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A study on the definitions that dictate “disability”

March 31<sup>st</sup>, 2022

## Part I: Introduction

Definitions are a threshold issue as it pertains to disability services in Ontario. While these definitions are necessary, they are also profoundly powerful; they serve to allow or deny members of the public the ability to receive government support and provide a framework for social assistance.

For many, definitions pose difficulties by creating barriers for members of society who may not be categorized easily within them. Furthermore, definitions may be too narrow, too wide, or too vague. In these circumstances, courts are relied on to interpret their meaning.

This difficulty is further exacerbated by ableism and the tendency for definitions to adopt a medical model of disability. The medical model views persons with disability as disabled by their physical impairments or differences rather than by the social model which views disability as stemming from barriers in society. Furthermore, definitions do not consider the need for intersectionality, an awareness of compounded difficulties faced by persons with disability who are also subject to social, racial, or economic prejudice.

Currently, there is no comprehensive common law test or set of indicia to guide courts in effectively interpreting definitions of disability to best serve the disabled community. Judicial discretion and some common law decisions, loosely connected, form an unpredictable basis on which to determine whether or not a person’s differences fall under the definition in question.

This gap in the common law can lead to further inequities as courts are left to their own interpretation.

This paper seeks not to change the current definitions. Rather, this paper will serve to closely evaluate this threshold issue and to provide a guide as to how courts should interpret definitions to better serve persons with disabilities. In my analysis I will highlight three important elements of interpretation: the social model of disability, a wide, purposive interpretation of disability, and an intersectional approach to disability. All three elements serve as essential pillars of interpretation to best serve persons with disabilities in gaining access to resources and legal recognition of their status. This guide and its pillars will be informed by statute, landmark cases at the provincial and federal level, and disability scholarship and intends to serve all citizens in Ontario with perceived and actual disabilities.

Models for interpretation are not novel. Ontario abides by the *Interpretations Act*<sup>1</sup> which dictates that a provision is inapplicable insofar as it is “inconsistent with the intention or object of the act.”<sup>2</sup> Although these statutes are useful resources, the Act itself is limited by its general nature. This paper, rather, serves to provide guidance attuned specifically to the realities of persons with disabilities.

For the purposes of this paper I will be focusing on definitions in the Ontario Human Rights Code (OHRC), Canadian Human Rights Act (CHRA), as well as the Ontario and Canadian Human Rights Tribunals, Ontario Court System and the Supreme Court of Canada.

## Part II: The Social Model of Disability

### *Statute*

In 2010, Canada ratified the United Nations Convention on the Rights of Persons with Disabilities (CRPD). The CRPD adopted a social model approach to disability, recognizing that “disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others.”<sup>3</sup> In its essence, the CRPD is a pledge, taken up by Canada, to view persons with disabilities as full and equal members of society through a human rights approach.<sup>4</sup> This endeavour illustrates an ameliorated approach to disability policy. By adopting a social model of disability, the definition expands its understanding of who and what is considered a disability. Disabilities are seen as restrictions imposed by society rather than the focusing on the impairments of the individual. By reframing the idea of disability, this approach aims to influence how governments consider the rights of persons with disabilities.<sup>5</sup> Ultimately, it is likely that this more progressive definition will better allow individuals with disabilities to receive government aid without the barriers demonstrated by medical model definitions. While the approach undertaken by the CRPD has not resulted in a modification of currently Canadian definitions, as evidenced below in the CHRA and OHRC, it has been reflective in judicial decisions across Ontario and Federal jurisprudence.<sup>6</sup>

Both the OHRC and CHRA adopt a medical model in their definitions of “disability.” These definitions provide a “functional view of disability, represented in personal and professional

assessments of having difficulty with daily living activities or having a physical or mental condition or a health problem that reduces the kind of activity that an individual can do. This approach is “rooted in biological and medical ways of understanding disablements.”<sup>7</sup>

The medical model results in harmful perception of persons with disability which leads to the perpetuation of stigmas and results in societal barriers for persons with disabilities.<sup>8</sup> The medical model of disability provides a specific framework based on a defect within the individual. Disability is seen as an aberration against normal characteristics which may or may not be cured by way of health care and social service professionals.<sup>9</sup> According to a paper published by UCSF, by identifying disabilities through the medical model, disability becomes understood as a negative trait, perpetuating stigmas and misconstruing the definition of disability. This places a burden on individuals who seek to rely on the definition for social assistance. Furthermore, the model conveys messages of low expectations and can lead to fewer opportunities for persons with disabilities.<sup>10</sup>

The definition within the OHRC is as follows:

“‘disability’ means

(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, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or

hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,

- (b) a condition of mental impairment or a developmental disability,
- (c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
- (d) a mental disorder, or
- (e) an injury or disability for which benefits were claimed or received under the insurance plan established under the Workplace Safety and Insurance Act”<sup>11</sup>

The *Code*, established by the Ontario Human Rights Commission is meant to protect all individuals from discrimination and harassment in five social areas: receiving goods and services, housing, contracts, employment, and professional associations.<sup>12</sup> The Commission has further published materials on ableism, duty to accommodate, mental health disabilities and additions as well as students with disabilities. This definition provides a list of conditions that constitute a disability. Under the auspices of the Ontario Human Rights Commission and the Ontario Human Rights Tribunal, Ontarians can apply to the courts for a redress of grievances. These judicial bodies are subsequently relied upon to interpret this definition and make decisions regarding whether or not a person falls within this definition.

The Definition in the CHRA is as follows: "disability" means any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug;”<sup>13</sup>

The Act, established in 1977, was created to ensure that with the federal legislative purview, all individuals should be treated equally regardless of their identity or disposition.<sup>14</sup> The Act further serves to protect those within its scope from discrimination: namely, those who are employed or receive benefits from the federal government and private industries regulated by the federal government such as banks, trucking, and telecommunications. Unlike the OHRC this definition does not include a list of ailments. This approach is purposefully broad as to encompass all perceived and actual disabilities but never-the-less relies on a medical model.<sup>15</sup> Like the OHRC, interpretation is left to the courts to determine whether or not an application falls within the definition.

### *Jurisprudence*

In 2011, the majority decision in *Hinze v Great Blue Heron Casino (Hinze)*<sup>16</sup> provides a synthesis of Supreme Court and Ontario jurisprudence with respect to the interpretation of “disability.” In seeking to determine whether or not the applicant was disabled and experienced discrimination due to his disability, the majority concluded that the “definition of disability extends to the actual or perceived possibility that an individual may develop a disability in the future”<sup>17</sup> and that the interpretive emphasis should be on the “obstacles to full participation in society rather than on the condition of the individual,” thereby invoking the social model of disability.<sup>18</sup> Ultimately, the court found that the applicant did not meet the *de minimus* threshold for having a disability when diagnosed with edema which impeded his mobility and required him to take frequent breaks from work.<sup>19</sup> According to the tribunal, in order to fall within the definition of disability, the applicant had to demonstrate an “inability to do something others could normally do” and a substantial, ongoing limit to his activities in addition to a perceived

differential treatment by his employer.<sup>20</sup> Ultimately the courts seems to embrace both the social and medical models of disability to cast a wider net as to who falls within its bounds.

### Part III: A Purposive, Flexible Approach

Courts can further ensure inclusivity by taking a purposive, flexible approach to definitions of disability. Most often this approach is called the 'modern approach' to statutory interpretation requires that effect be given to the ordinary meaning of a statutory text in its wider context and with reference to its purpose. Canadian courts have long been known to use this approach when addressing constitutional and statutory legal issues where the text has proven to be non-exhaustive and in need of further judicial analysis.

In *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montreal (City)*; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City) [City of Montreal]*,<sup>21</sup> the Supreme Court addressed two plaintiffs who were denied work by the City of Montréal based on pre-employment medical exams. The medical evidence of both exams did not suggest that either individual was not physically equipped to carry out their tasks. Thus, the plaintiffs each brought cases of discrimination against the City.<sup>22</sup> The major legal question posed was whether or not the plaintiffs' disabilities, while not resulting in functional limitations, were ultimately disabilities as understood under the common law. The *City of Montreal* decision sought to reframe the legal perceptions of disability to recognizes that society as a key contributor to the idea and perception of persons of disabilities: that "a person may have no limitations in everyday activities other than those created by prejudice and stereotypes."<sup>23</sup> The Supreme Court further held that the term "disability" must be interpreted flexibly and

purposefully, in light of both context and its objectives as a definition.<sup>24</sup> The majority proposed that a series of guidelines that would be appropriate to facilitating interpretation while allowing courts to develop the notion of handicap consistently with various biomedical, social and technological factors. The adopted guideline was drawn from J.E. Bickenbach's theory on disability and social policy which emphasized the need for a multi-dimensional approach to assessing the presence disability in a person's experience, specifically, by assessing a socio-political dimension if appropriate.<sup>25</sup>

*Ontario (Director, Disability Support Program) v Tranchemontagne*<sup>26</sup> is a further example of how courts have taken a purposive, flexible interpretation of a definition of disability to actualize the statute's intended purpose. In *Tranchemontagne*, two applicants to the ODSPA successfully appealed a decision precluding them from benefitting from the ODSPA on the basis that their conditions, namely, their alcoholism, which was outside the ODSPA statutory definition of disability under s.5(2) when considered the sole impairment of the individual.<sup>27</sup> The court affirmed that s.5(2) was inconsistent with the Ontario Human Rights Code s.1 and s.10(2), which recognized addiction to alcohol as a disability where those who suffer can experience chronic relapse, stigma, and endure several treatments before finding success.<sup>28</sup> In this case, the court called upon wider definitions and contextual and medical evidence to ensure that the ODSPA did not preclude those who, the court considered, squarely fall within its purview.<sup>29</sup>

## Part IV: An Intersectional Approach

Scholars have long held that looking at a person's physical condition as a sole determining factor of whether they constitute a disabled person paints an incomplete picture of society and its



challenges for persons with disabilities. Critical race theory, gender, sexuality, and disability studies are necessarily interdependent and mutually constitutive: a holistic representation of a person with disabilities must encompass all these aspects.<sup>30</sup> It is imperative that courts, when interpreting statutory definitions of disability based on the individual before them, adopt an intersectional approach.

As previously mentioned in the CHRA and jurisprudence on definitions of disability under the social model, disability is fluid and contextual rather than biological: a person is always disabled in relation to the context in which they find themselves. For example, someone becomes disabled when they are in a wheelchair in an environment that is inaccessible.<sup>31</sup>

Persons with disabilities who experience societal challenges as a result of their socioeconomic, gender, or racial status may be uniquely impacted by their disability; In some cases, it may be the case that a condition of an individual is not perceived as a disability, but when taken in consideration with other environmental factors, it is, by way of a social model definition, a disability.<sup>32</sup> People of colour, immigrants, and those living in poverty are at greater risk for losing ability capacities also face barriers when obtaining quality rehabilitative and speciality services.<sup>33</sup> Furthermore, minority populations face barriers in obtaining quality rehabilitative and specialty services, which may further place them at a disadvantage when, for example, attempting to re-enter the workforce.<sup>34</sup> This is not to suggest that race, gender or poverty alone is a disability, but rather that they are important considerations in assessing an individual's experience.

This sentiment is echoed in *City of Montreal*. As previously mentioned, the court recognized the need for a multi-dimensional approach for determining whether a person fell within a category of “disabled,” as “it is the combined effect of an individual’s impairment or disability and the environment constructed by society that determines whether such an individual experiences a handicap.”<sup>35</sup> However, a deliberate emphasis on intersectionality has yet to be implemented.

This oversight is exemplified in *Granovsky v Canada (Minister of Employment and Immigration)*<sup>36</sup>, a case in which the appellant was denied permanent disability insurance because he failed to make the required CPP contributions and experienced a temporary disability as opposed to a permanent one. Under the CPP permanent disability benefits, the applicant must have suffered from a “severe and prolonged mental or physical disability” during which they were “incapable regularly of pursuing any substantially gainful occupation” and was required to satisfy a “recency of contributions test”.<sup>37</sup> However, those who were permanently disabled or who collected a family allowance were permitted to exclude certain months from the contributory period whereas those with temporary disabilities were not.<sup>38</sup> The court further described a hierarchal approach to disability: Justice Binnie concluded that a plaintiff who experienced temporary disabilities that develop into permanent disabilities are “better off and “more fortunate” than those with permanent or pre-existing disabilities.<sup>39</sup> The appellant’s argument at the Supreme Court alleged that the CPP lacked a fundamental understanding of the true circumstance of persons with disabilities.<sup>40</sup> In cases like *Granovsky*, if the court were to take into consideration all contributing factors to an appellant’s inability to work, rather than focusing solely on whether the injury was severe enough to be the sole preclusion to gainful employment,

perhaps the appellant would not have been denied benefits and would have been deemed “disabled” as was required by the CPP in order to be eligible.

Jurisprudence, disability theory and demographic research strongly suggest that persons with disabilities are entitled to and should undergo needs-based assessments that include relevant factors to their ability or inability to gain necessary access, including recognition of gender, socio-economic status and race.

## Part V: Conclusion

In *Driedger on the Construction of Statutes*, Professor R. Sullivan summarized two rules of interpretation that apply to human rights legislation:

“(1) Human rights legislation is given a liberal and purposive interpretation. Protected rights receive a broad interpretation, while exceptions and defences are narrowly construed.

(2) In responding to general terms and concepts, the approach is organic and flexible. The key provisions of the legislation are adapted not only to changing social conditions but also to evolving concepts of human rights.”<sup>41</sup>

It is imperative to remember that at their core, definitions of disability have the power to determine how human rights are understood and demonstrated in society. Definitions alone have the power to control human rights standards set out by Ontario and Canada as a whole. When definitions are flawed, Ontarians rely on courts to interpret definitions to better suit their human rights objectives.

The social model, flexible/purposive, and intersectional approaches reflect Professor Sullivan's sentiment and set out specifically how courts should interpret disability definitions to ensure the disabled community, without barriers, receive benefits and accommodation intended for them.

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<sup>1</sup> Interpretation Act, RSO 1990 c I 11

<sup>2</sup> *ibid* s.1(10(a))

<sup>3</sup> *Convention on the Rights of Persons with Disabilities*, 24 January 2007, A/RES/61/106, Preamble.

<sup>4</sup> Government of Canada, *Promoting rights of persons with disabilities*, online: Government of Canada [https://www.international.gc.ca/world-monde/issues\\_development-enjeux\\_developpement/human\\_rights-droits\\_homme/rights\\_disabilities-droits\\_handicapees.aspx?lang=eng](https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/human_rights-droits_homme/rights_disabilities-droits_handicapees.aspx?lang=eng)

<sup>5</sup> UCSD Office of Developmental Primary Care, *Medical and Social Models of Disability*, online: <https://odpc.ucsf.edu/clinical/patient-centered-care/medical-and-social-models-of-disability>

<sup>6</sup> cite social model jurisprudence

<sup>7</sup> See: *Hinze v Great Blue Heron Casino*, 2011 HRTO 93 [*Hinze*].

<sup>8</sup> *supra* note 3.

<sup>9</sup> *ibid*.

<sup>10</sup> *ibid*.

<sup>11</sup> *Ontario Human Rights Code [OHRC]*, RSO 1990 cH19, s.10(1)

<sup>12</sup> Ontario Human Rights Commission, Guide to your rights and responsibilities under the Human Rights Code, online: <https://www.ohrc.on.ca/en/guide-your-rights-and-responsibilities-under-human-rights-code-0>

<sup>13</sup> *Canadian Human Rights Act*, RSC 1985 CH6, [*CHRA*], s 25.

<sup>14</sup> *ibid* at s 2.

<sup>15</sup> *Laurent Duverger v 2553-4330 Quebec Inc*, 2019 CHRT 18 at para 181.

<sup>16</sup> *supra* para 5.

<sup>17</sup> *ibid* para 14.

<sup>18</sup> *ibid*.

<sup>19</sup> *ibid* at para 24.

<sup>20</sup> *ibid* at para 24.

<sup>21</sup> *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montreal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, [2000] 1 SCR 665 [*City of Montreal*].

<sup>22</sup> *ibid*.

<sup>23</sup> *ibid* at 77.

<sup>24</sup> *ibid* at 26-27.

<sup>25</sup> *ibid* at 77.

<sup>26</sup> [2009] OJ 1613.

<sup>27</sup> *ibid* at 5.

<sup>28</sup> *ibid* at 40.

<sup>29</sup> *ibid*.

<sup>30</sup> Liat Ben-Moshe and Sandy Magaña, "An Introduction to Race, Gender, and Disability: Intersectionality, Disability Studies, and Families of Color" in *Women, Gender, and Families of Color*, vol 2, (University of Illinois Press, 2014) at 105-114.

<sup>31</sup> *ibid* at 105.

<sup>32</sup> *ibid*.

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<sup>33</sup> *ibid* at 107.

<sup>34</sup> *ibid*.

<sup>35</sup> *City of Montreal*, *supra* note 19, at 78.

<sup>36</sup> *Granovsky v Canada (Minister of Employment & Immigration)*, 2000 SCC 28 [*Granovsky*].

<sup>37</sup> *ibid* at 74.

<sup>38</sup> *ibid* at 12.

<sup>39</sup> *ibid* at 83.

<sup>40</sup> *ibid* at 30.

<sup>41</sup> Professor R. Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Markham Ont.: Butterworths Tolley, 1994) at pp. 383-84.