

## A TRIUMPH OF SUBSTANCE OVER FORM IN HOW DISCRIMINATION LAW TREATS OBESITY

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*Recent developments in human rights law at the Supreme Court of Canada suggest a new approach to the analysis of discrimination based on disability. Subjective perceptions of disability that lead to unlawful social responses to a physical or mental condition are now seen to disable an individual in the same way that an injury or illness may, regardless of the cause or the nature of the disability. Discrimination on the basis of disability is now being treated in the same way as discrimination on the basis of other grounds, such as race, religion or sex.*

*The new approach to disability discrimination dramatically changes the structure of the legal analysis and with it, the nature of the onus on complainants. It also allows the recognition of conditions such as alcoholism and drug addiction as disabilities under human rights law. In this paper we apply the new jurisprudence to obesity and conclude that obesity can be a disability under human rights law. We test this conclusion by examining whether excluding obesity drugs from employee benefit plans could give rise to successful human rights complaints.*

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*De récents développements à la Cour suprême du Canada concernant les droits de la personne nous proposent une nouvelle approche dans l'analyse de la discrimination basée sur le handicap. Les perceptions subjectives qui mènent à des réactions sociales illicites face à des conditions individuelles physiques ou mentales sont maintenant considérées comme un handicap pour ces individus de la même manière que le serait une blessure ou une maladie, et ce peu importe la cause ou la nature du handicap en question. La discrimination fondée sur le handicap est donc maintenant traitée de la même manière que celle basée sur d'autres motifs, tels la race, la religion ou le sexe.*

*Cette nouvelle approche vis-à-vis la discrimination fondée sur un handicap modifie de façon importante la structure de l'analyse juridique et avec elle la nature du fardeau de preuve des plaignants. Elle permet de plus la reconnaissance, à titre de handicap, de troubles tels l'alcoolisme et la toxicomanie pour les fins de l'application des lois protégeant les droits de la personne. Dans cet article nous appliquons la nouvelle théorie dans les cas ayant trait à l'obésité et concluons que cette dernière*

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*peut être considérée comme un handicap aux fins des lois protégeant les droits de la personne.*

*Nous vérifions cette conclusion en examinant si l'exclusion des régimes d'avantages sociaux des employés des médicaments traitant l'obésité pourrait donner lieu à des plaintes pour discrimination.*

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### I. Introduction

Human rights legislation in Canada and the Canadian *Charter of Rights and Freedoms*<sup>3</sup> (collectively, “human rights law”) have long focused narrowly on a closed category of relatively immutable personal characteristics such as race, sex and religion as grounds of impermissible discrimination. The law recognised a similarly narrow set of disabilities, chiefly “traditional” handicaps that cause physical limitations such as blindness or paraplegia.

Suddenly and recently, both the grounds of discrimination generally and what counts as a disability in particular have been revised and broadened. Disability has been defined in a pragmatic way that focuses on people’s experience in a social context rather than by reference to a list of physical conditions. Under this broader framework, social responses to a physical condition are seen to disable someone as effectively as an illness or injury. “Functional” and “perceived” disabilities now have the same effect in law: both can be grounds of prohibited discrimination. As a result, the list of disabilities recognised in law has been expanded to include “non-traditional” disabilities in the form of conditions that evoke a discriminatory response, such as alcoholism, drug addiction and, now, obesity.<sup>4</sup>

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<sup>3</sup> Canadian *Charter of Human Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

<sup>4</sup> Obesity is commonly defined as “an excess or surplus of body fat” compared, for a

This new approach is consistent with the approach the courts take to other forms of discrimination. It is based on a basic premise of human rights law that discriminatory behaviour manifests itself as a subjective perception that leads to inappropriate and unlawful social responses to a personal condition. Until recently, the cause of a disability was subjected to special scrutiny that might preclude a condition from recognition in law and therefore deny legal redress for any related discrimination. The significance of this development is profound. By focusing on the discriminatory response to a condition for the purpose of applying human rights law, the complainant is no longer required to prove that the condition on which the discrimination is based is a “disability” as the word was long defined.

Obesity does not fit neatly into either the old or the new paradigm of disability discrimination. Although obesity is a visible condition, it was excluded from the traditional grounds of disability. At the same time, any functional disabling effects of obesity are largely invisible and for many people non-existent. In this paper, we consider obesity as a grounds of discrimination in light of recent changes in the law. We conclude that obesity is a grounds of discrimination and that the subtleties of the modern law now allow the social and physical implications of obesity to be legally recognised.

## II. Obesity as a “disability” in the Past

Intense controversy surrounding the causes and nature of obesity underlay the long-standing unwillingness of the Canadian legal system to recognise discrimination on the grounds of obesity. These issues manifest themselves in Canadian law chiefly in the question of whether human rights statutes only protect people on “immutable” grounds of discrimination, namely those beyond a person’s control. The issue of causation also derives from the human rights legislation in six

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given height, to average weights from a large population and a body mass index (BMI) of 30 kg/m<sup>2</sup> or more. This definition was accepted by the Canadian Transportation Agency (“Agency”) in Decision No. 646-AT-A-2001 (12 December 2001) [*Air Canada*], in an application by Linda McKay-Panos against Air Canada as to whether obesity is a disability for the purposes of Part V of the *Canada Transportation Act*, online: Canadian Transportation Agency [http://www.cta-otc.gc.ca/rulings-decisions/decisions/2001/A/AT/646-AT-A-2001\\_e.html](http://www.cta-otc.gc.ca/rulings-decisions/decisions/2001/A/AT/646-AT-A-2001_e.html). It is also the definition used by the World Health Organization.

On the historical definition of “obesity” in human rights law in Canada, see also Harris Zwerling, “Obesity as a Covered Disability Under Employment Discrimination Law: An Analysis of Canadian Approaches” (1997) 52 *Relat. Ind.* 620 at 622 for references. This article deals very well with the analytical problems posed by obesity, but much of the legal analysis is out of date due to the recent Supreme Court of Canada cases, the *Air Canada* decision and revisions by the Ontario Human Rights Commission to its guidelines on disability discrimination.

jurisdictions that require that a “handicap” or “disability” be caused by “bodily injury, birth defect or illness.”<sup>5</sup> This rule has consistently prevented boards of inquiry from finding that obesity is a “handicap” or “disability.”

The issue of immutability refers most literally to an inability to change an existing situation, which in the context of obesity translates into the question of whether obese people can lose weight. The courts have not known how to answer this question. The Board of Inquiry decision in *Vogue Shoes*<sup>6</sup> in 1991 illustrates the common difficulty boards and legislators historically had in understanding obesity. In *Vogue Shoes*, the Board presumed that obesity must be caused either by a medical condition over which a person has no control or by behaviour, which a person can control. The Board in *Vogue Shoes* found that:

some of the factors which contribute to obesity, such as genetic predisposition, metabolic rates, hormone production, appetite set points and psychological factors, are largely beyond the individual’s control. On the other hand, overweight individuals often lose weight through a reasonable program of diet and exercise.<sup>7</sup>

The distinction that the Board attempted to draw between uncontrollable medical conditions and controllable behaviour has since been revealed to be a false dichotomy. While medical conditions can sometimes be controlled by the behaviour of the people who suffer from them, as is the case with diabetes, for example, where a strict diet can improve the medical condition, it is important to note that long-term weight loss appears to be an illusory outcome. The *International Journal of Obesity* estimates the rate of weight-loss failure at 95%, while the American National Institutes of Health estimates the rate at 90%.<sup>8</sup> Put otherwise, approximately two-thirds of people who lose weight will regain it within one year, and almost all who lose weight will regain it within five years.<sup>9</sup> The confusion over whether or not people can lose weight doubtless also

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<sup>5</sup> Alberta *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c.H-14, s. 44(1); Newfoundland *Human Rights Code*, R.S.N.L. 1990, c. H-14, s. 2(1); New Brunswick *Human Rights Code*, R.S.N.B. 1971, c. H-11, s. 2; Ontario *Human Rights Code*, R.S.O. 1990, c. H-19, s. 10(1) [Ontario Code]; Prince Edward Island *Human Rights Act* R.S.P.E.I. 2002, c. H-12, s. 1(1)(1); Yukon *Human Rights Act*, S.Y. 1987, c. 3, s. 34

<sup>6</sup> *Ontario (Human Rights Commission) v. Vogue Shoes* (1991), 14 C.H.R.R. D/425 (Ont. Bd. of Inquiry) [*Vogue Shoes*].

<sup>7</sup> *Ibid.* at para 66, citing the decision in *Hamlyn v. Cominco Ltd.* (1989), 11 C.H.R.R. D/333 (B.C.H.R.C.) [*Hamlyn*].

<sup>8</sup> See Sondra Solovay, *Tipping the Scales of Justice: Fighting Weight-based Discrimination* (Amherst, NY: Prometheus Books, 2000) at 190-91. For older references on the same point, see also Zwerling, *supra* note 2 at 639.

<sup>9</sup> NIH Technology Assessment Conference Panel: “Methods for voluntary weight loss and control”, (Consensus Development Conference, 30 March to 1 April, 1992) (1993) 119:7 Ann. Intern. Med.

reflects the fact that many people can lose weight temporarily but that very few can do so long-term. As a result of these considerations, it no longer makes sense to say that obesity is “controllable”.

The Supreme Court of Canada (the “Supreme Court”) has accepted, in the context of defining unconstitutional discrimination under s. 15 of the *Charter*, that control over a personal characteristic is not the proper test to apply when determining whether or not to recognise a personal characteristic as grounds of discrimination. When the Court recognised sexual orientation as a ground of impermissible discrimination it explained that it did so because sexual orientation, like being a Convention refugee, is a “deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs.”<sup>10</sup> As a bodily state, obesity is a deeply personal matter that involves intimate questions of how and what one eats, the activities in which one participates and how one’s body functions. We have already discussed the evidence that obesity, while it might be avoidable, is extremely difficult to change once a person has become obese. Accordingly, obesity fits the criteria of an analogous ground of impermissible discrimination under s. 15.

The second way immutability arises in the context of obesity relates to how people become obese in the first place. Factors beyond a person’s control appear to be more significant to losing weight than to gaining weight, but this is irrelevant because there is no requirement under the *Charter* about the origin of a disability or specifically that a disability not be “self-inflicted.” Some provincial legislation does impose a limitation based on causation and only prohibits discrimination against people whose disability is “caused by bodily injury, birth defect or illness.”<sup>11</sup> Of these three, only a birth defect is necessarily beyond someone’s control. An injury can be caused by recklessness, as can an illness. In general, of course, people avoid injury and illness. But discrimination law does not protect only those who are not responsible for the condition in relation to which they experience discrimination; an injury sustained in pursuit of

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<sup>10</sup> *Egan v. Canada*, [1995] 2 S.C.R. 513 at para. 5, (1995) 124 D.L.R. (4th) 609: “I [La Forest J.] have no difficulty accepting the appellants’ contention that whether or not sexual orientation is based on biological or physiological factors, which may be a matter of some controversy, it is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs, and so falls within the ambit of s. 15 protection as being analogous to the enumerated grounds. As the courts below observed, this is entirely consistent with a number of cases on the point. Indeed, there is a measure of support for this position in this Court. In *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 at 737-39, speaking for my colleagues as well, I observed that the analogous grounds approach in s. 15 was appropriate to a consideration of the character of “social groups” subject to protection as Convention refugees. These, I continued, encompass groups defined by an innate or unchangeable characteristic which, I added, would include sexual orientation.

<sup>11</sup> *Supra* note 3.

pleasure is no less covered than an injury sustained on the job.

The confusion in discrimination law surrounding obesity is perhaps exacerbated by the fact that the courts also deal with obesity in the context of tort law, which requires courts to apportion responsibility for injuries done to obese people. Obesity has been considered a reason to reduce damages awards on the grounds that a person's obesity is a contributing factor to a plaintiff's injury or that not losing weight constitutes a failure to mitigate one's injuries.<sup>12</sup> On the other hand, the Worker's Compensation Appeals Tribunal has applied the thin skull rule to find that where pre-existing obesity interfered with recovery, it should not limit a worker's benefit.<sup>13</sup> In one case, the Board initially instructed the worker to lose weight and reduced her benefits to "50% temporary partial benefits" when she lost less than the prescribed amount. All agreed the worker was totally disabled, but the Board attributed part of the disability to the compensable accident and part to her non-compensable obesity.<sup>14</sup> The worker's appeal was allowed on the grounds that obesity is a pre-existing condition and that the accident caused the total disability because it was a necessary although insufficient condition of the disability. The worker was entitled to temporary total disability provisions. These issues in tort law are irrelevant to discrimination law which is governed by a statutory regime. However, in light of recent changes in discrimination law, we would expect this latter approach to be followed.

The difficulties the courts have had with obesity cases in the context of human rights legislation can be seen in a brief discussion of the main authorities. In 1987, the Board of Inquiry in *Horton v. Niagara (Regional Municipality)*<sup>15</sup> refused to decide whether obesity was a "handicap" under then s. 9(1)(b)(I), now s. 10, of the Ontario *Code* in the absence of evidence that the complainant's obesity was "caused by bodily injury, birth defect or illness".<sup>16</sup>

Then in 1991, the *Vogue Shoes* Board dealt with conflicting accounts of obesity<sup>17</sup> as well as evidence that obesity has, since 1986, been

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<sup>12</sup> *Zvatora v. Liberman* (2000), 2000 BCSC 306 (B.C. S.C.); *Gibson v. Reeves* [1995] A.J.No. 1119 (Alta. Q.B.); *Cowie v. Mullin* (1992), 111 N.S.R. (2d) 229 (T.D.); *Mackie v. Wolfe* (1994), 153 A.R. 81 (Q.B.), additional reasons at (1994), 159 A.R. 148 (Q.B.), aff'd (1996), 184 A.R. 339, (C.A.) on failure to mitigate injuries through weight loss.

<sup>13</sup> Decision No. 1246/87 (1988), 9 W.C.A.T.R. 210 (Ont.).

<sup>14</sup> *Ibid.* at para. 26.

<sup>15</sup> (1987), 19 C.C.E.L. 259 at 266-67, (Ont. Bd. of Inquiry); the complainant successfully demonstrated discrimination related to hypertension [*Horton*].

<sup>16</sup> *Horton, ibid.* at 267. The Code was amended to replace "handicap" with "disability" through the *Ontarians with Disabilities Act*, S.O. 2001, c. 32, s. 27, which came into force on 7 February 2002. Despite lobbying efforts to do so, the causation requirement was not removed.

<sup>17</sup> *Supra* note 4 at para. 75 ff.

classified as a disease by concluding that obesity is a disease, but that:

[i]t 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 ... that obesity is a physical disability caused by illness, as required if obesity is to be recognised as a handicap within the provisions of the Human Rights Code.<sup>18</sup>

At the same time, the Board held that obesity could be a physical disability if it were “an ongoing condition, effectively beyond the individual’s control, which limits or is perceived to limit his or her physical capabilities.”<sup>19</sup> This definition represented a greater acceptance of obesity as a basis of discrimination than found in earlier cases, but the Board, following the text of the *Code*, held that a disability must also be “caused by illness.”<sup>20</sup> This requirement limited the extent to which an obese person might complain of discrimination under the Ontario *Code*. The result was that obesity was a “disease”, it could be a disability, but that the complainant’s obesity was not caused by “illness” and so could not be a “handicap”. The complaint was dismissed and the law relating to disability discrimination became a terminological quagmire.

The definition of “disability” in the Saskatchewan *Human Rights Code*, until 2000 when the causation requirement was removed, similarly required that a “disability” be “caused by bodily injury, birth defect or illness.”<sup>21</sup> In 1993 (before an amendment replaced the word “handicap” with “disability”), the Court of Appeal, contrary to the view in Ontario, confirmed that obesity was not itself an illness.<sup>22</sup> There was also insufficient evidence to show that the complainant’s obesity was caused by illness within the meaning of ss. 2(d.1). A complaint of discrimination in employment was dismissed. The Board, like its counterpart in Ontario, was uncomfortable with this outcome and wrote:

It may be that obesity per se should be a prohibited ground of discrimination in the same manner that epilepsy, amputation, blindness and paralysis are prohibited grounds

<sup>18</sup> *Ibid.* at para. 79.

<sup>19</sup> *Ibid.* at para. 70.

<sup>20</sup> *Ibid.* at para. 71.

<sup>21</sup> S.S. 1979, c. 24.1 s. 2(1)(d.1)(I); amended in 2000 by *The Saskatchewan Human Rights Code Amendment Act, 2000*, to remove the causation requirement [*Saskatchewan Code*].

<sup>22</sup> *Saskatchewan Human Rights Commission v. St. Paul Lutheran Home of Melville, Saskatchewan* (1993), 108 D.L.R. (4th) 671 (C.A.), (*sub nom. St. Paul Lutheran Home of Melville, Saskatchewan v. Davison*) 19 C.H.R.R. D/437 (C.A.), aff’g (*sub nom. St. Paul Lutheran Home of Melville, Saskatchewan v. Davison (No. 2)*) (1992), 19 C.H.R.R. D/433 (Bd. of Inquiry), (*sub nom. Davison v. St. Paul Lutheran Home of Melville, Saskatchewan*) (1992), 92 C.L.L.C. 17, 026 (Bd. of Inquiry) [*Davison*].

of discrimination. The decision to include obesity per se in the Code is not one for this Board to make—that decision is reserved to the Legislature.<sup>23</sup>

### The Court of Appeal agreed:

And 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 overweight 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 outrund, the effect of its enacting parts.<sup>24</sup>

The Court of Appeal acknowledged that a physical disability could be “actual or perceived,” but must still, under the Saskatchewan *Code*, be caused by illness. Although they did not so find in that case, the Court held that “a case of discrimination grounded in physical disability, attributable to obesity, [may] succeed if it be established that obesity is in fact an illness or that the obesity at issue was caused by illness.”<sup>25</sup> This position is more permissive than that of the Ontario Board in *Vogue Shoes* because it allows that it might be sufficient, for the purposes of the *Code*, that obesity be shown to be an illness, but it is still highly restrictive.

Some boards have tried, unsuccessfully, to make the determination of both the initial and the continuing cause of a complainant's obesity a question of fact to be resolved on an individual basis, rather than recognizing obesity as a ground of impermissible discrimination. As the Saskatchewan Court of Appeal recognised in *Davison*, this places an enormous burden on the complainant, who must make out not just the case of his or her experience of discrimination, but also the aetiology of his or her obesity. The Court of Appeal found that if a Superior Court were to accept that obesity is an “illness,” the Saskatchewan courts would accept complaints based on obesity without requiring each complainant to show that their own obesity is caused by illness.

Even where there is no definition of “disability,” as in the British Columbia *Human Rights Code*,<sup>26</sup> the courts have had difficulty dealing with obesity. The B.C. Human Rights Commission has been able to define the term itself and in several cases decided since 1989, the Commission has recognised that obesity could be grounds for

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<sup>23</sup> (Bd. of Inquiry), *ibid.* at para. 12.

<sup>24</sup> (C.A.), *supra* note 20 at para 10.

<sup>25</sup> *Ibid.* at para. 20.

<sup>26</sup> R.S.B.C. 1996, c. 210; formerly the British Columbia *Human Rights Act*, S.B.C. 1984, c. 22 until December 31, 1996 [*B.C. Code*].

discrimination.<sup>27</sup> Although no complainant has won a case based on actual “disability”, several employers have been found to have discriminated against a complainant because the complainant’s obesity was wrongly *perceived* by the employer to be a physical disability. Where the evidence did not establish that the refusal to employ the complainant was due to a *bona fide* occupational requirement, the discrimination was illegal.

However, the B.C. Human Rights Commission still refuses to find that obesity in itself is a “disability” rather than a “perceived disability,” by attaching a medical component to the definition of “disability.” The Deputy Chief Commissioner (“DCC”) recently argued that “where there is widespread evidence of negative attitudes towards people with a certain characteristic (in this case, obesity), that characteristic should be considered a disability.”<sup>28</sup> But the Tribunal voiced the following concerns with this idea and its implications:

It is unclear whether the position of the DCC is that obesity should, in every case, be considered a disability, or a perceived disability, or whether the determination should be made on a case by case basis. It may be that the determination of whether a particular individual who is obese is disabled will be determined on the basis of the medical evidence presented at the hearing. I note that in *Cominco*,<sup>29</sup> ... the arbitrator concluded, based on the medical evidence before him, that only some smokers (i.e., those who are heavily addicted) were disabled within the meaning of the Code.<sup>30</sup>

The debate about whether obese people can control their weight obscures the important principle that the benefit of human rights legislation should be available to anyone who experiences discrimination. It is discrimination that the legislation forbids, rather than having a personal characteristic on the basis of which other people choose to discriminate. The inquiry should focus not on the causes of obesity but on the impugned conduct of the person against whom a complaint has been made.

### III. *New Jurisprudence on obesity as a Disability*

The Supreme Court recently recognised in *Boisbriand*<sup>31</sup> that obesity can constitute a “disability” and therefore a ground of impermissible

<sup>27</sup> See *Hamlyn*, *supra* note 5 and *Rogal v. Dalgliesh*, [2000] B.C.H.R.T.D. No. 22 [*Rogal*].

<sup>28</sup> *Rogal*, *ibid.* at para. 25.

<sup>29</sup> *Cominco Ltd. v. United Steelworkers of America, Local 9705*, [2000] B.C.C.A.A.A. No. 62 [*Cominco*].

<sup>30</sup> *Rogal*, *supra* note 25 at para. 26.

<sup>31</sup> *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Québec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, [2000] 1 S.C.R. 665 at para. 48 [*Boisbriand*].

discrimination under s. 15(1) of the *Charter*. This comment was made in passing, however, in a case that concerned other disabilities. A regulatory tribunal, the Canadian Transportation Agency (the “Agency”) applied *Boisbriand* to find that obesity is a disability for the purposes of Part V of the *Canada Transportation Act*<sup>32</sup> (the “CTA”) when a passenger on Air Canada complained that aircraft seating was inadequate for obese passengers and raised concerns about the imposition of higher fares to accommodate obese passengers.<sup>33</sup> We examine both *Boisbriand* and the *Air Canada* decision below.

We then apply the arguments of the Supreme Court to assess whether provincial human rights law is itself constitutional in respect of disability discrimination. Most human rights claims about obesity have arisen either under provincial law or under the Canadian *Human Rights Act* because they have occurred in the context of employment relationships. The *Charter* is not directly relevant to such claims because the *Charter* regulates state action rather than the actions of private parties such as employers and service providers. Past jurisprudence is of limited precedential value in interpreting the provincial statutes, however, because the legal landscape in this area is being redrawn and past cases are not the source of the principles upon which it will be based in the future. We conclude that the new analysis of disability discrimination under human rights law as well as the *obiter dicta* in *Boisbriand* will lead human rights commissions and tribunals to conclude that obesity should be considered to be a disability or a handicap at law.

#### A) Obesity as a “disability” under the *Charter*

Section 15(1) of the *Charter* protects against discrimination by the state on the grounds of “physical disability,”<sup>34</sup> subject only to limitations justified under section 1.<sup>35</sup> The definition of “handicap” and of “disability”<sup>36</sup> were most recently before the Supreme Court in

<sup>32</sup> S.C., 1996, c.10.

<sup>33</sup> *Air Canada*, *supra* note 2.

<sup>34</sup> Section 15 (1). Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

<sup>35</sup> Section 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

<sup>36</sup> *Boisbriand*, *supra* note 29 at para. 43: Section 10 of the [Quebec] *Charter* must also be examined in light of other federal and provincial human rights legislation. The parties noted that the terminology used in human rights legislation varies from one jurisdiction to another. In fact, words such as “handicap” and “disability” are used in English, while words such as “handicap”, “déficience”, “incapacité” and “invalidité” are used in French. See, for example, ... *Human Rights Code*, R.S.O. 1990, c. H.19, s. 2.

*Boisbriand*, where the Supreme Court had to interpret s. 10 of the *Québec Charter*.<sup>37</sup>

“Handicap” is not defined in the *Québec Charter*; nor is “disability” defined in the *Charter*. The Supreme Court first found that no distinction should be made between the words “handicap” and “disability” and then defined them broadly and inclusively. Justice L’Heureux-Dubé declined to define “handicap” strictly and proposed instead a series of guidelines, “a multi-dimensional approach that includes a socio-political dimension ... [that places] the emphasis on human dignity, respect, and the right to equality.”<sup>38</sup> She noted that “a person may have no limitations in everyday activities other than those created by prejudice and stereotypes;”<sup>39</sup> in other words, it is sufficient that there be a “subjective perception” of a limitation for someone to discriminate on the grounds of disability:

[c]ourts will, therefore, have to consider not only an individual’s biomedical condition, but also the circumstances in which a distinction is made. In examining the context in which the impugned act occurred, courts must determine, inter alia, whether an actual or perceived ailment causes the individual to experience “the loss or limitation of opportunities to take part in the life of the community on an equal level with others.”<sup>40</sup>

This broad and inclusive definition is consistent with the principles of statutory interpretation that apply to all constitutional and quasi-constitutional protections of human rights, including the *Québec Charter*, the Canadian *Charter* and provincial human rights legislation. These include interpreting the statutory language in order to further the purposes of the legislation, expressed in the *Québec Charter* as ensuring the right to equality and protection against discrimination.<sup>41</sup> The Supreme Court’s readiness to remedy discrimination based on a “perceived” limitation without an attendant “functional” limitation has been described as

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<sup>37</sup> *Charter of Human Rights and Freedoms*, R.S.Q., c. C 12, s. 10 [*Québec Charter*]. Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap. Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.

<sup>38</sup> *Boisbriand*, *supra* note 29 at para. 77.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.* at para. 80, citing Ian B. McKenna, “Legal Rights for Persons with Disabilities in Canada: Can the Impasse Be Resolved?” (1997-98) 29 *Ottawa L. Rev.* 153 at 163-164. L’Heureux-Dubé J. continued, “[t]hese guidelines are not without limits. ... As the emphasis is on obstacles to full participation in society rather than on the condition or state of the individual, ailments (a cold, for example) or personal characteristics (such as eye colour) will necessarily be excluded from the scope of “handicap”, although they may be discriminatory for other reasons” at para. 82.

<sup>41</sup> The Preamble, discussed by Justice L’Heureux-Dubé in *Boisbriand*, *ibid.* at para. 34.

“another illustration of judicial willingness to accord a large and liberal interpretation to the categories of human rights law.”<sup>42</sup>

The importance of this new position should not be underestimated in equality law. The Supreme Court noted rather in passing that “[t]his Court has, on several occasions, referred to the existence of a subjective component of discrimination. Indeed, this concept is not foreign to Canadian law.”<sup>43</sup> It noted also the implications of this position in relation to discrimination based on disability:

Since the very nature of discrimination is often subjective, assigning the burden of proving the objective existence of functional limitations to a victim of discrimination would be to give that person a virtually impossible task. Functional limitations often exist only in the mind of other people, in this case that of the employer.<sup>44</sup>

This view underlay the conclusion that “the *Charter*’s objective of prohibiting discrimination requires that “handicap” be interpreted so as to recognize its subjective component. A “handicap”, therefore, includes ailments which do not in fact give rise to any limitation or functional disability.” It is only now that complainants of disability discrimination are in the same position as complainants of other forms of discrimination, such as race or sex discrimination. This asymmetry can easily be explained by the fact that the impetus behind human rights legislation is in part the belief that distinctions based on protected grounds are not based on functional limitations unless a defence is specifically made out. This belief was not applied to people who are disabled or to people who are perceived to suffer from functional limitations where in fact they do not before the decision in *Boisbriand*.

The three plaintiffs in *Boisbriand* did not base their claims on the ground of obesity but in the course of her reasons, Justice L’Heureux-Dubé specifically included obesity among “ailments” (in French, “affections”) that can be the basis of unconstitutional discrimination:

... tribunals and courts have recognized that even though they do not result in functional limitations, various ailments such as congenital physical malformations, asthma, speech impediments, obesity, acne and, more recently, being HIV positive, may constitute grounds of discrimination.<sup>45</sup>

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<sup>42</sup> Colleen Sheppard, “Grounds of Discrimination: Towards an Inclusive and Contextual Approach” (2001) 80 Can. Bar Rev. 893 at 900.

<sup>43</sup> *Boisbriand*, *supra* note 29 at para. 38.

<sup>44</sup> *Ibid.* at para. 39.

<sup>45</sup> *Ibid.* at para. 48 [emphasis added]. She cites *Labelle v. Air Canada* (1983), 4 C.H.R.R. D/1311 (Can. Trib.); *De Jong v. Horlacher Holdings Ltd.* (1989), 10 C.H.R.R. D/6283 (B.C.H.R.C.); *Matlock v. Canora Holdings Ltd.* (1983), 4 C.H.R.R. D/1576 (B.C. Bd. Inq.); *St. Thomas v. Canada (Armed Forces)* (1991), 14 C.H.R.R. D/301 (Can. Trib.); *Davison v. St. Paul Lutheran Home of Melville, Saskatchewan* (1992), 15 C.H.R.R. D/81

Although this view was strictly speaking *obiter dicta* in *Boisbriand*, it has obvious implications for obese complainants beyond the basic inclusion of obesity among the grounds of discrimination. The first is that removing the requirement that a complainant of disability discrimination have a functional limitation makes the complaint available to the many obese people who are without functional limitations, such as serious attendant medical conditions. Second, if obesity need not have a demonstrable medical origin, the vexed question of whether or not obesity itself is a medical condition is irrelevant under the *Charter*. This approach focuses on how a person is perceived and treated on the basis of their disability instead of on the disability itself.

The implications of Justice L'Heureux-Dubé's comment in *Boisbriand* for human rights law as it relates to obesity can best be understood if it is considered in the context of the Court's recent jurisprudence on both the definition of "disability" and on the way in which s. 15 protects people against discrimination on the grounds of disability.

Following *Boisbriand*, the Supreme Court next addressed the requirements of a claim of discrimination based on disability under s. 15(1) in *Granovsky v. Canada (Minister of Employment and Immigration)*.<sup>46</sup> There, Mr. Justice Binnie affirmed the general approach taken by the Court in *Boisbriand* and re-affirmed that a physical condition need not create a functional impediment to constitute a disability. He wrote:

The true focus of the s. 15(1) disability analysis is not on the impairment as such, nor even any associated functional limitations, but is on the problematic response of the state to either or both of these circumstances. It is the state action that stigmatizes the impairment, or which attributes false or exaggerated importance to the functional limitations (if any), or which fails to take into account the "large remedial component" ... that creates the legally relevant human rights dimension to what might otherwise be a straightforward biomedical condition.<sup>47</sup>

This analysis is, in our view, applicable to obesity. Under this analytical framework, obesity would constitute a "disability" if the state unfairly treats it as such, whether or not obesity impairs a person's functioning. This new focus on action that stigmatizes a personal characteristic rather than the personal characteristic itself has particular resonance in the context of obesity. Sociological analyses of obesity demonstrates that

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(Sask. H.R.C.); *Thwaites v. Canada (Armed Forces)* (1993), 19 C.H.R.R. D/259 (Can. Trib.) for this proposition.

<sup>46</sup> [2000] 1 S.C.R. 703 [*Granovsky*].

<sup>47</sup> *Ibid.* at para. 26 [footnotes omitted] [emphasis omitted].

prejudice against body size is very strong despite the fact that the functional limitations of a fat body are few, if any. The “limitations” of obese people are commonly perceived to be psychological and temperamental rather than physical:

Fat people . . . are presumed to be, among other things, lacking in energy, drive, self-discipline, and self-care. Unlike biases against thin people perceived as unattractive, stereotypes of fat people tend to include character shortcomings. These moral flaws are considered to be within the control of the person, meaning fat people tend to be viewed not only as “lacking” but also as “responsible” for the prejudices held against them.<sup>48</sup>

This sociological analysis is borne out by some of the human rights jurisprudence on obesity cited above. For example, in *Rogal*, the employer explained that the obese complainant was “too big and too heavy” to keep up with the “fast-paced lifestyle” of the carnival,<sup>49</sup> while in *Vogue Shoes*, the complainant’s obesity was thought to contribute to a “lackadaisical” appearance.<sup>50</sup>

The stigma surrounding obesity relates to the next issue addressed by the Supreme Court, namely the question of whether a disability must be immutable to be a ground of discrimination. Mr. Justice Binnie found it did not:

Some of the grounds listed in s. 15 are clearly immutable, such as ethnic origin. A disability may be, but is not necessarily, immutable, in the sense of not being subject to change. As this case shows, disabilities may be acquired in the course of life, and may grow more severe or less severe as time goes on. ... As Sopinka J. pointed out in *Eaton* at para. 69, disability “means vastly different things depending upon the individual and the context.”<sup>51</sup>

Under the Supreme Court’s new jurisprudence, it is our view that the issue of whether or not obese people can change their weight will be irrelevant to a discrimination claim. It does not matter how or why a person becomes obese. Similarly, conflicting medical and legal accounts of the causes of obesity and the extent to which people can lose weight will also be irrelevant. Responsibility for a condition in relation to which one experiences discrimination does not change the fact of the discrimination.

In our view, this position could hardly be otherwise under Canadian human rights law, which protects everyone from discrimination defined simply as an unjustified difference in treatment on the basis of certain

<sup>48</sup> *Solovay*, *supra* note 6 at 102 where she reviews several studies on this subject.

<sup>49</sup> *Supra* note 25 at para. 8.

<sup>50</sup> *Supra* note 4 at para. 44.

<sup>51</sup> *Granovsky*, *supra* note 44 at para. 27, citing *Eaton v. Brant County Board of Education* [1997] 1 S.C.R. 241.

listed characteristics. Disability is one such characteristic. In determining if obesity is a disability, it matters not that some people can control their weight more than others.

Support for this approach can be found in the way in which the Supreme Court's new jurisprudence was recently considered in *Air Canada* by the Agency, which concluded that "obesity, *per se*, is not a disability for the purposes of Part V of the CTA."<sup>52</sup> Whether or not a person's disability impaired his or her ability to use the federal transportation network, however, is a determination to be made on an individual basis.

The Agency's decision mirrors the structure of determinations of discrimination under human rights codes, where the disability must be made out and then the facts of the particular person's experience of discrimination are adjudicated. The result in *Air Canada* is consistent with both the Supreme Court's new approach and the structure of provincial human rights law.

#### B) *The Application of the Charter to Provincial*<sup>53</sup> *Human Rights Legislation*

Provincial human rights legislation varies across the country. At the same time, the Supreme Court has found that "human rights legislation must conform to constitutional norms, including those set out in the Canadian *Charter*. While there is no requirement that the provisions of the [provincial legislation] mirror those of the Canadian *Charter*, they must nevertheless be interpreted in light of the Canadian *Charter*."<sup>54</sup>

Specifically, the Supreme Court has found that variation in provincial legislation must not hinder the development of disability jurisprudence. The use of the different words "handicap" and "disability" has been held to be immaterial.<sup>55</sup> In relation to the debate about functional and perceived limitation, Justice L'Heureux-Dubé noted approvingly that "[w]hatever the wording of the definitions used in human rights legislation, Canadian courts tend to consider not only the objective basis for certain exclusionary practices (i.e. the actual existence of functional limitations), but also the subjective and erroneous perceptions regarding the existence of such

<sup>52</sup> *Air Canada*, *supra* note 2 at 38.

<sup>53</sup> References to "provincial" legislation include references to territorial legislation.

<sup>54</sup> *Boisbriand*, *supra* note 29 at para. 42. See also *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 at paras. 47-48 [*Meiorin*] ("human rights legislation ... while it may have a different legal orientation, is aimed at the same general wrong as s. 15(1) of the *Charter*"); *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para. 27 and para. 69 (by implication); *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103 at 1104 and 1007.

<sup>55</sup> *Boisbriand*, *ibid.* at paras. 43-46.

limitations.”<sup>56</sup> Justice L’Heureux-Dubé endorsed this approach, and held not only that provincial disability laws should be consistent across the country but that they already were.

This view is partial, however, for Justice L’Heureux-Dubé did not address the chief substantive difference among human rights statutes: some require a medical origin for a “handicap” or a “disability” while others do not. Those that do include statutes in Alberta, Newfoundland, New Brunswick, Ontario, Prince Edward Island and the Yukon, all of which require that a “disability” or “handicap” be caused by “bodily injury, birth defect or illness.”<sup>57</sup> This requirement has been the chief obstacle to recognising obesity as a disability and now conflicts with the dicta of the Supreme Court in *Boisbriand*. We discuss solutions to this conflict below in the context of the Ontario *Code*, because the Ontario Human Rights Commission has written several policies on its interpretation and because more cases on obesity discrimination have been heard in Ontario than in other provinces.

British Columbia, Manitoba, the Northwest Territories, Nunavut and Quebec, on the other hand, do not define “disability” in their statutes.<sup>58</sup> This means that the common law definition developed by the Supreme Court automatically applies to interpreting these statutes. Furthermore, the absence of such a requirement in British Columbia, for one, made it possible to develop the “perceived disability” jurisprudence before the Supreme Court did and in such a way that allowed people to complain of obesity discrimination. Last, Nova Scotia and Saskatchewan define “disability” but the definition does not require a medical cause and can be read consistently with the Supreme Court definition of “disability.”<sup>59</sup>

The refusal to recognise obesity as a grounds of discrimination is now contrary to the Supreme Court’s position that a disability need not be immutable or caused in any particular way for the protection of human rights law to be available. As Justice L’Heureux-Dubé held, “because the emphasis is on the effects of the distinction ... the cause and origin of the handicap are immaterial.”<sup>60</sup> As explained above, there is no need to enter into the vexed medical and social debate about the causes of obesity if a complainant suffers certain forms of social disadvantage on account of his or her obesity. Somehow the provincial legislation must be made to conform to the new principles articulated by the Supreme Court.

<sup>56</sup> *Ibid.* at para. 48.

<sup>57</sup> *Supra* note 3.

<sup>58</sup> B.C. *Code*, *supra* note 24; Manitoba *Human Rights Code*, C.C.S.M. 1987, c. H175; Northwest Territories *Fair Practices Act*, R.S.N.W.T. 1988, c. F-2; Nunavut *Fair Practices Act*, R.S.N.W.T. 1988, c. F-2 as duplicated for Nunavut by s.29 of the *Nunavut Act* S.C. 1993, c.28; Québec *Charter*, *supra* note 34.

<sup>59</sup> Nova Scotia *Human Rights Act*, R.S.N.S. 1989, c. 214, s. 3(1) as amended S.N.S. 1991, c. 12, Saskatchewan *Code*, *supra* note 19.

<sup>60</sup> *Boisbriand*, *supra* note 29 at para. 81.

i) *The Ontario Human Rights Commission's Approach*

The Ontario Human Rights Commission has developed a policy that conforms to the Supreme Court's broad interpretation of "disability" and that specifically cites the principles found in *Granovsky* and in *Boisbriand*. In Policy Guidelines on Disability and the Duty to Accommodate", the Commission expresses the view that "[d]isability" should be interpreted in broad terms. It includes both present and past conditions, as well as a subjective component, namely, one based on perception of disability."<sup>61</sup>

The Commission interprets the Ontario *Code* to this end by reading out the statutory requirement that a disability have a medical cause by emphasising the social construction of disability and making the following argument: because discrimination on the basis of disability can exist when a respondent perceives that someone is disabled when really he or she is not, it can no longer be said that a disability must be medical in origin because an imaginary disability has no origin. A version of this argument was considered and rejected in *Horton*<sup>62</sup> where the Board affirmed a literal reading of the *Code* under which the causation requirement applies to all disabilities.

The Commission's current view, although consistent with the recent dicta of the Supreme Court, remains less than literal as a construction of the statute. Section 10(1) reads:

"because of disability" 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 ...<sup>63</sup>

The Ontario *Code* allows that subjective perceptions of disability can underlie discrimination, but they must still be perceptions of a disability caused by bodily injury, birth defect or illness.

Lest this interpretation seem far-fetched, it is worth noting that this was the law in Quebec and was only changed through legislative amendment and judicial interpretation. Justice L'Heureux-Dubé reviewed this history in *Boisbriand*:

The first version of the [Quebec] Charter, which dates from 1975, offered no protection against discrimination based on disability or handicap. In 1978, s. 10 of the Charter

<sup>61</sup> Ontario Human Rights Commission, *Human Rights Policy in Ontario*, (Ontario: Ontario Human Rights Commission, 2001), at 201.

<sup>62</sup> *Supra* note 13 at 264.

<sup>63</sup> *Supra* note 3.

was amended to include a ground defined as “the fact that he is a handicapped person or that he uses any means to palliate his handicap” (emphasis added).<sup>64</sup>

This version of the *Québec Charter* was consistently interpreted by the courts to offer “protection against discrimination only to persons suffering from actual limitations in the performance of everyday activities.” According to Justice L’Heureux-Dubé, “the case law from that period indicates that courts rejected subjective perception in the case of handicap, although they did take it into account when considering other grounds of discrimination in s. 10.”<sup>65</sup> Then in 1982, the legislature amended s. 10 of the Charter by replacing the above with “handicap or the use of any means to palliate a handicap.” The revised wording has been interpreted to protect complainants from discrimination based on subjective perceptions of disability: “[a] clear trend has developed in the case law following the 1982 amendment. Courts have consistently recognized that discrimination based on “handicap” includes a subjective component.”<sup>66</sup>

One of the cases identified by the Supreme Court as exemplifying the pre-amendment jurisprudence is *Québec (Commission des droits de la personne) v. Héroux*,<sup>67</sup> where obesity was the condition at issue. The Québec Court of Appeal in that case refused to acknowledge the existence of a handicap without a functional limitation with the result that obesity was held not to be a “physical handicap” within the meaning of the *Québec Charter*.

It also is or was the law in many American jurisdictions that a person must suffer functional limitations to be protected by human rights legislation. In *Cassista v. Community Foods, Inc.*,<sup>68</sup> for example, the California Supreme Court found that weight may qualify as a protected “disability” under the California Fair Employment and Housing Act (FEHA), but only if it is caused by a medical condition. The perception of a disability must also be a perception of a medical condition: the legislation “requires an actual or perceived physiological disorder, disease, condition, cosmetic disfigurement or anatomical loss affecting one or more of the body’s major systems and substantially limiting one or more major life activities”.<sup>69</sup> The healthy obese complainant in this case was held not to have suffered discrimination on the grounds of disability:

<sup>64</sup> *Boisbriand*, *supra* note 29 at para. 54.

<sup>65</sup> *Ibid.* at paras. 56, 58.

<sup>66</sup> *Ibid.* at para. 62.

<sup>67</sup> *Québec (Commission des droits de la personne) v. Héroux* (1981), 2 C.H.R.R. D/388 (Q.C.A.) [*Héroux*].

<sup>68</sup> 5 Cal. 4th 1050 (Ca. S.C.)

<sup>69</sup> *Ibid.* at 1061.

Indeed, plaintiff alleged in her complaint and maintained at trial that despite her weight she is a healthy, fit individual. Thus, she demonstrated neither an actual nor a perceived handicap within the meaning of the FEHA.<sup>70</sup>

Similarly, the Ontario Human Rights Commission further diminishes the importance of the requirement in s. 10(a) that a “disability” have a medical cause by interpreting the statute thus: “Although sections 10(a) to (e) set out various types of conditions, it is clear that they are merely illustrative and not exhaustive.”<sup>71</sup> Although consistent with the Supreme Court’s position, this proposition is not entirely accurate. Following the Supreme Court, the Commission takes the normative position that “[e]ven minor illnesses or infirmities can be “disabilities”, if a person can show that she was treated unfairly because of the perception of a disability.”<sup>72</sup> The Commission thus reads out the requirement in the Ontario *Code* that the minor illness or infirmity be due to injury, birth defect or illness.

There is no mention of obesity in the policy paper on *Disability and the Duty to Accommodate*. Nor is there mention of the internal *Guidelines for the Application of “Because of Handicap” to the Condition of Obesity*, cited by Harris Zwerling.<sup>73</sup> The Commission has confirmed that these internal guidelines are no longer used, if indeed they ever were, and they are no longer available.<sup>74</sup> Nor is obesity addressed in the Commissioner’s policy paper on *Height and Weight Requirements*, which is directed at women and male members of ethnic minorities who are barred from employment in male-dominated industries on the basis of physical requirements unrelated to the work itself.<sup>75</sup>

The Commission’s approach will doubtless help complainants formulate complaints and help commissioners to investigate them. It is consistent with the Supreme Court’s dicta on disability to which the *Code* must conform. It does not technically amend the law, however.

## ii) *Amending the Statute by Legislation or Judicial Interpretation*

The Ontario Government could remove the definition of “disability” from the Ontario *Code* by legislative amendment so that disability is defined at law. The prevailing definition is that of the Supreme Court, discussed above. Alternatively, it could amend the current definition to remove the requirement that a “disability” be “caused by bodily injury,

<sup>70</sup> *Ibid.* at 1066.

<sup>71</sup> *Supra* note 59.

<sup>72</sup> *Ibid.*

<sup>73</sup> Excerpts are to be found in Zwerling, *supra* note 2 at 637.

<sup>74</sup> It is unclear if these were ever used, or whether this document was merely a draft circulated internally.

<sup>75</sup> *Supra* note 59 at 141-46.

birth defect or illness”, as the Saskatchewan government did in 2000. When the Ontario Legislature enacted the *Ontarians with Disabilities Act, 2001*, however, this option was considered and rejected.

Alternatively, a constitutional challenge to the definition of “disability” in the Ontario *Code* could be made under s. 52(1) of the *Charter*, which makes any law inconsistent with the *Charter* “of no force or effect.” The Supreme Court most dramatically used this power in the context of human rights protection in *Vriend v. Alberta*.<sup>76</sup> When the Alberta government refused to include sexual orientation in the provincial human rights legislation, the Supreme Court read it in as a grounds of discrimination.

Justice Cory explained that the Court would uphold provincial human rights legislation that differed from the *Charter* “so long as the tests for justification under s. 1, including rational connection, are satisfied.”<sup>77</sup> A challenge to the Ontario legislation could be based on the argument that there is no justification under s. 1 for defining “disability” more narrowly in the Ontario *Code* than “disability” is defined in the *Charter*. Based on the Supreme Court’s rationales for expanding the legal understanding of disability to include such conditions as obesity, among the others listed in *Boisbriand*, it is difficult to imagine a s. 1 justification for retaining the Ontario definition. Furthermore, a discrimination suit under human rights legislation remains an individual cause of action and a respondent has the defences under the Ontario *Code*. The principle of accommodation up to the point of undue hardship embodies limiting principles much like those found in s. 1 analysis, which makes the limitation in the definition of disability unnecessary.

There are several remedies available to a court that finds that the narrow definition of “disability” in the Ontario *Code* is underinclusive and therefore unconstitutional.<sup>78</sup> The court would most likely sever either the causation requirement or sever the definition of “disability”<sup>79</sup> and leave the definition at common law.<sup>80</sup>

We note that the Ontario Court of Appeal was faced with an

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<sup>76</sup> [1998] 1 S.C.R. 493.

<sup>77</sup> *Ibid.* at para. 106.

<sup>78</sup> See Peter Hogg, *Constitutional Law of Canada*, loose leaf, vol. 2, (Ontario: Carswell, 1997) at 37.20-37.29.

<sup>79</sup> This was done in *Re Blainey and Ontario Hockey Association*, (1986) 54 O.R. (2d) 513 (C.A.), leave to appeal to S.C.C. dismissed [1986] 1. S.C.R. xii, where the Ontario *Human Rights Code* allowed an exception from the rule against sex discrimination for single-sex sports teams. The Ontario Court of Appeal nullified the exception, leaving the rule against sex discrimination to allow a girl to play on a boys’ hockey team.

<sup>80</sup> The Court could attempt to sever only the phrase “that is caused by bodily injury, birth defect or illness,” but then would have to ensure that the remaining text was inclusive enough to conform to the *Charter* jurisprudence.

analogous interpretative challenge in *Entrop v. Imperial Oil*.<sup>81</sup> Justice Laskin had to apply the Supreme Court's "unified approach" to discrimination, which collapses the distinction between "direct" and "adverse effect" discrimination, to the Ontario *Code*, which explicitly makes the distinction. He chose a more subtle remedy than striking out parts of the legislation. The Ontario *Code* had been construed so that the remedial s. 11 applied to "adverse effect" discrimination and s. 17 applied to "direct" discrimination.<sup>82</sup> Laskin J.A. limited the non-application of s. 11 to as small a number of cases as possible, with the result that most cases will be dealt with under both s. 11 and s. 17. At the same time, he found that under either section the Supreme Court's tests should be followed rather than the tests articulated in earlier provincial jurisprudence:

The difference in wording in the two statutes [the Ontario Code and the B.C. Code] raises the question whether the Supreme Court's three-step test for justifying a prima facie discriminatory workplace rule should be applied in this case. In my view, the unified approach and the three-step test adopted in *Meiorin* should be applied. Applying the unified approach means that *Imperial Oil* can rely on s. 11 of the Code as well as s. 17. Under either section, however, to justify its workplace rules it must satisfy the three-step test in *Meiorin*.<sup>83</sup>

By analogy, the courts could read the definition of "illness" as broadly as required by the Supreme Court without disregarding the text of the Ontario *Code*. While the definition of "illness" accepted by the Court of Appeal in *Entrop* is indeed broad,<sup>84</sup> and perhaps broad enough to include obesity, the new Supreme Court jurisprudence suggests that the Board is under a duty to use a definition of "illness" that does not exclude any form of disability. Because the Supreme Court has recognized that obesity can be a disability, the proper definition of "illness" would be one that includes obesity. This solution is addressed below.

While it is possible that a tribunal might apply the *Charter* itself, it is unclear whether a human rights tribunal, empowered to decide questions of law, can apply s. 52 to find legislation unconstitutional. In *Cooper v. Canada (Human Rights Commission)*, for example, the Supreme Court held that the tribunal does not have the power to declare

<sup>81</sup> *Entrop v. Imperial Oil Ltd.*, [2000] 50 O.R. (3d) 18 (C.A.), aff'ing (June 23, 1995), File Nos. 93-0042 and 95-030-1 (Ont. Bd. of Inquiry), (1995), 23 CHRR (HUMQ) D191 and D196. [*Entrop*].

<sup>82</sup> (C.A.), *ibid.* at para 69 citing *Ontario Nurses' Assn. v. Orillia Soldiers Memorial Hospital* (1999), 42 O.R. (3d) 692. This case was argued before *Entrop* was decided by the Ontario Court of Appeal.

<sup>83</sup> *Ibid.* at para 77.

<sup>84</sup> Bd. of Inquiry, *supra* note 79 at 202, adopted by the C.A., *ibid.*, at para. 89. "Illness [is defined] as "a disability or malfunction that interferes with one's normal state of well-being and effective physical, psychological, social function".

legislation unconstitutional.<sup>85</sup> The lack of clarity in this area arises, however, because this finding does not comport easily with the requirement, acknowledged in *Cooper*,<sup>86</sup> that to fulfil its fact-finding mandate, “a tribunal may indeed consider questions of law” and in *Canada (Human Rights Commission) v. Taylor*,<sup>87</sup> where the Supreme Court held that a tribunal could entertain *Charter* arguments on the constitutionality of available remedies in a particular case.

We also note that earlier cases about the powers of administrative bodies suggest that bodies that can determine questions of law can also make decisions about constitutional validity.<sup>88</sup> In *Canada (Attorney General) v. Martin*, it was found that “where a tribunal is required, as part of its statutory functions, to apply or interpret legislation, it also has the authority to declare such legislation contrary to the *Charter*.”<sup>89</sup> In that case, the Federal Court held that the Canadian Human Rights Tribunal could have declared a section of the *Canadian Human Rights Act* to be unconstitutional.<sup>90</sup> This case was not discussed in *Cooper*, so the issue remains unresolved.

### iii) *Revisiting whether Obesity is an “Illness”*

In *Vogue Shoes*, the Board found that obesity was not a disability because, although a “disease,” it was not caused by an “illness.” The Ontario Court of Appeal recently accepted that alcoholism is a “disability” under the Ontario *Code* and interpreted the requirements of the Ontario *Code* so that this distinction from *Vogue Shoes* can no longer be made.

The Ontario Board of Inquiry in *Entrop*<sup>91</sup> found that alcoholism was an “illness” and therefore could constitute a “handicap” within the definition in s. 10(1) as it read at the time. “Illness” was defined as “a disability or malfunction that interferes with one’s normal state of well-being and effective physical, psychological, social function.” Alcoholism was found to be an illness.<sup>92</sup> This finding was not disputed in the appeal before the Ontario Court of Appeal, nor was a distinction drawn between

<sup>85</sup> [1996] 3 S.C.R. 854 at para. 67 [*Cooper*].

<sup>86</sup> *Ibid.* at para. 64.

<sup>87</sup> [1990] 3 S.C.R. 892.

<sup>88</sup> See *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5; *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22; W.S. Tarnopolsky, *Discrimination and the Law Including Equality Rights Under the Charter*, 1st ed. rev’d by W.F. Pentney & J.D. Gardner, loose leaf vol. 2 (Ontario: Carswell, 2001) c. 16.

<sup>89</sup> [1990] 2 F.C. 573, (T.D.) at 581.

<sup>90</sup> Case cited by Tarnopolsky, *Supra* note 86 at 16-18 ff; they prefer the view in *Martin* to that in *Cooper*. *Cooper* does not discuss *Martin*.

a condition being an illness and a condition caused by an illness:

The Board found, on uncontradicted expert evidence, that drug abuse and alcohol abuse — together substance abuse — are each a handicap. Each is “an illness or disease creating physical disability or mental impairment and interfering with physical, psychological and social functioning.” Drug dependence and alcohol dependence, also separately found by the Board to be handicaps, are severe forms of substance abuse. Therefore, on the findings of the Board, which are not disputed on this appeal, substance abusers are handicapped and entitled to the protection of the Code.<sup>93</sup>

The Board of Inquiry accepted that there are two causes of alcoholism: genetics and environment. This was held to be consistent with the view that alcoholism is an “illness”. The Board also considered, in order to reject it, the argument that a “handicap”<sup>94</sup> cannot include a temporary condition over which a person has control. There is nothing in s. 10(1) that requires a condition to be permanent, and the recent Supreme Court jurisprudence certainly allows for disabilities to appear and to change over time. The requirement that a “handicap” be “beyond one’s control,” which came from *Vogue Shoes*, was dismissed as itself based on weak or non-existent authorities.<sup>95</sup> Furthermore, there was much evidence that alcoholics have great difficulty controlling their condition.

Obesity, under this definition, might now be characterised as an “illness.” It is a “malfunction that interferes with one’s normal state of well-being and effective physical, psychological, social function.” The twin causes are commonly considered to be genetic and environmental.<sup>96</sup> Despite the popular view that obesity can be controlled, obese people have statistically a very small chance of becoming non-obese. The courts enjoy roughly the same degree of certainty about these propositions in relation to obesity as they do in relation to alcoholism. At the same time, the issues of self-control and the precise cause of the grounds of discrimination are not strictly relevant in discrimination law. The Ontario Court of Appeal’s acceptance of alcoholism as a disability suggests it should be willing to accept obesity as a disability, for there is little of relevance to distinguish them.

Recognising obesity as an illness and a disability would allow the Ontario courts to follow the Supreme Court’s emphasis on the way in which the social response to obesity “disables” an individual and the prevalence of negative stereotypes about obesity, including the ideas that obese people suffer functional limitations and that obesity can be

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<sup>91</sup> *Supra* note 79 at 202-03.

<sup>92</sup> *Ibid.* at 202.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Supra* note 13.

<sup>95</sup> (Bd. of Inquiry), *supra* note 79 at 204.

<sup>96</sup> See *Vogue Shoes*, *supra* note 4 at para. 74.

overcome through will- power, support the legal recognition of obesity as a ground of discrimination.<sup>97</sup>

The provinces that do not have human rights legislation that defines “disability” must also adapt their approach to obesity complainants as they apply in *Boisbriand*. The B.C. Tribunal, for example, will have to revise its approach to remove the judge-made distinction between “functional” and “perceived” disabilities and the attendant requirement of a medical basis for a “disability” as opposed to a “perceived disability.” In the absence of a definition of “disability” in the *B.C. Code*, this should be easy to do. It is simply a matter of applying the *Charter* jurisprudence, which the Tribunal is obliged to do in any case.<sup>98</sup>

On some issues, the *B.C. Code* has already been read in this way. In *Cominco*, for example, before the new Supreme Court jurisprudence, the arbitrator found that heavy smokers are “disabled” within the meaning of the *B.C. Code* in the face of earlier decisions regarding smokers to the contrary. The arbitrator cited the Board decision in *Entrop* and noted that a disability need not be permanent to engage the protection of the *B.C. Code*. The fact that some smokers can quit smoking does not mean that those who do not are not disabled.<sup>99</sup> He concluded that heavy smokers may be disabled at law on the basis of medical evidence about addiction to nicotine.<sup>100</sup> Causation was not discussed. On the contrary, the arbitrator explained that:

[t]he action of smoking is essentially irrelevant in the equation. The law neither sanctions nor condemns the activity any more than it does drug addiction or alcoholism. But it recognizes that people become addicted to the point that they become physically and mentally disabled. They are unable to control their addiction. It

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<sup>97</sup> Other solutions are problematic. As an Ontario Board has already noted, obesity cannot be treated as a separate analogous ground distinct from disability under the *Ontario Code* because there is “no scope under s. 4 of the *Code* for a board to identify additional prohibited grounds of discrimination based on other personal characteristics” (*Vogue Shoes*, *supra* note 4 at para. 58). Furthermore, the Supreme Court’s recognition in *Boisbriand* of obesity as a “disability” suggests that the Court would not recognize obesity as a separate analogous ground under s. 15(1). The Board has already rejected the view that the law could consider obesity to be a “malformation or disfigurement” under s. 10(1); this view would not obviate the need to establish a medical cause of obesity (*Vogue Shoes*, *supra* note 4 at para. 69).

<sup>98</sup> The Commission has recognized that the B.C. Supreme Court’s *Meiorin* test, which relates to accommodation, applies to all claims for discrimination under the *B.C. Code* in *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R.868 (S.C.C.).

<sup>99</sup> *Cominco*, *supra* note 27 at paras. 182 and 181 respectively.

<sup>100</sup> The arbitrator referred the matter back to the parties to resolve how to accommodate nicotine-addicted employees in light of the Supreme Court’s decision in *Meiorin* (below), decided after the parties made submissions.

is the state of disablement that is protected by the human rights legislation, not the behaviours that may have led to the addiction.<sup>101</sup>

It is also worth noting that complainants may not be worse off when they complain of discrimination based on “perceived disability” rather than “disability”. “Perceived disability” is the more inclusive term, for it includes any “disability” that is perceived, as well as conditions that are not experienced as disabilities but which are perceived as such. It also effectively includes people who suffer from “invisible” disabilities, because these people only experience discrimination when their condition causes functional limitations that are misunderstood or wrongly perceived by the respondent. In all cases, complainants must show that they have been treated unfairly and unreasonably, which includes describing the actions of a respondent who perceives them in a negative light. Some complainants might find it insulting that the tribunal find for them on the grounds of a “perceived disability” rather than an “actual disability,” but others might find it salutary to locate the source of their discriminatory treatment squarely in other people’s perceptions. In the contexts of employment discrimination and the provision of services, complainants are not deprived of a remedy by casting their complaint as one of “perceived disability” as opposed to “disability.”

The requisite change in the legal treatment of obesity has already occurred in the interpretation of the *Québec Charter*. In 1981 in *Héroux*,<sup>102</sup> the Q.C.A. refused to acknowledge the existence of a handicap without functional limitation with the result that obesity was held not to be a “physical handicap” within the meaning of the *Québec Charter*. This case was effectively overruled in *Boisbriand*, discussed above. In Québec, it has therefore already been determined that obesity may constitute a ground of prohibited discrimination.

#### *IV. Benefit Plans: Where Theory Meets Practice*

One of the implications of the above analysis is that once obesity is established as a ground of prohibited discrimination, a person who is refused insurance coverage for prescription drugs that treat obesity could sue an employer or an insurer under provincial human rights legislation. While it is true that employers are under no legal obligation to establish benefit plans for their employees, once an employer establishes a benefit plan, the plan must comply with legal requirements that include human rights legislation.

This issue may receive legal scrutiny in the near future due to the way in which drug benefit plans are now being designed. In response to higher costs for drugs that are being marketed to treat medical conditions

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<sup>101</sup> *Cominco*, *supra* note 27 at para. 203.

<sup>102</sup> *Supra* note 65.

of the middle-aged (e.g. Viagra for impotent males), insurance companies are marketing drug plans that exclude products that are deemed to be “lifestyle” drugs as opposed to “medically necessary” drugs. The concepts of “medically necessary” and “lifestyle drugs” are fraught with difficulty from a human rights perspective.

The legal argument involved in a complaint about a failure to cover an obesity drug or treatment would be a novel one because no provincial human rights case yet published applies the recent Supreme Court dicta to obesity discrimination.<sup>103</sup> There has, however, been an arbitral challenge to a restricted drug formulary on human rights grounds. In *Re Uniroyal Goodrich Tire Manufacturing and U.S.W.A., Local 677*, an arbitrator considered an employer’s refusal to cover Viagra under a benefit plan that covered “prescription drugs” on the grounds that it was a “lifestyle drug.” The arbitrator held that because Viagra was a prescription drug and the drug plan covered all prescription drugs, the employer had to cover it.<sup>104</sup> This decision, along with the jurisprudence on the application of human rights legislation, both provincial and the *Charter*, suggests that employers or insurers can be liable for improperly restricted drug formularies.

In addition to the analytical problems identified above, it must also be noted that there is no legal definition of “lifestyle drugs.” The phrase connotes both drugs used to treat a condition caused by the person who suffers from it and drugs that are not medically necessary but for which a prescription from a medical doctor is required. Causation is not relevant to the analysis of a disability under human rights law, as shown above, for the law does not enquire into the cause of a disability. Necessity is difficult for a court to define; it is most likely that a court would defer to medical opinion on this issue and draw the line between prescription and non- prescription drugs. In the Uniroyal decision on a restricted drug formulary, the issue of “lifestyle” was deemed irrelevant in the context of a collective agreement that provided for coverage of prescription drugs.<sup>105</sup> Principles of contract law required the drug to be covered under the collective agreement at issue.

To appreciate the discriminatory aspect of the invocation of the concept of “life style” drugs, it is worth noting that the concept suggests a distinction among activities based on choice but it is not applied consistently to all activities. For example, “lifestyle” is not usually invoked to distinguish among choices made in work, living conditions or family structure. Driving and working at a dangerous job, for example, are not considered “lifestyle” choices that would affect insurance

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<sup>103</sup> The *Air Canada* case concerned the CTA, a separate statute.

<sup>104</sup> (2000), [2001] 92 L.A.C. (4th) 366 at 380 and 383 [*Uniroyal*].

<sup>105</sup> *Ibid.* 383-84.

coverage or benefit plans. "Lifestyle" is commonly used euphemistically to refer to the pursuit of pleasure, in combination with a normative attitude that countenances "good" pleasures (such as playing sports) and "bad" pleasures (such as being sexually active at an older age or overeating). The medical treatment of conditions that derive from "good" pleasures, such as breaking a bone while playing soccer, is often insured, based on a subjective interpretation of activities that are worthy of legal protection. The underlying principle of excluding insurance coverage for "bad" pleasures is that the badness of the pursuit itself disentitles people to benefits. When such perceptions give rise to discriminatory actions, such as excluding coverage for certain prescription drugs, human rights law may be engaged.

However, even if the concept of "life-style" drugs survives judicial scrutiny, it is difficult to apply it to obesity drugs. First, obesity is linked to organic causes as well as behavioural causes; people do not simply cause their own obesity through choice or gluttony. Second, obesity contributes to serious, life-threatening health conditions. The necessity of treating some of these conditions through treating obesity is well-recognised. These two facts are widely known, which makes it unlikely that an employer or insurer would meet the requirements of good faith belief in the necessity of such exclusions.

If a human rights challenge to excluding an obesity drug were to come forward, employer liability would be analysed according to the Supreme Court's decision in *Meiorin*, where the Court found that an employer could justify a *prima facie* discriminatory workplace rule or standard by meeting a three-step test.<sup>106</sup> In defending itself, the employer must show that the discrimination is rationally connected to the performance of the job. The exclusion of obesity drugs relates to the desire on the part of employers to save money, however. It is difficult to imagine how the exclusion of obesity drugs would be rationally connected to the performance of any job. It is not related to ensuring a safe, healthy or productive workplace, for example. Faced with an obese complainant who has health problems caused or exacerbated by obesity, such as diabetes, the employer's decision not to cover obesity drugs is in fact contrary to the requirements of good health that relate to any job. So too is the increased likelihood of health problems developing in relation to obesity.<sup>107</sup> As a result, it will be difficult for an employer to pass the first step in the *Meiorin* inquiry.

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<sup>106</sup> *Supra* note 52.

<sup>107</sup> "A BMI greater than 28 is associated with a three to four fold increase in risks of morbidity compared to the general population. The outcomes seen with this population are increased risks of stroke, ischemic heart disease, diabetes mellitus and other illnesses." T.B. Van Itallie, "Health Implications of Overweight and Obesity in the United States". *Ann Intern Med* (1985) 103:6 983-988. This view is contested by those who believe that

The second element that must be made out is that the employer or insurer adopted the impugned policy in an honest and good faith belief that it was necessary to accomplish a legitimate company purpose. This is a subjective test and relates to the research and consultation that went into the formulation of the policy. It could be relevant here to examine an employer or insurer's honest belief in the concept of "life-style drugs." A complainant could reply that the policy of excluding "life-style drugs" from insurance coverage is not rational and well-researched. In excluding coverage, the only legitimate purpose would seem to be cost savings. While this is an important corporate concern, cost is subject to careful scrutiny under the third element of *Meiorin*.

The third and final step of the *Meiorin* analysis would involve a determination about whether the exclusionary rules are reasonably necessary to accomplish the employer's purpose and whether the employer cannot accommodate individual differences without experiencing undue hardship. Cost is the most common and obvious factor considered at this stage of the analysis. In this case, the respondent would have to show that it cannot afford the cost of covering obesity drugs.

The Supreme Court in *Grismer* cautioned against using cost as a defence in human rights cases:

While in some circumstances excessive cost may justify a refusal to accommodate those with disabilities, one must be wary of putting too low a value on accommodating the disabled.<sup>108</sup>

As the Ontario Court of Appeal put it, "[t]he phrase "undue hardship" suggests that [a respondent] must accept some hardship in order to accommodate individual differences."<sup>109</sup> The cost of obesity drugs is, in the context of overall benefit plan costs, low. Moreover, as a preventive measure, spending on obesity drugs may reduce the cost of drugs used to treat related conditions (e.g. diabetes) or may lead to a reduction in long-term disability benefit costs. Cost is, in the context of obesity drugs, unlikely to be so significant that it will create undue hardship for the employer. As a result, it is our view that employers will have difficulty discharging their duties under this part of the test.

The courts are gradually developing other ways to understand accommodation and hardship. The Ontario Code itself encourages this approach in its acceptance of a wide variety of remedies, beyond the

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lack of fitness rather than obesity is the cause of health problems: See Solovay, *supra* note 6, c. 10 "Is an ample body an able body?"

<sup>108</sup> *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [*Grismer*] at para. 41.

<sup>109</sup> *Entrop*, *supra* note 79 at para. 96.

traditional common law approach of using money damages to compensate for loss. In the context of benefit plans, the issue of accommodation could arise in a situation where plan costs are finite, usually because one or both of the employer and the employees prefers not to bargain about them. Accommodation could then involve trading off rights under the plan or developing flexible plans to reduce the conflict among employees' interests. Human rights law can help to ensure that such decisions are made in a non-discriminatory way.

In practice, of course, adding costs to an employee benefit plan will ultimately increase the cost of the plan to the employer. Human rights law can prevent an insurer or employer from designing an impermissibly discriminatory benefit plan, such as one that covers "medically necessary drugs" but attempts to exclude lifestyle drugs, including obesity drugs. But human rights law cannot prevent the rising costs of benefit plans. While an employer will be able to argue that cost should be considered in the context of all the new drugs that it may now be required to cover, we do not believe that such an argument will succeed. The determination about whether an individual has been discriminated against on the basis of a disability will, necessarily, occur on a case by case basis. Suggesting that an individual claim should be refused for fear of pharmacological innovation and increasing costs generally is not a strong argument because it does not address the issue of discrimination.

The real issue in the context of new drugs and ever-increasing plan costs is how employers and employees can best address the situation. Simply not covering a drug because it is expensive will not be a viable solution. Trade unions face the same design issue when bargaining for drug benefit plans. Even if a trade union were to agree about which drugs would be reimbursed, an excluded and aggrieved employee could launch a grievance against the union's decision under human rights law.

Other obvious cost-containing restrictive techniques have been developed by employers but, in our view, they all suffer from the same inadequacy in relation to human rights law. An employer could attempt to impose a cap or limit on the level or amount of reimbursement provided to each employee. The problem with this approach is that even if it applied to all drugs, it could result in adverse effect discrimination against those who require more expensive treatments. Requiring prior or special authorization for certain drugs is another restrictive technique. The

problem with this approach is the same: if its effect were to limit access to treatment it could be held to be discriminatory from a human rights perspective.

In the end, human rights considerations should lead to a fundamental redesign of benefit plans. The current model in the context of increasing costs may no longer be a viable model. Human rights considerations could lead to drug plans that are funded in the same way as pension plans or a better coordination between government and private drug plans. Pre-funded plans, for example, could allow workers to put money aside in their younger, fitter days for use in the future in a plan that allows funds to accumulate on a tax-deferred basis. In our view, human rights considerations should not be feared by employers. They should, indeed, be embraced and used to assist in designing benefit plans that better meet the needs of participants while respecting their entitlements under human rights legislation.