

CANADA / JUDGMENT

Pickering v. Workers' Compensation Board

2025 BCSC 376

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Supreme Court of British Columbia

DECIDED

6 March 2025

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2025 BCSC 376 Pickering v. Workers' Compensation Board

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Pickering v. Workers' Compensation Board,

2025 BCSC 376

Date: 20250306

Docket: S196707

Registry: Vancouver

Between:

James Pickering

Plaintiff

And

Workers' Compensation Board, and Attorney General of British Columbia

Defendants

Before: The Honourable Justice A. Ross

Reasons for Judgment

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Place and Date of Trial/Hearing:

Vancouver, B.C.

February 26-29, 2024

March 1, 2024

June 10-14, 2024

Place and Date of Judgment:

Vancouver, B.C.

March 6, 2025

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Introduction

- [1] This decision addresses the second part of Mr. Pickering's action for benefits under the Workers Compensation Act, R.S.B.C. 2019, c. 1 [WCA]. Mr. Pickering argues that two provisions of the WCA infringe his rights under s. 15 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [Charter]. He says that those provisions, in combination, led to the denial of his claim for workers' compensation.
- [2] The first part of this proceeding, indexed as *Pickering v. School District No. 38 (Richmond)*, 2021 BCSC 1497, was a judicial review of a decision of the Workers' Compensation Appeal Tribunal ("WCAT" and the "WCAT Decision"). In those reasons, I found that the WCAT Decision denying Mr. Pickering's claim for benefits under the WCA was not patently unreasonable. In doing so, I upheld it.
- [3] That first decision led to the trial which is the subject of these reasons. In short, the plaintiff says that his claim was denied for reasons that are discriminatory.

[4] The substantive issues in this trial address the WCA provisions relating to claims arising from chronic mental disorders. The plaintiff says that those WCA provisions discriminate against workers who suffer chronic work-related mental disorders when compared to workers who suffer other types of injuries or disorders. The plaintiff says that, for claims based upon chronic mental disorders, the WCA requires the Workers Compensation Board (the "Board" or "WCB") to apply:

- a) a higher causation standard, and
- b) a "labour relations exclusion",

neither of which apply to other types of claims.

[5] Again, to provide context for the analysis below, when a worker submits a claim to the Board based upon a condition related to "chronic stress" arising from "a significant work-related stressor, including bullying or harassment, or a cumulative series of significant work-related stressors", the Board requires that worker to establish that the chronic stress disorder was "predominantly caused" by work-related factors, as opposed to non-work-related factors: WCA, s. 135(1)(a)(ii). That is a higher standard than the Board applies to physical injuries and occupational diseases. It is also higher than the standard applied to PTSD-type claims. Those other types of claims are accepted if the work-related factors are of "causative significance".

[6] The core of Mr. Pickering's claim is twofold. He says that the WCA:

- a) applies a more stringent test to claims for WCA benefits caused by chronic mental disorders than it does to claims caused by physical disorders; and
- b) includes a "labour relations exclusion" that applies to chronic mental disorders, but not to physical injuries. A claim is excluded if it is caused by an employer's decision relating to the worker's employment.

[7] The plaintiff's position is that the higher and additional standards required for chronic stress claims are discriminatory and, thus, contrary to s. 15 of the Charter.

[8] The Attorney General of British Columbia (the "Province") acknowledges that the standard of test is higher for chronic stress claims. However, it says that there are good reasons for the higher standard. The Province also defends the "labour relations exclusion" as being necessary and non-discriminatory. The Province submits that:

- a) the provisions distinguish on the basis of "how" the condition originated (not on the basis of mental versus physical injury distinction);
- b) the provisions address complex social policy, diagnostic and scientific issues, including the multifactorial nature of mental disorders and the omnipresence of stress inside and outside the workplace; and

- c) based upon the evidence in this case, the distinctions are justified and not discriminatory.
- [9] In the alternative, the Province submits that if the provisions do offend s. 15, then they are saved by s. 1 of the Charter.
- [10] As to remedy, the Province submits that if I find in favour of the plaintiff, then the Province should be given time to draft compliant legislation.
- [11] Mr. Pickering's action operates at two levels:
- a) At the first level, Mr. Pickering seeks an individual remedy under s. 15 of the Charter. He says that his equality rights have been breached because the WCB denied his claim for benefits. He seeks a ruling referring the matter back to the WCB or the WCAT with instructions on the proper (non-discriminatory) reading of the WCA.
 - b) At the second level, Mr. Pickering seeks a constitutional remedy consisting of an order severing, or reading down, the two allegedly discriminatory provisions of the WCA.
- [12] The implications of the claim at the first level are significant for Mr. Pickering. The implications of the second level are significant for employers, employees and the workers' compensation sector.
- [13] In my analysis below, I note that the plaintiff's challenge is to the provisions of the WCA, and not the policies issued by the Board. Hence, the primary defendant in this action is the Province, as represented by the Attorney General of B.C.
- [14] To understand my reasons below, the term "chronic mental disorder claims" must be distinguished from "acute mental stress claims". The latter are caused by traumatic events and are often defined broadly as "Post Traumatic Stress Disorder" ("PTSD") claims. PTSD-related claims and similar conditions are not addressed in these reasons.
- [15] Instead, these reasons address claims for chronic stress: disabling stress that develops over time (in the absence of trauma). For ease of reference, I use the terms "chronic stress" and "chronic mental disorder" interchangeably in these reasons.
- [16] Also, for clarity, as explained in more detail below, the term "predominant cause" in the WCA is interpreted by the Board to mean the largest among several causes. When applied in the WCB context, the "predominant cause" test does not require a claimant to establish that the work-related causes represent more than 50 percent of the total cause. Instead, the word "predominant" means the largest factor among all the factors.
- [17] Hence, the distinction I address below is the difference between the two standards of causation: the lower standard which applies to physical claims ("causative significance") versus the higher standard that applies to chronic stress claims ("predominant cause" meaning "the largest among several causes").

- [18] There are, of course, other issues determined below. However, I believe it is important to explain that the plaintiff seeks to expand the gateway of WCB claims to include chronic mental disorder claims that fall between "causative significance" and "predominant cause". By doing so, the plaintiff seeks to place the treatment of chronic mental disorders onto an even playing field with physical disorders and trauma-induced mental disorders.
- [19] On the opposite side, the Province wishes to keep the gateway as defined in the legislation and Board policy. The Province submits that there are good reasons for keeping the current test.

The Parties

- [20] Mr. Pickering is a plaintiff because his claim for WCB benefits was rejected. I outline his claim below. The facts are not in issue. Further, I am bound by the findings of fact in the WCAT Decision.
- [21] The defence of the constitutionality of the WCA was presented by the Province.
- [22] The WCB was represented at this hearing but made limited submissions. As noted, the plaintiff challenges the legislation and not the Board's policies or its interpretations of the WCA.
- [23] Mr. Pickering's employer, the Richmond School District, is not a party to this proceeding, although it participated at earlier Board and WCAT hearings.
- [24] There was one intervenor: the WSN Worker Solidarity Network Society.
- [25] I note that in the period since the events underlying this claim, the Workers Compensation Act, R.S.B.C. 1996, c. 492 [1996 WCA], was repealed and replaced with the WCA. Two changes are relevant to this decision:
- a) Mr. Pickering's claim proceeded through various steps within the Board and WCAT process. At the time of those hearings, the Board Review Division had the jurisdiction to address Charter issues, but WCAT did not.
 - b) Section 5.1(1)(a)(ii) and s. 5.1(1)(c) of the now repealed 1996 WCA are now s. 135(1)(a)(ii) and s. 135(1)(c) of the WCA, respectively. Since the Board and WCAT decisions were made under the 1996 WCA, those decisions refer to the old sections. Where necessary, I refer to the section numbering in the 1996 WCA. However, my decision relates to the current wording.
- [26] Before exiting this introduction, I would be remiss if I did not record my indebtedness to all counsel, especially counsel for Mr. Pickering and counsel for the Province, for their well-considered and well-written briefs and oral submissions. They made the writing of these reasons much easier.

Issues

[27] The issues for me to decide in this action are:

- a) Are the provisions of the WCA, s. 135(1)(a)(ii), which require a person making a chronic stress claim to meet the "predominant cause" standard, discriminatory and against the s. 15 Charter rights of persons with chronic mental disorders?
- b) Is it discriminatory to apply the "labour relations exclusion" in s. 135(1)(c) of the WCA to mental disorder claims, but not to physical injury claims?
- c) Alternatively, is it discriminatory to apply the "labour relations exclusion" in circumstances where the employer's actions have not been taken in good faith?
- d) If the answers to i), ii) or iii) are "Yes", can those provisions be saved by s. 1 of the Charter?
- e) If the answers to the above questions lead to a Charter remedy, what should that remedy be?

Findings and Relief Granted

[28] For the reasons set out below, I make the following findings based upon the evidence adduced at trial:

- a) While the higher standard for establishing an entitlement to benefits for chronic mental disorders creates a distinction between those claims and physical claims, that distinction is justified given the evidence tendered in this trial. The higher standard is not arbitrary.
- b) The "labour relations exclusion" is overly broad in a manner that has a discriminatory effect on persons suffering chronic mental stress.

[29] Based upon those findings, I allow the plaintiff's claim, I read down the "labour relations exclusion", and I remit the matter to WCAT for reconsideration.

Legal Framework for Section 15 of the Charter

[30] Before turning to the evidence adduced at trial, I set out here, for context, a brief summary of the tests that I apply below when determining whether the provisions of s. 135(1)(a)(ii) and s. 135(1)(c) of the WCA discriminate against persons with chronic stress conditions.

[31] Section 15(1) of the Charter provides that every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination based on mental or physical disability.

[32] The parties agree that the proper approach to the s. 15 analysis is set out in the Supreme Court of Canada's decisions in *R. v. Sharma*, 2022 SCC 39; and *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30 [Taypotat].

[33] There is a two-step analysis for s. 15. In *Sharma* at para. 28, the Court explained that a law will infringe s. 15(1) where it:

- a) creates a distinction based on enumerated or analogous grounds, on its face or in its impact; and
 - b) imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.
- [34] The plaintiff bears the onus of satisfying the two separate parts of the test. The steps overlap but must be addressed separately.
- [35] I have considered all of the evidence discussed below in the context of this two-step analysis.

The Current WCA Handling of Mental Disorder Claims and the Underpinning of the Plaintiff's Action

- [36] The plaintiff's action alleges that the WCA provisions discriminate against persons with chronic mental disorders as compared to persons with physical disorders. The plaintiff submits that this distinction is a breach of s. 15 of the Charter and, specifically, his right to equal protection and equal benefit of the law without discrimination based on mental or physical ability. Hence, a discussion of the WCA provisions is required.
- [37] The WCA provides four paths to compensation for mental disorders. The first three paths are not in dispute because they do not apply the "predominant cause" standard. For context, those three paths are:
- a) A worker can show that they have a mental disorder that is a consequence of (i.e., in addition to) either a physical injury (under s. 134) or an occupational disease (under s. 136). In these circumstances, a mental disorder may be accepted as a compensable condition where the evidence indicates that it is a consequence of an employment-related injury or occupational disease.
 - b) Under s. 135(1)(a)(i), a worker is entitled to compensation where the mental disorder is a reaction to one or more traumatic events arising out of and in the course of the worker's employment. For example, this subsection applies where a worker suffers from PTSD after a traumatic event, or events, at work.
 - c) Section 135(2) provides for compensation where workers in an "eligible occupation" (for example, emergency responders) have experienced one or more traumatic events arising out of, and in the course of, their employment. The only requirement is that the worker has a mental disorder that is recognized by the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition ("DSM-IV") as a condition that may arise from exposure to a traumatic event. In those cases, the causation is "presumed to be a reaction to one or more traumatic events". The presumption is rebuttable.

[38] The provisions in issue in this case are s. 135(1)(a)(ii) and s. 135(1)(c) of the WCA (collectively, the "Impugned Provisions"). They are engaged in circumstances where there is no underlying physical injury, occupational disease, or traumatic event. Instead, the claimant's chronic stress has developed over time.

[39] The Impugned Provisions state:

Mental disorder

135 (1) Subject to subsection (3), a worker is entitled to compensation for a mental disorder, payable as if the mental disorder were a personal injury arising out of and in the course of a worker's employment, if that mental disorder does not result from an injury for which the worker is otherwise entitled to compensation under this Part, and only if all of the following apply:

- (a) the mental disorder is either
 - (ii) predominantly caused by a significant work-related stressor, including bullying or harassment, or a cumulative series of significant work-related stressors, arising out of and in the course of the worker's employment;
- (b) the mental disorder is diagnosed by a psychiatrist or psychologist as a mental or physical condition that is described, at the time of diagnosis, in the most recent Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association;
- (c) the mental disorder is not caused by a decision of the worker's employer relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the worker's employment.

[Emphasis added.]

[40] In broad overview, these provisions work as follows:

- a) Under s. 135(1)(a)(ii), a worker will be entitled to compensation where the mental disorder is predominantly caused by a significant work-related stressor, including bullying or harassment, or a cumulative series of significant work-related stressors. This type of claim is distinct from claims arising from reactions to traumatic events. Those claims are addressed in s. 135(1)(a)(i) and are not subject to the "predominant cause" standard.
- b) Under s. 135(1)(c), if a claimant satisfies the "predominant cause" test, they will not be entitled to compensation if the mental disorder was caused by a decision of the worker's employer relating to the worker's employment (the "Labour Relations Exclusion").

[41] The plaintiff submits that these two provisions are discriminatory. The plaintiff's main point of comparison in this action is the distinction between the test for physical disorders, which are assessed on the "causative significance" standard, versus chronic mental disorders, which are assessed on the "predominant cause" standard.

- [42] For the purpose of this litigation, the potentially affected persons (including Mr. Pickering) are those workers who have not experienced trauma at work, but who have been subject to significant work-related stressors, which may include bullying and harassment.
- [43] To expand on a point made above, Board Policy Item #C3-3 addresses the adjudication of stress-related claims under s. 135(1)(a)(ii). Determining whether the claimant's work was the "predominant cause" of their mental disorder requires consideration of other non-work-related stressors in the worker's life and the role of those stressors in causing the condition. Under Board policy, the term "predominant" does not mean that work-related stressors need to outweigh all other stressors combined. It does not mean 51 percent of the cause. Work-related stressors may still be the primary cause of the mental disorder even if the worker had other stressors which were also cumulatively significant in causing the mental disorder. In this context, the word "predominant" means the largest factor among all factors. In other words, the causes in each claim are adjudicated based upon a plurality, not a majority. I return to this definition when discussing the expert evidence.
- [44] The Province concedes that the imposition of the "predominant cause" test in s. 135(1)(a)(ii) creates a higher standard than the "causative significance" test applied to physical injuries and occupational diseases. The Province submits that there are good policy reasons for this distinction and that the distinction does not constitute discrimination.
- [45] The plaintiff also argues that the Labour Relations Exclusion is discriminatory. That exclusion only applies to chronic stress claims. Further, it applies whether or not the management decisions were made in good faith.

The Evidence

- [46] There were four sources of evidence adduced at trial:
- a) the facts and findings relating to Mr. Pickering's WCB claim;
 - b) the legislative history, including Hansard, and reports commissioned for the purpose of legislative review;
 - c) claims statistics provided by the Board; and
 - d) the expert reports relied upon by the parties.
- [47] The next four headings represent the different areas of evidence that the parties proffered at trial. I address those areas of evidence, and my findings, below.

The Facts and Findings Relating to Mr. Pickering's WCB Claim

Mr. Pickering's Experience at Work

- [48] I note again that this matter proceeded by way of trial. Despite that manner of proceeding, the parties accept that I am bound by the factual findings of the WCAT panel. Further, I ordered that the action be severed, such that the judicial review of Mr. Pickering's claim proceeded first, absent any Charter arguments. That judicial review was followed by this trial on the Charter issues.
- [49] From 2001 to 2017, the plaintiff was employed by Richmond School District No. 38 (the "Employer") as a carpenter. He was promoted to "lead hand" in the carpentry department in 2008. He had a pre-existing history of anxiety.
- [50] When the plaintiff went off work in July 2017, he had been working for the Employer for roughly 16 years. Much of his work was carried out in a millwork shop that produces cabinetry and other items for schools in the district (the "Shop"). He had suffered previous work-related injuries, including a finger amputation in a table saw accident.
- [51] It is not disputed that the plaintiff was bullied and harassed at work. The majority of the bullying was carried out by one particular co-worker. The evidence establishes that the co-worker made Mr. Pickering's life miserable. Among other things, the co-worker:
- a) posted insulting documents in the Shop;
 - b) pushed pins through photos of the plaintiff's face in the Shop;
 - c) scratched the plaintiff's name off various lists in the Shop;
 - d) threatened to ram a large cart into the plaintiff while he was working;
 - e) threw the Shop radio into the garbage after the plaintiff asked him to turn down the volume; and
 - f) posted a sign or banner at the Shop (after the plaintiff went off work) declaring the area a "Bully Zone".
- [52] The plaintiff repeatedly asked his manager to act to stop the bullying and harassment. His manager's response was dismissive, ineffective, and left the plaintiff exposed to continued bullying and harassment. The plaintiff became fearful of returning to his work setting. He experienced panic attacks almost daily.
- [53] In addition to the problems in the Shop, the plaintiff also began receiving complaints from school sites in which the administration was concerned about backlogs and work delays. The plaintiff raised those operational concerns with his manager, but nothing was done. Ultimately, management cancelled certain work orders. The plaintiff was required to report those cancellations to the schools, making him bear the blame.

- [54] On July 18, 2017, the plaintiff went on medical leave. The stressors the plaintiff experienced in the workplace aggravated his anxiety disorder and caused an adjustment disorder. I refer to Mr. Pickering's anxiety disorder and adjustment disorder collectively as the "Work-Related Mental Disorders". I address the specifics of the evidence below.
- [55] On July 19, 2017, the Employer filed an injury report with the Board documenting the bullying that the plaintiff had reported.
- [56] On July 27, 2017, the plaintiff was hospitalized at an in-patient psychiatric unit. He was then transferred to a psychiatric stabilization group home where he remained until August 23, 2017.
- [57] While in the group home, the plaintiff reported his claim to WCB. He stated that the ultimate cause of his breakdown was the ongoing bullying and passive-aggressive behaviour by his co-worker.
- [58] The Employer subsequently investigated the harassment and produced an investigation report dated November 29, 2017. Other employees confirmed the plaintiff's allegations. The report concluded that the co-worker's actions did not align with the school district's Code of Conduct, although the conduct had not breached the articles governing harassment in the collective agreement. The Employer's report noted that, while the manager had acted in the past to address workplace conduct issues, his inconsistent and informal approach did not support a positive change in behaviour that would align with respectful workplace conduct.

The Workers' Compensation Claim, Decision, and Appeals

- [59] The Board opened a claim for the plaintiff after receiving the Employer's injury report on July 19, 2017. On July 20, 2017, the Board received a report from Dr. Govindraju, who was the plaintiff's general practitioner. Dr. Govindraju diagnosed anxiety and noted that the plaintiff had reported bullying at work.
- [60] The Board referred the plaintiff for a psychological assessment. The assessment was conducted by Dr. Hans Beihl, a registered psychologist. Dr. Beihl produced a psychological assessment report dated January 9, 2018 (the "Beihl Report").
- [61] Dr. Beihl diagnosed the plaintiff with:
- a) Adjustment Disorder with Anxiety;
 - b) Generalized Anxiety Disorder, with Panic Attacks; and
 - c) Cannabis Use Disorder, mild.

- [62] Dr. Biehl opined that the predominant cause of the plaintiff's Adjustment Disorder and aggravated pre-existing Generalized Anxiety Disorder was the accumulation of stressful work incidents. The manager's way of dealing with these issues left Mr. Pickering feeling unsupported and hampered in his ability to do his job effectively. The push pin incident, where the co-worker put pins through the plaintiff's photo, was the breaking point in his ability to cope. He was highly fearful of returning to his work setting.
- [63] On February 13, 2018, a Board case manager issued a decision addressing the plaintiff's entitlement to compensation for the Work-Related Mental Disorders (the "Board's Decision"). The case manager agreed that the plaintiff was exposed to significant stressors in the workplace. However, the case manager decided that those stressors were not the "predominant cause" of the Work-Related Mental Disorders. Rather, the predominant cause was the manager's method of dealing with these issues. Thus, the main cause was the "decisions of the employer", not "an intense or [emotionally] stressful incident". The Board's Decision was that the claim was excluded based on the Labour Relations Exclusion in s. 135(1)(c) of the WCA. On this basis, the case manager denied the plaintiff's claim.
- [64] On May 18, 2018, the plaintiff applied to the Board's Review Division for a review of the Board's Decision. The plaintiff maintained that he was entitled to compensation under s. 5.1 of the WCA (now s. 135) for the Work-Related Mental Disorders. The plaintiff also argued that aspects of s. 5.1 unjustifiably discriminated against him on the basis of mental disability contrary to s. 15 of the Charter. At that time, the Review Division had the jurisdiction to address Charter issues and the WCAT did not.
- [65] On September 25, 2018, a review officer found that the plaintiff's claim for the Work-Related Mental Disorders should be accepted (the "Review Decision"). Among other things, the Review Officer determined that the behaviour of the plaintiff's co-worker was threatening, intimidating, and an attempt to belittle and frighten Mr. Pickering. Having found that the plaintiff's claim should be accepted, the review officer declined to address the Charter issues.
- [66] On October 18, 2018, the Employer appealed the Review Decision to the WCAT. The plaintiff argued that the Employer's appeal should be dismissed, and the Review Decision should be confirmed. Alternatively, the plaintiff argued that if the WCAT was inclined to grant the Employer's appeal, then it should return the matter to the Review Division to complete its decision-making process by rendering a decision on the Charter issues. At the time, s. 45 of the Administrative Tribunals Act, S.B.C. 2004, c. 45 [ATA], as adopted in s. 245.1(q) of the 1996 WCA, did not provide WCAT with jurisdiction over constitutional questions relating to the Charter.
- [67] On April 15, 2019, a WCAT vice-chair issued the decision with respect to the plaintiff's claims. The vice-chair found that:

- a) the plaintiff was subjected to significant workplace stressors in the form of bullying and harassment;
- b) the stressors arose out of, and in the course of, the plaintiff's employment;
- c) the stressors contributed to the Work-Related Mental Disorders and were likely of causative significance;
- d) the evidence established that the manager's lack of an effective response left the plaintiff exposed to the co-worker's behaviour and to what the plaintiff thought were serious problems in the scheduling of work.

[68] The vice-chair allowed the Employer's appeal and determined that the plaintiff was not entitled to compensation for the Work-Related Mental Disorders. The vice-chair ruled that:

- a) the predominant cause of the Work-Related Mental Disorders was not the bullying and harassment by the co-worker;
- b) the predominant cause of the Work-Related Mental Disorders was the accumulation of stressful work incidents, including the manager's way of dealing with the incidents which left the plaintiff feeling unsupported and hampered in his ability to do his job effectively; and
- c) the Work-Related Mental Disorders were caused by the Employer's decisions.

[69] Based upon the WCAT Decision, there was no doubt that Mr. Pickering's condition was work-related. However:

- a) the vice-chair characterized the manager's ineffective response as "a decision" relating to the plaintiff's employment; and
- b) the vice-chair determined that the predominant cause of the plaintiff's Work-Related Mental Disorder was the manager's decision not to respond effectively to the workplace stressors, including the bullying and harassment, as opposed to the stressors themselves.

[70] As a result of the WCAT Decision, the plaintiff's claim was precluded by the combination of s. 5.1(1)(a)(ii) and s. 5.1(1)(c) of the 1996 WCA (s. 135(1)(ii) and s.135(1)(c) of the current WCA).

Judicial Review

[71] On June 13, 2019, the plaintiff filed a petition initiating the present proceeding. The petition sought both administrative law and constitutional remedies. On September 11, 2020, I ordered severance of the two parts of the proceeding. The judicial review of the WCAT Decision would proceed first. The constitutional relief, if necessary, would proceed second by way of trial.

- [72] The judicial review came on before me in February 2021. I dismissed it on August 3, 2021. The standard of review on that application called for me to determine whether the WCAT Decision was patently unreasonable. I found that it was not patently unreasonable for WCAT to characterize the manager's actions and inactions as "decisions" falling within the Labour Relations Exclusion. It was also not patently unreasonable for WCAT to conclude that those management decisions were the predominant cause of the plaintiff's conditions. I found that there was an evidentiary basis for that finding. I made those rulings in the absence of any arguments relating to the Charter.
- [73] Following that decision, on November 2, 2022, the Charter issues were referred to the trial list.
- [74] The trial of the action was also divided. The evidence phase ran from February 26 to March 1, 2024. The parties returned on June 10-14, 2024, for five days of submissions.
- [75] Based upon the findings in the previous proceedings, there is no debate that Mr. Pickering's mental disorder was predominantly caused by work-related stressors. There is also no debate that it was disabling. The plaintiff submits these facts as part of his evidence of discrimination.

History of Compensation for Mental Disorder Claims in BC

- [76] Each side places weight on different aspects of the history of the Board's handling of mental disorder claims. There is no dispute about the history itself. It is fair to describe the WCA and the Board policies as regimes that are constantly under review.
- [77] Part of the discussion below addresses the "historic trade-off" of workers' compensation legislation. The first BC workers' compensation legislation came into force in 1917. From the start, workers gave up their right to sue for workplace injuries in exchange for the right to receive compensation and treatment that was not based on proof of fault or the employer's ability to pay. On the other side of the coin, employers were forced to contribute to the overall scheme but gained freedom from lawsuits. As discussed below, the parties' submissions touch on whether the exclusion of mental stress claims may disclose an imbalance in this historic trade-off.

Prior to 2002

- [78] Prior to 2002, the WCA was silent on compensation for mental stress or mental disorders.
- [79] Starting in approximately 1973, without legislative amendment, the Board began providing compensation for post-traumatic stress claims if the condition was an acute reaction to a traumatic event. Those claims were accepted on the basis that they were "personal injuries" as defined in the 1968 version of the WCA. The Board would not approve claims based on chronic stress unless the disorder was caused by one or more traumatic incidents. Over time, the Board and its Appeal Division developed a policy that "traumatically induced psychological impairment" could be accepted as a personal injury under the WCA, "even if

unaccompanied by any physical impairment".

- [80] The plaintiff submits that this history exposes that there was no separate or unique statutory provision differentiating physical conditions from psychological conditions before 2002. The Province clarifies that the policy only allowed claims that were acute reactions to trauma. Hence, the pre-2002 policies were more restrictive than the Impugned Provisions.
- [81] In 2001, again without legislative amendment, the Appeal Division decided that where the evidence establishes that some form of psychological impairment or injury exists, then consideration ought to be given to whether that impairment was "traumatically induced" in order to determine whether it arose out of the worker's employment: Decision No. 2001-0574 (2001), 17 B.C.W.C.R. 347. The Appeal Division enunciated the following set of questions for assessing whether the psychological impairment was "traumatically induced":
- a) Did the workplace circumstances or events involve "unusual stimuli"?
 - b) Were the workplace circumstances or events reasonably capable of causing psychological injury?
 - c) If so, were the workplace circumstances or events of "causative significance" with respect to the worker's psychological condition for which compensation was sought?

(Collectively, the "Traumatic Inducement Test".)

- [82] In 2000, the Appeal Division first addressed the impact of employer's actions: Decision No. 2000-0073 (2000), 17 B.C.W.C.R. 129. The panel held that an employer's actions were required to go beyond normal and expected labour relations actions to be considered "unusual stimuli" and, thus, satisfy the test for compensation. In that case, the worker reacted negatively to being disciplined. He was upset by the challenge to his credibility, as well as by the reaction of his fellow employees and his union for what he perceived to be a failure to support him. The Appeal Division found that the employer's discipline, and the worker's reaction to it, did not amount to "unusual" stimuli in the sense contemplated by the test: at 143-145.
- [83] The Province submits that the Traumatic Inducement Test is roughly equivalent to the Labour Relations Exclusion analysis for traumatic mental disorder claims.
- [84] That was the state of the Board's assessment of mental disorder claims as of 2001. Thereafter, there were two reports prepared that contained recommendations for the handling of mental disorder claims. Both parties rely on those reports but focus on different aspects.

Royal Commission Report, 1999

- [85] In 1996, the Province appointed a Royal Commission on British Columbia's workers' compensation system. The Royal Commission was tripartite, chaired by Judge Gurmail Gill with an employer-representative and worker-representative acting as co-commissioners. The tripartite make-up led to the issuance of both a majority and a minority report. The employer-representative wrote the minority report.
- [86] The Royal Commission delivered its report in 1999. Included in that report were considerations regarding compensation for "stress" or "psychological injury" claims.
- [87] The Royal Commission acknowledged that chronic stress claims presented additional difficulties, including:
- a) the highly subjective nature of psychological injuries;
 - b) the existence of stress in every workplace; and
 - c) adjudicators' limited ability to independently gather relevant and necessary information relating to the worker's psychological experiences both inside and outside of the workplace.
- [88] The report also acknowledged the concern that unrestricted entitlement to compensation for stress claims may have significant cost consequences.
- [89] The Royal Commission noted that certain features distinguish chronic stress claims from all other types of workers' compensation claims. One significant feature is the "pervasive nature of stress in everyone's life". The majority report stated that chronic stress claims are uniquely challenging because almost all claimants will experience stressors both inside and outside of the workplace which may play a causative role.
- [90] However, the majority report specifically rejected the use of the "predominant cause" standard as unworkable and unfair. At Volume II, Chapter 4, pp. 12 and 40 of its Final Report, the Royal Commission wrote:

Dominant or predominant cause tests generally require that work-related causes be of greater than 50% causal significance. The commission has concluded that such tests are not appropriate with respect to any type of disability in the workers compensation setting, whether it is manifested physically or psychologically, comes about gradually or by virtue of sudden onset, or is classified as injury or disease.

The dominant or predominant cause standards not only impose too high an onus, but are also administratively unworkable. In terms of fairness, there are many circumstances where a worker's disability has come about as a result of multiple factors, but would simply not have arisen in the absence of work-related factors. If the predominant cause test were adopted, workers who would not have suffered any disability had it not been for their employment would go uncompensated if other factors were deemed to have played a 50% or greater causal role. In the commission's view, such a result is inconsistent with the basic principle that industry should

fund compensation for consequences arising from employment. If a consequence would not have come about had it not been for the employment, it should be compensable. The causative significance test leads to full compensation in such circumstances (subject to "crumbling skull" or "proportionate entitlement" considerations, if applicable) and is the more appropriate approach.

From an administrative perspective, the predominant cause test assumes that adjudicators will be able to allocate degrees of causal significance among multiple factors. That assumption is, at best, highly suspect.

In a great many, if not most cases, there is simply no reasonable scientific method of allocating degrees of causation between work-related and non-work-related factors, and that is true whether one is considering physical or non-physical causes and effects. The result would therefore be either an arbitrary allocation of degrees of causation or a denial of most chronic stress claims on the basis that the predominant cause simply cannot be determined. Neither result can be justified on the basis of principles underlying the Act.

[91] It is clear in these paragraphs that the Royal Commission defined "predominant cause" as "greater than 50% causal significance". That is not the definition used by the Board. Hence, the report's comments about the high standard (50% plus) are not specifically applicable.

[92] Two of the three commissioners ultimately recommended that the WCA should provide compensation for "non-physical conditions arising from non-physical and non-traumatic stimuli or stressors" under the following conditions:

- a) The condition is medically recognized in the American Psychiatric Association's DSM-IV (the current version at that time).
- b) The condition is established by clear and convincing evidence to have arisen out of and in the course of employment. I note that this is a higher evidentiary standard of proof when compared to other injuries, but it is not a higher standard of causation.
- c) The stressors leading to the psychological disability are objectively verifiable and are excessive or unusual in comparison with the stressors experienced by the average employee in that type of employment.
- d) The stressors leading to the psychological disability are not related solely to generic work processes, such as labour relations issues, disciplinary actions, demotions, layoffs, termination or transfer, when done in good faith and in a lawful and non-discriminatory manner.

[93] The third (employer-nominated) commissioner agreed with the majority's concerns, but strongly disagreed with their recommendation to allow compensation for chronic stress injuries. He concluded that the majority's proposal "would do damage to the workers' compensation system". His stated reason against compensating chronic stress claims was as a "pure cost containment measure".

The Winter Report

- [94] In another report published in 2002, Mr. Alan Winter was asked to review the major law and policy issues existing in the workers' compensation system. He produced a document entitled the "Core Services Review" which I refer to as the "Winter Report".
- [95] I note that the Winter Report must be read as a whole and with some caution. Mr. Winter ultimately recommended that when physical or psychological conditions arise from multiple factors, the worker's benefits should be reduced (pro-rated) based on the Board's assessment of what percentage of the total causation was due to non-occupational factors. In my opinion, that ultimate recommendation may have coloured Mr. Winter's approach to all of the issues. In other words, Mr. Winter could be more generous in recommending thresholds because the causation issues would be resolved through the reduction of benefits.
- [96] The Winter Report addressed the issues surrounding chronic stress claims. It acknowledged the challenges identified by the Royal Commission in providing compensation for mental stress claims, including:
- a) chronic stress arises from a "myriad of interacting factors", some of which arise from employment, but many of which arise out of a worker's personal life;
 - b) the subjective nature of chronic stress claims;
 - c) regarding the Labour Relations Exclusion, the need for employers to make bona fide employment-related decisions (including lay-offs, discipline and termination) which may cause stress;
 - d) the risk that acceptance of chronic stress claims will make workers' compensation more litigious; and
 - e) the potential for a significant increase in claims and therefore potential negative cost implications for the system.
- [97] Having recognized the challenges, Mr. Winter highlighted the reasons why chronic stress claims should be accepted under the WCA, including:
- a) concern over excluding truly work-caused chronic stress claims;
 - b) similarities between chronic stress claims and already-compensable claims arising from a series of traumatic events;
 - c) the prospect of workers suing employers in tort if chronic stress claims were not compensable (i.e., referring to the "historic trade-off"); and
 - d) uncertainty over whether the exclusion of chronic stress claims would be compliant with s. 15 of the Charter.

- [98] Mr. Winter concluded that chronic stress claims ought to be compensable under the WCA. He agreed that the Board's policy could not disregard the unique challenges associated with chronic stress claims. He identified several requirements that ought to be met before chronic stress is compensable, including the need for an objective assessment into the causation of the worker's alleged psychological impairment and the need to exclude bona fide employment-related (i.e., management decision related) stressors.
- [99] Mr. Winter diverted from the Royal Commission recommendation that the "causative significance" standard be applied to chronic stress claims. He concluded that chronic stress claims should, instead, be adjudicated on the "predominant cause" threshold.
- [100] To be clear, he recommended an all or nothing threshold of 50 percent. Under his recommendation, if occupational factors causally contributed more than 50 percent to the worker's mental disorder, the worker would receive full compensation. If occupational factors contributed 50 percent or less, the claim would be denied. Mr. Winter referred to this greater than 50% standard as the "predominant cause" test. Although one of the fundamental purposes of workers' compensation legislation is to compensate workers for disabilities which are "truly work-caused", he felt that the unique features of chronic stress claims, and the inherent uncertainty with respect to causation, justified the higher "predominant cause" standard.
- [101] With respect to the Labour Relations Exclusion, Mr. Winter endorsed the Royal Commission's recommendation that any exclusion based on employer decisions be limited to bona fide employer decisions.
- [102] The plaintiff submits that the key takeaways from the Winter Report with respect to psychological injuries are as follows:
- i). It endorsed the Royal Commission's recommendations that would ensure "objectivity" by requiring:
 - i. a DSM-IV diagnosis; and
 - ii. that the stressors be objectively unusual.
 - ii). It endorsed the Royal Commission's recommendations which limited the Labour Relations Exclusion to decisions that were made in good faith and in a lawful and non-discriminatory manner.
 - iii). It did not endorse limiting compensation to "acute reactions".
 - iv). It departed from the Royal Commission by recommending that causation be apportioned by percentage for both physical and psychological claims.
- [103] On the last point, I note again that the Winter Report recommended pro-rated benefits where the physical injuries were the result of multiple causal factors.

[104] The Province submits that the Winter Report disagreed with the Royal Commission's recommendation that the "causative significance" standard should apply to chronic stress claims. Mr. Winter recommended the more stringent "predominant cause" threshold (meaning 50 percent or greater). The Province submits that Mr. Winter reached this conclusion based on the unique features of chronic stress claims, and in particular, the inherent uncertainty with respect to causation.

Enactment of Section 5.1 of the Act

[105] In 2002, the Legislature amended the WCA to reflect some of the recommendations in the above reports. For the first time, it created a scheme in the WCA governing compensation for (what was then called) "mental stress", including a specific provision on mental stress. However, chronic stress claims were not addressed. Both sides point to the Hansard debate on the amending bills.

[106] During the first reading, Minister Graham Bruce, the then Minister of Skills Development and Labour, summarized the purpose of Bill 49, now the Workers Compensation Amendment Act, 2002, S.B.C. 2002, c. 56 [2002 Amendment Act], as follows:

This bill clarifies coverage for mental stress, explicitly stating that coverage will only be provided for mental stress when it is an acute reaction to a sudden and unexpected traumatic event or the result of an injury or disease for which the worker is entitled to compensation.

[107] With respect to mental disorder claims, Minister Bruce stated at the second reading:

This bill also addresses the difficult issue of mental stress claims. The bill clarifies WCB coverage for mental stress by clearly establishing that compensation will be provided in cases of mental stress due to a sudden and unexpected traumatic event such as the post-traumatic stress that a bank teller may experience after a bank robbery. Coverage will also be provided in cases of mental stress that result from a compensable injury such as the loss of a leg.

Coverage will not be provided in other situations such as chronic stress conditions resulting from the sort of ongoing stress that everyone experiences in their everyday personal and workday lives. This clarification provides greater certainty for workers and brings British Columbia's coverage into line with most other provinces.

[108] The Legislature ultimately passed Bill 49 and the new provisions on mental stress came into force on June 30, 2002. At that time, s. 5.1 of the 2002 Amendment Act read:

Mental Stress

5.1 A worker is entitled to compensation for mental stress that does not result from an injury for which the worker is otherwise entitled to compensation, only if the mental stress

- (a) is an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of the worker's employment,

- (b) is diagnosed by a physician as a mental or physical condition that is described in the most recent American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders at the time of the diagnosis, and
- (c) is not caused by a decision of the worker's employer relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the worker's employment.

[Emphasis added.]

[109] The 2002 Amendment Act restricted compensation for "mental stress" in several ways:

- a) Compensation was restricted to situations involving a "sudden and unexpected traumatic event". Prior to 2002, compensation could be provided if the circumstances or events simply involved "unusual stimuli".
- b) A DSM diagnosis was a prerequisite for compensation, which was not required prior to 2002.
- c) Psychological injury caused by a decision of the worker's employer related to the worker's employment was excluded.

[110] The 2002 Amendment Act did not adopt the Royal Commission and Winter Report recommendation that the Labour Relations Exclusion be limited to decisions made in good faith and in a lawful and non-discriminatory manner.

[111] In 2003, s. 5.1 was amended to specify that the Board may require a Board-appointed physician or psychologist to review a mental stress diagnosis, and that the Board may consider that review in determining whether a worker is entitled to compensation for mental stress: Skills Development and Labour Statutes Amendment Act, 2003, S.B.C. 2003, c. 65, s. 16.

Court of Appeal considers constitutionality of section 5.1 and Board Policy

[112] In *Plesner v. British Columbia Hydro and Power Authority*, 2009 BCCA 188, the Court of Appeal considered the constitutionality of s. 5.1 as well as a Board policy interpreting that section. As of 2002, the 1996 WCA would only allow claims for mental disorders that were caused by a "traumatic event". The Court considered whether the requirement of a "traumatic event" in s. 5.1 of the 1996 WCA, either alone or when read together with the Board policy statement, contravened s. 15(1) of the Charter.

[113] Of note, the Court cited the Hansard debate quoted above and came to the following conclusions about the purpose of the 2002 amendments:

[149] In determining the purpose of these provisions, I would again refer to para. 52 of Madam Justice Ryan's reasons for judgment in which she sets out extracts from Hansard on the second reading of Bill 49. It appears from these and related extracts from Hansard that amendments to the Act, including s. 5.1, were enacted for two main purposes. The first, and

I would say the primary, purpose was cost-related. There was evidence of escalating costs and potential future overruns in the workers compensation system. The reasonable inference to be drawn from Hansard is that considerable savings were anticipated by, amongst other changes, removing chronic stress claims as a basis for compensation.

[150] The second purpose (closely linked to the first), was to "clarify" coverage for mental stress claims by limiting the circumstances in which mental stress would be compensated. A person suffering a purely mental injury could not recover if that injury fell within the descriptor of chronic stress, but could recover if it was caused by an acute reaction to a sudden and unexpected traumatic event, such as a bank robbery. This requirement was consistent with the description of an event deemed to be "traumatic" contained in Policy 13.30, which came into force at the same time.

[114] The Court found that the 2002 Amendment Act had two related purposes: cost control and limiting the kind of chronic stress claims that could be compensated.

[115] The Court's analysis turned on the Board policy interpreting the 2002 amendments. The Board's Policy Item (#13.30) provided, in part:

A worker may be entitled to compensation for mental stress that does not result from a physical injury or occupational disease if the impairment is due to an acute reaction to a sudden and unexpected traumatic event.

"Mental stress" is intended to describe conditions such as post-traumatic stress disorder or other associated disorders. Mental stress does not include "chronic stress", which refers to a psychological impairment or condition caused by mental stressors acting over time. Workers, who develop mental stress over the course of time due to general workplace conditions, including workload, are not entitled to compensation.

(See Plesner at Schedule "A".)

[116] I return to these provisions below.

[117] The Board policy outlined examples of an "acute reaction" and "traumatic event" that were "generally accepted as being traumatic". The effect of s. 5.1, in combination with the Board Policy Item #13.30, was to exclude all mental disorder claims that did not originate in an injury, occupational disease, or traumatic event.

[118] The majority of the Court of Appeal held that the Board policy was unconstitutional because it discriminated on the basis of mental disability: Plesner at paras. 96-101. The majority did not, however, find that s. 5.1 breached the Charter's guarantee of equality. It was only when s. 5.1 was read together with the Board's policy that it required mental stress claimants to meet the additional, overly burdensome test.

[119] For the majority, Justice Prowse wrote:

- [96] I am satisfied that the requirement of a "traumatic event" in s. 5.1(1)(a) of the Act, when read together with Policy 13.30, breaches s. 15(1) of the Charter by discriminating against Mr. Plesner, and other workers like him who suffer from purely mental work-related injuries, on the basis of mental disability. Workers with purely mental injuries are forced to meet a significantly higher threshold for compensation which is not required of those who suffer work-related injuries that are purely physical, or who suffer mental injuries which are linked to physical work-related injuries.
- [98] In my view, it is not an answer to Mr. Plesner's claim of an unjustified breach of s. 15(1) of the Charter to say (as do the respondents) that the impugned provisions are designed to enable the fact-finder to more readily determine whether mental injuries are work-related; that is, to say that they are simply causative provisions....
- [99] Nor is it an answer to say that, where the issue is one akin to the distribution of benefits under a legislated benefit plan (in this case an employer-funded plan), the Legislature can draw any line it thinks fit between those who are entitled to receive benefits and those who are not, without risk of Charter intervention. The Legislature can draw lines, but those lines cannot run afoul of s. 15(1) of the Charter.
- [100] The real question in this appeal is whether the causative threshold set by the impugned provisions, and the line-drawing exercise engaged in by the Legislature and the policy drafters, give rise to discriminatory treatment based on an enumerated or analogous ground within the meaning of s. 15(1). Mr. Plesner says that these provisions discriminate against him on the ground of mental disability as compared with those who suffer from physical work-related injuries. I agree. The fact that a subset of workers who suffer from purely mental injuries may meet the high threshold for compensation under these provisions does not dictate a different conclusion. They, too, are discriminated against in relation to those suffering from physical injuries in a manner which treats all of those who suffer from purely mental injuries as less deserving, less credible, and generally less worthy of compensation under the Act than workers suffering from physical injuries, or from mental injuries linked to physical injuries. The provisions are an affront to their human dignity and devalue them as human beings.
- [Emphasis added.]
- [120] Turning to the remedy, the majority severed portions of the Board Policy and declared them to be of no force and effect. The Court did not sever the statement in Policy #30.13 that "[w]orkers, who develop mental stress over the course of time due to general workplace conditions, including workload, are not entitled to compensation": see Plesner at Schedule "A".
- [121] I return to the reasoning in Plesner below.

Introduction of Bill 14

- [122] Following the decision in Plesner, the Legislature introduced Bill 14, now the Workers Compensation Amendment Act, 2011, S.B.C. 2012, c. 23 [Bill 14]. The amendments contained in this statute are the ones that are in issue in this action. There is no dispute that these amendments expanded coverage for mental disorders. However, the plaintiff says that they did not go far enough and that they are still discriminatory.
- [123] In his submission, the plaintiff points to a significant change in the wording of the amendments between the First Reading and the Second Reading of Bill 14. The plaintiff says that the amendment speaks to the underlying purpose of the final version.
- [124] At the First Reading, Bill 14 proposed to amend s. 5.1(1)(a) of the WCA to remove the requirement that mental stress be an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of the worker's employment. Instead, it would have provided compensation for mental stress arising from a reaction:
- a) to one or more traumatic events;
 - b) to a significant work-related stressor; or
 - c) to a cumulative series of significant work-related stressors.
- [125] There was no "predominant cause" standard in the original version of Bill 14. Mental stress claims, both traumatic and chronic, would have been adjudicated on the "causative significance" standard.
- [126] Each side relies on the Hansard debate at the introduction of Bill 14 but for different purposes. I have included excerpts from the Hansard speeches below. In doing so, I am alive to the Supreme Court's comments about the limited value of Hansard in the statutory interpretation analysis: Sharma at paras. 88-89.
- [127] When introducing Bill 14 on November 3, 2011, the Minister Margaret MacDiarmid, Minister of Labour, Citizens' Services and Open Government, summarized the purpose of the amending legislation as follows:

We know that mental stress can have a significant effect on workers and their families. It can also impact the productivity of a workplace through reduced efficiency, frequent absences and poor decisions that can result in accidents and injury. That's why through Bill 14 we will be expanding the mental stress conditions that will be eligible for workers compensation coverage.

- [128] As noted, there was no "predominant cause" language in Bill 14. However, when the Bill returned for the Second Reading, the "predominant cause" standard had been inserted. That later version of Bill 14 was ultimately passed and contains the provisions under review in this trial.

- [129] At the trial of this action, the Province introduced evidence regarding the impetus for the change from the first to the second draft of Bill 14. That evidence consisted of the affidavit of Mr. Michael Tanner.
- [130] From 2011-2012, Mr. Tanner was the Acting Director of Labour Policy and Legislation in the Labour Policy and Legislation Branch of the Ministry of Labour. His affidavit states that, following the introduction of Bill 14 in November 2011, the government informally reviewed the manner in which other jurisdictions provided compensation for chronic stress. In particular, the government conducted a comparative study of jurisdictions across Canada, as well as foreign jurisdictions such as California and Australia.
- [131] According to Mr. Tanner's affidavit:
- a) As of 2011, other Canadian Provinces, including Manitoba, Ontario, New Brunswick, Newfoundland and Labrador, Nova Scotia, and Prince Edward Island, had legislation that restricted compensation for mental stress to "acute reactions to a traumatic event". Some of those jurisdictions required that the traumatic event be "sudden and unexpected".
 - b) The Northwest Territories and Nunavut had policies in place that restricted compensation to traumatic events, but those territories also accepted gradual-onset reactions.
 - c) The remaining Canadian jurisdictions (Alberta, Saskatchewan, Quebec, and Yukon) had policies that provided compensation for traumatic stress (including gradual onset reactions) and for mental disorders arising from non-traumatic stressors. None of these four jurisdictions had specific legislative provisions dealing with mental disorders. Instead, they had developed policies which considered mental disorders to be encompassed within their statutory definitions of "injury" or "disease".
 - d) In Australia, all states provided compensation for psychological injuries. However, the various states applied different standards of causation to determine whether an injury was compensable as a work-related injury. The following different standards were applied: "material", "substantial", "significant", "major", and "most significant".
 - e) In the course of the review, the government also examined California's experience with compensating work-related mental disorders. In the early 1980s, California experienced a surge in mental stress claims after the state courts adopted a highly permissive test for establishing workplace-related mental stress claims. Based upon those decisions, California applied a purely subjective test for compensation of mental disorders. By 1990, mental stress claims increased by 700 percent and became the most common cumulative injury claim in California. Mental stress claims became more expensive than all other claims. They added significantly to the costs incurred by employers and workers. To preserve the system's financial sustainability, the state introduced additional eligibility criteria. I discuss the California experience below when addressing the evidence of Dr. Gnam.

[132] On the basis of Mr. Tanner's affidavit, the Province says that the informal review led to the conclusion that many jurisdictions had statutory requirements:

- a) aimed at ensuring only work-related injuries were compensated, whether they were mental disorders, personal injuries, or occupational diseases; and
- b) that treated mental disorders differently than physical injuries and occupational diseases in terms of establishing causation and compensable triggering events.

[133] Hence, the Province says that, after further consideration and consultation, Bill 14 was revised before the Second Reading.

[134] The plaintiff disputes the history contained in Mr. Tanner's affidavit, but did not cross-examine him. The plaintiff relies on the later Hansard, from the Second Reading on May 3, 2012, where the Minister MacDiarmid explained the amendments to the Bill stating:

Since first introducing Bill 14, a number of stakeholders stepped forward with recommendations and their thoughts. We've listened to that feedback, and we believe it's important to make some amendments to Bill 14 to provide clarity for both employers and workers. That's why I have tabled four amendments to this legislation.

They include a reference to harassment and bullying as significant work-related stressors; a predominant cause test for significant work-related stressors, including harassment and bullying; a change in terminology from "mental stress" to "mental disorder"; and a revised requirement for a diagnosis of a recognized mental disorder by a psychiatrist and a psychologist, rather than from a physician. These amendments strengthen the bill and help ensure that the legislation achieves its intended objectives, while protecting the financial integrity of the workers compensation system.

Before concluding, I'd like to reinforce one point. The amendments contained in Bill 14, particularly the expanded coverage for work-related mental disorders, encourage employers to take a leading role in providing environments that promote the mental well-being of workers. They help us to continue our commitment to ensuring that our workers compensation system remains responsive to the needs of both workers and employers.

[Emphasis added.]

[135] There was no mention of a comparative study in this speech.

[136] There was further Hansard debate from the committee stage. On May 30, 2012, Minister MacDiarmid specifically addressed the inclusion of the "predominant cause" threshold. The plaintiff notes that Minister MacDiarmid, again, made no reference to any comparative study undertaken by the ministry. Instead, she explained that claims involving "significant work-related stressors and resulting mental disorders will present challenges that don't exist for many physical injuries and occupational diseases". This includes "the pervasive nature of stressors in everyone's work and non-work lives, uncertainties surrounding the causal factors which led to a worker's mental disorder and the subjective nature of a mental

disorder claim".

[137] The plaintiff's submission is that I should make a finding that the amendments from the First Reading to the Second Reading, which added the higher "predominant cause" standard, were made for economic reasons and not for legitimate claims adjudication reasons.

[138] I am unable to make this finding of fact. I noted above the caution with which I approach statements recorded in Hansard. The affidavit evidence in this trial from Mr. Tanner does not accord with the statements in Hansard. Mr. Tanner was not cross-examined on his affidavit. I have no reason to doubt his statements. I take his affidavit at face value. I find that the higher causative standard was added to ensure that only work-related injuries were compensated.

[139] On May 30, 2012, Bill 14 was read a third time and passed. It came into force on July 1, 2012. The key changes it made were:

- a) a change in language to confirm that compensation is provided for "mental disorder", not "mental stress";
- b) a requirement that the mental disorder be diagnosed by a psychiatrist or psychologist, and not simply "a physician"; and
- c) the introduction of s. 5.1(1)(a)(ii), which allowed compensation for mental disorders "predominantly caused" by significant workplace stressors, including bullying and harassment.

2018 and 2019 Amendments and the Current State of the WCA

[140] The 1996 WCA was repealed and replaced by the current WCA in 2019. As noted earlier in these reasons, the (former) provisions of s. 5.1 are now set out at s. 135(1) of the WCA.

[141] In addition to renumbering, the provisions relating to mental disorders deriving from traumatic injury were amended in 2018 to create a presumption of causation for certain occupations routinely exposed to trauma (such as first responders): Workers Compensation Amendment Act, 2018, S.B.C. 2018, c. 10, s. 1. Those presumptions only apply in the case of traumatic injury (i.e., they do not apply in claims of chronic stress).

Current Version of the Impugned Provisions

[142] In the present legislation, s. 135(1) sets out three unique elements for mental disorder claims that do not apply to any other type of claim:

- a) The requirement in s. 135(1)(b) for a diagnosis by a psychiatrist or psychologist using the DSM. Mr. Pickering has met this requirement.
- b) The Labour Relations Exclusion in s. 135(1)(a)(ii).

- c) The Predominant Cause test for establishing workplace causation in the case of claims based on significant workplace stressors set out in s. 135(1)(c) of the WCA.

[143] In this action the plaintiff only challenges the Predominant Cause test and the Labour Relations Exclusion. The plaintiff does not challenge requirement in s. 135(1)(b) for a DSM diagnosis by a psychiatrist or psychologist.

[144] Further, the plaintiff does not challenge the Board policy interpreting s. 135. However, for the sake of completeness, I note that the Board policy provides the following framework for evaluating claims under s. 135(1) of the WCA (See Chapter 3, Rehabilitation Services and Claims Manual, Volume II, at Policy Item #C3-24.00):

- a) There is a five-step analysis for assessing mental disorder claims:
- i. Does the worker have a DSM mental disorder diagnosed by a psychologist or a psychiatrist?
 - ii. Were there one or more identifiable events, or an identifiable stressor, or a cumulative series of stressors?
 - iii. Was the event "traumatic" or the work-related stressor "significant"?
 - iv. Was the mental disorder a reaction to one or more traumatic events arising out of and in the course of the employment, and/or was the mental disorder predominantly caused by a significant work-related stressor, or a cumulative series of significant work-related stressors, arising out of and in the course of the worker's employment?
 - v. Was the mental disorder caused by a decision of the employer relating to the worker's employment?

[145] Below, I discuss the Impugned Provisions in the context of the s. 15 analysis. However, as noted above, I have accepted Mr. Tanner's affidavit evidence as the factual basis for certain changes.

Statistical Evidence

[146] At the request of the plaintiff, the Province (via the Board) produced certain statistics regarding claims acceptance rates. The plaintiff relies upon that evidence in support of his allegation of discriminatory conduct.

[147] The plaintiff points to the following data from 2022:

- i). Total claims made to the Board: 150,261
- ii). Total claims adjudicated: 114,687
- iii). Total claims accepted: 105,233

[148] Mental disorder claims are included in the statistics set out above from 2022. Of note:

- a) All mental disorder claims (trauma and work stressors):

- i. Submitted: 5,903
- ii. Accepted: 1,982 (representing 1.9% of all accepted claims)
- b) Mental Disorder claims under s. 135(1)(ii) (chronic only):
 - i. Submitted: 1,936
 - ii. Accepted: 611 (representing 0.6% of all accepted claims).
- iii. Disallowed: 703

[149] I note that these statistics may be confusing because the "accepted" plus "disallowed" figures do not total the "submitted" figure. However, a number of claims were "suspended" or required "no adjudication". The "acceptance rate" for chronic stress claims, using the figures above, was 46% in 2022. That percentage represents the proportion of disallowed claims as compared to accepted claims.

[150] The plaintiff notes that mental disorder claims under s. 135(1)(a)(ii) represent a very small percentage of all claims submitted and accepted. The plaintiff submits that the Province overstates the fear of higher WCB premiums. Only 611 claims were accepted applying the "predominant cause" standard. Hence, the plaintiff says that if the lower "causative significance" standard is applied, that number will increase, but it will not upset the apple cart.

[151] In my opinion, this last submission from the plaintiff constitutes speculation. I have no evidence on this issue. I have not considered it in coming to my decision.

[152] By way of overview, the plaintiff points to the higher acceptance rates for physical versus mental disorder claims. The raw statistics indicate that the acceptance rate for mental disorder claims is significantly lower than the acceptance rate for other types of claims. In 2022, the overall acceptance rate for all conditions (physical and mental) was 92%. The acceptance rate for mental disorder claims (both trauma and significant stressors) was 56%. The acceptance rate for mental disorder claims based on significant workplace stressors was only 46%.

[153] The plaintiff submits that these discrepancies constitute evidence of the discriminatory nature of the chronic stress provisions of the WCA.

[154] The Province takes issue with the plaintiff's interpretation of the statistics. The Province's main point is that the overwhelming percentage of claims are physical. Between 2020 and 2022, approximately 83% of total claim eligibility decisions addressed claims based on traumatic physical injuries. Those claims have an acceptance rate of 96%. Put differently, 83% of the total claims have an acceptance rate of 96%, leaving only 17% of "other" claims which lower the overall acceptance to 94%. This means that the acceptance rate for the 17% of "other" claims is in the range of 72%.

- [155] In my opinion, the plaintiff's assertion still holds, but with less force. The acceptance rate for mental disorder claims lags behind the acceptance rate for all "other" claims (i.e., it is lower than the average acceptance rate for the "other" 17% of claims).
- [156] By comparison, the Province points to low acceptance rates in relation to two specific types of claims:
- a) For activity-related soft tissue disorder claims, the acceptance rate was 57%.
 - b) For non-traumatic hearing loss claims, the acceptance rate was 59%.
- [157] The Province submits that these rates are comparable to the acceptance rate for mental disorder claims.
- [158] In my opinion, these last two statistics are irrelevant. The fact that two other types of disorders, selected by the Board, produce acceptance rates that are almost as low as mental disorder claims cannot be relied upon as evidence that the mental disorder provisions are not discriminatory. The issue in this trial is the higher standard required by the WCA for chronic stress cases.
- [159] The Province also points to the statistics indicating that, since the 2012 amendments, annual mental disorder claims have increased by 600%. In 2011, there were 365 mental disorder claims. In 2022, that number had increased to 1,982. Relying on these statistics, the Province submits that the amendments did the opposite of reflecting negative stereotypes or prejudicial attitudes. It argues that there can be no rational argument that this statistic indicates that the 2012 amendments exacerbated prejudice.
- [160] Further, the Province submits that the Supreme Court has held in *Sharma* that when the state legislates to address inequality, "it can do so incrementally": at para. 64.
- [161] The plaintiff distinguishes *Sharma* on the ground that it addressed legislation that was designed to remedy social inequalities. That type of legislation can move "incrementally". In the current situation, the WCA creates the inequality.
- [162] I accept the plaintiff's submission on this point. The Province's reliance on *Sharma* is, in my opinion, misplaced.
- [163] As to the statistics relied upon by the Province, the plaintiff responds that they are irrelevant. The real question in this trial is whether the current legislation improperly denies the legitimate claims of employees who suffer from chronic stress, in circumstances where the employment situation plays a causatively significant role in creating that condition.
- [164] I accept the plaintiff's position on the statistics submitted by the Province. In my opinion, the acceptance rates for other types of claims are irrelevant to the issues before me.

[165] I accept that the statistical evidence shows that the acceptance rate for chronic mental stress claims is lower than for other chronic non-physical injury claims.

Expert Evidence

[166] Each party tendered expert evidence:

- a) The plaintiff submitted expert reports and viva voce testimony from the following individuals:
 - i. Dr. Heather Stuart, Professor of Psychology, Queens University;
 - ii. Ms. Rachel Turnpenney, Employment Lawyer; and
 - iii. Dr. Gerald Young, Professor of Psychology, York University.
- b) The Province tendered two reports, and the viva voce testimony of, Dr. William Gnam, Psychiatrist (additional qualifications outlined below).

[167] As discussed below, Dr. Stuart and Ms. Turnpenney provided the necessary evidentiary foundation for two issues. The Province does not challenge their evidence or opinions. Dr. Young and Dr. Gnam provided opinions relating to the assessment, diagnosis, and attribution of causation in mental disorder claims. The difference between their opinions is at the core of this trial.

[168] I deal with Dr. Stuart's and Ms. Turnpenney's reports first.

Dr. Heather Stuart: Are mental disorders mistreated or marginalized?

[169] As noted above, the s. 15 analysis requires an assessment of whether a "distinction" constitutes "discrimination". One of the factors in that inquiry is whether the plaintiff is part of a group that has historically been mistreated or marginalized. The plaintiff bears the evidentiary burden on that issue.

[170] The plaintiff called Dr. Heather Stuart, a professor at Queens University in the Department of Public Health Sciences, Department of Psychiatry, and the School of Rehabilitation Therapy. She holds the Bell Canada Chair in Mental Health and Anti-Stigma Research.

[171] Dr. Stuart's opinion is that there is a stereotype that mental disabilities are frequently feigned, exaggerated, or less real than physical injuries. As a result, they are often approached with "heightened vigilance". Her report notes that mental illness is subject to stigma, including the notion that:

Mental illnesses are not legitimate illnesses and are used as a license for dodging work responsibilities or receiving special privileges. With the legitimacy of mental illnesses in question, there is a tendency to explain work issues as evidence of a moral flaw or character weakness. There is concern that employees will use a mental illness to place themselves at some advantage.

[172] Dr. Stuart further opined that mental disorder claims are viewed as a cost that must be contained to ensure compensation for other, more deserving, conditions. She notes that the literature has identified stigma surrounding "concerns that accepting mental illnesses as legitimate would result in increased costs associated with health and disability claims".

[173] The Province does not take issue with Dr. Stuart's evidence or the premise that persons with mental disorders constitute a group that have historically suffered discrimination in our society.

[174] I accept Dr. Stuart's opinion.

Ms. Rachel Turnpenney: The Labour Relations Exclusion

[175] The plaintiff also asserts that the Labour Relations Exclusion is discriminatory.

[176] On this issue, the plaintiff called Ms. Rachel Turnpenney, a lawyer who practices in Ontario in the area of workplace investigations. She provided expert opinion evidence about the Labour Relations Exclusion. Her opinion is that the harm from many employers' decisions is not "unavoidable". She says that an employer's choices may create, or mitigate, the risk of causing additional psychological harm to the worker:

An Employer's conduct, including the manner in which they choose to respond or not respond, to allegations of Disrespectful Conduct, can cause additional harm to the worker making the allegations.

[177] Ms. Turnpenney also opines that:

There are a number of practices and techniques that an Employer can use when responding to allegations of bullying or harassment that can seek to decrease the risk of causing harm or additional harm (beyond the impact of actually experiencing substantiated Disrespectful Conduct) to the Worker.

[178] Ms. Turnpenney concludes that an employer's improper handling of bullying and harassment complaints can cause additional harm to the worker beyond the initial alleged conduct.

[179] Ms. Turnpenney notes that the WCB has created policies requiring all employers "to take steps to eliminate, where possible, or otherwise minimize the risks to workers from bullying and harassment in the workplace". She says that it is implicit in this requirement that an employer's decision to address or not address bullying and harassment, and the many ways in which they may choose to do so, cannot be characterized as "inevitable or "unavoidable".

[180] Ms. Turnpenney's opinion is that the Labour Relations Exclusion is not limited to "unavoidable and inherent" decisions made in good faith. The plaintiff points to the recommendation in both the Royal Commission and the 2002 Winter Report that the Labour Relations Exclusion be limited to generic processes and actions taken in good faith.

The plaintiff submits that the current version of the WCA permits the Labour Relations Exclusion to apply to a range of situations that are not simply an "unavoidable or inherent" part of work.

[181] The Province does not take issue with the core of Ms. Turnpenney's evidence, but it rejects the contention that the Labour Relations Exclusion is discriminatory.

[182] I accept Ms. Turnpenney's opinion.

Dr. Young and Dr. Gnam: Assessment of Mental Disorder Claims

[183] The major point of dispute in the expert evidence relates to the assessment of mental disorders and the inherent problems with ascribing causation to any particular disorder. Again, for clarity, the mental disorders at issue do not arise from traumatic events. They are not associated with a physical injury or occupational disease. The only mental disorders that are in issue are those that are said to be caused by a significant work-related stressor, including bullying or harassment, or a cumulative series of significant work-related stressors. The opinions and discussions below address these types of "chronic stress" claims.

[184] The major points of contention between the parties are addressed in the reports of Dr. Young and Dr. Gnam and surround the following opinions:

- a) Are psychologists and psychiatrists capable of determining causation on the standard of "predominant cause" or by using percentage contributions from different causes?
- b) Are psychologists and psychiatrists capable of determining causation on the standard of "predominant cause" by using an ordinal scale (i.e., a ranking and ordering of the multiple causes without considering the degree of variation between them)?
- c) Is there a valid basis for using a higher standard for claims arising from chronic stress?

[185] Before delving into the differences between the experts' opinions, I note the following points upon which Dr. Gnam and Dr. Young agree:

- a) At present, the WCA requires mental disorder claims to be assessed on an objective standard. The claimant must have an objective diagnosis under the DSM: WCA, s. 135(1)(a)-(b). That diagnosis must be made by a psychiatrist or psychologist.
- b) Techniques exist to detect feigning, exaggeration, and malingering.
- c) All mental disorders have multiple causes. They are "multifactorial". In every case, there are risk factors that exist both at work and at home.
- d) Many physical disorders, such as chronic pain and back strain, are also multifactorial.

- e) Every case should be determined based upon an individual assessment of the claimant. In other words, there should be no blanket exclusion of a class of disorder based on population studies. Those studies can only give a probability of the linkage between workplace stressors and mental disorders.
- f) When assessing the causation of a patient's mental disorder, it is not possible to assign percentages of contribution to various causative factors.

[186] Despite agreement on those points, there are significant points of disagreement between the two experts. To place the differences in the two experts' opinions in context:

- a) The plaintiff submits that the "predominant cause" test is arbitrary and discriminates against persons with mental disorders. The plaintiff relies on Dr. Young's opinion evidence. The plaintiff also relies on points conceded by Dr. Gnam in cross-examination.
- b) The Province submits that the "predominant cause" test is not arbitrary. The Province relies upon Dr. Gnam's opinion evidence.

[187] The important differences between the opinions of Dr. Young and Dr. Gnam arise in the following areas:

- a) the clinical accuracy of attempts to attribute causal factors given the existence of research showing that statistically, work-related stressors have a weak causal relationship to mental disorders;
- b) the workability, and ethical problems, that arise from assigning percentages of causation to various causes of mental disorders; and
- c) the workability of the "predominant cause" threshold.

[188] Not surprisingly:

- a) The plaintiff argues that Dr. Young's opinion should be preferred over Dr. Gnam's. The plaintiff also emphasises the points that Dr. Gnam conceded in cross-examination.
- b) The Province submits that Dr. Young's opinion should be given little weight. It says that Dr. Gnam's opinion should be preferred.

[189] To set up the discussion below, it is important to distinguish between the standard of proof and the standard of causation:

- a) If a plaintiff must establish a fact on a balance of probabilities, that is the "evidentiary" standard of proof. It is a different standard than, for example, proof beyond a reasonable doubt.

- b) If a claimant must establish that work-related stressors were responsible for their mental disorder, then that is a "causation" standard. A number of different standards of causation can be applied, such as: sole cause, predominant cause, partial cause, or causative significance.
- c) Hence, in theory, a claimant might be called upon to prove that work-related stressors are the sole cause of their mental disorder, but they need only prove that fact on a balance of probabilities.
- d) Conversely, a different system could require a claimant to prove that work-related stressors were of "causative significance" beyond a reasonable doubt.

[190] I have outlined the positions of Dr. Young and Dr. Gnam below.

Dr. Young

[191] Dr. Gerald Young is a Professor at York University. His area of interest is psychological injury and the law. He is a co-author of the book *Causality of Psychological Injury: Presenting Evidence in Court* (New York: Springer Science & Business Media, 2007). He is Editor-in-Chief of the journal, *Psychological Injury and Law*. He has written extensively on the topics of causality and psychology, and on issues surrounding malingering.

[192] Each party takes different propositions from Dr. Young's report and testimony.

[193] The plaintiff focusses on the following opinions from Dr. Young:

- a) Trained psychiatrists and psychologists assess causation in individual cases, and they do so by employing the "causative significance" standard. Dr. Young says that that is an appropriate, workable, and ethical standard.
- b) The "predominant cause" test is unworkable. Psychologists are not trained to determine whether work-related events are the predominant cause of a mental disorder. Nor could such a differentiated question be determined by a practitioner with sufficient competence to meet professional and ethical standards. Dr. Young's report states:

the question arises whether the question is valid psychologically, that is, whether psychologists are trained and ethically competent to assess predominant cause as opposed to the less stringent significant, material, substantive cause in forensic disability and related assessments. The answer to this question is No, as justified in this report.

[194] Dr. Young's report continues:

More often than not, to the contrary, there will be a fine line causally that is too difficult to estimate percentage-wise when the causal nexus is putatively close to or at the 50% value for the index event at hand.

Moreover, any psychologist who attempts to decide whether the causal nexus in such cases includes an event at claim that constitutes a causal factor at or above the 50% value for the index event will risk making decisions that are ethically inappropriate, given the lack of scientific and practice direction on the question in our field.

[195] The plaintiff relies on Dr. Young's opinion that assessing mental disorder claims on the "predominant cause" threshold is ethically dubious.

[196] The Province submits that there are significant weaknesses in Dr. Young's opinion evidence.

[197] The first weakness is not a problem with Dr. Young's opinion, but with his understanding of the Board's claims policy. Dr. Young proceeded on the understanding that the "predominant cause" standard required a finding of 51% causation. As outlined above, the Board interprets "predominant cause" to mean the primary cause among several causes (i.e., a plurality). The work-related cause does not have to contribute more than 50 percent to the condition, it only has to be the largest causative factor. Hence, in my opinion, Dr. Young's report addresses the wrong issue.

[198] The second weakness in Dr. Young's opinion is connected to the first and was exposed during cross-examination. In *Causality of Psychological Injury: Presenting Evidence in Court*, Dr. Young wrote a chapter which included the title, "An Ordinal Scale of Degrees of Causality". He wrote:

After an index event such as a motor vehicle accident, sexual assault, or physical impact to the head, mental health assessors may need to estimate the degree of responsibility of the event in eliciting an individual's subsequent psychological symptoms relative to other factors such as pre-existing state and unrelated stressors. The following scale is proposed to assist in attributing cause in such evaluations. It is comprised of five scale points, ordinal in nature: sole cause, preponderant cause, partial cause, minor cause, and absent cause. It should only be used after comprehensive assessment and consideration of all the data gathered.

[199] Dr. Young was cross-examined on the meaning of the term "preponderant cause" in his book. He declined to agree that the terms "preponderant cause" and "predominant cause" were synonymous. However, in drawing that distinction, he clarified that his use of the word "predominant" (in his report) meant "more than 50 percent", whereas "preponderant" (in the cited chapter) meant the main or primary cause among several causes.

[200] The Province submits that Dr. Young's use of the term "preponderant cause" in his book equates to the Board's application of the term "predominant cause" in its policy. Dr. Young was not taken to the Board policy during his cross-examination, but the Province submits, and I accept, that the point was made out in testimony.

- [201] In his book, Dr. Young propounded the "preponderant cause" standard as one that can be used by assessors. The Province submits that it follows that Dr. Young should have no criticism of the workability or the ethics of applying the "predominant cause" test as used by the Board because he promoted the use of that standard (albeit by another name) in his book.
- [202] In short, I accept the Province's submission on Dr. Young's testimony. In my opinion, Dr. Young's opinion and report answered a question that is not before me, namely the "more than 50%" test. That is not the test used by the Board. Further, it would appear that Dr. Young has taken different stances in the past. He has propounded the use of the very standard which he now denounces. Hence, I find that his opinion and report are of little help to me.
- [203] My finding on Dr. Young's opinion does not, however, end the inquiry. The imposition of the "predominant cause" test may still be discriminatory because it is a higher standard than that applied to physical injuries.
- [204] As a result, in my discussion below, I place significant boundaries around Dr. Young's opinion. I do not accept it at face value. It follows that, in the realm of expert opinion evidence on the issue of the reasonableness of the "predominant cause" test, I am left with the opinion evidence of Dr. Gnam.

Dr. Gnam

- [205] Dr. Gnam is a practising psychiatrist, currently employed as the On-Site Occupational Psychiatrist for the City of Toronto. In addition to his medical qualifications, he holds:
- a) a Master's Degree in Physiology (Oxford);
 - b) a Master's Degree in Clinical Epidemiology (Toronto); and
 - c) a PhD in Health Economics (Harvard).
- [206] Not surprisingly, for a person with those qualifications, Dr. Gnam has previously been asked to comment on workers' compensation policies.
- [207] The main points of Dr. Gnam's report are:
- a) Statistics and Research:
 - a) Recent scientific research (the "Duchaine Study") has demonstrated that the causal effect of many workplace factors on disabling mental disorders is small, relative to genetic and childhood factors.

- b) Dr. Gnam discusses this relationship as an "Odds Ratio", meaning a measure of the influence of different factors on the risk of developing a disabling mental disorder. To obtain this ratio, the researchers compared groups of persons who were exposed to workplace stress against groups that were not. The Odds Ratio represents the difference between the percentage of mental disorders reported by the two groups.
 - c) Viewed on a population basis, many chronic stress disorders develop in the absence of exposure to adverse workplace events. Dr. Gnam describes this as a low Odds Ratio.
 - d) Dr. Gnam opines that the existence of this low causal effect (or low Odds Ratio) could lead to high error rates when clinicians make causal inferences in the workers' compensation context. In other words, on a population basis, most claimants would have developed mental disorders in the absence of workplace stressors.
 - e) The low causal effect for "chronic stress" claims sits in contrast to the direct, discernable, and necessary relationship between traumatic events and post-traumatic stress disorder.
- b) The Nature of the Clinician's Individual Investigation:
- a) The most important information that is used by clinicians to determine the causation of any mental disorder is the information that comes from the patient (self-report). This information source distinguishes mental disorders from physical disorders.
 - b) On the issue of self-report, a widely acknowledged problem occurs when a person with a pre-existing mental disorder experiences changes in their perception of events. This change of perception can result in the worker perceiving routine workplace stresses as excessive or harmful. This situation creates the potential for "reverse causation", where an assessor hears a claimant's complaints about their workplace and interprets them as causative, when the actual events may have been benign. Hence, the clinician's opinion on the attribution of fault is based on the patient's misperception of the situation.
- [208] On the subject of the "Odds Ratio" research and the Duchaine Study, Dr. Gnam says that there are obstacles to accurately determining any causal link between workplace exposures and mental disorders. Based on the Duchaine Study, he opines that the causal effect of many workplace factors and disabling mental disorders is small when compared to genetic and childhood factors. This means that there can be high error rates when clinicians attempt to assess the level of causation of workplace stressors. The current scientific literature identifies many causal factors as contributing to mental disorders, with genetic and childhood factors remaining dominant. In contrast, adverse workplace stressors represent only a minor causal factor. The Duchaine Study concludes that work-related factors have a minor influence on the risk of developing a disabling mental disorder.
- [209] Dr. Gnam arrives at the following conclusions:

- a) If the WCB institutes a lower causation threshold for mental disorders, it may result in a significant increase in the number of mental stress claims made each year and their related costs.
 - b) If one accepts the general principle of the Duchaine Study, then most chronic stress conditions would have occurred whether or not the individual was exposed to work-related stressors. Hence, on a population basis, there is the potential that a significant percentage of WCB claims for chronic stress conditions are not, in fact, work-related. In other words, the work-related stressors were not "causative".
 - c) Any such change in policy would lead to an increase in the acceptance rate for chronic stress claims.
 - d) That increase may, in future, represent a financial strain on the workers' compensation system in BC. In this respect, Dr. Gnam points back to the experience in California in the 1980s, though he concedes that it is as a warning, not a direct comparator.
- [210] Based on Dr. Gnam's opinion, the Province submits that many, if not most, mental disorders have no relationship to adverse workplace events. In other words, they would have developed without any work-related stressors. As discussed below, the Province ties this to the argument that the higher standard of causation is required to properly determine whether each claim is, in fact, work-related. By inference, the Province submits that a higher standard of causation in the WCA is necessary to discern which mental disorder claims are unrelated to workplace factors.

The Plaintiff's Submission on Dr. Gnam

- [211] The plaintiff criticizes Dr. Gnam's opinion on several grounds.
- [212] In answer to the financial concerns raised by Dr. Gnam, the plaintiff points to a number of statistics which I discuss below. To foreshadow:
- a) As of 2022, mental disorder claims (both traumatically induced and chronic) made up only 1.9% of all allowed WCB claims; and
 - b) chronic stress claims comprised 0.6% of all claims made.
- [213] Given the WCB's total number of "annual accepted claims" (in the range of 105,000), there are currently approximately 611 accepted chronic stress claims. Accepting the California example as the worst-case scenario, a 700% increase would project to approximately 4,500 accepted chronic stress claims per year. This would still represent less than 4.5% of all accepted claims. On that basis, the plaintiff submits that I should not be swayed by predictions of financial ruin.
- [214] The plaintiff submits that I should:
- a) reject the portions of Dr. Gnam's opinions that run contrary to the plaintiff's positions; and

b) accept the portions that align with the plaintiff's submission.

[215] Based on these submissions, I address the plaintiff's criticisms of Dr. Gnam's report within this part of my reasons. I then return to discuss Dr. Gnam's opinions (the ones that I accept) within the context of the s. 15 test.

[216] The plaintiff's submissions fall under the following headings:

- a) Dr. Gnam's prior academic writing and his evidence in prior hearings do not accord with his opinion in this case.
- b) Read in context, Dr. Gnam's statistical evidence supports the plaintiff's case.
- c) Comparison of "Physical/Mental" Claims versus "Mental/Mental" Claims.
- d) Reliance on self-report is not unique.
- e) The predominant cause test is arbitrary because it is impossible to apply it in the context of mental disorders.
- f) Dr. Gnam's report is internally inconsistent with respect to the ability of clinicians to discern causation based upon individualized assessment.

[217] I address each of these submissions in order.

Dr. Gnam's Prior Academic Writing and Evidence

[218] The plaintiff submits that the opinions expressed in Dr. Gnam's reports are belied, or contradicted, by his prior writing. The plaintiff argues that I should put no weight on Dr. Gnam's evidence. In support of this submission, the plaintiff points to a paragraph in a book chapter written by Dr. Gnam in 2001 which includes the following statement:

In summary, scientific research from several sources strongly supports the view that certain mental aspects of the workplace may lead to medical illness, mental disorder, and other disabling mental conditions. Collectively, the studies cited above provide as strong or stronger evidence of workplace causation than exists for several industrial diseases.

[219] The plaintiff submits that, in this paragraph, Dr. Gnam has essentially admitted that the statistical evidence of "workplace causation" is "as strong or stronger" for mental disorders than it is for several industrial diseases. Thus, if the WCB compensates industrial diseases at the lower standard of causative significance, there is no reason for it to apply a higher standard to chronic stress claims.

[220] The plaintiff notes that Dr. Gnam testified as the Province's expert in Decision No. 2157/09, 2014 ONWSIAT 938 (the "OWSIAT Decision"), a 2014 Ontario Charter case before the Ontario Workplace Safety and Insurance Appeals Tribunal.

- [221] In the OWSIAT Decision, the panel partly relied on the above-quoted sentence from Dr. Gnam's book chapter to conclude that the Ontario legislation was discriminatory. For present purposes, the plaintiff points to the OWSIAT Decision for its reliance on Dr. Gnam's prior academic writing. The panel wrote:
- [244] The evidence that the association between job strain and mental disorder is at least as strong as it is for occupational disease undermines the argument that the mental stress provisions correspond with the circumstances of the claimant group
- [246] The evidence from the Attorney General's expert indicates that the impugned provisions do not correspond with the needs of persons with mental stress disabilities, since Dr. Gnam acknowledged that the impugned provisions are underinclusive and that the epidemiological evidence for job strain and mental disorder is stronger than that available in occupational disease claims. Claims for physical injuries and diseases are subject to similar weaknesses in the epidemiological evidence; as such, there is no logically sound basis for the differential treatment of mental stress claims.
- [222] The plaintiff submits that the panel's comments apply with equal force in this case. He submits that there is no non-discriminatory explanation for why chronic stress claims are subject to the Impugned Provisions when not a single occupational disease is subject to similarly onerous provisions.
- [223] I pause here to note two things about the OWSIAT Decision:
- a) The Ontario statutory provisions in that case excluded all claims in the "chronic stress" realm. The Ontario scheme only covered claims based on "an acute reaction to a sudden and unexpected traumatic event". Hence, the comments and findings of the panel in the OWSIAT Decision do not necessarily translate to the present case.
 - b) The Province submits that the plaintiff seeks to rely on factual findings from another proceeding from a different province and in a different venue. The Province submits that the factual findings of the OWSIAT Decision were based upon the evidence adduced at that hearing. Thus, those specific factual findings have no evidentiary value in this case. I accept this submission.
- [224] The Province further takes issue with the plaintiff's (and the panel's) interpretation of Dr. Gnam's prior academic writing. The plaintiff's submission is that Dr. Gnam conceded in his 2001 chapter that several unnamed industrial diseases have a weaker statistical relationship to the workplace than non-traumatic workplace stressors. In response, the Province notes that this outlier sentence in Dr. Gnam's chapter has been taken far out of context, both by the plaintiff and the panel. I agree with the Province's position on this point.
- [225] Dr. Gnam's chapter does not say that there is a stronger occupational connection between mental disorders and occupational diseases. He did not specify or describe the number of industrial diseases to which he was referring. Dr. Gnam did not write (as the panel did) that "epidemiological evidence for job strain and mental disorder is stronger than that available

in occupational disease claims": OWSIAT Decision at para. 246. Instead, the sentence in his chapter noted that the research available in 2001 showed that the mental disorder connection shows "stronger evidence of workplace causation than exists for several industrial diseases" (emphasis added).

- [226] In my opinion, Dr. Gnam's prior writing can only mean what it says: as of 2001, the prevailing research indicated that there were several industrial diseases that had weaker evidence of workplace causation than disabling mental conditions.
- [227] In my opinion, the sentence from Dr. Gnam's chapter excerpted above is of limited assistance to the plaintiff. The chapter did not identify or quantify the "industrial diseases" (in B.C., "occupational diseases") that were in issue. There is no evidence that these unidentified diseases are recognized by the current legislation in B.C. Further, assuming that every occupational disease exists on a spectrum of "strength of evidence of workplace causation" from strongest to weakest, these diseases may have represented the bottom end of that spectrum.
- [228] The plaintiff's main point is that there is no occupational disease that is subject to the higher "predominant cause" standard. However, again, I have no evidence as to the diseases to which Dr. Gnam was referring in 2001. Further, the state of the research has improved since 2001.
- [229] Further, even if the occupational diseases were to be identified, I accept the Province's position that, within the WCA, there are distinctions between occupational diseases themselves. Some occupational diseases are presumed to be work-related. Others are compensable, although without a statutory presumption. The WCA and Board policies therefore contain many distinctions between different types of medical conditions. I address the existence of distinctions between different conditions below in my analysis of the s.15 factors. As noted, the Province accepts that there is a distinction.
- [230] Still further, I accept the Province's submission that, because the Ontario legislation completely excluded chronic stress claims, it is not possible to make an "apples to apples" comparison to the tests in the B.C. legislation.
- [231] For these reasons, I do not accept that Dr. Gnam's prior writing, in combination with the OWSIAT Decision, weakens Dr. Gnam's opinion in this case. In my opinion, the OWSIAT Decision took Dr. Gnam's prior writing out of context. Further, in my opinion, Dr. Gnam's book chapter:
- a) was based upon the research as of 2001;
 - b) does not say that all occupational diseases have a lower Odds Ratio than mental disorders, particularly chronic stress claims.

Read in Context the Statistical Evidence Supports the Plaintiff

[232] In a similar vein, the plaintiff points to para. 24 of Dr. Gnam's October 30, 2023 report (filed in this action), wherein he wrote:

There is now strong and, in my opinion, conclusive evidence that exposure to certain enduring characteristics of jobs and workplaces are causal factors with respect to the development of mental disorders that cause work absence. The most compelling evidence of this causal association comes from a very recently published Systematic Review and Meta-analysis by Duchaine et al

[233] The plaintiff submits that these sentences provide evidence of the arbitrary nature of the Impugned Provisions. The plaintiff submits that if the best research shows that there is a causal relationship between workplace characteristics and mental disorders, then chronic stress claims should not be subject to a higher standard.

[234] I do not accept this submission.

[235] In my opinion, the plaintiff's submission takes this portion of Dr. Gnam's report significantly out of context. Within this section of his report, Dr. Gnam relies on the Duchaine Study. His ultimate point is to the opposite effect of the paragraph cited above. He notes that a statistically significant causal relationship does not necessarily mean a strong causal relationship. The report states that, while there is a statistically significant causal relationship, it is necessary to examine the magnitude (strength) of that relationship (the Odds Ratio). Relying on the Duchaine Study data, Dr. Gnam found that when he compared the distribution of the risk of developing a disabling mental disorder for workers with and without exposure to psychosocial stress was represented as two normal distributions, there was considerable risk overlap between those participants who were exposed to workplace stress, and those who were not. Dr. Gnam wrote at para. 26:

The importance of understanding the magnitude of the increased risk can be appreciated by noting that in the studies included in the Duchaine meta-analysis, there were [a] considerable number of workers who developed a disabling mental disorder, but who were not exposed to the psychosocial workplace stress. This important observation implies that a significant number of the workers exposed to the workplace stress would have developed a mental disorder even if they had not been exposed. The fact that numerous workers in these studies who developed mental disorders were not exposed to the workplace psychosocial stresses being studied is consistent with the scientific evidence demonstrating the importance of genetic and early life experiences in the causation of mental disorders such as Major Depressive Disorder, implying that many workers develop mental disorders spontaneously, without an identifiable precipitating or causal factor

[Emphasis in original.]

[236] When the report is read in full, Dr. Gnam's point is that, at the population level, the research shows that it is difficult to distinguish between which causal factors (work-related versus non-work-related) lead to mental disorders.

[237] In furtherance of this point, Dr. Gnam undertook a statistical analysis of the risk of developing a disabling mental disorder among workers who were exposed to a type of workplace psychosocial stress versus workers who were not exposed. When the risk for both groups was represented as two normal distributions, the two distributions overlapped by 87.7%. This means that, on a population basis:

- a) if a clinician assessed a large group of workers who were disabled by a mental disorder and had been exposed to workplace stress (not including trauma),
- b) and the clinician found that exposure to workplace psychosocial stress was a causal factor in every case of a worker with a disabling mental disorder who was exposed to psychosocial stresses at work,
- c) that finding would only be correct in 12.3% of the cases.

[238] Dr. Gnam arrived at the figure of 12.3% because in 87.7% of cases, the risk existed that mental disorders would have developed even if the worker had not been exposed to workplace stress.

[239] I do not accept the plaintiff's interpretation of Dr. Gnam's report as supporting the plaintiff's assertions. Dr. Gnam does opine that there is a causative relationship between work-related stressors and mental disorders. However, his full opinion is as follows:

- a) There is conclusive evidence that exposure to certain enduring characteristics of jobs and workplaces are "causal factors" with respect to the development of mental disorders that cause work absence.
- b) However, a considerable number of workers would develop those mental disorders without the associated job stress.
- c) The overlap between those figures is very high.
- d) Hence, there is a reason to put in place a higher causative standard for WCB claims to ensure that the WCB only compensates truly work-related injuries and conditions.

[240] There is an important limitation to this aspect of Dr. Gnam's opinion which relates to population studies and group statistics. The statistical analysis does not account for the individual facts of a given case. As noted above, both Dr. Gnam and Dr. Young agree that each claim must be evaluated on an individual basis and that population studies, by definition, do not account for individual clinical examination.

Comparison of "Physical/Mental" Claims v. "Mental/Mental" Claims

[241] To place this next submission in context, some explanation of the WCA provisions regarding other mental health disorders is required.

- [242] Under s. 134 of the WCA, where a claimant suffers both a physical injury and related mental disorder, the mental disorder is compensable if it meets the "causative significance" test. For example, if a worker suffers a knee injury that causes a long period of inactivity and subsequently develops depression, their depression will be compensated if the underlying knee injury was "of causative significance". These are often referred to as "physical/mental" claims. They are distinct from "mental/mental" claims where a person suffers a mental disorder in the absence of trauma or physical injuries.
- [243] The plaintiff points to Dr. Gnam's statistical analysis of "physical/mental" claims. According to Dr. Gnam's report, the Odds Ratio for certain "physical/mental" claims is 1.36. Without delving too far into the statistical analysis, this represents a relatively low probability that the worker's physical injury will lead to the development of a mental disorder. The plaintiff notes that an Odds Ratio of 1.36 is weaker than the Odds Ratio for many of the workplace stressors leading to mental disorders (according to the research Dr. Gnam relies on in his report).
- [244] To provide clarity on Dr. Gnam's point in these paragraphs, his report specifically discusses the statistical relationship between being injured at work and developing depression. Dr. Gnam's report indicates that this Odds Ratio is relatively low, even when compared to the Odds Ratio for individuals who suffer non-work physical injuries. To be clear, he is only talking about one type of mental disorder in one specific context: depression after injury. He further completes the same paragraph by noting that, in his opinion, these estimates "are preliminary and require further high-quality prospective cohort studies". In other words, there is no conclusive body of studies on this issue. I accept Dr. Gnam's caution that not much can be derived from these figures.
- [245] With that context in mind, the plaintiff submits that when you compare the Odds Ratio of "physical/mental" claims against "mental/mental" claims arising from workplace stressors, a higher percentage of individuals will develop mental disorders after being exposed to certain workplace stressors. The plaintiff notes that "physical/mental" claims are not subject to the higher "predominant cause" standard. The plaintiff submits that this difference undermines any argument that population studies dictate a higher causative standard in the Province's workers' compensation system.
- [246] The Province submits that there is an underlying problem with this argument: it points to a distinction within the assessment of different types of mental disorder claims when compared among themselves. The Province submits that, by implication, the plaintiff's argument is to the effect that:
- a) the Board does not discriminate against people with "physical/mental" claims, so
 - b) why are they discriminating against these people with "mental/mental" claims?
- [247] In other words, the argument is that one type of mental disorder claim receives preference over others.

- [248] I pause to note that, within this context, I accept that legislation which targets only a subset of workers with mental disorders can still be discriminatory. In *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54 at paras. 75-76 [Martin], the Supreme Court of Canada rejected the argument that because the legislation targeted only a subset of workers with physical disabilities (those with chronic pain), there was no distinction based on physical disability. It follows that it is possible for the WCA to discriminate against a subset of individuals in a protected group.
- [249] However, on this point, the Province submits that the plaintiff must provide "a clear definition of the protected group": *Li v. British Columbia*, 2021 BCCA 256 at para. 180. In *Li*, the Court considered the effect of the foreign buyer's tax provisions within the Property Transfer Tax Act, R.S.B.C. 1996, c. 378. The appellant argued that the tax discriminated on the basis of citizenship. However, the Court accepted the Province's argument that the distinction in the Act was based on immigration status, not citizenship. Justice Fisher wrote for the Court:
- [180] Respectfully, the appellant's argument that the only relevant factor is that all persons who pay the tax are non-citizens is too simplistic. Differential treatment can clearly occur among a subset of the protected group, as not all persons belonging to the protected group need be equally mistreated. The key, though, is a clear definition of the protected group defined by the applicable enumerated or analogous ground. For example, a distinction on the basis of sex may only affect pregnant women (*Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219); a distinction on the basis of disability may affect only chronic pain sufferers (*Martin*) or deaf people (*Eldridge*): see *Fraser* at paras. 72-75.
- [181] Here, the tax draws a distinction based on citizenship combined with another ground--permanent residence--that is neither an enumerated nor an analogous ground. While it is true that no citizens are required to pay the tax, non-citizens fall on both sides of the line drawn by this dual distinction.
- [182] Therefore, it is my view that the tax provisions draw a distinction based on immigration status, not citizenship
- [250] The Province submits that the same reasoning applies here. Within the WCB scheme, various mental disorders are subject to various adjudication tests. The same is true with respect the tests for various physical injuries and occupational diseases. Hence, the Province submits that there is nuance to the adjudication of all claims, physical and mental.
- [251] Consistent with the treatment of mental disorder claims, the WCA and Board's policies impose differing requirements for physical conditions which are dependent on various objective factors. The Province submits that, in order to accept the plaintiff's overall proposition, I would have to accept that the legislation discriminates against some persons with mental disorders, but not others.

- [252] I note that the Province made similar arguments in Plesner which were rejected by the Court of Appeal.
- [253] In my opinion, this criticism of Dr. Gnam's report is valid, but it is not particularly helpful to the plaintiff. As noted, the Province acknowledges the legislation distinguishes chronic mental stress claims from other claims. The Province's argument is that there are good policy reasons for that distinction. Hence, evidence of distinctions does not equate to evidence of discrimination. As noted above, the WCA and the Board policies contain many distinctions among the assessment of different types of conditions. Those differences occur within a system that assesses multiple types of claims. There is no "one size fits all" assessment method.

Reliance on self-report is not unique to mental disorders

- [254] A portion of Dr. Gnam's report is devoted to the elements of chronic stress claims that are distinguishable from claims resulting from a physical injury. Dr. Gnam's point is that chronic stress claims are different (unique) because they rely so heavily on the claimant's self-report.
- [255] The plaintiff submits that Dr. Gnam's report is incorrect on this issue. The plaintiff says that reliance on self-reported symptoms is not unique to mental disabilities. The attribution of causation for certain physical ailments, such as chronic pain, muscle strains, and back injuries, relies significantly on the individual's self-report. For example, a labourer with pre-existing back pain who suffers a back injury while cleaning their gutters on the weekend can easily report that the injury was caused by lifting a heavy object at work on the next workday. The analysis of that worker's claim would be adjudicated on the "causative significance" standard. There is nothing in that standard that requires a higher test to ensure that the injury is, in fact, work-related.
- [256] The plaintiff points to statistics from 2020, showing that claims for "back strain" exceeded mental disorder claims by more than 600%. Back strain claims accounted for 15.3% of all "days lost to injury" in that year.
- [257] The plaintiff submits that the notion that a reliance on self-reporting makes mental disorder claims categorically different than physical claims is unsustainable.
- [258] In my opinion, this criticism of Dr. Gnam's reports is overstated. As with most expert opinions, Dr. Gnam does not isolate "self-reporting" as the sole basis for distinguishing mental disorder claims. Instead, it is simply one of the elements that he considered in coming to his overall opinion.
- [259] Further, the plaintiff and Dr. Gnam were talking at cross-purposes. The plaintiff was attempting to establish that chronic mental disorder claims are not unique in relying on self-reports. Dr. Gnam's opinion was that mental disorder claims are unique. They are unique for a number of reasons. One of those reasons is that they are heavily reliant on self-

report. In my opinion, there is room for both of these propositions to be true. Moreover, based upon the entirety of Dr. Gnam's reports and testimony, I am satisfied that the nature and origin of chronic mental disorders is different from the nature and origin of other conditions.

[260] Dr. Gnam's reports do not state that self-report is the only source of information for the clinician or the assessor, but rather that assessors are heavily reliant on self-reports.

[261] Further, Dr. Gnam's opinion on this subject noted the absence of definitive standardized testing for determining the cause of a mental disorder. In his second report (which responded to Dr. Young's report), Dr. Gnam wrote:

Dr. Young's professed confidence in the multi-modal-multimethod assessment to produce accurate and fair causation opinions in the workplace setting is not supported by scientific evidence. Moreover, Dr. Young's Report does not acknowledge any of the inherent challenges of conducting workplace causation assessments, when gathering all the relevant information in an objective manner is sometimes not possible, when the nature and severity of the workplace exposure sometimes cannot be objectively determined, and when the causal effects of some adverse workplace exposures are so small/weak that opinions that the factor has more than de minimus causal impact will, much more often than not, be erroneous. Dr. Young has promoted the multi-modal-multimethod approach to causal determination without adequately acknowledging the complications and inherent limitations to applying this method in the workplace context

Assessors determining causation related to workplace events or stressors cannot rely upon any sort of standardized tests, including psychometric tests, written or otherwise, because such scientifically validated tests do not exist it is important to emphasize that psychological tests of validity have a limited range of applicability, and they do not measure or assess the truthfulness or accuracy of patient's self-report of many other aspects of their history that are important for causation determination, including the nature and intensity of the workplace stressor/exposure, the temporal association, the presence of other life stressors or adverse events that are independent of work, and vulnerability factors such past psychiatric history and family psychiatric history

In my opinion, it is important to emphasize that a comprehensive assessment, whether labelled as "multi-modal-multimethod" or not, often cannot overcome these inherent and intractable barriers to the Assessor being able to make fair and valid causal inference.

[262] The plaintiff's main point is that there are some physical conditions (e.g., chronic pain) that are similar to chronic stress claims because they rely on self-reports and are not amenable to standardized testing. Those physical claims are not subjected to the higher causation standard. However, I accept Dr. Gnam's opinion that chronic mental disorders have a unique causation profile.

[263] Again, I prefer Dr. Gnam's opinion over Dr. Young's. I find Dr. Gnam's exposition on this issue to be logical and supportive of his overall opinion. I accept that the assessment of mental disorder claims requires a review of all information, but that assessors are heavily reliant upon self-reporting. While there are some physical conditions that also rely on self-reporting, those conditions are more amenable to standardized testing. Hence, the causation profile for chronic stress claims is unique."

The predominant cause test is arbitrary because it is impossible to apply it in the context of mental disorders.

[264] The plaintiff submits that the predominant cause standard is arbitrary and impossible to apply it in the context of mental disorders. The plaintiff submits that Dr. Young and Dr. Gnam agree that it is not possible to assign percentages to various causal factors. For example, there is no evidence indicating how a clinician could calculate the percentage contribution of work-related stressors versus the contribution of a claimant's genetic makeup or early childhood experience. The plaintiff submits that, using the "causative significance" standard, it would be sufficient for a clinician to say that the workplace stressor contributed significantly. However, the clinician has no way of determining that the same workplace stressor contributed to a greater degree than the claimant's genetic makeup. Hence, the plaintiff argues Dr. Gnam's support of the higher standard cannot be accepted as being reasonable.

[265] The main problem with this criticism of Dr. Gnam's opinion is linked to Dr. Young. As noted above, Dr. Young, in earlier writing, propounded a spectrum of levels of causation for psychological injury. That spectrum included "preponderant cause", which Dr. Young defined as the primary cause among several causes. I am unable to accept the plaintiff's argument on this point. The plaintiff's expert has previously written in support of the same standard that is propounded by Dr. Gnam. Further, the workability of the predominant cause standard is demonstrated by the WCB applying it for the past several years. As noted above, a certain percentage of claims have been accepted. It follows that the higher standard is workable.

[266] Further, without treading on the expertise of Dr. Young and Dr. Gnam, I have difficulty with the plaintiff's submission that an adjudicator would be able to:

- a) identify multiple causes in a specific case,
- b) and determine that one factor had "causative" (i.e., more than trivial) significance,
- c) but would be unable to determine which of several factors was "predominant" (meaning most important) among the factors.

[267] I accept Dr. Gnam's opinion on the workability of the predominant cause test. It is not impossible to apply in the context of mental disorders. It does not require the assessment of specific percentages of cause, only an ordinal finding of the most important cause.

Dr. Gnam's report is internally inconsistent with respect to the ability of clinicians to discern causation based upon individualized assessment.

- [268] The plaintiff submits that Dr. Gnam's evidence with respect to individualized assessment of causation is confusing and contradictory.
- [269] Starting from that premise, the plaintiff submits that when read in full context, Dr. Gnam agrees that qualified practitioners can assess causation in individual cases.
- [270] Again, to put this submission in context, Dr. Gnam's opinion, in part, is that a higher standard of causation is required for mental stress claims in order to ensure that only work-related cases are accepted and approved. The theory behind that opinion is that a lower standard (causative significance) would lead to acceptance of many non-work-related claims. This could open the gates too wide and result in financial strain.
- [271] The plaintiff submits that, while Dr. Gnam's report suggests that trained psychologists and psychiatrists cannot assess causation in individual cases (absent trauma), he clarified in cross-examination that individual assessment can occur for stressors such as bullying and harassment. The plaintiff submits that Dr. Gnam also conceded in cross-examination that clinicians can assess causation for mental disorders and, indeed, must do so for some DSM diagnoses. For example, the diagnosis of an adjustment disorder requires a finding of causation. By definition, these patients are disordered by the requirement that they adjust to new stressors in their lives. Hence, those stressors must be identified.
- [272] The plaintiff argues that if you accept that clinicians can assess causation in mental stress claims, then there is no need for a higher standard ("predominant cause") to root out claims that are not work-related. The flipside of this argument is that, although certain physical conditions present similar problems, none of those physical conditions are tested on the higher standard.
- [273] The plaintiff submits that, on this point, Dr. Gnam's opinion accords with Dr. Young's: individual assessment is required, and clinicians are able to assess causation to some level.
- [274] In my opinion, Dr. Gnam's opinion is not internally inconsistent. Instead, Dr. Gnam views the problem using a different lens than Dr. Young and the plaintiff.
- [275] On this point, Dr. Gnam opines that even when the list of potential causal factors is identified, there is no accepted or validated method for assigning attribution among the factors. He notes that there are no reproducible or valid clinical methods for adjudicating the relative causal importance of the multiple factors that might be relevant for any specific individual who has developed a disabling mental disorder.
- [276] In this regard, Dr. Young placed significantly more faith in testing protocols than Dr. Gnam. In large part, Dr. Young's opinion rests on the proposition that testing protocols can weed out non-work-related conditions on the "causative significance" standard. Dr. Gnam disagrees.

- [277] In my opinion, Dr. Gnam's opinion is consistent with respect to individualized assessment. In Dr. Gnam's opinion, that exercise is necessary, but it is made difficult by the inherent nature of the formation of chronic mental disorders.
- [278] For example, Dr. Gnam emphasizes the role played by genetic and early childhood factors. He notes that genetic and early childhood factors likely contribute to all mental disorders but may be difficult or even impossible to identify for an individual patient. That being the case, it may be impossible to weigh the relative importance of workplace factors against genetic or early childhood factors.
- [279] In my opinion, this is a unique factor in the assessment of chronic mental health claims and their causation. I accept Dr. Gnam's opinion on this point.

Summary of Findings on Dr. Gnam's Opinions

- [280] I have outlined above the reasons why I have discounted Dr. Young's opinion. Having made that finding, the remaining expert evidence on the issue of the assessment of mental disorder claims is provided by Dr. Gnam.
- [281] The plaintiff made several submissions on various reasons why Dr. Gnam's opinions should not be accepted. I have reviewed those arguments above. In my opinion, while there may be a basis for reasonable people to disagree, there are no inherent weaknesses in Dr. Gnam's opinions.
- [282] I note that Dr. Gnam refers to the 1980s workers' compensation experience in California when the state introduced a combined test that was purely subjective and had a low causation threshold. Mental disorder claims soared, and the test standard had to be tightened up to protect the financial viability of the system. Dr. Gnam holds out the California experience as a cautionary tale. In my opinion that comparison, and that danger, are not directly transferrable to the B.C. situation. As noted, there is no challenge to the objective requirement that is included in s. 135(1)(b). There are other parts of the test in s. 135(1) that provide significantly more rigour than the purely subjective test adopted by California.
- [283] With that said, the upshot of Dr. Gnam's opinion is that if the WCB institutes a low causation threshold for mental disorders, there is a prospect (he says more likely than not) that there would be a significant increase in "chronic stress" claims and related costs. Dr. Gnam's opinion is that, on a population level, if a hypothetical assessor assumes that the workplace contributed to the condition, the majority of those claims would be mis-assessed as being work-related. In other words, in the majority of cases, the claimant would have developed the mental disorder in the absence of work-related stressors.
- [284] Of course, the Province is not allowed to discriminate against persons with valid, work-related chronic stress claims in order to protect the financial viability of the system. The system should adjust to those individuals.

[285] However, Dr. Gnam's opinion does not suggest or promote a system that discriminates. In my opinion, Dr. Gnam's concern about the financial viability of the system is the end point, not the starting point of his analysis. He places a lens on the issue that views the financial viability of the system as a byproduct of a hypothetical claims system (with a low causation standard) that would allow a significant number of claims that are not work-related. In other words, his opinion starts with the proposition that only work-related claims should be accepted. He warns of the statistical dangers that are exposed in the research. His opinion is that a higher causative standard is required because of the unique nature of chronic stress claims. That higher standard will protect the financial viability of the system by ensuring that the claims that are accepted are truly work-related.

[286] In my opinion, Dr. Gnam's opinion is sound and internally consistent. I find that there is a research-based reason to apply a higher causal standard to chronic mental disorder claims.

Summary of Findings on the Four Areas of Evidence

[287] As noted above, the evidence in this trial fell into four broad areas. My findings in each area are as follows:

- a) I reviewed the facts and findings relating to Mr. Pickering's WCB claim above. I find:
 - i. The higher "predominant cause" standard was a part, but not the deciding factor, in the Board's decisions and the WCAT Decision on Mr. Pickering's claim. The WCAT found that Mr. Pickering's claim met the "predominant cause" test and was work-related.
 - ii. Mr. Pickering's claim was denied because of the Labour Relations Exclusion.
- b) I reviewed the legislative history. As noted, I accept Mr. Tanner's evidence as to the reasons why the "predominant cause" standard was added into the amending statute in 2011. I do not accept the plaintiff's submission that it was added as a cost control measure.
- c) On the evidence setting out the statistical analysis of physical and mental claims, I accept that chronic mental stress claims have a lower acceptance rate than other claims, including other chronic conditions.
- d) On the expert evidence:
 - i. I accept that persons with mental health conditions have historically been discriminated against in our society.
 - ii. I accept that there can be situations where the Labour Relations Exclusion leads to the denial of claims where the employer's decision was not made in good faith.
 - iii. I prefer Dr. Gnam's opinion over Dr. Young's. I accept Dr. Gnam's opinion that there is research that provides a reasoned basis for applying a higher causal standard to chronic mental health claims in order to ensure that the claims that are accepted are, in fact, work-related.

[288] With those findings of fact made, I now proceed to address the submissions on the law.

Section 15 of the Charter and the Applicable Tests

[289] Before beginning the discussion of the Charter issues, I set out here the issues and non-issues that affect the analysis.

[290] First, I note, and accept, the following general tenets:

- a) Constitutional issues should not be addressed unless necessary.
- b) I am to presume that the legislature intended to comply with all limits on its jurisdiction. If there is an ambiguity, and if possible, I am to read the Impugned Provisions in a manner that is constitutional.
- c) If Mr. Pickering's claim can be resolved by addressing only one of the two Impugned Provisions, then I should pursue that option.
- d) When addressing the appropriate remedy (if necessary), I should apply the doctrine of "reading down" to the extent possible.
- e) Section 15(1) protects substantive, and not merely formal, equality: *Taypotat* at para. 17.
- f) "[N]ot all distinctions and differentiations created by law are discriminatory": *R. v. Kapp*, 2008 SCC 41 at para. 28, citing *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 182, 1989 CanLII 2.
- g) Section 15 does not protect a right to "identical treatment": *Kapp* at para. 27.

[291] I also find it convenient to address here the Province's submission regarding issues as to the correct comparator group.

What is the appropriate comparator group?

[292] As an overarching submission, the Province raises the issue of the proper "comparator group". Cases addressing s. 15 rights, by definition, require a comparative analysis. The investigation looks into whether the plaintiff's group is being treated equally. The question inevitably arises: as compared to whom?

[293] The Province submits that the plaintiff has chosen an inapt comparator group. The Province says that it is inappropriate to compare "mental/mental" claims against "physical/mental" claims (see paras. 241-253 above). It also submits that any comparison to occupational diseases is inappropriate because, within the WCA and Board policies, there are different causative standards that apply to different diseases.

- [294] In response to this argument, the plaintiff submits that the need for a formalistic "mirror comparator group" has long been abandoned. The plaintiff submits that attempts to define a singular appropriate comparator group obscures the proper focus of the substantive equality analysis: the impact of the law on historically disadvantaged groups. The plaintiff points to Ontario (Attorney General) v. G, 2020 SCC 38 (which I refer to as the "G Decision"), where the Court said:
- [45] In *Andrews*, this Court interpreted the Charter's broadly worded equality rights guarantee as a clear repudiation of the formalism that had dominated under the Canadian Bill of Rights, S.C. 1960, c. 44, whose more limited equality guarantee was rendered ineffectual by narrow interpretation (p. 170). Recognizing that identical treatment may produce inequality and that different treatment may not always produce inequality, the Court properly highlighted the law's impact on individual claimants and groups as the main consideration (pp. 164-65).
- [46] Since then, the Court has remained vigilant in its jurisprudence in guarding the s. 15(1) analysis from incursions by formal equality approaches (see *Centrale des syndicats*, at paras. 25-26; *Withler*, at para. 43). To this end, it has eschewed a formalistic analysis based on "mirror comparator groups" because the search for the "proper" comparator group obscured the oppressive nature of some laws (*Withler*, at para. 2)
- [Emphasis added.]
- [295] I accept the plaintiff's submission. Finding an appropriate comparator group may or may not be important in any particular case. In reaching the opinion that a "mirror" group is not required, I take confidence from the Court of Appeal's discussion of that issue in *Plesner*, where Justice Prowse wrote:
- [121] In my view, the comparator group chosen by WCB, those who suffer purely mental stress but who are able to satisfy the description of a "traumatic event" under s. 5.1(1)(a), is not the appropriate comparator group. This group is also disadvantaged in relation to those who suffer work-related physical injuries and fall under s. 5(1), because they, too, have to satisfy the burdensome criteria of an acute reaction to a sudden and unexpected "traumatic event" in s. 5.1(1)(a), as further defined under Policy 13.30, in order to obtain compensation. I do not read any of the decisions to which counsel have referred as requiring that the claimant choose as a comparator group a group which is arguably equally disadvantaged, while ignoring an obvious comparator group which receives the benefits the claimant is seeking. As stated in *McIvor*, (at para. 76), "all the complainant must show, in order to pass the first stage of analysis of a s. 15 claim, is that there is at least one appropriate comparator group which is afforded better treatment than the one to which he or she belongs".
- [296] As I have noted, the *Plesner* decision addresses a precursor provision in the WCA. In my opinion, *Plesner* considered almost the same issue and almost the same subgroup of the population. I do not consider the comparator group to present any difficulty for my analysis.

[297] Hence, the question is whether there is another group that is afforded better treatment than Mr. Pickering's group. I address that issue below.

Section 15 and the Sharma Two-Step Analysis

[298] All of the discussion above leads me to a consideration of the principles to be applied under s. 15 of the Charter.

[299] Section 15(1) of the Charter provides that:

Equality before and under law and equal protection and benefit of law

15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical ability.

[300] Counsel referred me to Justice McIntyre's description of discrimination under s. 15 in *Andrews* at 174-175. Although penned in the early days of Charter litigation, it is still apt and oft-cited:

I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

[301] As noted above, I address the issues before me in a two-step analysis from *Sharma*:

- a) Step 1: Does the provision create a distinction based on an enumerated or analogous ground, on its face or in its impact?
- b) Step 2: Does the provision impose a burden or deny a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage?

[302] The steps overlap but must be addressed separately.

[303] As to the evidentiary burdens, at Step 1:

- a) "the claimant must establish a link or nexus between the impugned law and the discriminatory impact": *Sharma* at para. 44.
- b) "To give proper effect to the promise of s. 15(1), a claimant's evidentiary burden cannot be unduly difficult to meet": *Sharma* at para. 49.

[304] At Step 2, it is clear that not all distinctions are discriminatory: *Sharma* at paras. 51, 53:

- a) the claimant is required to establish that the impugned law imposes burdens or denies benefits in a manner that has the effect of reinforcing, perpetuating, or exacerbating the group's disadvantage;
- b) factors that may assist a judge in determining whether claimants have met their burden at Step 2 include, but are not limited to, arbitrariness, prejudice, and stereotyping.

[305] In *Sharma*, Justices Brown and Rowe, writing for the majority, described the distinction between step 1 and step 2 as follows:

[31] The first step examines whether the impugned law created or contributed to a disproportionate impact on the claimant group based on a protected ground. This necessarily entails drawing a comparison between the claimant group and other groups or the general population (*Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 164). The second step, in turn, asks whether that impact imposes burdens or denies benefits in a manner that has the effect of reinforcing, perpetuating, or exacerbating a disadvantage. The conclusion that an impugned law has a disproportionate impact on a protected group (step one) does not lead automatically to a finding that the distinction is discriminatory (step two).

[Emphasis in original.]

[306] In *Taypotat*, Justice Abella provided a more comprehensive description of the second step:

[20] The second part of the analysis focuses on arbitrary - or discriminatory - disadvantage, that is, whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage:

The root of s. 15 is our awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed. If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory. [*Quebec v. A*, at para. 332]

[Emphasis added.]

[307] While there may be overlap in the evidence at each step, the two steps ask fundamentally different questions. As such, the analysis at each step must remain distinct. I address each of these aspects and considerations below.

[308] Under step 1, I address the Impugned Provisions together. However, I discuss the Impugned Provisions separately under step 2.

Step 1: Do the impugned provisions create a distinction based on enumerated grounds?

[309] The first question (Step 1) is whether the challenged law, on its face or in its impact, draws a distinction based on an enumerated or analogous ground.

- [310] There are two routes to finding a "distinction". Some provisions create a distinction that is apparent from reading the legislation. In those cases, the first step can be satisfied by simply reading the relevant text.
- [311] Alternatively, a provision may, on its face, appear to be neutral, but it may have an adverse impact on individuals with a particular protected characteristic. The plaintiff must show that the law has, or contributes to, a disproportionate impact on individuals with that protected characteristic.
- [312] The plaintiff submits that the legislation cannot be construed as "facially neutral" with respect to mental disability:
- a) Section 135 is entitled "Mental Disorder", which distinguishes it from s. 134, "Compensation for personal injury or death".
 - b) The text of s. 135 expressly refers to the enumerated ground of mental disorder.
 - c) A more onerous test is applied to chronic stress claims. The Labour Relations Exclusion applies to mental disorder claims and no other types of claims.
- [313] In response, the Province submits that s. 135(1)(a)(ii) (the "predominant cause") is facially neutral. It says that the Impugned Provisions distinguish on the basis of the originating cause of the disorder, as opposed to the enumerated ground itself. The Province argues that in prior cases cited by the plaintiff, the legislation barred all claims of a particular type. For example, in *Martin*, the legislation excluded claims for chronic pain. The Province submits that, in this case, the Impugned Provisions allow that all (work-related) mental disorders are covered by the WCA, but they distinguish based on the mechanism of injury (or disorder). The provisions do not distinguish on the basis of any applicable enumerated or analogous ground.
- [314] The Province points to analogous examples with respect to occupational diseases. Some occupational diseases are adjudicated on the "causative significance" standard. However, for others (listed in Schedule 1 of the Act), the nature of the worker's employment is deemed to be the cause of the disease, unless the contrary is proven.
- [315] In my opinion, the Impugned Provisions are not facially neutral. Section 135(1)(a)(ii) and s. 135(1)(c), on their face, create a distinction and place additional burdens on persons with chronic mental disorders.
- [316] As noted in *Sharma*, the plaintiff bears the burden of establishing that the Impugned Provisions contributed to a disproportionate impact on the claimant group based on a protected ground. To do this, the plaintiff must compare one group to another group. I address each Impugned Provision in order:

- a) With respect to s. 135(1)(a)(ii) ("predominant cause"), claimants with chronic mental health conditions face a higher standard than both claimants who suffer physical injuries and claimants who suffer psychological reactions to traumatic events.
- b) With respect to s. 135(1)(c), the Labour Relations Exclusion, all "mental disorder" claimants must establish that their condition was not caused by a decision of their employer. This is not a hurdle that any physical injury claimant must establish. I return to this analysis below in Step 2.

[317] In short, I do not accept the Province's submission that the provisions distinguish based on the originating cause of the disorder. The Province made a similar submission in Plesner and the majority rejected it. Justice Prowse wrote:

[122] Nor am I persuaded by the Attorney General that the impugned provisions do not draw a distinction between workers like Mr. Plesner and others based on one or more personal characteristics (namely, mental disability). Counsel for the Attorney General submits that s. 5.1(1)(a) merely establishes an objective test for causation which is required because of the relative difficulty in proving purely mental injuries as compared with physical injuries. Counsel says that it is the nature of the event, rather than any personal characteristic of the worker, or the nature of the injury, which is the relevant distinction raised by s. 5.1(1)(a). She submits that this distinction is simply an exercise in legitimate line-drawing by the Legislature designed to assist the tribunals in determining whether mental injuries are work-related.

[123] I agree that the Legislature and WCB are entitled to establish laws and policies, respectively, to assist those who have to administer the Act, but they must do so in a manner which is not discriminatory within the meaning of s. 15. To say that the impugned provisions are merely about causation and line-drawing by government is, with respect, to sidestep the purpose of the analysis, which is to determine whether in drawing lines and setting tests for causation for those with purely mental injuries, the Legislature and policy makers have discriminated against some of the very persons for whose benefit the compensation scheme was designed, namely workers who have suffered a mental disability arising out of and in the course of their employment.

[Emphasis added.]

[318] Put simply, the WCA creates a distinction (a higher standard) for persons with chronic stress claims. It also excludes a subgroup of mental disorder claims that were caused by an employer's decision via the Labour Relations Exclusion.

[319] With respect to Step 1 of the test, I accept the plaintiff's submission that the purpose and effect of s. 135(1)(a)(ii) and s. 135(1)(c) of the WCA are to create a distinct statutory regime that, by definition, applies only to persons who submit claims for chronic mental disorders. Neither provision in the legislation can be construed as being "facially neutral" with respect to mental disability. Section 135 imposes a higher standard of causation ("predominant

cause") on employees who suffer from chronic mental disorders. It also imposes the Labour Relations Exclusion, which does not apply to physical injury claims.

[320] Hence, I find that the plaintiff has satisfied Step 1 of the Sharma Test. The Impugned Provisions create a distinction based upon enumerated grounds.

Step Two: Do the Impugned Provisions impose burdens or deny benefits in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage?

[321] The second step of the s. 15 test asks whether the Impugned Provisions impose burdens or deny benefits in a manner that has the effect of reinforcing, perpetuating, or exacerbating the group's disadvantage: Sharma at para. 51. This assessment focuses on the situation of the group in question in the context of the legislation as a whole. The question centers around whether the distinctions found in Step 1 are "arbitrary" or involve prejudice or stereotyping. Some of this analysis overlaps with Step 1.

[322] The Supreme Court's decision, in Sharma at para. 55, provides the following guidance on the evidentiary burden at the second step of the inquiry:

- a) The claimant need not prove that the legislature intended to discriminate.
- b) The court may take judicial notice of notorious and undisputed facts, or of facts which are capable of immediate and accurate demonstration, by resorting to readily accessible sources of indisputable accuracy.
- c) Courts may infer that a law has the effect of reinforcing, perpetuating, or exacerbating disadvantage, where such an inference is supported by the available evidence. However, the drawing of that inference cannot be based upon mere assertion or deductive reasoning.

[323] To address the first two points:

- a) On the first point, having satisfied step 1, there is no evidentiary burden for the plaintiff to prove an intention to discriminate.
- b) On the second point, I described above the evidence of Dr. Stuart and my acceptance that society often perceives mental illnesses as illegitimate and persons with mental disabilities as attempting to shirk work responsibilities.
- c) Even without Dr. Stuart's opinion, I would take judicial notice on this point. I note the following statement from the Supreme Court of Canada in the G Decision:

[1] People with mental illnesses face persistent stigma and prejudicial treatment in Canadian society, which has imposed profound and widespread social, political, and legal disadvantage on them. In particular, discriminatory perceptions that those with mental illnesses are inherently and indefinitely dangerous persist. These perceptions have served to support some of the most unjust treatment of those with mental illnesses

[324] I accept that the first and second points of the Step 2 analysis have been satisfied.

[325] The real point of contention is the third element: whether the Impugned Provisions have the effect of reinforcing, perpetuating, or exacerbating disadvantage.

[326] I address the two provisions ("predominant cause" and the Labour Relations Exclusion) separately.

Is the "predominant cause" standard arbitrary?

[327] The plaintiff submits that that the application of the "predominant cause" standard is arbitrary and cannot be rationalized. The plaintiff argues that the higher test perpetuates the disadvantage of persons who suffer disabling chronic stress.

[328] The plaintiff relies primarily on two decisions: Plesner and Martin.

[329] The plaintiff also relies, to some extent, on the OWSIAT Decision. As noted above, I consider that decision to have misinterpreted Dr. Gnam's evidence. I do not find it helpful in my analysis.

[330] I will deal first with the Supreme Court of Canada's decision in Martin. In that case, the plaintiff challenged the Nova Scotia workers' compensation legislation which restricted access to benefits for workers disabled by chronic pain. In lieu of the benefits normally available to injured workers, the scheme provided a four-week strengthening program and no further benefits.

[331] The Court in Martin found that the Nova Scotia scheme was discriminatory. It reinforced the notion that those with chronic pain do not have a real disability and are not equally valued in Canadian society. Justice Gonthier wrote, for the unanimous Court:

[104] Our Court has consistently emphasized the crucial importance of work and employment as elements of essential human dignity under s. 15(1) of the Charter. Indeed, in the words of Bastarache J., "work is a fundamental aspect of a person's life" (Lavoie, supra, at para. 45).

[105] Thus, far from dispelling the negative assumptions about chronic pain sufferers, the scheme actually reinforces them by sending the message that this condition is not "real", in the sense that it does not warrant individual assessment or adequate compensation. Chronic pain sufferers are thus deprived of recognition of the reality of their pain and impairment, as well as of a chance to establish their eligibility for benefits on an equal footing with others. This message clearly indicates that, in the Nova Scotia legislature's eyes, chronic pain sufferers are not equally valued as members of Canadian society.

[332] In Martin at para. 94, the Court described the overall purpose of the legislation as a "vital consideration" in assessing discrimination:

A classification that results in depriving a class from access to certain benefits is much more likely to be discriminatory when it is not supported by the larger objectives pursued by the challenged legislation.

- [333] The Court went on to find that a provision that restricts benefits available to workers suffering from chronic pain is inconsistent with the overall purpose of the legislation. The Court pointed back to the historic trade-off that underpins the workers' compensation system: protection against the possibility of tort lawsuits in exchange for a reasonable amount of compensation for injury. The provisions before the Court preserved the bar to tort actions without providing any benefits to workers disabled by chronic pain: *Martin* at paras. 94-95.
- [334] In *Martin*, the defendant province pointed to scientific evidence which supported the concept of early medical intervention and early return to work. The Supreme Court accepted that evidence but noted that the statistics indicated that such a program would fail in many cases. In discussing whether there was a connection between the ground upon which the differential treatment was based and the chronic pain sufferers' actual needs, characteristics, and circumstances, Gonthier J. wrote for the Court:
- [96] The respondents [the Province] allege that this blanket exclusion of chronic pain claims responds to the actual needs and circumstances of workers suffering from chronic pain. In their submission, the combination of early medical intervention through the Functional Restoration Program and an immediate cut-off of benefits is the optimal strategy to favour early return to work, which has been identified in medical studies as the most promising approach to the treatment of chronic pain.
- [97] I am unable to agree that the challenged provisions are sufficiently responsive to the needs and circumstances of chronic pain sufferers ... Although the medical evidence before us does point to early intervention and return to work as the most promising treatment for chronic pain, it also recognizes that, in many cases, even this approach will fail. It is an unfortunate reality that, despite the best available treatment, chronic pain frequently evolves into a permanent and debilitating condition. Yet, under the Act and the FRP Regulations, injured workers who develop such permanent impairment as a result of chronic pain may be left with nothing: no medical aid, no permanent impairment or income replacement benefits, and no capacity to earn a living on their own. This cannot be consistent with the purpose of the Act or with the essential human dignity of these workers.
- [335] The plaintiff analogizes *Martin* to his own case. Despite the fact that the plaintiff's disability was clearly caused by workplace issues, his claim was denied due to the interaction of the "predominant cause" test and the Labour Relations Exclusion.
- [336] Mr. Pickering submits that, by applying a higher standard to persons with mental disorders, the WCA reinforces negative stereotypes. I return to this submission below.
- [337] The plaintiff relies on the reasoning in *Martin* on the following points:
- a) The impugned law reinforced the negative assumptions about people suffering from chronic pain.

- b) Restricting benefits for workers suffering from chronic pain was inconsistent with the overall purposes of the scheme.
- c) A categorical distinction based on self-reported symptoms was rejected in Martin in relation to chronic pain: at para 1.

[338] The Province distinguishes the decision in Martin on the following grounds:

- a) In Martin, there was a "blanket exclusion" of chronic pain: at para. 6. In the WCA, there is no category of disability that is similarly excluded from coverage.
- b) While Martin was a clear case of discrimination based on a prohibited ground, the WCA provisions draw a distinction on the basis of how the injury arose. I have considered and rejected this argument above.
- c) The Nova Scotia regime in Martin did not allow for individual assessment. The WCA specifically provides for individual assessment.

[339] In my opinion, the Province's submission on the differences between the Nova Scotia regime and the Impugned Provisions captures the distinguishing features of that decision. The regime in Martin completely eliminated a type of condition from eligibility. That exclusion was inconsistent with the purpose of the workers' compensation scheme as a whole. However, I have found that the higher causal standard is designed to ensure, as much as possible, that only work-related chronic stress claims are compensated. That goal is entirely consistent with the purpose of the workers' compensation regime as a whole.

[340] In my opinion, the reasoning in Martin does not apply to the higher standard applied under the WCA. Under the BC legislation, every claim is adjudicated on its own merits. The WCA does not impose a blanket exclusion for a type of claim.

[341] Turning to Plesner, as noted above, the Court of Appeal addressed s. 5.1(1) of the 1996 WCA, the predecessor to s. 135(1). For context, it is important to understand the following:

- a) As of 2009, s. 5.1(1) of the 1996 WCA restricted benefits to "mental stress" caused by acute reactions to work-related, sudden and unexpected traumatic events. There was no provision for coverage of "chronic stress" claims (i.e., claims without a precipitating traumatic event) in the 1996 WCA. In other words, there was a blanket exclusion.
- b) Mr. Plesner submitted a claim based upon his reaction to an event. The tribunal deemed that event to have been non-traumatic and disallowed his claim.
- c) The plaintiff argued that s. 5.1 of the 1996 WCA and the applicable Board Policy were unconstitutional.
- d) The Court in Plesner did not strike down, or read down, s. 5.1.
- e) Instead, the Court severed portions of the Board Policy interpreting s. 5.1.

[342] The plaintiff relies on the decision in Plesner for the following propositions:

- a) The former s. 5.1, when combined with Board Policy Item #13.30, discriminated against individuals on the basis of mental disability.
- b) The majority in Plesner noted that applying elevated standards to mental disorder claims did not correspond to the worker's actual needs. Rather, mental injury claimants were "stamped with a 'purely mental stress injuries' label whereby all of their claims [were] treated with heightened vigilance requiring a distinct and elevated burden of proof in relation to causation": Plesner at para. 137. The majority confirmed that this "ignores the particular needs of workers who suffer such injuries": Plesner at para. 137.

[343] The plaintiff points to the majority reasons of Justice Prowse in Plesner, where she concluded:

[96] I am satisfied that the requirement of a "traumatic event" in s. 5.1(1)(a) of the Act, when read together with Policy 13.30, breaches s. 15(1) of the Charter by discriminating against Mr. Plesner, and other workers like him who suffer from purely mental work-related injuries, on the basis of mental disability. Workers with purely mental injuries are forced to meet a significantly higher threshold for compensation which is not required of those who suffer work-related injuries that are purely physical, or who suffer mental injuries which are linked to physical work-related injuries.

[Emphasis added.]

[344] The plaintiff submits that the same reasoning applies in this case. He focusses on the underlined statement from para. 96 of Plesner, arguing that he and other workers who suffer from chronic stress due to work-related factors are arbitrarily required to meet a significantly higher threshold.

[345] In response, the Province submits that the decision in Plesner supports the defence position. The Province says:

- a) The 2012 amendments to the 1996 WCA were made in answer to (i.e. to remedy the problem noted in) the Plesner decision.
- b) Plesner, like Martin, dealt with a complete bar to recovery, except where the mental disorder was caused by trauma.
- c) The provision at issue in Plesner excluded workers suffering purely mental injuries in all but the most extreme circumstances.
- d) Despite the blanket exclusion, the Court of Appeal did not sever or read-down the legislation in question. It only read-down portions of a Board policy.
- e) The 2012 amendments to the 1996 WCA (now s. 135(1)(a)(ii)) broaden the scope of claims that can be made for mental disorders.

[346] The Province submits that s. 135(1)(a)(ii) reasonably corresponds to the needs, capacities, and circumstances of workers who experience mental illness. In contrast to the impugned legislation in Martin and Plesner, the current legislation provides coverage to all categories of mental disorders in recognition of the needs of workers suffering from mental injuries. Further, each claim is adjudicated on its own merit. There is no blanket exclusion.

[347] Returning to the Plesner decision, the Province submits:

- a) The Court of Appeal did not strike down any part of the legislation. It only severed portions of Board Policy Item #13.30, which interpreted s. 5.1 of the 1996 WCA.
- b) One portion of Policy #13.30 that the Court of Appeal did not sever reads:

Mental stress does not include "chronic stress", which refers to a psychological impairment or condition caused by mental stressors acting over time. Workers, who develop mental stress over the course of time due to general workplace conditions, including workload, are not entitled to compensation.

[348] The Province submits that the decision in Plesner constitutes the Court of Appeal's approval of those sentences. Those sentences in Policy #13.30 excluded all "chronic stress" claims that develop over time, which the 2011 amendments eliminated. Hence, the 1996 WCA after the 2011 amendments is less restrictive than the 1996 WCA's 2002 provisions (i.e., the Board Policy Item #13.30) which was considered, and approved, in Plesner.

[349] The Province further submits that the procedural background to Plesner is relevant and it makes Plesner distinguishable. Plesner arose as a judicial review in this Court with an attached Charter challenge. Justice Wong found the underlying WCAT Decision internally inconsistent and referred the matter back to the tribunal for reconsideration. He declined to address the Charter challenge. The petitioner appealed the court's failure to address the Charter challenge. The Court of Appeal took up that appeal and ultimately struck down Board Policy Item #13.30. The Province submits that the important context of that procedural background is that:

- a) as noted above, the provision in question barred all claims that did not arise from a traumatic event or events; and
- b) there was no evidence available regarding the reasoning behind the WCA provision or the Board Policy.

[350] As a result, the Province submits that the Court of Appeal's decision was rendered in an evidentiary vacuum.

[351] In contrast to Plesner, the Province plainly states that it marshalled all of its evidence (primarily that of Mr. Tanner and Dr. Gnam) to address the second step of the analysis in the Sharma test. The Province submits that the evidence in this case establishes that the higher "predominant cause" standard is not arbitrary. The higher standard was instituted:

- a) to broaden the scope of chronic mental disorders covered under the workers' compensation scheme; and
- b) to address the complex issues described in Mr. Tanner's affidavit. Those issues are borne out by Dr. Gnam's opinion.

[352] On those bases, and relying on that evidence, the Province submits that the "predominant cause" standard is not arbitrary or discriminatory.

Analysis of Step 2 - the "Predominant Cause" Standard

[353] I indicated above my findings of fact on the evidence. I accepted Mr. Tanner's affidavit as truthful. Mr. Tanner's evidence was that the 2011 amendments were based on a cross-jurisdictional review and were aimed at ensuring that only work-related injuries are compensated.

[354] I also accepted Dr. Gnam's opinions over Dr. Young's. Dr. Gnam's opinion is that there are good research-based reasons to employ a higher causative standard to chronic stress claims because of the unique and multifactorial nature of such claims.

[355] It follows from those factual findings that the higher causative standard applied to chronic stress claims in s. 135(1)(a)(ii) is not arbitrary. In that respect, I have accepted that:

- a) As noted at the outset of these reasons, the difference between the two comparator groups is:
 - a) physical claims must meet the "causative significance" test; whereas
 - b) chronic mental stress claims must meet the "predominant cause" test (i.e., establish that the work-related stressors were the most prominent among several causes).
- b) Chronic stress claims pose unique problems for assessors because of their multifactorial nature.
- c) On a population basis, there is a low causal connection between work-related stressors (excluding trauma) and the development of disabling chronic stress conditions.
- d) Hence, a lower causative threshold could lead to a substantial percentage of claims being accepted when they are not work-related.
- e) The "predominant cause" standard was instituted to provide a scheme whereby chronic stress claims can be accepted, but the assessment process is accurate to ensure that they are, in fact, work-related.

[356] On that basis, I find that s. 135(1)(a)(ii) makes a distinction between chronic mental stress claims and other claims. However, the evidence does not support an inference that the provision has the effect of reinforcing, perpetuating, or exacerbating disadvantage. The higher causative standard is not arbitrary. In my opinion, neither of these two inferences are supported by the available evidence accepted in this trial.

[357] It follows that I find that the plaintiff has failed to establish the underpinning required for Step 2 of the Sharma test as it relates to the "predominant cause" standard.

Labour Relations Exclusion

[358] Returning to the premise of Step 2 of the Sharma test, I must analyse whether the Labour Relations Exclusion imposes burdens or denies benefits in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage. I must examine whether the provision is arbitrary.

[359] In my opinion, the Labour Relations Exclusion, when read plainly, does exacerbate disadvantage. It is arbitrary because it does not distinguish between employers' actions that are taken in good faith and those that are not.

[360] In this regard, I return to the factual findings made in the WCAT Decision that is the subject of this trial. As noted above, the vice-chair allowed the Employer's appeal and determined that the plaintiff was not entitled to compensation for the Work-Related Mental Disorders on the basis that:

- a) the vice-chair characterized the manager's ineffective response as "a decision" relating to the plaintiff's employment; and
- b) the vice-chair determined that the predominant cause of the plaintiff's Work-Related Mental Disorder was the manager's decision not to respond effectively to the workplace stressors, including the bullying and harassment, as opposed to the stressors themselves.

[361] Again, the question I am addressing arises from a challenge to the WCA and not to Board policies.

[362] The plaintiff's overarching submission on the Labour Relations Exclusion is that it is too broad. It should be limited to decisions made in good faith, and in a lawful and non-discriminatory manner, as recommended by the Royal Commission and the Winter Report.

[363] The plaintiff points to the Board's claim statistics and notes that the 2022 acceptance rate for mental disorder claims subject to the Labour Relations Exclusion was 56%, substantially lower than the overall acceptance rate of 92%.

[364] I noted above that, in my opinion, those statistics are not relevant or helpful in my analysis.

- [365] The plaintiff relies on the opinion of Ms. Turnpenney, which I have accepted. Her opinion is that an employer's conduct, including the manner in which they choose to respond, or not to respond, to allegations of bullying can cause additional harm to the worker. She further opined that the Labour Relations Exclusion is not limited to "unavoidable and inherent" decisions made in good faith.
- [366] Ms. Turnpenney also notes that the WCB has policies that require all employers to take steps to eliminate or minimize bullying and harassment in the workplace. The plaintiff submits that, implicit in this requirement is an understanding that the many ways in which an employer may address bullying and harassment can affect the worker's mental health. The plaintiff submits that not all stress created by the employer's decisions is inherent and unavoidable.
- [367] The Province submits that the Labour Relations Exclusion accounts for necessary and inherent stressors that, if not excluded, would create an unbalanced employer-employee relationship. The Province describes this issue in common sense terms. In order for our society to function, employers must have management control over their employees. Within reason, employers must be able to hire, schedule and assign work. Further, in more contentious cases, employers must be able to discipline, lay off or fire employees. Those steps are inherently stressful for an employee and should not be compensable under the WCA.
- [368] If workers were entitled to claim WCB benefits for stress caused by management decisions, it would create an unbalanced employer-employee relationship. On this basis, the Province submits that accounting for these unique considerations is not arbitrary.
- [369] The Province further argues that the Labour Relations Exclusion does not make an association with any particular categories of mental disability. Instead, the exclusion is focused on a specific category of triggering event: management decisions. Those decisions are an intractable and unavoidable aspect of the employment relationship. The Province submits that this situation does not promote stereotypes. To the contrary, the only message to be inferred relates to the worker's situation at work: they were disciplined, fired, or had their working conditions changed. They are not entitled to claim benefits arising from any mental stress that follows the employer's decision.

Analysis: Step 2 - Labour Relations Exclusion

- [370] On this issue, I accept a portion of the plaintiff's position. In my opinion, the blanket exclusion for all management decisions is arbitrary. Further, because the Labour Relations Exclusion only applies to mental disorders, a plain reading of s. 135 would disallow (otherwise) valid claims when there is no good policy reason for doing so. Mr. Pickering's claim is one of those.

- [371] The provision at issue is s. 135(1)(c) which excludes compensation for mental disorders caused by "a decision of the worker's employer relating to the worker's employment". In my opinion, that provision accurately expresses the legislative intent. It does not contain any element of good faith on the part of the employer. It appears that the legislative intent was to have a blanket exclusion.
- [372] The problem with the blanket nature of the exclusion is evident from the facts of Mr. Pickering's case. There is no doubt that Mr. Pickering was disabled. Based upon the WCAT findings, there is no doubt that his employer's ineffective actions (or inactions) were the cause of his disability. This is not a case where the employer exercised its power to discipline, fire, or change the working conditions. As a result, an ineffective set of management decisions caused a Mr. Pickering's disability.
- [373] The plaintiff's submissions seek to include the concept of "bona fide" or "good faith" as a limiting modifier of the employer's decision.
- [374] I note that in *Bendera v. Workers' Compensation Appeal Tribunal*, 2018 BCSC 552, this Court found that an interpretation of the Labour Relations Exclusion that excluded compensation for bullying and harassment conducted by a worker's employer in the context of an employment-related matter would be patently unreasonable. Justice Marzari ruled at para. 76 that an interpretation of the Labour Relations Exclusion that precluded "all actions, conduct, and language of an employer from giving rise to compensation in all cases involving employment related decisions is so incompatible with the language of the provision, the scheme of the [Act], and its legislative intent, as to be patently unreasonable".
- [375] Returning to this case, I accept that there were, and are, good policy reasons for excluding WCB claims arising from management decisions. It is entirely foreseeable that problematic claims would be submitted if workers were entitled to claim for mental distress caused by being disciplined or fired. However, in my opinion, that exclusion goes too far, and results in a regime that denies benefits in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage. The Labour Relations Exclusion excludes claims that arise from ineffective management decision. In my opinion, the provision is arbitrary because it is overly broad.
- [376] *Bendera* was not a Charter case. However, it assists me in arriving at my conclusion as follows:
- a) The blanket nature of the Labour Relations Exclusion, as described in s. 135(1)(c), is overbroad.
 - b) The overly wide scope of the Labour Relations Exclusion imposes a burden, and denies benefits in a manner that reinforces disadvantage to people who suffer from chronic mental stress.
 - c) On that basis, I find that it is arbitrary.

Section 1

- [377] Having found that the Labour Relations Exclusion breaches s. 15 of the Charter, the burden shifts to the Province to demonstrate, on a balance of probabilities, that the infringement is justified under s. 1 of the Charter. This is a "stringent standard of justification": *R. v. K.R.J.*, 2016 SCC 31 at para. 91.
- [378] I note that in *Plesner*, the Court of Appeal addressed s. 1 "for the sake of completeness" on the following basis:
- [147] Counsel for the Attorney General acknowledged that she would be hard-pressed to pursue a s. 1 argument if the Court were to find that there was a breach of s. 15(1) in this case on the basis of mental disability. Similarly, counsel for WCB did not seek to rely on s. 1 in the event this Court should find a breach of s. 15(1). I consider it appropriate to deal briefly with the s. 1 analysis, however, if only for the sake of completeness.
- [379] I address s. 1 in the same manner, on the basis that I have found that the Labour Relations Exclusion breaches s. 15 on the basis of mental disability.
- [380] In overview, the Province submits that the salutary effects of the scheme under s. 135 outweigh any deleterious effects and are proportionate to government's objectives. It submits that this is not a case where an egregious Charter breach outweighs a pressing and substantial legislative objective. Hence, any breach of s. 15 is a reasonable limit justifiable in a free and democratic society.
- [381] To determine this issue, I must apply the *Oakes* test (*R. v. Oakes*, [1986] 1 S.C.R. 103, 1986 CanLII 46) consisting of two branches as described in *G Decision* at para. 71:
- a. The Province must demonstrate that the infringing provisions have a pressing and substantial objective; and
 - b. The Province must show that the infringing provisions do not disproportionately interfere with s. 15 rights in furtherance of that objective.

Pressing and Substantial Objective

- [382] On the first issue (pressing and substantial objective), the Province submits that it is important that employers not be required to fund mental injuries alleged to arise from unavoidable labour relations issues such as terminations, demotions, or disciplinary issues. Employers operating in dynamic and competitive economies must be free to make inherently stressful employment decisions about terminations and working conditions without fear of liability for workers' compensation. Failure to exclude such claims would destabilize the employee-employer relationship and restrict employers' ability to make necessary employment decisions in good faith. Ensuring that this unbalancing does not occur is a pressing and substantial legislative objective. The Province points to the Royal Commission and the Winter Report as evidence of the need to achieve this objective.

- [383] I have noted above that I accept the overall necessity for some form of Labour Relations Exclusion. However, in my opinion, the fact that some form of exclusion is necessary does not make all forms of exclusion necessary. Hence, I do not accept that s. 135(1)(c), in its current form, serves a pressing and substantial objective. Put another way, there is no pressing and substantial need to protect employers from the consequences of management decisions that are not taken in good faith.
- [384] Having found that there is no pressing and substantial objective, the Province's s. 1 argument fails. However, if I should be mistaken in that finding, I proceed to the next steps.

Proportionality

- [385] If the Province were to establish that there is a pressing and substantial objective, then the government must also establish that the means by which the objective is furthered are proportionate: *Frank v. Canada (Attorney General)*, 2019 SCC 1 at para. 38. This involves three elements, each of which the government must satisfy that:
- a) the Labour Relations Exclusion must be rationally connected to the pressing and substantial objective;
 - b) the Labour Relations Exclusion must be minimally impairing of the claimant's Charter rights; and
 - c) the Labour Relations Exclusion must be proportionate, in that the salutary benefits achieved by the provisions outweigh the deleterious effects on the claimant's rights.

Rational Connection

- [386] The Province submits that the Labour Relations Exclusion is drafted such that it can reasonably be expected to increase the likelihood that accepted mental disorder claims are truly work-related. It argues that mental disorders arising from management decisions are not injuries that typically relate directly to the performance of work. Carving out stress related to labour relations issues increases the likelihood that a mental disorder will relate to the performance of job duties, rather than labour relations issues dependent upon economics, budgetary constraints, or industry standards that are more remote from employees' day-to-day functions.
- [387] In my opinion, the Province's submission is focussed on the overall need for a Labour Relations Exclusion, and not the manner in which it is imposed.
- [388] Further, I do not accept that the WCB scheme is designed to address mental disorders arising from the performance of job duties. In that regard, s. 135 specifically allows claims arising from bullying and harassment. Those claims have nothing to do with "job duties".

[389] In short, I do not accept that there is a rational connection between the blanket nature of the Labour Relations Exclusion and the legislative objective.

Minimally Impairing of the Claimant's Charter Rights

[390] The question at this step of the proportionality analysis is "whether the limit on the right is reasonably tailored to the pressing and substantial goal put forward to justify the limit.": *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para. 53 [Hutterian].

[391] The Province submits that courts will accord legislatures a measure of deference in considering whether a legislative provision is minimally impairing. That is especially true on "complex social issues where the legislature may be better positioned than the courts to choose among a range of alternatives" (*Hutterian* at para. 53). The question is whether the legislative choice "falls within a range of reasonable alternatives", not whether the legislative choice is the least restrictive option that a court could conceivably imagine. As stated in *RJR- MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, 1995 CanLII 64:

160 The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement. On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail.

[Emphasis added.]

[392] The Province acknowledges that a complete ban (or exclusion) that violates Charter rights is more difficult to justify at the minimal impairment step than a partial ban. As McLachlin J. explained in *RJR-MacDonald* at para. 163:

163 it will be more difficult to justify a complete ban on expression than a partial ban The distinction between a total ban on expression, as in *Ford* where the legislation at issue required commercial signs to be exclusively in French, and a partial ban such as that at issue in *Irwin Toy*, *supra*, is relevant to the margin of appreciation which may be allowed the government under the minimal impairment step of the analysis.

[Emphasis added.]

[393] The Labour Relations Exclusion must be proportionate, in that the salutary benefits achieved by the provisions outweigh the deleterious effects on the claimant's rights.

[394] Further, the Province submits that it would be artificial to consider the Labour Relations Exclusion in isolation from the rest of the objective test prescribed by s. 135(1)(a)(ii). The analysis should not consider the impugned provision "apart from its legislative context".

[395] On this point, I have made my findings on the higher causative standard applied to chronic mental stress claims. I have found that standard to be justified. I am left to consider the blanket nature of the Labour Relations Exclusion. The question is whether it is reasonably tailored to the pressing and substantial goal put forward to justify the limit. In my opinion, it is not.

[396] The Labour Relations Exclusion constitutes a total exclusion for claims caused by management decisions. As noted above, that reading of the section was found in *Bendera* to be patently unreasonable. A reading that is patently unreasonable within the administrative law context cannot, in my opinion, be said to be reasonably tailored within the Charter context.

Final Balancing

[397] Given that I have not accepted any of the Province's submissions on this issue, I find that there is little reason to perform a "final balancing".

[398] As I have outlined above, the provision under scrutiny is s. 135(1)(c), the Labour Relations Exclusion. I have described that as a blanket exclusion. While it is possible that the Board could develop policies that interpret that blanket exclusion, there is nothing in the wording of s. 134(1)(c) that suggests or warrants such a narrowing. The evidence in Mr. Pickering's case, being the WCAT Decision, indicates that the blanket exclusion is interpreted literally. It mattered not that the manager was ineffective in dealing with the bullying and harassment that Mr. Pickering suffered.

[399] Based upon my analysis above, I find that the Province has failed to justify the blanket nature of the Labour Relations Exclusion under s. 1.

Remedy

[400] The plaintiff seeks remedies under both s. 52 and s. 24 of the Charter. Under s. 52, he seeks a remedy severing and declaring to be of no force and effect:

- a) the word "predominantly" in s. 135(1)(a)(ii) of the WCA; and
- b) s. 135(1)(c) of the WCA.

[401] The plaintiff also seeks an individual remedy under s. 24 of the Charter directing the Board to accept his workers' compensation claim, or alternatively, remitting the claim to the Board for adjudication without reference to the Impugned Provisions.

[402] Having dismissed the plaintiff's claim regarding the higher causative standard, I am only addressing the appropriate remedy in relation to the Labour Relations Exclusion.

[403] As I have stated above, I accept that there is a need for a Labour Relations Exclusion. I also noted above that I accepted the opinion of Ms. Turnpenney.

[404] In my opinion, the Labour Relations Exclusion should be read down.

[405] As noted by Justice Burke in *Yahey v. British Columbia*, 2020 BCSC 278:

[74] As the late Professor Hogg noted, reading down involves "giving a statute a narrow interpretation in order to avoid a constitutional problem that would arise if the statute were given a broad interpretation" (Peter Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 2019) ch. 40.1(g)).

[406] In this case, the Labour Relations Exclusion, if given a broad interpretation, infringes on the Charter rights of persons with chronic mental stress. Hence, it should be given a narrow interpretation.

[407] Hence, the Labour Relations Exclusion (s. 135(1)(c)) should be limited to management decisions on generic processes and actions taken in good faith. In this way, the claims of persons with chronic mental stress will not be excluded when those problems derive from management decisions that are not generic or that are taken in bad faith.

[408] As to the personal remedy for Mr. Pickering, I decline to direct the acceptance of his claim by the Board. Instead, in my opinion, the proper remedy is a remittance of his claim to WCAT for adjudication with the "read-down" version of the exclusion.

Summary and Conclusion

[409] For the reasons set out above, I make the following findings and rulings based upon the evidence adduced at trial and the facts as I have found them:

- a) While the higher standard for establishing an entitlement to benefits for chronic mental disorders creates a distinction between those claims and physical claims, that distinction is justified given the evidence tendered in this trial. The higher standard is not arbitrary.
- b) The Labour Relations Exclusion is arbitrary because it is unlimited. In my opinion it should be read down. The exclusion should be limited to management decisions on generic processes and actions taken in good faith.
- c) Mr. Pickering's claim is remitted to WCAT, or the appropriate level of WCB decision-maker, for a re-determination of his claim based upon the read-down version of the Labour Relations Exclusion.

[410] I heard no submissions on costs. If either side seeks costs, I request that the submissions be submitted within 90 days.

"A. Ross J."

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Prepared on 26 October 2026 · Esheria