

WHEN IS DISCRIMINATION NOT A CONTRAVENTION OF THE LAW?




Alberta Human Rights
and Citizenship Commission

INTERPRETIVE BULLETIN

Table of Contents

Introduction	3
What you will find in this publication	4
Employment, services, and tenancy	4
Reasonable and justifiable discrimination	5
Determining if a standard amounts to reasonable and justifiable discrimination	6
Identifying prima facie discrimination	6
Applying the <i>Meiorin</i> three-step test	7
The duty to accommodate	8
Exception to the <i>Meiorin/Grismer</i> approach	9
A guide to identifying reasonable and justifiable discrimination	10
1. New business objective	10
Checklist for identifying prima facie discrimination	12
Checklist for designing a new standard	13
2. Taking action based on an existing standard	13
Checklist for analyzing an existing standard	14
3. Providing a defence to a complaint that a standard is discriminatory	14
Checklist for defending an existing standard	16
Conclusion	16
Appendix 1: Historical overview	17
1) <i>Etoibicoke</i> : When direct discrimination is a BFOR	17
2) <i>O'Malley</i> : Indirect discrimination and the duty to accommodate	17
3) <i>Bhinder</i> : BFOR defence applies to indirect discrimination	18
4) (<i>Town of</i>) <i>Brossard</i> : An employment standard must be rationally connected to its objective	18

5) <i>Saskatoon City</i> : To establish a BFOR, individualized testing must be impractical	19
6) <i>Central Alberta Dairy Pool</i> : BFOR restricted to direct discrimination—duty to accommodate restricted to indirect discrimination—what constitutes undue hardship	19
7) <i>Central Okanagan School District</i> : Unions have a duty to accommodate	20
8) <i>Meiorin</i> : Erasing the distinction between direct and indirect discrimination	20
9) <i>Grismer</i> : Applying the three-step <i>Meiorin</i> test to public services	21
Does the three-step <i>Meiorin</i> test apply to section 11 of the <i>HRCM Act</i> ?	21
Appendix 2: Case law on reasonable and justifiable discrimination	22
The <i>Charter</i> background	22
Cases in which discrimination was found to be reasonable and justifiable	23
Cases in which discrimination was not found to be reasonable and justifiable	26
Appendix 3: <i>HRCM Act</i> provisions regarding reasonable and justifiable discrimination	30
Contact us	31
Reader survey	32



This publication discusses Alberta Human Rights and Citizenship Commission policies and guidelines. Commission policies and guidelines reflect the Commission's interpretation of certain sections of Alberta's *Human Rights, Citizenship and Multiculturalism Act* as well as the Commission's interpretation of relevant case law. Case law includes legal decisions made by human rights panels and tribunals, and the courts. As the case law evolves, so do the Commission's policies and guidelines.

Commission policies and guidelines:

- ◆ help individuals, employers, service providers, and policy makers understand their rights and responsibilities under Alberta's human rights law, and
- ◆ set standards for behaviour that complies with human rights law.

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

Introduction

The *Human Rights, Citizenship and Multiculturalism Act* (the *HRCM Act*) prohibits discrimination in Alberta in specified areas and under specified grounds. At the same time, the *HRCM Act* allows discrimination when it is reasonable and justifiable. 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 *HRCM Act*, even if the practice is discriminatory.

This interpretive bulletin includes a number of tools to help employers, service providers, landlords, and others who must interpret and apply human rights law determine if a standard or practice conforms to the law. It provides information about reasonable and justifiable discrimination for:

- ◆ employers, service providers, and landlords who must meet the requirements of the *HRCM Act*

- ◆ employees, service users, and tenants
- ◆ others who need to understand or apply human rights law

The information in this bulletin is intended to:

- ◆ guide employers, service providers, and landlords in designing and implementing business practices that do not contravene the *HRCM Act*
- ◆ help employees, service users, and tenants to understand the concept of reasonable and justifiable discrimination
- ◆ increase awareness of situations in which an otherwise discriminatory practice would be found reasonable and justifiable

The information presented here provides general guidelines. If you have questions about a specific situation, please contact the Alberta Human Rights and Citizenship Commission. (See *Contact us* in this publication.)

What you will find in this publication

This publication:

1. describes the concept of reasonable and justifiable discrimination
2. examines how two major Supreme Court of Canada decisions (*Meiorin* and *Grismer*) apply to the exemption for reasonable and justifiable discrimination in section 11 of the *HRCM Act*
3. provides a practical step-by-step guide to determine whether a practice amounts to reasonable and justifiable discrimination
4. provides contact information for the Alberta Human Rights and Citizenship Commission
5. includes as appendices:
 - ◆ an historical overview of how the concept of reasonable and justifiable discrimination has developed through Supreme Court of Canada decisions
 - ◆ a review of case law related to reasonable and justifiable discrimination
 - ◆ the provisions of the *HRCM Act* that address reasonable and justifiable discrimination

EMPLOYMENT, SERVICES, AND TENANCY

The *HRCM Act* protects individuals against discrimination in specific areas. The areas in which discrimination most frequently occurs are employment, services, and tenancy. Discrimination appears differently in these three areas, as do “reasonable and justifiable” exemptions under section 11 of the *HRCM Act*.

Employment

The leading cases in reasonable and justifiable discrimination have dealt with discrimination in the area of employment. Employment, in the context of human rights law, includes any activity related to employment. The term employment is given a “large and liberal” interpretation in order to ensure that the law’s protection covers all those who need it. In the cases included in the case summaries in this bulletin, employment ranges from the hiring process, to employment for wages, to the role trade unions play. Direct discrimination in employment is usually a rule that excludes an individual or group, such as a nightclub’s policy of hiring only female bartenders. Indirect discrimination, which is more common, is a rule in which exclusion is not stated but has an adverse effect on a protected individual or group. A warehouse owner’s requirement, for instance, that all employment candidates be able to lift forty kilograms would effectively discriminate against most female candidates. To justify any such discrimination in the area of employment, the employer must be able to establish a bona fide occupational requirement or “BFOR.”

Services

As in employment, the area of services customarily available to the public has been interpreted broadly to give full effect to the law’s protections. Government services; commercial services such as hotels and restaurants; clubs, including sports, veterans, and ethnic groups; and volunteer organizations have all been found to offer services to the public. However, based on human rights legislation and the common law, tribunals and courts have found reasonable and justifiable some instances of discrimination in the area of services. For instance, an Alberta human rights panel found, in the *Mattern* case discussed in the case summaries in Appendix 2, that a family-oriented campground’s exclusion of a group of single male campers was reasonable and justifiable under section 11 of the *HRCM Act*.

Tenancy

The *HRCM Act* includes in its definition of tenancy the renting process and occupancy of any commercial or residential property available for rent. Discrimination in the area of tenancy is usually indirect. For example, landlords often set economic criteria and demand references and thereby effectively exclude, for example, individuals who depend on social assistance or have a disability. In determining if a landlord’s discriminatory standards are reasonable and justifiable, tribunals and courts now rely on the *Meiorin* test, looking for the same elements that constitute a BFOR—see for example, the *Ganser* case in the Case law section of this publication in Appendix 2.

The *HRCM Act* protects individuals in Alberta from discrimination in certain areas, based on specific grounds set out in the *HRCM Act*. These **protected grounds** include race, colour, ancestry, place of origin, religious beliefs, gender, age, physical disability, mental disability, marital status, family status, source of income, and sexual orientation.¹

Discrimination on the basis of these grounds¹ (except age) is prohibited in these areas:

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

In addition, the equal pay area (section 6) requires employers to pay males and females the same rate of pay if they perform the same or substantially similar work.

1 Under the *HRCM Act*, age is not a protected ground in the area of tenancy or the area of goods, services, accommodation or facilities customarily available to the public. Although sexual orientation is not explicitly stated in the *Act*, the Government of Alberta agreed to read it in as a protected ground, effective April 2, 1998. For more information, see the Commission information sheet *Protected areas and grounds under the Human Rights, Citizenship and Multiculturalism Act*.

Reasonable and justifiable discrimination

The *HRCM Act* sets out specific exemptions in some areas. Section 7 allows an employer to discriminate if the reason is a bona fide occupational requirement, and section 8 allows the same exemption for employment advertising and interviewing. Section 11 allows any form of discrimination, if it is “reasonable and justifiable in the circumstances.”² These sections of the *HRCM Act* are called **defences**, because they allow an employer, service provider, or landlord to demonstrate that their standards or policies do not amount to discrimination under the law.

These defences set out when a discriminatory action is reasonable and justifiable, and therefore acceptable. In the 14 human rights statutes in 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**—a “BFRJ” or “BFRQ”—or simply “reasonable and justifiable discrimination.”

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 is discriminatory, it is reasonable and justifiable in the circumstances. The Court has made it clear 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, service, or rental property in order to make it accessible to persons or groups of persons who, because of a protected ground such as gender or disability, would otherwise be excluded.

2 See Appendix 3 for full text of sections 7, 8, and 11.

A NOTE ABOUT THE WORD “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 discrimination. To simplify, this document refers to all of these as **standards**.

Determining if a standard amounts to reasonable and justifiable discrimination

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 discriminate. Reasonable and justifiable discrimination can only result from a process that attempts to find a non-discriminatory, or the least discriminatory, method for meeting a business objective.

Identifying *prima facie* discrimination

The first question employers or service providers must answer is whether a standard results in **prima facie discrimination** (which means, literally, “on its face”). If a standard treats individuals or groups differently based on any of the protected grounds in the *HRCM Act* and results in harm to the dignity and self-worth of those affected, the standard is *prima facie* discrimination.

Prima facie discrimination may be either **direct** or **indirect**. Although the Supreme Court of Canada effectively eliminated this distinction in 1999,³ the terms “direct discrimination” and “indirect discrimination”

help in understanding the ways in which discrimination occurs. Direct discrimination is differential treatment based openly on a protected ground. Such a standard is said to discriminate *on its face* because the differential treatment is stated outright. For example, a rule that prohibits persons who experience seizures from working as forklift operators discriminates directly, in the area of employment and on the basis of disability. Direct discrimination is usually easier to identify, because the exclusion is defined by the protected ground. In the workplace, direct discrimination is usually based on age or disability. In services, direct discrimination usually involves the exclusion of an individual or group, such as denying girls and women membership on sports teams.

Indirect discrimination—also called **adverse effect** discrimination—results from a standard that appears to treat people equally, but results in an individual or group of individuals receiving different treatment on the basis of a protected ground. For example, a requirement that candidates for senior management in a fire department have 20 years of experience appears on its face to be neutral and to treat all candidates equally. However, women have only been working in any significant number as firefighters for a

³ See discussion below of the *Meiorin* decision

few years. The requirement, then, will have an adverse effect on potential female candidates in comparison to males. Similarly, a set of stairs in a department store may seem to present the same obstacle to all customers, but those with mobility disabilities will be adversely affected. To identify indirect discrimination, it is necessary to look behind the standard to see what effect its application will have on people, based on the protected grounds of the *HRCM Act*.

A thorough and systematic examination of a standard will help determine if it is discriminatory. Considering a standard's impact on each protected ground separately will simplify the analysis. Disability encompasses a wide variety of physical and mental conditions. Individuals with different disabilities may be impacted differently when a standard is applied. For instance, a rule disciplining employees who are absent more than fifteen days in a year will have a different effect on a person with a mobility disability, and a person with bi-polar disorder. A checklist to help identify situations that are prima facie discriminatory is presented later on in this publication under the heading *A guide to identifying reasonable and justifiable discrimination*. The checklist offers a systematic way to analyze the effect a standard will have on those who are protected under the *HRCM Act*.

Another way to analyze the effect of a standard is to consider the statistical impact it will have on different groups. In considering, for example, the rule requiring twenty years of experience for management candidates in a fire department, the composition of a sample of firefighters would serve as a useful guide. If the department as a whole has 200 firefighters, 15 per cent of whom are female, while those with over 20 years of experience are exclusively male, the rule is discriminatory.

Although the rule appears neutral, a simple statistical analysis shows that it has an adverse effect on potential female applicants.

In most cases, if a standard has a negative impact on the dignity or self-worth of anyone protected by the *HRCM Act*, the standard is prima facie discriminatory. In some situations, however, the group potentially affected negatively by a standard will not suffer any loss of dignity or self-worth as a result of the discriminatory standard. This is usually the case where the group in question has not suffered disadvantage historically in receiving the service or working in the area in question. For example, a fitness club exclusively for women excludes men as members, by definition. However, the dignity of men is not harmed in this case, since men have had and continue to have ample access to the service fitness clubs provide.

Applying the *Meiorin* three-step test

Once it is established that a standard results in prima facie discrimination, the standard must be examined to see if the discrimination is reasonable and justifiable. This examination involves a three-step test established by the Supreme Court of Canada in the 1999 *Meiorin* case.⁴ In that 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 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 Court established a test with three steps, all of which must be met to show that

4 British Columbia (Public Service Employee Relations Commission) v. BCGSEU [1999] 3 S.C.R. 3.

a discriminatory standard 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 objective, and
3. that the standard itself is reasonably necessary to accomplish the goal or purpose.

In *Meiorin*, the Court found that even though the employer's standard was based on safety concerns (rule 1), and established in good faith (rule 2), the employer had failed to show the requirement was reasonably necessary (rule 3) because it had not considered ways to accommodate the complainant. The Court did not provide suggestions for accommodations that the employer might have considered. However, the Court made it clear that a standard is not reasonably necessary if the employer has not fully considered alternatives that might allow the affected individual to fill the position.

Shortly afterwards, the Court applied the *Meiorin* three-step test in *Grismer*, a case involving services to the public.⁵ The B.C. Superintendent of Motor Vehicles had revoked Terry Grismer's driver's licence because of Mr. 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, Mr. Grismer could have been tested individually for his fitness to drive. By not doing so, the superintendent failed to accommodate him, and the standard was not reasonably necessary.

The duty to accommodate

The duty to accommodate obligates the service provider or employer to adjust the service or the conditions of employment in order to eliminate discrimination. The accommodation process includes identifying alternatives and choosing the approach that delivers full and genuine equality, while minimizing as much as possible the costs to the employer, landlord, or service provider.

In all situations where there is a duty to accommodate, the employer, landlord, or service provider must be prepared to provide accommodation to the **point of undue hardship**. Undue hardship is the point at which the value of a service or of an employment position is outweighed by the costs involved in accommodation. Among the factors that may be considered in weighing undue hardship are financial cost, safety, disruption of the workplace or the service, and impact on other staff and clients. This list is not exhaustive. The Supreme Court of Canada has found that the factors involved will depend on the circumstances of each case.

The financial cost of accommodation will be undue hardship for a service provider when it results in the service provider being unable to offer the essential elements of its service to its clients. For an employer, the financial cost of accommodation will amount to undue hardship at the point that there is more financial cost in accommodating an employee than there is value in the work the employee performs.

⁵ British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights) [1999] 3 S.C.R. 868.

At the same time, the employer or service provider may well experience some real hardship in providing accommodation. Accommodation may involve substantial financial cost and other negative impact. The test is for hardship that is *undue*, not for hardship that the employer or service provider might reasonably be expected to bear.

Because undue hardship varies from case to case, and may involve different factors, the point of undue hardship is difficult to define precisely. What amounts to undue hardship in one situation, for example for a specific service provider providing a specific kind of accommodation, will not necessarily be adequate in another similar case. Employers and service providers might believe that they will be required to provide the same accommodation that they have seen required in other cases. Employees and service users, too, might believe that they can expect the same accommodation they have seen provided, or ordered by a court or tribunal, in other situations. The notion of undue hardship itself also creates expectations. Employees and service users may tend to believe that they have the right to accommodation that takes the employer or service provider all the way to the point of undue hardship, but less costly measures might be entirely adequate.

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

Exception to the *Meiorin/Grismer* approach

Section 11 of the *HRCM Act* allows discrimination if it can be shown to be "reasonable and justifiable in the

circumstances." This language, unlike that in other Canadian human rights statutes, parallels the language of the *Canadian Charter of Rights and Freedoms*. 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 1992, the Supreme Court of Canada applied *Oakes* in considering the effect of the Alberta human rights legislation⁷ on the University of Alberta's mandatory retirement policy.⁸ Applying the logic in *Oakes*, the Court found the policy reasonable and justifiable.

After *Meiorin* and *Grismer*, in 1999, it was unclear whether those decisions or *Oakes* would be used to consider the effect of section 11 when analyzing cases of discrimination to determine if the discrimination was reasonable and justifiable. Since then, Alberta courts have laid out two paths for applying section 11. Several cases in employment, tenancy, and services suggest that a *Charter* approach to section 11—that is, one based on *Oakes*—is appropriate only when government programs and services are involved.⁹ Otherwise, employers, service providers, and landlords must meet the requirements set out in *Meiorin*.

6 R. v. Oakes [1986] 1 S.C.R. 103

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

8 Dickason v. University of Alberta [1992] 2 S.C.R. 1103

9 See, for example, *Mattern v. Spruce Bay Resort* (2000), CHRR Doc. 00-102 (Alta. H.R.P.) and *Ganser v. Rosewood Estates Condominium Corp.* (No. 1) (2002), 42 C.H.R.R. D/264 (Alta. H.R.P.).

A guide to identifying reasonable and justifiable discrimination

The application of the legal framework for determining whether a practice amounts to reasonable and justifiable discrimination will differ depending on the point at which the inquiry begins. In the ordinary course of business, there are three points at which such an inquiry is usually required:

1. when a new business objective is established and a standard created or implemented to meet the new objective,
2. when taking action based on an existing standard may have a discriminatory effect, or
3. when it becomes necessary to provide a defence to a complaint that a standard is discriminatory.

1. New business objective

Business objectives are constantly changing in response to the dynamic environment in which employers, service providers, and landlords operate. New business objectives might include improving workplace safety, customer service, public image, or production efficiency. Objectives like these might result in changes in location, financing, marketing, employment practices, or service standards.

Employers, service providers, and landlords all must meet substantially the same human rights standards when setting new objectives. In order to simplify the discussion of the requirements involved in establishing a new business objective, the following examination of the process focuses on the employment setting.

When a business objective involves a new employment-related standard, the employer must ensure that the new standard complies with the *HRCM Act*. If the standard is discriminatory, either directly or indirectly, it must meet the *Meiorin* test. The test's three steps are aimed not simply at meeting narrow legal requirements, but at crafting workplace standards that best meet business objectives while ensuring full participation by a diverse workforce.

Input from a range of people who will work with the new standard helps to ensure that a standard is truly based on objective business needs. The process of choosing a standard could include input from a cross-section of the organization, so that both operational and human resources perspectives are considered. The breadth of input will be proportional to the size of the employer. In a small operation, for instance, this process may involve only one or two people. Including a wide range of input will not only deliver a wide range of options, but will also help to establish that the employer chooses the new standard with the "honest and good-faith belief" that it is necessary to fulfill an objective, as the *Meiorin* test requires. For example, a new workplace standard that sets physical strength requirements might be drafted by a committee including the personnel manager, the production manager, shop floor representatives, the shop steward, and the chair of the health and safety committee.

Step one: Describe and measure the objective

By systematically describing and measuring the business objective, an employer can ensure that a new standard is rationally connected to its purpose—the first step of the *Meiorin* test. For example, if the business objective is to reduce the number of workplace accidents related to lack of physical strength, the initial assessment process might include:

- ◆ an inventory of workplace accidents and their severity
- ◆ a quantitative and qualitative assessment of workplace accidents related to a lack of physical strength
- ◆ an assessment of job-related factors contributing to those accidents
- ◆ an assessment of social factors among the workforce contributing to those accidents

Step two: Identify options for meeting the objective

A range of sources should be canvassed for options, and might include:

- ◆ standards used in the industry and already found effective and legally valid
- ◆ standards recommended by insurers or regulatory bodies
- ◆ standards developed in-house by the committee

For example, if the business objective is to reduce workplace accidents related to a lack of physical strength, alternatives might include changing the work routine so that less physical strength is required, requiring employees to work with a partner on tasks that require significant physical strength, using equipment that assists employees to carry out work that requires significant physical strength, or providing employees with personalized training to help them work

more safely when lifting and moving heavy objects. The list need not be exhaustive, but should demonstrate that the employer has attempted to identify a reasonable number of options for meeting the business objective. This step is especially important in meeting the good-faith requirement of step 2 of the *Meiorin* test.

Step three: Choose the least discriminatory option to meet the objective

Review the standard: To choose the least discriminatory option for meeting the business objective, *the employer must review the standard to determine whether it has a discriminatory effect.* As discussed above, there is no effective difference between a standard that discriminates directly and one that discriminates indirectly by adverse effect. For example, automatically removing employees who do not meet the physical strength requirement could discriminate directly on the basis of physical disability, and indirectly based on gender. If the standard is not discriminatory, however, it may be implemented without further consideration of its effect on the human rights of the workforce.

Consider alternatives: *If the standard is discriminatory, alternatives must be considered.* If one or more of the alternatives does not have a discriminatory effect and still meets the business objective, the original standard will not be “reasonably necessary” in terms of the third step of the *Meiorin* test. For example, an employer might need to reduce injuries on the job, and impose a strength requirement that results in some employees being dismissed and some otherwise eligible employment candidates being rejected because they could not meet the standard. In its effect on people with physical disabilities, such a standard would

discriminate directly. As an alternative, the employer might modify the facilities, revamp job assignments, or assign employees to work in pairs to accomplish physically strenuous tasks. If this non-discriminatory alternative also meets the employer's business objective, the original option of automatic dismissal will not be legally acceptable.

Weigh the impact: However, the other alternatives might not meet the business objective, or might also be discriminatory. If so, the importance of the business objective must be weighed against the discriminatory effect of the standard under consideration. *If the employer can forgo the business objective without undue hardship, the standard is not "reasonably necessary," according to the third step of the Meiorin test.* For example, a restaurant might establish a policy of hiring only men as servers to create a uniform presence in its dining room. Such a policy would discriminate against otherwise qualified women. In this situation, the restaurant could probably forgo the business objective—creating a specific image in its dining room—without undue hardship. The policy of only hiring men as servers would not be "reasonably necessary" because the employer would not experience undue hardship by doing without it.

Look for ways to accommodate employees:

In other cases, abandoning the business objective will create undue hardship for the employer. If it does, *the employer must then look for ways to accommodate employees who are affected by the standard, and the employer must accommodate to the point of undue hardship.* This means that the search for accommodation must be thorough, and that accommodation may well involve some significant cost or inconvenience.

For example, an employer might decide to require that all customer service staff to be able to keyboard at a rate of 50 words per minute, as a way of improving the quality of service. The new requirement would be prima facie discriminatory for older employees who did not receive keyboard training in school. Permanently assigning those employees not able to meet the keyboarding standard to lower paying positions might appear at first glance to be a form of accommodation. However, a scheme of temporary reassignment, with an opportunity for employees to receive additional training to meet the standard and then return to their customer service positions, would be more effective at reducing the discrimination involved and would probably not create undue hardship for a large employer.

Checklist for identifying prima facie discrimination

In order to determine if a standard is discriminatory on its face, an employer, service provider, or landlord needs to consider the effects of the standard on each of the protected grounds in the *HRCM Act*. Considering these effects provides a way to analyze the impacts a standard will have.

The protected grounds are: race, colour, ancestry, place of origin, religious beliefs, gender, age, physical disability, mental disability, marital status, family status, source of income, and sexual orientation.

1. Write out the standard carefully and in detail.
2. Examine and record whether the standard has a prima facie discriminatory effect on the basis of any protected ground. Potentially discriminatory elements of a standard include:

- ◆ the date the standard came into effect: consider the establishment of the standard and how it relates to other changes in the business or service, the historical relationship to any changes in the legal or regulatory environment, and so on.
 - ◆ the group affected by the standard: specify which individuals or groups were negatively affected, and if they are protected under the *HRCM Act*.
 - ◆ the quantity required by the standard: if the standard sets requirements such as years of service or the ability to meet a measured performance standard, specify the measurements involved and the rationale behind them.
 - ◆ the quality required by the standard: if the standard requires a particular quality such as a certificate or membership in a specific group, describe the requirement and the rationale behind it.
7. Review the options in order, in terms of potential discriminatory impact, until an option is found that is not prima facie discriminatory. If a non-discriminatory option is found, implement it.
 8. If all of the acceptable options discriminate, choose the least discriminatory option for meeting the business objective.
 9. Specify the process for accommodating individuals who are discriminated against by the new standard.
 10. Analyze and describe the hardship to the organization of accommodating individuals against whom the new standard discriminates.
 11. If individuals for whom the standard is prima facie discriminatory can be accommodated without causing undue hardship, the standard meets the requirements of the *HRCM Act*.
 12. If accommodation would cause the organization undue hardship, describe the costs, financial and otherwise, and why the organization would be unable to bear them.
 13. If the standard is prima facie discriminatory, and accommodating individuals affected would cause undue hardship, the standard is protected by the *HRCM Act* as reasonable and justifiable discrimination.

Checklist for designing a new standard

1. Describe the business objective.
2. Describe the importance of the business objective to meeting the organization's mission.
3. Describe how to measure if the business objective is being met.
4. Describe the process for choosing a standard for meeting the business objective.
5. Generate a list of acceptable options for meeting the business objective.
6. Rank the acceptable options by their effectiveness in meeting the business objective.

2. Taking action based on an existing standard

The same legal principles apply to the application of existing standards as to the drafting of new ones. In other words, existing standards must meet the *Meiorin* test. The question of whether or not a discriminatory standard is reasonable and justifiable arises

most commonly in the ordinary course of business when employers, service providers, or landlords apply existing standards. Most businesses and services rely on a complex web of standards to guide their operations. These standards may range from complex regulatory requirements, to job descriptions, to unwritten workplace policies, to the application of common sense. Standards may also be set down in collective agreements or legislation. Examples include dismissing an employee after a number of absences; requiring compliance with provincial safety standards; or making simple, on-the-spot decisions such as giving a hotel guest with a mobility disability a ground-floor hotel room.

As a preventive measure, employers and service providers should review their standards to see whether they have a discriminatory effect. If a standard appears to have a discriminatory effect, the employer must consider less discriminatory alternatives and the need for accommodation. The process is the same as that described above for designing standards to meet new business objectives.

When taking action on the basis of an existing standard, an employer or service provider should consider any discriminatory effect that might arise. Although it is unlikely in most ordinary situations that discrimination will result, if it does, the employer or service provider's actions must meet the *Meiorin* test.

The first question that must be considered is whether or not the standard is reasonably necessary. Even if the standard has been carefully designed through a process like the one outlined above for designing new standards, new factors may have arisen that would allow less discriminatory alternatives that would still meet the business objective,

or new ways in which those affected might be accommodated.

If the standard is not the product of a careful effort to minimize discrimination, the employer or service provider must make every effort to accommodate those who experience discrimination as a result. Again, the search for accommodation must be thorough and consider every alternative short of undue hardship. Documenting the process as thoroughly as possible will ensure that there is no ambiguity in the standard, in the way it is applied, and in efforts made to accommodate.

Checklist for analyzing an existing standard

1. Review the existing standard in light of its potential discriminatory impact to determine if it is prima facie discriminatory. Maintain documentation on the process.
2. If the existing standard is not prima facie discriminatory, continue to use it as a method for meeting the business objective.
3. If the existing standard is prima facie discriminatory, the full process for developing a standard to meet a new business objective must be engaged. Follow the steps in order in the checklist for designing a new standard on page 13.

3. Providing a defence to a complaint that a standard is discriminatory

The *Meiorin* test is perhaps most easily applied in examining a standard that is already in place in an employment setting, or in the provision of a service to the public. This is also the situation when an employee complains about an action the employer has already

COMPLAINANT AND RESPONDENT

A **complainant** is a person who believes that he or she has experienced discrimination and chooses to make a formal complaint to the Commission. A complainant may also be a person who makes a complaint on behalf of someone else.

A **respondent** is a business, organization, or individual that a complainant alleges, in a formal complaint to the Commission, has discriminated against him or her.

taken, when someone makes a human rights complaint about an action the employer has already taken, or when someone complains about being denied access to a service or tenancy. The *Meiorin* test requires the employer, service provider, or landlord to:

- ◆ produce information that identifies the business objective,
- ◆ demonstrate how the standard was formulated,
- ◆ explain why the standard was chosen over other alternatives, and
- ◆ show that the individual or group was accommodated to the point of undue hardship.

In order to respond to a human rights complaint, the employer or service provider will need to put together a chronological record of information that demonstrates how the standard was adopted. For the most part, business records such as meeting minutes, e-mails, and draft policies will provide a record of the process. These records will also provide a list of people who participated in developing the standard and can provide further information about the process. If experts were involved, their evidence will be particularly helpful for demonstrating why the standard was chosen, and why any less discriminatory alternatives could not meet the business objectives. The evidence of experts will also be helpful in determining the degree to which the standard remained reasonably necessary after its inception, since a complaint about the standard may well take place long after it was adopted.

In some cases, a standard has been adopted informally, years before a complaint about it has been made. The informality of the process

that established the standard and the passage of time may make it very difficult for respondents to a human rights complaint to put together all of the information needed to defend a standard as reasonable and justifiable. In such a situation, a respondent may want to assume that the complainant has established a prima facie case of discrimination, and move directly to showing that the complainant was accommodated, to the point of undue hardship.

In satisfying the *Meiorin* requirements that the standard be rationally connected to the objective and established in the honest and good-faith belief that it was reasonably necessary, a respondent can also work “from the bottom up” and show how the standard has worked in practice. If the standard can be shown to have served effectively in meeting the business objective, without a discriminatory result, it is likely to meet the first two of the *Meiorin* steps. A statistical analysis of the historical effect of a standard is an example of this kind of inquiry. For example, if a grocery wholesaler had established a physical strength requirement for warehouse positions, no women working at the time had lost their jobs as a result, and equal numbers of men and women had been hired in the intervening five years, the standard does not result in discrimination by keeping women out of the position.

In most cases, however, if the standard is not the product of a thorough process like that described in this bulletin, the employer or service provider will probably not be able to show that there were no less discriminatory alternatives available, or that the complainant was accommodated to the point of undue hardship.

Checklist for defending an existing standard

1. Review the existing standard to determine whether it is prima facie discriminatory.
2. If the standard is prima facie discriminatory, explain why. Include in this analysis the prohibited ground involved, the area of discrimination, the details of the complaint, supporting information regarding the standard and its establishment, and relevant case law.
3. If the standard is not prima facie discriminatory, the defence does not necessarily need to proceed further. If the standard is prima facie discriminatory, or if there is doubt, it will be necessary to examine the standard in light of the *Meiorin* test, as described below.
4. Is the standard rationally connected to its objective?
 - ◆ Describe the business objective.
 - ◆ Describe how meeting the business objective was measured.
 - ◆ Describe how the standard met the business objective.
 - ◆ Demonstrate that the standard is used by the industry to meet the business objective.
5. Was the standard adopted with an honest and good-faith belief that it was necessary?
 - ◆ Describe the importance of the business objective for meeting the organization's mission.
 - ◆ List available documentation of the process used to develop the standard, including meeting minutes, correspondence, draft standards, and the approval process.
 - ◆ Describe the process for choosing the standard for meeting the business objective.
 - ◆ List the acceptable options for meeting the business objective.
 - ◆ Explain how the discriminatory effect of the acceptable options for meeting the business objective was considered when the standard was chosen.
6. Was the standard reasonably necessary for meeting the business objective?
 - ◆ Describe the accommodation provided for individuals against whom the standard discriminated. Explain the process used to develop the accommodation.
 - ◆ Describe the hardship caused to the organization by the accommodation process.
 - ◆ If further accommodation would cause the organization undue hardship, explain why. Will the hardship experienced by the organization be greater than the hardship experienced by the individuals affected by the discrimination?

Conclusion

This bulletin has presented a practical guide for:

- ◆ creating, reviewing, and adjusting standards to eliminate discrimination, and
- ◆ identifying situations in which it is reasonable and justifiable to discriminate.

The appendices provide additional resources for determining whether discrimination is reasonable and justifiable.

Appendix 1: Historical overview

The law regarding reasonable and justifiable discrimination, and the role of accommodation in meeting the needs of individuals and groups protected by the *Human Rights, Citizenship and Multiculturalism Act*, is in continual evolution. Since 1982, when it began shaping and developing the concept of reasonable and justifiable discrimination, the Supreme Court of Canada has attempted to clarify how the concept should be applied to the areas covered by human rights legislation and the *Charter of Rights and Freedoms*. However, the Court's clarifications have often left many participants in the human rights process feeling bewildered and unsure of how to apply the law in specific situations. This appendix discusses key Supreme Court of Canada decisions that deal with reasonable and justifiable discrimination and highlights the contribution of each decision.

1) *Etobicoke*: When direct discrimination is a BFOR

In 1982, in the *Etobicoke* decision¹⁰, the Court initially examined the reasonable and justifiable exemption. The case involved firefighters who had been dismissed at age 60, in accordance with their collective agreement. The Ontario human rights legislation allowed termination or any other conditions of employment based on age, if the employer could establish a bona fide occupational requirement (BFOR). The question before the Court, then, was whether or not the mandatory retirement was a BFOR. The Court found the employer's evidence in support of the mandatory retirement "impressionistic," rather than objective or scientific, and insufficient to support a BFOR. This was a case of **direct discrimination**, since the provision explicitly treated employees over 60 differently than it treated others. The Court spelled out what an employer needed to do in such a case to establish a valid BFOR:

[Such a standard] must be imposed honestly, in good faith and in the sincerely held belief that such a limitation is imposed in the interest of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which would defeat the purposes of the [Ontario *Human Rights*] Code. In addition, it must be related in an objective sense to the performance of the employment concerned in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.

2) *O'Malley*: Indirect discrimination and the duty to accommodate

In 1985, in the *O'Malley* decision¹¹, the Court issued perhaps its most significant ruling on the question of the reasonable and justifiable exemption. Theresa O'Malley became a Seventh-day Adventist sometime after she had begun to work for Simpsons-Sears. Observing the Sabbath of her religion meant that she could not continue to work a normal schedule, which included two out of every three Saturdays. At the time, Ontario human rights legislation did not include a BFOR defence for religion.

10 Ontario (Human Rights Commission) v. Etobicoke (Borough) [1982] 1 S.C.R. 202.

11 Ont. Human Rights Comm. v. Simpsons-Sears [1985] 2 S.C.R. 536.

The case presented two new issues to clarify. First was the employer's rule that required all employees to work two out of three Saturdays—a standard neutral on its face but discriminatory in its effect—discrimination within the meaning of the legislation? Previously, discrimination in Canadian human rights law had only included direct discrimination—in other words, policies or practices that discriminated openly. Second, how could an employer defend its actions if there was no BFOR defence specifically included in the legislation?

The Court dealt with these issues by importing two concepts from the *U.S. Civil Rights Act*. The first was the concept that **indirect discrimination**, which flowed from neutral standards but in its effect discriminated against groups or individuals, was also discrimination within the meaning of the legislation.

The second new concept was that where an employment standard discriminated indirectly, the employer had a duty to accommodate, to the point of undue hardship, employees whose rights were affected. In Ms. O'Malley's case, Simpsons-Sears should have considered alternative shift arrangements or job assignments to accommodate the requirements of her religion.

3) ***Bhinder*: BFOR defence applies to indirect discrimination**

On the same day that the Court issued the *O'Malley* decision, it released its decision in the *Bhinder* case.¹² On the basis of his Sikh faith, Mr. Bhinder refused to wear a hardhat, which his employer required for safety reasons. Mr. Bhinder also refused to accept an alternative position in which he would not be required to wear a hardhat. The case fell under the *Canadian Human Rights Act*, which included a BFOR defence for religion in employment.¹³ The Court followed the analysis in the *O'Malley* decision, finding that the neutral rule that all employees in safety-sensitive positions must wear hardhats amounted to discrimination. The Court also determined that the hardhat rule was a valid BFOR. In this case, the Court found that once an employer had established a valid BFOR, there was no duty to accommodate. This meant that the BFOR defence was available to employers for both a standard that discriminated directly, and a standard that did not discriminate directly but had an adverse effect on individual employees.


4) ***Town of Brossard*: An employment standard must be rationally connected to its objective**

The Town of Brossard refused to hire the daughter of one of its employees, based on its anti-nepotism policy. In this decision, the Court refined the reasonable necessity test established in *Etobicoke* by asking two questions:

- 1) Is the aptitude or qualification rationally connected to the employment concerned?
This allows us to determine if the employer's purpose in establishing the requirement is appropriate in an objective sense to the job in question.

¹² *Bhinder v. CN* [1985] 2 S.C.R. 561.

¹³ Mr. Bhinder was employed by Canadian National Railroad, which, as a federal undertaking, falls under the *Canadian Human Rights Act*. Most organizations and businesses in Alberta fall under the jurisdiction of Alberta's *HRCM Act*. Businesses and organizations that are federal undertakings such as banks, Canada Post, and Canadian National Railroad fall under the *Canadian Human Rights Act*.

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- 2) Is the rule properly designed to ensure that the aptitude or qualification is met without placing an undue burden on those to whom the rule applies? This allows us to inquire as to the reasonableness of the means the employer chooses to test for the presence of the requirement for the employment in question.

In this decision, the Court found the aptitude or qualification required of all candidates—an absence of real and potential conflicts of interest and the appearances thereof—was rationally connected to employment with the town, including employment as a lifeguard. The Court then went on to find that the rule was disproportionately stringent in view of the aptitude or qualification that it sought to verify. The hiring policy that the town chose to adopt was a blanket rule allowing for no exceptions and therefore did not sufficiently take into account the degree of likelihood that an abuse of power would take place. The mother was not in a position to influence the hiring of her daughter and there was no reasonable apprehension that she could have done so.

5) ***Saskatoon City*: To establish a BFOR, individualized testing must be impractical**

In *Bhinder*, the Court had found that once a BFOR was established, the employer had no duty to accommodate individual employees. However, in 1989 the Court stretched the concept of the reasonable necessity of an employment standard to the brink of requiring accommodation of individuals. The *Saskatoon City* case¹⁴ involved a requirement that firefighters retire at the age of 60. The *Saskatchewan [human rights] Regulation* included a BFOR defence. The Court held that, once established, a BFOR does not require accommodation of individuals. However, to establish reasonableness the employer must show that there is no practical alternative, including individualized testing of affected individuals. This was a half-step in the direction of requiring accommodation of individuals based on protected grounds (although in this case the Court found that individualized testing would have been impractical).

6) ***Central Alberta Dairy Pool*: BFOR restricted to direct discrimination—duty to accommodate restricted to indirect discrimination—what constitutes undue hardship**

In a 1990 decision, the Court reversed its earlier findings in *Bhinder* that a neutral standard with adverse effect could be defended as a BFOR, with no duty to accommodate on the employer's part. *The Central Alberta Dairy Pool* case¹⁵ involved an employee who converted to the World Wide Church of God, which required him take Saturday as his Sabbath and not to work on five other holy days throughout the year. The Court found that a BFOR had to be approached differently depending on whether the discrimination occurred directly or through adverse effect. In the case of direct discrimination such as a mandatory retirement rule, when the rule was found to be a BFOR the employer did not have a duty to accommodate. However, where an employment rule that was a BFOR had an adverse effect

14 *Saskatchewan (Human Rights Commission) v. Saskatoon (City)* [1989] 2 S.C.R. 1297.

15 *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)* [1990] 2 S.C.R. 489.

on an individual based on a protected ground, the employer had a duty to accommodate that individual to the point of undue hardship. The Court also set out a non-exhaustive list of factors that could be considered in determining whether hardship is undue:

[Relevant factors include] financial cost, disruption of a collective agreement, problems of morale of other employees, [and] interchangeability of work force and facilities. The size of the employer's operation may influence the assessment of whether a given financial cost is undue or the ease with which the work force and facilities can be adapted to the circumstances. Where safety is at issue both the magnitude of the risk and the identity of those that bear it are relevant considerations.

7) *Central Okanagan School District: Unions have a duty to accommodate*

The 1992 *Central Okanagan School District* case¹⁶ involved a Seventh-day Adventist who was prevented by his religion from working from sundown Friday to sundown Saturday. The employer's ability to alter the employee's schedule was restricted by the collective agreement. The Court found that the union, like the employer, had a duty to accommodate if it had participated in the creation of a discriminatory work rule, or where its cooperation was needed to reasonably accommodate an individual employee. The Court also reaffirmed that an employee who seeks accommodation has a responsibility to do his or her part to facilitate reasonable accommodation, and cannot hold out for perfect accommodation.


8) *Meiorin: Erasing the distinction between direct and indirect discrimination*

In this landmark 1999 decision, the Court revisited the entire issue of discrimination in employment and the duty to accommodate. In the *Meiorin* case,¹⁷ 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 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 in which the employer must demonstrate:

- ◆ that a workplace standard or goal is rationally connected to the functions of the job performed;
- ◆ that the standard was established honestly and in the good-faith belief that it was necessary to fulfill a legitimate objective; and
- ◆ that the standard itself is reasonably necessary to accomplish the goal or purpose.

¹⁶ *Central Okanagan School District No. 23 v. Renaud* [1992] 2 S.C.R. 970.

¹⁷ *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* [1999] 3 S.C.R. 3.



The Court found that even though the employer's standard was based on scientific evidence, it had failed to show the requirement was reasonably necessary—the third step of the test—because it had not considered ways to accommodate the complainant.

9) ***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*.¹⁸ 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 up to the point of undue hardship—in this case, individualized testing. 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.

Does the three-step *Meiorin* test apply to section 11 of the *HRCM Act*?

Section 11 of the *HRCM Act* is very similar in its language to section 1 of the *Charter*. Section 1 had been considered in the 1986 *Oakes* case, but that case had to do with balancing individual rights against the government's needs in controlling crime. In the meantime, Alberta courts have in effect laid out two paths for applying section 11. Decisions since 1999 suggest that a *Charter* approach to section 11—that is, one based on *Oakes*—is appropriate only when government programs and services are involved. In other cases, particularly involving employment, the appropriate yardstick is the three-step *Meiorin* test.

¹⁸ *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)* [1999] 3 S.C.R. 868.

Appendix 2: Case law on reasonable and justifiable discrimination

Human rights case law is constantly evolving based on issues that come before the courts and human rights tribunals or panels. The following legal cases establish important legal principles involving the concepts of reasonable and justifiable discrimination and accommodation. The cases chosen include Supreme Court of Canada decisions, relevant Alberta cases, and major decisions from other jurisdictions.

The cases come from human rights tribunals or the courts. They are grouped under headings that reflect the major concepts discussed in the cases, and are listed in chronological order. Where the decisions are available on public websites, a URL is provided. The decisions are also reported in various publications such as the *Canadian Human Rights Reporter* (C.H.R.R.), which can be obtained at the Law Society Library at the Court of Queen's Bench of Alberta in Calgary, Drumheller, Edmonton, Grande Prairie, Lethbridge, Medicine Hat, Peace River, Red Deer, and Wetaskiwin. To contact the Law Society Library nearest you, visit www.lawlibrary.ab.ca or check your phone book under Government of Alberta, Courts.

The cases below reflect the major trends in the development of the law related to reasonable and justifiable discrimination. Most of the case law in this area has developed in response to employers setting standards that might constitute discrimination. The italicized introductory phrases at the beginning of each summary highlight the major concepts discussed in the court or tribunal decision. Other significant cases in this area are covered in *Appendix 1: Historical overview*.

The *Charter* background

R. v. Oakes

[1986] 1 S.C.R. 103 | www.canlii.org/ca/cas/scc/1986/1986scc7.html

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, it 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 must be the objectives.

Oakes was the basis of judicial consideration of section 11.1 of the Alberta *Individual's Rights Protection Act* (since replaced by section 11 of the *Human Rights, Citizenship and Multiculturalism Act*) because the language of section 1 of the *Charter* is so similar.

Cases in which discrimination was found to be reasonable and justifiable

Dickason v. University of Alberta

[1992] 2 S.C.R. 1103 | www.canlii.org/ca/cas/scc/1992/1992scc82.html

Alberta IRPA s.11.1 “reasonable and justifiable” standard—Oakes test applied—mandatory retirement—collective agreement

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* (the *IRPA*, predecessor of the *HRCM 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*.¹⁹ 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.

Co-operators General Insurance Co. v. Alberta (Human Rights Commission)

(1993), 21 C.H.R.R. D/343 (Alta. C.A.)

Alberta IRPA s.11.1—“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. The insurance company’s practice was reasonable and justifiable (under section 11.1 of the *Individual’s Rights Protection Act*, predecessor of the *HRCM 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.

¹⁹ at pages 1134—1138.

*Newfoundland Assn. of Public Employees v. Newfoundland
(Green Bay Health Care Centre)*

[1996] 2 S.C.R. 3 | www.canlii.org/ca/cas/scc/1996/1996scc46.html

collective agreement—gender requirement—BFOQ—role of collective agreement

The respondent, when hiring an attendant to care for elderly male patients, considered only 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"). 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 out of the human rights legislation.

Beeman v. Marlborough Development (1973) Ltd.

(1997), 28 C.H.R.R. D/1

restaurant's duty to accommodate—undue hardship—economic cost of accommodation

The *Manitoba Human Rights Code* includes in its definition of discrimination, at section 9, the failure to accommodate an individual or group's special needs arising from disability, making specific mention of wheelchair users. A restaurant patron who had to use a wheelchair filed a complaint under the *Code* because of restrictions to wheelchair access in the respondent's new restaurant. The Manitoba human rights board of adjudication considered in detail the architectural and physical access standards that had been applied to the restaurant's design as well as measures that had been taken to provide access (which included a lift to allow access to some, but not all, parts of the establishment). The Board found that by restricting physical access to parts of the restaurant, the respondent's actions had been prima facie discriminatory. However, accommodation in the form of the necessary renovations would constitute undue hardship, and the respondent thus had, under section 13 of the *Code*, "bona fide and reasonable cause" for the discrimination.

Wong Morriseau v. Wall

(2000), 39 C.H.R.R. D/422 (Man. Bd.Adj.) |

www.gov.mb.ca/hrc/english/publications/morriseau.html

duty to accommodate when providing commercial service—Meiorin test applied

A mother was asked by a store owner to breastfeed in a courtyard adjoining a store, rather than in the main part of the store. The Manitoba (human rights) board of adjudication found that the store owner's policy against eating and drinking in the store discriminated against the complainant, and that the store owner had a duty to accommodate the complainant's needs, based on the Manitoba *Human Rights Code*, the common law, and international covenants. Applying the three-step test in *Meiorin*, the board found in its analysis of whether or not the respondent's actions were reasonably necessary that the store had adequately accommodated the complainant by offering her alternative seating. The board also found that the complainant had not fully participated in the accommodation process.

Pringle v. Alberta (Human Rights, Multiculturalism and Citizenship Commission)

(2004), CHRR Doc. 04-430, 2004 ABQB 821

Law test incorrectly applied by panel—government program—s.11 of HRCM Act—Oakes test applied

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. On review, the Court of Queen's Bench found that the panel had incorrectly applied the "subjective-objective" *Law test*²⁰ for determining the impact of a standard on an individual's dignity, and that the refusal of access to the birth certificate was discriminatory. The Court then applied an *Oakes* analysis²¹ to determine if the 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 minimally impaired their rights. The standard was thus reasonable and justifiable.

²⁰ In *Law v. Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 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. See www.canlii.org/ca/cas/scc/1999/1999scc17.html.

²¹ at paragraphs 141-151.

Cases in which discrimination was not found to be reasonable and justifiable

Crepault v. Woo

(1994), 21 C.H.R.R. D/487 (Man. Bd.Adj.)

onus on landlord to show reasonable cause—tenancy

A landlord refused to rent to a visually impaired tenant, saying the applicant's guide dog would cause problems for other tenants with allergies. The Manitoba (human rights) board of adjudication found that although the Manitoba *Human Rights Code* at section 16.1 allowed a landlord to discriminate in the presence of "bona fide and reasonable cause," the respondent had failed in its duty to prove such cause.

Battlefords and District Co-operative Ltd. v. Gibbs

[1996] 3 S.C.R. 566 | www.canlii.org/ca/cas/scc/1996/1996scc101.html

benefits denied to employees with mental disability—identification of comparator for determining discrimination

Employees unable to work because of physical disability were entitled to income replacement support indefinitely, while those with a mental disability were cut off after two years. The Supreme Court of Canada found that the purposes of the insurance plan were identical for all disabled employees, and therefore it was necessary to examine differential effects among that group. The appropriate comparator was employees unable to work on the basis of physical disability, and therefore the complainant had been discriminated against on the basis of mental disability.

Miller v. 409205 Alberta Ltd.

409205 Alberta Ltd. v. Alberta (Human Rights and Citizenship Commission)

(2002), 44 C.H.R.R. D/260, 2002 ABQB 681

denial of tenancy—s.11 of HRCM Act—duty to accommodate

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. 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 discrimination was not reasonable and justifiable under section 11 of the *HRCM Act*.

Ganser v. Rosewood Estates Condominium Corp. (No. 1)

(2002), 42 C.H.R.R. D/264 (Alta. H.R.P.)

definition of service available to public—condominium corporation—physical disability—Grismer test applied—reasonable alternatives—s.11 of HRCM Act

A condominium corporation changed its by-laws, 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 "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), 44 C.H.R.R. D/52, 2002 ABQB 685

Law test applied—government program—s.11—Oakes test applied

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 discrimination was reasonable and justifiable. However, the Alberta Court of Queen's Bench found that the panel had applied the *Meiorin* test in error. Because the complaint involved actions of the government, the Court followed *Law* (see footnote 21), finding that the complainants had been treated differently from those who were successful in applying for the pension, that they were economically and socially disadvantaged, and that their fundamental dignity had been compromised. In considering the respondent's defence under section 11 of the *HRCM Act*, the Court followed *Dickason*, applying the *Oakes* test.²² 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.²³

²² at paragraphs 174—233.

²³ 2004 ABCA 210.

Canada Safeway Ltd. v. Alberta (Human Rights and Citizenship Commission)

(2003), 47 C.H.R.R. D/220, 2003 ABCA 246

employees with disabilities excluded from “buyout”—seniority—s.11.1 of IRPA—s.11.1 test “subsumed” by Meiorin test—union and employer responsibility—duty to accommodate

Citing difficult economic circumstances, Canada Safeway negotiated a “buyout” of about 3,500 Active employees, who agreed to take lump-sum payments in return for either resigning or taking a pay cut. Because they were on disability leave, fifteen employees had failed to accumulate enough hours to benefit from the buyout 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 in deciding if the discrimination was reasonable and justifiable under section 11.1 of the *Individual’s Rights Protection Act* (which was in force at the time of the alleged discrimination). Including the employees with disabilities would have cost the company very little, and the company and the union had both failed to accommodate them.

Oak Bay Marina Ltd. v. British Columbia (Human Rights Tribunal) (No. 2)

(2004), CHRR Doc. 04-361, 2004 BCHRT 225

evidence used to establish BFOR—duty to accommodate—undue hardship

An employer refused to re-hire a seasonal employee, citing safety concerns arising from the employee’s mental disability. Although it had some medical information that the employee could safely return to work, the employer’s decision was based largely on its own observations of the employee’s behaviour. The B.C. human rights tribunal initially found that the employer had failed in its duty to accommodate the employee. The Court of Appeal later sent the case back to the tribunal, which then found that the employer had not established a BFOR, since it had ignored other medical evidence available to it regarding the employee’s condition and had not carried out any real inquiry into possible accommodation. The tribunal also examined extensively the factors that might constitute undue hardship for the employer, including the size and nature of the business, safety, customer relations and profitability, pressures of staff scheduling, the employer’s responsibility in learning more about the employee’s condition, and the regulatory environment. The employer had failed in its duty to accommodate.



Alberta (Human Rights and Citizenship Commission) v. Federated Co-operatives Limited

2005 ABQB 587

duty to accommodate—employee’s responsibility to participate in accommodation

As a result of bi-polar 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 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.

Appendix 3: *Human Rights, Citizenship and Multiculturalism 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, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income or family status 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, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income or family status of that person or of any other person, or
 - (b) that requires an applicant to furnish any information concerning race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income or family status.
- (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.



Contact us

The Alberta Human Rights and Citizenship Commission is an independent commission of the Government of Alberta. Our mandate is to foster equality and reduce discrimination. We provide public information and education programs, and help Albertans resolve human rights complaints.

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E-mail humanrights@gov.ab.ca

Website www.albertahumanrights.ab.ca

Please note: A complaint must be made to the Alberta Human Rights and Citizenship Commission within one year after the alleged incident.

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The Human Rights, Citizenship and Multiculturalism Education Fund has provided funding for this publication.

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When is discrimination not a contravention of the law? Reader survey

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