, "Disability and Work" *supra* note 16 at 205.

in translating the Courts' principles into operational rules, creating Low Law.[47] In assessing the efficacy of the duty of accommodation, Low law is essential because the greater expertise, experience, and flexibility in decision-making and solutions enables the evolution of the duty. The duty to accommodate in Canada has been broadly interpreted to create a "two-way relationship. To comply with the duty, an employer must be prepared to adjust its workplace to the particular requirements of the employee's disability."[48] Furthermore, it is apparent that "the US and Canada have distinctly separate judicial response to anti-discrimination law."[49]

3.2 The current duty of accommodation in Canada

With the *Meiorin* test in hand, Canadian courts, academics, and tribunals were now responsible for determining the application of the duty to accommodate. The application of the *Meiorin* test itself also depends on a finding of discrimination. For disability-based employment discrimination, three things must be proved: (1) existence of a distinction; (2) this distinction is based on a disability or perceived disability; and (3) the distinction interferes with the right to full and equal human rights and freedoms.[50] Some thought was required to understand the framework of the test—should accommodation be considered a standalone concept or does it properly belong integrated in the BFOR discrimination test? The correct understanding is necessary in order to satisfy the purpose of the test and of accommodation. The practical implications of the framework and purpose sets out the responsibilities of the employee and employer in determining accommodation. Although the "rise of human rights obligations, and, in particular, the emergence of the duty to accommodate, has become the most significant workplace law development in recent times,"[51] this has not been a perfect transition.

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[47] *Ibid*.
[48] Michael Lynk, "Disability and the Duty to Accommodate: An Arbitrator's Perspective" *Labour Arbitration Yearbook 2001-2002* (Toronto: Lancaster House, 2002) 51 at 53 [Lynk, "An Arbitrator's Perspective"].
[49] Atkins, *supra* note 33 at 87.
[50] *ADGA Group Consultants Inc v Lane* (2008), 91 OR (3d) 649 (Sup Ct) at para 85 [*Lane*]; See also *Grismer*, *supra* note 45 at para 23 and *Québec (Commission de droits de la personne et des droits de la jeuneese) v Montréal (City)*, 2000 SCC 27 at paras 77 and 79 [*City of Montréal*].
[51] Lynk, "Disability and Work" *supra* note 16 at 190.

3.2.1 The purpose of accommodation

The decisions of *Meiorin* and *Grismer* raised the hopes and expectations of the disability rights movement. These cases set out a vision of an inclusive workplace where "human rights legislation would be interpreted liberally and purposively, to achieve its substantive equality goals."[52] However, there are concerns that "efforts are being made to return us to a minimalist aversion of accommodation."[53] This is despite the fact that "the *Charter* supports a unified approach to equality which emphasizes accommodation before any reasonably necessary limits are considered."[54] The duty to accommodate, as set out in the *Meiorin* test, includes both substantive and procedural aspects.[55] However, the law is not settled on this issue at this time. Some recent rulings have stated that a procedural duty exists whereas other legal forums have rejected the idea.[56] For example, the Federal Court recently held that, once it is determined that substantive equality is not possible, then there is no procedural right to accommodation, under the CHRA or the *Meiorin* test.[57] The substantive dimensions require substantive equality goals, which necessitate "changes at all levels of society: individual behaviour, perceptions, and attitudes; ideas and ideology; community and culture; institutions and institutional practices; and, deeper structures of social and economic power."[58] In other words, the substantive dimension of accommodation—substantive equality—requires an institutional change. Arguably,

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[52] Gwen Brodsky, Shelagh Day, & Yvonne Peters, *Accommodation in the 21st Century*, (March, 2012), online: Canadian Human Rights Commission <http://www.chrc-ccdp.gc.ca/proactive_initiatives/default-eng.aspx> at 15 [Brodsky, Day & Peters].
[53] *Ibid* at 42.
[54] Tamar Witelson, "From Here to Equality: Meiorin, TD Bank, and the Problems with Human Rights Law" (1999) 25 Queen's LJ 347 at 380.
[55] Colleen Sheppard, "Inclusion, Voice, and Process-Based Constitutionalism" (2013) 50 Osgoode Hall LJ 547 at 556 [Sheppard, "Inclusion"].
[56] *Lane*, *supra* note 50; *Lee v Kawartha Pine Ridge District School Board*, 2014 HRTO 1212, but see *Re Cruden and Canadian International Development Agency*, 2013 FC 520 [*Cruden*]; *Gahagan v James Campbell Inc*, 2014 HRTO 14; *Stewart v Elk Valley Coal Corp*, 2015 ABCA 225.
[57] *Cruden*, *supra* note 56 at paras 67-76.
[58] Melina Buckley, "Law v Meiorin: Exploring the Governmental Responsibility to Promote Equality under Section 15 of the *Charter*" in Fay Faraday, Margaret Denike, & M Kate Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006) 179 at 180 [Buckley].

Justice McLachlin in *Meiorin* was endorsing an institutional change by challenging the standard rather than the individual complaint.[59]

Thus, "*Meiorin* reveals another understanding of the purpose of human rights legislation, namely the elimination of the 'systemic discrimination' which occurs through the application of exclusionary *standards* that fail to take into account the real characteristics of a group."[60] This is in fact what provides the promise of accommodation to amount to more than formal equality for individuals. So in reality, there are actually two forms of accommodation: "institutional policy change accommodation and individual accommodation."[61] The former entails dealing with the systemic problem to change the workplace and society and hopefully establish a more inclusive standard, whereas the latter involves an *ad hoc* individual accommodation that deals with the standard after the fact in a way that may still exclude the individual in other aspects.[62] Another way of thinking about it is the "distinction between the duty of non-discrimination and the responsibility to promote equality,"[63] for individual and institutional policy change accommodation, respectively. In terms of the practical application, this means that the duty to accommodate requires two steps: "First, an employer must consider whether the standard itself can be changed so as to be more inclusive and promote substantive equality in the workplace. Second, if this is not possible, or if the standard is fully justifiable…then substantial efforts toward individual accommodation are still required."[64] Thus, employers must first consider institutional policy accommodation and, only if that is not possible, then individual accommodation.

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[59] Colleen Sheppard, "Of Forest Fires and Systemic Discrimination: A Review of British Columbia (Public Service Employee Relations Commission) v BCGSEU" (2001) 46 McGill LJ 533 at 553 [Sheppard, "Of Forest Fires"].
[60] Brosky, Day & Peters, *supra* note 52 at 22.
[61] Sheppard, "Of Forest Fires" *supra* note 59 at 553.
[62] *Ibid*; Dianne Pothier, "How Did We Get Here? Setting the Standard for the Duty to Accommodate" (2009) 59 UNB LJ 95 at 105 [Pothier, "Setting the Standard"].
[63] Dianne Pothier, "Tackling Disability Discrimination at Work: Toward a Systemic Approach" (2010) 4 McGill JL & Health 17 at 180 [Pothier "Tackling Disability Discrimination"].
[64] Buckley, *supra* note 58 at 190.

The CRPD "guarantees rights to accessibility, access to justice, independent living and community inclusion, education, employment, and an adequate standard of living,"[65] all of which falls under institutional policy accommodation to some extent. As such, the duty to accommodate persons with disabilities must include two parts: changing the institution and the individual. However, "[p]rogress towards a systemic approach has been modest" since *Meiorin*, and instead accommodation remains focused on the individual.[66] For the most part, the legal process for dealing with accommodation deals with procedural issues and fails to engage with the substantive aspect of accommodation.[67] The accommodation duty is dealt with mostly on a complaint-driven basis. This is despite evidence from public reviews of human rights enforcement in the early 2000s that "concluded that the complaint-driven model was an outdated and ineffective way of addressing forms of discrimination that are systemic."[68] Thus, Canadians with disabilities are left to "negotiate accessibility on their own, resulting in a largely inaccessible social and physical Canadian environment."[69] However, there is hope for the future. The *Accessibility for Ontarians with Disabilities Act 2005*[70] requires Ontario to be fully accessible for accommodation, employment, the physical environment, and goods and services by January 1, 2025.[71]

Accommodation amounting to genuine inclusiveness is thus set out by the SCC in *Meiorin* and *Grismer* and the CRPD.[72] The duty of accommodation itself flows from the right to equal treatment articulated in section 15 of the *Charter*. The duty is also enshrined in human rights legislation like the OHRC and the CHRA so that it is also a statutory right. Gillian Demeyere argues that this statutory right "can be conceived as a purely contractual right arising from the work-for-wages exchange at the core of the contract of employment

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[65] Brodsky, Day & Peters, *supra* note 52 at 43; See CRPD, *supra* note 8 at Article 4.
[66] Pothier, "Tackling Disability Discrimination" *supra* note 63 at 27.
[67] Sheppard, "Inclusion", *supra* note 55 at 573.
[68] Kevin Banks, Richard P Chaykowski, & George A Slotsve, "The Disability Accommodation Gap in Canadian Workplaces: What Does it Mean for Law, Policy, and an Aging Population?" (2013) 17 CLELJ 295 at 307.
[69] Atkins, *supra* note 33 at 88.
[70] SO 2005, c 11.
[71] M David Lepofsky & Dr Randal NM Graham, "Universal Design in Legislative Drafting—How to Ensure Legislation is Barrier-Free for People with Disabilities" (2010) 27 NJCL 129 at 136.
[72] Brodsky, Day, & Peters, *supra* note 52 at 3.

or collective agreement."[73] As such, the duty to accommodate can be understood as a long-standing contractual right in the employer-employee relationship that has recently been subsumed in human rights law. Demeyere then views the duty of accommodation as "simply the duty to refrain from setting and relying on occupational requirements that are not reasonably necessary to the performance of the work. It is a negative duty: a duty not to do something. The accommodation itself may take the form of a positive act."[74] This perspective offers support for the existence of the duty to accommodate and enables the imposition of the duty to complement rather than conflict with contractual principles of employment.[75]

3.2.2 The framework of the *Meiorin* test and how accommodation fits

The above discussion, similar to many academic sources, examines accommodation as an independent duty, however, the duty to accommodate is part of the third step of the *Meiorin* test. Dianne Pothier argues that the "duty to accommodate cannot be properly understood as a stand-alone concept. It should be seen as subsumed within the overarching concept of reasonable necessity as a critical part of the test for a BFOR. It is also inextricably bound up with the qualification of undue hardship."[76] In practice, the first two steps of the tests are minor considerations with the third step constituting the "make or break part."[77] Yet, application of the full *Meiorin* test means that the employer could fail the test in a prior step where the standard is not rationally connected to the performance of the job or reasonably necessary to the fulfillment of the job. The employer could also fail in the first part of the third step if it is unable to prove that the standard is reasonably necessary, before any consideration of accommodation.[78]

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[73] Gillian Demeyere, "Human Rights as Contract Rights: Rethinking the Employer's Duty to Accommodate" (2010) 36 Queen's LJ 299 at 302.
[74] *Ibid* at 320.
[75] *Ibid* at 327.
[76] Pothier, "Setting the Standard" *supra* note 62 at 95.
[77] *Ibid* at 98.
[78] Pothier, "Tackling Disability Discrimination" *supra* note 63 at 25.

Thus, the "concepts of reasonable necessity, duty to accommodate, and the defence of undue hardship are all inextricably linked. None can be properly understood in isolation. None is a stand-alone concept. They are substantially interrelated."[79] If an employee can perform the core responsibilities of the job with accommodation short of undue hardship, then a standard that conflicts with the accommodation is not reasonably necessary and is not a BFOR. Conversely, if no accommodation short of undue hardship will enable the completion of these core tasks, then the standard is reasonably necessary and is a BFOR.[80]

Accommodation, with or without consideration of reasonable necessity and BFOR, is a common subject in human rights complaints and labour arbitrations. As such, the *Meiorin* test has been considered and interpreted abundantly by tribunals and arbitrators. Despite the fact that "[h]uman rights obligations and the accommodation duty have a universal application to all workplaces,"[81] when assessing employment law, in particular wrongful dismissal claims, courts have rarely taken the *Meiorin* test and the duty to accommodate into consideration.[82] One of the most recent cases in which the SCC dealt with a person with a disability who needed accommodation was *Honda Canada Inc v Keays* (*Honda Canada*).[83] The employee, Keays, sued for wrongful dismissal. After a one year leave on account of his chronic fatigue syndrome, he returned to work and was placed in a disability program that allowed employees to take absences from work with a doctor's notes. The employer questioned the legitimacy of the doctor's notes and asked for the employee to meet with a medical specialist to determine how his disability could be accommodated. The employee refused to do so without details of the consultation and the employer stated that his employment would be terminated if he continued to refuse, a plan which they implemented. The SCC stated, "[t]his appeal raises a number of important issues related to the proper allocation of damages in wrongful dismissal cases," thus overlooking accommodation as an issue.[84] When discussing punitive damages, the court disregarded

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[79] Pothier, "Setting the Standard" *supra* note 62 at 104.
[80] *Ibid* at 100.
[81] Lynk, "Disability and Work" *supra* note 16 at 244.
[82] *Ibid* at 218.
[83] 2008 SCC 39 [*Honda Canada*].
[84] *Ibid* at para 19.

human rights concerns with the "view that the [OHRC] provides a comprehensive scheme for the treatment of claims of discrimination and *Bhadauria*[85] established that a breach of the [OHRC] cannot constitute an actionable wrong."[86]

3.2.3 Responsibilities of the employee and employer flowing from the duty of accommodation

The employer and employee both have responsibilities flowing from the duty to accommodate. The employer has both procedural and substantive obligations: it must assess the circumstances to meet the procedural duty and it must not "dismiss someone without establishing that it could not accommodate the disability of that person without undue hardship."[87] Thus, "the onus is on the employer to establish that it has met procedural and substantive duties to accommodate employees with a disability to the point of undue hardship, rather than the employee having to establish that the employer has breached the [OHRC]."[88] This procedural duty involves "conducting an independent assessment of an employee's accommodation needs and whether the employee has the capacity to resume work. Accepting the conclusions of another organization or agency without making an independent determination can amount to a breach of the duty."[89] However, the Federal Court recently held that where it is determined that substantive accommodation is not possible, there is no procedural right.[90] The employer must continue to reassess the accommodation and the needs of the employee because of the changing nature of disability.[91] This assessment and reassessment may necessitate that the employer learn about the disability in order to be better informed about the condition and limit stereotyping and assumptions.[92] The employer should keep communication open and may need to warn

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[85] *Seneca College of Applied Arts and Technology v Bhadauria*, [1981] 2 SCR 181. This case is known for barring the tort of discrimination for several reasons including that human rights legislation already dealt with the violations of its substantive terms.
[86] *Ibid* at para 64.
[87] *Lane v ADGA Group Consultants Inc*, 2007 HRTO 34, aff'd in *Lane*, *supra* note 50.
[88] *Canadian Mental Health Assn v OPSEU, Local 133* (2012), 110 CLAS 62 (Ont Arb) at para 121, citing *Lane*, *ibid*.
[89] Lynk, "An Arbitrator's Perspective", *supra* note 48 at 73.
[90] *Cruden*, *supra* note 56 at 67-76.
[91] *Ibid* at 74.
[92] *Lane*, *supra* note 50 at paras 106-107.

the employee about problems, particularly if an issue like absenteeism could result in dismissal.[93]

The substantive obligations under the duty to accommodate requires employers to accommodate up to the point of undue hardship. This may require re-bundling the position, providing training, transfer to an open position, or other accommodations depending on the needs and abilities of the person with the disability and the employer.[94] The Ontario Human Rights Commission (Commission) publishes a policy and guidelines on accommodation which requires the employer to "obtain expert opinion or advice where needed," "take an active role" in investigating, "grant accommodation requests in a timely manner," and "bear the cost of any required medical information or documentation."[95] Although these guidelines receive deference, they are not binding.[96] Unions have similar responsibilities. A union may be responsible for discrimination where it imposed the discriminatory rule or where it interferes with the employer's efforts to accommodate.[97] However, unions differ in that their focus is primarily on any impact on other employees—where the accommodation effects other employees significantly, this may constitute undue hardship.[98] The Commission requires unions to "share joint responsibility with the employer to facilitate accommodation."[99] The union's duty to accommodate arises when its "involvement is required to make accommodation possible and no other reasonable alternative resolution of the matter has been found or could reasonably have been found."[100]

The employee also has some responsibilities. The employee cannot be passive throughout the process, but must instead contribute to determining the best accommodation and

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[93] Lynk, "Disability and Work" *supra* note 16 at 240-241.
[94] See Lynk, "An Arbitrator's Perspective" *supra* note 48 at 72-75.
[95] Ontario, Ontario Human Rights Commission, *Policy and guidelines on disability and the duty to accommodate* Revised version (Toronto: OHRC, 2009) at 19 [*Policy and guidelines*].
[96] *Complex Services Inc v OPSEU, Local 278*, [2012] OLAA No 209 at paras 80-82.
[97] *Renaud v Central Okanagan School District No 23*, [1992] 2 SCR 970 at paras 43-44 [*Renaud*]. There are a multitude of tribunal decisions that have articulated and expanded on the union's duty.
[98] *Ibid* at para 45.
[99] *Policy and guidelines*, *supra* note 95 at 19.
[100] *Renaud*, *supra* note 97 at para 47.

cooperate.[101] The Commission's requirements for the person with a disability revolve around informing and co-operating with the employer.[102] According to Michael Lynk, the employee has four responsibilities:

> (1) they must actively co-operate with the employer in locating potential accommodations,
> (2) if offered a reasonable accommodation, they must provide a persuasive reason as to why the proposal cannot be accepted,
> (3) they are required to accept a reasonable accommodation offer that satisfies the employer's operation needs if their legitimate concerns have been sufficiently addressed, and
> (4) if they decline to accept a reasonable accommodation, the employer's accommodation duty is normally extinguished.[103]

Thus, the employee must be an active participant in the accommodation process.

Even where employers, unions, and employees satisfy their responsibilities flowing from the duty to accommodate, sometimes the accommodation itself cannot be provided. Where the accommodation amounts to undue hardship, the duty to accommodate will be satisfied. In regards to undue hardship, "[w]hile the general rule is easy to state, the outer boundaries of accommodation are much harder to identify."[104]

3.3 Undue hardship

Rarely is there any argument regarding whether the individual has a disability under the meaning in the Human Rights Code or even entitlement to accommodation.[105] Instead the area of disagreement usually lies in establishing undue hardship. The contention in this aspect seems to fall into two parts: the determination of the standard as a BFOR and establishing that the required accommodation constitutes undue hardship.[106] Once again, it is apparent that reasonable necessity, accommodation, and undue hardship are

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[101] Lynk, "An Arbitrator's Perspective" *supra* note 48 at 121.
[102] *Policy and guidelines*, *supra* note 95 at 19.
[103] Lynk, "Disability and Work" *supra* note 16 at 242-243.
[104] Lynk, "An Arbitrator's Perspective" *supra* note 48 at 58.
[105] See e.g. *Re Laurentian University and LUFA (Dr. X)* (2015), 123 CLAS 186 (Ont Arb) [*Dr. X*] at para 100.
[106] See e.g. *Re North York General Hospital and SEIU, Local 1 (Smith)*, 2011CarswellOnt 16248 (Arb) at paras 13 & 15.

interrelated.[107] Tribunals and arbitrations are responsible for clarifying and applying the broad principles articulated by higher courts and, as such, Low Law is essential to understanding accommodation and undue hardship. First, the major High Law cases are delineated. This will be followed by the articulation of the application of the High Law principles in Low Law tribunals and arbitrations.

3.3.1 High Law: what do the higher courts say about undue hardship?

Undue hardship is determined on a case-by-case basis for which there is no definite and exhaustive list of factors to consider. The SCC in *Meiorin* held that there may be a defence to the duty to accommodate if the employer can "establish that it cannot accommodate the claimant and others adversely affected by the standard without experiencing undue hardship."[108] The SCC drew on its earlier description in *Renaud* wherein the "use of the term 'undue' infers that some hardship is acceptable; it is only 'undue' hardship that satisfies this test."[109] The SCC also referred to the list of factors that should be considered when assessing the duty to accommodate and undue hardship delineated in *Central Alberta Dairy Pool* and specifically mentioned financial cost, interchangeability of workforce and facilities, and interference with rights of other employees.[110] Other factors listed in *Central Alberta Dairy Pool* included problems of morale of other employees, size of the operation, and safety.[111] This list of factors was non-exhaustive and instead they "should be applied with common sense and flexibility in the context of the factual situation presented in each case."[112] Having said that, not all of these factors have been given as much weight as others by courts and tribunals.[113]

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[107] Pothier, "Setting the Standard" *supra* note 62 at 104.
[108] *Meiorin*, *supra* note 40 at para 62.
[109] *Renaud*, *supra* note 97 at 984.
[110] *Meiorin*, *supra* note 40 at para 63.
[111] *Central Alberta Dairy Pool*, *supra* note 14 at para 74.
[112] *Chambly (Commission scolaire régionale) c Bergevin*, [1994] 2 SCR 525 at para 36.
[113] Michael Lynk, "Establishing Undue Hardship: What it Takes to Meet the Standard" (2012) [unpublished, used with permission of author] at 10-11 [Lynk, "Establishing Undue Hardship"].

In assessing accommodation and undue hardship, courts and tribunals should consider: whether there was any investigation of alternative approaches; if the standard was necessary; and, if other parties have satisfied their obligations flowing from the duty to accommodate.[114] Standards for assessing undue hardship are not articulated in legislation, but instead come from jurisprudence alone where the "specific objective is to eliminate exclusion that is arbitrary and based on preconceived ideas concerning personal characteristics which, when the duty to accommodate is taken into account, do not affect a person's ability to do a job."[115] As per step three of the *Meiorin* test: "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."[116]

Since *Meiorin*, the SCC has released a trilogy of cases on the topic of the duty to accommodate up to the point of undue hardship:[117] *McGill University Health Centre (Montréal General Hospital) v Syndicat des employés de l'Hôpital general de Montréal* (*McGill University*),[118] *Honda Canada*,[119] and *Hydro-Québec v Syndicat des employés-e-s de techniques professionnelles et de bureau d'Hydro Québec, section local 2000 (SCFP-FTQ)* (*Hydro-Québec*).[120] In all three of these cases, the employees struggled with absenteeism and chronic illnesses, which the employers attempted to accommodate but ultimately terminated the employees. The absenteeism was so excessive that termination may have been legitimate, but the SCC offered weak reasoning to justify it. Rather, the SCC provided an insufficient analysis of the accommodation duty that failed to engage with the key issues. *Honda Canada* is particularly egregious as the SCC did not provide any accommodation analysis or consideration of human rights principles, but focused on the common law cause of action of wrongful dismissal. Accommodation was denied in each case, yet it should have been a major focus as employers owe the duty of accommodation to each and every employee prior to consideration of termination and

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[114] *Meiorin*, *supra* note 40 at para 65.
[115] *City of Montréal*, *supra* note 50 at para 36.
[116] *Meiorin*, *supra* note 40 at para 54.
[117] *Kirby v Treasury Board (Correctional Service of Canada)*, 2014 PSLREB 41 at para 110 [*Kirby*].
[118] 2007 SCC 4 [*McGill University*].
[119] *Honda Canada*, *supra* note 83.
[120] 2008 SCC 43 [*Hydro-Québec*].

wrongful dismissal. Each of these cases fall short of what was set out in *Meiorin* and the creative and promising application of the test in *Grismer*, both of which were earlier SCC decisions. The SCC is not only struggling with the high standard it set out, but also failing to provide clear and useful reasoning. This is particularly disappointing given that there were clear opportunities for an accommodation analysis in each of these cases, which would have elevated the reasoning.

In *Honda Canada*, the SCC did not engage in any significant discussion of human rights or disability discrimination. The SCC spoke at length regarding automatic termination clauses and non-culpable absenteeism in the context of undue hardship and accommodation in *McGill University*. The SCC continued its stance that accommodation is not "absolute nor unlimited" with undue hardship as the impediment.[121] The duty to accommodate "balances an employer's legitimate expectation that employees will perform the work they are paid to do with the legitimate expectations of employees with disabilities that those disabilities will not cause arbitrary disadvantage."[122] However, employers cannot use collective agreements or automatic termination clauses to contract out of the duty to accommodate, but the specified periods in the agreements can be used as evidence of undue hardship, when they are exceeded.[123] Indeed, once the requirements of the collective agreement and the duty of accommodation have been met, the employer can dismiss the employee on the basis of innocent absenteeism.

In *Hydro-Québec*, the SCC restated the test for undue hardship:

> The test is not whether it was impossible for the employer to accommodate the employee's characteristics. The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work.[124]
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> Thus, the test for undue hardship is not total unfitness for work in the foreseeable future. If the characteristics of an illness are such that the proper

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[121] *McGill University*, *supra* note 118 at para 38.
[122] *Ibid* at para 63.
[123] *Ibid* at paras 20 & 27-28.
[124] *Hydro-Québec*, *supra* note 120 at para 16.

> operation of the business is hampered excessively or if an employee with such an illness remains unable to work for the reasonably foreseeable future even though the employer has tried to accommodate him or her, the employer will have satisfied the test.[125]
>
> The employer's duty to accommodate ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future.[126]

Furthermore, the SCC suggested that, due to the case-by-case analysis required, rigid rules for determining undue hardship should be avoided. Where the employer can offer more accommodation—if it is a larger or more flexible operation—then the employer must do so.[127] Where the employee will be unable to work for the reasonably foreseeable future, the decision to dismiss "must necessarily be based on an assessment of the entire situation."[128] The requirement of balancing needs is also articulated as enabling the rule that employers must respect the rights of employees to be compatible with the rule that employees must do their work.[129] This test seems like it could be narrowing the approach set out in *Meiorin* as well as declining the flexible and creative approach in *Grismer*. It appears that *Hydro-Québec*'s restatement of undue hardship is the main authority; tribunals and courts since then have depended on it.[130] However, these cases have been criticized as "call[ing] into question the expansive vision of human rights where employees with disabilities are concerned."[131] Despite the apparent disability discrimination in these three cases, the SCC did not engage with human rights law as the primary focus. Instead, the reasoning in these cases is weak and, as such, has been largely ignored by tribunals, with the exception of the test for undue hardship in *Hydro-Québec*. Thus, the influence of this trilogy of cases may be limited; however, the fact that the SCC struggles with this high standard for dealing with disability indicates that the duty of accommodation may not be

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[125] *Ibid* at para 18.
[126] *Ibid* at para 19.
[127] *Ibid* at para 17.
[128] *Ibid* at para 21.
[129] *Ibid* at para 19.
[130] See e.g. *Horvath v Rocky View School Division No 41*, 2015 AHRC 5; *Re Ambulance New Brunswick and CUPE, Local 4848 (Saunders)* (2013), 115 CLAS 257 (NB PSLRB); *CAW-Canada, Local 111 v Coast Mountain Bus Co*, 2010 BCCA 447 [*Coast Mountain Bus*].
[131] Judith Mosoff, "Lost in Translation?: The Disability Perspective in *Honda v Keays* and *Hydro-Québec v Syndicat*" (2009) 3 McGill JL & Health 137 at 138.

fully realized. In other words, despite progress with the duty of accommodation, there is still a long way to go.

3.3.2 Low Law: what do tribunals and arbitrators say about undue hardship?

Tribunals and arbitrators are responsible for the heavy lifting with regards to determining how to apply the broad principles set out by higher courts. Because the duty of accommodation flows from human rights principles found in the *Charter* and human rights codes across the provinces, the duty is Canada-wide. The majority of low law decisions on undue hardship in the workplace comes from labour arbitrations and human rights complaints. In their discretion tribunals and arbitrators may choose different understandings of the law than that set out by higher courts. This has allowed tribunals and arbitrators to ignore the weak reasoning of *Hydro-Québec*, *McGill University*, and *Honda Canada*. Having said that, they do draw on aspects of significant caselaw from the higher courts.

When determining accommodation and undue hardship, reference is almost always made to *Meiorin* and *Hydro-Québec*. Although the tests could be understood differently, usually both cases are referred to together, which indicates that they are not considered substantively different.[132] This is despite the possible narrowing of the test in *Hydro-Québec*. Undue hardship must be "proven by the employer on a case by case basis."[133] It does not depend on whether the disability is temporary or permanent; a permanent disability does not "automatically translat[e] into undue hardship—even where the disability restricts the employee from performing a core function of the job."[134] Furthermore, the employer cannot prematurely decide that the duty of accommodation has been met.[135] Where the employer has not even attempted to "investigate; assess; engage;

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[132] The BC Court of Appeal held that the tests were the same, see *Coast Mountain* Bus, *supra* note 130 at para 87-88.l
[133] *Hoyt v Canadian National Railway*, 2006 CHRT 33 at para 121 [*Hoyt*].
[134] *Re British Columbia (Ministry of Public Safety and Solicitor General) and BCGEU (Pearson)*, [2013] BCWLD 8653 (Arb) at para 193.
[135] *Re Clean Harbors Canada, Inc and TC, Local 419 (R(L))*, [2013] CLAD No 393 (Can Arb) at paras 30-31 [*Clean Harbors*].

propose alternative work duties or processes; and effect efforts and results directed to making an accommodation happen,"[136] then it is difficult to argue that the point of undue hardship has been reached.[137]

Regardless, there are limits to the duty of accommodation, which usually fall under the factors listed in *Central Alberta Dairy Pool*.[138] The factors that more readily amount to undue hardship are safety, disruption of a collective agreement, financial cost albeit at a high threshold, and legitimate operational requirements of the organization whereas morale of other employees, interchangeability, and size of the operation are usually given less weight.[139] However, a "mere apprehension that undue hardship would result is not a proper reason…to obviate the analysis."[140] When assessing undue hardship, the employer must consider the entire history of the interaction; it must be "based on an assessment of the entire situation," rather than a "compartmentalized approach."[141]

Health and safety has been given the most weight.[142] In assessing undue hardship where safety is a factor, "it is necessary to consider both the magnitude of the risk and the identity of those who bear it as elements of hardship."[143] However, the risk must be more than a hypothetical risk.[144] Additionally, in order to satisfy the accommodation duty, the employer "may have to permit a tolerable range of risk."[145] Presumably, safety will be a more convincing ground of undue hardship in workplaces that offer more risk. The disruption of a collective agreement is also an important factor in assessing undue hardship. The collective agreement is treated with a fair amount of deference. As such, an employer can only interfere with the agreement where a search for a suitable accommodation does not

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[136] *Nicol v Treasury Board (Service Canada)*, 2014 PSLREB 3 at para 15 [*Nicol*].
[137] *Clean Harbors*, *supra* note *135* at para 31.
[138] *Supra* note 14.
[139] See Lynk, "Establishing Undue Hardship" *supra* note 113.
[140] *Hoyt*, *supra* note 133 at para 121.
[141] *Hydro-Québec*, *supra* note 120 at para 21; tribunals have followed this statement, see *Dr. X*, *supra* note 105 at para 144.
[142] Lynk, "Establishing Undue Hardship" *supra* note 113 at 2; *Brant (County) v OPSEU, Local 256*, [2010] OLAA No 117 [*Brant*] at para 52.
[143] *AA v Halifax Regional School Board*, 2013 NSSC 228 at para 50.
[144] *Domtar Inc and CEPT Local 74*, 2011 CanLii 52247 (Ont LA).
[145] Lynk, "Establishing Undue Hardship" *supra* note 113 at 4.

yield a result.[146] The employer may have to modify jobs, reallocate tasks, or even transfer the employee with some impact on coworkers.[147] Financial cost may also be a factor with some weight but in order to constitute undue hardship, it needs to be substantial.[148] Tribunals follow the high threshold confirmed in *Via Rail Canada Inc v Canadian Transportation Agency*,[149] in which costs must be extraordinary to amount to the point of undue hardship. In this case, the SCC put forth the question, "[w]hat monetary value can be assigned to dignity" to set this high threshold because it "will always seem demonstrably cheaper to maintain the status quo and not eliminate a discriminatory barrier."[150] Several other factors may impact the cost, including: size of the workplace, timing of the cost, any sharing of expense, and the possibility of external resources.[151]

The final factor that has been given weight is legitimate operational requirements of the organization, but the threshold to establish undue hardship remains high.[152] However, this is not a factor that has been explicitly set out in case law; rather it a useful heading under which a variety of considerations can be grouped. Most notably, absenteeism falls under this factor. Tribunals seem to follow *Hydro-Québec* wherein if the employee is unable to work for the reasonably foreseeable future even with accommodation, then the test for undue hardship is satisfied.[153] Absenteeism is a contentious issue because it is very difficult to accommodate. With the decision in *Hydro-Québec*, it has garnered more consideration in the lower courts, particularly because it is a common problem for persons with disabilities. Additionally, although the employer must be flexible, it "does not have to create a new job, or one that is not productive, or one that has core duties removed, or one that changes working conditions in a fundamental way."[154]

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[146] *ATU, Local 741 v London Transit Commission*, [2011] OLAA No 576 at para 13; *Re Evraz Inc, NA and USW, Local 5890* (2015), 121 CLAS 341 (Sask Arb) at para 38 [*Evraz*]; *Kirby*, *supra* note 117 at para 115.
[147] *Evraz*, *ibid* at para 23.
[148] *Brant*, *supra* note 142 at para 50; *Jardine v Costco Wholesale Canada*, 2014 BCHRT 214 at para 39-40.
[149] 2007 SCC 15.
[150] *Ibid* at para 225.
[151] Lynk, "Establishing Undue Hardship" *supra* note 113 at 10.
[152] *Ibid* at 7.
[153] *Hydro-Québec*, *supra* note 120 at para 18; see *Re Glencore Canada Corp and USW, Local 7085 (Roy)*, 2015 CarswellNB 424 (Arb) at paras 158 & 161. Absenteeism is discussed in more detail in Chapter 4.
[154] *Re Evraz Inc NA Canada and Shopmens (IABSRI, Local 805) (Curry)*, 2010 CarswellAlta 2842 (Arb) at para 35; also see *Kirby*, *supra* note 117 at para 116; *Nicol*, *supra* note 136 at para 75.

The high threshold for finding undue hardship requires a nuanced and understanding approach from employers, tribunals, and courts. Each case must be assessed individually on its own facts. This undoubtedly provides opportunities to further the rights of persons with disabilities, but it is also a time-consuming process, particularly when it is reported that disability discrimination complaints "have been the most common ground of discrimination complaints received by every human rights commission across Canada year after year."[155]

3.4 How does Canada compare?

The duty to accommodate exists in other jurisdictions outside of Canada. Canada imported various concepts of accommodation and disability discrimination from the US.[156] The UN CRPD and EU legislation also draws from the US approach, particularly the ADA.[157] The social model has strongly influenced the ADA,[158] CRPD, and the approaches in the EU and Canada[159] because the "concept of reasonable accommodation is grounded in the social model of disability… [which] recognizes that the interaction between an impairment and society can result in disabled individuals being exposed to disadvantage, and the goal of any reasonable accommodation is to eliminate or reduce the disadvantages resulting from such interaction."[160] Having said that, each approach has flaws that have hindered its ability to improve the rights of persons with disabilities. A comparison across the three approaches presented—Canada, the US, and the EU—highlights the strengths and weaknesses of each. These approaches are substantively comparable, but differ in terms of process: Canada is regulated provincially with federal principles, the US is regulated federally, and the EU sets out regulations that are then adapted by each Member State.

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[155] Lynk, "Disability and Work" *supra* note 16 at 193.
[156] *O'Malley*, *supra* note 14.
[157] Lisa Waddington, *From Rome to Nice in a Wheelchair: The Development of a European Disability Policy* (Groningen Amsterdam: Europa Law Publishing, 2006) at 24 [Waddington, *From Rome to Nice*].
[158] Michael Ashley Stein & Penelope JS Stein, "Beyond Disability Civil Rights" (2006-2007) 58 Hastings LJ 1203 at 1203-1204 [Stein].
[159] Lynk, "Disability and Work" *supra* note 16 at 191-192.
[160] Waddington, *From Rome to Nice*, *supra* note 157 at 22.

3.4.1 The US approach

When the ADA was enacted in the US to apply nationally, "disability rights advocates thought they had won a major victory,"[161] however it was interpreted and applied so narrowly that the threshold for qualifying as disabled served as a gatekeeper and barrier for access to rights for persons with disabilities.[162] The individual had to prove that he or she not only had a disability (or was regarded as having one) but also had to have a limitation on a major life activity as a result.[163] As such, the *ADA Amendments Act of 2008*[164] (ADAAA) was enacted to expand the definition of disability.[165] With the ADAAA, the standard to qualify as having a disability is not as demanding.[166] Despite the fact that the ADAAA has expanded this requirement, qualifying as a person with a disability in the US still seems to be gatekeeper for access to rights. The threshold in Canada is comparatively easy to qualify as a person with a disability; it is not usually an issue.

Once the person has qualified as disabled, then the general rule against discrimination applies. Under this rule, a failure to make reasonable accommodation, unless it would impose undue hardship, amounts to discrimination.[167] It acts like a negative duty wherein the employer must prevent discrimination with positive acts, rather than a positive duty which requires provision of aid. Accommodation is "'any change' in the work environment or in the way things are customarily done that enables a disabled individual to enjoy equal employment opportunities."[168] Thus, accommodation may require the employer to: restructure the position, reallocate non-essential tasks, change work schedule, reassign to a vacant position but only as a last resort, and permit unpaid leave.[169] There is no specific time limit for leave under the ADAAA or ADA, but generally "requests for indefinite leave

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[161] Samuel R Bagenstos, *Law and the Contradictions of the Disability Rights Movement* (New Haven: Yale University Press, 2009) at 1.
[162] Colker, *supra* note 37 at 29-30.
[163] ADA, *supra* note 10 §12102.
[164] 42 U.S.C.A. §12101 (2011) [ADAAA].
[165] *Ibid* at s 2. Linda B Dwoskin & Melissa Bergman Squire, "Reasonable Accommodation Under the New ADA: How Far Must Employers Go?" (2013) 38:4 Employee Relations LJ 3 at 3 [Dwoskin & Squire].
[166] Dwoskin & Squire, *ibid* at para 4.
[167] ADAAA, *supra* note 164 §12112(b); Colker, *supra* note 37 at 124-125.
[168] Dwoskin & Squire, *supra* note 165 at 4.
[169] *Ibid* at 14-16.

are inherently unreasonable."[170] The accommodation must be reasonable, which implies that "an employer is only obliged to take action that does not result in excessive costs, difficulties, or problems."[171] Undue hardship serves the same function in the US as in Canada: it is the limit of accommodation. However, in the US, under the ADAAA, finding undue hardship requires consideration of financial factors such as the cost of the accommodation, the financial resources of the employer, and the type of operation of the employer.[172] In determining an accommodation, it must be "reasonable in the sense both of efficacious and of proportional to costs," and undue hardship looks at excessive costs "in relation either to the benefits of the accommodation or to the employer's financial survival or health."[173] Financial considerations are the focus rather than human rights like in Canada's approach. This may be because the ADA is not actually focused on human rights, but instead revolves around civil rights and anti-discrimination, which are more individualized approaches.[174] Additionally, the development of both the ADA and ADAAA has been subject to compromise and pressure from businesses.[175]

3.4.2 The CRPD and the EU approach

The CRPD was enacted in 2007 and both Canada and the EU signed at that time, whereas the US did not sign until 2009. Canada and the EU have both ratified the CRPD but the US has yet to do so.[176] The US's reluctance is in spite of the fact that the ADA was the basis of the CRPD, yet Congress opposed the CRPD because of "a possible sacrifice of elements of US sovereignty."[177] This concern over sovereignty may be a reaction to some of the directive language in the CRPD that imposes responsibilities and duties on all the ratifying

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[170] *Ibid* at 16.
[171] Lisa Waddington, "When it is reasonable for Europeans to be confused: Understanding when disability accommodation is 'reasonable' from a comparative perspective" (2008) 29 Comp Lab L & Pol'y J 317 at 321 [Waddington, "Europeans to be confused"].
[172] ADAAA, *supra* note 164 §12111(10); Colker, *supra* note 37 at 125.
[173] *Vande Zande v State of Wisconsin Department of Administration*, 44 F.3d 538 (7th Cir. 1995) at 543.
[174] Stein, *supra* note 158 at 1204.
[175] Colker, *supra* note 37 at 29-32; See also Ruth Colker, *The Disability Pendulum: The First Decade of the Americans with Disabilities Act* (New York: New York University Press, 2007).
[176] UN, *Multilateral Treaties Deposited with the Secretary-General, Status of Treaties, Chapter IV: Human Rights, 15. Convention on the Rights of Persons with Disabilities* (5 May, 2016), online: United Nations Treaty Collection <https://treaties.un.org/>.
[177] Rick Cohen, "UN Draws Attention to Disability Treaty That US Still Hasn't Ratified" (24 September 2013) Non-Profit Q.

members, in ways that may go beyond the ADA and ADAAA. The CRPD defines reasonable accommodation as "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms."[178] Article 27 of the CRPD sets out positive duties in regards to employment such as enable access to programmes, promote opportunities, and employ persons with disabilities in the public sector. Thus, reasonable accommodation as set out by the CRPD requires satisfaction of the right to equality and non-discrimination, which necessitates positive measures to achieve substantive equality.[179] The CRPD "establishes the principle of inclusion as the key to equality for people with disabilities, and imposes positive obligations on governments to take steps to achieve it."[180]

The EU has ratified the CRPD and, as such, "EU Member States can be held accountable for breaches of international treaties to which they have acceded, even where the breach results from any acts or omission required by EU law."[181] This means that the EU must implement the CRPD.[182] Having said that, the EU had already adopted the *Employment Equality Directive*[183] (*Directive*) in 2000 that sets out a requirement for reasonable accommodation in Article 5 that was influenced by the ADA.[184] Unlike the ADA, the *Directive* is relatively brief and does not provide details or lengthy guidance.[185] The *Directive* is responsible for introducing accommodation to most of the Member States.[186] The Member States were responsible for transposing Article 5 into their legal systems, but

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[178] CRPD, *supra* note 8 at article 2.
[179] Janet E Lord & Rebecca Brown, "The Role of Reasonable Accommodation in Securing Substantive Equality for Persons with Disabilities: The UN Convention on the Rights of Persons with Disabilities" in Marcia H Rioux, Lee Ann Basser, & Melinda Jones, eds, *Critical Perspectives on human rights and disability law* (Boston: Martinus Nijhoff Publishers, 2011) 273 at 279-281.
[180] Brodsky, Day & Peters, *supra* note 52 at 45.
[181] Lisa Waddington, "The European Union and the United Nations Convention on the Rights of Persons with Disabilities: A Story of Exclusive and Shared Competencies" (2011) 18:3 MJECL 431 at 450.
[182] *Ibid* at 452.
[183] EC, *Council Directive 2000/78/EC*, [2000] OJ L303/16 [*Directive*].
[184] Waddington, *From Rome to Nice*, *supra* note 157 at 20-24.
[185] Waddington, "Europeans to be confused" *supra* note 171 at 319.
[186] *Ibid* at 218.

there is some variance in how they did so.[187] An accommodation is an adjustment but a reasonable accommodation is limited to those that are not excessive in terms of costs or hassle. It must also be effective.[188] Both the US and EU have a reasonableness requirement and the limitation of undue hardship, or disproportionate burden in the EU; the former has proven easier to establish.[189] A disproportionate burden is determined by looking at the cost of the accommodation, the financial resources of the organization, and availability of public funding.[190]

3.4.3 Canada stands apart

It is apparent that the approaches to disability discrimination and accommodation differ between Canada, the US, and the EU. Despite the fact that the EU and Canada both drew on the US approach, arguably Canada is the outlier whereas the EU and the US are more similar. The EU and the US place a lot of weight on financial costs in determining (1) the reasonableness of the accommodation and (2) existence of undue hardship or disproportionate burden, whereas Canada has set a high financial threshold only in regards to undue hardship.

Arguably, none of them meet the inclusive vision set out in the CRPD for accommodation. Although the US has tried to expand the definition of disability, people still struggle to qualify as disabled. Additionally, due to the high weight accorded to financial considerations, the US approach may tend towards the employer's needs, rather than balancing them with the employee's. The EU, having followed the US approach, also focuses on financial considerations, but does not seem to be quite as limited in terms of qualifying as disabled. Not only does the legislation in the EU lack detail with regards to application and implementation, but it is also relatively new, so more development is needed. Canada attempts to provide a more balanced approach with a focus on human rights rather than financial considerations. However, despite the inclusive vision of

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[187] *Ibid* at 321-338; See also, Waddington, *From Rome to Nice*, *supra* note 157 at 25-34.
[188] *Ibid* at 322.
[189] *Ibid* at 330.
[190] *Directive*, *supra* note 183 Preamble, recital 21; Waddington, *From Rome to Nice*, *supra* note 157 at 24.

Meiorin, the complaint-driven system and emphasis on individual accommodation rather than institutional results in an individualized application of the accommodation duty, which fails to satisfy the CRPD's imposition of positive obligations for institutional change. Despite these shortfalls, Canada, the US, and the EU each have potential for institutional change if the obligations and thresholds for accommodation are interpreted broadly.

3.5 Conclusion

The Canadian duty to accommodate has progressed rapidly over the past 30 years. The stated aim of accommodation is for substantive equality as a human right. This right flows from the *Charter* and in human rights codes across Canada. Thus, it is a Canada-wide duty. *Meiorin* presented the promise of an inclusive workplace that could achieve substantive equality; however, Canada has not quite fulfilled that promise. *Meiorin* set out the BFOR test that contains the accommodation duty in the third step. First, the employee must prove *prima facie* discrimination. Second, the employer must try to justify the impugned standard as reasonably necessary. If it is not, then it will be struck down, but if the standard is reasonably necessary then accommodation must be considered. There are two types of accommodation: institutional and individualized. The employer and employee both have obligations to actively try to determine the best accommodation. The CRPD requires a systemic approach to accommodation to remove the discrimination institutionally rather than on an individual-basis. However, in Canada, the approach after *Meiorin* seems to be individualized, based on individual complaints and an "after-the-fact" consideration of accommodation rather than starting from an inclusive position. This is where Canada could improve to satisfy the obligations under the CRPD.

If the accommodation cannot be provided, the employer must prove that it would constitute undue hardship. The current approach to determining undue hardship draws on *Meiorin* and *Hydro-Québec*, both in courts and tribunals. *Meiorin* set out that, "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."[191]

[191] *Meiorin*, *supra* note 40 at para 54.

The SCC in *Hydro-Québec* restated undue hardship as "not whether it was impossible for the employer to accommodate the employee's characteristics" but "where the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future" and "the proper operation of the business is hampered excessively."[192] This restatement of the test of undue hardship gives more weight to the undue hardship factors of safety, legitimate operational requirements, excessive financial costs, and interference with the collective agreement.

Canada's approach to accommodation differs from that in the US and EU. By framing it as a human rights issue and moving the focus from financial consideration, Canada offers the potential for an inclusive approach with substantive equality. Additionally, Canada may more readily be able to impose a positive duty on governments and employers to provide institutional accommodation and live up to the promise of *Meiorin*. Having said that, the shortcomings in the Canadian approach may contribute to the lesser access to accommodation and equality experienced by persons with chronic pain disorders.

[192] *Hydro-Québec*, *supra* note 120 at paras 16, 19, & 18.

Chapter 4

4 Accommodation of Chronic Pain Disorders in the Canadian Workplace

Then my body failed me and everything fell apart.[1]

What are chronic pain disorders? Chronic pain disorders qualify as a disability in Canada as per the statutory definition found in human rights legislation across Canada, including the Ontario *Human Rights Code* (OHRC)[2] and the *Canadian Human Rights Act* (CHRA),[3] as well as the ratified UN *Convention on the Rights of Persons with Disabilities* (CRPD).[4] This status as a disability stands regardless of whether it is considered a physical or mental disability—a debate that has not been settled, which is discussed later. Furthermore, persons with chronic pain disorders are entitled to the benefits of accommodation in the workplace, flowing from the right to equality set out in the *Canadian Charter of Rights and Freedoms* (*Charter*)[5] and the right to accommodation articulated in human rights legislation across Canada.[6] However, chronic pain disorders cannot always be considered under the umbrella of disability because the "lived experience of chronic illness…is often qualitatively different from that of disability."[7] Chronic illnesses differ from "mainstream" disabilities because of the fluctuation of symptoms, meaning that individuals have good days and bad days. The symptoms can fluctuate in impact and severity, which requires frequent re-assessment and alteration of the accommodation needs. By considering chronic pain disorders under the umbrella of disability, the law and the medical field overlook this significant difference.

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[1] Julie Devaney, "Narrative Preface: Julie's Story" in Sharon-Dale Stone, Valorie A Crooks, and Michelle Owens, eds, *Working Bodies: Chronic Illness in the Canadian Workplace* (Montréal & Kingston: McGill-Queen's University Press: 2014) 89 at 89.
[2] RSO 1990, c H 19 s 10(1) [OHRC].
[3] RSC 1985, c H 6 s 25 [CHRA]
[4] 30 March 2007, GA Res 61/106 at Preamble e and Article 2 [CRPD].
[5] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982 s 15.
[6] See e.g., OHRC, *supra* note 2 at s 17; CHRA, *supra* note 3 at s 5, 15.
[7] Sharon-Dale Stone, Valorie A Crooks, & Michelle Owen, "Introduction" in Stone, Crooks, & Owens, *supra* note 1, 1 at 3 [Stone].

Chronic pain disorders, like all disabilities, have unique features and, as such, encounter different barriers than other disabilities. Qualifying as a person with a disability is required to obtain accommodation, but persons with chronic pain disorders struggle to prove the medical legitimacy of their conditions because of the particular reliance on subjective evidence and lack of definitive diagnosis. What makes accommodation of individuals with chronic pain disorders unique and challenging is the episodic and unpredictable nature of absences and productivity. As such, these particular problems with medical legitimacy and absenteeism may require a different approach than that of other disabilities. By recognizing the different needs of the wide range of persons with disabilities, the goal of substantive equality through individualized tailoring is within reach.

Accommodation is meant to alleviate disadvantages that result from the interaction between an impairment and the social environment, which should mean that the existence of an impairment, regardless of the source or diagnosis, is sufficient to trigger the duty to accommodate.[8] This is a particularly important distinction for disabilities that struggle with medical legitimacy, such as chronic pain disorders. The chronic pain disorders of interest are chronic fatigue syndrome (CFS), fibromyalgia (FM), and multiple chemical sensitivity (MCS). Additionally, literature and case law dealing with mental illness in the workplace are used to draw implications for chronic pain disorders because of the similar issues in terms of accommodation including stigma and prejudice, invisible symptoms, chronic prognosis, and problems with medical legitimacy. There is a marked lack of research on the accommodation of chronic pain disorders from a legal perspective, but enough caselaw, particularly from tribunals and arbitrations, has developed to warrant an investigation.[9]

The duty to accommodate has enabled great progress in Canadian human rights law for persons with disabilities, particularly in the workplace. However, persons with chronic pain disorders have faced unique challenges in accessing the accommodation duty's promise of

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[8] Lisa Waddington, *From Rome to Nice in a Wheelchair: The Development of a European Disability Policy* (Groningen, Amsterdam: Europa Law Publishing, 2006) at 22.

[9] Caselaw was found through various legal search engines with a focus on labour arbitrations and human rights tribunals (and judicial review of those rulings), but with no limitations with regards to date or jurisdiction across Canada.

equality. Part I provides relevant medical literature on CFS, FM, and MCS as well as an examination of how they are commonly accommodated and why they are different from other disabilities. In Part II, the factors that influence accommodation of chronic pain disorders are discussed, including supportive supervisors, cooperative employees, acceptance of medical information, and a supported return to work. Part III examines undue hardship factors for the accommodation of chronic pain disorders, including, most significantly, innocent absenteeism. In Part IV, Canada's approach to accommodating chronic pain disorders is compared with that of the US and the European Union (EU), wherein shortcomings and strengths in Canada's approach will be elucidated. It is expected that Canada has a more flexible approach given its broader interpretation of disability, but the lack of objective medical evidence is likely an obstacle for the US, the EU, and Canada.

4.1 What are chronic pain disorders?

The chronic pain disorders of interest are CFS, FM, and MCS. In order to understand why chronic pain disorders pose different problems than other disabilities, the medical literature and common methods of accommodation are discussed. CFS, FM, and MCS have different symptoms and functional limitations in the workplace; however, they share common problems in accommodation.

4.1.1 Chronic Fatigue Syndrome & Fibromyalgia

Despite the fact that CFS and FM are considered different syndromes by the medical community, the terms have been used interchangeably on account of the similarities in symptoms and functional limitations. Further confusing the matter is the frequent diagnosis of both syndromes in the same individual. CFS has been described as feeling "like having flu all the time with no certainty of recovery."[10] It is also referred to as myalgic encephalopathy, although there is some disagreement as to whether these are the same

[10] Jo Marchant, "It was like being buried alive': battle to recover from chronic fatigue syndrome" *The Guardian* (15 February 2016) online: The Guardian <http://www.theguardian.com> [Marchant].

condition.[11] In the 1970s, it was known as "mass hysteria" and in the 1980s, it was called "yuppie flu."[12] It is evident from these flippant terms that CFS was not regarded as a legitimate or serious condition, a perspective that served, and continues to serve, as the basis for the dismissive attitude towards CFS demonstrated by courts, tribunals, and medical practitioners. This attitude results in further derogation and poor understanding. Although CFS is taken more seriously now, it is still subject to scepticism with regards to its seriousness, diagnosis, and existence from both the medical and legal communities.[13] CFS is characterized by "persistent fatigue, pain, sleep difficulties, and cognitive impairments."[14] There is no specific curative treatment nor a treatment to improve symptoms.[15] There is also no biological or single diagnostic test for CFS,[16] instead it is a diagnosis of exclusion.[17] In order to be diagnosed with CFS, the individual must self-report chronic fatigue for at least six months that can be a new or definite onset, but not a result of ongoing exertion, not substantially alleviated by rest and results in substantial functional limitations.[18] The individual must also have four or more of the following symptoms concurrently present for at least six months: impaired memory or concentration, sore throat, tender lymph nodes, muscle pain, multiple joint pain, headaches, unrefreshing sleep, and post-exertional malaise.[19]

CFS often co-occurs "with other so-called functional illnesses such as fibromyalgia, multiple chemical sensitivities, irritable bowel syndrome, and temporomandibular joint disorder."[20] Despite the fact that some objective abnormalities have been found in the

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[11] Sometimes these two names are used interchangeably whereas sometimes the conditions are distinguished; see RA Underhill, "Myalgic encephalomyelitis, chronic fatigue syndrome: An infectious disease" (2015) 85 Medical Hypotheses 765 and Marchant, *ibid*.
[12] Marchant, *ibid*.
[13] Institute of Medicine, "Beyond Myalgic Encephalomyelitis/Chronic Fatigue Syndrome: Redefining an Illness" (2015) 180:7 Military Medicine 721 at 721.
[14] Niloofar Afari & Dedra Buchwald, "Chronic Fatigue Syndrome: A Review" (2003) 160:2 American J Psychiatry 221 at 221 [Afari].
[15] Caralee Caplan, "Chronic fatigue syndrome or just plain tired?" (1998) 159:5 CMAJ 519 at 521 [Caplan].
[16] *Ibid* at 519.
[17] Afari, *supra* note 14 at 230.
[18] Caplan, *supra* note 15 at 519.
[19] *Ibid*.
[20] Afari, *supra* note 14 at 222.

central nervous system, immune system, and neuroendocrine regulation of persons with CFS, there is debate regarding whether CFS is a psychological or physical disorder in the medical literature,[21] which is further confused by the increased prevalence of mood disorders, particularly depression, for persons with CFS.[22] For now, treatment of CFS attempts to alleviate symptoms and improve functioning.[23]

FM can look like CFS to an outside perspective or even to medical professionals, who often diagnosis both syndromes in the same individual, but it is considered a separate syndrome. FM has been described as the "medicalization of misery"[24] and is characterized by widespread musculoskeletal pain that is "diffuse, fluctuating and with neuropathic features among some patients."[25] It was formerly called fibrositis syndrome.[26] Associated symptoms include fatigue; nonrestorative sleep and sleep disturbances; cognitive dysfunction including poor working memory, spatial memory alterations, and verbal fluency; mood disorder especially depression and anxiety problems; somatic symptoms like irritable bowel syndrome and migraines; and, sexual dysfunction.[27] Persons with FM have increased sensitivity to pressure and light touch, "which causes allodynia (perceived pain to non-noxious stimuli) and hyperalgesia (disproportionate pain to painful stimuli)."[28] Although these symptoms are similar to CFS, the difference seems to lie in the primary symptoms: CFS is characterized by fatigue whereas FM is distinguished by widespread musculoskeletal pain. Both syndromes are subject to a multitude of criticism regarding their existence and diagnosis, but there is a lack of investigation of the progress of research

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[21] See Morton E Tavel, "Somatic Symptom Disorders Without Known Physical Causes: One Disease with Many Names?" (2015) 128:10 American J Medicine 1054, which suggests that both FM and CFS are manifestations of the same somatic disorder wherein the "physical" symptoms are psychological in origin. This distinction seems to be quite polarizing in the medical and psychology fields; the research supports that these disabilities are physical or psychological, but rarely considers whether they could be both.
[22] Afari, *supra* note 14 at 230 & 225.
[23] *Ibid* at 230.
[24] Steven Chinn, William Caldwell, & Karine Gritsenko, "Fibromyalgia Pathogenesis and Treatment Options Update" (2016) 20:25 Curr Pain Headache Rep 1 at 1 [Chinn].
[25] Mary-Ann Fitzcharles, Peter A Ste-Marie, & John X Pereira, "Fibromyalgia: evolving concepts over the past 2 decades" (2013) 185: 13 CMAJ E645 at E646 [Fitzcharles, "Fibromyalgia"].
[26] Chinn, *supra* note 24 at 1.
[27] Mary-Ann Fitzcharles et al, "2012 Canadian Guidelines for the Diagnosis and Management of Fibromyalgia Syndrome" (2016), online: National Guidelines <http://www.fmguidelines.ca> at 1.1.2 [Fitzcharles, "2012 Canadian Guidelines"].
[28] Chinn, *supra* note 24 at 2.

in the medical field. Instead, researchers seem rather intractable as they support only one side of the various debates (real or not, psychological or physical, etc.) without assessing any middle ground or overlap.[29]

For FM, "symptoms are subjective, assessment is dependent entirely on patient report, no objective or laboratory test exists to confirm the diagnosis, and there is an absence of a gold standard of treatment."[30] FM is diagnosed through a scoring system where the individual must report at least moderately severe widespread pain for at least 3 months.[31] This scoring system is preferred over the previous diagnostic tender points test for greater sensitivity to symptoms. Similar to CFS, the cause of FM is unknown and it is also subject to debate regarding whether it is a psychological or physical condition or perhaps occupying the area in between medicine and psychology.[32] It is described as "a bitterly controversial condition. It pits patients, pharmaceutical companies, some specialty physicians, professional organizations, and governmental agencies…against the large majority of physicians, sociologists, and medical historians in what we call the 'fibromyalgia wars.'"[33] This controversy is evident in the caselaw. Some studies suggest that the "course of FM after onset indicate that the signs and symptoms usually stabilize within the first year of the syndrome and remain largely unchanged over time."[34] Despite this stabilization, the unpredictable character of the symptoms and fluctuation of impairment hinders individuals' control over the symptoms.[35]

For persons with CFS, FM, or CFS and FM, their performance at work can be impacted by their disability. This is problematic when the impairment is "difficult to reconcile with a

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[29] See e.g. Lauren Wierwill, "Fibromyalgia: Diagnosing and managing a complex syndrome" (2012) 24 J American Academy Nurse Practitioners 184 [Wierwill]; Masato Murakami & Woesook Kim, Psychosomatic Aspects of Fibromyalgia" in Kyung Bong Koh, ed, *Somatization and Psychosomatic Symptoms* (New York: Springer Science+Business Media, 2013) 165.
[30] Fitzcharles, "2012 Canadian Guidelines" *supra* note 27 at Introduction.
[31] Chinn, *supra* note 24 at 2.
[32] Joseph Bernstein, "Not the Last Word: Fibromyalgia is Real" (2015) 474 Clin Orthop Relat Res 304 at 305; M Hotopf & S Wessely, "Is fibromyalgia a distinct clinical entity? Historical and epidemiological evidence" (1999) 13 Baillieres Best Pract Res Clin Rheumatol 427.
[33] Frederick Wolfe, "Fibromyalgia Wars" (2009) 36:4 J Rheumatology 671 at 671.
[34] Wierwill, *supra* note 29 at 184.
[35] Paivi Juuso, et al, "The Workplace Experiences of Women with Fibromyalgia" online (2016), Musculoskeletal Care <http://www.wileyonlinelibrary.com> at 1 [Juuso].

mostly healthy looking individual."[36] It is important to note the value of employment for persons with CFS and FM, as some studies have found that, when employed, persons with these disabilities have better health and quality of life.[37] However, for persons with CFS and FM, "[t]heir body had become an obstacle to continuing to work."[38] An employee with CFS, FM, or CFS and FM will probably call in sick often, come in late due to fatigue and sleep problems, suffer from memory or concentration problems, and experience various physical fatigue and limitations. These symptoms will be chronic, fluctuating, and invisible—all of which make accommodation more difficult. The most common accommodations, by a large margin, for employees with CFS and FM are short-term and long-term disability leaves.[39] Other accommodations can include modified workspace,[40] ergonomic furniture,[41] reduced hours, transferring position,[42] minimized physical duties, and reassignment.[43] Cognitive and psychological accommodations could also be provided such as mentoring, changes to the social climate, alternative break schedules, working from home, and relaxation of workplace policies around sick time use and shift rotations.[44]

The medical field has clearly struggled with defining these two syndromes, resulting in not only a lack of consensus but also a lack of legitimacy to diagnoses of CFS and FM. Having said that, the medical field has made some progress. Although the lack of consensus remains, more research on treatment, the presentation of symptoms, and etiology have been conducted to slowly add some legitimacy by providing more definitive ways to diagnose and understand the syndromes.[45] The law has a history of deferring to the medical field for

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[36] Fitzcharles, "Fibromyalgia" *supra* note 25 at E650.
[37] *Ibid* at E650.
[38] Juuso, *supra* note 35 at 5.
[39] See e.g., *British Columbia (Liquor Distribution Branch) v BCGSEU*, 2011 CanLii 60460 (BC LA) at p 4; *Lloyd v Canada Revenue Agency*, 2009 PSLRB 15 at 33 [*Lloyd*]; *Panacci v Treasury Board (Canada Board Services Agency)*, 2011 PSLRB 2 at 20 [*Panacci*].
[40] *Re Ontario Human Rights Commission and Jeffrey and Dofasco*, [2007] OJ No 3767 (Sup Ct) at 2 [*Dofasco*].
[41] *Sketchley v Canada (Attorney General)*, 2004 FC 1151 [*Sketchley*].
[42] *City of Ottawa v Civic Institute of Professional Personnel*, 2010 CanLii 70011 (Ont LA) at 1 [*City of Ottawa*].
[43] *Panacci*, *supra* note 39; *Sketchley*, *supra* note 41.
[44] Rosemary Lysaght & Terry Krupa, "Employers' Perspectives on Workplace Accommodation of Chronic Health Conditions" in Stone, Crooks, & Owens, *supra* note 1, 91 at 108 [Lysaght].
[45] See e.g. Chinn, *supra* note 24.

definitions and proof of disabilities. With well-established and accepted disabilities, this is not usually problematic. However, for chronic pain disorders, the law depended on the medical field when it had no answers. As such, when CFS and FM were first claimed in courts in the late 1980s and early 1990s, claimants faced blatant scepticism and disbelief. The Alberta Queen's Bench noted in 1994,

> [F]ibromyalgia or chronic pain syndrome, as it is often called, has been the subject of litigation only in the recent past. It is as if all previous motor vehicle accident plaintiffs were fortunate enough never to have contracted this apparent debilitating condition whereas many of the recent plaintiffs did. It is a late 1980s/1990s condition that some courts have welcomed as a new medical condition worthy of expensive damages…I am satisfied that fibromyalgia has become a court-driven ailment that has mushroomed into big business for plaintiffs.[46]

This flippant and sceptical attitude is evident in much of the early caselaw dealing with CFS and FM, which were often referred to interchangeably.[47] Courts and tribunals were hindered by questions of whether the disability was proved through subjective evidence,[48] if the individual was malingering,[49] whether it was totally disabling,[50] and if causation was established to prove liability.[51] One of the main factors in these questions was the lack of medical research at the time. Often courts and tribunals attempted to determine the validity of CFS and FM as medical conditions, but, given the lack of research at the time, the findings were inconclusive, confused, or in the negative. However, these findings were made without acknowledging the limitations of the medical field. Nowhere is this more evident than in one of the leading cases at the time, *Mackie v Wolfe*, in which the court decided that FM and CFS (referred to as one condition) was really a personality disorder that could not then be a compensable physical condition because it was pre-existing and

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[46] *Mackie v Wolfe* (1994), 41 Alta LR (3d) 28 (CA) at paras 213 & 220 [*Mackie*].
[47] See *ibid*.
[48] See *Maslen v Rubenstein*, [1994] 1 WWR 53 (BC CA) at 59: "there must be evidence of a 'convincing' nature to overcome the improbability that pain will continue, in the absence of objective symptoms, well beyond the normal recovery period, but the plaintiff's own evidence, if consistent with the surrounding circumstances, may nevertheless suffice for the purpose."
[49] See *Mackie*, *supra* note 46 at para 64; *Louis v Esslinger, and one other action*, [1981] BCJ No 2112 (Sup Ct) [*Louis*]; *Jung v Waldron*, 1991 CanLii 448 (BC Sup Ct) [*Jung*].
[50] See *Palmer v Goodall*, 1991 CanLii 384 (BC CA); *Lyon v Gill* (1985), 34 ACWS (2d) 68 (Ont HC); *Stronge v London Life Insurance Co*, [1993] OJ No 103 (Gen Div).
[51] See *Louis*, *supra* note 49; *Decision No 219/87*, 1988 CanLii 17892 (ON WSIAT); *Jung*, *supra* note 49.

psychological in nature.[52] The court made this decision despite a variety of medical evidence supporting different findings. Although it is necessary for courts to make findings of fact, this particular finding seems to go beyond questions of law or fact and instead straying into areas clearly outside the court's expertise to make decisions of questions of medicine.

4.1.2 Multiple Chemical Sensitivity

MCS is "characterized by recurrent symptoms, referable to multiple organ systems, occurring in response to demonstrable exposure to many chemically unrelated compounds at doses far below those established to cause harmful effects in the general population."[53] It is also known as environmental sensitivities, environmental allergies, sick building syndrome,[54] and idiopathic environmental intolerance to those who consider it to be a psychiatric condition.[55] MCS was the last of the three chronic pain disorders discussed here to be claimed at court, beginning instead from the mid 1990s. For the most part, courts were even less welcoming to MCS than FM and CFS. Claims for MCS as a disability were often quickly dismissed for lacking objective evidence and failing to establish the degree of disability alleged.[56] The cause of the symptoms was disputed and sometimes attributed to other more accepted sources such as asthma or allergies.[57] Arguably, even now, MCS is the least accepted of the three chronic pain disorders discussed.

> In order to be diagnosed with MCS, six criteria must be met:
>
> 1) The symptoms are reproducible with [repeated chemical] exposure.
> 2) The condition is chronic
> 3) Low levels of exposure [lower than previously or commonly tolerated] result in manifestations of the syndrome.

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[52] *Mackie*, *supra* note 46 at paras 222 & 226.
[53] Mariko Saito et al, "Symptom Profile of Multiple Chemical Sensitivity in Actual Life" (2005) 67 Psychosomatic Medicine 318 at 318.
[54] Cara Wilkie & David Baker, "Accommodation for Environmental Sensitivities: Legal Perspective" (May 2007) *Canadian Human Rights Commission* at 8.
[55] Christian Riise Hauge et al, "Mindfulness-based cognitive therapy (MBCT) for multiple chemical sensitivity (MCS): Results from a randomized controlled trial with 1 year follow-up" (2015) 79 J Psychosomatic Research 628 at 628 [Hauge].
[56] See e.g., *Thomas v R* (1996), 97 DTC 165 (TCC); *LaPorte v Saskatchewan Government Employees' Union*, 1997 CanLii 11154 (SK QB).
[57] *Re King's County District School Board and NSTU* (1996), 42 CLAS 243 (NS Arb).

4) The symptoms improve or resolve when the incitants are removed.
5) Responses occur to multiple chemically unrelated substances.
6) Symptoms involve multiple organ systems.[58]

These symptoms can include muscle and joint pain, fatigue, headache, dizziness, confusion, and breathing problems.[59] Problems with concentration, mood, and memory are also common.[60] Common chemicals that cause this response include "car exhaust, perfumes, pesticides, paint, new carpeting, air pollution, cigarette smoke, or hair spray."[61] Similar to CFS and FM, there is no single test and no effective cure as well as a debate regarding whether it is a psychological or physical condition. There are high rates of co-occurrence of CFS, FM, migraines, asthma,[62] and psychiatric disorders, particularly depression and anxiety.[63]

The most common accommodation for MCS is a scent-free policy, but employers also change cleaning supplies, provide air cleaners and masks, transfer positions or workspaces, and allow leave from work.[64] It is more common for the accommodations of MCS to be institutional, meaning there are changes to the workplace to deal with the systemic problem, in the hopes of a more inclusive environment and ultimately substantive equality.[65] Whereas for CFS and FM, the accommodations are individualized, meaning that employers change something in the workplace after it is established only for the one individual.[66] Institutional accommodation provides potential for a more inclusive workplace; however, its success depends on coworkers' cooperation, which is in no way

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[58] "Multiple Chemical Sensitivity: A 1999 Consensus" (1999) 54:2 Archives Environmental Health 147 at 148 [1999 Consensus]; also see Isam Alobid et al, "Multiple chemical sensitivity worsens quality of life and cognitive sensorial features of sense of smell" (2014) 271 Eur Arch Otorhinolaryngol 3203 [Alobid] for recent use of these criteria.
[59] Hauge, *supra* note 55 at 628.
[60] Xiaoyi Cui et al, "The Correlation between mental health and multiple chemical sensitivity: A survey study in Japanese workers" (2015) 20 Environ Health Prev Med 123 at 123 [Cui].
[61] Alobid, *supra* note 58 at 3204.
[62] "1999 Consensus" *supra* note 58 at 148.
[63] Cui, *supra* note 60 at 129.
[64] See e.g., *Brewer v Fraser Milner Casgrain LLP*, 2006 ABQB 258 at 3-10 [*Brewer*]; *Toronto District School Board v OSSTF, District 12*, [2011] OLAA No 461 [*Toronto District School Board*].
[65] Colleen Sheppard, "Of Forest Fires and Systemic Discrimination: A Review of British Columbia (Public Service Employee Relations Commission) v BCGSEU" (2001) 46 McGill LJ 533 at 533.
[66] Dianne Pothier, "How Did We Get Here? Setting the Standard for the Duty to Accommodate" (2009) 59 UNB LJ 95 at 105 [Pothier, "Setting the Standard"].

guaranteed and instead seems to be quite problematic with regards to cooperation and morale of coworkers. This requirement for institutional accommodation may contribute to the lesser acceptance of MCS compared to CFS and FM, despite the fact that MCS seems to be more easily attributed to physiological processes, given that it is a response to a physical stimulus and it is similar to allergies.

4.1.3 Commonalities among CFS, FM, and MCS

Despite being distinct syndromes, CFS, FM, and MCS have some overlapping symptoms and thus some similar issues with regards to accommodation and employment.

Canadian Rates in 2014[67]	CFS	FM	MCS
Total	1.4%	1.7%	2.4%
Male	1.0%	0.6%	1.3%
Female	1.7%	2.8%	3.5%

Table 1: Rates of CFS, FM, and MCS in Canada in 2014 from Statistics Canada data.

As we can see from Table 1, the rates of CFS, FM, and MCS are not particularly high, but, to put it in perspective, CFS, FM, and MCS are more common than more well-known disabilities like Hodgkin lymphoma[68] and bipolar disorder.[69] Despite only making up a small portion of the population, this is not a reason to dismiss these syndromes. A study of the functional impairments for people with any of these syndromes reported that "[m]ost (68.8%) had stopped work, and on average this had occurred 3 years after symptom onset."[70]

There are several factors that are common to CFS, FM, and MCS. First, all three of these syndromes are reported by more women, as we can see in Table 1. It is possible that they

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[67] Data from Statistics Canada, *Canadians reporting a diagnosis of fibromyalgia, chronic fatigue syndrome, or multiple chemical sensitivities by sex, household population, aged 12 and over*, (Ottawa: StatCan, 25 June 2015).
[68] Canadian Cancer Society's Advisory Committee on Cancer Statistics, *Canadian Cancer Statistics 2015* (Toronto: Canadian Cancer Society, 2015) at slide 3.
[69] Canadian Mental Health Association, News Release, "Fast Facts about Mental Illness" (2016) online: <http://www.cmha.ca/media/fast-facts-about-mental-illness/#.VzuV6pErJpg>.
[70] M Ruth Lavergne, "Functional impairment in chronic fatigue syndrome, fibromyalgia, and multiple chemical sensitivity." (2010) 56 Can Fam Physician e57 at e57.

are just more common for women or perhaps women are more willing to report pain. Regardless, significantly more women report these syndromes and, as such, accommodation of chronic pain disorders is a somewhat gendered issue. Second, these disabilities are invisible, meaning that there are no physical, external, or obvious signs of disability or illness. This invisibility may hinder individuals with these disabilities identifying as disabled, which means they may not disclose their symptoms; if they do identify as disabled, then they have the choice whether to disclose.[71] Third, these disabilities are chronic. They have fluctuating symptoms resulting in the person "being both healthy and sick at the same time,"[72] which also makes accommodation difficult because the limitations and capabilities of the individual are unpredictable. Fourth, the medical legitimacy of each of these syndromes is hotly contended, both for individuals who are suspected of faking or malingering and with respect to the syndromes generally in terms of the existence, prognosis, and diagnosis due to the lack of definitive and objective tests and reliance on subjective self-reporting.

These factors lead to the fifth factor—the high level of scrutiny associated with these disabilities. Because they are invisible and struggle for legitimacy, individuals may face scrutiny and then stigma because of disbelief from coworkers, supervisors, and medical professionals. Additionally, CFS, FM, and MCS are strongly associated with mental illness, which are well known as the most stigmatized of disabilities.[73] It is unclear whether any of these disabilities are psychological or physical conditions; the law should not be responsible for this determination. However, due to the high co-occurrence of mental illness, CFS, FM, and MCS, are connected with mental illness. Persons with chronic pain disorders already experience a high degree of scrutiny in establishing proof of their disability. This association with mental illness suggests a high likelihood for persons with chronic pain disorders to also be subject to stigma and prejudice, similar to persons with mental illnesses.

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[71] Stone, *supra* note 7 at 9.
[72] *Ibid* at 5.
[73] Marjorie L Baldwin & Steven C Marcus, "Stigma, Discrimination, and Employment Outcomes among Persons with Mental Health Disabilities" in Izabela Z Schultz & E Sally Rogers, eds, *Work Accommodation and Retention in Mental Health* (New York: Springer Science+Business Media, 2011) 53 at 53-54.

For most disabilities, it seems that they fall into either side of a spectrum: they can be accommodated or they cannot and the person cannot work. Persons with chronic pain disorders do not fall neatly into either group, and instead require many attempts at accommodation with no clear indication of whether they can or cannot work. Thus, it is apparent that CFS, FM, and MCS pose unique problems in the workplace, distinct from disabilities generally.

4.2 Factors that influence accommodation

There are several factors that influence accommodation in the workplace. Because chronic pain disorders are complex disabilities, consideration of these non-legal factors is essential to understanding the circumstances of accommodating these disabilities. These factors include the attitudes of the supervisor and employer, the cooperation of the employee, the medical information, and return to work procedures.

4.2.1 Attitudes of the supervisor and employer

Supervisors are the leaders in the workplace; they set the tone of the work environment. They also reflect the employers' attitudes and have to work with the attitudes of the union, if the workplace is unionized. Supervisors can foster a climate of respect and trust in the workplace, but they must also balance this with their duties to the employer to maintain the bottom line of the operation.[74] When they can, supervisors should attempt to create a supportive environment by encouraging open communication about health-related concerns, balancing employees' needs with each other, and clarifying policies or avenues for requesting accommodation.[75]

Employers are not required to have anti-discrimination policies, but they are bound by human rights legislation in Ontario. Anti-discrimination policies are recommended and it is within the power of human rights commissions to order a public interest remedy that

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[74] Lysaght, *supra* note 44 at 102.
[75] Vicki L Kristman, William S Shaw, & Kelly Williams-Whitt, "Supervisors' Perspectives on Work Accommodations for Chronically Ill Employees" in Stone, Crooks, & Owens, *supra* note 1, 114 at 122 [Kristman]; Melissa Popiel, Wendy Porch, & Le-Ann Dolan, "Accommodation in the Context of Complex Chronic Illness" in Stone, Crook, & Owen, *supra* note 1, 138 at 144, 151 [Popiel].

requires the employer to establish a policy that addresses anti-discrimination on the ground of disability.[76] Larger operations are more likely to have policies and procedures, as well as a human resources department, whereas smaller workplace may not and, as a result, may lack the knowledge or resources to establish a policy or to create a supportive workplace environment.[77] A collective agreement can serve a similar purpose, when unions negotiate for rights and procedures dealing with accommodation of persons with disabilities.[78] Regardless of whether the organization has a policy, the employer must provide accommodation in a timely manner, otherwise this is a breach of the duty to accommodate.[79]

Where the employer and supervisor understand the disability, they are better able to provide accommodation; this is particularly the case with disabilities that are not well-understood, such as chronic pain disorders. As part of their duties, supervisors "may need to interpret medical restrictions, document job demands, brainstorm possible accommodations, order special supplies, create modified duty positions, temper production demands, alter workstations, adjust work schedules, monitor adherence to medical restrictions, engage co-workers to provide assistance, communicate with providers and insurers, and monitor the effectiveness of job accommodations over time."[80] In order to satisfy these obligations, the supervisor likely needs to understand the disability and its functional limitations. Thus, the employer and supervisor may be required to learn about the disability to satisfy the duty to accommodate.[81] Where the employer and supervisor do not make this effort for accommodating persons with chronic pain disorders, it may also be discriminatory because the inaccurate assumptions made on limited knowledge may

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[76] See *Lane v ADGA Group Consultants Inc*, 2007 HRTO 34 at para 164-165 [*Lane*]; aff'd (2008), 91 OR (3d) 649 (Sup Ct).
[77] Lysaght, *supra* note 44 at 100.
[78] *Ibid*.
[79] See *Lloyd*, *supra* note 39 at paras 2, 28-29.
[80] Kristman, *supra* note 75 at 116.
[81] See *Lane*, *supra* note 76 at paras 79, 97-99, & 144. In this case, the supervisor briefly researched the employee's bi-polar disorder and made incorrect and stereotyping assumptions regarding his capabilities that led to his termination.

result in differential treatment of these persons compared to other persons with disabilities and persons without disabilities.[82]

The support of supervisors and the employer is important due to the potential for harassment because "[r]esentment is a particular problem for workers who manage invisible impairments."[83] A 2007 study found that harassment was common for persons with MCS, who "endured eye rolling, disgusted looks, verbal abuse, increased use of perfume, perfume spraying outside their doors, being 'tested' in various ways…, laughter when they wore masks and ostracism."[84] Furthermore, "[t]he fact that a greater portion of unemployed than employed people in this study had endured workplace harassment raises the question whether that harassment is not in fact a causal factor in job loss."[85] Where the supervisor and employer are supportive and have policies in place to prevent discrimination, it seems likely that the rate of harassment will be reduced and that the individual will have a more positive attitude towards work.[86]

4.2.2 The cooperation of the employee

Despite the common suspicion that the employee is faking a chronic pain disorder, many persons with chronic pain disorders view work as "important and even a source of joy."[87] In *Metsala v Falconbridge Limited, Kidd Creek Division*, the employee with CFS on leave phoned repeatedly to inquire about coming back to work and, when she did return, she worked to the point of exhaustion so that she could satisfy her duties.[88] This is merely an example of the desire to work that is common to many persons with chronic pain disorders to gain self-value, life satisfaction, and an income.[89] However, maintaining employment is often only possible with accommodation for persons with chronic pain disorders. The

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[82] *Metsala v Falconbridge Limited, Kidd Creek Division*, 2011 CanLii 26213 (OHRT) at 11 [*Metsala*].
[83] Theresa Aversa & Nicolette Carlan, "Navigating Chronic Injuries in the Workplace: Five Workers' Experiences with Systems and Relationships" in Stone, Crooks, & Owens, *supra* note 1, 71 at 80 [Aversa].
[84] Pamela Reed Gibson & Amanda Lindberg, "Work accommodation for people with multiple chemical sensitivity" (2007) 22:7 Disability & Society, 717 at 727.
[85] *Ibid* at 729.
[86] Juuso, *supra* note 35 at 6.
[87] *Ibid* at 6; Margaret Oldfield, "Portrayals of Fibromyalgia and Paid Work: Too Sick to Work?" in Stone, Crooks, & Owens, *supra* note 1, 31 at 32 [Oldfield].
[88] *Metsala*, *supra* note 82 at 4 & 7.
[89] Oldfield, *supra* note 87 at 32-33.

individual must (1) have a disability and (2) disclose the disability in order to request accommodation. Once that is done, the onus falls on the employer to provide accommodate. However, where persons with chronic pain disorders do not understand this process to request accommodation, then they may not obtain accommodation. Because chronic pain disorders are invisible, they must be disclosed to activate the employer's duty to accommodate; without disclosure, the employer cannot be expected to anticipate the need for accommodation.[90] However, disclosure may publicly identify the individual as disabled, thus interfering with privacy concerns, and may not actually result in accommodation if hindered by discrimination or limited by undue hardship.[91] Thus, employees may avoid disclosure out of fear of discrimination, particularly those in more precarious employment.[92] Where employees know about their human rights, they may be better able to navigate the complex processes including return to work procedures, workers' compensation, and any appeal processes.[93] However, due to the chronic and invisible nature of chronic pain disorders, employees may be unsuccessful in many of these procedures because of the difficulty in proving medical legitimacy of the claim.[94]

Where "a sense of belonging, reciprocity, and empathy characterizes workplace relationships," accommodation is usually most successful.[95] If co-workers and supervisors like the individual, it is more likely that they will be willing to help.[96] This is the unfortunate reality for accommodation, despite the fact that the individual's personality is irrelevant to the accommodation duty and resulting legal obligations of the employer. In the case of chronic pain disorders where absenteeism and emotional problems are common, more adversarial relationships may develop, particularly if the legitimacy of a leave or

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[90] Popiel, *supra* note 75 at 147; Sharon-Dale Stone, Valorie A Crooks, & Michelle Owens, "Epilogue" in Stone, Crook, & Owens, *supra* note 1, 216 at 219.
[91] Oldfield, *supra* note 87 at 34.
[92] Kim M Shuey & Emily Jovic, "Disability Accommodation in Nonstandard and Precarious Employment Arrangements" (2013) 40:2 Work & Occupations 174.
[93] See e.g. *KA v Physical and Health Education Canada*, 2013 HRTO 1212 where the employee's complaint was dismissed for being filed too late; *Hall v Regional Municipality of Niagara Police Service Board*, 2015 HRTO 311 where the complaint was deferred to wait for a WSIAT decision.
[94] Aversa, *supra* note 83 at 72-75.
[95] Lysaght, *supra* note 44 at 97.
[96] See e.g. *Toronto District School Board*, *supra* note 64 at 29-39, where co-workers and supervisors found her adversarial and difficult and her accommodation was only partially provided.

accommodation is questioned by co-workers.[97] Employees with chronic pain disorders may contribute to these problems by "refusing offered accommodation, exceeding physician recommended restrictions, and refusing treatment, as well as failing to provide necessary medical information, avoiding meetings or failing to call in if they are unable to attend work."[98] Employers as well as courts and tribunals may view this uncooperative behaviour as frustrating the employer's attempts to accommodate, thus ending the employer's duty to accommodate.[99] Although an employee's failure to mitigate or participate in the process of accommodation may be grounds for ending the employer's duty to accommodate, the personality of the individual with a chronic pain disorder and relationships with co-workers has no relevance or standing in the fulfilment of the accommodation duty.

4.2.3 Medical information

Chronic pain disorders are problematic in terms of medical information, not least because of the disagreements in the medical field over the existence, etiology, and diagnosis. In addition, a self-management ideology has developed wherein persons with chronic pain disorders are encouraged to manage their own symptoms at work, but this places the burden on individuals without recognizing the imbalance of power between employee and employer and the unequal distribution of resources for managing illness such as health care. Furthermore, this ideology "focuses on individual change, and so it does not offer options for changing social environments," such as accommodation, so accommodation is not requested.[100] When it is requested, the employer may struggle to find the "balance between sufficient investigation of disability and employee harassment."[101] Investigation may be primarily due to suspicion[102] or it may be an attempt by the employer to ascertain

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[97] Ramona L Paetzold et al, "Perceptions of People with Disabilities: When is Accommodation Fair?" (2008) 20 Basic & Applied Social Psychology 27 at 28.
[98] Kristman, *supra* note 75 at 125.
[99] *Brewer*, *supra* note 64 at para 10; *Honda Canada Inc v Keays*, 2008 SCC 39 at paras 4-6, 71 [*Honda Canada*]; *Dofasco*, *supra* note 40 at para 96.
[100] Oldfield, *supra* note 87 at 37, 37-43.
[101] Kelly Williams-Whitt, "Impediments to Disability Accommodation" (2007) 62:3 RI 405 at 417, 413 [Williams-Whitt].
[102] See *Honda Canada*, *supra* note 99 at 4-6.

how best the employee can be accommodated,[103] which may be reasonable given the misunderstood and subjective nature of chronic pain disorders.

Courts and tribunals have inconsistently recognized that a "distinction should be drawn between the question of whether a disability exists and the question of whether medical science has a label for it or has determined its cause."[104] This is an essential concept when considering the accommodation of chronic pain disorders which are so contentious with regards to medical legitimacy. Instead, there are two hurdles to establishing medical legitimacy for accommodation: (1) providing accommodation for the impairment without a definitive diagnosis—both (a) accepting subjective evidence and (b) accepting impairment without a diagnosis—and (2) accepting and accommodating the disability without determining whether it is of physical or psychiatric etiology. First, employers and courts and tribunals have seized onto the lack of objective medical evidence. In *Re Joseph Brant Memorial Hospital and ONA* (*Joseph Brant Memorial Hospital*),[105] a nurse had been off work for several years, the first two for which she received long term disability benefits (LTD). Once the two-year time period for LTD benefits concluded, she was denied further benefits on the grounds that there was no objective evidence that she was unable to work elsewhere. The arbitrator, Michael Bendel, made three points regarding medical evidence:

> [1] Fibromyalgia and other conditions for which there exists no objective medical test are not, *ipso facto*, ineligible for compensation…
>
> [2] Medical evidence that is based on a claimant's self-reports and other non-objective medical evidence can therefore be sufficient to prove a disability claim…
>
> [3] in the absence of objective medical evidence of disability, the credibility of the claimant is very much in issue.[106]

He maintained that this was not new ground, but instead followed what was set out in *Martin v Nova Scotia (Workers' Compensation Board*), in which chronic pain was accepted

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[103] See *Small v Caritas Health Group*, 2003 ABQB 968 at 9 [*Small*]; Williams-Whitt, *supra* note 101 at 418.
[104] *Brewer*, *supra* note 64 at para 29.
[105] [2014] OLAA No 459 [*Joseph Brant Memorial Hospital*].
[106] *Ibid* at paras 210-212.

as a disability.[107] Arbitrator Bendel further stated that the requirement for objective evidence is an additional criterion that was unilaterally imposed on the employee.[108] The arbitrator found that the employee was credible and thus, accepted the subjective medical evidence as proving her functional limitations from a variety of disabilities including FM. This is a relatively new decision from 2014. The arbitrator demonstrated a flexible and inclusive application of disability by recognizing the problems of subjective medical evidence while accepting its necessary use for disabilities which cannot be proven through objective evidence. This is a promising decision, particularly given that it was followed in another arbitration in 2015.[109] However, despite this progress, tribunals, arbitrators, and especially courts continue to struggle with accepting subjective evidence.

An additional problem is that sometimes the chronic pain disorder is not definitively diagnosed: instead the doctor confirms the impairment and functional limitation and says that it might be a chronic pain disorder. This was the case in *Brewer v Fraser Milner Casgrain LLP*, in which a legal secretary asked for accommodation for what her doctor suspected was MCS. The employer implemented a scent free policy, assigned her a private washroom, altered her work hours to avoid crowds, and placed air cleaners in her workspace. She was reassigned to a different floor that had recently been renovated, which caused an episode of MCS for which she left work on short term disability. While on leave, she refused to try another position and was terminated. The Alberta Human Rights Commission found that the employer was justified in rejecting the employee's claim that she had a physical disability from her doctor's suspicions of MCS, without a definitive diagnosis.[110] The Chief Commissioner stated that "[a]lthough MCS is a controversial disability issue it is important to note none of the reports submitted by Janice Brewer's physicians actually came up with a firm MCS diagnosis. Without such a diagnosis the

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[107] 2003 SCC 54.
[108] *Joseph Brant Memorial Hospital*, *supra* note 105 at para 217.
[109] *Re Ontario (Treasury Board Secretariat) and AMAPCEO (Union)*, [2015] OGSBA No 60. (This was an arbitration wherein the employer had denied long-term disability benefits because it argued that the medical evidence did not support the claim. The arbitrator referred to *Joseph Brant Memorial Hospital* to accept the subjective medical evidence of several conditions including FM because the claimant was credible and found that the claimant was entitled to benefits.)
[110] *Brewer*, *supra* note 64 at para 20.

respondents were in my view justified in rejecting her contention that she had a physical disability of this nature."[111] This was in spite of the fact that the doctor confirmed her impairments—but not the diagnostic label—and recommended various accommodations in the workplace. The Alberta Queen's Bench held that this distinction was unreasonable because she had an impairment regardless of the label or cause,[112] but this was overturned by the Alberta Court of Appeal which upheld the Commission's decision.[113] In upholding this decision and declining to distinguish between the impairment and the diagnosis, the Human Rights Commission and the Court of Appeal demonstrated a traditional approach to understanding disability that fails to be flexible, inclusive, or adaptive. This approach fails to recognize disabilities that are difficult to diagnose and replicates that which was initially applied to mental illness. As mental illnesses have become more understood, the potentially unclear diagnoses have become less problematic for the legal system. Hopefully, that is the route that recognition of chronic pain disorders will take as well.

The second distinction that courts and tribunals struggle with is whether chronic pain disorders are psychological or physical, because the employer argues whether it qualifies as a disability. Although this is an important question for the medical community to determine the appropriate treatment, diagnosis, and prognosis, this is not a legal question. Arbitrator Paula Knopf stated, "[w]here there is no dispute about the fact that a person is disabled [or has an impairment], entitlement to the protections of the *Human Rights Code* does not require scientific certainty about either the nature of the condition or the cause."[114] The question of whether the condition is psychological or physical is irrelevant to accommodation because the impairment still exists.[115] The presentation of symptoms, which have been confirmed by a medical professional, requires the employer to attempt to

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[111] *Ibid* at para 22.
[112] *Ibid* at paras 29, 32
[113] *Brewer v Fraser Milner Casgrain LLP*, 2008 ABCA 435.
[114] *Toronto District School Board*, *supra* note 64 at 96.
[115] Consider this passage from JK Rowling, *Harry Potter and the Deathly Hallows* (Vancouver: Raincoast Books, 2007) at 579:

> "Tell me one last thing," said Harry. "Is this real? Or has this been happening inside my head?"
> Dumbledore beamed at him… "Of course it is happening inside your head, Harry, but why on earth should that mean that it is not real?"

alleviate the resulting limitations—i.e. accommodate up to the point of undue hardship, regardless of the diagnosis or etiology.

4.2.4 Return to work

Going on leave is the most common accommodation for persons with chronic pain disorders, particularly CFS and FM. As such, returning to work is also common because the leave cannot be indefinite and people want to earn a living. Where supervisors are supportive, the economic climate is healthy, and working conditions are conducive to accommodation, the return to work is more likely to be successful.[116] Where this is not the case, the return to work is more likely to be unsuccessful. Due to the problems before the employee went on leave, such as frequent and unpredictable absenteeism, the employee may face resentment and a lack of support from co-workers.[117] Before the employee returns or even after, the employer may pressure the employee to accept medical retirement or quit.[118] This pressure may come in the form of offering an unattractive position with no alternative but termination or refusing to provide a gradual return to work.[119] The employer may make no attempt to accommodate the employee's return to work and instead wait out the minimum time allotted before termination is acceptable.[120] The employee may experience financial pressure from the insurer's decision to end long-term disability benefits.[121] The employer may intend to help but not know how to provide accommodation for return to work and may then request more medical information or clarification.[122] Having said that, there are employers who make every effort but the employee with a chronic pain disorder is unwilling or unable to return to work.[123] Where this happens, the employer's duty to accommodate is satisfied.

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[116] Tatiana I Solovieva & Richard T Walls, "Implications of Workplace Accommodations for Persons with Disabilities" (2013) 28 J Workplace Behavioural Health 192 at 196.
[117] *Metsala*, *supra* note 82 at 8 & 11; *Toronto District School Board*, *supra* note 64.
[118] *Toronto District School Board*, *ibid*.
[119] *Gravel v Attorney General of Canada*, 2011 FC 832 at para 17 [*Gravel*].
[120] *Sketchley*, *supra* note 41at para 21.
[121] *Gravel*, *supra* note 119 at paras 13-14.
[122] *Metsala*, *supra* note 82 at para 11; *Small*, *supra* note 103 at para 9, in which the employer acknowledged some difficulty ascertaining when the employee was recovered from a mental disorder compared to a physical injury.
[123] *Small*, *ibid* at para 9; *Health Sciences Association of Alberta v David Thompson Health Region*, 2007 CanLii 80620 (AB GAA) at para 13 [*David Thompson Health Region*];

4.3 Undue hardship in the accommodation of chronic pain disorders

Typically, when accommodating disabilities, there are two outcomes: the disability can and is accommodated or the disability cannot be accommodated. Chronic pain disorders do not easily fall into either of these outcomes. Instead, the individual with a chronic pain disorder usually goes on leave as the accommodation, sometimes without attempts at any other accommodations and sometimes having tried other accommodations like shortened hours, ergonomic office equipment, and rebundling of duties. It may not be clear whether the disability can or cannot be accommodated, even after various accommodations have been attempted and the employment contract has ended. In going through this process of trial and error of accommodations, undue hardship may be reached. Safety, cost, morale of other employees, and disruption of the collective agreement are brought up in caselaw as factors that potentially amount to undue hardship. But, by a very large margin, the problem of innocent absenteeism is the most frequent problem in accommodating persons with a chronic pain disorder, and the most likely factor that constitutes undue hardship.

4.3.1 Safety, cost, morale of other employees, and disruption of the collective agreement

The SCC set out a non-exhaustive list of undue hardship factors in *Central Alberta Dairy Pool v Alberta* to include safety, size of the operation, financial cost, interchangeability of the workforce and facilities, interference with rights of other employees, and morale of other employees.[124] Legitimate operational requirements has been added as another factor in the undue hardship assessment, but has not been directly recognized. Arbitrators and tribunals give the most weight to *safety* as an undue hardship factor.[125] With regards to chronic pain disorders, if safety is argued as an undue hardship factor, it is usually in reference to the safety of the person with a chronic pain disorder, particularly persons with MCS. For example, In *Toronto District School Board v OSSTF, District 12* (*Toronto*

[124] [1990] 2 SCR 489 at para 74.
[125] Michael Lynk, "Establishing Undue Hardship: What it Takes to Meet the Standard" (2012) [unpublished, used with permission by author] at 2 [Lynk].

District School Board), a teacher with MCS was attempting to return to work after a lengthy leave but she felt that various scented products at the school "were causing injuries to her health" and submitted various reports of health and safety concerns.[126] Ultimately, the employer is this case could not argue safety as an undue hardship factor because it had failed to fully accommodate her, as per the accommodation plan that had been generated through earlier arbitrations. However, it seems that in cases of severe MCS, the safety of the individual with MCS should be a factor of serious consideration because most workplaces cannot guarantee a completely scent-free environment, thus creating more than a hypothetical risk.

In order for *financial costs* to amount to undue hardship, the cost must go beyond "mere efficiency. It goes without saying that in weighing the competing interests on a balance sheet, the costs of restructuring or retrofitting are financially calculable, while the benefits of eliminating discrimination tend not to be."[127] As such, in order for costs to amount to undue hardship, they must be quite significant. Accommodating chronic pain disorders can require reduced hours, reassignment, ergonomic furniture, working from home, and transferring position or workspaces. Although these accommodations do incur some cost, unless the operation is very small and already in jeopardy, it seems unlikely that these changes will put the majority of workplaces in financial peril. It is more likely that an extensive period of leave will be costlier in that it may require compensation to the replacement employee, disability insurance payments, and various other administrative costs. However, this does not seem to be a significant cost, particularly since it would be spread over many years, rather than at one time. Additionally, employers may experience a number of benefits from retaining employees with chronic pain disorders including increased productivity due to a consistent workforce, reduced sick leave compensation, lower disability insurance premiums, and reduced need for recruitment, hiring, and training.[128]

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[126] *Toronto District School Board*, *supra* note 64 at 16.
[127] *Via Rail Canada Inc v Canadian Transportation Agency*, 2007 SCC 15 at para 225.
[128] Lysaght, *supra* note 44 at 106-107.

Undue hardship flowing from the *morale of other employees* has not been given significant weight by tribunals and arbitrators.[129] Despite the common perception that the accommodations of chronic pain disorders are unfair and the resulting resentment,[130] the individual with a chronic pain disorder has a legal right to accommodation that is quasi-constitutional as a human right. Thus, while the morale of other employees is a problem, it is not "a legitimate consideration in an undue hardship analysis."[131] Morale is unlikely to be accepted as amounting to undue hardship, but resentment from coworkers is a problem in the workplace that employers should try to alleviate.

Disruption of the collective agreement is a factor that is given some weight. Breaching the collective agreement is only permitted when there is no other suitable accommodation.[132] With regards to accommodating persons with chronic pain disorders, transferring or rebundling of the duties may disrupt the collective agreement by interfering with other employees' seniority rights or other rights in that other employees may be prioritized lower[133] or have to pick up the slack. Unions and employers struggle with balancing the rights of the individual with other employees. Due to these concerns, the employer may delay transfer[134] or require the employee to compete for a position,[135] both of which are potentially discriminatory and contrary to the duty to accommodate.

4.3.2 Innocent absenteeism

The fluctuating symptoms of chronic pain disorders result in ever-changing accommodation needs,[136] which also makes the accommodation process difficult and time-

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[129] Lynk, *supra* note 125 at 10.
[130] See *Metsala*, *supra* note 82.
[131] *Backs v Ottawa (City)*, 2011 HRTO 959 at para 58; *Dover Flour Mills (Dover Industries Limited) v United Food and Commercial Workers Canada, Local 175*, 2012 CanLii 1234 (Ont LA). These cases do not deal with chronic pain disorders, but the rejection of morale of other employees as undue hardship applies to accommodating chronic pain disorders as well.
[132] Lynk, *supra* note 125 at 4-5.
[133] *Metsala*, *supra* note 82 at 6-7. The employee was placed in a competitive position that she was not qualified for, but she was the senior employee and the employer's obligation to accommodate justified the training required.
[134] *City of Ottawa*, *supra* note 42.
[135] *Panacci*, *supra* note 39 at paras 42-43.
[136] Popiel, *supra* note 75 at 139.

consuming. There is no greater threat to the ideal accommodation of chronic pain disorders than absenteeism, despite the fact that the most common accommodation for chronic pain disorders is a leave of absence. However, the duty of accommodation has expanded the obligations of the employer with regards to termination for absenteeism:

> In traditional employment law, an employer had just cause to terminate an employee for innocent absenteeism, when two standards were met: (1) the employee's past record of absenteeism was excessive; and, (2) there was no reasonable prognosis for improvement…The arrival of the accommodation duty has expanded and transformed the test in the labour arbitration arena. Now…the employer must also establish two further criteria: (3) the employee had been warned that her absenteeism was excessive, and that failure to improve could result in dismissal; and (4) if the absenteeism is the result of a disability then accommodation efforts to the point of undue hardship have to be extended to the employee.[137]

Thus, absenteeism can justify termination, but on what grounds? Does absenteeism cause frustration of contract, as is frequently claimed; is attendance at work a *bona fide occupational requirement* (BFOR); or does absenteeism amount to undue hardship and under what factor? Absenteeism falls under *legitimate operational requirements* as an undue hardship factor.

Absenteeism could cause frustration of contract because the employee is "simply unable to perform" and so the termination is based on incapacity and cannot constitute discrimination.[138] The absenteeism violates the essential term of the employment contract—to do work—so that the employer can treat the contract as at an end.[139] Termination on the grounds of frustration of contract must be modified by human rights principles that require accommodation.[140] Having said that, in *USWA v Weyerhaeuser*, the employer's actions in dismissing employees due to absenteeism was considered

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[137] Michael Lynk, "Disability and Work: The Transformation of the Legal Status of Employees with Disabilities in Canada" in R Echlin & C Paliare, eds, *Law Society of Upper Canada Special Lectures 2007: Employment Law* (Toronto: Irwin Law, 2008) 189 at 240.
[138] William R Gale, "When is a Disabled Employee's Incapacity to Work a Defense to Discrimination?" (2014) 24 Emp Bul No 1.
[139] Gillian Demeyere, "Human Rights as Contract Rights: Rethinking the Employer's Duty to Accommodate" (2010) 36 Queen's LJ 299 at 317.
[140] *Dofasco, supra* note 40 at para 71.

discriminatory because it was not done in good faith. This decision was characterized as using a frustration of contract approach to terminating the contract.[141] This suggests that, despite the required importation of human rights principles, assessing absenteeism under a contract law framework using frustration of contract minimizes human rights obligations and increases the potential for discrimination.

Framing the problem as a BFOR requires more from the employer with regards to human rights obligations. Attendance at work can be considered a BFOR, wherein "it is reasonably necessary that an employee actually show up for work. That is the most basic of job requirements. Some level of absenteeism is consistent with continued job status, but at some point undue hardship is reached establishing a BFOR."[142] Where a disability precludes a return to work, this may amount to undue hardship. Furthermore, "[d]etermining how much absence from work is incompatible with one's status as employee is clearly a BFOR issue. Some absence from work for health reasons is to be expected for most, if not all employees, without detracting from their basic qualifications for their jobs."[143] However, what is less clear is when absenteeism is excessive and when it amounts to undue hardship. Absenteeism may amount to undue hardship under the factor legitimate operational requirements, which has been recognized in caselaw, "albeit not in a clearly stated or defined way."[144] Under the undue hardship factor of legitimate operational requirements, "[e]mployers do not have to create new positions or provide unproductive work for accommodated employees. Moreover, the accommodation itself must reflect the legitimate needs of the workplace."[145]

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[141] 2009 BCHRT 328. The employer terminated long term employees receiving long term disability benefits for their absenteeism in an effort to avoid paying them severance when the plant closed shortly after. Four employees grieved this termination because they felt that it was unfair and humiliating how they had been dismissed. Additionally, the length of the leaves ranged from 15 years to just over 1 year, from which it is clear that not all the absences could be considered excessive.
[142] Pothier, "Setting the Standard" *supra* note 66 at 102; also see *ibid* at para 69 and *Scheuneman v Canada (Attorney General)*, [2000] 2 FCR 365 (FC) at para 69 & 71.
[143] Dianne Pothier, "Tackling Disability Discrimination at Work: Toward a Systemic Approach" (2010) 4 McGill JL & Health 17 at 32 [Pothier, "Tackling Disability Discrimination"].
[144] Michael Lynk, "Disability and the Duty to Accommodate: An Arbitrator's Perspective" (2001-2002) *Labour Arbitration Yearbook Vol 1* 51 at 68.
[145] Lynk, *supra* note 125 at 7.

In order to clarify when absenteeism is considered excessive, several examples from caselaw can be examined. In *Hydro-Québec v Syndicat des employés-e-s de techniques professionnelles et de bureau d'Hydro Québec, section local 2000 (SCFP-FTQ)* (*Hydro-Québec*), the employee missed 960 days of work over the seven and a half years of her employment due to her various chronic illnesses including a personality disorder, depression, and physical ailments, despite various accommodations provided.[146] In *Health Sciences Association of Alberta v David Thompson Health Region*, the employee was dismissed after 7 years off work with no proof that she could return to work in the future due to her FM and CFS.[147] Similarly, in *Scheuneman v Canada (Attorney General)*, the employee was dismissed after 8 years of leave without pay when it was clear that it was unlikely that he would be able to work in the foreseeable future on account of his CFS.[148]

Several aspects of absenteeism were made clear in these cases. First, "the purpose of leave without pay is to provide a temporary respite, allowing the employee to maintain continuity in employment. The purpose is not to keep an employee indefinitely, despite the fact that he or she can no longer work for the employer."[149] As such, a leave cannot continue indefinitely, but can only be permitted where there is some reason to believe that the employee could return to work. This possibility of return to work does not have to be definite and the employer may have to allow some time for determination of whether a return is possible. Second, the absenteeism must be assessed globally, taking into account the entire situation.[150] Thus, absenteeism and time off on leave are included in the assessment from the beginning to the end of the absenteeism issues. Third, "human rights legislation does not preclude the right to terminate for non-culpable absenteeism."[151] In some situations, particularly after absenteeism becomes excessive and amounts to undue hardship, the employer is not obliged to maintain employment by human rights legislation. Human rights legislation seeks to protect persons with disabilities from discriminatory

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[146] [2008] 2 SCR 561 at para 2-3 [*Hydro-Québec*].
[147] *David Thompson Health Region*, *supra* note 123 at 12
[148] [2000] FCJ No 1997 (FCA) at paras 5-6.
[149] *Sketchley*, *supra* note 41 at para 19.
[150] *Hydro-Québec*, *supra* note 146 at paras 20-21.
[151] *David Thompson Health Region*, *supra* note 123 at 8.

treatment, not from reasonable termination when they cannot perform their job. Fourth, in all of these cases, there was no proof or reason to believe that the employee could work consistently in the reasonably foreseeable future. This inability to return to work was a significant factor in the termination. In fact, this may be a determinative factor in termination of the employee because it marks the end of both the duty to accommodate and human rights protection. It seems that once the employee cannot return to work in the reasonably foreseeable future, the employer is entitled to terminate.

Despite these findings, there is no clear line for when absenteeism becomes excessive. It would be inappropriate to compare absenteeism to the average attendance in the workplace because "[t]here is no reason to assume any connection between below average attendance records and undue hardship."[152] Instead, a qualitative judgment must be made regarding what level of absenteeism would disrupt the operation of the business excessively.[153] From the caselaw, it appears that absenteeism becomes excessive somewhere between two and seven years. Employers and unions should negotiate automatic termination clauses to clearly set out a standard in the workplace and avoid human rights challenges. However, the employees that are most vulnerable to these automatic termination clauses are those with disabilities, particularly ones that are prone to absenteeism like chronic pain disorders.[154] This, in itself, is a case of adverse effects discrimination.[155] Although dismissal for absenteeism is not automatically discriminatory, where a discriminatory standard that mandates termination at a certain point applies, then it is discriminatory. For example, a two-year limit on a leave of absence is quite common, but this may be discriminatory for persons with chronic pain disorders who then experience different treatment on the basis of their disabilities, compared both with people without disabilities and people with other disabilities. Having said that, the leave cannot be indeterminate. In order to balance the rights of employer and employee, the leave cannot be excessive.

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[152] Pothier, "Tackling Disability Discrimination" *supra* note 143 at 29.
[153] *Ibid*; *Hydro-Québec*, *supra* note 146 at para 18.
[154] Pothier, "Tackling Disability Discrimination", *supra* note 143 at 30-32.
[155] *Ibid* at 32.

It is apparent that employers must tolerate excessive absenteeism before it constitutes undue hardship, but each case must be assessed individually to determine when absenteeism is excessive, taking into account a variety of factors including the size of the workplace, the operation of the business, and, most importantly, the ability of the employee to work in the reasonably foreseeable future. This is a particularly difficult determination for persons with chronic pain disorders because the nature of the disability means that it may be unclear when the person can return to work, whether he or she will be able to return to work, and if the person will require accommodation to return. The "goal of accommodation is to ensure that an employee who is able to work can do so;"[156] however, for persons with chronic pain disorders, it is often unclear whether or not they are able to work, with or without accommodation.

4.4 How does Canada compare?

The accommodation of chronic pain disorders in Canada is still developing. Similarly, the approaches to chronic pain disorders in the US and the EU are also in development. However, the approaches across Canada, the US, and the EU differ for accommodating disability generally, resulting in differing treatment of chronic pain disorders. The primary difference lies in the gatekeeper aspect that both the US and the EU have, that Canada does not.

In the US, under the *Americans with Disabilities Act of 1990* (ADA)[157] and the *ADA Amendments Act of 2008*,[158] the individual has to prove that he or she not only has a disability with objective proof but also that there is a limitation on a major life activity as a result.[159] Thus, qualifying as a person with a disability is a gatekeeper for access to the protections of the ADA. This gatekeeper has served as a barrier for persons with chronic pain disorders to accommodation. Instead, there is "[i]nconsistent treatment... [that] results

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[156] *Hydro-Québec*, *supra* note 146 at para 14.
[157] 42 U.S.C. §12101 et seq [ADA].
[158] 42 U.S.C.A. §12101.
[159] ADA, *supra* note 157 at §12102.

in intolerable uncertainty" in the US.[160] For persons with chronic pain disorders, there are two major evidentiary problems. First, not only is there a lack of objective proof of disability, the proof that does exist is based on subjective self-reporting and is not easily documented.[161] The second problem is related to the requirement for limitation on a major life activity. Persons with chronic pain disorders have fluctuating and unpredictable symptoms, as such, they will likely find it difficult to prove this level of interference on a major life activity due to a lack of objective evidence and limited, potentially conflicting subjective evidence.[162] In practice, this results in two hurdles: (1) "these individual's attorneys must plead fibromyalgia successfully as a disability in order to survive motions to dismiss and motions for judgment on the pleadings;" and (2) "attorneys must develop sufficient evidence in discovery to survive motions for summary judgment."[163] Most cases fail on the first problem.[164] Arguments against including chronic pain disorders as disabilities under the ADA seem to revolve around disbelief in the syndromes and fear of abuse of the benefits due to the lack of objective evidence.[165]

It seems that the majority of cases in the US have failed to prove disability with sufficient evidence for chronic pain disorders. The evidence put forth by claimants must establish the three elements of an ADA disability claim: physical or mental impairment, substantial limitation, and major life activity.[166] Similar to Canada, the subjective self-reporting common with chronic pain disorders is problematic. US courts have found that the subjective self-reported evidence is insufficient alone, but it can become sufficient where corroborated by a physician, repeatedly.[167] Additionally, this evidence must prove that the disability exists to a degree that it is substantial; due to the lack of objective evidence, this

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[160] Amanda L Van, "Intolerable Uncertainty: An Examination of the Inconsistent Treatment of Fibromyalgia under the Americans with Disabilities Act" (2005) 27:2 Thomas Jefferson L Rev 421 at 422.
[161] *Ibid* at 429-432.
[162] *Ibid* at 435-436.
[163] James A Inman & Sandra L Inman, "Fibromyalgia and the Americans with Disabilities Act: Overcoming Hurdles for Successful Litigation" (2009) 13 Mich St U J Med & L 39 at 40 [Inman].
[164] *Ibid.*
[165] Michael Faillace & Richard Lang, "Why Multiple Chemical Sensitivity and Related Conditions Should Be Excluded from the Americans with Disabilities Act" (Feb 1997) Lab LJ 66 at 67 & 79.
[166] Inman, *supra* note 163 at 51.
[167] See *LaBrecque v Sodexho USA, Inc.*, 287 F.Supp. 2d 100 (D. Mass. 2003).

is a common ground for denial of the claim.[168] The evidence must also be linked to the chronic pain disorder, not another condition or impairment.[169] This is different from Canada, where all the conditions can be claimed together with no real distinction for which condition results in the impairment, as long as the condition is proved. The chronic pain disorder must also be chronic or long-term, not temporary.[170] Finally, the tasks that are impaired must be of central importance to daily life,[171] which is far above the Canadian requirement that there is a functional limitation to invoke accommodation.

Despite this uncertainty in courts dealing with accommodation of persons with chronic pain disorders, the Job Accommodation Network, a service of the US Department of Labor's Office of Disability Employment Policy has released a fact sheet series that deals with chronic pain. The fact sheet on FM recommends a variety of accommodations to deal with concentration issues, depression and anxiety, fatigue/weakness, fine motor impairment, gross motor impairment, migraine headaches, respiratory difficulties, skin irritations, sleep disorder, and temperature sensitivity.[172] The fact sheet on chronic pain offers practical accommodations for activities of daily living, depression and anxiety, fatigue/weakness, and muscle pain and stiffness.[173] No recommendations were made in terms of how to provide medical proof or how to deal with absenteeism, which are the two most common issues with chronic pain disorders. As such, this suggests that these fact sheets are not meant to truly deal with the problems of accommodation, but instead offer superficial guidance without resolving the true problems. Thus, the uncertainty continues.

In the EU, there may be less uncertainty but it does not serve to help persons with chronic pain disorders. Instead, there is a question regarding "whether pain—and in particular chronic pain—will be continued to generally be understood as a mere symptom of an

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[168] See *Miller v Ameritech Corp.*, 214 Fed. Appx. 605, 606-07 (7th Cir. 2007).
[169] See *Kersey v Costco Wholesale Corp*., 32 Fed. Appx. 351, 352 (9th Cir. 2002); *Ageman v AFG Industries, Inc.*, 50 Fed Appx. 875, 876 (9th Cir. 2002). The claims were denied in both these cases.
[170] *Ibid*.
[171] See *Amann v Potter*, 105 Fed. Appx. 802, 803, 806 (6th Cir. 2004); *Toyota Motor Mfg.. Kentucky, inc v Williams*, 534 US 184 (2002). Both claims were denied here as well.
[172] United States, US Department of Labor's Job Accommodation Network, *Fact Sheet Series: Job Accommodations for People with Fibromyalgia* (Morgantown, WV: ODEP, 2011).
[173] United States, US Department of Labor's Job Accommodation Network, *Fact Sheet Series: Job Accommodations for People with Chronic Pain* (Morgantown, WV: ODEP, 2010).

underlying disease or eventually be acknowledged as a disease in its own right."[174] A report published by the Council of Europe recommended that chronic pain should be included "as an essential part of the policy making on chronic diseases and to consider pain as a health state to be treated as a chronic disease in its own right."[175] This is supported by a report one year later finding that chronic pain is a common condition with high costs to healthcare systems across Europe.[176] Not only is it costly, but persons with pain are subject to a lack of understanding from healthcare professionals and limited treatment.[177] Despite this evidence and associations like Pain Alliance Europe[178] and European Network of Fibromyalgia Associations,[179] it appears that not only does the EU legal system fail to accept chronic pain disorders as disabilities, but the medical system characterizes FM as a "non-disease."[180] Thus, persons with chronic pain, in the form of chronic pain disorders or otherwise, likely are not considered disabled in the EU at all. In the EU, similar to the US, qualification as a person with a disability is required in order to access any protections and rights, like accommodation. UK caselaw similarly demonstrates confusion regarding how to deal with claims of chronic pain disorders due to the conflicting medical opinions, which often results in denial of the claims.[181]

The lack of objective medical evidence is a barrier to acceptance of chronic pain disorders. The problems of medical legitimacy obstruct accommodation of chronic pain disorders in the US, the EU, and Canada. However, because Canada does not have a high threshold to qualify as disabled, there is at least potential for better access to the benefits of accommodation. In Canada, employers, courts, and tribunals have difficulty determining

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[174] Systematic Literature Report, Council of Europe, EFIC, *Reflection process on chronic diseases in the EU – the role of chronic pain*, (York, UK: Kleljnen Systematic Reviews Ltd, 2012) at 11.
[175] *Ibid* at 16.
[176] The Painful Truth Survey, *The Painful Truth: State of pain management in Europe* (Boston Scientific, 2013) at 4.
[177] *Ibid* at 11-12.
[178] Pain Alliance Europe <http://www.pae-eu.eu>.
[179] European Network of Fibromyalgia Associations <http://www.enfa-europe.eu>.
[180] "How the British and Europe Look at Fibromyalgia – Be Glad You Live in the United States" *Fibromyalgia.com*, online: Fibromyalgia.com <http://www.fibromyalgia.com/index.php>.
[181] See *Fareham College Corporation v Walters*, [2009] IRLR 991 (Eng EAT); *Bennett v Smith*, [2003] EW HC 1006 (Eng QB). No EU caselaw was found, but there may be caselaw under the Member States, which is beyond the scope of this research.

how to accommodate, particularly with absenteeism, rather than being caught by the question of whether the person with chronic pain disorders is disabled.

4.5 Conclusion

It appears that there has been progress with regards to the acceptance of chronic pain disorders in law. The first claims for chronic pain disorders in courts were usually dismissed due to the sceptical and disbelieving attitudes of the courts. Chronic pain disorders were not accepted as disabilities due to (1) the lack of credibility after being damaged by surveillance evidence, without recognizing the inherent limitations of such evidence, and (2) the court's findings on medical etiology and evidence that barred recovery by understanding chronic pain disorders as outside the boundaries for recovery.[182] This seems to be similar to the current approaches in the US and the EU, in which qualifying as a person with a disability is the gatekeeper to access to benefits, but persons with chronic pain disorders struggle to qualify because of the lack of objective medical evidence.

Fast forward to the modern era of accommodation, after *British Columbia (Public Service Employee Relations Commission) v BCGSEU (Meiorin Grievance)* (*Meiorin*),[183] and there has been clear progress since those early days with the imposition of human rights principles, including the duty of accommodation. However, the current approach to accommodation of chronic pain disorders is in no way perfect, or even ideal. Instead, courts have inconsistently recognized the inherent limitations and unique challenges of chronic pain disorders. For example, in *Brewer*, the Alberta Queen's Bench recognized that chronic pain disorders may not be able to produce objective medical evidence or definitive diagnoses and that these limitations should not justify discrimination or bar claims.[184] This was a promising decision that showed a nuanced understanding of chronic pain disorders. Yet the Alberta Court of Appeal overturned this decision, failed to distinguish between impairment and diagnosis, and ultimately justified the discriminatory conduct of the

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[182] See *Mackie*, *supra* note 46.
[183] [1999] 3 SCR 3.
[184] *Brewer*, *supra* note 64.

employer. The Court of Appeal's decision adhered to a more traditional approach and failed to apply human rights principles in any way, let alone the flexible and adaptable approach advocated in *Meiorin*.

This inconsistent application of human rights principles characterizes the current approach, which is a hybrid between the traditional approach and a human rights approach. Chronic pain disorders are difficult to accommodate because, unlike "mainstream" disabilities, it is not clear whether the individual with a chronic pain disorder can or cannot be accommodated, even after several attempts at accommodation. Furthermore, even when an accommodation succeeds, the needs of the individual must be regularly assessed because of the fluctuation of symptoms common for chronic pain disorders. In the face of these issues, the easiest, and thus most common, accommodation provided is a leave of absence. However, the inconsistent application of human rights principles is also demonstrated in cases dealing with absenteeism due to chronic pain disorders. Despite the required imposition of human rights principles into contract and employment law, framing termination for absenteeism as frustration of contract results in a lack of consideration of human rights. This is in comparison to the BFOR and undue hardship approach, which is set out in the *Meiorin* test—a human rights test for discrimination. Yet, even within this test, courts fail to satisfy human rights principles by inconsistently recognizing the unique challenges of chronic pain disorders. Thus, the current approach fails to live up to human rights principles.

In Canada, there are two major problems with regards to accommodation of chronic pain disorders in particular: (1) medical legitimacy and (2) absenteeism. Medical legitimacy is a problem in the US and the EU as well because it undermines the status of chronic pain disorders as disabilities. Not only is there a lack of objective evidence and reliance on subjective self-reporting, but also invisibility of symptoms and resulting scrutiny and stigma. Further compounding the problem are the chronic and fluctuating symptoms, which make it more difficult to accommodate as well as providing periods of seeming wellness that casts doubt on the veracity of the claim of disability. The legal system cannot clarify the medical legitimacy; that is a task for the medical field. However, the legal system can draw clearer boundaries for dependence on medical proof—only proof of impairment is

necessary and the fact that it is subjective does not discount it. In fact, excluding disabilities because there is no objective evidence, when objective evidence is not actually required, is discriminatory. The lack of definitive diagnosis and unknown cause have no bearing on the legal right and duty to accommodate.

With regards to absenteeism, there is no easy answer, nor should there be. The facts of each case must be assessed to determine when absenteeism is excessive. There may be disagreement from medical professionals in terms of the ability of the person to work and whether the person can return to work in the reasonably foreseeable future. The approach that best balances the rights of the employer and the employee is to understand attendance at work as a BFOR with some allowance for sickness or disability. Only when absenteeism is excessive does it constitute undue hardship. Again, the determination of whether absenteeism is excessive depends on the facts. Due to the uncertain and fluctuating nature of chronic pain disorders, absenteeism may only be excessive after an extensive amount of accommodation and time. Greater awareness of the nature of chronic pain disorders on the employer's part may enable more successful accommodation because the employee feels more supported and may receive more of what is needed. Having said that, a nuanced understanding of chronic pain disorders is inconsistently applied.

There is hope still, however, for a more principled human rights approach if we look to recent arbitration decisions. In these decisions starting from 2010, the arbitrators recognized the unique challenges of chronic pain disorders to apply a flexible and adaptable approach to accommodation and disability claims. In *Re City of Toronto and CUPE, Local 79 (C08-05-8938),*[185] the arbitrator understood the inherent limitations of surveillance evidence in that it cannot prove capabilities for employment by demonstrating unrelated activity, particularly for invisible disabilities. In *Toronto District School Board,*[186] arbitrator Knopf demonstrated a sensitive and nuanced approach to understanding the grievor's MCS. In so doing, she was able to balance the rights and needs of the employer

[185] [2010] OLAA No 389.
[186] *Supra* note 64.

and the employee. Finally, in *Joseph Brant Memorial Hospital*,[187] the arbitrator specifically set out that certain disabilities including FM can be accepted as a disability with subjective medical evidence where the claimant is credible. Some disabilities cannot be proved with objective evidence and a lack of such evidence cannot be grounds for denial of the claim because that would be discriminatory. These arbitration decisions demonstrate a flexible and adaptable application of human rights principles in a way that recognizes the unique challenges of chronic pain disorders while balancing the needs of both employer and employee. These decisions set out the ideal approach that should be followed by other decision makers. It is unclear at this time whether these arbitration decisions mark progress in the law's understanding and approach to chronic pain disorders or whether they are merely flukes. To satisfy human rights principles, however, only these arbitrators' approach will do. However, the influence of these decisions may be limited as they only occurred in Ontario in unionized workplaces.

It is evident that chronic pain disorders are complex disabilities that are difficult to accommodate. Due to this complexity, and especially the problem of medical legitimacy, a hierarchy of disability has emerged, wherein chronic pain disorders falls lower than other disabilities, which are perceived as more "legitimate."[188] Similarly, mental illnesses fall lower on the hierarchy as well due to the associated stigma. Failing to recognize the problems inherent with chronic pain disorders and instead treating persons with chronic pain disorders the same as persons with other disabilities may result in adverse effects discrimination for persons with chronic pain disorders.

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[187] *Supra* note 105.
[188] Judith Mosoff, "Lost in Translation?: The Disability Perspective in *Honda v Keays* and *Hydro-Québec v Syndicat*" (2009) 3 McGill JL & Health 137 at 141.

Chapter 5

5 Legal Options When Accommodation Fails for Persons with Chronic Pain Disorders

What happens after accommodation fails? So much effort has gone into determining the limits of accommodation—reasonable necessity amounting to a *bona fide occupational requirement* or undue hardship—that it calls into question what legal options exist once the duty of accommodation is satisfied. Persons with chronic pain disorders are difficult to accommodate due to frequent absenteeism issues, chronic and fluctuating symptoms, and unclear needs, and, as such, reaching the limits of accommodation seems more likely than other disabilities that are more readily and easily accommodated. In other words, it seems more likely that persons with chronic pain disorders will not be accommodated, but may not be considered totally disabled. Thus, an examination of the legal options available besides accommodation helps to provide a broader picture of the experience of persons with chronic pain disorders. However, similar to accommodation, these alternate legal avenues struggle with the subjective diagnosis and unclear etiology of chronic pain disorders. Although there are other legal options besides accommodation for persons with chronic pain disorders, accommodation is the only option that enables them to remain in the workplace. The value of work for persons with chronic pain disorders cannot be overstated: not only does working provide financial means, but it also appears to help people with chronic pain disorders avoid deterioration of their symptoms and improve life satisfaction.[1]

This chapter examines the legal options available besides accommodation for persons with chronic pain disorders in Canada in an effort to examine the whole experience of these people. The chronic pain disorders of interest are chronic fatigue syndrome (CFS), fibromyalgia (FM), and multiple chemical sensitivity (MCS). Part I looks at options that are available before dismissal, while the individual is still employed. The two possibilities

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[1] Margaret Oldfield, "Portrayals of Fibromyalgia and Paid Work: Too Sick to Work?" in Sharon-Dale Stone, Valorie A Crooks, & Michelle Owens, eds, *Working bodies, chronic illness in the Canadian workplace* (Montréal & Kingston: McGill-Queen's University Press, 2014) 31 at 32.

that are discussed are long-term disability (LTD) benefits and workers' compensation. In Part II, the options that individuals may pursue after dismissal are examined. These include claims to human rights commissions, most likely discrimination and harassment, and common law litigation, in particular wrongful dismissal against the employer. Part III analyzes caselaw dealing with accommodation and the above options to assess how courts, tribunals, and arbitrators deal with chronic pain disorders. It seems that decisions fall into a spectrum where, on one end, a traditional approach does not accept chronic pain disorders as disabilities because of a lack of objective evidence and, on the other end, a human rights approach calls for extensive and adaptive obligations on the part of employers to satisfy the quasi-constitutional right to accommodation. The majority of caselaw falls into the middle ground, a hybrid of the two prior approaches, which recognizes some of the issues but fails to fully engage with them. Persons with chronic pain disorders face unique barriers that hinder full access to human rights and accommodation, particularly lack of objective medical evidence, fluctuating symptoms, and unknown etiology. These barriers also obstruct the other options that may be available to them, including LTD, workers' compensation, claims of discrimination, and wrongful dismissal causes of action. As such, chronic pain disorders are not only considered less legitimate, but persons with these disabilities experience less access to their human rights, including accommodation, and other options for compensation.

5.1 Options before dismissal

The ideal option to pursue for employees with chronic pain disorders while they are still employed is, of course, accommodation. Where that option is not available, the duty to accommodate has been exhausted, or perhaps in tandem with accommodation, LTD and workers' compensation may be pursued.

5.1.1 Long-term disability

5.1.1.1 Claiming LTD benefits

LTD leave is the most common accommodation but, in order to receive LTD benefits, it can require a separate process and be subject to different rules than other accommodations. This is due to the fact that other accommodations are usually provided directly by the

employer, such as ergonomic work equipment and modified duties, whereas LTD benefits are typically provided by an insurer, who applies its own rules and practices. LTD benefits are provided to employees with disabilities monthly, "provided the insured meets the applicable policy definition of disability and is not otherwise precluded from receiving benefits due to the operation of any applicable exclusion to receiving benefits."[2] This is dependent on what is set out in the policy and the regular payments of premiums by the employer to the insurer.

The typical structure of LTD policies allows 24 months of benefit payments where the employee is unable to perform the essential duties of his or her own job—this is referred to as "own occupation" disability because the employee is considered disabled in his or her own job.[3] After these 24 months, most policies shift to require that the employee be disabled for any occupation "for which he is reasonably suited by reason of his education, training, and experience," which is referred to as "any occupation" disability.[4] In other words, after two years of LTD benefits, the employee must demonstrate total disability to continue receiving benefits. There is no universal test for total disability, but the general idea is that the employee "can take on only trivial or inconsequential work, or work for which he is over-qualified, or work for which he is completely unsuited by background."[5]

The employee bears the onus of proof to establish the requirements for LTD. Proof must cover: "(i) the date disability started; (ii) the cause of disability; and (iii) how serious the disability is."[6] The proof is usually medical evidence from a medical practitioner. However, "[f]or the most part, long-term disability policies do not require proof of disability by way of objective medical evidence (i.e., x-ray films, CT scans, etc.). Having said that, it is easier for the [insurer] to dispute the existence of a disability if there is no

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[2] Eric J Schjerning & David Norwood, *Disability Insurance Law in Canada* (Toronto: Carswell, 2010) at 49 [Schjerning].
[3] *Ibid* at 49-50.
[4] *Ibid* at 50; see e.g., *Re City of Toronto and CUPE, Local 79 (C08-05-8938),* [2010] OLAA No 389 [*City of Toronto*] and *Fidler v Sun Life Assurance Co of Canada*, 2006 SCC 30 at para 6 [*Fidler*].
[5] Schjerning, *supra* note 2 at 50 and 58.
[6] *Eddie v UNUM Life Insurance Co of America*, 1999 BCCA 507 at para 3 [*Eddie*].

objective evidence to prove that the [employee] is disabled."[7] Where the employee is credible and the medical evidence is supportive, then a claim for LTD benefits is more likely to be successful.[8] Medical evidence can be provided by a medical professional who is accredited by the relevant organization—the family physician is frequently called upon, but specialists for the particular disability may also provide evidence. Insurers may try to weaken these claims with surveillance evidence and conflicting medical evidence.

Claims for LTD benefits differ depending on whether the workplace is unionized or non-unionized. Where the workplace is unionized, claims for LTD benefits are conducted in accordance with the collective agreement and are usually limited to internal processes, primarily grievance arbitrations.[9] Whether a grievance goes forward depends on the union, not the individual employee. In non-unionized workplaces, the employee can launch a complaint with the relevant human rights commission or seek recourse at court, but does so without support from a union or employer.[10] Courts do not have jurisdiction in matters arising out of a collective agreement.[11] Additionally, in Ontario, arbitrators have jurisdiction to apply the *Human Rights Code* to assess discrimination claims.[12] Thus, unionized employees can only claim or appeal denials of claims through the collective agreement and grievances. In non-unionized workplaces, the employee can pursue an action in court against the insurer.[13]

It may be more beneficial for the employee to resolve an LTD claim prior to engaging in litigation. Disability management in the workplace attempts "*minimizing the impact of*

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[7] Peter N Downs & Kathryn D Whyte, "Acting for the Plaintiff in a Chronic Pain, Fibromyalgia, and Chronic Fatigue Case: Tactics and Strategies" (Paper delivered at Chronic Pain, Chronic Fatigue & Fibromyalgia: Strategies for Litigating and Defending Pain-Related Cases, 18 May 2004) (2004) LSUC CPD [Strategies for Litigating Pain-Related Cases] at 5-1.
[8] *Ibid* at 5-3.
[9] David Wright, "Litigating Pain Related Cases In The Workplace: Unionized Vs. Non-Unionized Environments" in Strategies for Litigating Pain-Related Cases, *supra* note 7, at 3-21, 3-22 [Wright].
[10] *Ibid* at 3-20.
[11] *Weber v Ontario Hydro*, [1995] 2 SCR 929 at paras 55-63 & 72 [*Weber*].
[12] *Parry Sound (District) Welfare Administration Board v OPSEU, Local 324*, 2003 SCC 42 at para 1 [*Parry Sound*].
[13] *London Life Insurance Co v Dubreuil Brothers Employees Assn* (2000), 49 OR (3d) 766 (CA).

impairment on the individual's capacity to participate competitively in the work environment, and maximizing the health of the employees to prevent disability, or further deterioration when a disability exists."[14] Disability management can be used to prevent the employee going on LTD leave and help the employee return to work more successfully. It may also be used to guide employees through the processes for short and long-term disability leaves. However, for complex disabilities like chronic pain disorders, disability management may fall short of its goals. Instead, persons with chronic pain disorders may quickly ascend the levels of the disability management program to be in the most scrutinized and serious level of disability on account of their frequent absenteeism and fluctuating symptoms, making them closest to termination.

This was the case in *Honda Canada Inc v Keays* (*Honda Canada*), in which an employee with CFS returned to work after his LTD benefits were denied by the insurer and was placed in the Honda Disability Program.[15] This program "permits disabled employees to take absences without the invocation of Honda's attendance policy by confirming that the absence from work is related to the disability."[16] The allowance of absences was intended to be an accommodation; however, Honda also required that the employee get a doctor's note validating each absence, which employees with more well-understood and established disabilities did not have to do.[17] When these doctor's notes were scrutinized, Honda then requested that the employee meet with other medical specialists to understand his condition with the threat of termination if he did not comply.[18] It is apparent that the nature of his disability caused a quick progression through the disability management program wherein termination was the inevitable outcome. The Supreme Court of Canada (SCC) did not engage in any discourse regarding the discrimination demonstrated in the differential

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[14] Dianne EG Dyck, *Disability Management: Theory, Strategy & Industry Practice* (Markham: LexisNexis Butterworths, 2006) at 7.
[15] 2008 SCC 39 at paras 3-4.
[16] *Ibid* at para 4.
[17] *Keays v Honda Canada Inc (c.o.b. Honda of Canada MFG)* (2006), 82 OR (3d) 161 (CA) at para 8 [*Honda* CA].
[18] *Ibid* at paras 10-13.

treatment of this employee in the disability management program compared to persons with more "mainstream" disabilities.

Chronic pain disorders present other problems, as well, in terms of LTD. First, there is the problem of medical proof of the disability. The employee must first provide medical evidence, then the insurer or employer "must prove on a balance of probabilities that the disability has ceased or decreased such that it no longer constitutes a disability."[19] The employer and insurer often argue that the medical evidence does not support the claim because it is based on a subjective report of the symptoms.[20] Whether the subjective evidence is accepted seems to hinge on the credibility of the employee and possibly the credibility of witnesses who corroborate the day-to-day living conditions and ability to work.[21] Although the subjective nature of the medical evidence is still discussed, arbitrators in particular have found it sufficient to prove disability where the claimant is credible.[22] Courts have also shown a willingness to accept subjective evidence for disabilities that cannot be proved objectively, but this is rare.[23]

A second issue in LTD claims for persons with chronic pain disorders is the time limit typically imposed. LTD benefits are usually only permitted for two years, then the employee must prove that he or she is totally disabled for any occupation. However, due to the fluctuating and chronic symptoms and lack of consensus in the medical field with regard to diagnosis and treatment, persons with chronic pain disorders may not be able to prove total disability. Additionally, they may struggle to prove an ability to return to work in the reasonably foreseeable future for the same reasons. Although some studies suggest that the "course of FM after onset indicate that the signs and symptoms usually stabilize

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[19] *Gerber v Telus Corporation*, 2003 ABQB 453 at para 78 & 74 [*Gerber*].
[20] See *Re Ontario (Treasury Board Secretariat) and AMAPCEO (Union)*, [2015] OGSBA No 60 at paras 10 & 58 [*AMAPCEO*]; *Garriok v The Manufacturers Life Insurance Company*, 2009 CanLii 27825 (Ont Sup Ct) at para 28 and 33 [*Garriok*].
[21] *Eddie*, *supra* note 6 at para 46.
[22] *Re Joseph Brant Memorial Hospital and ONA*, [2014] OLAA No 459 at paras 210-212 [*Joseph Brant Memorial Hospital*], followed in *AMAPCEO*, *supra* note 20 at para 59.
[23] *McCallum v Government of Manitoba*, 2006 MBQB 114 at para 31 [*McCallum*]; *Eddie*, *supra* note 6 at para 46.

within the first year of the syndrome and remain largely unchanged over time,"[24] the unpredictable and fluctuating impairment hinders individuals' control over the symptoms.[25] As such, the time limits for disability benefits can be problematic. In *Sketchley v Canada (Attorney General)*, while the employee was on leave without pay, the disability insurer declined to extend the leave beyond two years, whereupon she felt that she was forced to apply for medical retirement.[26] The employee claimed that she had only wanted to extend the leave for one more year, in light of some evidence from her doctor that indicated that she would know whether she could return to work by that time.[27] By adhering to firm time limits for LTD leave and benefits, persons with chronic pain disorders may be prematurely excluded from the workplace and benefits with regards to their symptoms. Instead, persons with chronic pain disorders may be forced to return to the workplace too soon or medically retire unnecessarily. This is, of course, differential treatment on the basis of disability, which is discriminatory. Considering just how common LTD leave is for persons with chronic pain disorders, resolving some of these issues with the limited time periods and medical proof is essential.

5.1.1.2 Disputing denial of LTD benefits by insurers

Persons insured under disability insurance contracts can pursue an action for breach of contract against the insurer for damages[28] as well as punitive and aggravated damages when LTD benefits are denied by the insurer under the group disability insurance contract through their workplace. Aggravated damages are those given for mental distress arising out of a breach of contract, based on the parties' expectations of peace of mind.[29] Where the disability insurer unfairly denies benefits, then aggravated damages may be awarded for the insured's mental distress in the face of financial pressure, loss of work, and

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[24] Lauren Wierwill, "Fibromyalgia: Diagnosing and managing a complex syndrome" (2012) 24 J American Academy Nurse Practitioners 184 at 184.
[25] Paivi Juuso, et al, "The Workplace Experiences of Women with Fibromyalgia" online (2016), Musculoskeletal Care <http://www.wileyonlinelibrary.com> at 1.
[26] 2004 FC 1151 at para 8.
[27] *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 107.
[28] See e.g. *McCallum*, *supra* note 23.
[29] *Fidler*, *supra* note 4 at paras 55-57.

exacerbation of the disability.[30] Punitive damages, on the other hand, are not meant to compensate the wronged party. Instead, punitive damages are only awarded in exceptional cases to address the goals of retribution, deterrence, and denunciation, where the insurer has acted in bad faith.[31] To seek punitive and aggravated damages, the insurer must have acted wrongfully in some way by causing mental distress or in bad faith.

In order to succeed in this action, the insured person must first prove that he or she had a disability that satisfied the requirements of the insurance LTD contract to provide entitlement to benefits. Persons with chronic pain disorders tend to have difficulty at the two-year mark, when most LTD contracts change from requiring total disability for "own" occupation to "any" occupation. It is also common for insurers to depend on surveillance evidence to deny chronic pain disorders, despite the fact that they are invisible disabilities and prone to fluctuation of symptoms, meaning that persons with these disabilities could look completely fine at any time.[32] As such, surveillance evidence is irrelevant to proof of total disability or ability to work. Insurers also deny claims for LTD by persons with chronic pain disorders because of the lack of objective medical evidence, but some courts do not accept this as a basis for denial.[33]

If the insured person is able to prove entitlement to the benefits, then the insurer must pay them out. The insured can also claim aggravated and punitive damages for the way that the insurer denied entitlement. In *Fidler v Sun Life Assurance Co of Canada* [*Fidler*], the insurer denied the insured LTD benefits for more than five years for her CFS and FM.[34] *Fidler* is the key case for aggravated damages in actions for breach of contract against insurers. Generally, damages for mental distress from a breach of contract are barred, except where the contract is a "peace of mind" contract: insurance contracts are accepted

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[30] *Ibid* at para 57.
[31] *Whiten v Pilot Insurance Co*, 2002 SCC 18 at para 123 [*Whiten*].
[32] See e.g., *Verbong v Great-West Life Assurance Co.*, 2003 MBQB 39; *Milner v Manufacturers Life Insurance Co*, 2005 BCSC 1661 [*Milner*]; *Fidler*, *supra* note 4.
[33] See e.g., *Re Hotel-Dieu Grace Hospital and ONA*, [2004] OLAA No 458; *Eddie*, *supra* note 6.
[34] *Fidler*, *supra* note 4.

as such.[35] The test for aggravated damages requires satisfaction of two steps: "(1) that an object of the contract was to secure a psychological benefit that brings mental distress upon breach within the reasonable contemplation of the parties; and (2) that the degree of mental suffering caused by the breach was of a degree sufficient to warrant compensation."[36] The loss arises from the breach itself, so there is no requirement for an independent actionable wrong.[37] The SCC awarded aggravated damages in *Fidler* because of the psychological consequences of the insurer's breach.[38]

Punitive damages, on the other hand, require an independent actionable wrong because it is given in recognition of conduct that goes beyond what was within contemplation of the contracting parties. The SCC did not award punitive damages in *Fidler* because the insured's conduct was not exceptionally malicious and "an insurer will not necessarily be in breach of the duty of good faith by incorrectly denying a claim that is eventually conceded, or judicially determined, to be legitimate."[39] The insurer has the right to investigate a claim. Where persons with disabilities pursue punitive damages against the LTD insurer, usually the independent actionable wrong is breach of the duty of good faith. This duty requires the insurer "to act promptly and fairly when investigating, assessing and attempting to resolve claims made by its insureds."[40] The key case for punitive damages in Canada is *Whiten v Pilot Insurance Co,* in which the insurer denied a claim for fire damage at the insured's house by alleging arson, contrary to all proof and expert opinions in a hostile and confrontational manner, to force settlement for less than what it was worth.[41] Punitive damages are only awarded in exceptional cases for "malicious, oppressive and high-handed" misconduct that "offends the court's sense of decency"[42]

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[35] See *Addis v Gramophone Co*., [1909] AC 488 (Eng HL), aff'd *Peso Silver Mines Ltd v Cropper,* [1966] SCR 673; *Jarvis v Swan Tours Ltd* (1972), [1973] 1 All ER 71 (Eng CA); *Vorvis v Insurance Corp of British Columbia*, [1989] 1 SCR 1085.
[36] *Fidler*, *supra* note 4 at para 47.
[37] *Ibid* at para 55.
[38] *Ibid* at para 59.
[39] *Ibid* at para 71.
[40] *702535 Ontario Inc v Lloyds of London* (2000), 184 DLR (4th) 687 (Ont CA) at para 27.
[41] *Supra* note 31 at para 3
[42] *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 at para 196; test aff'd in *Whiten*, *ibid*.

where other penalties are "inadequate to accomplish the objectives of retribution, deterrence, and denunciation."[43] Additionally, the "financial or other vulnerability of the plaintiff, and the consequent abuse of power by the defendant, is highly relevant where there is a power imbalance."[44]

Despite this consideration of other vulnerability, there was very little discussion of the vulnerability associated with chronic pain disorders—greater scrutiny, negative attitudes from co-workers, and fluctuation of symptoms. The lack of objective medical evidence was considered and, in many cases, the courts recognized that chronic pain disorders often cannot produce objective proof and that this should not be a barrier to claims.[45] However, this lack of objective proof was used to justify the scrutiny that led to the denial of benefits—the insurer had reason to doubt the claim.[46] Generally, punitive damages are awarded far more rarely. This is due in part to the fact that punitive damages require more exceptional circumstances, but may also be related to the fact that courts justify insurer's conduct because of the inconclusive nature of chronic pain disorders.[47] Aggravated damages, on the other hand, are much more readily awarded. Courts seem willing to recognize the vulnerabilities of chronic pain disorders when considering aggravated damages as stress seem to be relatively easily accepted as proof of mental distress to justify aggravated damages.[48] Having said that, *Fidler*, despite revolving around chronic pain disorders, did not significantly address the issues particular to these disabilities.

5.1.2 Workers' compensation

Workers' compensation are provincially administrated programs that seek to protect employees "from the financial hardships associated with work-related injuries and

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[43] *Whiten*, *ibid* at para 123.
[44] *Ibid* at para 14.
[45] *Eddie*, *supra* note 6 at paras 46, 60-61.
[46] *Milner*, *supra* note 32 at para w48.
[47] See *Gerber*, *supra* note 19 in which the court awarded aggravated damages but declined to award punitive damages because the insurer's conduct was not egregious enough.
[48] See *Gerber*, *ibid*; *McCallum*, *supra* note 23; *Warrington v Great-West Life Assurance Co*, [1996] 10 WWR 691 (BCCA).

occupational disease."[49] As such, only injuries "arising out of and in the course of employment" are compensable under workers' compensation.[50] Although each province has its own legislation, only Ontario, Alberta, and British Columbia are examined as representative of the general process and the specific problems in pursuing workers' compensation for chronic pain disorders because the majority of the decisions are found in these provinces. Most employees are able to make a claim for worker's compensation, but must start the process as soon as possible after the occurrence, or, in the case of an occupational disease, after the employee discovers that he or she suffers from the disease.[51] By pursuing benefits under workers' compensation, the employee is waiving the right to other actions against the employer because these benefits are in lieu of that right.[52] The benefits that an employee may receive from workers' compensation include loss of earnings, loss of retirement income, and non-economic loss for permanent impairment.[53]

Employees who try to claim workers' compensation for chronic pain disorders seem to encounter three problems revolving around proof: (1) the time delay in claiming for the chronic pain disorder; (2) proving the degree of disability to require compensation; and (3) proving causation or material contribution of the compensable injury to the development of the chronic pain disorder. The first problem occurs when there is a delay or difficulty diagnosing the chronic pain disorder after it has developed—this can be a process over several years. It can impact the claim by detracting from the directness of causation.[54] The more time between the compensable injury and the chronic pain disorder claim, the more likely that other factors have arisen in the meantime to reduce the contribution of the initial injury.[55] The second problem revolves around insufficient or conflicting medical evidence, which is a common obstacle for chronic pain disorders.

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[49] Labour Program, *Workers' Compensation* (3 June 2013), online: Government of Canada <http://www.labour.gc.ca/eng/health_safety/compensation/index.shtml>.
[50] Ontario *Workplace Safety and Insurance Act, 1997*, SO 1997 c 16 Schedule A ss 2(1), 13(1) [ON WSIA]; similar wording is also found in the British Columbia *Workers Compensation Act*, RSBC 1996, c 492 s 5(1) [BC WCA] and in the Alberta *Workers' Compensation Act* RSAB 2000, c W-15 s 1(1) [AB WCA].
[51] ON WSIA, *ibid* s 22(1); BC WCA, *ibid* s 53; AB WCA, *ibid* ss 26(1), 32.
[52] ON WSIA, *ibid* s 26; BC WCA, *ibid* s 10; AB WCA, *ibid* s 21.
[53] ON WSIA, *ibid* ss 43, 45, 46; BC WCA, *ibid* ss 22, 23, 23.2, 23.3, 33; AB WCA, *ibid* s 56.
[54] *Decision No 2009-173*, 2009 CanLii 66459 (AB WCAC) at para 13 [*Decision No 2009-173*].
[55] *Decision No 946/12*, 2014 ONWSIAT 2364 at paras 55, 59-60, 62 [*Decision No 946/12*].

The third problem can be a significant hindrance to workers' compensation claims for chronic pain disorders. With regards to these kinds of disabilities, "in order to establish entitlement, it is not necessary to show that the workplace injury was the sole contributing factor, or even the predominant contributor. The workplace injury need only be a cause of the disability, providing that it makes more than a de minimus contribution."[56] Having said that, there is a "well-established general rule against 'stacking' entitlement for [chronic pain disorders] with other impairments;" only where the chronic pain disorder is a separate and distinct component of the disability can it constitute a separate entitlement.[57] When proving that the compensable injury caused or contributed to the chronic pain disorder, workers' compensation boards sometimes decline to award benefits because the medical information is deemed insufficient to prove the causal link[58] or the chronic pain disorder is attributed to factors outside of work.[59] Where the worker has a positive work history prior to the accident,[60] no pre-existing condition,[61] and a "preponderance of medical opinion" in support of the causality,[62] then the claim for the material contribution of the injury to the development of the chronic pain disorder is stronger.

In Ontario, the Workplace Safety and Insurance Board adheres to various operational policies in making decisions, including the *Chronic Pain Disability Operational Policy*, which sets out five eligibility criteria:

1. A work-related injury occurred.
2. Chronic pain is caused by the injury.
3. The pain persists 6 or more months beyond the usual healing time of the injury.

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[56] *Decision No 2190/06*, 2009 ONWSIAT 317 at para 19 [*Decision No 2190/06*]; see also *Decision No 1661/04*, 2005 ONWSIAT 426 at para 37.
[57] *Decision No 232/13*, 2013 ONWSIAT 1334 at paras 22-24.
[58] *Decision No 2009-173*, *supra* note 54 at paras 13 & 19.
[59] *Decision No 2005-780*, 2005 CanLii 76589 (AB WCAC) at para 7 [*Decision No 2005-780*]; *Decision No 2006-1244*, 2006 CanLii 78122 (AB WCAC) at para 38 [*Decision No 2006-1244*]; *Decision No 797/10*, 2010 ONWSIAT 1735 at para 42 [*Decision No 797/10*].
[60] *Decision No 1213/15*, 2015 ONWSIAT 1521 at para 20.
[61] *Decision 680/10*, 2011 ONWSIAT 1846 at para 64 [*Decision 680/10*]; *Decision No 797/10*, *supra* note 59 at para 42; *Decision No 946/12*, *supra* note 55 at paras 60 & 70. A pre-existing condition does not bar compensation for an injury, but it may weaken a claim that it is a separate injury. Alternatively, the employee can claim aggravation of the pre-existing injury, but this may be difficult to prove without clear documentation. See *Decision 2009/657*, 2009 CanLii 59970 (AB WCAC) at para 13; *Decision 871/11*, 2012 ONWSIAT 2252 at para 60 [*Decision 871/11*].
[62] *Decision No 2190/06*, *supra* note 56 at para 47; *Decision No 2043/04*, 2005 ONWSIAT 901 at para 36.

4. The degree of pain is inconsistent with organic findings.
5. The chronic pain impairs earning capacity.[63]

Proof of these criteria can be subjective or objective. Both CFS and FM fall under the description of chronic pain disability,[64] thus enabling a more flexible approach to establishing causation of the chronic pain disability. MCS does not fall under this policy. Employees who claim workers' compensation for MCS seem to be less successful in proving causation because the Board finds medical information insufficient and debates what kind of disability it is (psychological, toxicity, or gastro-intestinal).[65] Despite the fact that both Alberta and British Columbia also have policies dealing with chronic pain claims in a similar manner,[66] neither of the Boards refer to these policies and both are less willing to accept medical evidence that supports a causal claim. Instead, the Alberta and British Columbia Boards find that the information is insufficient or the disability is due to outside and unrelated conditions.[67]

Workers' compensation is an option that persons with chronic pain disorders can pursue if an injury at work contributed to the development of the chronic pain disorder. The Ontario Board shows a greater willingness to recognize the contribution of the compensable injury and to accept the medical evidence. However, this is only the case for FM and CFS, not MCS. Thus, not all workers' compensation boards across Canada deal with chronic pain disorders in the same way, nor are all chronic pain disorders treated the same. Additionally, a workers' compensation claim can only result in money; the Boards do not have authority to order accommodation or reinstatement. However, employees can claim workers' compensation as well as pursuing other options like LTD benefits and accommodation through other processes

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[63] Ontario, The Workplace Safety and Insurance Board, *Document 15-04-03 Chronic Pain Disability Operational Policy* (Toronto, 15 February 2013) at 1-2 [*Chronic Pain Policy*].
[64] *Ibid* at 2 & 7.
[65] *Decision No 2485/10*, 2013 ONWSIAT 2628 at paras 13 & 16 [*Decision No 2485/10*]; also see *Decision No 2013-00753*, 2013 CanLii 36991 (BC WCAT) at para 26 for similar problems at the BC Board.
[66] Alberta, Workers' Compensation Board, *Policy 03-02 Part II: Application 7: Chronic Pain/Chronic Pain Syndrome* (Edmonton, 26 November 1996); British Columbia, Workers' Compensation Board, *Practice Directive #C3-1* (Vancouver, 1 January 2003).
[67] *Decision No 2006-1244*, *supra* note 59 at para 38; *Decision No 2009-173*, *supra* note 54 at para 13; *Decision No WCAT-2012-02257*, 2012 CanLii 54375 (BC WCAT) at para 58 [*Decision No WCAT-2012-02257*].

5.2 Options after dismissal

After the employee is dismissed, accommodation is no longer an option, nor are LTD benefits. The employee may be able to pursue workers' compensation if the initial compensable injury occurred while employed. After dismissal, the employee may instead seek damages for the termination by pursuing a claim at the relevant human rights commission or through common law litigation. An employee can make a complaint at the human rights commission before dismissal, but it is more commonly done after dismissal.

5.2.1 Human rights claims

Where "a person believes that any of his or her rights under [the Ontario *Human Rights Code*] have been infringed, the person may apply to the Tribunal for an order" for compensation, restitution, or any other appropriate remedy.[68] Persons with chronic pain disorders who have been dismissed because of their disability (or suspect that is the case) may file a complaint of discrimination or harassment in employment.[69] Human rights commissions and tribunals have the authority "to determine all questions of fact or law that arise in any application before it."[70] Having said that, where the workplace is unionized, a human rights complaint by a former employee may be dismissed because it should be dealt with under the collective agreement given that arbitrators can apply human rights legislation[71] and have exclusive jurisdiction over matters arising from the collective agreement.[72] The complaint may progress "where the employee also alleges that the union has acted discriminatorily."[73] Claims under human rights codes can result in reinstatement

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[68] *Human Rights Code*, RSO 1990, c H-19 s 34(1) [OHRC]; see also the *Canadian Human Rights Act*, RSC 1985, c H-6 s 40(1) [CHRA]. Each province has its own human rights legislation, but they are largely similar. As such, only Ontario and federal Canadian legislation will be discussed. Ontario was chosen because of the volume of tribunal caselaw from the Ontario Human Rights Commission

[69] OHRC, *ibid* s 5; CHRA, *ibid* ss 7, 10, 14(1).

[70] OHRC, *ibid* s 39; see also CHRA, *ibid* s 50(2).

[71] *Parry Sound*, *supra* note 12 at para 1; see *Pinder v Toronto District School Board*, 2012 HRTO 1217 at para 57 [*Pinder*] where the Tribunal dismissed the complaint of discrimination because it had already been dealt with in a previous grievance arbitration proceeding under the collective agreement.

[72] *Weber*, *supra* note 11at paras 55-63 & 72.

[73] Wright, *supra* note 9 at 3-25; also see *Casler v Canadian National Railway*, 2011 FC 148 at para 3. But see *Pinder*, *supra* note 71 at para 11: "[t]o found a claim against the Union, the applicant must prove a factual basis that could give rise to a finding that the Union itself discriminated against her." A union can

to the position with compensation for lost wages and benefits under arbitrators or human rights tribunals and commissions.[74] The Ontario Human Rights Tribunal has discretion to make an "order directing any party to the application to do anything that, in the opinion of the Tribunal, the party ought to do to promote compliance with this Act."[75]

With regards to chronic pain disorders, the most common complaint is discrimination in employment based on disability either by failing to accommodate or termination because of disability. Harassment does not seem to be commonly claimed, despite the likelihood that harassment has occurred, given the frequently reported resentment from co-workers and supervisors.[76] In order to successfully prove discrimination, the individual with a chronic pain disorder must "establish on a balance of probabilities, a link between a respondent's alleged actions and a prohibited ground of discrimination under [human rights legislation]."[77] The complainant must convince the Tribunal that there was *prima facie* discrimination by the employer.[78] In order to establish *prima facie* discrimination, the individual must establish (1) the existence of a disability that the employer knew or ought to have known; (2) some adverse effect on employment; and (3) that the disability was a factor in the adverse treatment.[79]

Persons with chronic pain disorders encounter evidentiary problems from employers and at human rights tribunals. Some employers refuse to accept medical evidence, even where it is reasonable and consistent and in response to the employer's own request for more

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file a representative complaint on behalf of some of its members as well; see, e.g. *USWA v Weyerhaeuser*, 2009 BCHRT 328 at para 1.

[74] *Ibid* at 3-26.

[75] OHRC, *supra* note 68 s 45.2.

[76] A harassment complaint may be dealt with through another process; in *Pardo v School District No 43 (Coquitlam)*, 2008 BCHRT 129 [*Pardo*], harassment was dealt with in an internal complaint procedure at para 60.

[77] *Brouillette v Northern Lights Canada*, 2012 HRTO 159 at para 37 [*Brouillette*].

[78] *Gravel v Canadian Human Rights Commission and Public Service Commission of Canada*, 2010 CHRT 3 at para 150.

[79] *McGill University Health Centre (Montréal General Hospital) v Syndicat des Employes de l'Hopital General de Montréal*, 2007 SCC 4 at para 49; applied in *Pardo*, *supra* note 76 at para 49.

information.[80] The medical evidence may not definitively prove disability, either due to the subjective nature of chronic pain disorders[81] or because of an employee's unwillingness to cooperate.[82] The employer points to this lack of cooperation as a reason for its failure to accommodate, which is sometimes accepted by tribunals and courts during judicial review of the lower decision.[83] Employees are usually considered blameworthy when they do not cooperate with the employer's (1) requests for more medical information,[84] and (2) attempts developing or providing accommodation.[85]

Tribunals also grapple with the problem of proof. The medical evidence may fail to meet the evidential threshold to prove a disability, which is required to prove discrimination against a disability.[86] Employees encounter difficulties at tribunals proving the existence of a chronic pain disorder because of the nature of the disability; however, courts and tribunals are improving at recognizing the subjective nature of chronic pain disorders and its accompanying evidentiary problems, albeit inconsistently.[87] Despite these obstacles, employees do succeed in proving discrimination.[88] On the whole, however, human rights tribunals fall short of the analysis required by failing to engage in the unique challenges of chronic pain disorders with limited reasoning.

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[80] *Easthom v Dyna-Mig, a Division of F&P Mfg., Inc*, 2014 HRTO 1457 at paras 37 & 43 [*Easthom*]. The employer's actions were found discriminatory.
[81] *Brewer v Fraser Milner Casgrain LPP*, 2006 ABQB 258 at para 27 [*Brewer*].
[82] *Miller v Golden and Area Community Economic Development Society*, 2011 BCHRT 108 at para 29 [*Miller*].
[83] *Brewer*, *supra* note 81 at para 20; *Brewer v Fraser Milner Casgrain LPP*, 2008 ABCA 435 at para 19; *Re Ontario Human Rights Commission and Jeffrey and Dofasco*, [2007] OJ No 3767 (Sup Ct) at para 96 [*Dofasco*].
[84] *Small v Caritas Health Group*, 2003 ABQB 968 at para 9; *Miller*, *supra* note 82 at para 29.
[85] *Kovios v Inteleservices Canada Inc*, 2012 HRTO 1570 at para 53
[86] *Panacci v Attorney General of Canada*, 2010 FC 114 at paras 32, 34; see also *Trimble v Human Rights Commission*, 2006 YKSC 28 where the tribunal sent it back to the Commission for a normal hearing because there was not enough evidence to make a decision either way at paras 32-34.
[87] *Brewer*, *supra* note 81 at paras 29, 32.
[88] *Metsala v Falconbridge Limited, Kidd Creek Division*, 2001 CanLii 26213 (OHRT); *Dofasco*, *supra* note 83.

5.2.2 Common law litigation: wrongful dismissal

The whole ambit of common law causes of action may be open to the individual with a chronic pain disorder, depending on the situation. However, the usual action pursued by employees with chronic pain disorders is wrongful dismissal against the employer.

Employees who feel that they have been wrongfully dismissed or dismissed without cause have several options. They can pursue wrongful dismissal as a common law cause of action or they can complain to the Ministry of Labour by writing to an inspector as per Part III of the *Canada Labour Code* (CLC)[89] for federal employees and under the relevant provincial legislation for provincial employees.[90] Neither of these options are available for unionized employees, who are limited to acting under the collective agreement. To be unjust or wrongful, the employer must have ended the employment relationship without reasonable notice, pay in lieu of notice, or cause. Under the CLC, the inspector will first try to help settle the complaint and then, if unsuccessful, the inspector will prepare a report that may be referred to an adjudicator.[91] The Ontario *Employment Standards Act* provides a similar process wherein the complainant must file a complaint and it will be investigated by an employment standard officer who may attempt to settle.[92] In both federal and provincial complaints, the decision maker has the power to pay compensation, reinstate the person to the position, or do any other thing to "remedy or counteract any consequence of the dismissal."[93]

A complaint under labour statutes is likely less expensive compared to the common law cause of action; additionally, the common law civil action generally cannot result in specific performance of the employment contract, thus the court cannot return the

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[89] RCS, 1985, c L-2. This action is only available for persons who have been employed for 12 continuous months, see s 240(1)(a) [CLC].
[90] See the Ontario *Employment Standards Act, 2000*, SO 2000, c 41 s 96(1) in contravention of the requirement of notice in s 54 [ESA]. Only Ontario is specifically discussed due to the greater amount of relevant caselaw in Ontario.
[91] CLC, *supra* note 89 ss 241-242.
[92] ESA, *supra* note 90 s 101.1.
[93] CLC, *supra* note 89 at s 242(4) for an adjudicator in a federal case; ESA, *ibid* at s 104(1), the employment standard officer may order compensation or reinstatement or both.

employee to the position.[94] However, the employee cannot pursue both the common law cause of action and the statutory one.[95] In order to begin a civil action for wrongful dismissal, the employee must follow the rules of civil procedure and issue an originating document.[96] Generally, wrongful dismissal claims are settled informally by counsel or through the mediation process.[97] Remedies for a wrongful dismissal civil action are typically meant to compensate the employee as if he or she had been employed.[98] With regards to chronic pain disorders, the remedies that are sought include compensation and aggravated and punitive damages for the method of dismissal. Compensation includes all the entitlements they would have received if they had continued to work during the notice period including "bonuses, fringe benefits, medical and dental benefits, life insurance and…disability insurance."[99] Punitive damages can be awarded where acts of discrimination in breach of human rights legislation constitute a separate actionable wrong in a wrongful dismissal case.[100] It seems wrongful dismissal complaints under a labour statute include human rights considerations more than those claimed in courts perhaps because the arbitrator or investigator assigned has more contact with the complainant, more access to evidence and the facts, and more flexibility in considering human rights.[101]

With regards to chronic pain disorders, there is one key case that must be mentioned for wrongful dismissal: *Honda Canada*.[102] This is the most recent SCC decision dealing with wrongful dismissal and disability and it is the only one dealing with wrongful dismissal of an individual with a chronic pain disorder. Keays was a long-term employee of Honda with

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[94] *Van Snellenberg v Cemco Electrical Manufactoring Co*, [1946] 4 DLR 305 (SCC); *Michaels v Red Deer College* (1975), [1976] 2 SCR 324; *Hayes v Harshaw* (1913) 30 OLR 157 (CA).
[95] ESA, *supra* note 90 ss 97(2) & 98(2) set out that the employee who files a complaint alleging wrongful dismissal cannot commence a civil proceeding, and vice versa.
[96] *Rules of Civil Procedure*, O Reg 575/07, s 6(1), R 14.01(1) & 14.03.
[97] Janice Rubin & Hena Singh, *A Practical Guide to the Law of Termination in Ontario*, 2d ed (Aurora: Canada Law Book, 2010) at 111.
[98] *Lewarton v Walters* (1985), 8 CCEL 86 (BC Sup Ct); *Cockburn v Trusts & Guarantee Co* (1917), 33 DLR 159 (Ont CA).
[99] Michael G Sherrard, "The Lurking Danger in Taking the 'Bare Minimum Route': Disability Benefits During the Reasonable Notice Period of Termination" (Paper delivered at Disability Benefits in Employment AND AFTER DISMISSAL, 30 January 2013) (2013) LSUC CPD at 2-12.
[100] *McKinley v BC Tel*., [2001] 2 SCR 161 at para 88.
[101] *Re Ford and King's Transfer Van Lines Inc*. (2013), 12 CCEL (4th) 141 (Can Adjud).
[102] [2008] 2 SCR 362 [*Honda* SCC]; *Honda* CA, *supra* note 17; *Keays v Honda Canada Inc*, [2005] OJ No 1145 (Sup Ct) [*Honda* SC].

CFS. He was on disability leave from October 1996 to December 1998 when he was required to return following the insurance company's finding that he could return to work, contrary to his own physician's findings.[103] He began to struggle with work absences and so was coached in the first step of Honda's progressive discipline process, then placed in Honda's special program for employees with disabilities as an accommodation for his disability.[104] In this program, Keays was required to validate each absence with a doctor's note before returning to work, which was not required for more "mainstream" disabilities and served to prolong the absences.[105] He met with Honda's medical staff but it was a negative meeting and so he retained legal counsel. Honda then requested that Keays meet with an occupational medicine specialist because it did not accept the legitimacy of his absences.[106] When Keays requested clarification as to the purpose of this meeting, Honda responded that he either meet with the specialist or be fired. Ultimately, he was terminated for insubordination in failing to meet with the doctor. He discovered that he was fired when a co-worker phoned him after Honda announced that he had been dismissed. Keays began an civil action for wrongful dismissal.

At the Ontario Superior Court, Justice McIsaac awarded the unprecedented amount of $500,000 in punitive damages after a twenty-nine-day trial because he was "not satisfied that the maximum penalty under the OHRC, $10,000, comes even close to an appropriate deterrence and denunciation of the outrageous and high-handed conduct of this defendant."[107] Justice McIsaac delivered a passionate and condemning set of reasons for this decision, which also included a 15 months' notice award. The awards were justified because of the differential discrimination with regards to Keays' treatment and persons with "mainstream" disabilities, "stone-walling" from Honda which aggravated his symptoms, the insensitive manner of his termination that also worsened his condition, and retaliation for Keays' retaining legal counsel by dismissal.[108] Justice McIsaac did not allow

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[103] *Honda* SC, *ibid* at para 4.
[104] *Ibid* at para 6.
[105] *Ibid* at para 7.
[106] *Ibid* at para 12.
[107] *Ibid* at para 64.
[108] *Ibid* at paras 7, 8, 44.

the claim for intentional infliction of nervous shock because it was redundant with the *Wallace* damages that were awarded for bad faith conduct in dismissal.[109] The tort of discrimination claim was also dismissed because the Court did not have jurisdiction to create this tort, when it had been denied by the SCC.[110] Punitive damages were awarded because Justice McIssac had "no difficulty in finding that the plaintiff has proved that Honda committed a litany of acts of discrimination and harassment in relation to his attempts to resolve his accommodation difficulties. When he began to push them on his concerns by having his lawyer attempt to advocate for him, they imposed the most drastic form of harassment possible: they terminated him."[111]

Honda appealed this decision as well as alleging bias on the part of the trial judge.[112] The majority of the Ontario Court of Appeal allowed the appeal in part to reduce the punitive damages to $100,000 because although Honda's conduct "was sufficiently outrageous to warrant an award of punitive damages," the quantum was not proportionate to punitive damage awards in other dismissal cases.[113] The Ontario Court of Appeal also dismissed the trial judge's findings of a corporate conspiracy due to lack of evidence.[114] The dissent, written by Justice Goudge, would have dismissed the appeal. Justice Goudge justified the punitive damages because they did not flow from a breach of human rights legislation, which was barred in *Seneca College of Arts and Technology v Bhadauria* [*Bhadauria*], but rather the discriminatory conduct amounted to an independent actionable wrong:[115]

> [I]n the context of punitive damages, the appellant's conduct is not advanced to support a cause of action for breach of the respondent's human rights, but as an independent wrong actionable by way of wrongful dismissal. What matters is that the appellant's acts of discrimination and

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[109] *Ibid* at para 49; see *Wallace v United Grain Growers Ltd*, [1997] 3 SCR 701 at 745: "where an employee can establish that an employer engaged in bad faith conduct or unfair dealing in the course of dismissal, injuries such as humiliation, embarrassment and damage to one's sense of self-worth and self-esteem might be all worthy of compensation…compensation does not flow from the fact of dismissal itself, but rather from the manner in which the dismissal was effected by the employer."
[110] See *Seneca College of Applied Arts and Technology v Bhadauria*, [1981] 2 SCR 181 [*Bhadauria*], aff'd in *Taylor v Bank of Nova Scotia*, [2005] OJ No 838 (CA).
[111] *Honda* SC, *supra* note 102 at para 57.
[112] *Honda* CA, *supra* note 17.
[113] *Ibid* at para 103-104.
[114] *Ibid* at para 91.
[115] *Bhadauria*, *supra* note 110.

> harassment triggered the respondent's termination. In fact, the trial judge found that the appellant's course of discriminatory conduct culminated in the most dramatic form of employment harassment, namely the respondent's termination. This would give rise to a cause of action for wrongful dismissal apart altogether from any question of the respondent's disobedience. It is in this context that the trial judge found the appellant's discriminatory conduct to constitute an independent actionable wrong.[116]

Justice Goudge deliberately avoided applying human rights legislation because of *Bhadauria*. Accommodation and freedom from discrimination for persons with disabilities are required by the *Canadian Charter of Rights and Freedoms* (*Charter*)[117] and by human rights legislation in each province.[118] Yet, these decisions show the court's confusion with regards to the incorporation of human rights in other areas of the law, here, employment and contract law.

The SCC allowed the appeal in part to set aside the *Wallace* damages and the punitive damages entirely, leaving only the regular damages award for 15 months' notice.[119] The recitation of facts was significantly smaller in the SCC decision at only 4 paragraphs with much less of a focus on the discriminatory conduct of Honda that garnered attention in the lower court decisions. Instead, the SCC found that "[t]here was no detriment in being part of the disability program and being treated differently from persons with 'mainstream illnesses.' The differential treatment was meant to accommodate the particular circumstances of persons with a particular type of disability and to provide a benefit to them."[120] Although this may have been true initially, the facts provided in the lower courts indicate that Honda continued to apply this differential treatment even when it was evident that it was not helpful at all, but actually harmful—meaning that Honda failed to appropriately accommodate Keays.[121] Instead it was adverse effect discrimination: the standard was not discriminatory on its own but the application resulted in differential

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[116] *Honda* CA, *supra* note 17 at para 46.
[117] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 s 15.
[118] See e.g. the OHRC, *supra* note 68 Preamble & s 17 and the CHRA, *supra* note 68 ss 2, 5, 15.
[119] *Honda* SCC, *supra* note 102 at para 2.
[120] *Ibid* at para 67.
[121] Specifically, the requirement of a doctor's note to validate each absence before being permitted to return to work actually served to extend the length of each absence, despite the program's intended purpose of permitting and supporting disabilities that resulted in absences.

treatment. Additionally, Honda's scepticism in regards to Keays' condition was discriminatory given both its prior acceptance of the disability and the medical evidence of his physician that was consistent with no grounds for suspicion. The dissent in the SCC decision recognized that Honda "acted in a discriminatory manner in subjecting him to the kind of scrutiny he underwent and, in fact denying him accommodation for his disability.[122]

However, the SCC went on to preclude any civil remedies for breach of human rights legislation by requiring that the complainant must seek a remedy as set out in the relevant human rights scheme,[123] which was set out in *Bhadauria*. However, in denying evidence of human rights violations to serve as an independent actionable wrong for the purposes of punitive damages, the Court went beyond *Bhadauria*. In so doing, the SCC has essentially forced an ultimatum on employees with disabilities who have been wrongfully dismissed: they can complain to human rights tribunals of discrimination or they can pursue a monetary award in an action for wrongful dismissal. As the case progressed, the courts considered human rights less and demonstrated less concern about the discriminatory treatment by Honda and less understanding of the disability experienced by Keays—CFS.

Courts cannot hear civil actions based on breach of human rights legislation alone; this is barred by *Bhadauria*. Although the OHRC grants jurisdiction to hear human rights claims when they are attached to an independent cause of action, there is limited consideration of human rights aspects in wrongful dismissal actions: "[o]nly a handful of wrongful dismissal judgments issued by the common law courts over the past decade involving a disability case have even considered the duty to accommodate, and none have applied the duty in any systematic or consistent fashion."[124] Furthermore, given that human rights tribunals can determine any question of law or fact before it and can order anything that will promote compliance with the act, the tribunals have a distinct advantage. Common law actions of wrongful dismissal demonstrate a lack of consideration of human rights

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[122] *Honda* SCC, *supra* note 102 at para 122.
[123] *Ibid* at para 63.
[124] Michael Lynk, "Disability and Work: The Transformation of the Legal Status of Employees with Disabilities in Canada" in R Echlin & C Paliare, eds, *Law Society of Upper Canada Special Lectures 2007: Employment Law* (Toronto: Irwin Law, 2008) 189 at 244 [Lynk].

concerns for all persons with disabilities. However, for persons with chronic pain disorders, this may be particularly problematic because they are considered less legitimate and, as such, blatant discrimination as seen in *Honda Canada Inc v Keays* is less likely to be recognized by courts as discriminatory than for other "mainstream disabilities."[125] Without more consideration of human rights in wrongful dismissal cases for disabilities generally, this disability hierarchy with respect to legitimacy is maintained with ramifications demonstrated in other areas of the law.

5.3 Chronic pain disorders in the caselaw

There are several options available for persons with chronic pain disorders; however, only accommodation can enable individuals to continue to work. Persons with chronic pain disorders encounter some of the same obstacles to access accommodation across this range of options: lack of objective medical evidence and dependence on subjective self-reporting; scrutiny owing to the fluctuation of symptoms and questions of etiology; and, confusing the medical and legal definitions of disability to deny access to benefits. These issues result in a hierarchy of disabilities wherein chronic pain disorders fall lower and are thus considered less legitimate.[126] As such, persons with chronic pain disorders can be subject to differential treatment and potentially discrimination on the basis of their particular disability, which is clearly unacceptable under human rights principles in Canada. Yet, only some courts, tribunals, and arbitrators are cognizant of this potential whereas others are not. Decisions dealing with chronic pain disorders seem to fall into three different categories: (A) the traditional approach, (B) the human rights approach, and (C) the hybrid approach. The majority of caselaw falls into the hybrid approach, which is the middle ground wherein, despite stated human rights objectives by courts and tribunals, there is instead inconsistent and inadequate application of these human rights principles.

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[125] See Judith Mosoff, "Lost in Translation?: The Disability Perspective in Honda v Keays and Hydro-Québec v Syndicat" (2009) 3 McGill JL & Health 137 at 141-142.
[126] *Ibid*.

5.3.1 The traditional approach

The traditional approach, as the name suggests, is the more conventional perspective wherein a disability can only be proven with objective evidence and a clear medical cause. This approach is not flexible and, as such, is now outdated with the imposition of human rights principles that require the duty of accommodation and freedom from discrimination. It is most evident in the earliest cases dealing with chronic pain disorders. These early cases often refused to accept subjective medical evidence and the imprecise cause of chronic pain disorders, which was even more of a problem in the early 1990s because of the complete lack of medical research regarding chronic pain disorders at that point. Instead, courts were sceptical and disbelieving as well as dismissive.[127] In many early cases, chronic pain disorders were not accepted as disabilities, either because the credibility of the individual was destroyed by surveillance evidence[128] (which is inherently limited for invisible disabilities) or because the courts made findings regarding the medical etiology that barred recovery.[129]

When reading these earlier cases, the blatant discrimination and dismissive attitude of the courts is shocking and obviously inappropriate. However, these cases took place in the early days of accommodation, before the current approach to accommodation was set out by the SCC in 1999 in *British Columbia (Public Service Employees Relations Commission) v BCGSEU (Meiorin Grievance*) (*Meiorin*).[130] This does not excuse this attitude, but it can help to explain it. Unfortunately, echoes of this dismissive and discriminatory attitude still exists today. For example, the traditional approach is also evident in the US and EU wherein persons with chronic pain disorders cannot qualify as disabled in order to access

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[127] See e.g. *Mackie v Wolfe* (1994), 41 Alta LR (3d) 28 (CA) [*Mackie*] and *Palmer v Goodall*, 1991 CanLii 384 (BC CA).
[128] See *Stronge v London Life Insurance Co*, [1993] OJ No 103 (Gen Div) at para 51.
[129] See *Louis v Esslinger, and one other action*, [1981] BCJ No 2112 (Sup Ct) where the court found that "his continuing complaints of pain and physical disability spring not from the accident but from a psychological need to explain an unpleasant, embarrassing, and unacceptable reality" at para 27; *Mackie*, *supra* note 127.
[130] [1999] 3 SCR 3.

rights and benefits often due to the lack of objective evidence and fluctuating symptoms, all of which detract from the credibility of the claim.

Canada is not exempt from the traditional approach either. Canada, with the recognition of accommodation and disability rights in human rights legislation and the *Charter*, should have progressed from this traditional approach, but this is not always the case. Workers' compensation is one example of the current use of the traditional approach. Here, only the workers' compensation schemes in Ontario, Alberta, and British Columbia are examined because of the caselaw available. Even with this limited analysis, it is evident that not all workers' compensation schemes are equal. In Alberta and British Columbia, the workers' compensation boards demonstrated a traditional approach wherein the boards did not accept subjective evidence, found there was insufficient information to make a decision, rejected the claim that the compensable injury caused the chronic pain disorder, and questioned the degree of disability.[131] The Ontario Board used the same approach in dealing with claims of MCS.[132]

There are of course arguments that could be made regarding the fact that workers' compensation is a compensatory scheme and that, in order to be considered a compensable injury, strict requirements must be met. However, given the differential treatment both among different boards and different chronic pain disorders, this argument must be rejected. Obviously it is possible to compensate for chronic pain disorders despite the obstacles of subjective evidence and indirect causation because the Ontario board does so when dealing with CFS and FM. MCS may be more problematic because the initial compensable injury can be more difficult to prove both in the sense that it was actually an injury and that it caused the MCS. The compensable injury for CFS and FM is often one single traumatic event in the form of a viral infection or physical injury. The policies and definitions of disability are largely similar across the boards of Alberta, British Columbia, and Ontario. Yet, chronic pain disorders are treated differently by the different boards.

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[131] See e.g. *Decision No 2005-780*, *supra* note 59; *Decision No 2006-1244*, *supra* note 59; *Decision No 2009-173*, *supra* note 54; *Decision No WCAT-2012-02257*, *supra* note 67.
[132] See e.g. *Decision No 797/10*, *supra* note 59; *Decision No 2485/10*, *supra* note 65.

Thus, the adverse treatment by the Alberta and British Columbia boards is discriminatory because it is neither necessary nor justified as demonstrated by the more flexible approach demonstrated by the Ontario board.

Although the application of the traditional approach in workers' compensation schemes is problematic, the use of this approach in higher level caselaw is far more concerning. The differential treatment evident at workers' compensation boards can result in discrimination, but the reasoning given rarely demonstrates a dismissive attitude. Rather, there is a sense of frustration with the limited objective evidence and the strict evidential requirements to obtain compensation. Although workers' compensation boards often deny the claims in ways that can result in discrimination, they do not necessarily do so in a discriminatory fashion.

Unfortunately, we can ascertain remnants of the discriminatory attitudes of early caselaw in current high level caselaw. One of the worst offenders is, of course, *Honda Canada* in which the SCC failed to consider the accommodation duty and dismissed the claim for what was obviously discrimination—the requirement of a doctor's note to validate absences for Keays' "non-mainstream" disability when others did not have suffer this requirement. Wrongful dismissal judgments by courts dealing with disability typically decline to consider human rights principles such as the duty of accommodation.[133] This failing in *Honda Canada* is particularly problematic given that it is not only the most recent wrongful dismissal case dealing with disability from the SCC, but also one of the most recent SCC cases dealing with disability. Here, the highest level of court in Canada denied that there was discrimination, when it was undoubtedly there, at a time when the nuances and importance of human rights principles, in particular the duty of accommodation, has been made clear by the same court nine years earlier, starting with *Meiorin*. *Honda Canada* may actually be a sign of progress in the wrong direction: stepping back from the inclusive vision set out in *Meiorin* to limit the effect of accommodation and human rights principles.

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[133] Lynk, *supra* note 124 at 244.

Perhaps this limiting attempt is merely with regards to “non-mainstream” disabilities such as chronic pain disorders or perhaps there will be ramifications for disabilities generally.

Another significant case is *Brewer v Fraser Milner Casgrain LPP* (*Brewer*), in particular the decisions by the Alberta Human Rights Commission and the Alberta Court of Appeal, both of which doubted her disability because the doctor did not definitively diagnose her with MCS—despite reporting impairment and making recommendations for impairment.[134] These decisions demonstrate a complete lack of consideration of human rights principles that results in the courts failing to identify discrimination and to justify discrimination because of the basis of the disability. Thus, the courts in *Brewer* and *Honda Canada* are not merely allowing discrimination but participating in it by applying differential treatment *because* of the disability. This means that the traditional approach is outdated and discriminatory, according to our current understanding of human rights principles. Having said that, the traditional approach seems to be far less common now, aside from these few exceptions, perhaps because of the current emphasis on human rights principles. Hopefully, these cases are not signs of regression in our approach to human rights principles and are instead, merely remnants of the former approach. Having said that, the current emphasis on human rights does not mean that the human rights approach is the main method.

5.3.2 The human rights approach

The human rights approach is how the law is supposed to be: open, flexible, and inclusive to balance the rights of all parties as much as possible, as long as sufficient medical evidence is provided. This is not an approach that accepts all claims of disability at face value but it is also not one that denies claims because of the inherent limitations of the medical proof, namely the lack of objective evidence for chronic pain disorders. With a few exceptions, it is almost exclusively arbitrations that demonstrate a human rights approach, which is likely due to the expertise of the arbitrators and the frequency with

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[134] *Brewer*, *supra* note 81.

which they deal with disabilities and chronic pain disorders.[135] Arbitrators also have relative freedom in their decision making, both in what to consider and which remedies to order. Surprisingly, human rights tribunals do not demonstrate this human rights approach. This is partially due to the fact that there are not that many tribunal decisions, which may be because these cases are dealt with at the arbitration level or perhaps they are dropped when the person becomes too disabled to continue with the claim. The tribunal decisions that deal with these cases do not provide strong reasoning or much analysis of the facts or issues, regardless of whether there is recognition of the unique challenges of chronic pain disorders.[136] Instead, most tribunal decisions seem to fall into the hybrid approach because the tribunals claim to apply human rights principles but fail to do so consistently or fail to engage with the issues by only providing limited reasoning.

There are three significant arbitration decisions dealing with chronic pain disorders. First, in a 2010 Ontario labour arbitration, *Re City of Toronto and CUPE, Local 79 (C08-05-8938)*, the arbitrator did not accept surveillance evidence as proof that the grievor was able to work and instead found that the "fact that the grievor is able to engage in certain activities of daily living is not evidence from which one may conclude that she is able to function in employment."[137] This finding was particularly significant for the grievor's CFS and FM because of the invisible fluctuation of symptoms, meaning that surveillance was irrelevant to proof of disability. Second, in *Toronto District School Board v OSSTF, District 12* in 2011,[138] Arbitrator Paula Knopf demonstrated a particularly nuanced and sensitive understanding of the facts and the grievor's MCS. Arbitrator Knopf understood the evidential limitations of MCS and accepted the subjective medical evidence to allow the grievance in part. It was only allowed in part because, although the employer did not satisfy the duty of accommodation and was disrespectful, the grievor was not cooperative and it was likely that accommodation would not have possible. The arbitrator was able to balance

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[135] See e.g. *Health Sciences Association of Alberta v David Thompson Health Region*, 2007 CanLii 80620 (AB GAA); *Dofasco*, *supra* note 83; *City of Ottawa v Civic Institute of Professional Personnel*, 2010 CanLii 70011 (Ont LA).
[136] See e.g. *Brouillette*, *supra* note 77; *Easthom*, *supra* note 80.
[137] *City of Toronto*, *supra* note 4 at para 86.
[138] [2011] OLAA No 461.

the rights and needs of both the employer and employee, while dealing with MCS, which is arguably the most controversial and misunderstood of chronic pain disorders. Third, in 2014, in *Re Joseph Brant Memorial Hospital and ONA*, arbitrator Bendel set out rules to determine what subjective evidence is acceptable.[139] Acceptance of subjective evidence hinges on credibility both of the witnesses that provide corroborating evidence and of the individual with a chronic pain disorder. This decision was followed the next year in *Re Ontario (Treasury Board Secretariat) v AMAPCEO (Union)*[140] in which the tribunal also accepted subjective evidence of a chronic pain disorder for a disability claim.

These are all Ontario arbitrations, which may be due to a higher volume of arbitrations dealing with chronic pain disorders or perhaps a greater application of the human rights approach by Ontario arbitrators. Additionally, these are all relatively recent decisions, which suggests that there may currently be progress with regards to chronic pain disorders. Most importantly, however, these decisions all deal with unionized workplaces. It has long been recognized that unions typically enable better access to human rights and that seems to be the case for chronic pain disorders. Having said that, these three factors—unions, arbitrations, and Ontario—in no way guarantee a human rights approach because the majority of LTD decisions applied the hybrid approach and failed to fully engage with the issues. Only these few Ontario arbitrations demonstrate the ideal approach to dealing with chronic pain disorders and can be considered proof that it is possible to accept chronic pain disorders as disabilities. Both the traditional and hybrid approaches seem to anticipate fraud and deception where there is no objective evidence. These arbitrators demonstrated how to accept subjective evidence while reducing the potential for fraud by requiring credibility and possibly corroboration where appropriate. However, given that these decisions only occurred in arbitrations dealing with unionized workplaces in Ontario within the last six years and have not been cited more than a few times each, the potential reach of these decisions is markedly limited.

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[139] *Joseph Brant Memorial Hospital*, *supra* note 22; see Chapter 4 for a thorough discussion.
[140] *AMAPCEO*, *supra* note 20.

Some lower court decisions have also demonstrated the human rights approach, but, disturbingly, they have been overturned by higher courts. Arguably, the vehement decision of Justice McIsaac of the Ontario Superior Court in *Honda Canada* recognized many of the vulnerabilities of persons with chronic pain disorders and thus the discrimination in this case, as well as the employer's failure to satisfy the duty of accommodation.[141] However, the SCC, despite upholding compensation for wrongful dismissal, refused to find discrimination and reduced punitive damages to nothing. Although this may be due to the trial judge's controversial language, the failure to find discrimination is incomprehensible at best because of the clearly discriminatory conduct by the employer as agreed upon in the facts. Similarly, in *Brewer*, the Alberta Queen's Bench demonstrated a nuanced understanding of the employee's MCS to distinguish between an impairment and diagnosis, but the Alberta Court of Appeal overturned the decision with the traditional approach to find that the employer's denial of the disability without a definitive diagnosis was not discriminatory.[142] The fact that these decisions that demonstrate the human rights approach were overturned is highly concerning. It can be taken as clear evidence that courts not only fail to apply human rights principles adequately, but also actively work against such an approach. Thus, this failing of courts is not out of confusion or misunderstanding, but can only be a deliberate action. Presumably courts have acted in this way for the same reasons that courts initially denied chronic pain disorders in the early 1990s: fear of abuse and fraud.

Only one court decision that was not overturned employed the human rights approach: *Eddie v UNUM Life Insurance Co of America*.[143] Here the employee proved total disability to receive benefits under an LTD policy with subjective evidence of FM. The British Columbia Court of Appeal upheld the trial judge's decision to accept the subjective evidence because it was verified and supported by other witnesses and their credibility and the employee's credibility were not doubted.[144] Furthermore, the court recognized "[i]f the

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[141] *Honda* SC, *supra* note 102.
[142] *Brewer*, *supra* note 81.
[143] *Eddie*, *supra* note 6.
[144] *Ibid* at para 46.

insurer were correct that disability payments can only be triggered when a claimant is able to pinpoint the precise cause of disability, then situations could arise in which a claimant is clearly disabled by some kind of sickness, but is not eligible for benefits because the exact nature of the sickness cannot be determined."[145] This case was decided in 1999, which suggests that it is likely a fluke more than a sign of progress. Although the human rights approach is what the law now requires, the majority of caselaw falls into the hybrid approach.

5.3.3 The hybrid approach

The majority of caselaw seems to fall somewhere in the middle between the traditional and human rights approaches. In this hybrid approach, courts and tribunals apply human rights principles and recognize the unique challenges of chronic pain disorders but in an inconsistent and undeveloped manner. Instead, the courts and tribunals provide lip service to human rights principles while applying a watered down approach. Workers' compensation in Ontario for CFS and FM demonstrate this hybrid approach because, by adhering to the WSIB *Chronic Pain Disability Operational Policy*,[146] the Board is able to accept subjective evidence and causation where it is credible and proven that the workplace injury made a significant contribution to the development of the chronic pain disorder, respectively.[147] Surrounding circumstances are also considered to support claims of causation and injury. However, these decisions do not take a particularly nuanced approach nor do they adequately consider human rights principles as they are hindered by problems of unclear etiology and establishing the degree of disability.

Many LTD decisions fall into this middle ground, regardless of whether the claimant receives benefits because the courts fail to engage with human rights considerations and to

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[145] *Ibid* at para 60.
[146] *Chronic Pain Policy*, *supra* note 63.
[147] See e.g., *Decision No 680/10*, *supra* note 61; *Decision No 871/11*, *supra* note 61; *Decision No 588/00*, 2000 ONWSIAT 717; *Decision No 1661/04*, 2005 ONWSIAT 426; *Decision No 2190/06*, 2009 ONWSIAT 317.

recognize the evidentiary issues inherent to chronic pain disorders.[148] Instead, the courts inconsistently recognize the vulnerabilities of chronic pain disorders. In order to assess subjective medical evidence for proof of disability and proof of mental distress for general and aggravated damages, the credibility of the claimant is key. However, the way in which the credibility is considered suggests that there is an "ideal" plaintiff for LTD claims and that many persons with chronic pain disorder do not fit it. This is obviously hugely problematic, not merely in the practical sense that persons with chronic pain disorders struggle more to obtain LTD, but also with regards to the clear discrimination against these persons that this demonstrates. For example, in *Lumsden v The Government of Manitoba,* the Alberta Queen's Bench stated, "[a]dd to this the plaintiff's problems in organizing his thoughts and recollecting events, and a personality that was reportedly difficult at times, one can understand why the plaintiff's claim was the cause of concern and further information was sought. This was especially so given the lack of clinical findings by several of the specialists the plaintiff saw."[149] This describes a typical person with a chronic pain disorder. In effect, this means that the behaviour of a typical individual with a chronic pain disorder—due largely to symptoms of the disability—justifies discrimination in the form of scrutiny. As such, we can see the lingering influence of the traditional approach, wherein scrutiny and discrimination is validated because of fear of abuse and deception.

Persons with chronic pain disorders may be more successful in claims for LTD benefits if they base their claim on more well-established disabilities, such as mental illness. If a person with a chronic pain disorder claimed LTD benefits because of depression, then the issues of medical evidence and fluctuating symptoms may be sidestepped entirely. Persons with chronic pain disorders may fit better into the "ideal" plaintiff for mental illness claims than for physical disabilities. Although this is helpful to know in practice, this is unacceptable. Chronic pain disorders have been recognized as disabilities and, as such, should be sufficient to make a claim for LTD benefits. The fact that chronic pain disorders are not sufficient is discriminatory.

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[148] See e.g. *Garriok, supra* note 20; *Gerber, supra* note 19; *Lumsden v The Government of Manitoba*, 2007 MBQB 277 [*Lumsden*]; *Fidler, supra* note 4.
[149] *Lumsden, ibid* at para 103.

Other court decisions also fall into this hybrid approach, notably *Hydro-Québec v Syndicat des employés-e-s de techniques professionnelles et de bureau d'Hydro Québec, section local 2000 (SCFP-FTQ)* (*Hydro-Québec*) and the dissents in *Honda Canada*. Justice Goudge wrote the dissent for the Ontario Court of Appeal in *Honda Canada*.[150] Although he did not assess the accommodation duty, Justice Goudge recognized the employer's conduct as discriminatory and found that it gave rise to an independent cause of action in support of punitive damages. Thus, he recognized some of the vulnerabilities of the employee with CFS as well as allowing a breach of the OHRC (the discrimination) to support a claim for punitive damages. In doing so, he applied human rights principles against discrimination with limitations from *Bhaduaria*, but failed to assess accommodation. The dissent at the SCC was written by Justices LeBel and Fish, who similarly recognized the discrimination in this case as well as the denial of accommodation by the employer.[151] However, neither of these dissents applied a comprehensive human rights analysis by avoiding assessing accommodation and thus they fall into the hybrid approach for this deficiency.

Similarly, in *Hydro-Québec*, the SCC engaged with some aspects of accommodation and human rights but ultimately failed to provide meaningful reasoning or precedents for subsequent cases. Furthermore, both *Honda Canada* and *Hydro-Québec* failed to address the unique challenges of accommodating complex disabilities—chronic pain disorders and mental illness. Given that these are the only two recent SCC decisions that deal with "non-mainstream" disabilities in the workplace, this is a disappointing shortcoming that demonstrates a failing of the SCC to properly consider human rights principles. Again, the SCC reneged on the inclusive vision it set out in *Meiorin* to ultimately limit and narrow the accommodation duty and human rights principles.

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[150] *Honda* CA, *supra* note 17.
[151] *Keays* SCC, *supra* note 102.

5.3.4 Is this progress or have we stalled?

Despite the fact that caselaw in the hybrid approach marks progress from the traditional approach that does not mean that it is adequate. It is undoubtedly inadequate because it fails to amount to what is set out by human rights principles: open, flexible, and adaptable application of the law to recognize and support people's diverse capabilities and needs. Instead, indirect forms of discrimination are evident from employers, insurers, and, most problematically, courts. Having said that, there is the small hope that the human rights approach seen in recent arbitrations will influence other caselaw to shift the proportion of caselaw in the hybrid approach to the human rights approach. Clearly there are hindrances to the acceptance of chronic pain disorders as legitimate disabilities—lack of objective evidence and fluctuation of symptoms—but a flexible and adaptive approach will undoubtedly provide more access for persons with chronic pain disorders to their human rights. Regardless of whether persons with chronic pain disorders do receive accommodation, respect and consideration by courts and tribunals is required by human rights principles and the duty of accommodation. Unfortunately, there are more indications that courts are moving in the opposite direction to limit the effects of human rights principles out of fear of abuse and deception. Instead, scrutiny and discrimination are accepted as legitimate because of the nature of chronic pain disorders. Obviously, this results in differential treatment of persons with chronic pain disorders merely because of the limitations of medical evidence. Thus, a hierarchy of disabilities is apparent.

5.4 Conclusion

Persons with chronic pain disorders face unique challenges, in particular the lack of objective medical evidence, fluctuating symptoms, and unknown etiology. These challenges obstruct access to human rights and the benefits of accommodation. They also hinder other options that may be available including LTD benefits, workers' compensation, human rights claims for discrimination, and civil actions for wrongful dismissal. Some courts, tribunals, and arbitrators recognize these limitations and the resulting discriminatory situation due to the differential treatment of persons with chronic pain disorders compared to persons with other disabilities. A few recent arbitration decisions show some promise by applying a flexible and open approach that recognizes the unique

vulnerabilities of persons with chronic pain disorders and accepts subjective medical evidence where the individual is credible. However, there is no indication that this approach will influence courts, tribunals, or other arbitrators. In fact, the most recent SCC cases fail in this regard and demonstrate movement in the opposite direction to limit the effects of human rights principles. Persons with chronic pain disorders are also less likely to succeed in the few options available after accommodation fails: LTD benefits, workers' compensation, discrimination claims, and wrongful dismissal actions.

Besides accommodation, LTD benefits are likely the most helpful source of financial aid because the individual can receive monetary help while remaining employed. However, LTD can be quite a process, particularly if the insurer, who administers the policy, disputes entitlement. Most LTD disputes come out of unionized workplaces wherein the claim rapidly progresses to an arbitration, which is essentially the last chance for the employee. The claim escalates so rapidly because of the frequent absenteeism problems and unclear and misunderstood nature of chronic pain disorders. Technically, objective medical evidence is not usually required by LTD policies, but it does provide the strongest evidence against the insurer's denial. In the case of chronic pain disorders, usually only subjective medical evidence can be produced. The insurer balks at this subjective proof as well as doubting the degree of disability alleged to decline that there is total disability, which is required at the two-year mark. As a result, the individual is often forced to return to work before he or she is recovered or to medically retire.

The individual can also dispute the denial of LTD benefits by the insurer. First, the individual must prove disability, but this is complicated by surveillance evidence that displays activity and cannot show an invisible disability, and the lack of objective medical evidence. The individual can also claim aggravated damages where there was psychological distress due to the denial. In fact, courts seem to recognize greater vulnerability to stress for persons with chronic pain disorders and are thus more willing to award aggravated damages. Punitive damages are far more unlikely, not just because it is a more exceptional form of damages, but also because courts seem to justify the scrutiny and discrimination that supports the claim for breach of the duty of good faith (the

independent actionable wrong for punitive damages) because of the lack of objective evidence. As such, many of these LTD decisions fail to fully engage with the issues.

Workers' compensation can also be claimed by persons with chronic pain disorders where the disorder has evolved from a compensable work injury. However, there are three problems with proof: (1) the time delay in claiming the chronic pain disorder due to the time developing it and potentially problems with diagnosis; (2) proving the degree of disability which is hampered by the lack of objective medical evidence; and, (3) proving causation or material contribution of the compensable injury to the development of the chronic pain disorder. Where the worker has a positive work history prior to the accident, no pre-existing condition to confuse the claim, and a lot of supporting medical evidence, the claim is much stronger. Ontario's *Chronic Pain Disability Operational Policy* permits the board to accept subjective evidence for claims for CFS and FM. Alberta and British Columbia generally decline to accept subjective evidence and instead deny the claim on the grounds that the information is insufficient and that the disability is due to outside and unrelated conditions. Claims for MCS are problematic across all three boards, likely due to greater lack of a clear and direct link to a compensable injury, which may not even be an injury at all. Workers' compensation can be helpful to provide monetary funds but the board cannot order accommodation or reinstatement.

After dismissal, the individual can make a claim for discrimination at the human rights commission or pursue a common law cause of action of wrongful dismissal at court. In order to prove discrimination at the human rights tribunal, the individual must prove: (1) there is a disability that the employer knew or ought to have known about; (2) the individual suffered some adverse effect on employment; and, (3) the disability was a factor in the adverse treatment. Once again, there is a problem with medical proof. Although tribunals do recognize some discrimination, often the analysis is lacking and only limited reasoning is provided. Instead, the tribunals fail to engage with the issues. Wrongful dismissal claims are even less promising. Individuals who are dismissed from a non-unionized workplace can pursue a wrongful dismissal claim, but this cannot result in specific performance of the contract, only monetary damages. The most significant case of wrongful dismissal and disability is *Honda Canada*. Although the lower courts recognized discrimination, the SCC

found none and failed to recognize that Honda did not accommodate the employee. Instead, the court did not consider human rights principles despite ample opportunity and need. This is especially problematic for chronic pain disorders because the lack of legitimacy means that blatant discrimination, as in *Honda Canada*, is less likely to be recognized.

With the discussion of the various caselaw surrounding chronic pain disorders in the workplace, the efficacy of the law in these cases is assessed. Most caselaw falls into the hybrid approach, which is a middle ground between the traditional and human rights approaches. The traditional approach only accepts disability when it is proven with objective evidence and a clear medical cause. It was evident in early caselaw from the 1990s dealing with chronic pain disorders wherein the courts were dismissive and ultimately discriminatory. The Alberta and British Columbia workers' compensation schemes also demonstrate this traditional approach. Far more problematic, however, is the use of the traditional approach in high level caselaw such as in *Honda Canada*. Here, the SCC seems to have regressed to instead limit application of accommodation and human rights principles. The SCC did not merely allow discrimination but participated in it by applying differential treatment (i.e. declining to find discrimination, when it was obvious) because of the nature of the disability.

The human rights approach is the opposite of the traditional approach to be open, flexible, inclusive, and adaptable, as per human rights principles. Unfortunately, only a few recent Ontario arbitrations have demonstrated this approach to accept subjective evidence where the individual is credible and to recognize the unique challenges of chronic pain disorders. These arbitrations demonstrate how other decision-makers can accept subjective evidence while reducing the potential for fraud by assessing credibility and requiring corroboration, where appropriate. It is possible that these arbitrations are signs of progress, but they are far more likely to be flukes, particularly given that they were limited to recent arbitrations in Ontario for unionized workplaces. Recent court decisions that demonstrated a human rights approach were overturned by higher courts. In this decisions, it is apparent, that overturning these decisions was not due to confusion, but was instead deliberate to limit the application of human rights principles.

The hybrid approach is the most common by far. Here, courts and tribunals essentially pay lip service to human rights principles by applying an attenuated approach that is inconsistent and inadequate. Instead, indirect discrimination can be found. In LTD decisions, it is clear that there is an ideal plaintiff for the claim, but it is the opposite of a typical person with a chronic pain disorder. Rather, the typical behaviour of a person with a chronic pain disorder justifies the scrutiny and discrimination. *Hydro-Québec* is an example of the court applying the hybrid approach. Here, the SCC reneged on the inclusive vision set out in *Meiorin* to limit and narrow the accommodation duty with unclear reasoning.

When considering the variety of caselaw surrounding chronic pain disorders in the workplace, it seems as though we are regressing, rather than progressing in our approach. Caselaw that directly assesses accommodation of persons with chronic pain disorders falls short of reaching the inclusive vision set out by human rights principles. For the most part, caselaw that is not directly examining accommodation does not discuss accommodation at all. Persons with chronic pain disorders face barriers to accessing accommodation that place them at a lower tier on the hierarchy of disability. Not only are chronic pain disorders considered less legitimate but persons with these disabilities are also less likely to receive accommodation and so less likely to remain in the workforce. This means that persons with chronic pain disorders are then less likely to recover from their disability because of the value of work in these kinds of chronic illnesses. Only a few arbitrations adequately applied human rights principles, whereas the majority of caselaw either failed to engage with the issues or seemed to narrow the application of human rights principles. The most limiting caselaw is from the courts, including the SCC. Cases that have demonstrated a more human rights approach have been overturned. Thus, the evidence is stacking up that courts and arbitrators are moving in opposite directions, with courts likely exercising more influence with regards to chronic pain disorders.

Chapter 6

6 Conclusion

Disability is a complex concept. Chronic pain disorders are complex disabilities. That leaves us with a doubly complex reality. The social model separates impairment from disability wherein impairment is the functional limitation and disability exists external to the individual. Disability results from the interaction between the functional limitation and the environment so it differs for every person.[1] The duty of accommodation seeks to alleviate disability by changing the social environment. Thus, accommodation flows from the social model. Accommodation is the most beneficial tool for persons with disabilities because it can enable them to continue working, which offers opportunities for independence, self-sufficiency, and participation. Disability affects almost everybody; it is "part of the human condition."[2] Chronic pain has been recognized as a disability in Canada.[3] However, persons with chronic pain disorders have less access to the benefits of human rights, and accommodation in particular, than persons with "mainstream" disabilities.

6.1 Why are chronic pain disorders different from other disabilities?

Chronic pain disorders present a unique challenge to accommodation because the experience of chronic pain disorders differs from that of disability due to several factors, including fluctuating symptoms. This means that the needs of persons with chronic pain disorders are constantly changing. As such, chronic pain disorders warrant a separate consideration with regards to the efficacy of accommodation. This separate consideration yields key challenges in dealing with chronic pain disorders. First and foremost, chronic pain disorders suffer from a lack of medical legitimacy. There is a lack of consensus in the

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[1] Marcia H Rioux & Fraser Valentine, "Does Theory Matter? Exploring the Nexus between Disability, Human Rights, and Public Policy" in Dianne Pothier & Richard Devlin, eds, *Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law* (Vancouver: UBC Press, 2006) 47 at 50-51.
[2] World Health Organization, *World Report on Disability* (Malta: WHO, 2011).
[3] *Martin v Nova Scotia (Workers' Compensation Board*), 2003 SCC 54.

medical community regarding the existence, diagnosis, etiology, and prognosis of chronic pain disorders. Not only does this mean that the medical evidence is regularly disputed among the medical experts, but it is also consistently conflicting. Thus, it is difficult to prove the existence of disability and the degree of disability.

Second, chronic pain disorders have an unclear etiology, which means that they cannot be easily slotted into the categories of disability—physical or psychological. Instead, there is frequent disagreement regarding the nature of the disability when it cannot be proved either way as the medical field has not definitively determined the cause. This forms an administrative problem because it is unclear whether the disability claim should be made under a physical or psychological category. If made in the wrong category, depending on the particular procedure, this may result in dismissal of the claim. For example, claiming either a physical or psychological disability for workers' compensation is a significant distinction with regards to proof, causation, and compensation. With regards to accommodation, the employer may not understand why a physical accommodation is requested for a psychological disability, and vice versa. Additionally, chronic pain disorders may have insufficient proof as either physical or psychological. It may not qualify as physical because there is no organic source or injury whereas it may not qualify as psychological because of the physical symptoms. There is a high co-occurrence of mental illness with chronic pain disorders so it may be easier to make a disability claim under the mental illness. Although, unfortunately, mental illnesses are the most stigmatized of disabilities.[4]

Third, many of the symptoms of chronic pain disorders are chronic and fluctuating. This makes it very difficult to accommodate because the individual's needs change unpredictably. As a result, the most common accommodation for chronic pain disorders is a leave of absence, but this does not actually help the individual to work, merely to maintain employment if he or she is eventually able to return. Absenteeism is a significant problem

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[4] Marjorie L Baldwin & Steven C Marcus, "Stigma, Discrimination, and Employment Outcomes among Persons with Mental Health Disabilities" in Izabela Z Schultz & E Sally Rogers, eds, *Work Accommodation and Retention in Mental Health* (New York: Springer Science+Business Media, 2011) 53 at 53-54.

for accommodation because the employer cannot and should not maintain employment indefinitely but the employee should have the opportunity to return to work to provide motivation for improvement. The fluctuation of symptoms also interferes with proof because the individual may be symptom-free one day and completely disabled the next. Surveillance evidence and evidence from others may depict these "good" days to discredit the individual's claim.

Fourth, the symptoms of chronic pain disorders are invisible, meaning that there is no physical or external evidence of the disability that can be perceived by others. Consequently, the employer and co-workers may doubt that the individual is disabled. All of the above leads to the fifth challenge of chronic pain disorders: the high level of scrutiny experienced by persons with chronic pain disorders. Each of the other factors contribute to discrediting the individual with a chronic pain disorder and to an overall disbelief in both the disorder and the individual's experience. This disbelief can lead to scrutinizing each aspect of the disability claim and eventually discrimination because of the unfair and disproportionate scrutiny or the resulting behaviour from that scrutiny. Thus, chronic pain disorders present unique challenges as a disability.

6.2 Foundations for understanding disability and accommodation

Disability is a difficult concept to define; courts and legislatures have struggled to do so since the advent of human rights. Chapter 2 provides a more thorough history of the theory of disability that shows that we have come a long way. The current theoretical approach to disability is CDT, which employs the social model as its main mechanism. Through this model, disability is understood as the social interaction between the functional limitation and the environment whereas impairment is the functional limitation. Although the social model is perhaps an oversimplified understanding of disability, its benefits and influence are immeasurable. The social model enables the possibility of substantive equality, wherein each person has what he or she needs to participate in society and thus achieve full citizenship. This is in opposition to the prior approach: the biomedical model. The biomedical model sees disability as an anomaly that needs to be cured or eliminated within each individual. The biomedical model is a far more traditional approach wherein disability

is a purely medical phenomenon, which can only be proven through objective medical evidence. Unfortunately, the biomedical model still has some influence on the law evidenced by the reliance on medical evidence as proof of disability. This is obviously problematic for disabilities that not only struggle with medical legitimacy, but cannot be proven through objective medical evidence, such as chronic pain disorders. This lack of medical legitimacy and evidence is, in fact, the major recurring problem in dealing with chronic pain disorders, in accommodation and other legal avenues for persons with these disabilities. If the social model is applied to the duty of accommodation, then two proofs are required: proof of impairment and proof of disability. Proof of impairment likely requires medical evidence whereas disability is proved by evidence that impairment impedes functioning in the workplace. Accordingly, proof of disability does not need to be medical in nature, but can be proved through subjective self-reporting.

The modern iteration of the accommodation duty was articulated in *British Columbia (Public Service Employee Relations Commission) v BCGSEU (Meiorin Grievance)* (*Meiorin*).[5] *Meiorin* set out a vision of an inclusive workplace where "human rights legislation would be interpreted liberally and purposively, to achieve its substantive equality."[6] With this vision, the Supreme Court of Canada endorsed not only individual accommodation but also institutional wherein the goal is to eliminate systemic discrimination by changing the standards on more than an individual basis.[7] This goal accords with the guarantees in the United Nations' *Convention on the Rights of Persons with Disabilities* (CRPD): "rights to accessibility, access to justice, independent living and community inclusion, education, employment, and an adequate standard of living."[8] Chapter 3 provides a more in-depth account of the accommodation duty in Canada. Ideal accommodation is inclusive and flexible with the goals of participation for all persons, with and without disabilities, and removal of systemic discrimination and barriers. Arguably,

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[5] [1999] 3 SCR 3.
[6] Gwen Brodsky, Shelagh Day, & Yvonne Peters, *Accommodation in the 21st Century*, (March, 2012), online: Canadian Human Rights Commission <http://www.chrc-ccdp.gc.ca/proactive_initiatives/default-eng.aspx> at 15.
[7] Dianne Pothier, "How Did We Get Here? Setting the Standard for the Duty to Accommodate" (2009) 59 UNB LJ 95 at 10.
[8] 30 March 2007, GA Res 61/106 Article 4.

Canada falls short of this ideal for most disabilities because of its focus on individualized accommodations. Persons with chronic pain disorders, however, seem to be even farther from this ideal than "mainstream" disabilities because of the greater difficulty receiving any accommodations, let along individualized ones. As a result, persons with chronic pain disorders have less access to human rights and accommodation. Not only are there practical problems with accommodating chronic pain disorders revolving around the fluctuating symptoms and chronic absenteeism, but there is also a resistance to accepting chronic pain disorders as legitimate disabilities.

6.3 How does the law fall short for chronic pain disorders?

There are two major problems with the accommodation of chronic pain disorders in Canada: absenteeism and medical legitimacy, which are discussed in Chapter 4. With regards to absenteeism, it can serve as grounds for termination but only where the absenteeism is excessive and the employee cannot provide proof of an ability to return to work. This justification stands regardless of the framework with which absenteeism is considered. The employment contract could be considered frustrated because the employee is not completing work, but this approach diminishes human rights in practice. Considering attendance at work a *bona fide occupational requirement* results in a more human rights principled approach. However, not all absenteeism will amount to undue hardship; only excessive absenteeism constitutes undue hardship.

There is no clear standard for what is excessive absenteeism, which is problematic for chronic pain disorders that have a long recovery rate, if at all. In fact, one of the problems with accommodating persons with chronic pain disorders is that it is unclear whether or not they can be accommodated, even after providing various accommodations including leaves of absence. Thus, the employee with a chronic pain disorder could be terminated after excessive absenteeism and the lack of proof of ability to return, rather than proof that he or she could not return to work. It seems that absenteeism is considered excessive after 2-7 years, but whether that is continuous absenteeism or inconsistent absenteeism is unclear. Thus, accommodation may fail in the face of absenteeism to reach its goal "to

ensure that an employee who is able to work can do so."[9] Absenteeism is a very common problem for chronic pain disorders that undoubtedly results in more people with chronic pain disorders excluded from the workplace. There is no easy fix for this problem. Courts, tribunals, and arbitrators need to be sensitive to the issues and closely consider the facts, but otherwise, in order to balance the rights of employee and employer, sometimes, the employee with a chronic pain disorder must be terminated.

The more problematic and potentially discriminatory problem is the medical evidence issues. With regards to accommodation, several problems may arise: accommodation may not be requested because of lack of understanding; discriminatory levels of scrutiny and investigation may be applied; and, the employer, court, tribunal, or arbitrator may not accept proof of disability or proof of the degree of disability. With regards to proving the medical legitimacy of the disability, there are two problems: (1) providing accommodation for impairment without a definitive diagnosis, both (a) accepting subjective evidence and (b) accepting impairment without a diagnosis, and (2) accepting and accommodating the disability without determination of the etiology. Arbitrators have proven far superior in dealing with these issues by accepting that chronic pain disorders cannot be proven with objective evidence and thus accepting subjective evidence where the employee and other witnesses are credible.[10]

By failing to accept subjective evidence, the employer and decision-maker may be discriminating against the employee on the basis of the limitations of the disability. Additionally, requiring a definitive diagnosis of the condition is not necessary. The duty of accommodation should be invoked when there is proof of impairment; the specific nature of the disability does not need to be proved. Instead, "a distinction should be drawn between the question of whether a disability exists and the question of whether medical science has a label for it or has determined its cause."[11] This distinction is where the law

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[9] *Hydro-Québec v Syndicat des employés-e-s de techniques professionnelles et de bureau d'Hydro Québec, section local 2000 (SCFP-FTQ)*, 2008 SCC 43 at para 14.
[10] *Re Joseph Brant Memorial Hospital and ONA*, [2014] OLAA No 459 at para 210-212 [*Joseph Brant Memorial Hospital*].
[11] *Brewer v Fraser Milner Casgrain LLP*, 2006 ABQB 258 at para 29 [*Brewer*].

and medicine should diverge, but instead the law relies too much on the medical field for proof of disability, when the proof is not necessary to invoke the duty of accommodation. Human rights principles require an adaptive and flexible approach—the inconsistent recognition of the limitations of medical evidence for chronic pain disorders demonstrated by courts and tribunals does not follow this human rights approach. However, recent arbitrations demonstrate some potential for progress. Having said that, Canada as a whole demonstrates a more human rights approach than that of the US and the EU, which have a high threshold to qualify as disabled that essentially acts as a gatekeeper for access to rights. Indeed, the problems with medical evidence are even more of a hindrance as persons with chronic pain disorders struggle just to be recognized as disabled in the EU and the US, let alone realize their rights.

A lack of objective medical evidence also hinders claims for chronic pain disorders outside of accommodation, such as long-term disability (LTD) claims, workers' compensation, human rights claims for discrimination, and common law actions for wrongful dismissal as set out in Chapter 5. The lack of medical legitimacy actually justifies some potentially discriminatory conduct. On one hand, greater scrutiny by the employer and insurer and the resulting stress for persons with chronic pain disorders is not perceived as discriminatory because it is justified: the employer and insurer have reason to doubt the claim. On the other hand, the greater vulnerability to stress and emotional problems from the discriminatory conduct is also occasionally recognized, as we can see sometimes when aggravated damages are awarded for the LTD insurer's denial of benefits. Thus, the majority of the caselaw outside of accommodation is inconsistent in recognizing the unique challenges of chronic pain disorders.

LTD benefits are likely the most common alternative to accommodation because the individual can remain employed and continue to be paid. However, with regards to chronic pain disorders, the insurer often denies the claim because of lack of objective medical evidence. In addition, the fluctuating symptoms are a source of weakness because surveillance evidence shows "good days" and there is difficulty proving "total disability" in order to remain on LTD leave at the two-year mark. Workers' compensation is another possible source of financial support but there are three problems with proof: (1) the delay

in time between the initial compensable injury and diagnosis of chronic pain disorders; (2) proof of the degree of disability; and, (3) establishing causation or material contribution of the compensable injury to the development of the chronic pain disorder due to the unknown etiology of these disorders. The Ontario worker's compensation board has demonstrated a more flexible approach by recognizing the evidential limitations of chronic pain disorders to accept subjective proof. The individual can also make a claim of discrimination at the human rights commission; however, this is not that common, perhaps because the claims are settled before or the claim is dropped because the condition worsens. Furthermore, human rights tribunals are inconsistent in recognizing the challenges of chronic pain disorders and fail to provide adequate reasoning when they do recognize discrimination. Courts, however, are the least understanding of chronic pain disorders. Wrongful dismissal cases rarely invoke consideration of human rights principles by courts, which is particularly problematic for chronic pain disorders because the lack of legitimacy results in even less recognition of discrimination by courts. Thus, the alternatives to accommodation also grapple with the issue of medical evidence and, as a result, provide less access to rights for persons with chronic pain disorders than other disabilities.

Indeed, most of the caselaw demonstrates a hybrid approach, which is more flexible and open than the traditional approach, but it fails to be consistent or adequate and so falls short of the human rights approach. Instead, courts using this hybrid approach avow adherence to human rights principles, but do not follow through in action. In doing so, there are instances of indirect discrimination perpetuated by courts, tribunals, and arbitrators. This includes: justifying scrutiny of LTD claimants through their own behaviour that is symptomatic of chronic pain disorders; insufficiency of chronic pain disorders to make a disability claim despite being recognized as a disability; and, justifying scrutiny and discrimination because of the nature of the chronic pain disorders, i.e. the lack of objective medical evidence. The traditional approach is exemplified by early caselaw dealing with chronic pain disorders in the late 1980s and 1990s where disabilities were only proven with objective evidence and a clear medical cause. As such, chronic pain disorders, which lack both, were dismissed and courts were insensitive at best, discriminatory at worst. However, some courts still demonstrate aspects of the traditional approach, such as in *Honda Canada Inc v Keays* (*Honda Canada*) where the SCC refused to recognize blatant discrimination

as such, when the lower courts had.[12] Here, the court overturned a more flexible and progressive decision to return to a traditional approach.[13]

The human rights approach is the ideal approach as set out by human rights principles, meaning that it is open, flexible, and inclusive to balance the rights of all the parties. It is the embodiment of the inclusive vision set out in *Meiorin* that is best able to achieve substantive equality. The human rights approach demonstrated in recent Ontario arbitrations[14] balances the need for proof with the limitations of medicine to also balance the needs of the employee and employer. In doing so, these few arbitrations demonstrate how subjective medical evidence can be accepted as proof of disability. In fact, the arbitrators unintentionally apply the social model of disability to accept medical evidence of impairment and subjective self-reporting of the disability, where the individual is credible and possibly with corroboration from credible witnesses. However, it is almost exclusively these few Ontario arbitrations involving unions that demonstrate this approach. Human rights tribunals fall short of this ideal by inconsistently applying human rights principles and failing to provide clear or strong reasoning and thus failing to engage with the issues. The few court decisions that have demonstrated the human rights approach have been overturned for a narrower application of human rights principles, often in the traditional approach.

6.4 Change is not on the horizon: the law is failing persons with chronic pain disorders

With this overview of relevant caselaw, a few points become clear. First, the human rights approach taken in a few arbitrations demonstrates just how flexible and inclusive the law should aspire to be. These arbitrations did not all agree with the person with chronic pain disorders and nor should they. The arbitrators were able to understand the unique challenges of chronic pain disorders in a sensitive way as well as a principled one.

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[12] 2008 SCC 39 [*Honda Canada*].
[13] Also see *Brewer*, *supra* note 11.
[14] *Re City of Toronto and CUPE, Local 79 (C08-05-8938)*, [2010] OLAA No 389; *Joseph Brant*, *supra* note 10; *Toronto District School Board v OSSTF, District 12*, [2011] OLAA No 461 [*Toronto District School Board*].

Arbitrator Knopf in *Toronto District School Board v OSSTF, District 12*, in particular, demonstrated a nuanced, sensitive, and measured approach dealing with a teacher with MCS. Arbitrator Knopf imparted several wise findings, including:

> If the wisdom of science cannot come to a conclusion about what causes the symptoms of her condition, it cannot be expected that this Arbitrator could or should do so. Nor is it necessary.
>
> When accommodation measures are possible to achieve and no satisfactory evidence is given why they were not done, it must be concluded that an employee's rights have been violated.
>
> At best these [uncooperative] behaviours make it very difficult for this employer to be able to manage or avoid problems. At the worse, these behaviours make observers wonder about the validity of some of her claims.
>
> While it is perfectly valid for a manager to question and investigate an employee's reasons for absenting him/herself from work, the tone of derision and cynicism suggest a lack of genuine concern.[15]

As such, these arbitrations demonstrate the approach that should be taken to dealing with chronic pain disorders. They are complex disorders so the analysis is proportionately complex.

Second, courts seem to be heading in the opposite direction with a few significant cases reversing progressive decisions to return to a rigid method akin to the traditional approach, in particular *Honda Canada* and *Brewer v Fraser Milner Casgrain LLP*.[16] Given that these are higher court decisions by the SCC and Alberta Court of Appeal respectively, this return to the traditional approach seems to be of far greater influence than the few progressive arbitrations. This is not a return in the sense that the approach to chronic pain disorders has changed, rather the approach to chronic pain disorders may be diverging from the progress of accommodation for disabilities generally to instead regress to the traditional approach that was initially applied for all disabilities. Thus, should this regression continue, chronic pain disorders will receive far less access to accommodation and human rights principles.

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[15] *Toronto District School Board*, *ibid* at paras 96, 105, 112, 118.
[16] *Honda Canada*, *supra* note 12; *Brewer*, *supra* note 11.

Third, the vast majority of decisions employ the hybrid approach, but this unprincipled, inconsistent, and inadequate approach obviously falls short of the ideal. As such, regardless of whether the approach to chronic pain disorders is returning to the traditional approach, persons with chronic pain disorders currently experience less access to accommodation and human rights principles. Additionally, given that arbitrators have demonstrated the most principled approach, it is likely that there is a difference in access between unionized and non-unionized employees with chronic pain disorders. This is in keeping with the trend for all persons with disabilities: unions advance employees' access to rights.

Fourth, chronic pain disorders fall lower on a hierarchy of disabilities not only in terms of legitimacy, but also in terms of their rights across all disability claims. This is due almost entirely to legitimacy problems in the medical field. The influence of the biomedical model is clearly displayed by the law's inappropriate dependence on the medical field to define disability with regards to chronic pain disorders. The social model has been adopted by Canada and the ratified CRPD. Thus, in continuing to use the biomedical model, Canada is not meeting what is set out by the CRPD. Furthermore, only proof of impairment is actually necessary to invoke the duty of accommodation. Proof of impairment is really only proof that the individual has some functional limitation; the diagnosis is largely irrelevant to accommodation.

Dealing with chronic pain disorders in the workplace is a relatively new area of law. Accommodation and human rights have rapidly progressed in the last twenty years, yet the rights of "non-mainstream" disabilities have trailed behind. As such, for these "non-mainstream" disabilities, including chronic pain disorders, the law is deficient. It has failed to protect persons with chronic pain disorders from discrimination, as we can see from the discrimination permitted and perpetrated by courts and tribunals. The law relies on the medical field when medicine is lacking, so the law then propagates this lack. The law may be regressing to a narrower and potentially discriminatory approach out of fear of deceit and abuse. This backwards movement is obviously problematic, but worse, it is not even necessary. A few arbitrations have demonstrated how to provide access to rights and respect the individual while still requiring proof. Thus, the law is failing persons with chronic pain disorders.

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