In preparation for the CBA Administrative Law Conference, I was asked to present a paper on a mandatory retirement case I had recently argued in the Supreme Court of Canada. Since my experience with lawyers relitigating their losses in the court of public opinion is invariably bad, I accepted the invitation to speak, but proposed a broader topic. Therefore, this paper deals with recent Supreme Court of Canada jurisprudence interpreting various statutory exceptions and defences. I argue that the Court has departed from its previous jurisprudence in a way that undermines human rights protections in Canada. This development is, however, consistent with the concurrent diminuition of the jurisdictional scope afforded by the Court to specialized human rights bodies such as commissions and tribunals.
in favour of assorted “subject matter expert” bodies such as labour arbitration boards¹, social
benefit appeal boards² and discipline bodies.³ The paper is organized in four parts:

1. Established interpretive principles in the construction of rights

2. Meiorin and the impossibility standard

3. Retreat from broad, liberal and purposive interpretations

4. Procedural, evidentiary and substantive implications

Established interpretive principles in the construction of rights

The interpretive principles for rights-granting provisions of human rights statutes are gen-
erally well understood. Rights are said to be interpreted broadly and liberally, favouring inter-
pretations that support or advance the overall purpose of human rights schemes.⁴ Some
variation in the trade-off between legislative intent (narrower) and overall purposive ap-
proaches (broader) does, however, occur from time to time.⁵

The interpretation of statutory exceptions has long been thought to be a mere inverse of
these propositions, i.e. if rights are supposed to be interpreted broadly, then exceptions and
defences that operate to limit rights should be interpreted narrowly and restrictively so as to

---

¹ Canada (House of Commons) v. Vaid, 2005 SCC 30 (CanLII)

² Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General),
2004 SCC 39 (CanLII) and its companion case: Quebec (Attorney General) v. Quebec (Human
Rights Tribunal), 2004 SCC 40 (CanLII)

³ Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners, 2000 SCC 14 (CanLII)

150 at 156; British Columbia (Public Service Employee Relations Applicant) v. BCGSEU, [1999] 3
S.C.R. 3 at para 44.

avoid undue constraints on the right and thus the purpose of the scheme. Thus, Prof. Sullivan notes in the fourth edition of *Driedger*:

> Interpretive doubts should be resolved in such a way that the overall purpose of the legislation – the promotion and the protection of rights – is fostered. Thus, exceptions and defences in human rights legislation are strictly construed.\(^6\)

This seemingly simple calculus has tended to break down where the exception relates to interests of the respondent that in turn raise human rights issues, such as group cultural rights or religious freedom. Therefore, in cases invoking fraternal or social group exceptions, courts and tribunals have either expressly interpreted the exceptions broadly\(^7\) or have resorted to interpretive principles that allowed for a broader scope of the exception such as a focus on legislative intent.\(^8\) The rationale for this departure from the normal approach is straightforward: since the interests on both sides have human rights dimensions, it appears sensible to balance them more equally. Despite this, there are significant difficulties raised by the change: the mere fact that the respondent has a human rights related interest should not obscure the fact that the power imbalances between complainants and respondents are typically no different than in human rights cases where the respondent is advancing a commercial or other non-human rights related interest as justification for the rights infringement. Courts and tribunals must further be careful not to confuse the human rights inter-

---


\(^7\) *Gregory v. Donauschwaben Park Waldheim Inc.* (1990), 13 C.H.R.R. D/505 (Ont. Bd. of Inquiry)

ests of owners with the business interests of the enterprises they run. Similarly, an employer with an interest in freedom of religion is still an employer, i.e someone whose religious freedom must be understood in the context of the power imbalance that underlies all employer-employee relationships. Taking all this into account, these cases still support what is essentially a hierarchical understanding of human rights vis-à-vis other rights and interests. Human rights would tend to trump other rights and interests and the bar for respondents will typically be high. This default position was expressed most perfectly in Meiorin.

**The unified approach and the impossibility standard**

The most significant advance to the way statutory exceptions were approached came about in 1999 as a result of the Meiorin and Grismer decisions. Generally, these decisions have been understood as standing for the proposition that both direct and adverse effect discrimination claims should be adjudicated based on a single, unified test. For present purposes, I want to highlight two additional “unifying” aspects of these decisions. First, Meiorin and Grismer directed that the unified approach be applicable to all claims of discrimination, be they in the sphere of employment as in Meiorin, service, as in Grismer, or, indeed any of the other protected spheres such as housing or contracts. In Grismer, McLachlin C.J. expressed this idea as follows:

---


11 supra, note 4.

Meiorin announced a unified approach to adjudicating discrimination claims under human rights legislation. The distinction between direct and indirect discrimination has been erased. Employers and others governed by human rights legislation are now required in all cases to accommodate the characteristics of affected groups within their standards, rather than maintaining discriminatory standards supplemented by accommodation for those who cannot meet them. Incorporating accommodation into the standard itself ensures that each person is assessed according to her or his own personal abilities, instead of being judged against presumed group characteristics. Such characteristics are frequently based on bias and historical prejudice and cannot form the basis of reasonably necessary standards. While the Meiorin test was developed in the employment context, it applies to all claims for discrimination under the B.C. Human Rights Code.\textsuperscript{13}

Second, the approach to justifications under human rights legislations and the approach to be taken under the Charter under s. 1 should be unified. This goes beyond the Charter values argument that is frequently made in the interpretation of all statutes. Instead, it takes its departure from the proposition that the approach to equality under s. 15(1) of the Charter should be consistent with the approach to equality under human rights legislation. What follows, however, has little to do with s. 15 jurisprudence and much to do with the Oakes test. After all, the purpose of the test is not to establish a \textit{prima facie} case of discrimination, but to permit a respondent to justify as \textit{bona fide}, a policy or practice that would otherwise be discriminatory. For this reason, the Meiorin test requires rational connection, good faith purpose and necessity, concepts that translate easily, if not orderly, into the pressing and

\footnotesize{\textsuperscript{13} ibid., at para. 19, my emphasis.}
substantial objective, rational connection and minimal impairment branches of the Oakes test.

Immediately following the development of the new test in the Meiorin decision, McLachlin C.J. indicated a further gloss on the accommodation jurisprudence, i.e. that in order to meet the new justification standard, the respondent would have to show that accommodation was impossible. This standard was not greeted with universal enthusiasm by the lower courts.¹⁴

Thus, the Ontario Divisional Court insisted in Roosma in 2002 that:

the Board applied the proper legal test. In examining whether Ford had discharged its burden of proving that accommodation was not possible short of undue hardship, the Board determined that the general purpose of the Oakville plant structure was aimed at a rational and legitimate business objective, namely to achieve a quality product.¹⁵

The Divisional Court thereby reduced the Meiorin test to its “purpose” branch, the analytical equivalent of abandoning the Oakes analysis after finding that the government had a pressing and substantial objective. Not always was the refusal of the impossibility standard this express. In many cases, courts and tribunals simply made factual findings that avoided the impossibility standard or interpreted it generously in favour of respondents.¹⁶ Indeed, it was difficult to conceive of situations where a large employer would find it truly impossible to accommodate the disability of an employee as long as the employee was able to perform


¹⁵ Oak Bay Marina Ltd. v. British Columbia (Human Rights Commission), 2002 BCCA 495 (CanLII); Parisien v. Ottawa-Carleton Regional Transit, 2003 CHRT 10 (CanLII); Desormeaux v. Ottawa-Carleton Regional Transit, 2003 CHRT 2 (CanLII);
some aspects of the work. Put another way, at least in the case of a large employer, it was difficult to see when a hardship would be undue under an impossibility standard. While this made life for respondent counsel more difficult, it constituted a significant advancement of the purposes of human rights legislation as protecting a set of prioritized individual rights near the top of the legal hierarchy.

**Retreat from broad, liberal and purposive interpretations**

A mere four years after *Meiorin*, the Court began to carve out an exception to the *Grismer* rule in the *Maksteel* case. *Maksteel* concerned an employee who was terminated after he was criminally convicted. The Quebec *Charter* prohibits discrimination on the basis of a criminal record if either the conviction is unrelated to employment or a pardon has been granted. Contrary to McLachlin’s C.J. dictum that all claims of discrimination would be subject to a *Meiorin* analysis, the Court in *Maksteel* declared that “[i]n the context of an independent justification mechanism being provided in s. 18.2 itself, the “reasonable accommodation” standard established in *Meiorin* in relation to bona fide occupational requirements plays no role.”17 The “independent justification mechanism” relates to the fact that the offence must be unrelated to employment. From this, Deschamps J. concludes that the legislature intended that no accommodation was required. The argument is weak from a legislative intent perspective because there was no Hansard to support the idea that the Quebec legislature had consciously rejected the application of s. 20 of the Quebec *Charter*. It is weaker from the perspective of a purposive interpretation viewpoint because the Court finds that the idea animating s. 18.2 is to limit the stigmatizing effects of a criminal conviction in the con-

17 *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Maksteel Québec Inc.*, 2003 SCC 68 (CanLII) at para. 26.
text of employment. Thus, a broad and liberal approach to interpreting s. 18.2 would have resulted in requiring individual accommodation. The fact that the protection is limited to the sphere of employment is used by the Court in support of arguing a diminished right. It appears to me that this is where this form of discrimination is focused might be the more obvious explanation for the legislative choice, an alternative explanation that would not support a diminution of the right and one that was not adverted to by the Court. The overall effect of Maksteel is that the unified approach has broken down. This is even more evident in a second more recent decision concerning s. 18.2, where the second branch (prohibiting discrimination on the basis of a criminal record where pardon has been granted,) was in issue in the case of S.N.18 An applicant for a position as police officer was screened out on the basis of lack of good character despite a statutory pardon that had been granted for her summary conviction. The Court split on whether s. 20 was available in connection with the pardon provision. Deschamps J. for the majority relied on her earlier reasons in Maksteel to sever s. 18.2 from an accommodation and undue hardship analysis. Charron J. in dissent inferred legislative intent to find that the “purpose of the Charter is to protect against stereotypes and unjustified exclusions based on criminal records. It is not intended to erase the past and shield an individual from all civil consequences of their own behaviour.”19 This split decision and its relationship with Maksteel highlights a complex aspect of the accommodation analysis that would have been rendered unnecessary by a consistent application of Meiorin. It is the right to reasonable accommodation that generates the justification of undue hardship. Thus, in Maksteel, the job applicant had no right to be accommodated and in-

18 Montréal (City) v. Quebec (Commission des droits de la personne et des droits de la jeunesse), 2008 SCC 48 (CanLII) (S.N.)

19 Ibid. at para 71.
dividual circumstances did not enter into the equation of how the facts underlying his conviction would affect his ability to perform the essential functions of the job. But this disadvantage for the complainant turns into an advantage in S.N. because in the absence of a duty to accommodate, the employer cannot claim undue hardship. This further demonstrates the weakness of the Maksteel analysis. Deschamps J. is of course right to insist that once a separate regime is accepted for s. 18.2 as was done in Maksteel, it is not open to the Court to reintroduce undue hardship when it suits. But we have to be clear that one of the major insights of Meiorin is lost in the process, i.e. the recognition that the line between direct and adverse effect discrimination is artificial. Maksteel and S.N. reestablish the old direct discrimination analysis.

Even in cases where the Court finds a duty to accommodate, it has departed from Meiorin. As discussed above, Meiorin had imposed, or had been widely understood to impose, an impossibility standard for the evaluation of undue hardship. This understanding was based on the third part of the Meiorin test as articulated by McLachlin C.J.:

To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

This “impossibility” standard was the subject of a rereading by Deschamps J. for the entire Court in the recent decision of Hydro-Québec. She explains that

What is really required is not proof that it is impossible to integrate an employee who does not meet a standard, but proof of undue hardship, which can take as many

---

forms as there are circumstances. This is clear from the additional comments on undue hardship in *Meiorin*. 21

It is difficult to rationalize why the varied nature of the circumstances or ways in which it might be impossible to integrate an employee would substitute for the question of the standard. But logical finery aside, it is clear that the Court has bid its adieu to the impossibility standard and with it expressed its final good-byes to a hierarchical understanding of rights. Warning of this development had come some four years earlier in a Charter context. As early as 2004, it became apparent that the Court was beginning to question its commitment to the privileged position of human rights, both under the Charter and under human rights legislation. In *N.A.P.E.*, 22 the Court preferred fiscal room for hospital beds and continued employment over the enforcement of pay equity payments. After piously reciting the importance of prioritizing constitutional rights 23, Binnie J. writing for the Court notes that governments will be afforded a large margin of appreciation because:

> the requirement that the measure impair “as little as possible” the infringed Charter right cannot be applied in a way that is blind to the consequences for other social, educational and economic programs. (...) It is not convincing simply to declare that an expenditure to achieve a s. 15 objective must necessarily rank ahead of hospital beds or school rooms. To do so would be to ignore the very difficult context in which these decisions were made. 24


23 at para. 82.

24 at para. 95.
The Court clearly considers the balancing of societal interests to be in the nature of a political exercise. This forgets one of the crucial lessons of human rights law: beyond being fundamental and unalienable, human rights are also supremely vulnerable. It is because human rights are not capable of effective protection through majoritarian rule that their enforcement has to be prioritized in the legal process. If political processes were adequate to the job of ensuring human rights, and, possibly more importantly, the human rights dimensions of legal rights, there would be no need for human rights regimes, either statutory or constitutional. Thus, it is not the back pay expenditure that was in issue in *N.A.P.E.*, rather, it was the failure to recognize the value of women’s work. And the failure to uphold the back pay remedy was therefore not a preference for hospital beds or schools, it was a preference for discrimination against women. Confusing rights and remedies was one of the dangers McLachlin C.J. warned about in *Grismer* when she admonished employers and service providers not to exaggerate the costs of accommodation and to diminish its value.\(^{25}\)

In addition to requiring accommodation as a universal element of interpreting human rights and prioritizing the resulting rights over others, *Meiorin* and *Grismer* had, as a third and consequential principle, put the spotlight firmly on individuals. It was the discriminatory or mindless application of general rules to individual circumstances that was mostly to be guarded against. We have already seen that the first two principles have suffered considerable losses. The third has not fared better. In *McGill University Health Centre*\(^{26}\) the majority abandoned the individualized accommodation approach even in the context of the BFOR exception where the collective agreement provides for an automatic dismissal clause for in-

\(^{25}\) at para 41.

\(^{26}\) *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4 (CanLII)
nocent absenteeism. Three concurring judges would have gone even further to evaluate the reasonableness of the period to avoid a finding of *prima facie* discrimination.

Similarly, the Court refused to entertain the idea of individual accommodation in the context of mandatory retirement in the *Potash* case. This decision under the New Brunswick *Human Rights Act* dealt with a statutory exception to the prohibition of age discrimination where mandatory retirement was being imposed “because of the terms or conditions of any *bona fide* retirement or pension plan”. The issue was whether the term “*bona fide*” attracted a duty to accommodate individuals who did not want to retire, requiring the employer to show that continuing to work would cause it or the pension plan undue hardship. A majority of the Court adopted the view that not only was no individual accommodation required, but that the term *bona fide* did not even engage human rights concerns, rather, the issue was whether the plan was pretextual or, in the words of Abella J., a sham. McLachlin C.J. would have required the employer to demonstrate that the rights-limiting provisions of the plan were objectively justifiable, but she agreed with the majority that no obligation to accommodate individual employees existed. The Court also rejected the invitation by the intervener Alberta Human Rights and Citizenship Commission to revisit its policy stance on mandatory retirement more broadly.

**Procedural, evidentiary and substantive implications**

Administrative lawyers have grown used to a great deal of fluidity in the way the Supreme Court of Canada has approached every aspect of administrative law from standard of review to jurisdiction, from the duty of fairness to institutional independence. Human rights law-

---

yers had experienced a honeymoon period where at least the principles of statutory interpretation in human rights law had solidified and had been applied with a great deal of consistency and reliability. Clearly, the honeymoon is over. How does this affect the way Commission lawyers, human rights advocates and respondent counsel should do business? I want to offer some suggestions in three areas: procedure, evidence and substantive law.

In the area of procedure, there is a growing trend for complainants to appear without the benefit of commission counsel, either because of direct access jurisdictions or because commissions have responded to fiscal pressures by seeking Tilberg28 orders or referring the complaint without commission participation. This trend, while not welcome, was made more acceptable by the idea that the law was fairly settled, that tribunals were engaged predominantly in fact-finding missions and that the role of counsel was therefore more limited.

Now, this trend is much more problematic. If the ground rules are up for re-negotiation, and it appears that they are, complainants are going to be at a significant disadvantage if they have to represent themselves or retain counsel privately.

In the area of evidence, the emergence of a non-hierarchical view of human rights means that the evidentiary context of countervailing interests is going to become more important. Given the broader scope for justifications and the emphasis on competing interests, tribunals will have to be educated about the factual and legal matrix underlying these interests, be they commercial or involving pensions, educational institutions, correctional policy or health care. It would go far beyond the scope of this paper to contemplate the potential impact this shift in focus might have on issues of standard of review, but clearly, these implica-

tions are important. Commissions and respondent counsel alike may have to adduce expert evidence in more cases to bridge the gap in expertise that is created by shifting the focus away from human rights and towards the factual context of the justification.

In the area of substantive law, a rethinking of the desirability of unified approaches will have to occur. After struggling for over a decade, the Supreme Court of Canada came to analytical agreement in s. 15 in the Law case. A single test was to guide Canada’s equality law. Less than a decade later, the Court has raised the white flag and indicated that the Law test is no longer the law in Canada. As we have seen, the carefully crafted unified approach in Merin and Grismer enjoyed an even shorter life-span. Unified approaches have compelling advantages in terms of analytical clarity and doctrinal consistency. Despite this, they seem to be difficult to maintain. It may be that this is because the underlying agreements and insights become forgotten as the need to articulate them is obviated. It may therefore be the case that the current state of uncertainty will foster a “back to basics” return to the foundational principles of human rights law. Maybe we need to remind ourselves that human rights are, indeed, fundamental and at the same time cannot be taken for granted.
