



## **Proposal for a “Recovery” Based Restatement of the Duty to Accommodate Employee Addicts<sup>1</sup> (including the application of the new duty to an existing case on appeal to the Supreme Court)<sup>2</sup>**

Summary of Concept Presentation to the Annual General Meeting of the Canadian Industrial Relations Association  
Saskatoon, 2 June 2016

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Draft no. 10 – 28 May 2016

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<sup>1</sup> The ideas in this summary are taken from a longer academic paper to be published later in 2016. Comments are welcome and can be provided to the author at [johncomrie@definitiveadr.com](mailto:johncomrie@definitiveadr.com). The terms “addict” and “addiction” as used in this summary, are not found in DSM-5 which employs the concept of “Substance Use Disorder”. The significance of this fact is discussed in the longer paper, but not in this summary.

<sup>2</sup> See Appendix B for analysis of *Stewart v. Elk Valley Coal*, 2015 ABCA 225

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(Photo with permission requested- but not received-from the cover of William L White's *Slaying the Dragon, The History of Addiction Treatment and Recovery in America*, (2<sup>nd</sup> ed, 2014), Bloomington, IL, Chestnut Health Systems)

### The Problem

The application of the duty to accommodate an addicted employee exhibits at least three problems that have rippled through Canadian jurisprudence from *Quebec Cartier* (SCC in 1995) to *Stewart* (Alberta CA in 2015). Resolution of the problems requires the duty to be restated uniquely for this disease. Problems with the current interpretation can be summarized as follows:

1. The current jurisprudence typically (most recently in *Stewart*) discriminates against the addict by making it a condition of protection under human rights disability codes that the addict do something that contradicts the very definition of addiction, namely accept at the time of the discipline that he or she is addicted and needs help, before any protection is granted. Thus in *Stewart* for example, the court concluded the employee in that case was able to make a free and informed decision not to disclose his disease under the employer's drug policy, notwithstanding his addiction. As a result, the Court concluded there was no duty to accommodate the employee because at the time of the termination, he had not acknowledged his addiction and had been uncooperative in acknowledging his disease when given the opportunity.<sup>4</sup>
2. If protection is not denied under the above scenario, then much current jurisprudence requires the courts to analyze the employee's behavior using an illogical framework. The appropriateness

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<sup>4</sup> *Stewart* at paras 26 to 35

of granting protection for the addict is analyzed by first requiring the courts to make an impossible determination of degree of causation or fault or nexus that can be associated with the employee's compulsive conduct, none of which is supported by science.

3. Nowhere in any analysis of the duty does one find a consideration of the principles of long term recovery from addiction, the promotion of which is the main objective of making the disease a protected disability under human rights codes. Providing access to recovery is fundamental to this disability protection. Without it you cannot eliminate the discrimination and all that is left is the non-sensical protection of the addict's right to continue abusing drugs.

### A Proposed Answer<sup>5</sup>

One answer to the above problems, using the broad and flexible guidelines of the SCC in *Renaud* and elsewhere, is to restate the duty to accommodate an addict, using a new analytical framework that includes an overriding obligation to make "long term recovery" the focus of the accommodation plan:

1. Recovery would become the focus firstly, because of the manner in which initial discipline was imposed (resulting for example from a valid post-incident drug test or termination for misconduct or simple innocent absenteeism, all without any prior disclosure of addiction). The discipline would be administered in the same manner for the addict and the non-addict, thus giving the employee addict (if applicable) an opportunity to face the consequences of the addiction, consistent with one of the basic principles of recovery, namely reducing responsibility to help an addict is counter-productive. It does not assist recovery, delays its inception and may in fact, enable further addiction.
2. If the employee responds (within 6 months of the discipline, and regardless whether the employee was terminated) with an acknowledgement of the addiction, this forced accountability, and resulting acceptance of the need for treatment would be considered fulfillment of the employee's obligation to participate in the identification of the accommodation requirement, notwithstanding the fact it occurred after the termination.
3. The duty to accommodate the employee would be seen as having been extant, but latent at the time of the initial discipline and inactive and unidentifiable due to the employee's denial of the addiction. To hold otherwise and say no duty existed discriminates against the addict because of the addiction. *Quebec Cartier* would be distinguished because it doesn't apply to the interpretation of the duty to accommodate. The SCC has made the protection of discrimination rights fundamental. To eliminate the employer's duty to accommodate an addict because he or she is an addict, clearly contravenes the direction of the Court. After the fact reinstatement by an arbitrator is legislatively authorized by all human rights codes in appropriate circumstances and confirms the logic of this approach.
4. The acknowledgement of addiction by the employee within the 6 months period would lead to the development of an employer sponsored, professionally designed and individualized recovery accommodation plan. Ultimately, such an "Employee-Recovery Accommodation Plan" or "E-

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<sup>5</sup> See Appendix A for a chart that summarizes the solution in a chart.

RAP” would include the best practices from the continuum of care for long term recovery from addiction, including the newly released “Standards of Care: For the Addiction Specialist Physician” (the ASAM Standards)<sup>6</sup> or Canadian equivalent when available. Preferably the ASAM Standards would be integrated with a corporate adoption of the “National Standard of Canada for Psychological Health and Safety in the Workplace”<sup>7</sup> (Canadian Workplace Mental Health Standard).

5. The overriding theme of each specific plan (best developed under a more comprehensive drug and alcohol policy mutually agreed with the union) would be recognition of the need for transparent workplace support from employer, union and employee for long term recovery for every employee who had disclosed an addiction (including as well all those who may have voluntarily disclosed under a corporate policy encouraging same without job consequences). There would be some proportionality in the design of the E-RAP conditions so that for example, the longer an employee waited to disclose (eg at 5 months after initial discipline rather than 1 month), the longer the employee would have to wait to be reinstated, assuming ongoing compliance with the conditions of the accommodation.
6. Acknowledgement by the employee of the need for help and notice to the employer could be made almost immediately or at any time up to 6 months following the triggering event. However, initial finalization of the E-RAP could only be completed after executing the actual consequences of the discipline so that they were made real to the employee. The termination would have to be real, with the usual process followed. Nothing would prevent the employee from starting the treatment process in the meantime, without however finalizing the terms of the E-RAP.
7. The employee’s right to the E-RAP would exist, even for a terminated employee who had been out of work and unpaid for six months, if at any point within that period the employee gave notice to the employer that he or she had been addicted at the time of the triggering incident, had accepted the need for treatment and had begun the recovery process.
8. The employer’s obligation to cooperate with the E-RAP development would be conditional on the determination of an independent addiction specialist that the employee was addicted at the time of the discipline or sanction and had begun the initial steps to achieve long term recovery.
9. The terms and conditions of the E-RAP would:
  - a. Be designed to promote long term recovery from addiction (similar to standards for other chronic diseases), including the full range of best practices along the continuum of care identified in the ASAM Standards, such as assessment, diagnosis, withdrawal management, treatment planning, treatment management, care transitions, care

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<sup>6</sup> See American Society of Addiction Medicine “Standards” *available* on 26 May 2016 at <http://www.asam.org/docs/default-source/practice-support/quality-improvement/standards-of-care-final-design-document.pdf?sfvrsn=0>

<sup>7</sup> Free download of the Canadian Workplace Mental Health Standard available here: [http://shop.csa.ca/en/canada/occupational-health-and-safety-management/canca-z1003-13bnq-97008032013/inv/z10032013?utm\\_source=redirect&utm\\_medium=vanity&utm\\_content=folder&utm\\_campaign=z1003](http://shop.csa.ca/en/canada/occupational-health-and-safety-management/canca-z1003-13bnq-97008032013/inv/z10032013?utm_source=redirect&utm_medium=vanity&utm_content=folder&utm_campaign=z1003)

- coordination, and continuing care management between medical and health professionals, community support groups and the employer's HR professionals;
- b. Include an opportunity to be reinstated at a time and on terms determined by the addiction specialist, but in no event later than 1 year following the triggering event;
  - c. Also include the possibility, following reinstatement, for the employee to earn some portion of the back pay he or she had lost following the discipline when appropriate;
  - d. Provide for ongoing random drug testing as designed by the addiction specialist;
  - e. Require ongoing "recovery check-ups" as outlined in the ASAM Standards;
  - f. Require regular involvement with a proven support group approved by the specialist;
  - g. Acknowledge the possibility of relapse and allow for a limited number of relapses as recommended by the addiction specialist, subject to a maximum of (3?) which would be pre-agreed as constituting undue hardship and justifying termination of the plan (reference is made to Appendix C which contains a comparison of relapse rates between different chronic diseases);
  - h. An obligation to assist the employer and the union following the successful completion of the E-RAP with some aspect of their ongoing education and support of recovery initiatives within the corporation and/or within the union
10. I have not referred to the epidemic of opioid addiction in North America, that needless to say enhances the importance of this topic. As well, this summary and the larger paper from which it is derived are concerned only with addiction. The topic has however, a close nexus to a number of related topics, including for example i) the broader concept of "substance use disorder", ii) the medical use of marijuana, particularly after legalization, iii) drug testing and iv) mental health generally. A high percentage of addicts typically suffer from some degree of depression which health professionals will treat independently from addiction. However, the commonality of this dual diagnosis underlines the need for corporate workplace health and safety programs. In an ideal world, the employer's support of recovery from the disease of addiction would be an integral part of a larger commitment to workplace health and safety, including adoption and compliance with the new Canadian Workplace Mental Health Standard referred to above. The importance of the wider issue of mental health is critical:

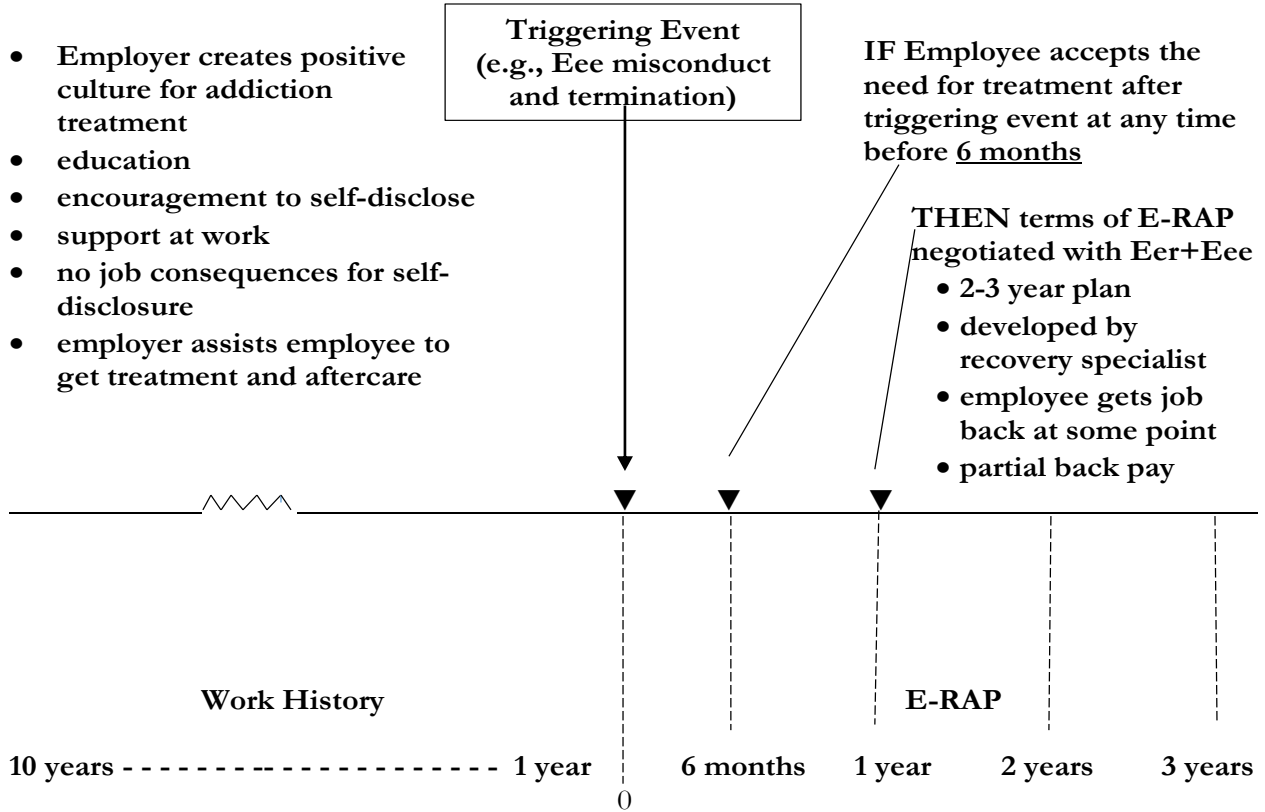
Approximately 1 in 5 Canadians, or seven million fellow citizens, will experience a mental health problem this year, and many of these problems relate in some way to the workplace. In a summary of The Shain Reports from April 2010 (commissioned by the Mental Health Commission of Canada), more clarity is given to these figures: "If addictions are included, the total is about one in three, and adding stress and burnout raises the figure considerably higher again". Those affected are employees in their prime working years.<sup>8</sup>

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<sup>8</sup>From the press release of the Human Resource Professionals Association press release announcing the mental health standards "Canada Sets a New Psychological Health & Safety Standard", page 1 available at: [http://www.hrpa.ca/Documents/news/National\\_Standard.pdf](http://www.hrpa.ca/Documents/news/National_Standard.pdf) as of 28 May 2016

**APPENDIX A: E-RAP Chart**

**Timeline to Demonstrate Use of E-RAP**



## **APPENDIX B: Application of E-RAP to *Stewart v Elk Valley Coal***

Relevant Background. The Grievor Stewart had participated in various component parts of Elk Valley Coal's drug and alcohol policy, including seminars where he was given information about addiction and was asked to acknowledge whether he suffered from any such issues, which he denied at all times prior to the triggering event. The policy provided employer support and promised no negative job consequences for employees who acknowledged an addiction and sought treatment prior to any employment incident.

Triggering Event. The Grievor was involved in a workplace accident while operating a machine which gave rise to a post-incident drug test in which the Mr. Stewart tested positive for cocaine. As a result, he was terminated.

Acknowledgement of Addiction. Subsequent to his termination Mr. Stewart acknowledged he was addicted to cocaine, sought treatment and began a typical recovery process which had carried on until the arbitration.

Relevant Findings of the Alberta Court of Appeal. The Court determined that Mr. Stewart was capable of making a free and informed decision as to whether he should self disclose his addiction prior to the triggering event. The Court then concluded that no duty to accommodate Mr. Stewart arose because of his failure to acknowledge the addiction and participate in the accommodation prior to the triggering event. The Court also concluded that his post discharge recovery and related developments were not relevant to whether his termination was valid and therefore denied a request for reinstatement.

Application of E-RAP. Had the Court applied the E-RAP analysis:

1. A duty to accommodate the employee for the disease of addiction would have been imposed on the employer because the employee had acknowledged the disease and sought treatment within 6 months of his termination.
2. The exact same initial course of events would have been unchanged, including the termination of the employee which the Court would allow on the basis described in the above paper and the employee would have similarly self-disclosed his addiction just as he in fact did. The only change from the actual case would be that following the self-disclosure within the 6 month period, the employee would have been offered an E-RAP
3. Following the employee's acknowledgement of the need for treatment, the terms of an E-RAP would have been developed by an addiction specialist (or imposed by the Court) to provide a 2-3 year recovery plan that included a complete range of recovery actions as outlined in the attached summary paper.

4. The E-RAP would also provide that Mr. Stewart would be reinstated at some point (within 1 year of his termination) if he had complied with the terms of the E-RAP to that point.
5. Mr. Stewart would have been able to apply for back-pay for some of the time he missed work, typically from the date of his entry into treatment until he was allowed to be reinstated. For example, if that period was 6 months and if he continued to comply with the terms of his E-RAP once he was reinstated, then in addition to his regular pay, he would be able to earn the 6 months of back pay over the 2 year remaining period of the E-RAP. .

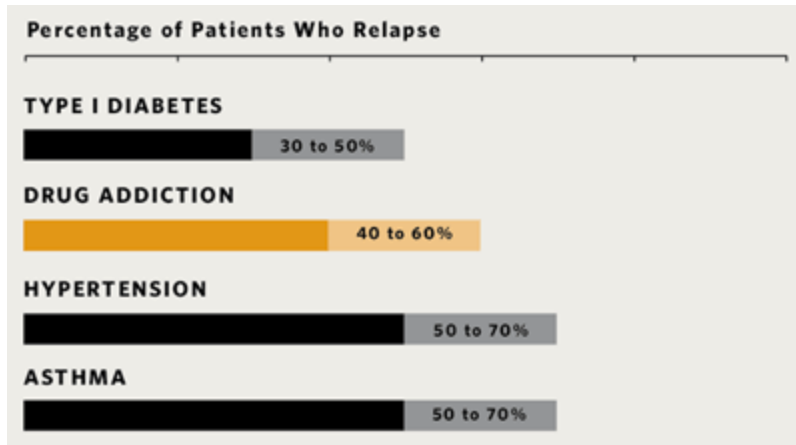
Benefits to Employer of E-RAP. In the actual facts of this particular case, the employer was willing to entertain an application from the employee to return to work after he completed treatment. Under the E-RAP that willingness would be converted to a “right” to be reinstated, subject to ongoing compliance with a medically directed long term treatment plan. From the employer’s perspective, it would still have the ability to enforce a relatively strict discipline of termination. Moreover, although it would be required to reinstate the employee, the employee would return with an increased likelihood of maintaining long term recovery, under medical conditions that promoted same. If all that transpired, the employer would have returned to it, an employee already fully trained with significant experience on the job, but who was now a better employee by being in recovery.

Benefits to Employee. The employee would have been entitled to be reinstated, subject to full compliance with the terms of the E-RAP. Moreover, the employee’s likelihood of long term recovery would have been significantly enhanced by the development and application of the medically supervised recovery conditions.

E-RAP Compromise. Standing back from *Stewart v Elk Valley Coal*, the above analysis would provide a reasonable compromise between the positions of the employer on the one hand and the union and employee on the other. Of perhaps more importance however, the new analytical framework would make the discussion between the parties more focused on the question of whether the employee was an addict, and if so, what would be the best remedial principles that could be imposed to encourage the recovery of the employee. The E-RAP process would maintain the therapeutic effect of the termination and the resulting acceptance of his addiction by Mr. Stewart, provide the best mechanism possible to give the employee an opportunity to recover from his addiction. If successful, the employer and employee would both be in a much improved position than under the decision of the Court of Appeal, where the employee lost his job, may in fact lose the support of this job in maintaining his sobriety through the crucial first couple of years and the employer has lost the benefit of a potentially recovered employee.



## APPENDIX C: Comparison of Relapse Rates Between Drug Addiction and Other Chronic Diseases



Relapse rates for drug-addicted patients are compared with those suffering from diabetes, hypertension, and asthma. Relapse is common and similar across these illnesses (as is adherence to medication). Thus, drug addiction should be treated like any chronic illness, with relapse serving as a trigger for renewed intervention.

Soure: McLellan et al., JAMA, 284: 1689-1695, 2000