DEFENCES TO HUMAN RIGHTS COMPLAINTS

Alberta
Human Rights Commission

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HUMAN RIGHTS GUIDE

This publication is produced by the Alberta Human Rights Commission (the Commission). It discusses the principles of human rights law and is based on decisions made by human rights panels,[1] tribunals, and courts. These decision-makers have interpreted certain sections of the *Alberta Human Rights Act* (the *Act*) given the facts of particular cases. As this case law evolves, so does the Commission's application of the *Act*.

This publication will:

- Help individuals, employers, service providers, and policy-makers understand their rights and responsibilities under Alberta's human rights law
- Assist organizations and individuals in setting standards for behaviour that complies with human rights law

The *Act* protects individuals in Alberta from discrimination in certain areas, based on specific grounds set out in the *Act*. These protected grounds include race, religious beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status, or sexual orientation.[2]

Discrimination on the basis of these grounds is prohibited in these areas:

- statements, publications, notices, signs, symbols, emblems, or other representations that are published, issued, or displayed before the public (section 3)
- goods, services, accommodation, or facilities customarily available to the public (section 4)
- residential or commercial tenancy (section 5)
- employment practices (section 7)
- applications and advertisements regarding employment (section 8)
- membership in trade unions, employers' organizations, or occupational associations (section 9)

In addition, the equal pay area (section 6) requires employers to pay the same rate of pay to employees who perform the same or substantially similar work, regardless of their sex (gender).

In certain situations, exceptions to age restrictions in seniors-only housing are allowed.

The *Act* has an appendix called the Human Rights (Minimum Age for Occupancy) Regulation. This regulation allows for some exceptions to age restrictions in seniors-only housing so that the following individuals may occupy an owned or rented unit or site designated as seniors-only housing:

- Individuals who provide home-based personal or health-care services to an occupant of the unit or site
- A minor related to an occupant, by blood, adoption or marriage, or by virtue of an adult interdependent partnership to an occupant, is also allowed to reside in seniors-only housing, where due to an unforeseen event, the occupant becomes the primary caregiver to the minor after occupancy has commenced
- A surviving spouse or adult interdependent partner of a deceased former occupant of the unit or site who lived with the occupant at the time of death

[1] In October 2009, as part of the amendments to Alberta's human rights legislation, panels were renamed human rights tribunals. In this publication, the word "tribunal" should be interpreted to include panels.

[2] Under the *Act*, as of January 1, 2018, age is now a protected ground in all areas, including tenancy and goods, services, accommodation or facilities. For more information, see the Commission information sheet *Protected areas and grounds under the Alberta Human Rights Act*.

The information in this publication was current at the time of release. If you have questions related to this publication, please contact the Commission.

This publication does not provide legal advice. Should you require legal advice, please consult legal counsel.

Introduction

The *Act* prohibits discrimination in Alberta in specified areas and under specified grounds. For example, the *Act* prohibits discrimination in the area of employment under the ground of physical disability. In this publication, we will examine circumstances where it may appear on its face that there is discrimination (referred to as **prima facie discrimination**), but at the same time, there is a reasonable and justifiable rationale for contravening the *Act*. When this occurs, the *Act* allows a defence to, or exemption from, a finding of prima facie ("on its face") discrimination. For example, setting some kinds of job qualifications or denying services to individuals or groups of individuals may, under some circumstances, be reasonable and justifiable under the *Act*, even if the practice is discriminatory on its face.

What you will find in this publication

This publication:

1. Describes the concept of reasonable and justifiable contravention of the *Act*
2. Examines how two major Supreme Court of Canada decisions (*Meiorin* and *Grismer*) apply to the exemption for reasonable and justifiable contraventions in section 11 of the *Act*
3. Provides a practical step-by-step guide to determine whether a practice or rule, which on its face is discriminatory, can nevertheless be found to be reasonable and justifiable
4. Discusses ameliorative programs and standards, and how they affect prima facie discrimination
5. Provides contact information for the Alberta Human Rights Commission

A note about the term "standards" in this publication

Employers, service providers, and landlords routinely establish rules and practices to determine how they will run their organizations and control the way they provide goods and services. For example, employers establish job requirements for various positions, service providers decide who their clientele will be, and landlords make decisions to accept or reject individuals as tenants. Depending on the situation, these steps might be called rules, requirements, policies, standards, measures, or practices. All require the same approach in identifying prima facie discrimination. To simplify, this document refers to all of these as **standards**.

Complainant and respondent

A **complainant** is a person who makes a formal complaint under the *Act*.

A **respondent** is a person or organization named in a complaint, who is alleged to have violated the *Act*.

6. Includes as appendices:
   - a review of case law related to reasonable and justifiable contraventions of the *Act*
   - a review of case law related to ameliorative policies, practices, and activities
   - the provisions of the *Act* that address reasonable and justifiable standards or rules that may be exemptions from or defences to a contravention of the *Act*
   - the provisions of the *Act* that address ameliorative polices, practices, and activities

Employment, services, and tenancy

The *Act* protects individuals against discrimination in specific areas. The areas in which discrimination most frequently occurs are employment, services, and tenancy. Discrimination may not look the same in these three areas; likewise, what will be found "reasonable and justifiable" exemptions under section 11 of the *Act* will vary from one context to another.

Employment

The term employment is given a "large and liberal" interpretation. The cases included in the case summaries in this publication discuss topics such as the hiring process, employment for wages, and the role trade unions play. The leading cases in reasonable and justifiable defences to prima facie discrimination have dealt with discrimination in the area of employment.

Services

The following have all been found to offer services to the public: government services; commercial services such as hotels and restaurants; clubs, including sports, veterans, and ethnic groups; and volunteer organizations. Based on human rights legislation and the common law, tribunals and courts have found some instances of prima facie discrimination in the area of services to be reasonable and justifiable. For instance, an Alberta human rights panel found in the *Mattern*[3] case that a family-oriented campground's exclusion of a group of single male campers was reasonable and justifiable under section 11.[4] In addition, the *Act* will not apply to services if they are not customarily available to the public. For more information on services "customarily available to the public," see the Commission's publication *Human Rights in the Hospitality Industry*.

Tenancy

The area of tenancy includes occupying a rental commercial unit or self-contained dwelling unit. There are some circumstances where landlords committing prima facie discrimination may be able to defend their actions or policies as being reasonable or justifiable. For example, it may ultimately be found reasonable under the *Act* if a landlord sets economic criteria and asks for references, thereby effectively excluding, for example, individuals who are unable to pay their rent. In determining if a landlord's prima facie discriminatory standards are reasonable and justifiable, tribunals and courts now rely on the *Meiorin* and *Grismer* tests, looking for the elements that constitute a bona fide reasonable qualification (discussed below)—see, for example, the Ganser case summary in **Appendix 1**.

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[3] *Mattern v Spruce Bay Resort* (2000), CHRR Doc. 00-102 (Alta HRP).

[4] In October 2009, Alberta's human rights legislation (the *Human Rights, Citizenship and Multiculturalism Act*) was renamed the *Alberta Human Rights Act*. In this publication, both names of the legislation are used to reflect historical accuracy.

Ameliorative programs

Section 10.1 of the *Act* says that it is not a contravention of the *Act* to plan, advertise, adopt, or implement a policy, program, or activity, as long as the objective of the program is to improve the conditions of disadvantaged persons, or classes of disadvantaged persons, including those who are disadvantaged based on the protected grounds listed in the *Act*. The *Act* and the courts have not yet established a clear definition of "disadvantaged person." The existing cases have found individuals from the following groups to be disadvantaged in some circumstances: Indigenous persons, females, transgender persons, young persons, and persons with disabilities.

To be covered under section 10.1, the policy, program, or activity must achieve or be reasonably likely to achieve that objective. These programs are called **ameliorative programs** and they are an exception to the prohibition against discrimination. Before the introduction of section 10.1, ameliorative programs would have likely otherwise been found to be defences or exemptions under section 11 of the *Act*, if they were reasonable and justifiable in the circumstances. However, the new ameliorative program provision sets out specific requirements for the program to be accepted as ameliorative (that is, the program achieving or being reasonably likely to achieve its objective).

Ameliorative programs are also covered under section 15(2) of the *Canadian Charter of Rights and Freedoms* (*Charter*), which supports ameliorative programs created by the government to improve the condition of disadvantaged persons. To understand what this means for people creating such a program, see the following example of case law based on the *Charter*. In *R v Kapp*, a group of non-Indigenous commercial fishers challenged a program designed by the federal government that granted an exclusive fishing licence for the Fraser River to three First Nations groups in the region. Because the commercial fishers were excluded from the program, they argued that their section 15(1) equality rights had been violated—in other words, they had been discriminated against because they were not a part of the First Nations groups benefiting from the program. The Supreme Court of Canada stated that as long as it could be proven that a program targeted a disadvantaged group, and that the program had been designed to improve the conditions of this group, it would not violate anyone's equality rights.

One difference between section 10.1 of the *Act* and section 15(2) of the *Charter* is that section 10.1 of the *Act* requires that the ameliorative program in question achieves or is reasonably likely to achieve its ameliorative objective. While section 15(2) does not address the effectiveness of such a program, the *Act* requires that such a program be reasonably effective at improving the conditions of disadvantaged persons in order for it not to be found discriminatory.

Checklist for determining if a standard is ameliorative

Once prima facie discrimination is established (as in, if there will be enough evidence provided to show the discrimination occurred, it will be presumed to be discrimination until proven otherwise. For more on prima facie discrimination, see below), the person defending the policy, program, or activity, may argue that it is ameliorative, and therefore, not in contravention of the law. At the Commission investigation stage, as well as after (that is, in matters before the Tribunal and/or court), the person or organization defending the policy, program, or activity will need to show that:

1. It was designed with the objective to improve the conditions of a certain group of persons
2. The group of people are disadvantaged, including whether they are disadvantaged based on one of the grounds under the *Act*
3. It achieves or is reasonably likely to achieve that ameliorative objective

Reasonable and justifiable contraventions of the Act

In addition to the provisions regarding ameliorative programs, the *Act* sets out specific defences to prima facie discrimination in certain areas. Section 11 says that it will not be a contravention of the *Act* if the alleged contravention is shown to be "reasonable and justifiable in the circumstances."[5] This section applies to the entire *Act*. These sections of the *Act* are called **defences**, because they allow any respondent to a human rights complaint to argue that their prima facie discriminatory standards or policies are not contravening the *Act*.

In human rights statutes across Canada, a variety of terms describe the "reasonable and justifiable" exemption. In employment practices, a reasonable and justifiable practice that would otherwise be discriminatory is referred to as a **bona fide occupational requirement** or **qualification**—a "BFOR" or "BFOQ." In the areas of services customarily available to the public and tenancy, such a practice is called a **bona fide reasonable justification** or **qualification**.

Section 7(2) says that the inclusion of age and marital status in section 7 should not affect the operation of a bona fide ("good faith") retirement or pension plan, or a group or employee insurance plan. Section 7(3) allows an employer to impose a prima facie discriminatory rule or standard if the reason is a bona fide occupational requirement, and section 8(2) allows the same exemption for employment practices, which would include advertising and interviewing. These provisions apply only to section 7 and section 8, respectively.

The Supreme Court of Canada has, over the years, established a comprehensive set of requirements that employers, service providers, and landlords must meet in order to show that, although a practice may be seen as prima facie discriminatory, it is reasonable and justifiable in the circumstances. Many of the Supreme Court of Canada cases are in the context of the

[5] See **Appendix 3** for full text of sections 7, 8, and 11.

Charter, which only covers actions taken by the government. Section 1 of the *Charter* allows the limitation of a right only when "demonstrably justified in a free and democratic society." The impact of section 1 of the *Charter* was considered in *Oakes*,[6] a 1986 criminal case, where the Supreme Court of Canada balanced the rights of the individual against the government's needs in dealing with criminal behaviour. In 1998, the Supreme Court of Canada applied *Oakes* in considering the effect of the Alberta human rights legislation[7] on the University of Alberta's mandatory retirement policy.[8] Applying the logic in *Oakes*, the Court found the policy reasonable and justifiable.

Courts and human rights tribunals have found that the process of accommodation is an important factor in determining whether a standard or policy is reasonable and justifiable. Accommodation may involve making changes to a job or service in order to make it accessible to people who, because of a protected ground such as gender identity or disability, would otherwise be excluded.

There is information on the duty to accommodate below.

Determining if a standard is reasonable and justifiable

Human rights law in Canada requires employers, service providers, and landlords to search for non-discriminatory ways to meet their business objectives, while recognizing that in some circumstances it will be reasonable and justifiable to impose standards that initially appear to discriminate. The "reasonable and justifiable" defence to prima facie discrimination can only be successful if a respondent shows that serious attempts or considerations were given to accommodate a complainant facing the respondent's prima facie discriminatory standard.

Identifying prima facie discrimination

First, the complainant must establish that there has been prima facie discrimination. The *Moore*[9] case found that a complainant must show the following to demonstrate prima facie discrimination:

1. the complainant has a protected characteristic under human rights law
2. the complainant suffered an adverse impact
3. the protected characteristic was a factor in that adverse impact

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6 *R v Oakes*, [1986] 1 SCR 103.

7 In force at the time was the *Alberta Individual's Rights Protection Act*, section 11.1, and which had the same effect as the current section 11 of the *Act*.

8 *Dickason v University of Alberta*, [1992] 2 SCR 1103.

9 *Moore v British Columbia (Education)*, 2012 SCC 61.

For instance, in *Mortland and Van Rootselaar* (see **Appendix 1**) the Tribunal Chair first found that the complainants had a characteristic protected under the *Act*—age. Second, it was found that the complainants had been terminated, which is an adverse impact. Third, the complainant's age was a factor in the termination of employment because of a mandatory retirement policy for bus drivers who were 65 years old. The burden then shifted to the respondent school division to demonstrate that there was a defence for the prima facie discrimination.

Applying the three-step legal test for the "reasonable and justifiable" defence

Once it is established that a standard results in prima facie discrimination, the standard is then examined to see if the prima facie discrimination is reasonable and justifiable. This examination involves a three-step test established by the Supreme Court of Canada in the 1999 *Meiorin*[10] case, which involved the area of employment. For cases involving services, the test is found in the 1999 *Grismer*[11] case.

In the *Meiorin* case, a forest firefighter who had successfully performed her job for several years failed the aerobic portion of a new employee fitness test and was consequently laid off. The fitness test had been developed for the employer by a team of university researchers in response to a coroner's inquest report that recommended that the employer, for safety reasons, only assign physically fit employees to firefighting jobs. The complainant argued that the employer and the researchers who devised the aerobic test had not considered differences between male and female test subjects or ways to accommodate such differences. The Supreme Court of Canada established a test with three steps, all of which must be met to show that a prima facie discriminatory standard in employment is reasonable and justifiable. Specifically, the employer must show:

1. That a workplace standard is rationally connected to the functions of the job performed
2. That the standard was established honestly and in the good-faith belief that it was necessary to fulfill a legitimate work-related objective
3. That the standard itself is reasonably necessary to accomplish the work-related goal or purpose. In demonstrating if the standard is reasonably necessary, the employer must show that they have accommodated the employee to the point of undue hardship[12]

In *Meiorin*, the Court found that even though the employer's standard was based on safety concerns (step 1) and established in good faith (step 2), the employer had failed to show the requirement was reasonably necessary (step 3) because it could not be shown that passing the new aerobic test was reasonably necessary to be a safe and efficient forest firefighter. The Court did not provide suggestions for accommodations that the employer might have

[10] *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 [*Meiorin*].

[11] *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868 [*Grismer*].

[12] *Meiorin* at para 54.

considered. However, the Court made it clear that a standard is not reasonably necessary if the employer has not fully considered alternative accommodations that might allow the affected individual to fill the position.

Shortly thereafter, the Supreme Court of Canada applied the *Meiorin* three-step test in *Grismer*, a case involving services to the public.[13] The B.C. Superintendent of Motor Vehicles had revoked Terry Grismer's driver's licence because of Grismer's inability, as a result of physical disability, to meet a vision standard. The standard was unconditional, with no possibility of individual assessment for actual fitness to drive. The Court found that without causing the Motor Vehicles department undue hardship, *Grismer* could have been tested individually for his fitness to drive. By not doing so, the superintendent failed to accommodate him to the point of undue hardship.

In *Grismer*, the *Meiorin* test was modified to account for the different relationship between a customer and service provider. To prove that a standard was reasonable and justifiable, the respondent service provider must demonstrate that the standard:

1. Was adopted for a purpose that is rationally connected to the function being performed
2. Was established in an honest and good-faith belief that it was necessary to fulfill a legitimate purpose or goal
3. Was reasonably necessary to accomplish that purpose or goal, including that the respondent could not accommodate the complainant without incurring undue hardship

Fulfilling the duty to accommodate

The duty to accommodate is a responsibility of the employer, service provider, or landlord to adjust the conditions of employment or service in order to address any prima facie discrimination. The person who needs accommodation must participate in the accommodation process, cooperate with the employer, service provider, or landlord, and accept reasonable accommodation efforts.

In all situations where there is a duty to accommodate, the employer, service provider, or landlord must provide accommodation to the **point of undue hardship**. One factor in the analysis of what constitutes undue hardship is the size of the organization, because a larger company is better able to apply additional resources before reaching the point of undue hardship than is a smaller company.

The duty to accommodate has not been fulfilled by having one rule for all employees or clients; for example, one change in policy may not effectively accommodate every individual. Duty to accommodate is a process of exploring the individual needs of a particular person and making an individual assessment. The Supreme Court of Canada has found that the factors involved will depend on the circumstances of each case.

[13] *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868

Undue hardship occurs if accommodation would create overly onerous (burdensome) conditions for an employer, service provider, or landlord; for example, intolerable financial costs or serious disruption to business. An employer, service provider, or landlord must make considerable effort to find an appropriate accommodation for an employee, client, or tenant. Some hardship may be necessary in making an accommodation; only when there is "undue" hardship can the employer, service provider, or landlord claim that they have tried all the accommodations available.

For more information about accommodation and undue hardship, please see the Commission's publications *Duty to accommodate* and *Duty to accommodate students with disabilities in post-secondary educational institutions*.

How to assess whether a standard is reasonable and justifiable

Employers, service providers, and landlords must meet the requirements set out in *Meiorin* or *Grismer* to prove that a standard is reasonable and justifiable. In the ordinary course of business, an organization will have several opportunities to assess whether an employment or business standard is discriminatory. For instance:

- When employees or clients notify the organization that a standard has a discriminatory impact on them, or
- When a new business objective is established and a standard is created to meet the new objective

Justifying an existing standard

The organization or employer must justify a standard by proving that it is a bona fide occupational requirement. The following considerations, taken from the *Meiorin* case (at page 65), may be used throughout this analysis:

a. Has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?

b. If alternative standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented?

c. Is it necessary to have all employees meet the single standard for the employer to accomplish its legitimate purpose or could standards reflective of group or individual differences and capabilities be established?

d. Is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose?

e. Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?

f. Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles?

Designing a new standard or reviewing existing standards

Organizations may make their policies stronger by examining new and existing standards for potential discrimination. The following checklist will assist in that process and help organizations make a record of the reasoning behind establishing a particular standard.

1. Describe the business objective that a standard is meant to address.
2. If the business objective is ameliorative, identify the group of persons it is targeting and whether they are disadvantaged, and then describe how the business standard will be effective in improving the targeted group's condition. Ameliorative standards that meet the objectives of section 10.1 of the *Act* are protected.
3. Describe the importance of the business objective in meeting the organization's mission or a particular goal.
4. Generate a list of acceptable options for meeting the business objective. Choose a standard, if one is not already in place, that meets this business objective.
5. Describe the process used in choosing the standard. Describe why the standard is reasonably necessary to meet the legitimate business objective.
6. Review whether the standard might cause any obvious discriminatory impacts on particular groups of people. Assess if there are other methods to achieve the business objective that do not cause discrimination. Choose the standard that causes the least discrimination or no discrimination.
7. Give some thought to ways in which the organization can accommodate individuals who may experience discrimination because of the standard. How might the organization fulfill its duty to accommodate? Recognize that the issue of whether accommodating a specific individual will cause undue hardship on the organization can only be assessed when the full situation of the specific individual is known.

The following appendices provide additional resources for determining whether prima facie discrimination is reasonable and justifiable, and further reading on ameliorative practices.

Appendix 1: Case law on reasonable and justifiable contraventions

Human rights case law is constantly evolving based on issues that come before the courts and human rights tribunals.[14] The following legal cases establish important legal principles involving the concepts of reasonable and justifiable contraventions of the *Act* and duty to accommodate. The cases chosen include Supreme Court of Canada decisions, relevant Alberta cases, and major decisions from other jurisdictions.

Tribunal and court decisions are available online through the Canadian Legal Information Institute (CanLII) website at **canlii.org**. Alberta Human Rights Commission tribunal decisions can be found at **canlii.org/en/ab/abhrc**.

The cases below reflect the major trends in the development of the law related to reasonable and justifiable defences to prima facie discrimination. Most of the case law in this area has developed in response to employment standards that have been deemed prima facie discriminatory. The bold introductory phrases at the beginning of each summary highlight the major concepts discussed in the court or tribunal decision.

Note: In 1996, the *Individual's Rights Protection Act* became the *Human Rights, Citizenship and Multiculturalism Act*. In October 2009, the *Human Rights, Citizenship and Multiculturalism Act* (*HRCM Act*) was amended and renamed the *Alberta Human Rights Act* (*Act*). In these case summaries, the historically accurate name of the act is referenced.

The Charter background

R v Oakes,
[1986] 1 SCR 103 (Supreme Court of Canada)
***Charter s 1*—standard for determining "reasonable and demonstrably justified" limits to rights**

In *Oakes*, a criminal defendant challenged part of the *Narcotics Control Act*, under the *Charter of Rights and Freedoms*. Looking at section 1 of the *Charter*, the Supreme Court of Canada considered when the limitation of a right is "demonstrably justified in a free and democratic society." The Court found that any measure that limits a guaranteed right must involve concerns that are "pressing and substantial," and that the limitation must be proportional. In other words, the limitation must be rationally connected to its objectives, it must impair the right as little as possible, and the more severe the measure, the more serious the objectives of the limitation must be.

[14] In October 2009, as part of the amendments to Alberta's human rights legislation, panels were renamed human rights tribunals. In this publication, the word panel is used where it reflects accurate historical references.

Landmark cases

Meiorin: Establishing a three-step test for accommodation

In this landmark 1999 decision, the Supreme Court of Canada revisited the entire issue of discrimination in employment and the duty to accommodate. In the *Meiorin* case,[15] a forest firefighter who had successfully performed her job for several years failed the aerobic portion of a new employee fitness test, and was laid off. The aerobic test had been developed for the employer by a team of university researchers in response to a coroner's inquest report that recommended that the employer, for safety reasons, only assign physically fit employees to firefighting jobs. In its decision, the Court erased the distinction between direct and indirect discrimination, which had led to two interpretations of the BFOR concept and two approaches to accommodation. Instead, the Court established a single three-step test, where the employer must demonstrate that:

1. A workplace standard or goal is rationally connected to the performance of the job
2. The standard was established honestly and in the good-faith belief that it was necessary to fulfill a legitimate work-related objective
3. The standard itself is reasonably necessary to accomplish the goal or purpose[16]

The SCC found that even though the employer's standard was based on scientific evidence, it had failed to show the fitness requirement was reasonably necessary.

Grismer: Applying the three-step *Meiorin* test to public services

Shortly after the *Meiorin* decision, the Court applied the *Meiorin* three-step test to a services case in *Grismer*.[17] Terry Grismer's driver's licence had been revoked by the Superintendent of Motor Vehicles because of his inability, as a result of physical disability, to meet a minimum field-of-vision standard. The standard was unconditional, with no possibility of individual assessment for actual fitness to drive. The Court found that the superintendent had failed to demonstrate that the standard had included every possible accommodation, in this case, individualized testing, up to the point of undue hardship. The Court also increased the burden for demonstrating undue hardship by finding that the superintendent would have had to show serious risk of danger, rather than only sufficient risk, and that the superintendent had a duty to consider every possible accommodation.

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[15] *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 [*Meiorin*].

[16] *Meiorin* at para 54.

[17] *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)*, [1999] 3 SCR 868.

Cases in which a contravention of the *Act* was found to be reasonable and justifiable

Dickason v University of Alberta,
[1992] 2 SCR 1103 (Supreme Court of Canada)
University professor given mandatory retirement

The Supreme Court of Canada found that the mandatory retirement of a university professor was "reasonable and justifiable" under section 11.1 of the Alberta *Individual's Rights Protection Act*. Because of the similarity of that section and section 1 of the *Charter*, the Court applied a test very similar to the test it had used in *Oakes*.[18] The Court found that in regard to the question of proportionality and in light of the employer's personnel needs, no practical alternative to mandatory retirement was available. The Court also found that the collective agreement's acceptance of mandatory retirement supported the policy's reasonableness.

Note: In light of more recent legal developments, it is quite unlikely that mandatory retirement, a contravention based on age discrimination, could easily be justified. In most Canadian provinces, mandatory retirement is either prohibited entirely or permitted only if it is based on a bona fide retirement or pension plan, or as a bona fide occupational requirement.

Co-operators General Insurance Co v Alberta Human Rights Commission,
1993 ABCA 305 (Alberta Court of Appeal)
Insurance rate-setting a reasonable and justifiable practice evidenced by standard industry practices—no practical alternative

The Alberta Court of Appeal found that an insurance company's rate-setting methods were prima facie discriminatory on the ground of age. However, the insurance company's practice of charging more for certain groups was reasonable and justifiable under section 11.1 of the *Individual's Rights Protection Act* because it was a sound and accepted practice, and because there was no practical alternative available that would be fair to other insured drivers.

Newfoundland Assn of Public Employees v Newfoundland (Green Bay Health Care Centre),
[1996] 2 SCR 3 (Supreme Court of Canada)
Is hiring only male candidates a bona fide occupational requirement?

The respondent, when hiring an attendant to care for elderly male patients, only considered male candidates. It then hired a man who was not a member of the bargaining unit, while a woman who was a member was turned down. The collective agreement required that there be no discrimination on the basis of gender in hiring and that union members were to be hired ahead of external candidates. The Supreme Court of Canada found that the employer's gender requirement was a bona fide occupational qualification (BFOQ) because of the intimate functions the male hires were going to perform. It also found that the collective agreement's non-discrimination clause did not interfere with the employer's power to set a BFOQ, and thus did not amount to an attempt to contract outside of human rights legislation.

[18] At pages 1133 - 1138.

Pringle v Alberta (Human Rights, Multiculturalism and Citizenship Commission), (2004), CHRR Doc 04-430, 2004 ABQB 821 (Court of Queen's Bench of Alberta)
Adoptee refused access to her birth certificate

An Alberta human rights panel dismissed the complaint of an adoptee who had been refused access to her birth certificate, which would have identified her birth parents.[19] The Court of Queen's Bench applied an *Oakes* analysis[20] to determine if the prima facie discrimination was reasonable and justifiable under section 11 of the *HRCM Act*. Given the need to protect the privacy of parents placing children for adoption, the Court found that denying adoptees access to their birth records only minimally impaired their rights. The standard was thus reasonable and justifiable.

Assn of Professional Engineers and Geoscientists of Alberta v Mihaly, 2016 ABQB 61 (Court of Queen's Bench of Alberta)
Undue hardship—Employment—Foreign credentials

The complainant was from the former Czechoslovakia where he had trained to be an engineer. He came to Canada and applied to the Association of Professional Engineers and Geoscientists of Alberta (APEGA) to become registered as a professional engineer. His application was rejected as APEGA did not view his education as the equivalent to an engineering degree in Canada. The Association required the complainant to take additional tests in order for his application to be accepted, all of which he either failed or did not take. The complainant filed a complaint citing discrimination on the basis of his place of origin, in contravention of section 4 of the *Act*. The Tribunal found that the complainant had been discriminated against because of his place of origin and where he had acquired his education, and was unable to establish himself in his desired area of employment as a result. The Tribunal held that the Association should have matched the complainant with a mentor to help guide him through the Canadian engineering professional community, as well as offered him an individually customized assessment appropriate for his background and place of origin. On appeal to the Alberta Court of Queen's Bench, however, the respondent's prima facie discrimination on the basis of place of origin was found to be reasonable and justifiable. The requirement to offer individualized testing would be too costly for the Association, and would force them to alter their standards and step outside their regulatory role. The Court held that this would impose undue hardship on the Association.

Cyrynowski v Alberta Human Rights Commission, 2017 ABQB 745 (Court of Queen's Bench of Alberta)
Kijiji advertisement for babysitter—parent's right to choose babysitter

A male babysitter responded to a Kijiji advertisement for a job as an in-house babysitter. The advertisement specified that the preference was to hire an "older lady with experience." The complainant was refused an interview and went on to file a complaint with the Commission, citing discrimination on the basis of gender in contravention of section 8

[19] In *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, the Supreme Court of Canada elaborated a complex test for determining the impact of a policy or standard on a person's dignity, and the overall context in which a discriminatory act takes place. This test was changed in the *Kapp* case, discussed below.

[20] At paragraphs 141-151.

of the *Act*. The Director of the Commission found that an employment advertisement for a babysitter in the context of a private home is a private matter between the parties, and therefore did not fall within the scope of "employment" in section 8. Furthermore, the respondent's refusal to interview the complainant was based on a bona fide occupational requirement, as parents should have the final say on who takes care of their children. Pursuant to section 26 of the *Act*, the respondent requested a review of the Director's decision by the Chief of the Commission and Tribunals. The Chief said that advertising for childcare in a private home did fall within section 8 (the area of employment), but upheld the Director's decision that gender was a bona fide occupational requirement based on the parent's right to choose who looked after her child. The babysitter's appeal was dismissed by the Alberta Court of Queen's Bench.

Cases in which a contravention of the *Act* was not found to be reasonable and justifiable

Miller v 409205 Alberta Ltd (panel decision)
409205 Alberta Ltd v Alberta (Human Rights and Citizenship Commission) (Court decision), 2002 ABQB 681 (Court of Queen's Bench of Alberta)

A landlord had a series of disputes with a tenant whose rent was subsidized. The landlord refused to renew its participation in a subsidy program that had previously paid a portion of the tenant's rent. Other tenants in the building were not subject to the same rent increases as the complainant. The Alberta Court of Queen's Bench upheld the decision of an Alberta human rights panel that, in spite of the tenant's responsibility for much of his poor relationship with the landlord, the rent increases and the landlord's effective cancellation of the tenant's rent subsidy amounted to discrimination based on source of income. The Court held that no reasonable and justifiable defence applied under section 11 of the *HRCM Act*.

Ganser v Rosewood Estates Condominium Corp. (No. 1),
2002 AHRC 2 (The Alberta Human Rights and Citizenship Commission)
Actions based on "impressionistic" views of disability—to whom do condominium corporations owe public service?

A condominium corporation changed its bylaws, depriving a disabled 87-year-old resident of her former parking space. Although the resident herself did not drive, family members and friends used the space frequently when they came to pick her up. The resident filed a human rights complaint. An Alberta human rights panel found that the condominium corporation provided a public service to tenants, and that the complaint was therefore within the panel's jurisdiction. The panel also found that taking away the parking space was prima facie discriminatory because it was based on "impressionistic" assumptions about disability and because, in line with the reasoning in *Grismer*, reasonable alternatives had not been sought. The policy was not reasonable and justifiable under section 11 of the *HRCM Act* because it was not based on any "sound and accepted practice," nor had any fair, practical inquiry been made into alternatives to the policy.

Gwinner v Alberta (Minister of Human Resources and Employment),
2002 ABQB 685; appeal dismissed 2004 ABCA 210 (Alberta Court of Appeal)
Excluding people from benefits on the basis of their marital status

A group of complainants alleged that the *Alberta Widows' Pension Act* discriminated against women who were divorced, separated, or never married by denying them benefits for which they would have been eligible had they been widows. An Alberta human rights panel dismissed the complaints on the basis that, while the program was prima facie discriminatory, the contravention was reasonable and justifiable. However, the Alberta Court of Queen's Bench found that the panel had applied the *Meiorin* test in error. In considering the respondent's defence under section 11 of the *HRCM Act*, the Court followed Dickason, applying the *Oakes* test.[21] It found that excluding those who were single or who had never married was reasonable and justifiable, but that excluding persons who were divorced or separated was not. The Alberta Court of Appeal affirmed these findings.[22]

United Food and Commercial Workers, Local 401 v Alberta (Human Rights and Citizenship Commission),
(2003), 47 CHRR D/220, 2003 ABCA 246 (Alberta Court of Appeal)
Excluding employees on disability leave from receiving benefits that other employees had received

Citing difficult economic circumstances, Canada Safeway negotiated a "buyout" of about 3,500 active employees, all of whom agreed to take lump-sum payments in return for either resigning or taking a pay cut. However, 15 employees had failed to accumulate enough hours to benefit from the buyout because they were on disability leave and could only go back to work at the new, reduced salaries. An Alberta human rights panel found discrimination, a decision upheld by the Court of Queen's Bench, which found the union equally liable with the employer. The Court of Appeal upheld those decisions, using the *Meiorin* test to decide whether there was a reasonable and justifiable contravention under section 11.1 of the *Individual's Rights Protection Act*. Including the employees with disabilities in the buyout would have cost the company very little, and the company and the union had both failed to accommodate them.

Alberta (Human Rights and Citizenship Commission) v Federated Co-operatives Limited,
2005 ABQB 587 (Alberta Court of Appeal)
Employee's responsibility to participate in accommodation—Employer requesting further medical information

As a result of his bipolar disorder, an employee had trouble driving and relating to customers, both of which were significant responsibilities in his job. An Alberta human rights panel found that the employer had made some tentative attempts at accommodation. However, the employee had failed in his obligation to provide the detailed medical information the employer needed in order to allay its concerns about his ability to do his job, particularly to safely drive the long distances the job required. The panel found that the employee's unwillingness to participate in the accommodation process meant that the employer could not accommodate

[21] At paragraphs 174-233.

[22] 2004 ABCA 210 (CanLII).

him, and dismissed the complaint. On review, the Court of Queen's Bench found that the employer was not justified in seeking further medical information and did not reasonably request such information, nor did the employee refuse to provide it. The employer also failed in its duty to accommodate the employee. The Court reversed the panel's decision and ordered compensation paid to the employee.

Mortland and Van Rootselaar v Peace Wapiti School Division No 76,
2015 AHRC 9 (Alberta Human Rights Tribunal)
Forced retirement at age 65

The complainants were former school bus drivers who were fired by the respondent due to a policy allowing the termination of anyone over the age of 65. The respondent argued that the policy was a bona fide occupational requirement due to visual and cognitive risk factors associated with age. The Tribunal applied the test from *Meiorin*. While the Tribunal found that the policy's purpose was rationally connected to the job and that it was created in good faith, the Tribunal found that the policy was not reasonably necessary given that the respondent had not proven a sufficient risk in employing drivers over 65. The respondent was ordered to abolish its policy and offer the complainants their jobs back, as well as pay them damages.

Andric v 585105 Alberta Ltd,
2015 AHRC 14, 2015 CarswellAlta 2374 (Alberta Human Rights Tribunal)
Employee transfer and constructive dismissal amounted to discrimination

The complainant was employed at a spa in Edmonton. While at work, the complainant was physically assaulted by another employee and the employee's husband. Based on statements made by the assailants, the attack seemed to be motivated by a difference in religion between the complainant and the assailants. The owner of the spa, the respondent, who employed the complainant, told the complainant that she would be transferred to another spa location for her safety, but there would be a potential decrease in the employee's salary and responsibilities as a result of the transfer. At a meeting with the complainant, the respondent made comments about the employee who had assaulted the complainant, stating that she was a family friend and belonged to the same religious faith, thus he had to treat her with respect and support her. The assaulting employee was hired back at the spa the following year.

The complainant filed a complaint with the Commission, alleging that she had been discriminated against on the basis of her religious beliefs in contravention of section 7 of the *Act*. The location of her new employment made it very difficult for her to get to work and constituted, in the complainant's eyes, a constructive dismissal. The Tribunal found that, based on the respondent's statements, religion played a part in the complainant's transfer, at least in part. The transfer seemed to be the result of the employer's shared belief system with the employee who had assaulted the complainant. In applying the test from *Meiorin*, the Tribunal held that transferring the complainant for the alleged reasons of "safety" were not rationally connected to her transfer. Given that the other employee was barred from the mall where her original workplace was located, and that the other employee could easily find out which spa the complainant had been transferred to, this did not serve the purpose of keeping

the employee safe, nor was the justification given to the tribunal made in good faith by the employer. The prima facie discrimination was therefore found to be unreasonable and the complainant was awarded damages for hurt feelings and lost wages.

Cooper v 133668899 Ltd,
2015 AHRC 6, 2015 CarswellAlta 2625 (Alberta Human Rights Tribunal)
Temporary work leave and absenteeism on the basis of mental disability

The complainant had been put on temporary medical leave from her job at a hotel for depression and stress. When she communicated to her employer that she would need to leave work on a temporary basis, but would return in the future, the complainant alleged that her employer fired her and told her not to return to the property. The respondent stated that he had not fired the complainant, but that she had quit, as the complainant had stated that she would not be completing her remaining work shifts. The respondent told the complainant to pack her things and not return to the property.

The complainant filed a complaint with the Commission, stating that she had been discriminated against on the basis of mental disability. The respondent argued that because the complainant had quit, they had not had a reasonable opportunity to accommodate her. However, the Tribunal held that it was unreasonable for the respondent to interpret the complainant's medical leave as quitting, and that the respondent did, in fact, fire the complainant because of her request for medical leave on the basis of her mental illness. The Tribunal also held that, while it was understandable that the respondent would initially react unfavourably to the inconvenience of losing an employee temporarily, they had a duty to consider her request for accommodation. Given this lack of consideration of her request, the Tribunal held that the respondent had not accommodated the employee to the point of undue hardship. The respondent was awarded damages for injury to dignity, in addition to lost wages.

Appendix 2: Case law on ameliorative policies, programs, and activities

Currently, Saskatchewan has the only other provincial human rights legislation that includes a provision identical to section 10.1 in the *Act*, which provides that ameliorative programs and practices are allowed as exceptions to discrimination. Other provinces mention ameliorative practices within certain contexts only, such as in employment, avoiding an umbrella application of the principle. As such, there exists little human rights case law to date on ameliorative practices. However, the *Canadian Charter of Rights and Freedoms* includes a provision about ameliorative practices in section 15(2), allowing disadvantaged groups to benefit from programs created for them, without violating anyone else's right to equality under the *Charter*. Even though directly relevant case law does not exist yet for section 10.1, because of the similarities between section 10.1 and section 15(2) of the *Charter*, judicial interpretation of section 10.1 has been informed by *Charter* cases and other human rights case law under the *Act*.

The Charter background

R v Kapp,
2008 SCC 41(Supreme Court of Canada)
***Charter s 15(2)*—effect of ameliorative or remedial programs on section 15 equality rights**

In *Kapp*, three Aboriginal groups were given exclusive fishing licenses to fish in the Fraser River for a 24-hour period. *Kapp* was a non-Aboriginal commercial fisher who, along with other commercial fishers, protested against being excluded from the fishing licence by fishing in the Fraser River on the day that the licence allowed only the three Aboriginal groups to fish there. *Kapp* was charged with fishing without a license. He brought a *Charter* section 15(1) equality claim against the government. Section 15(1) guarantees that every individual is equal before and under the law and is entitled to equal protection and benefit. The Supreme Court of Canada held that section 15(1) was not a standalone clause and that it interacted with section 15(2), which allows an exception for ameliorative programs. While the fishing licenses did discriminate against *Kapp*, they were still legal because the government's objective in granting them was to improve the conditions of the three Aboriginal groups who are historically disadvantaged.

Alberta (Aboriginal Affairs and Northern Development) v Cunningham,
[2011] 2 SCR 670 (Supreme Court of Canada)
***Charter 15(2)*—when an ameliorative program discriminates against another disadvantaged group on an enumerated ground**

The respondents were a group of Métis people/persons who also identified as status Indians. They brought an application to the Supreme Court of Canada arguing that they were excluded from Alberta's *Métis Settlements Act* because they were also status Indians, and that this violated their equality rights under section 15(1) of the *Charter*. The Court held

that an ameliorative program's objective only needs to be deemed rationally connected to its action in order to be valid under section 15(2). Furthermore, section 15(2) allows the government to set priorities, which naturally leads to other groups being left out of programs intended to benefit groups of disadvantaged persons. Because the objective of the *Métis Settlements Act* was to preserve the identity of Métis persons living in Alberta, and this was rationally connected to its action, the *Act* constituted an ameliorative program, and did not violate section 15(2). The claim was therefore dismissed.

Appendix 3: Act provisions regarding reasonable and justifiable discrimination

Discrimination re employment practices

7(1) No employer shall:

(a) refuse to employ or refuse to continue to employ any person, or

(b) discriminate against any person with regard to employment or any term or condition of employment,

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

(2) Subsection (1) as it relates to age and marital status does not affect the operation of any bona fide retirement or pension plan or the terms or conditions of any bona fide group or employee insurance plan.

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

Applications and advertisements re employment

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

(a) that expresses either directly or indirectly any limitation, specification or preference indicating discrimination on the basis of the race, religious beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or of any other person, or

(b) that requires an applicant to furnish any information concerning race, religious beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation.

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

Reasonable and justifiable contravention

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

Appendix 4: Act provisions regarding ameliorative policies, programs, and activities

Ameliorative policies, programs, and utilities

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

(a) has as its objective the amelioration of the conditions of disadvantaged persons or classes of disadvantaged persons, including those who are disadvantaged because of their race, religious beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation, and

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

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