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Article abstract

Since the passage of the first anti-discrimination laws in North America, the number of groups or classes protected has slowly expanded. People with disabilities are one of the more recent groups to be covered by such laws. No Canadian human rights statute includes the obese or overweight as a separate designated group. British Columbia is the only jurisdiction in which obesity per se has been found to be a covered disability. All other Canadian jurisdictions that have explicitly addressed the issue require claimants to prove that their obesity is a disabling condition and has an underlying involuntary medical cause. This paper examines the treatment of the obese under the antidiscrimination laws of the Canadian federal and provincial jurisdictions, focusing primarily upon the laws of Ontario. Its central thesis is that despite the reticence of various human rights agencies, there is ample legal basis for including obesity as a covered disability under human rights law.

Obesity as a Covered Disability Under Employment Discrimination Law

An Analysis of Canadian Approaches

HARRIS L. ZWERLING

Since the passage of the first anti-discrimination laws in North America, the number of groups or classes protected has slowly expanded. People with disabilities are one of the more recent groups to be covered by such laws. No Canadian human rights statute includes the obese or overweight as a separate designated group. British Columbia is the only jurisdiction in which obesity per se has been found to be a covered disability. All other Canadian jurisdictions that have explicitly addressed the issue require claimants to prove that their obesity is a disabling condition and has an underlying involuntary medical cause. This paper examines the treatment of the obese under the anti-discrimination laws of the Canadian federal and provincial jurisdictions, focusing primarily upon the laws of Ontario. Its central thesis is that despite the reticence of various human rights agencies, there is ample legal basis for including obesity as a covered disability under human rights law.

Since the passage of the first anti-discrimination laws in North America, the number of protected groups or classes has slowly expanded. People with disabilities are one of the more recent groups to be covered by such laws.[1] In the past decade, some American jurisdictions have added obesity

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– The author thanks Kari Abrams, Michael Glazer, Akos Hoffer, and Alistair Price for their excellent research assistance. For helpful comments on a previous version of this paper, the author thanks two anonymous referees.

1. See A. Mayerson, "The Americans with Disabilities Act: An Historic Overview" (1991), 7 *Lab. Lawyer* 1.

to their lists of covered disabilities through legislation or adjudication,[2] but no Canadian human rights statute specifically prohibits employment discrimination against obese persons.[3] To date, British Columbia is the only jurisdiction where it has been ruled that obesity discrimination is encompassed in its prohibitions against discrimination on the basis of disability.[4] All other Canadian jurisdictions that have explicitly addressed the issue require claimants to prove that their obesity is a disabling condition and has an underlying involuntary medical cause. This paper examines the treatment of the obese under the anti-discrimination laws of the Canadian federal and provincial jurisdictions, focusing primarily upon the laws of Ontario. Its central thesis is that despite the reticence of various human rights agencies, there is ample legal justification for including obesity as a covered disability under human rights law.[5]

The treatment of obese individuals under American federal and state anti-discrimination statutes has followed three general approaches. Only Michigan prohibits discrimination on the basis of weight.[6] All other jurisdictions that cover obesity do so under the rubric of handicaps or disabilities. This is the approach taken under the Rehabilitation Act of 1973[7] which became the framework for the Americans with Disabilities Act of 1990[8] as well as similar state laws. However, jurisdictions which prohibit discrimination on the basis of disability vary substantially in the scope of their definitions of that term.[9] Most that have addressed the issue do not cover obesity per se.[10]

Canadian jurisdictions have been even slower to outlaw employment discrimination against the obese. However, before analysing this lack of

2. See J. G. Frierson, "Obesity as a Legal Disability Under the ADA, Rehabilitation Act, and State Handicapped Employment Laws" (1990), 44 *Lab. L. J.* 286.

3. See *Canadian Employment Law Guide*, Don Mills, Ont.: CCH Canadian Limited, 1991.

4. *Hamilyn v. Cominco Ltd.*, 11 C.H.R.R. D/333 (B.C.H.R.C. 1989). The Council found that obesity *per se* could be the basis for the perception of a disability, and therefore, is covered under the British Columbia Human Rights Act.

5. The author thanks an anonymous referee for suggesting the emphasis of this theme.

6. See Frierson, *supra*, footnote 2, at p. 291.

7. 28 USC § 791 et seq. (1988). Morbid obesity could be found to be a physical impairment under the Rehabilitation Act of 1973 [*Cook v. State of Rhode Island, Dept. of Mental Health*, 10 F.3d 17, at p. 23 (1st Cir. 1993)].

8. 42 USC §§ 12101–12213 (1990). See M.A. Rothstein, C.B. Craver, E.P. Schroeder, E.W. Shoben, and L.S. VanderVelde, *Employment Law*, Hornbook ed., St. Paul, Minn.: West Publishing 1994, at p. 185.

9. Frierson, *supra*, footnote 2.

10. *Cassista v. Community Foods, Inc.*, 856 P.2d 1143, at p. 1150 n.11 (Cal. 1993).

legal protection for obese persons in Canada, it is necessary to define obesity and briefly point to some of the evidence showing that employment discrimination against the obese is a problem worthy of redress.

DEFINING OBESITY

Difficulties in precisely defining obesity have been noted elsewhere.[11] Like many other potentially disabling conditions, weight problems are on a continuum, a matter of degree. Obesity has been defined as "an excess or surplus of body fat."[12] One of the most common indirect measures of obesity "requires the comparison of an individual's weight, for a given height, to weight standards developed from large population samples."[13] The Ontario Human Rights Commission's internal guidelines regarding obesity[14] (Obesity Guidelines) offers the following definition:

> a Body Mass Index [weight (in kilograms) divided by height (in metres) squared] greater than 27 kg/M^2 or a weight more than 120% over the ideal body weight for height set out in the New York Metropolitan Life tables.[15]

EMPLOYMENT DISCRIMINATION AGAINST OBESE PERSONS

Researchers using samples drawn from the United States, Canada and the United Kingdom are slowly accumulating systematic evidence of the influence on earnings of appearance in general,[16] and obesity in particular.[17] Apparently, discrimination results in lost employment opportunities and substantially lower earnings for otherwise equally qualified obese or "unattractive"

11. Frierson, *supra*, footnote 2, at p. 294–295.

12. C.A. Register and D.R. Williams, "Wage Effects of Obesity among Young Workers" (1990), 71 *Soc. Sci. Q.* 130, at p. 131.

13. *Ibid.*

14. Ontario Human Rights Commission, *Guidelines for the Application of 'Because of Handicap' to the Condition of Obesity"* (n.d), (hereafter Obesity Guidelines). Internal guidelines are intended mainly to aid the Commission's field officers in determining whether to take a discrimination complaint.

15. Some weight-height tables have been revised in recent years to allow for greater "ideal" weights. See S.A. McEvoy, "Fat Chance: Employment Discrimination Against the Overweight" (1992), 43 *Lab. L. J.* 3, at p. 4.

16. D.S. Hammermesh and J.E. Biddle, "Beauty and The Labor Market" (1994), 84 *Am. Econ. Rev.* 1174.

17. See Register and Williams, *supra*, footnote 12 and J.D. Sargent and D. G. Blanchflower, "Obesity and Stature in Adolescence and Earnings in Young Adulthood" (1994), 124 *Archives of Pediatric and Adolescent Med.* 681.

individuals.[18] Given the greater emphasis placed on women's appearance, it is not surprising that so far researchers have found that obesity has a negative effect only on female earnings.[19]

Despite the efforts of organized advocates for the obese, there seems to be little political momentum for adding obesity as a separate protected classification under anti-discrimination statutes. The current political climate in North America makes changes in this situation very unlikely. Accordingly, this paper will focus on administrative and judicial interpretation of existing legislation. Recent legal history suggests that adjudicative bodies which do extend anti-discrimination protections to the obese are most likely to do so under the existing protected classification of disability. The principle of judicial restraint would inhibit the creation of a new separate designated group.

Canadian human rights codes roughly follow one of two general models with respect to their coverage of the disabled. All Canadian human rights statutes include some variant of "handicap," "disability," "physical disability," or "mental disability" among their protected classifications.[20] The Canadian

18. For additional citations to evidence of the negative economic and social impact of obesity and "unattractiveness" see "Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance" (hereafter "Facial Discrimination") (1987), 100 *Harv. L. Rev.* 2035 and J.P.R. Howard, "Incomplete and Indifferent: The Law's Recognition of Obesity Discrimination" (1995), 17 *Advoc. Q.* 338, at p. 347-355.

19. This was the finding of Register and Williams, *supra*, footnote 12, as well as Sargent and Blanchflower, *supra*, footnote 17. For an excellent discussion of the disproportionate impact of obesity discrimination on women and obesity discrimination as a form of gender discrimination see Howard, *supra*, footnote 18.

20. In R.S. Abella, *Report of the Commission on Equality in Employment.* Ottawa: Minister of Supply and Services, 1984, at p. 38-39, the Commission noted the following distinctions in terminology relating to disabilities and the implications of the different terms:

> The World Health Organization distinguishes among "impairment", "disability", and "handicap". An "impairment" embraces any disturbance of or interference with the normal structure and function of the body, including the systems of mental function. (footnote omitted)...
>
> "Disability", according to the World Health Organization, "is the loss or reduction of functional ability and activity" that results from an impairment (footnote omitted). In other words, an impairment does not necessarily produce a disability...
>
> A "handicap" is defined by the World Health Organization as the disadvantage that is consequent upon impairment and disability (footnote omitted).
>
> The language of disability was very much a preoccupation of disabled persons across Canada. Many were particularly concerned because the language of disability often reinforces the perception of their incapacities rather than their capacities.
>
> Persons with disabilities experience some limitation of their work functioning because of their physical or mental impairment. But the extent to which their disability affects their lives on a daily basis – that is, handicaps them – is very often determined by how society reacts to their disability. A disabled person need not be handicapped (footnote omitted).

(federal jurisdiction) Human Rights Act[21] and the British Columbia Human Rights Act[22] prohibit employment discrimination on the basis of "disability" or "physical or mental disability," respectively. The federal statute broadly defines disability as "any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug."[23] British Columbia's statute includes no definition of disability. Given this latitude, human rights tribunals in these jurisdictions have extended coverage to the obese or have otherwise adopted a broader interpretation of the term "disability."[24] Quebec's Charter of Human Rights and Freedoms prohibits discrimination on the basis of "handicap or the use of any means to palliate a handicap."[25] However, as will be explained below, it was not until recently that Quebec apparently joined the jurisdictions offering broader protection against discrimination on the basis of disability.

THE DEFINITION OF "HANDICAP" IN "ONTARIO-TYPE" CODES[26]

The language typically used in the second and larger group of human rights acts raises several legal questions relating to coverage of obesity. Statutes in this group include detailed definitions of the terms "disability" or "handicap." The definitions of physical handicap or disability in the human rights legislation of Alberta, Ontario, New Brunswick, Newfoundland, and Saskatchewan are substantially the same in structure and content.[27] Section 10(1)(a) of the Ontario Human Rights Code typifies this group.

21. *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 3(1).

22. *British Columbia Human Rights Act*, S.B.C. 1984, c. 22, s. 8(1).

23. R.S.C., 1985, c. H-6, s. 25.

24. 11 C.H.R.R. D/333 (B.C.H.R.C 1989). *Ede v. Canada (Canadian Armed Forces)*, C.H.R.D. No. 3, No. T.D. 3/90 (C.H.R.T. 1990).

25. R.S.Q., 1977, c. C-12, s. 10.

26. This shorthand was chosen because Ontario's legal treatment of obesity discrimination cases has been the most extensive and as a consequence will serve as the main focus of this paper.

27. These are, respectively, the *Individual Rights Protection Act*, R.S.A. 1980, c. 1-2, s. 38(1)(i); *Human Rights Act*, R.S.N.B. 1973, c. H-11, s. 2; *Human Rights Code*, R.S.N. 1990, c. H-14, s. 2(*l*); *Human Rights Code*, R.S.O. 1990, c. H.19; *Human Rights Act*, R.S.P.E.I. 1988, c. H-12, s. 1(1)(*l*); and the *Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, s. 2(1)(*d.1*)(i). Howard, *supra*, footnote 19, at p. 358–359, emphasizes that these statutes all require the disabling condition to be caused by bodily injury, birth defect, or illness. The human rights legislation of Manitoba and Nova Scotia also contains detailed definitions of disability, but does not contain the causal nexus noted by Howard. See the *Human Rights Code*, S.M. 1987–88, c. 45 (C.C.S.M., c. H175), s. 9(2)(*l*); and the *Human Rights Act*, R.S.N.S. 1989, c. 214, s. 3(1)(iii). For this reason, despite many similarities, these

Section 5(1) of the Ontario Human Rights Code prohibits employment discrimination "because of... handicap."

> Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or handicap.

Section 10(1) defines this phrase:

> "because of handicap" means for the reason that the person has or has had, *or is believed* to have or have had,
>
> (a) *any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect, or illness* and, *without limiting the generality of the foregoing*, including diabetes mellitus, epilepsy, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or on a wheelchair or other remedial appliance or device... (emphasis added).

The Code's wording, as well as its adjudicative and subsequent administrative interpretation with respect to obesity, demonstrate the many problems with this predominant Canadian approach. In short, the wording of the "Ontario-type" codes is overwrought, opaque, and redundant. Cautious tribunals have construed these provisions in a manner which has contradicted the broad remedial goals of human rights law[28] and avoided extending coverage to the obese.

Interpreting Saskatchewan's Human Rights Code, the Saskatchewan Court of Appeal opined:

> [a]nd we think it offensive for an employer to treat one person less favourably than another, when considering them for employment, on the ground the one is over-weight or homely or possessed of some such personal attribute having nothing to do with that person's ability to perform the work. Such treatment strikes at the dignity of the person. It constitutes an insensitive and often cruel blow to one's sense of self-worth and esteem. But, as counsel for the Commission acknowledged, not all such acts are prohibited by the Code. In other words the expression of the objects of the Code occasionally outrun the effect of its enacting parts.[29]

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laws may not belong among the "Ontario-type" codes. However, they should be considered no more restrictive towards disabled claimants, so the arguments offered below advocating coverage for obesity under "Ontario-type" codes should apply *a fortiori* to these latter jurisdictions.

28. Regarding the broad remedial purposes of anti-discrimination law see *O'Malley v. Simpsons-Sears Ltd.*, 2 S.C.R. 536, 7 C.H.R.R. D/3102, at p. 547 D/3105 (1985).

29. *Davison v. St. Paul Lutheran Home of Melville, Sask. et al.*, 116 Sask. R. 141, 59 W.A.C. 141, at p. 144 (1994).

J. Paul R. Howard emphasizes that "Ontario-type" statutes all require the disabling condition to be caused by bodily injury, birth defect, or illness.[30] He persuasively argues that this causal requirement has proved the major barrier to obese persons claiming disability discrimination in those jurisdictions. However, as will be argued below, this causal requirement has been incorrectly interpreted by various human rights tribunals and courts. It should not be the insurmountable barrier to obese claimants that Howard suggests it is.

ESTABLISHING OBESITY AS A COVERED DISABILITY

Tribunals in Ontario and Saskatchewan have developed two possible methods by which obese individuals can claim coverage.[31] Either they must establish that (1) obesity in general is a handicap, or (2) they must prove that their own obesity fits the statutory definition of handicap. As will be discussed below, there is ample reason to include obesity within the definition of handicap in Ontario-type codes. This should then be sufficient to enable future claimants to pursue their cases if they can prove discrimination on that basis. This has not yet happened. The second avenue provided, which requires individual proof is flawed in several respects. Briefly stated, it focuses on the characteristics of the claimant, not the discriminatory act. Moreover, this avenue could easily lead to inconsistent treatment of obese claimants based on their ability to produce scientific evidence regarding their condition. It would also require human rights tribunals to make repeated scientific assessments, a task for which they are ill-suited. As will be discussed below, two recent sets of internal Ontario Human Rights Commission (OHRC) Guidelines (Handicap Guidelines,[32] Obesity Guidelines[33]) indicate that this is the avenue that the Commission will stress. Most importantly, the requirement of individual proof also creates the risk that statutory protection against discrimination on the basis of some perceived disabilities will evaporate. Finally, the focus on scientific proof of the causes of each claimant's obesity also may be a mixed blessing for employers because of the informational requirements and uncertainty it imposes upon them in attempting to avoid liability.

30. Howard, *supra*, footnote 18, at p. 358-369.

31. *Horton v. Regional Municipality of Niagara et al.*, 88 C.L.L.C. 16,021 (1987). *Davison*, 116 Sask. R. 141 (1994).

32. Ontario Human Rights Commission, *Guidelines for Interpretation of 'Because of Handicap'* (1991) (hereafter Handicap Guidelines).

33. Obesity Guidelines, *supra*, footnote 14.

OVERVIEW: IS OBESITY A DISABILITY/HANDICAP?

Close examination of the Ontario code suggests that obesity does fit within its language. In the Vogue Shoes case, an Ontario Board of Inquiry interpreted section 10(1)[34] as having a two part test for establishing coverage on the basis of handicap.[35] Briefly, the first part requires that a condition be a "physical disability, infirmity, malformation, or disfigurement." The second part of the test examines the cause of the handicapping condition. Following the Lily Cups[36] decision by another Board of Inquiry, the Ontario Human Rights Commission developed internal guidelines which include additional extra-statutory prerequisites for a condition to be considered a covered handicap.[37] As part of a close analysis of the Code's provisions, we will examine these tests and the cases in which they were elaborated.

Part I: "Any degree of physical disability, infirmity, malformation, or disfigurement"

Is Obesity a Physical Disability?

The Vogue Shoes case is Ontario's leading case dealing with obesity discrimination.[38] Carolyn Maddox, the complainant, worked for Vogue Shoes as a salesperson for 17 years.[39] It was uncontested "that she was a very capable shoe salesperson," who would handle the banking in her employer's absence.[40] However, her relationship with Mr. Goldford, her employer, began to decline during her last few years with the company. Mr. Goldford complained about her punctuality, performance, making personal phone calls while at work, attitude, and dress.[41] He felt that on a number of occasions she dressed inappropriately for a woman of her size (approximately 5 feet 4 inches and 200 pounds).[42] He periodically suggested she lose weight, and finally in 1985 told Mrs. Maddox she would have to lose

34. The numbering of these sections has been changed during the 1993 revisions of the Ontario Human Rights Code. This section was previously numbered 9(1)(b).

35. *Ontario Human Rights Commission v. Vogue Shoes*, 14 C.H.R.R. D/425 (1991).

36. *Ouimette v. Lily Cups Ltd.*, 12 C.H.R.R. D/19 (1990).

37. Handicap Guidelines, *supra*, footnote 32.

38. Howard, *supra*, footnote 18, at p. 363.

39. 14 C.H.R.R. at p. D/427 (1991).

40. *Ibid.*, at p. D/431.

41. *Ibid.*, at p. D/432-33.

42. *Ibid.*

35 pounds within 6 weeks (by the time of her birthday) or be terminated.[43] She resigned and contacted the OHRC, which issued a complaint against Vogue Shoes and Guilford for discrimination on the basis of handicap.[44]

In the Vogue Shoes case, the Board of Inquiry concluded: "Obesity is not a physical disability unless it is an ongoing condition, effectively beyond the individual's control which limits or is perceived to limit a person's abilities."[45] It is noteworthy that the Vogue Shoes (and its predecessor, Horton[46]) decisions did not address the implications of the first three words of 10(1)(a)'s definition of handicap, "...any degree of *physical disability*" (emphasis added). Certainly that phrasing suggests an inclusive approach to defining handicaps. The Vogue Shoes Board stated in April of 1991:

> I accept Dr. Jenkins' evidence that obesity is now recognized by medical experts as a disease. It is not, however, a disease which causes a disability. Rather, it is a condition which enhances other risk factors with such probability that it is now designated as a disease. This does not establish, in my view, that obesity is a physical disability caused by illness, as required if obesity is to be recognized as a handicap, within the provisions of the *Human Rights Code*. Dr. Jenkins' evidence was that obesity is rarely caused by illness. It is generally the result of genetic and environmental factors.[47]

In other words, this Board found that obesity was a disease, but that it was rarely caused by illness and did not cause a disability. Compare the previous statement with the finding of a Saskatchewan Board of Inquiry that:

> [t]he evidence only shows that her obesity results from unspecified causes. In the view of this Board the fact that her condition may be caused by illness is not sufficiently strong to lead to the conclusion that it is more probable than not that her obesity is caused by illness. The Board regards the probabilities as equal and as a result, the burden has not been discharged.[48]

Affirming the Board of Inquiry's decision, the Saskatchewan Court of Appeal wrote:

> we agree[...]that her obesity did not as such constitute the physical disability at issue, as the Board's findings suggest; it was but the cause of that disability. But nothing turns on this, for it was incumbent upon the Commission to demonstrate that her disability, attributable to her obesity, was caused by illness, meaning that it had to demonstrate that her obesity was caused by illness or

43. *Ibid.*

44. *Ibid.*, at p. D/427.

45. *Ibid.*, at p. D/438.

46. 88 C.L.L.C. 16,021 (1987).

47. 14 C.H.R.R. at p. D/439 (1991).

48. Quoted at 116 Sask. R. p. 143 (1994).

> was the manifestation of an underlying illness. But according to the Board, the Commission failed to establish that fact. We agree with the Board...[49]

Thus, the Court of Appeal, agreeing with the Board of Inquiry, held that obesity is not a disability, but could cause one. They were not persuaded by the evidence that the claimant's obesity was caused by an illness. These conclusions in the Vogue Shoes and Davison cases obviously reflect the relative ability of two claimants to produce scientific evidence in support of their claims. The former held that obesity is a disease, but not one which causes disability, while the latter found that obesity caused the claimant's disability, but was not necessarily caused by illness. One might take this as the predictable outcome of opaque statutory language which seems to go beyond requiring that a claimant be disabled into the murky area of causation.

Is obesity a physical disability? It has a substantial probabilistic relationship to many disabling conditions. It causes a number of them. Various authors have noted the large and growing body of scientific evidence supporting these contentions.[50] There is a consensus in the medical community that obesity is an illness[51] and much evidence that many view extreme obesity itself as a physical disability.[52]

Is Obesity an Infirmity?

Cases reported to date have ignored the statutory term "infirmity" which Webster's Dictionary defines as "feebleness," "disease," or "ailment".[53] This would seem to be a possible line of argument, because as already noted, one human rights tribunal has already found that obesity is a disease.[54] One difficulty with this argument is that it exposes the redundancy of Ontario-type codes, which read literally, would define a handicap as "any degree of [...] infirmity [...] that is caused by [...] illness."[55]

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49. *Ibid.*

50. See J.P. Després, S. Moorjani, P.J. Lupien, A. Tremblay, A. Nadeau, and C. Bouchard, "Genetic Aspects of Susceptibility to Obesity and Related Dyslipidemias" (1992), 113 *Molecular and Cellular Biochemistry* 151.

51. See M. Larocque, "Planning Safe Diet Therapy for Your Obese Patient" (June 1990), *Canadian J. of Diagnosis*, 133-135+.

52. See Frierson, *supra*, footnote 2, at p. 288.

53. *Webster's Seventh Collegiate Dictionary*, Springfield, Mass.: G. & C. Merriam Company, 1967, at p. 432.

54. 14 C.H.R.R. at p. D/439 (1991).

55. R.S.O., 1990. c. H19, s. 10(1)(a).

Is Obesity a Malformation or Disfigurement?

In Vogue Shoes, the Board of Inquiry drew a distinction between discrimination on the basis of appearance and disability. However, that Board cursorily dismissed the possibility that obesity should be considered a form of disfigurement or malformation.

> In my view the definition of "handicap" provides only limited protection to those who are discriminated against on the basis of appearance alone. The definition covers, in addition to physical disability, "infirmity, malformation or disfigurement." It has not been suggested that the obese can be considered "malformed" or "disfigured." Neither, in my view can the term "physical disability" be extended to include the appearance of obesity.[56]

It is unfortunate that this line of argument was not pursued. In the Vogue Shoes case, Mr. Goldford repeatedly tried to convince the complainant Mrs. Maddox to lose weight. "On one occasion, he told her that she was a pretty lady and would be prettier if she lost some weight."[57] Later, the employer issued the ultimatum that Mrs. Maddox lose thirty-five pounds within two and one-half months or face termination. Given his statement regarding the effect of Mrs. Maddox's weight on her appearance, it would be difficult to understand how the Board could have maintained that the employer did not perceive Mrs. Maddox's obesity to be "any degree of [...] dis*figure*ment," had the Board fully considered the issue.[58] Disfigurement is defined in Black's Law Dictionary as "[t]hat which impairs or injures the beauty, symmetry, or appearance of a person or thing: that which renders it unsightly, misshapen, or imperfect, or deforms in some manner."[59]

There was no evidence that Mrs. Maddox's weight physically prevented her from doing her work or that maintaining a certain physique was in any way required for successful performance of her job as a shoe salesperson. The unrefuted evidence cited in the Vogue Shoes case indicates that Mr. Goldford was discriminating on the basis of Mrs. Maddox's appearance. However, it appears that his primary reason for issuing her an ultimatum about her weight was that he was becoming dissatisfied with her attitude. The employer apparently chose to confront her by demanding she lose weight. The language of Ontario-type codes does give human rights tribunals sufficient latitude to decide whether this sort of managerial behaviour should

56. 14 C.H.R.R. at p. D/438 (1991).

57. 14 C.H.R.R. at p. D/432 (1991).

58. This argument was first made by Howard, *supra*, footnote 18, at p. 365.

59. H.C. Black, *Black's Law Dictionary*, 5th ed., St. Paul, Minn.: West Publishing, 1979, at p. 420. This conventional definition of disfigurement is similar to those found elsewhere. See *ibid.*

be countenanced by public policy. At best, such conduct is poor management and is also an affront to the employee's dignity. If one acknowledges that obesity frequently may be a deeply entrenched, if not immutable condition, then such behaviour amounts to a cruel, unprovoked, degrading and unjustifiable attack on the employee's psychological and economic well-being.[60] The irony here is that the employer apparently considered the weight loss ultimatum to be the easiest way to pressure a disfavoured employee. Obviously, even if such forms of discrimination are proscribed, employers are still free to search for more acceptable, and less demeaning means to motivate employees. The facts presented in Vogue Shoes indicate that Mrs. Maddox's obesity had been long-term. As noted, the employer did comment how her weight detracted from her appearance. It is difficult to understand how the Board would allow the employer to demand Mrs. Maddox lose weight or lose her job. How is this logically different from discriminating against one who is disfigured in some other fashion? Would an employer be allowed to demand that such an employee undergo plastic surgery?[61]

In summary, one could plausibly argue that there is a substantial probability that obesity *can* be any of three of the four listed forms of handicap specified in the first part of the Ontario-type test. Thus, some (probably high) proportion of obese persons have *some* degree of physical disability, infirmity or disfigurement when compared to people with average physical characteristics. As will be explained more fully below, this should be sufficient to fulfill the first requirement for including obesity as a covered handicap if the statutory protection against discrimination on the basis of perceived disability is to have meaning.

Part II: "Caused by bodily injury, birth defect or illness"

The second part of the Ontario-type statutory test to establish coverage under the term "handicap" addresses the matter of causation of the handicapping condition. Before accepting a claim that obesity is a physical disability, the Vogue Shoes Board interpreted the Ontario Code to require that it be caused by an illness. The Board acknowledged that obesity can be the

60. In the Davison case, the Saskatchewan Court of Appeal, as quoted above, acknowledged as much while upholding the denial of statutory coverage for Ms. Davison who was refused employment due to her weight. She weighed 148 kgs. (330 lbs.) and was 165 cm (5 ft. 4 in.) tall. See footnote 29 and accompanying text.

61. Such a scenario may not be far-fetched. In the Davison case, the claimant had undergone counseling and was scheduled for surgical treatment for her condition (vertical banded gastroplasty), yet a Board of Inquiry and the Saskatchewan Court of Appeal found that there was insufficient evidence that the disability occasioned by her obesity was caused by illness. See 116 S.R. at p. 145 (1993).

result of a genetic predisposition. In what seems to be a particularly formalistic reading of the statute, the Board found no place to fit obesity in the phrase "any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect, or illness..." Obesity can be caused by any of the three of these. Bodily injuries may limit mobility leading to weight gain. As quoted above, the Vogue Shoes Board acknowledged that genetics play a role in predisposing people towards obesity. What then is this nonnormal genetic predisposition to bodily conditions which can cause various physical ailments if not a birth defect or a latent illness, genetic bad luck? It is difficult to understand how such semantic distinctions justify noncoverage. One cannot distinguish the genetic disposition to obesity from covered conditions on the basis of its latency. The statute covers conditions like bodily injuries or illnesses that can occur later in life. Also, illnesses such as HIV infections which can have long latency periods before developing into AIDS are covered. These difficulties in statutory construction are created by the overwrought and redundant phrasing of the Ontario Code.

Though the Vogue Shoes Board accepted (conflicting) expert testimony that obesity was a disease, it read the statute as requiring that the claimant prove this disease was caused by an illness. That is tantamount to reading the statute to require proof that obesity was an illness caused by an individual's illness, as opposed to a lack of personal discipline, one supposes. This view was embodied in the following revealing passage from the Vogue Shoes Board's decision.

> Nonetheless, it would in my view be unreasonable to find retroactively, in light of subsequent medical developments, that a common condition, widely considered to be within an individual's control, is actually a handicap which gives rise to obligations under the *Human Rights Code* (emphasis in original).[62]

Human rights tribunals have interpreted the phrase "caused by bodily injury, birth defect or illness" as meaning that a condition must be involuntary or immutable to be considered a covered handicap.

A "PURPOSIVE" INTERPRETATION OF THE ONTARIO HUMAN RIGHTS CODE?

Internal Handicap Guidelines[63] adopted by the OHRC subsequent to a Board of Inquiry's Lily Cups decision show the ongoing nature of the barriers being placed in the path of claimants asserting discrimination "because of handicap." After an adverse decision by the Lily Cups Board, the OHRC

62. 14 C.H.R.R. at p. D/439 (1991).

63. Handicap Guidelines, *supra*, footnote 32.

adopted what it called a "purposive" interpretation of the statutory phrase "because of handicap," as well as its "substantial or material limit" test, both in derogation of the statute's language.[64] The Lily Cups Board approvingly cited an American court's explanation of the test which originates in the U.S. Rehabilitation Act of 1973.[65] The policy rationale for such a limitation is obvious (in Lily Cups, the Board ruled that the flu was not a covered handicap). However, the "substantial or material limit" test has no basis in the language of Ontario-type human rights codes. In fact, while the Lily Cups Board and the OHRC see this as an approach which comports with the "underlying purpose of human rights legislation in Ontario,"[66] neither body explained how this language, taken from a U.S. statute, can be reconciled with the more expansive phrasing of the Ontario Code, which defines handicap as "any degree of physical disability, infirmity, malformation, or disfigurement..."

> The reason that persons with short term or temporary and commonplace disabling conditions do not fall within a purposive definition of handicap is because these persons simply are not part of any identifiable group suffering from historical, economic or social disadvantage in our society. This is true even through [sic] such persons may suffer serious real life consequences as a result of their temporary conditions. Such serious real life consequences may be arbitrary or unfair, but they do not constitute "discrimination."[67]

The circularity of the logic of this passage does little to dispel the impression that the OHRC cannot find a justification for these limits to coverage

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64. *Ibid.*, at p. 1.

65. The Lily Cups Board found the following passage from the Rehabilitation Act and its interpretation by the U.S. Fourth Circuit Court of Appeals in *Forissi v. Bowen*, 794 F. 2d 931 (4th Cir. 1986) to be "relevant" to the Board's analysis of the Ontario Code:

> The Rehabilitation Act of 1973, as amended, defines the term "handicapped individual" at 29 U.S.C.A. § 706(7)(B), 505, as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such impairment."...
>
> The Rehabilitation Act assures that truly disabled, but genuinely capable, individuals will not face discrimination in employment because of stereotypes about the insurmountability of their handicaps. It would debase this high purpose if the statutory protections available to those truly handicapped could be claimed by anyone whose disability was minor and whose relative severity of impairment was widely shared. *Indeed, the very concept of an impairment implies a characteristic that is not commonplace and that poses for the particular individual a more general disadvantage in his or her search for satisfactory employment* (emphasis in original) [Quoted in 12 C.H.R.R. at p. D/33 (1990)].

66. Handicap Guidelines, *supra*, footnote 32, at p. 1.

67. *Ibid.*

from within the actual language of the Code. The Handicap Guidelines continue:

2. This section of the guidelines is comprised of three parts. First, paragraphs 3 and 4 describe conditions that are clearly within the definition of handicap set out in section 9(b)(i) [now 10(a)(1)] of the *Code*. Second, paragraph 5 (subject to paragraph 6) identifies conditions which are clearly not within a purposive interpretation of the definition of handicap. Third, the guidelines will consider conditions which do not fit within either of the aforementioned two categories. Conditions which fall between these two categories will be considered in the particular circumstances of each case on the basis of a purposive interpretation of the definition of handicap in accordance with the factors set out in paragraph 7 below....

3. If a person has a condition, or is perceived to have a condition, which meets all of the following criteria, she or he will be considered to have a physical disability within the meaning of the *Code*:

   (i) The condition or perceived condition is permanent, ongoing or of some persistence; and

   (ii) The condition or perceived condition is not commonplace or widely shared; and

   (iii) The condition or perceived condition is a substantial or material limit on an individual in carrying out some of life's important functions....

5. Conditions like the flu or the common cold, are excluded if they meet all of the following criteria:

   (i) The condition is transitory in nature, lasting only for a very short period with no ongoing or long term effects; and

   (ii) The condition is commonplace or widely shared; and

   (iii) The effect of the condition on one's ability to carry out any of life's important functions is minor....

7. If a condition does not meet all of the above criteria set out in paragraphs 3 or 4 above and is not excluded by paragraph 5 above, then the condition (or the condition that a person is perceived to have) in any particular case will be considered on the basis of a purposive interpretation of the definition of handicap in light of the medical evidence obtained and any applicable legal precedent. Some of the factors that will be considered by the Commission in making this determination are as follows:

   (a) The extent to which a person suffering from such condition can be considered a member of an identifiable group suffering from economic, social, political or legal disadvantage in our society, having regard to indicia of discrimination such as segregation, stereotyping, prejudicial attitudes, inordinately high rates of unemployment or underemployment and public misconceptions about said condition and having regard to the goal of achieving integration of persons with disabilities into all facets of community life;

(b) The duration of the condition, and the extent to which the condition can be regarded as ongoing or of some persistence as opposed to being merely temporary without creating any significant ongoing or persistent limitations;

(c) The severity of the limitation caused by the condition upon the person's ability to carry out any of life's important functions;

(d) Whether the person is suffering from a disabling condition, such as cancer, but is being treated and may recover, such that accommodation of the person's absences to seek treatment and to monitor the condition may be necessary...[68] (emphasis in original).

These guidelines create new ambiguities along with new hurdles for claimants. First, The OHRC may have even gone beyond the Rehabilitation Act which requires a substantial limitation on **one or more** of a complainant's major life activities, to require in paragraph 3 (iii) "a substantial or material limit on an individual in carrying out **some** of life's important functions." However, 5(iii) and 7(c) of the same guidelines indicate that the Commission will consider whether the condition limits "the person's ability to carry out **any** of life's important functions" (emphasis added). Why are there different standards in the different sections? What is the significance of the difference? Does this mean that more than one limitation will assure coverage?

The requirement of 3 (ii) that the condition not be "commonplace or widely shared" is troublesome. Aside from the ambiguity of these terms, there is no evidence that these requirements have any basis in the Code. Heart disease is a widely shared, if not commonplace condition. Do these guidelines mean it that should no longer be covered? What level of incidence makes a condition commonplace or widely shared? It is difficult to see how any case of extreme obesity would not be a covered disability under these guidelines. If this assessment is true, these Handicap Guidelines may conflict with the internal Obesity Guidelines issued by the OHRC in the wake of the Vogue Shoes decision.

Depending upon how this "substantial and material limit" requirement is interpreted, it could either shore up or exacerbate the erosion of the perceived disability language in the Code. Already the Horton Board has held that a perceived disability cannot be covered if the disability involved is not also covered.[69] The Rehabilitation Act, from which the "substantial and material limit test" was taken, clearly will cover those "regarded as having [...] an impairment" that substantially limits a major life activity.[70]

68. *Ibid.*, at p. 2-4.

69. 88 C.L.L.C. at p. 16,023 (1987).

70. See footnote 65.

Yet, the phrasing of the Handicap Guidelines' paragraph 3 is unclear. A literal reading of 3(iii) suggests that if a person "is perceived to have a condition," which "perceived condition is a substantial or material limit on an individual in carrying out some of life's important functions," he or she may be covered. The most reasonable interpretation of this paragraph, one which protects against discrimination on the basis of perceived disabilities, is that if the condition is perceived to impose a substantial and material limit on an important life function and meets the conditions of 3 (i) and (ii), then it will be covered. This reading could actually increase protection against those who are perceived to be substantially and materially limited.[71] However, given that the subsequent Obesity Guidelines continue to require individual proof of the medical causes of a disability, and the Horton Board's holding that a perceived disability cannot be covered unless the disability is covered, it is more likely that the "substantial and material limit test" will become but another hurdle to obese claimants.

By ignoring the implications of the inclusion of "disfigurement" as a type of handicap listed in 10(1)(a), the Commission's guidelines cannot address the problem raised by Professor Jones. What if an "individual has an impairment" that is "substantially limiting" only "because of the attitudes of others towards the condition"?

> For example, suppose an individual may have a prominent facial scar or disfigurement, or may have a condition that periodically causes an involuntary jerk of the head but does not limit the individual's major life activities. If an employer discriminates against such an individual because of the negative reactions of customers, the employer would be regarding the individual as disabled and acting on the basis of that perceived disability.[72]

The Handicap Guidelines would not appear to cover a disfigurement that does not limit an important function, but for the prejudices of those who

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71. Having already taking the "substantial and material limit" test from U.S. law, will the OHRC also adopt its interpretation given by the First Circuit Court of Appeals in *Cook v. State of Rhode Island, Dept. of Mental Health*, 10 F.3d 17 (1st Cir. 1993)? There the Court held that work was one of the major life activities and that a claimant need not unsuccessfully seek a "myriad of jobs" before qualifying as being substantially limited [10 F.3d at p. 25 (1st Cir. 1993)].

> Put in slightly more concrete terms, denying an applicant even a single job that requires no unique physical skills, due solely to the perception that the applicant suffers from a physical limitations [sic] that would keep her from qualifying for a broad spectrum of jobs, can constitute treating an applicant as if her condition substantially limited a major life activity, *viz.*, working (10 F.3d at p. 26).

As yet, it is unclear whether the OHRC's use of the phrase "important life function" will be more or less inclusive than "major life activity".

72. C.C. Jones, "Individuals Protected by the Employment Provisions of the Americans With Disabilities Act" (1994–95), 3 *J. of Indiv. Employment Rts. and Resp.* 209, at p. 214.

see it. To an extent, disfigurement is always a perceived disability, that is, if beauty, or its converse, is truly in the eye of the beholder. Given the Handicap Guidelines' ambiguities and informational requirements, it is doubtful that despite their restrictiveness, they will provide much comfort or guidance to employers.

The OHRC's internal Obesity Guidelines, adopted post-Vogue Shoes, may have added to the confusion surrounding the interpretation of the statutory phrase "because of handicap." The Commission's Obesity Guidelines contain the following questions to be used in determining if an overweight claimant is covered by the Code:

1. Does the complainant fit a medically recognized definition of obesity? (footnote omitted)
2. Is the complainant's weight caused by a medical condition (e.g., endocrine abnormality, mental disability, eating disorder)?
3. Are other members of the complainant's family (parents, grandparents, siblings) also obese?
4. Does the complainant's weight cause any medical problems (e.g., hypertension, diabetes, cardiovascular disease)?
5. Does the complainant's weight cause any functional problems (e.g., shortness of breath, limited mobility)?
6. Is the complainant's weight perceived by the respondent (employer/landlord/service provider) to cause medical or functional problems?[73]

While these questions are comprehensive, one might wonder if this is a reasonable scope of inquiry for a legal institution charged with the protection of human rights.[74]

The legal quagmire into which the OHRC has been thrown by adverse[75] rulings of two boards of inquiry is amply illustrated by the part of their guidelines regarding obesity cases which distinguishes between claimants who are "protected" and those who "may be protected."[76] According to the Guidelines, obesity which is "due to endocrine abnormality" or "due to factors beyond individual control" is "protected." However, obesity "due to genetic factors", or "which causes health problems," or "which leads to perception of physical limitation" only "may be protected." It is difficult, if not impossible, to imagine a consistent statutory or logical basis for drawing distinctions between factors beyond individual control and genetic factors.

73. Obesity Guidelines, *supra*, footnote 14, at p. 1.

74. See also Howard, *supra*, footnote 18, at p. 365.

75. In the Lily Cups and Vogue Shoes cases, the OHRC had argued positions rejected by the Boards of Inquiry.

76. Obesity Guidelines, *supra*, footnote 14, at p. 1-2.

Requiring proof of medical cause of obesity will lead to arbitrary distinctions regarding statutory coverage. It is unlikely that employers will usually know the cause of an employee's obesity. Given the state of scientific knowledge, is it really a wise or efficient public policy to, in effect, require employers to determine the causes of their employee's obesity? If they do discriminate, it will probably be on the basis of outward appearances, as well as their conclusions regarding actual or presumed limitations imposed by the condition. Statutory coverage will inevitably be marked by arbitrary demarcations if human rights tribunals decide the validity of employment rules or decisions which discriminate against the obese based on the ability of a particular claimant to adduce sufficient evidence of the medical cause of their condition. Claimants vary greatly in their sophistication and means to pursue their causes. As already noted, it is doubtful whether the members and staffs of human rights agencies have the appropriate training to be responsible for such inquiries. It would be simpler, more sensible and consistent with the overall pattern of human rights law to focus on the employer's decision and its business-related justification. The Obesity Guidelines are also flawed due to their failure to address the possibility that obesity could be a handicap or perceived handicap due to its potential relationship to infirmity or disfigurement.

IS THE VOLUNTARINESS OR MUTABILITY OF OBESITY RELEVANT?

According to the OHRC Obesity Guidelines the answers is yes.[77] However, others have noted that for many other disabling conditions, such as AIDS or the loss of a limb, lawmakers have deemed the voluntariness of the cause to be irrelevant.[78] While this argument is convincing, Canadian tribunals seemed to be more concerned with a related concern, the mutability of an individual's obesity. The Vogue Shoes Board quoted with approval a previous Board's characterization of physical disability as a condition where one "can do nothing of his own volition to remove himself or herself from the category."[79]

77. The Obesity Guidelines begin as follows:

> The recent board of inquiry in *OHRC (on Behalf of Carolyn Maddox) v. Vogue Shoes et al.* ruled that not all persons discriminated against on the basis of their weight are protected under the *Code*. However, the ruling indicates that people whose obesity is caused by factors clearly beyond their control, such as an endocrine abnormality, will be protected by the *Code* (Obesity Guidelines, *supra*, footnote 14, at p. 1).

78. Frierson, *supra*, footnote 2, at p. 294.

79. 14 C.H.R.R. at p. D/437 (1991).

While some might find it morally appealing to distinguish between voluntary or mutable conditions on the one hand, and involuntary and permanent disabilities on the other, attempting to make such distinctions regarding obesity rapidly becomes both a scientific and adjudicative morass.[80] For example, the Vogue Board approvingly cited previous cases that declared hypertension and allergies to be handicaps. Given that both are treatable conditions, and that the former is so closely related to obesity in causes and effects, it is hard to see how from a legal perspective these conditions can be meaningfully distinguished from obesity even using the mutability or voluntariness criteria for establishing coverage as physical disabilities. Medical evidence indicates that obesity has multiple causes including genetic predispositions, which may have much greater influence than environmental causes.[81] It is widely known that long term-weight loss programs have low success rates.[82] It may be true for many individuals that hormonal and metabolic factors will render futile any attempts to lose weight. A British Columbia Human Rights Tribunal is the only one in Canada to recognize that the multifactoral etiology of obesity casts doubt on the assertions that it is a voluntary condition, doing so despite the testimony of a claimant's family practitioner that he was obese mainly due to a "lack of willpower."[83] That ruling implicitly follows the view that science cannot yet give precise answers regarding the degree to which obesity is voluntary or mutable in groups or individuals. More importantly, adjudicative tribunals are not well-suited to evaluate such scientific evidence even to the extent it is available.

Adjudicators generally do not have the scientific training to independently evaluate medical or statistical research. Typically, they are put in a position of being arbiters of conflicting expert testimony. Under these circumstances it would be unreasonable to expect adjudicators to be able to weigh reliably either the credentials or testimony of the experts.[84] This lack of institutional competence is only compounded by requiring repeated evaluation of scientific evidence regarding the causes of the obesity of each

80. See Howard, *supra*, footnote 18, at p. 372-373, 388-390.

81. T.I.A. Sørensen and A. J. Stunkard, "Does Obesity Run in Families Because of Genes?" (1993), 370 *ACTA Psychiatrica Scandinavica, Supplementum* 67.

82. Larocque, *supra*, footnote 51.

83. 11 C.H.R.R. at p. D/334-335 (B.C.H.R.C. 1989).

84. For example, see 14 C.H.R.R. at p. D/438-439 (1991). Québec Superior Court Judge Claude Tellier succinctly stated a more appropriate judicial attitude towards conflicting scientific evidence. "Il y a donc ici controverse et débat d'école. Ce n'est pas à la Cour de trancher et d'opter en faveur de l'une ou l'autre des thèses qui s'affrontent" [*Commission des droits de la personne du Québec c. Hôpital Rivière-des-Prairies*, 15 C.H.R.R. D/504, at p. D/506 (Qué. Super. Ct. 1991)].

individual claimant, as is now apparently mandated in Ontario, and perhaps, in Saskatchewan.

In essence, those who consider the voluntariness of an individual's obesity to be a relevant consideration are, in those circumstances, contending that obesity is a matter akin to grooming, not a physical or mental disability. A more tenable, and less problematic approach would be to recognize and protect the employer's right to impose grooming standards. However, if the physical condition in question would require surgery or prolonged formal programs of behavior modification, then the matter goes beyond mere grooming, and thus the condition could be considered a disability. Only in the limited circumstances of alcohol and drug addiction, where safety and criminal law concerns are paramount, should employers be allowed to demand that employees enroll in treatment programs. In all other circumstances, a generous and more consistent vision of human rights would suggest that all employment-related decisions based on physical characteristics must be justified by reference to some *bona fide occupational requirement*.[85]

ESTABLISHING OBESITY AS COVERED HANDICAP: WHAT PROOF SHOULD BE REQUIRED?

Ontario's Horton case became the precedent for the principle that obese individuals would have to provide evidence of the medical causation of their condition in order to be covered by anti-discrimination protections. This approach was followed by subsequent Ontario boards of inquiry and adopted by the Saskatchewan Court of Appeal.[86] A Saskatchewan Board of Inquiry seems to have adopted the wrong legal test. The issue is not whether the balance of probabilities shows that a claimant's obesity is caused by illness.[87] Rather, a more appropriate question is whether obesity in the general population, or of the individual claimant, is probably "caused by bodily injury, birth defect, or illness." Within the context of the Ontario-type codes it makes no sense to repeatedly require individual proof of causation. Otherwise, one reads out these codes' protections against discrimination on the basis of a perceived disability.

The Horton decision cited a lack of information regarding the causes of obesity. It also declined to rule on whether the claimant's obesity was covered because she did not provide medical evidence that *her obesity*

85. See C.H.R.D. No. 3, No. T.D. 3/90 at p. 8 (1990).

86. See footnote 49 and accompanying text.

87. See footnote 48 and accompanying text.

was caused by birth defect or illness. The Horton Board, noting that common understanding and previous jurisprudence considered hypertension to be an illness, required no proof of its cause in the claimant's case.[88] A more tenable reading of Ontario-type human rights codes indicates that the appropriate analysis would determine whether obesity in general is a covered disability. Once the requirements of 10(1)(a)'s two part test are met with general medical or individual case specific evidence, then obesity should thereafter be considered a covered disability/handicap.[89] Having established that obesity *can* be a covered disability, an employer's belief (perception) that a person is disabled by their obesity then would be logically sufficient to make a prima facie showing of discrimination on the basis of a perceived handicap. Just as it would be legally irrelevant if an employer thought HIV infections are caused by immoral behaviour, or contaminated blood transfusions, it should not matter what an employer believed to be the cause of a particular employee's obesity, or what the cause was.

Requiring each individual claimant to provide proof of an involuntary cause of her obesity is questionable on scientific and pragmatic grounds for the reasons stated above. Beyond that, changing the focus to the claimant's characteristics and the causes of her obesity, could effectively read perceived disabilities out of human rights law. Protection against discrimination on the basis of perceived disabilities is critical to the effectiveness of handicap discrimination law because perceptions are necessary precursors to discriminatory acts.

WHY COVERAGE OF PERCEIVED DISABILITIES IS CRUCIAL

The power to make distinctions is a primary operation of intelligence. We distinguish between white and black, beautiful and ugly, pleasant and unpleasant, gain and loss, good and evil, right and wrong. The fate of mankind

88. 88 CLLC 16,021, at p. 16,024 (1987).

89. One apparent problem with the jurisprudence discussed is that two related issues are being conflated. The first issue concerns whether a particular condition in general is a covered handicap. Obesity is one such condition. The second, case specific issue is whether the claimant's overweight condition is such that it constitutes covered obesity. That is, assuming obesity in general is a covered disability, how overweight must one be to be covered by anti-discrimination law? (Of course, additional people could come within the statute's coverage providing they were discriminated against due to the perception that they have disabling obesity.) Human rights commissions could adopt strict rules that all weight requirements must be justified by reference to some occupational necessity, or could restrict the definition of covered obesity to situations where individuals are morbidly obese (twice their "ideal" body weight) or some percentage over their ideal body weights as established by the Metropolitan Life tables, or some similar standard. However, even under the latter approach, the logic of perceived disability cases would hold an employer liable for discrimination if the employer responded to the perceived obesity as a disabling condition.

> *depends upon the realization that the distinction between good and evil, right and wrong, is superior to all other distinctions...*[90]

All decisions require decisionmakers to discriminate, i.e., distinguish between/among alternatives. Discussions of anti-discrimination law often obscure this simple fact and its logical corollary that efforts to curb unlawful choices or acts of discrimination should primarily focus on the decision maker before considering the characteristics of the alleged victim. All acts of discrimination entail perceptions regarding the "facts" concerning the object of choice. If an employer refused to hire someone because they incorrectly believed the applicant to be a Catholic, when in fact the individual was Protestant, would that not still be unlawful discrimination on the basis of religion? It would. What is the logical difference between that circumstance and a case where an employer refuses to hire an applicant based on an incorrect attribution of disability? Once it is established that obesity can be a disability by general or individual evidence, then it should no longer be necessary for successive claimants to establish that they are disabled by their obesity, or the causes of their weight problem. They only should have to establish that they are obese or perceived to be disabled because of their weight, and that due to this, they were the victims of direct or indirect discrimination. Even in cases of indirect discrimination, the characteristics of the purported victim are only relevant insofar as they might establish membership in the protected group.[91]

Before leaving the matter of perceived disabilities, it will be instructive to consider some cases decided under Quebec's Human Rights Code. Quebec's evolving case law illustrates some of the drawbacks of a statute that does not prevent discrimination on the basis of perceived disability and the unsatisfactory nature of adjudicative efforts to circumvent this problem.

In one of the earliest of Quebec's obesity discrimination cases, Johanne Rioux was dismissed from her job as a secretary-receptionist at a pediatric clinic solely due to her obesity.[92] The evidence indicated that she had consulted doctors and tried several diets without success. Although the claimant was 5 feet 2 inches tall and between 210 and 220 pounds, she testified that her weight did not limit her at all in the accomplishment of her normal activities. For that reason the court found she was not a handicapped person under the Quebec Charter of Human Rights and Freedoms (as revised in 1978). The lack of a statutory prohibition against discrimination

90. A.J. Heschel, *I Asked for Wonder, A Spiritual Anthology*, ed. S. H. Dresner, New York: Crossroads, 1972, at p. 58.

91. Of course any of the claimant's characteristics actually relating to her ability to perform the job, including her weight, are very relevant.

92. *La Commission des droits de la personne du Québec v. Roger Héroux et al.* 2 C.H.R.R. D/388 (Québec Provincial Court 1981).

on the basis of perceived disabilities obviously played a central role in the failure of her claim.

A subsequent disability case, decided after amendments to the Charter, showed that the courts would try to fill in the void facing those claiming discrimination on the basis of perceived disabilities. Jean Juneau, an accomplished athlete, was denied a summer position as a recreation instructor in a hospital on the basis of a physical examination (an x-ray which showed that he had a spinal anomaly (spondylosis) for which he was asymptomatic).[93] The hospital had a policy of denying employment to anyone with spinal anomalies if the job required substantial physical effort. The Superior Court set out a two part test defining handicap: (1) the presence of an anatomical or physiological anomaly; and (2) that the anomaly be of a nature that appreciably limits the individual's capacity to function normally.[94] Although the claimant did not meet the second part of the test, the Court found that he was discriminated against on the basis of a disability, because the hospital based its decision on an inadequate examination. This decision appears to be a tortuous effort to evade the lack of a "perceived disability" category in statute and precedent. Otherwise, it is hard to see how the court could assert that a failure to adequately examine someone is tantamount to discrimination on the basis of a disability, given the court's own legal test and that all applicants received the same examination. Though the court made no mention of discrimination on the basis of "perceived disabilities," this case seems to turn implicitly on such a concept. In any event, it starkly illustrates the inadequacy of anti-discrimination statutes that do not account for this type of prejudice.

In a subsequent case, involving a firefighter denied employment also due to asymptomatic spondylosis, a Tribunal of the Quebec Human Rights Commission took the next logical step. Without citing any authority, the Tribunal ruled that the definition of handicap now covered any exclusions based on perceived handicaps, regardless of whether the perception was objectively or subjectively based.[95] Thus, Quebec has moved from being

93. 15 C.H.R.R. D/504 (Qué. Super. Ct. 1992).

94. 15 C.H.R.R. at p. D/507 (Qué. Super. Ct. 1992). See also A.E. Aust and L. Charette, *The Employment Contract,* Cowansville, Qué.: Les Éditions Yvon Blais, 1993, at p. 41–42.

95. *Commission des droits de la personne du Québec et Claude Poirier c. Ville de Montréal,* 22 C.H.R.R. D/325, at p. D/328–329 (1994). The entire passage incorporating perceived handicaps into the statutory definition is as follows.

> Ajoutons que le désavantage peut être réel et objectif lorsqu'il y a présence d'une anomalie ou déficience qui empêche de manière importante un fonctionnement dit "normal"; ce désavantage peut aussi être présumé lorsqu'on interfère que quelqu'un, à cause d'une anomalie ou d'une déficience, ne pourra effectivement fonctionner "correctement". Réalité objective et perception subjective font donc partie intégrante de la notion de handicap.

one of the most restrictive jurisdictions for those claiming handicap discrimination to join British Columbia and the federal jurisdiction as those with the most expansive coverage.

EXPANDING THE PROTECTED CLASSIFICATIONS OF ANTI-DISCRIMINATION LAW: WHERE TO DRAW THE LINE?

As the foregoing suggests, one of the most difficult and troubling problems in the field of anti-discrimination law is deciding which groups or classes of people should be designated for protection. Where and how do we draw lines? How do we choose which decisional criteria are suspect? Some commentators have warned against the inexorable accretion of protected classes, arguing that the political contest for such recognition balkanizes and polarizes society.[96] One does not have to subscribe to this implicitly rosy view of the pre-civil rights era polity to understand that this ad hoc, piecemeal approach to protecting human rights can be divisive,[97] litigious, costly and ultimately counterproductive or ineffective. On the other hand, the piecemeal approach does have the advantage of allowing legal change to come only after some form of popular consensus or acceptance develops regarding the merits of a group's claim to protected status. However, popular prejudices die slowly. The desire for consensus may leave the most unpopular groups without redress — witness the ongoing conflict over the inclusion of sexual orientation as a protected classification.

One critic suggests that obesity should not be protected under anti-discrimination law because doing so runs the risk of diminishing the public approval of and voluntary compliance with anti-discrimination laws generally.[98] That writer suggests that, while emotionally compelling, the mistreatment of the obese was not a social problem of comparable magnitude to that experienced by other protected groups.[99] No empirical support of that assertion was offered. Nor did she convincingly explain why, even if that

96. See R.A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws,* Cambridge, Mass.: Harvard University Press, 1992. See also R. Brenner, *In Pursuit of Canadian Prosperity,* Montréal: McGill University Faculty of Management, 1994, at p. 36–37.

97. One needs no further evidence of the divisive nature of the piecemeal approach than the objections some obese individuals have raised to the idea of being labeled disabled. While that may be the most pragmatic path to the protection of obese people's rights, it ironically has been called demeaning. See W. Lambert, "Obese Workers Win On-the-Job Protection Against Bias," *The Wall Street Journal,* November 12, 1993, p. B1, B7. This sensitivity to labels and status has a familiar ring. See Abella, *supra,* footnote 20.

98. See M. Carlson, "And Now, Obesity Rights," *Time,* December 6, 1993, p. 96.

99. *Ibid.*

contention is correct, the problems of the obese are not worthy of redress. In Canada, one must ask why the obese are any less deserving of protection against employment discrimination than are people with criminal records.[100]

Where does one reasonably draw the line? How do tribunals avoid making arbitrary choices when deciding which characteristics are prohibited or suspect bases for making distinctions and which are not? The Canadian Human Rights Tribunal offered the following dicta which suggests the most expansive approach taken so far.

> We believe that a broader interpretation of disability – to include any physical characteristic utilized to reject an individual – finds support in the definition in s. 25. The section says "disability" means any... physical disability". In our view, shortness is a physical disability if the Armed Forces states that it disables a person from joining: the disability need not be the result of an illness. To come to any other conclusion would defy logic and common sense: the Armed Forces (and any other employer subject to the Act) could select any criterion, indeed an unreasonable one such as rejecting all people with red hair, that fell outside the enumerated prohibited grounds and yet was not based on a bona fide occupational requirement under s. 15(a); with impunity they could deny an employment opportunity to any person based on that criterion.[101]

As noted earlier, the Canadian Human Rights Act does not define disability, so it imposes no constraints on Human Rights Tribunals, if they decide to define the term broadly. Moreover, cases decided under federal law also can find additional support for a broad definition in the equal protection requirements of the Canadian Charter of Human Rights and Freedoms.

> On this basis of consistency with the Charter, the right to the equal benefit of the law reinforced an interpretation of disability that prohibits the Armed Forces from relying on a prima facie unreasonable criterion, such as a minimum height requirement, unless it can be justified as a bona fide occupational requirement under s. 15(a) of the Act.[102]

While some academic commentators have advocated sweeping protection against discrimination on the basis of appearance,[103] no other Canadian cases were found, even in the federal jurisdiction, that have taken up this

100. Four provinces and both territories protect people against employment discrimination on the basis of having a criminal record. See Canadian Employment Law Guide, *supra*, footnote 3.

101. C.H.R.D. No. 3, No. T.D. 3/90 at p. 8 (1990).

102. C.H.R.D. No. 3, No. T.D. 3/90 at p. 9 (1990).

103. See "Facial Discrimination", *supra*, footnote 18. See also S. A. McEvoy, "Employment Discrimination Based on Appearance" (1994), 45 *Lab. L. J.* 592.

thread.[104] Although the decency of approach has obvious appeal, its radical contradiction of deeply entrenched, popular behaviour makes such a prohibition unlikely to obtain widespread acquiescence, much less acceptance at this time.

CONCLUSION

One unfortunate side effect of the ongoing debate over expanding the number of protected groups is a focus on the bona fides of each group's claim to protection. While this is obviously necessary, sometimes it seems as if the primary goal of anti-discrimination law, that is, to modify the behavior of those who would discriminate on unacceptable bases, is obscured by the debate over the merits and classification of the victims.[105] The quest for designation of protected status is unavoidable so long as society is committed to this piecemeal approach to the protection of human rights.

If the goal of human rights law is to promote fairness as well as to eradicate irrational prejudices that injure people due to their essential physical, mental, and cultural characteristics, then society can no longer excuse the use of obesity as a criterion for employment-related decisions unless justified by a *bona fide occupational requirement.* Although it would be preferable to have legislatures add obesity as a distinct protected classification under their human rights Codes,[106] this is very unlikely at this time. For the reasons argued above, the failure of legislatures to act is not preemptive of reform, if only human rights tribunals would find the will to take an inclusive approach towards fulfilling the broad remedial goals of human rights law. Even under the Ontario-type statutes, which contain Canada's most restrictive definitions of disability, there is ample legal basis to prohibit employment discrimination on the basis of obesity.

104. It appears that appellate tribunals in the federal jurisdiction may reject such an expansive interpretation of the prohibitions against discrimination on the basis of appearance implied in federal law. See Howard, *supra*, footnote 18, at p. 365-367.

105. The proper classification of a claimant into a protected group is critical only when deciding eligibility for remedial measures such as affirmative action or reasonable accommodation.

106. See Howard, *supra*, footnote 18, at p. 383-390.

RÉSUMÉ

L'obésité et la loi sur la discrimination dans l'emploi : approches canadiennes

Depuis l'adoption des premières lois anti-discrimination en Amérique du Nord, le nombre de groupes ou de classes protégées a crû lentement. Les personnes handicapées sont un de ces nombreux groupes couverts par de telles lois. Durant la dernière décennie, quelques états américains ont ajouté l'obésité à la liste des handicaps couverts par leurs lois.

Aucune loi canadienne anti-discrimination n'inclut les personnes obèses ou de poids excessif dans un groupe désigné distinct. Seule la Colombie-Britannique considère que l'obésité peut en soi être une invalidité couverte. Toutes les autres juridictions canadiennes ayant touché ce sujet exige que le réclamant prouve que son obésité est de cause médicale involontaire.

À partir d'échantillons recueillis aux États-Unis, au Canada et au Royaume-Uni, les chercheurs accumulent lentement des données systématiques suggérant que la discrimination résulte en une perte de chances d'emploi et de gains substantiellement plus bas pour ces individus obèses ou « non attrayants » aussi qualifiés que les autres.

Mais, malgré les efforts des défenseurs organisés des obèses, il semble y avoir peu de momentum politique pour les ajouter comme groupe séparé, protégé en vertu des lois anti-discrimination. L'histoire juridique récente suggère que les tribunaux qui appliquent les dispositions anti-discrimination aux obèses le font en recourant aux catégories de handicaps déjà protégés.

Les codes canadiens de droits de la personne suivent en gros deux modèles pour inclure les invalides. Toutes les lois canadiennes en la matière incluent des variantes de « handicap », d'« invalidité », d'« invalidité physique » ou d'« invalidité mentale » dans leurs classes de protection. La Charte canadienne des droits de la personne et la Charte des droits de la personne de la Colombie-Britannique prohibent la discrimination en emploi sur la base de l'« invalidité » ou de l'« invalidité physique ou mentale », sans pour autant en fournir la définition. Vu cette discrétion, les tribunaux des droits de la personne dans ces juridictions ont étendu l'application de ces lois aux obèses ou ont interprété de façon plus libérale le mot « invalidité ». La Charte québécoise des droits et libertés de la personne prohibe la discrimination sur la base d'un « handicap ou l'utilisation de tout moyen pour pallier un handicap ». Cependant, ce ne sera que récemment que le Québec a joint ces deux motifs offrant ainsi une plus grande protection aux obèses contre la discrimination.

Le second groupe de lois ici visées utilise une terminologie qui soulève plusieurs questions quant à l'inclusion de l'obésité. Ces lois incluent des définitions détaillées des mots « invalidité » ou « handicap ». Le Code ontarien caractérise ce groupe de telle sorte que sa terminologie est excédée, opaque et redondante. Les tribunaux prudents de l'Ontario et de la Saskatchewan ont interprété des dispositions identiques de telle manière qu'ils contredisent les grands objectifs d'une loi sur les droits de la personne et qu'ils évitent d'inclure les obèses.

Les tribunaux de l'Ontario et de la Saskatchewan ont élaboré deux méthodes possibles par lesquelles les individus obèses peuvent réclamer leur inclusion à la loi. Ils doivent établir l'une de deux choses : que l'obésité en général est un handicap ou que leur propre obésité satisfait à la définition légale de handicap. Il y a amplement de raison d'inclure l'obésité dans la définition de handicap dans les codes de type ontarien. Cela devrait suffire aux futurs réclamants de poursuivre leur cause s'ils prouvent discrimination sur cette base. Cela n'est pas encore arrivé. La seconde avenue possible qui exige une preuve individuelle est imparfaite à plusieurs égards. En bref, cette avenue se concentre sur les caractéristiques du réclamant et non sur l'acte discriminatoire. De plus, cette avenue peut facilement mener à un traitement inégal des réclamants obèses selon leur habileté à présenter une preuve scientifique de leur condition. Cela exigerait également des tribunaux des évaluations scientifiques répétées, ce qui ne leur convient guère. Deux récents guides administratifs de la Commission ontarienne des droits de la personne (CODP) indiquent la préférence de la CODP pour cette dernière avenue. Notons ici un aspect très important : l'exigence de la preuve individuelle crée également le risque que les protections légales essentielles contre la discrimination sur la base de quelques invalidités perçues s'évaporeront. Finalement, cette insistance sur la preuve scientifique des causes de l'obésité de chaque réclamant peut être une bénédiction suspecte pour les employeurs vu les exigences d'information et l'incertitude imposée dans leur tentative d'éviter leur responsabilité.

Un examen attentif du Code ontarien suggère que l'obésité satisfait à son test en deux parties pour être inclue à titre de handicap. En bref, la première partie de ce test exige qu'une condition soit une « invalidité physique, une infirmité, une malformation ou une défiguration ». L'obésité est-elle une invalidité physique ? L'obésité a des relations substantielles probables avec plusieurs conditions invalidantes. Elle en cause même un certain nombre. La preuve scientifique à cet égard est non seulement impressionnante, mais également croissante. Une proportion des personnes obèses possèdent quelque degré d'invalidité physique, d'infirmité ou/de défiguration comparée aux personnes avec des caractéristiques physiques moyennes. Cela devrait suffire pour satisfaire à la première exigence pour inclure l'obésité

comme handicap couvert si la protection légale contre la discrimination sur la base d'une invalidité perçue veut dire quelque chose.

La seconde partie du test ontarien, pour déterminer s'il y a handicap ou non, s'attarde à la causalité de la condition handicapante. Les tribunaux des droits de la personne ont interprété l'exigence de la loi qui stipule « causé par une blessure corporelle, un défaut de naissance ou une maladie » comme signifiant qu'une condition (physique) doit être involontaire et immuable pour être considérée comme un handicap couvert. Alors qu'il peut être moralement tentant de distinguer entre les conditions volontaires et muables d'une part et les invalidités involontaires et permanentes d'autre part, tel exercice appliqué à l'obésité devient rapidement un nid de crabe tant sur le plan scientifique que juridique.

Exiger une preuve de cause médicale de l'obésité mène à des distinctions arbitraires quant au champ d'application de la loi. Il est peu probable que les employeurs vont connaître la cause de l'obésité d'un employé. Considérant l'état des connaissances scientifiques, est-il sage et de politique publique efficace que d'exiger des employeurs de déterminer les causes de l'obésité de leurs employés ? S'ils discriminent de facto, ce sera probablement sur la base d'apparences extérieures et de leurs conclusions quant aux limitations actuelles ou présumées imposées par telle condition physique. Le champ d'application de la loi connaîtra inévitablement des démarcations arbitraires si les tribunaux des droits de la personne consacrent la validité des règles d'emploi qui discriminent contre les obèses sur la base de la possibilité pour un réclamant particulier de fournir une preuve suffisante de la cause médicale de sa condition. Les réclamants sont forts distincts quant à leur degré de sophistication et quant à leurs moyens de soutenir leurs causes. On peut douter de la qualité de la formation des membres et du personnel des agences des droits de la personne pour être responsables de telles enquêtes. Ce serait plus simple, plus sensé et plus conforme avec l'esprit général des lois sur les droits de la personne, de se centrer sur la décision de l'employeur et sur sa justification d'affaires.