LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO

THE LAW AS IT AFFECTS PERSONS WITH DISABILITIES

Preliminary Consultation Paper: Approaches to Defining Disability

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ABOUT THE LAW COMMISSION OF ONTARIO

The Law Commission of Ontario (LCO) was created by an Agreement among the Law Foundation of Ontario, the Ministry of the Attorney General, Osgoode Hall Law School and the Law Society of Upper Canada, all of whom provide funding for the LCO, and the Law Deans of Ontario's law schools. It is situated at York University.

The mandate of the LCO is to recommend law reform measures to enhance the legal system's relevance, effectiveness and accessibility; improve the administration of justice through the clarification and simplification of the law; consider the use of technology to enhance access to justice; stimulate critical legal debate; and study areas that are underserved by other research. The LCO has committed to engage in multi-disciplinary research and analysis and make holistic recommendations, as well as to collaborate with other bodies and consult with affected groups and the public more generally.

The LCO wishes to acknowledge the significant contribution made to this Paper by Osgoode Hall Law School LCO Scholar-in-Residence Professor Roxanne Mykitiuk.

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I. BACKGROUND

A. Project on the Law as it Affects Persons with Disabilities

In the fall of 2007, the Board of Governors of the Law Commission of Ontario (LCO) approved a project on the law as it affects persons with disabilities and those with whom they interact.

The intent of this Project is to develop a coherent approach to this area of the law. That is, like the LCO's similar project on the law as it affects older adults, this project will not focus on reform of any one specific issue; rather, its purpose is to develop a principled analytical framework for this area of the law that can be used as a tool for shaping legislative initiatives that affect persons with disabilities or reforming current law. Current laws, policies and programs may be used as examples in developing and illustrating the framework.

Older adults are more likely than their younger counterparts to live with disabilities. Several of the most complex issues in the area of elder law are related to disability law, such as institutional living, substituted decision-making and caregiver supports. Therefore, there are some areas of significant overlap between the two projects. The LCO expects that the two projects will benefit from being developed in tandem.

This Project on the law as it affects persons with disabilities is very broad in scope. Given the wide range of Ontario laws and policies that impact on persons with disabilities in areas as diverse as employment, income support, transportation, the built environment, health law, caregiving supports, education and mental health, it is a significant challenge to simply identify the current framework, the principles and assumptions that underlie it, and the way in which it has been operationalized, let alone develop a principled basis for reforming and developing this area of law. Therefore, this will be a multi-year, multi-stage project.

Persons with disabilities make up a very significant proportion of the Canadian population – 14.3 per cent (and 15.5 per cent of Ontarians), according to the results of the 2006 Statistics Canada *Participation and Activity Limitation Survey* (PALS).[1] The number and proportion of Canadians with disabilities has been steadily increasing, partly, but not entirely, as a result of the aging of the Canadian population.[2] Persons with disabilities therefore make up a substantial proportion of the population. Given the increased occurrence of disability associated with aging, some refer to persons without impairments as the "not *yet* disabled", and point out that, when disability is considered in this light, almost

everyone will, at some point in their lives, either experience disability or have a family member with a disability.

Over the past 40 years, there has been significant movement towards acknowledging the experiences of persons with disabilities and recognizing their rights. There has been concerted organization and advocacy by persons with disabilities, and traditional understandings of the nature of disability have been challenged and transformed. Disability has been added as a protected ground to the Ontario *Human Rights Code*,[3] the Ontario *Building Code* now includes minimum accessibility standards,[4] there has been considerable advancement in the deinstitutionalization of persons with disabilities, and primary and secondary public schools provide special education programs. The *Canadian Charter of Rights and Freedoms* and human rights statutes have been the basis of significant legal victories.[5] Recent initiatives include the passage and gradual implementation of the *Accessibility for Ontarians with Disabilities Act*,[6] Ontario's new *Developmental Disabilities Act*,[7] the new Mental Health Commission of Canada and on the international front, the United Nations *International Convention on the Rights of Persons with Disabilities*,[8] which Canada is expected to ratify.

Nevertheless, persons with disabilities continue to experience significant and wide-ranging disadvantage when compared to their non-disabled peers. Persons with disabilities experience barriers in obtaining education that may result in compromised educational attainment.[9] They are less likely to be employed, and when employed, are likely to earn less and to be employed in precarious work.[10] (There may therefore be some overlap between this project and the LCO's concurrent project on vulnerable employees and precarious work.) Overall, they are significantly more likely to live with a low-income.[11] Persons with disabilities are also significantly more likely to be the victims of violent crime and domestic violence.[12] This suggests a need to critically re-examine current legal approaches to disability issues, and to develop a new framework of principles for this area of the law. The LCO hopes that this Project will ultimately provide a valuable aid to law and public policy in undertaking this task.

B. Considerations and Starting Points

As a starting point for this Project, the LCO has identified a number of analytical considerations, or starting points, which will shape the LCO's approach to the law as it affects persons with disabilities. The LCO will:

- employ an intersectional analytical framework, taking into account the impact on the experiences of persons with disabilities of gender, sexual orientation, age, racialization, Aboriginal identity, citizenship status, marital and family status, socio-economic status and other relevant factors;

- view the law as it affects persons with disabilities in light of the broader social and economic conditions within which people with disabilities are situated, and within which the law is made, interpreted, accessed and enforced;

- undertake to understand the law as it manifests itself in the lived experiences of persons with disabilities and consider how persons with disabilities experience their encounters with the law; as part of this approach, the LCO will employ a life-course perspective when considering the impact of the law on persons with disabilities;

- adopt as a starting point of analysis an equality rights/human rights framework, grounded in the principles underlying the *Canadian Charter of Rights and Freedoms* and the Ontario *Human Rights Code*; and

- will take into account the broader international human rights context, including key international human rights instruments and policy documents.

C. This Paper

This Paper marks the first step in this Project. Its purpose is to assist in defining the scope of the Project. In order to understand the law as it affects persons with disabilities, it is essential to first understand what is meant by the term "person with a disability". This is by no means as simple a question as it may appear. The answer has varied over time in the popular understanding, as well as among scholars, advocates and policy makers. The legal frameworks currently applied in Ontario with respect to disability adopt a multiplicity of approaches and definitions. The issue continues to be the subject of lively debate, and understandings are continually evolving.

The answer is important, however. It determines whose needs are recognized and addressed. Legislative definitions of disability frequently serve to determine entitlement to government benefits and programs, and access to rights. As well, the answer we give to this question reflects how we think about the issues associated with disability, and will shape the types of programs and policy responses to disability that are considered appropriate.

This Paper outlines some of the key conceptual approaches to disability, and how they have evolved over time. It examines definitions of disability found in key international documents, influential Canadian policy frameworks and demographic research. It provides a brief overview of Ontario legislation relating to disability and the types of approaches to defining disability used in these statutes and regulations. This is a broad area, and this Paper does not attempt to

be comprehensive: the aim is to identify key ideas, trends and issues. Lastly, it raises questions for consideration in adopting a definition of disability.

The LCO welcomes comments on the issues raised by this Paper and will consider them in defining the scope of this Project and developing an approach to disability. Details on providing input are provided in the final section of this Paper.

II. DISABILITY AND THE LAW IN ONTARIO

In order to analyze legal approaches to defining disability, it is helpful first to consider the broad legal landscape surrounding disability in Ontario, and the nature and purposes of the laws which affect persons with disabilities.

Ontario laws affecting persons with disabilities are subject to, and must be understood through the prism of the *Canadian Charter of Rights and Freedoms.* Section 15 of the *Charter*, which came into force in 1985, guarantees the right to equality before and under the law, and to equal protection and benefit of the law, without discrimination based on, among other grounds, physical or mental disability (terms which the *Charter* does not define). Section 15(2) protects laws, programs or activities that have as their object the improvement of the condition of persons or groups that have experienced disadvantage based on a number of grounds, including mental or physical disability.[13] The *Charter*'s equality rights provisions have been very important in advancing the rights of persons with disabilities, articulating the right to inclusion and participation, and advancing the principle of accommodation.[14]

International policy frameworks and covenants also have a significant influence on Canadian policy approaches. As is discussed later in this Paper, the work of the World Health Organization (WHO) related to impairment and disability has been extremely influential in Canada, and the new United Nations *International Convention on the Rights of Persons with Disabilities* is expected to have a significant impact on disability policy at both the federal and provincial levels.

Ontario has a very wide array of laws that affect persons with disabilities. Some have disability-related issues as a central concern, while others deal with disability only tangentially. These laws touch on a broad range of issues, including transportation, education, employment accommodation, income-support and security, assistive devices and the administration of justice.

It should be noted that many laws that do not deal explicitly with disability nevertheless have a significant and disparate impact on persons with disabilities. Laws that ignore the existence of persons of disabilities, and thereby fail to take into account the experiences and circumstances of persons with disabilities, may create barriers. For example, laws related to divorce, support and child custody do not make explicit reference to disability-related issues. However, where decision-makers rely on stereotypes about the capacity of persons with disabilities to act as parents, or fail to take into account the needs of persons with disabilities in making decisions related to division of property, support or the matrimonial home, persons with disabilities may be disadvantaged. Laws that require members of the public to provide information and complete forms to access programs and benefits and do not take into account the needs of persons

with communications or intellectual disabilities may unintentionally create barriers to access.

Ontario's laws relating to disability serve a range of purposes, and as these purposes affect the approach to disability within each statute, it is important to distinguish them. For the purposes of this analysis, Ontario's disability-related laws can be separated into three broad categories: laws promoting the removal of barriers for persons with disabilities; laws that provide access to benefits, supports and accommodations for persons with disabilities; and laws that restrict the roles, activities or decisions of persons with disabilities.

1. Laws Promoting The Removal Of Barriers For Persons With Disabilities

These statutes are unique in that they have as their central purposes the recognition of persons with disabilities as a group that has experienced disadvantage and the removal of barriers in order to achieve full equality and participation for persons with disabilities. These laws require organizations and individuals to take proactive steps across a range of areas to achieve equality and inclusion for persons with disabilities. There are only three Ontario statutes that fall into this category. The oldest of these is the Ontario *Human Rights Code*,[15] which has included disability (originally referred to as "handicap") as a protected ground since 1982. Under the *Code*, persons with disabilities have the right to equal treatment without discrimination in the areas of employment; housing accommodation; goods, services and facilities; contracts; and unions and other professional associations. The *Code* provides for both proactive and reactive mechanisms for ensuring these rights.[16] It is worth noting that in recent years, disability has been the most frequently cited ground of the *Code* in complaints of discrimination, cited in more than half of all complaints to the Ontario Human Rights Commission (prior to the very recent changes to the enforcement mechanisms under the *Code*).[17]

More recently, the government passed the *Ontarians with Disabilities Act* (ODA)[18] and subsequently the *Accessibility for Ontarians with Disabilities Act* (AODA).[19] The latter is considerably broader in scope than the former, but both have as their aim the systematic removal of physical, attitudinal, technological, informational or communications barriers for persons with disabilities. The ODA applies to the broader public sector, including transportation providers, education institutions and municipalities, and requires the development of accessibility plans. The AODA applies to the private as well as the public sector, and among other measures sets out a process for the development of accessibility standards for specific industries, economic sectors, or classes of persons or organizations.

2. Laws That Provide Access To Benefits, Supports And Accommodations For Persons With Disabilities

There are numerous Ontario laws that recognize the unique circumstances of persons with disabilities, either as a broad group or in terms of specific types of disabilities, and provide access to supports, benefits and accommodations aimed at ameliorating disadvantage, providing supports or enhancing opportunities. Some of these have disability-related needs as a core focus, while others address the populace at large but provide specific accommodations or supports for persons with disabilities.

For example, the disadvantage that persons with disabilities face in securing and maintaining employment and the resultant levels of low income among persons with disabilities are addressed in part in Ontario by income support programs, the two most important of these being the Ontario Disability Support Program (ODSP) (provided under the *Ontario Disability Support Program Act*[20]), which provides a separate social assistance program for persons with disabilities who fall within the specified eligibility requirements, and the Workplace Safety Insurance program, which provides income and re-employment supports for persons who experience temporary or permanent disabilities due to workplace accidents.[21]

There are numerous statutes entitling persons with disabilities to adapted programming or policies in order to ensure equal opportunity to participate and benefit from government programs. Perhaps the most important of these is the provision under the *Education Act*[22] for individualized supports, teaching methodologies and programming for "exceptional pupils". Other examples include municipal bylaws or policies providing for specialized transit services for persons whose disabilities prevent them from using general transit services, and the provision for "disabled parking permits" under the *Highway Traffic Act,* to ensure that persons with mobility-related disabilities are able to park their vehicles within a reasonable distance of their destinations.[23]

The Ontario government also provides benefits related to specific needs of persons with disabilities. For example, Ontario's retail sales tax is waived for the purchase of certain types of assistive devices,[24] and Ontario funds a home and vehicle modification program[25].

There are numerous services and supports targeted at children with disabilities, including child development services through the *Child and Family Services Act*,[26] day nursery programs for children with disabilities through the *Day Nurseries Act*,[27] respite care for families of children with disabilities and a Child Disability Benefit for families caring for a child with a severe or prolonged physical or mental disability.[28]

3. Laws That Restrict The Roles, Activities Or Decisions Of Persons With Disabilities

Laws frequently identify disability as a consideration for permitting participation in various roles or decisions. Most often, this applies to psychiatric, cognitive or intellectual disabilities, and is dealt with as an issue of "capacity" or "competency". Lack of "capacity" may, for example, be a reason for suspending the license of a lawyer under the *Law Society Act*[29] or for appointing a litigation guardian under the *Courts of Justice Act*.[30] Under the *Evidence Act*, persons who are found to lack mental competency may not have their evidence form the basis of a legal decision unless it is otherwise corroborated, a measure which may have serious consequences for the ability of persons with mental disabilities to seek redress, for example, where they have been abused or exploited.[31]

Even more seriously, the possession of legal capacity determines whether a person with a disability can make decisions about some of the most fundamental aspects of his or her life. Possession of the requisite mental capacity is required in order to marry[32] or to make a valid will. As well, statutory regimes set up complex substitute decision-making mechanisms for circumstances where individuals are determined to not have the legal capacity to make decisions regarding health care, personal care and management of property. The *Health Care Consent Act, 1996*[33] sets out procedures and requirements for consent to medical treatment, admission to care facilities, and personal assistance services where a person has lost "capacity". The *Substitute Decisions Act, 1992*[34] creates procedures for making decisions about property or personal care where an individual no longer has "capacity" to do so. A person who loses legal capacity may, for example, be committed to institutional care and treatment against their will. A decision under the *Mental Health Act*[35] that a person is not mentally competent may lead to treatment decisions being made without the consent of the person receiving the treatment. The loss of the legal right to make these basic decisions can leave persons with disabilities extremely vulnerable to exploitation and abuse.

III. EVOLVING LEGAL APPROACHES TO DISABILITY: CONTEXT AND CONSIDERATIONS

As is outlined in detail in Section IV, since the 1960s, concepts of disability have been in rapid flux. This section provides some context for understanding and assessing the evolving debates about legal notions of disability.

A. Background

The meaning of "disability" may seem obvious, a matter of "common sense". However, a historical review demonstrates that disability has been understood from a variety of perspectives over time and across cultures. For example, until fairly recently in European history, disability was understood from a predominantly religious perspective. Disability was seen as a sign of divine judgment or as a result of the action of supernatural powers. In particular, mental illness was explained in terms of demonic forces.[36] Conceptions of disability are shaped by cultural and economic forces.[37]

For most of the 20th century, there was a broad consensus among the general populace, academics, legislators and policy communities about the nature of disability – that it was a bio-medical issue, rooted in individual tragedies, and best addressed through charity and, where possible, treatment and rehabilitation. Definitions of disability were therefore not controversial: the issue was one of "common-sense".

Beginning in the late 1960s, this consensus has fragmented, as activists and academics have introduced new approaches to disability that have challenged common understandings. The area is now one of complex and ongoing debate and discussion: there is no longer any single commonly-accepted conception.

This debate is visible in many arenas and on many levels – not just in academic debate, but in ongoing tensions, debates and developments in public policy and the law. The World Health Organization, for example, developed new classification systems for disability in 1980 and again in 2001, and these classification systems are the subject of ongoing discussion and advocacy. Statistics Canada has recently revised the definition of disability that it uses for gathering information related to disability. And not surprisingly, there has been considerable development and fragmentation in the law's approach to the understanding and definition of disability.

B. Some Considerations Regarding Legal Definitions of Disability

When assessing legal approaches to disability, it is helpful to consider the context in which definitions are developed and interpreted, including the scope of the statutes in question, the role of definitions in statutory schemes related to persons with disabilities, and the circumstances that give rise to caselaw related to definitions of disability.

1. Statutory Definitions of Disability

Not infrequently, statutes and regulations referencing the term "disability" provide no definition of the term: the determination of who is and is not disabled for the purpose of the statute is left to the decision-maker's interpretation, and is generally decided on a case by case basis. For example, the *Consumer Protection Act* takes a consumer's disability into account in determining whether a consumer was unable to reasonably protect his or her interests and was subject to an unconscionable representation, but provides no guidance to interpreting what is meant by "disability".[38] The *Elections Act* permits accommodations to voting procedures to facilitate access for "persons with disabilities" but does not define the term.[39]

Where definitions of disability exist in Ontario statutes, there is considerable variance in approach and no discernible consistent principles underlying the selection of statutory approaches to definitions, as is further detailed later in this Paper. Given the current lack of a unified conceptual approach to disability, perhaps this should not be surprising.

Of course, given that programs and statutes addressing disability vary widely in their purposes, it is inevitable that there will be some variance in their scope. As an example, statutes commonly restrict the scope of the term "disability" to certain specified types of disability, as a reflection of their purposes. The objective of the *Ontario Building Code*, insofar as it deals with disability issues, relates to the accessibility of the built environment; its definition of disability is therefore limited to persons with a "physical or sensory disability" (although it could be argued that persons with, for example, cognitive or developmental disabilities could also benefit from specialized accessibility features).[40] Similarly, special procedures may be instituted to take the evidence of persons who are unable to attend a hearing under the *Charitable Institutions Act* due to "age, infirmity or physical disability".[41]

When considering legal approaches to defining "disability", it is always helpful to keep in mind that most statutes dealing with disability fall into the category of those providing benefits, supports and accommodation for persons with disabilities. Maintaining the scope and integrity of the program is a key concern. Definitions of disability in such statutes generally operate as determinants of

eligibility for programs and services, and there is therefore a perceived need to ensure that definitions provide a clear and easily administered mechanism for allocating services and determining eligibility. This influences both the legislative definition and the caselaw that develops around the terms. For example, judicial decisions regarding the definition of "disability" under the *Ontario Disability Support Program Act* generally arise from situations in which the Ministry of Community and Social Services, and subsequently the Social Benefits Tribunal, have denied social assistance benefits to applicants on the grounds that the alleged impairment is insufficiently substantial, does not have a sufficient impact on life functions, or has not been adequately verified. Individuals are seeking the label of "disability" in order to access benefits and supports, while institutions are withholding the label in order to maintain program standards.[42] A similar dynamic is often at play in human rights caselaw, where the label of "disability" is essential to obtain the opportunity to obtain redress for the loss of employment or access to important services.

2. Caselaw and Interpretation

Not surprisingly, there is considerable case law interpreting "disability", "handicap" and related terms. However, the caselaw, like the statutory provisions, reveals a fragmented approach to the term "disability". A review of caselaw and legal commentary relating to the definition of disability reveals ongoing dispute and evolution. As is outlined later in this Paper, conditions such as obesity, addictions, infertility and temporary medical conditions are in some cases considered disabilities and in others not, indicating ongoing tensions between the various conceptual approaches to disability.

Much of the caselaw has developed under human rights statutes. However, it is important to recall that, given the purpose and quasi-constitutional status of these statutes, courts and tribunals interpret their provisions in a broad, liberal and purposive manner, which is not generally the approach applied to the eligibility provisions of other statutes. For example, the Supreme Court of Canada took a very broad approach to the definition of disability under Quebec's human rights statute,[43] but a subsequent Federal Court of Appeal decision took a narrower approach when interpreting the definition of disability that functions to determine eligibility for certain Canada Pension Plan benefits.[44] A review of human rights caselaw may not provide a full sense of the ways in which courts and tribunals have approached the notion of disability.

The circumstances giving rise to caselaw are not necessarily representative of the full spectrum of circumstances under which persons with impairments and/or disabilities may be affected by the law. For example, decisions regarding "mental competency" and "capacity" arise in complex circumstances, frequently from situations where family members are in conflict with each other and seek declarations which may be contested by the person alleged to be incapable or

incompetent. Human rights cases most frequently arise in the context of employment and relatively rarely in the context of rental housing: this does not necessarily reflect the relative incidence of discrimination in the respective social areas, but rather the fact that employment discrimination is more susceptible to effective remedies through damages and reinstatement than is loss of an opportunity to rent an apartment.

As the discussion later in the Paper regarding the evolution of the approach to the term "disability" under human rights statutes reveals, very different interpretive approaches can be taken to the same statutory wording, with quite different results and a significant effect on the rights and opportunities of persons with disabilities. In that case, evolving conceptions of disability had a significant impact on the interpretation of the term "disability" in human rights statutes, and thereby on the ability of persons with a range of conditions and impairments to seek redress under those statutes.

As well, given that many statutory definitions of disability operate to manage access to government programs, extra-legal administrative requirements may have a practical effect on the way in which definitions are applied to persons seeking assistance. For example, during its 2002 public consultations on Ontario's special education system, the Ontario Human Rights Commission heard that, because of the way that funding for students with disabilities was structured and allocated, school boards would sometimes inappropriately over-label or over-identify students' disability-related needs, in order to generate higher funding levels.[45]

C. Policy Approaches to Legal Definitions of Disability

Despite vigorous debate and considerable evolution in academic, advocacy and policy approaches to disability, until recently relatively little attention has been paid to legislative definitions of disability. However, the federal government has recently recognized the lack of a coherent approach to legislative definitions of disability as a potential source of concern.

When, in 1998, the federal, provincial and territorial ministers responsible for social development released *In Unison: A Canadian Approach to Disability Issues*,[46] describing their vision and long-term policy directions for promoting the full inclusion of persons with disabilities in Canadian society, that document did not consider legislative definitions of disability, or adopt any particular definition, although it recognized the importance of the most relevant international definition, the World Health Organization's *International Classification of Impairments, Disabilities and Handicaps*. The Report did note that most Canadians experience some form of functional incapacity or limitation as a normal part of aging, and that Canadians with disabilities are a diverse group.

However, in 2002, when the Government of Canada released *Advancing the Inclusion of Persons with Disabilities*, its first comprehensive report on disability in Canada,[47] it acknowledged the difficulties inherent in defining "disability", particularly in the legislative context where definitions of disability also serve as eligibility criteria for important government programs, such as the Canada Pension Plan, the *Employment Equity Act*, and the Veterans Disability Pension. The Report reviewed several approaches to disability, and concluded that no single definition could cover all aspects of disability.

As a follow-up to *Advancing the Inclusion of Persons with Disabilities*, the Government of Canada conducted a study of the definitions used in federal government legislation and programs, and developed a synthesis document, *Defining Disability: A Complex Issue*, which was released in 2003.[48] This document provided a review of, and a framework for understanding, disability definitions in key federal government programs and legislation.

The Report concluded that while no single definition of disability existed at the federal level, this might not be as problematic as at first it might appear:

> Disability is a multi-dimensional concept with both objective and subjective characteristics. A single harmonized "operational" definition of disability across federal programs may not be desirable or achievable. And, the scope of solutions to address the broader issues identified go beyond definitions.[49]

The Report further concluded that, while definitions of disability may operate as eligibility criteria for programs, eligibility criteria ought not to be conflated with definitions. Differences in eligibility criteria may reflect attempts to address the different circumstances and needs of persons with disabilities. Different programs have different objectives and purposes, some disability related, and others not. Therefore, the Report did not advocate for the development of a harmonized approach to the definition of disability at the federal level.

IV. CONCEPTUAL APPROACHES TO DISABILITY AND THEIR LEGAL APPLICATION

A. Introduction

As noted earlier, during the last forty years, there has been a rapid evolution of thought about the nature and meaning of "disability". Today, there exist multiple competing perspectives and the notion of "disability" is the subject of wide-ranging and complex discussion and controversy.

It is not the purpose of this Paper to fully canvass all of these perspectives and debates; given the complexity and multiplicity of the issues, that would require a very lengthy document. This portion of the Paper will provide highlights of some aspects of these concepts and debates, insofar as they are relevant to the development and understanding of legal definitions of disability, and the approach to be taken in this Project.

Scholars have categorized concepts of disability in various ways. Generally, the axis of differentiation has revolved around the role of 'impairment' in the experience of disability. Many scholars therefore categorize conceptual approaches to disability into two broad groupings: one focussed on impairment and the other on the social construction of disability. This is the fundamental distinction. However, based on a review of concepts of disability as they are revealed in statutory definitions of disability and the accompanying caselaw, it may be helpful to further breakdown these two categories. The LCO has therefore categorized legal definitions of disability in Ontario into four conceptual approaches:

1. **Bio-medical approach:** A pure impairment model;
2. **Functional limitations approach:** A modified impairment model which takes into account some aspects of how the experience of impairment is affected by the environment;
3. **Human rights model:** A modified social model which recognizes the impact of impairment on the experience of disability, and situates its analysis in a recognition of persons with disabilities as a oppressed group: this is primarily located in human rights legislation; and
4. **Social model:** A pure social model.

Recently, there is some movement towards the development of a mixed model, although this has not yet been reflected in legal structures.

The four categories here identified are similar to the categorization adopted by the federal government in its analysis of definitions of disability, and therefore allows comparisons across jurisdictions.[50] It should be noted that, not infrequently, laws combine multiple approaches into a single definition.

Each of these conceptual approaches to disability will be described below, together with examples of how these approaches have been implemented in law and public policy.

B. Bio-Medical Approach

1. The Approach: Impairment and Disability

To a substantial degree, debates about the nature of disability turn on the role of physical, mental, sensory, cognitive or intellectual impairments in disabling individuals, versus the role of societal attitudes and structures.

Popular understandings of the nature of disability, as well as many policy and legal frameworks centre on the notion of disability as resulting from physical, sensory, psychiatric, cognitive or intellectual impairment.[51] That is, disability is intrinsic to the individual who experiences it.[52] In this model, impairments are dysfunctions that have the effect of excluding persons with disabilities from important social roles and obligations, leaving them dependent on family members and society. As such, disability is an individual tragedy, and a burden on family and society.

This bio-medical conception of disability was the dominant policy model for understanding disability until the last few decades of the 20th century, and remains ascendant in the popular understanding of disability

Under this approach, the most appropriate policy response to disability is medical and rehabilitative. The aim is to overcome, or at least minimize, the negative consequences of individual disability. Individuals with disabilities may therefore become the focus of intensive and sometimes coercive expert attention focused on accurately identifying and “fixing” the impairment causing the disability.

The focus on “fixing” persons with disabilities may lead to assumptions that persons with disabilities are defective and abnormal, and therefore in some way inferior to, and less worthy of consideration than persons who do not have a disability.

2. *Statutory Definitions Using the Bio-Medical Approach*

Under the bio-medical approach, expertise regarding the nature, causes and responses to disability resides with medical and rehabilitative professionals. This approach defers to these professionals in identifying who has a disability and prescribing appropriate rehabilitative or other strategies for addressing the disability.

While statutes now rarely use lists of bio-medical conditions in defining disability, it is still common for statutes to defer the determination of disability entirely to medical professionals without other definition, an approach that implicitly incorporates a bio-medical model of disability, by leaving determinations about eligibility for important programs, benefits and services to the discretion of individual medical practitioners.

For example, the *Homes for the Aged and Rest Homes Act* provides special evidentiary procedures for persons who are unable to attend a hearing because of age, infirmity or physical disability. It provides no definition of "physical disability", but requires certification by a medical practitioner.[53]

Other statutes require medical practitioners to certify that the person in question has the asserted limitation or impairment. For the purposes of defining eligibility for specialized day nursery programs, the *Day Nurseries Act* includes a functional definition of a "handicapped child", but requires medical certification:

> "handicapped child" means a child who has a physical or mental impairment that is likely to continue for a prolonged period of time and who as a result thereof is limited in activities pertaining to normal living as verified by objective psychological or medical findings and includes a child with a developmental disability.[54]

Certification may be provided by a member of the College of Physicians and Surgeons of Ontario, a member of the College of Psychologists of Ontario, a member of the College of Optometrists of Ontario, or a member of the College of Nurses of Ontario who holds an extended certificate of registration.

Specialized transit programs very commonly require medical certification of a mobility-related impairment. Kingston Access Bus, for example, provides specialized transit services for "individuals with physical disabilities regardless of age who, due to a mobility impairment, are unable to use conventional transit facilities". Applicants for this service must have their physicians fill out and certify the application form, detailing the type and severity of the mobility-related impairment. [55]

Other statutes do not explicitly require medical verification of disability, but in practice determinations regarding eligibility rely heavily on information provided by medical practitioners. For example, Regulation 181/98 under the *Education*

Act sets out the process for the identification and placement of exceptional pupils. Regulation 181 does not require parents to provide professional certification of their child's exceptionality, specifying only that the Identification, Placement and Review Committee must consider any educational, health or psychological assessment placed before them, as well as information submitted by parents.[56] In practice, the accommodation process under the *Education Act* may be heavily weighted towards professionals.[57]

There is considerable literature on the power that this model gives medical practitioners over the lives of persons with disabilities. Medical diagnoses become key to accessing rights and disability-related supports and benefits. Persons with disabilities are expected to defer to medical professionals, and may be labeled as non-cooperative and unreasonable if they fail to do so. As medical professionals become the gatekeepers of scarce resources, persons with disabilities who are not "model patients" are at risk of being dismissed or disbelieved. This reliance on medical and health professionals has been critiqued as placing persons with disabilities in a position of dependence, and giving professionals excessive power to label, evaluate and define persons with disabilities.[58]

3. Learning from Examples

i. Environmental Sensitivities

Some of the limitations of a legal approach to disability based on a bio-medical approach are revealed by examining the treatment in law of persons with environmental sensitivities.

Medical consensus regarding diagnostic criteria and causation for the condition known as environmental sensitivity is still developing. The clinical picture is complex: there is no single, simple condition with a universal cause.[59] The lack of a universally acknowledged bio-medical description and causation for environmental sensitivities has led to difficulties for persons living with this condition in having their experiences recognized as a form of disability and in obtaining appropriate accommodations. Environmental sensitivities may be dismissed as a fabrication or as being "all in their heads".

Legally, the lack of an agreed-upon bio-medical foundation for environmental sensitivities is not necessarily an overwhelming barrier under human rights statutes, which are less preoccupied with the cause of limitations than with demonstrated accommodation needs.[60] However, as a practical matter, it may create significant difficulties in legal regimes that require scientifically verifiable evidence regarding diagnosis and causation.[61] Where access to rights or benefits depends on the ability to provide expert medical verification of impairment (for example, in accessing disability benefits), the lack of widespread medical recognition and knowledge about environmental sensitivities can create a significant barrier for these individuals.[62]

ii. Genetic Information

Rapid scientific advances in the field of genetics and genetic testing have raised complex legal issues that we have only recently begun to examine in-depth. Genetic information can provide valuable information, but contrary to popular understandings, only in rare circumstances can genetic testing provide clear predictions about future health conditions. Genetic testing may reveal only an increased chance of developing a particular disorder. Some conditions may be curable, or may be preventable through diet or environment. That is, genetic information does not indicate current impairment, and it cannot predict with certainty further impairment; in most cases, genetic information is limited to indicating increased risk for future impairment.

Although genetic information is not necessarily associated with impairment, its use in decision-making may lead to disadvantage. Concerns have been raised regarding the potential for genetic discrimination, particularly in the fields of insurance or employment.[63] Some American states have passed legislative measures to prevent discrimination on the basis of genetic susceptibility.[64] In Canada, the question has been raised as to whether the current human rights regime can provide protection against discrimination on the basis of genetic information.

The most likely avenue for protection would be a claim of discrimination on the basis of disability. It is not clear, however, whether genetic information would fall within the scope of the definition of disability under the *Human Rights Code*, or if it is in fact desirable that it be so included.[65] Persons whose genetic information indicates a susceptibility to a particular medical condition are not experiencing any physical limitations or impairments, and may never do so. It is only at the point where genetic information is shared with decision-makers that these individuals are at risk of experiencing disadvantage related to their genetic information. However, human rights caselaw has adopted an approach to disability that focuses less on the impairment than on the effects of exclusion; a perceived disability is also protected under human rights law. Under this approach, genetic information could fall within the scope of "disability" under the Ontario *Human Rights Code*.[66]

Some have suggested that to include genetic information as a disability under human rights statutes may suggest that such information is more powerful and has more predictive value than is actually the case. From this perspective, the most appropriate legislative response may not be disability-related, but focused on privacy, and the appropriate collection and use of information.[67]

C. The Functional Limitations Approach

1. The Approach: A Modified Impairment Focus

The functional limitations approach is generally considered as a variant on the bio-medical approach. However, since it has been extremely influential in the development of legislation and public policy, and has some significant implications for policy development, it is worthwhile to consider it separately.

In this approach, disability is identified, not so much in terms of an underlying medical condition, but by considering the functional limitations caused by impairments. For example, a person may have an underlying medical condition of diabetes. So long as this medical condition has no impact on the person's activities, there is no "disability". However, if the diabetes leads to deteriorating eyesight, which limits the individual's ability to access transportation or perform his or her job functions, these functional limitations result in a disability. Functional limitations are associated with the person's ability to appropriately engage in key social roles, such as employment or caring for family members.

Thus, the functional limitations approach, while firmly maintaining the role of impairment in causing disability, recognizes that disability may be influenced by social factors, such as the roles that the individual inhabits, how he or she responds to impairment, and whether the environment is designed in a way that magnifies or minimizes the effects of the impairment.

The functional limitations approach has been, and continues to be, immensely influential in both law and public policy.

2. WHO International Classification of Impairments, Disabilities and Handicaps

The World Health Organization (WHO), through its responsibilities for monitoring health, developing policy options, and setting norms and standards, has had an important role in shaping approaches to disability. The WHO has produced two important classification systems related to impairment and disability, the 1980 *International Classification of Impairments, Disabilities and Handicaps*, and the 2001 *International Classification of Functioning, Disability and Health.*[68]

The WHO's 1980 *International Classification of Impairments, Disabilities and Handicaps* (ICIDH) was the first major classification system to focus specifically on disability and was extremely influential in the development of policy approaches to disability world-wide, including in Canada. The ICIDH adopted a three-pronged definition of disability as consisting of:

1. *Impairment*: any loss or abnormality of psychological, physiological, or anatomical structure or function.
2. *Disability:* a restriction or lack (resulting from an impairment) of ability to perform an activity in a manner or within the range considered normal for a human being.
3. *Handicap:* a disadvantage for a given individual, resulting from an impairment or a disability, that limits or prevents the fulfillment of a role that is normal (depending on age, sex and social and cultural factors) for that individual.

The ICIDH essentially adopted a functional limitations perspective as its basic approach to disability. Disability was caused by impairment and manifested in an inability to perform one or more activities in a "normal" range. However, the ICIDH's use of the term "handicap" did allow for consideration of the role of social factors in determining the consequences of disablement.

The ICIDH was widely criticized by disability activists and others for its reliance on medical definitions and the ableist assumptions underlying the use of a standard of "normalcy". As well, the assumption that disability is always caused by some kind of impairment resulted in a focus on medical and rehabilitative responses to disability, ignoring the importance of legislative, policy and environmental changes in removing disabling barriers. The ICIDH model was seen as placing persons with disabilities in roles as victims and dependents, reliant on others for care or 'charity'.[69]

The WHO has since developed a new framework for addressing disability-related issues, the *International Classification of Functioning*, which adopts a mixed model of disability. This framework is discussed later in this Paper.

3. Statutory Definitions Based on a Functional Limitations Model

The functional limitations perspective is the most common statutory approach to defining disability. Functional definitions of disability are appealing in the legal sphere in that they provide clear, easily applied statutory criteria for program eligibility and the distribution of benefits. However, they retain the emphasis on disability as arising from individual impairment rather than societal barriers, and therefore reinforce the idea that individuals with disabilities require individual remediation rather than inclusion through the removal of physical, attitudinal, or policy-based barriers.

The specific statutory functional requirements related to disability vary depending on the scope and purpose of the statutory program at issue. The following are a few examples of the way in which Ontario statutes have incorporated a functional approach.

The *Highway Traffic Act* combines bio-medical and functional approaches. It defines "person with a disability" for the purposes of determining eligibility for a disabled parking permit by providing a lengthy list of functional limitations and biomedical conditions, including inability to walk without assistance from another individual or some kind of assistive device; dependence on portable oxygen; visual acuity below a defined standard; or cardiovascular disease of a defined extent.[70]

The new *Developmental Disabilities Act*, *2008* provides a good example of a classic functional approach to defining disability. This statute replaces the older *Developmental Services Act* and provides a framework for how persons with intellectual or developmental disabilities apply for and receive government-funded services and supports.[71] It defines "developmental disability" as follows:

> 3. (1) A person has a developmental disability for the purposes of this Act if the person has the prescribed significant limitations in cognitive functioning and adaptive functioning and those limitations,
>
> (a) originated before the person reached 18 years of age;
> (b) are likely to be life-long in nature; and
> (c) affect areas of major life activity, such as personal care, language skills, learning abilities, the capacity to live independently as an adult or any other prescribed activity.
>
> (2) In subsection (1),
>
> "adaptive functioning" means a person's capacity to gain personal independence, based on the person's ability to learn and apply conceptual, social and practical skills in his or her everyday life; ("fonctionnement adaptatif")
>
> "cognitive functioning" means a person's intellectual capacity, including the capacity to reason, organize, plan, make judgments and identify consequences

The *Education Act* uses a somewhat circular approach in its definition of "exceptional pupils" who are entitled to special education services. "Exceptional pupils" are those

> whose behavioural, communicational, intellectual, physical or multiple exceptionalities are such that he or she is considered to need placement in a special education program by a committee … of the board[72]

That is, pupils who are eligible for placement are those whose level of functioning demonstrates a need for such a placement. The functional limitation is a need for the service provided, when linked to certain types of "exceptionalities". The Ministry of Education has developed detailed guidelines outlining the types of impairments that fall within the definition.[73]

Statutes often require that the disability be "severe" or "substantial". Under the ODSP, the family of a child with a "severe disability" is eligible for additional assistance.[74] Under the *Day Nurseries Act*, in order to be eligible for reduced day nursery fees, a person with a disability must demonstrate, in addition to other requirements, that he or she has a "substantial" mental or physical impairment.[75]

Statutory definitions of disability may combine a number of approaches. The definition adopted under the *Ontario Disability Support Programs Act*[76] to determine eligibility for program benefits is an example of a hybrid approach to defining disability. It is particularly important because a number of other statutes, provide that persons who are eligible for ODSP also thereby meet the criteria for their programs.[77] The definition states that:

> 4(1) A person is a person with a disability for the purposes of this Part if,
>
> (a) the person has a substantial physical or mental impairment that is continuous or recurrent and expected to last one year or more;
>
> (b) the direct and cumulative effect of the impairment on the person's ability to attend to his or her personal care, function in the community and function in a workplace, results in a substantial restriction in one or more of these activities of daily living; and
>
> (c) the impairment and its likely duration and the restriction in the person's activities of daily living have been verified by a person with the prescribed qualifications.

This definition combines three elements: first, limitations aimed at restricting the definition to persons who have "serious" disabilities as demonstrated by their "substantial" nature and length in duration; second, a functional limitations requirement; and third, a requirement for medical verification that links the definition to a bio-medical approach.

4. Learning from Examples

i. Temporary Medical Conditions

Temporary medical conditions, whether grave (such as, for example, cancer) or relatively minor (such as a broken limb) have sometimes been regarded as disabilities, and sometimes not. Generally, functional limitations approaches exclude persons with temporary conditions, on the basis that such conditions do not create *ongoing* limitations in life's important activities.

Thus, many statutes exclude persons with temporary or episodic disabilities by requiring that the disability be "continuous" or "prolonged" or have lasted for a defined period of time. The definition of "person with a disability" under the *Ontario Disability Support Program Act, 1997* requires in part that "the person has a substantial physical or mental impairment that is continuous or recurrent

and expected to last one year or more".[78] The provisions of the *Retail Sales Act* related to retail sales tax rebates for persons with disabilities or their caregivers who purchase accessible vehicles require that the disability be permanent.[79] The *Day Nurseries Act* defines "handicapped child" in part as a child who has a mental or physical impairment "that is likely to continue for a prolonged period of time".[80]

Through the 1980s and 1990s, human rights regimes excluded many medical conditions from the definition of disability because they were impermanent, even if they resulted in significant loss or disadvantage for the person who experienced them. For example, a 1986 decision by the British Columbia Human Rights Tribunal dismissed the complaint of a woman whose employment was terminated after a fall resulted in a temporary bout of sciatica and several days' absence from work. The Tribunal found that the employee had experienced a temporary injury, and that this did not constitute a physical disability.[81] An Ontario Board of Inquiry took a similar approach in *Ouimette v. Lily Cups,* a case which lead to a *de facto* adoption of a functional limitations test for disability under Ontario's human rights statute.[82] The Newfoundland Court of Appeal endorsed this approach in *Woolworth v. Human Rights Commission of Newfoundland*, stating that "if the incapacity is of short duration it may be so temporary that it is not addressed by the *Code* as there is no disability under the *Code*".[83]

Later human rights caselaw rejected this approach in favour of a broader conception of disability, which focused less on the duration of a particular condition than its impact on the life of the person experiencing it. For example, in *Clark v. Country Garden Florists*, the Newfoundland Board of Inquiry extended the protection of the *Code* to a person dismissed as a result of an absence resulting from a broken foot.[84] In another case, an Ontario Board of Inquiry upheld the complaint of a woman dismissed because she was absent due to medically-indicated breast-reduction surgery.[85]

A similar tension between concepts of disability can be seen in decisions under the *Ontario Disability Support Program Act*. For example, in *Lloyd v. Ontario (Director of Disability Support Program),* the Social Benefits Tribunal rejected the application of a woman who experienced chronic, but intermittent, arthritis, on the basis that temporary conditions by their nature were not "substantial" within the meaning of the *Act*. The Ontario Divisional Court rejected this approach, stating that an impairment may be "substantial" even if sometimes the person is not impaired at all.[86]

ii. Capacity and Competency

The functional limitations approach has continued to dominate Ontario's legal approaches to capacity and competency. Legal capacity – or the lack of it – determines the ability of individuals to make fundamental decisions on their own

behalf – including decisions regarding marriage, the management and disposition of their property, health care and personal care. The lack of legal capacity also impacts on the ability of a person to access the legal system, for example, to give evidence or to carry on a legal action on their own behalf.

Because loss of legal capacity has such extreme and serious consequences, the standards and processes for assessing legal capacity raise complex and contested medico-legal issues, and have been the subject of considerable debate and study.

In Ontario, tests for legal capacity are set out in the *Substitute Decisions Act* and the *Health Care Consent Act.* Both statutes adopt a two part test for capacity:[87]

1. Does the person have the ability to understand the information that is relevant to making the decision in question?
2. Does the person have the ability to appreciate the reasonably foreseeable consequences of this particular decision, or of not making a decision?

The *Mental Health Act* sets out a similar test for mental competency: does the patient have the ability to understand the nature of the illness for which treatment is proposed and the treatment recommended; and does the patient have the ability to appreciate the consequences of giving or withholding consent?[88]

The Rules under the *Court of Justice Act* adopt the definition of capacity under the *Substitute Decisions Act* for determining where it is necessary to appoint or recognize a litigation guardian.[89]

The issue of capacity also arises in the context of wills and estates, although in this case, capacity is defined through the common law, rather than by statute. A will drafted when the testator did not have testamentary capacity will be invalid. The test for testamentary capacity is similar to that set out in the *Substitute Decisions Act* and the *Health Care Consent Act.* To briefly summarize the test, the testator must be sufficiently clear in his understanding and memory to know, on his or her own, and in a general way, the nature and effect of the act of making the will and of the particular provisions that are being made, the nature and extent of the property in question, the logical beneficiaries of the will and the kinds of claims there may be on the estate.[90]

Mental capacity is also required under Ontario's *Marriage Act*, although the statute does not provide a definition of mental capacity.[91] The standard for mental capacity to marry is different from, and lower than, the standard for testamentary capacity.[92]

The *Health Care Consents Act* and the *Substitute Decisions Act* create a presumption of capacity.[93] The test is not whether the person in question *actually* understands the issues at hand, but whether he or she has the ability to do so.

The focus is on the ability to understand certain types of information and to make specific types of decisions.

Capacity is to be assessed with respect to a particular decision, and not globally. There is no single, universally accepted test for assessing capacity. Capacity may be assessed through different persons or processes depending on the nature of the decision at issue and the legislation at play.

The tests for capacity and competency may therefore be considered as functional in their approach to mental disability. At issue is not the underlying impairment, but the effect on the individual's ability to understand certain types of information and make certain kinds of decisions. The test does not consider environmental or social factors as they may impact on the ability to carry out the functions in question.

Current processes for capacity assessment have been the subject of considerable concern and criticism. One criticism is that methods for assessing capacity may pay insufficient attention to the interactional environment on capacity: how one performs and interacts is a function, not only of one's biomedical status, but of how one is treated and perceived. As well, many have criticized the "all or nothing" effect of the current system, which does not recognize the variations among individuals, and may unnecessarily strip autonomy away from individuals. There is also concern that current structures around capacity assessment in Ontario do not provide sufficient training or monitoring for assessors.[94]

Interestingly, the new United Nations *Convention on the Rights of Persons with Disabilities* sets out a principle of supported decision-making, in which the key question becomes, not whether a person has capacity to make decisions, but how that person can be involved in decisions regarding him or herself, regardless of capacity.[95] The province of British Columbia has taken a leading role in incorporating the principles of supported decision-making into practice under its legislation.[96]

D. The Social Approach

1. The Approach: Environmental Barriers and the Creation of Disability

The bio-medical approach to disability (and with it the functional limitations model), has been widely critiqued for failing to take into account the effect of social attitudes and structures in disabling individuals. A person with a mobility impairment is not prevented from fully participating in society by the impairment, but by the failure of policy makers, planners and builders to take into account the existence of persons with mobility impairments and to create accessible transportation, buildings and services. Persons with epilepsy are not excluded

from employment so much by their medical condition as by the fears, myths and lack of information that lead potential employers to close their minds against their applications. From this perspective, disability is less an individual issue than it is a societal one. For this reason, this perspective is frequently referred to as the "social model" of disability.[97]

This perspective has had a profound impact on disability theory and public policy over the past thirty years, and is now the dominant approach among scholars and activists.

Under the social approach, disability is best addressed by a concerted effort to remove the socially constructed barriers that disable individuals, and to develop a society that is inclusive and respectful of persons across a wide spectrum of differences. This involves a radical shift in policy approaches from the bio-medical approach.[98]

If disability is seen as the result of socially constructed barriers, then persons with disabilities can be considered members of an oppressed group, similar to women, racialized persons, or members of the LGBT community, for example. Therefore, inherent in an understanding of disability as a social construction is a call to advocacy and social change.

There are many variants of the social model, and there continues to be significant debate about how to theorize the role of impairment in disability.

Some feminist commentators and others have argued that the social model of disability takes insufficient account of the actual experience of impairment and the way that impairment itself, apart from societal reactions, can have a profound impact on lived experience. These writers emphasize the importance of an "embodied" understanding of the experience of disability.[99] Different types of impairments will have different implications for health and individual capacity. Stereotypes, social attitudes and barriers will also differ depending on the type of impairment. The experiences of a person who is, for example, Deaf, deafened or hard of hearing will differ considerably from those of persons with a learning disability, or cerebral palsy or bipolar disorder.

The social approach has also been criticized for failing to sufficiently incorporate the experiences of persons with non-physical disabilities, particularly persons with psychiatric, developmental and cognitive disabilities. Mental health survivors, for example, may point to the historical practice of labeling certain types of refusal to conform to social norms (such as homosexuality, or refusal to comply with gender norms) as mental illness and argue that "barrier removal" is an inadequate response to such dynamics. It has also been pointed out that the social approach has been slower to benefit persons with cognitive and developmental disabilities and to confront the profound devaluation of their worth in a society focused on production and profit.[100]

Recently, some have argued that the dichotomy between impairment and social construction is false and misleading. Illness, frailty and impairment is part of the human condition. We are all in some way impaired and the aging process is likely to result in increased impairments for most of us. However, not everyone with an impairment experiences oppression because of that impairment: only some of us will be additionally disabled by societal processes.[101]

Further, any single model of the experience of disability runs the risk of obscuring the profound variations in the experiences of persons with disabilities, depending not only on the kind of impairment they have, but also on gender, socio-economic status, racialization, sexual orientation, age and other characteristics.[102]

2. Learning from Example

i. Obesity

The caselaw around obesity as a disability has been markedly inconsistent, reflecting the difficulty that courts and tribunals have had approaching conditions which may create social disadvantages, but are not necessarily the result of a bio-medical impairment.[103]

The long-running *McKay-Panos* case[104] demonstrates the difficulties courts and tribunals have had in addressing these issues. The complainant alleged that she faced an undue obstacle in air travel due to her disability (obesity), and sought accommodation. The medical evidence in this case was that the complainant was morbidly obese; however, there was no medical evidence as to the cause of her obesity. The Canadian Transportation Agency dismissed her application on the grounds that she was not disabled. There were divided opinions as to the appropriateness of applying the WHO's recently developed "biopsychosocial" model in determining whether an individual had a disability for the purposes of the *Canada Transportation Act,* and as to the relative roles of impairment versus activity and participation limitations in determining the existence of a disability.

The Federal Court of Appeal overturned the decision of the Agency and found that McKay-Panos did in fact have a disability for the purposes of the Act. The Court ruled that determinations as to the existence of a disability must take into account the obstacles faced by the person in question. The Court stated that "it would take very clear words to hold that the existence of a disability is to be determined without regard for context. Arguably, no disability exists in the abstract."[105]

ii. Infertility

Infertility raises analytical difficulties of an opposite nature to those raised by obesity: there is clearly a bio-medical condition and a functional impairment, but the degree to which this may be considered to create social disadvantage is a matter of debate.

In one of a handful of decisions where superior courts have considered the meaning of the term "disability" under the equality rights provisions of the *Charter of Rights and Freedoms,* the Nova Scotia Court of Appeal held that medical infertility is a disability under the *Charter.*[106] The claimants in this case challenged the failure of their province's health insurance plan to provide coverage for fertility treatments. The Court's decision moved quickly from the determination that the policy in question drew a distinction based on the personal characteristic of infertility to the determination that persons who are unable to procreate are disabled:[107]

> [I]nfertile people can be classified as physically disabled. True, the disability is not obvious to the eye – they need no ramp or seeing eye dog. Nevertheless, they have a personal characteristic – the inability to have a child – on the basis of which a distinction can be drawn and has in fact been drawn. We must take a "flexible and nuanced approach". We must make a comparison of the infertile with the conditions of others in the social and political setting in which this claim arises. As long as the indicia of discrimination exist when the distinction is drawn … there is disability here sufficient to meet the requirements of s. 15(1) either as an enumerated or an analogous ground.

A more recent decision by the Canadian Human Rights Tribunal adopted a slightly different approach to a similar issue. The Tribunal ruled that the refusal of the complainant's employer, the Canadian Forces, to fund treatment for male factor infertility discriminated on the basis of disability (as well as sex). The Tribunal referenced expert evidence that "most people are 'hardwired' to want to have children" and that infertility has a significant psychological impact, as well as the inclusion of infertility in the WHO's classification system.[108]

The decision in *Cameron* has been criticized for its unexamined adoption of a medical model of disability, whereby a serious physical impairment is by definition a disability. In making the determination that infertility is a disability, the decision does not examine the social attitudes surrounding childbearing and infertility, or the existence of historical disadvantages for the infertile, or the particular gendered aspects of infertility. Some have argued that women who claim a reproductive disability have appropriated a disability rights discourse in order to gain access to medical technology, and share little in common with women with disabilities whose disabilities have shaped their access to employment, education, living arrangements and social relations, such that their disability becomes a fundamental part of how they experience the world.[109]

E. The Human Rights Approach

1. The Approach: Equality and Dignity for Persons with Disabilities

The human rights approach to disability is a variant on the social approach. The human rights approach recognizes persons with disabilities as a disadvantaged group, parallel to racialized, LGBT persons, women and other disadvantaged groups, and emphasizes the role of social attitudes and facially neutral systems in creating and perpetuating that disadvantage. The role of impairment in disability is recognized insofar as it is necessary to design accommodations to permit persons with disabilities to achieve equality.[110]

The aim of the human rights approach is to achieve equality and inclusion for persons with disabilities through the removal of barriers and the creation of a climate of respect and understanding. There is an emphasis on the fundamental and inalienable dignity, value and contribution of all persons, regardless of disability.[111]

2. United Nations International Convention on the Rights of Persons with Disabilities

Very recently, the United Nations adopted the *International Convention on the Rights of Persons with Disabilities* (ICRPD).[112] Canada has not yet ratified the ICRPD, but is expected to do so. The ICRPD is likely to have a significant impact on policy makers in Canada, and on approaches to domestic human rights statutes.

The purpose of the ICRPD is to promote, protect and ensure the equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent worth and dignity. A key principle of the ICRPD is respect for difference and acceptance of persons with disabilities as part of human diversity and humanity.

The ICRPD adopts an expansive 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.

The ICRPD explicitly includes in its scope those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others. It recognizes the diversity among persons with disabilities.

3. A Case Study in the Evolution of the Conceptions of Disability

All three of the Ontario statutes which have as part of their stated purpose the removal of barriers for persons with disabilities use the same definition, which was first incorporated in the Ontario *Human Rights Code*:[113]

> s. 10(1) "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, 1997*; ("handicap")

The *Code* goes on to specifically include past and perceived disabilities. This is a fairly broad definition of "disability" in that it includes physical, sensory, psychiatric, learning, developmental and acquired disabilities, includes "any degree" of physical disability, and includes perceived disabilities, thereby acknowledging at least to some degree the role of social attitudes in disabling individuals. However, the lengthy listing of medical conditions seems to indicate a bio-medical approach to disability.

This bio-medical definitional approach is interesting, given that the objectives of these statutes are to remove barriers to persons with disabilities, thereby firmly situating them in a social approach to disability. There may therefore be some inherent tension between the purposes of these statutes and the definition of disability adopted.

The bio-medical aspects of this definition may reflect the fact that in the *Code* this definition serves a dual purpose: it defines disability for the purpose of requiring the identification and removal of barriers, but it also does so for the purpose of determining who is able to access the mechanisms set out under the *Code* for seeking redress for discrimination. Persons who are not determined to be disabled within the meaning of section 10(1) of the *Code* do not fall within its jurisdiction, and cannot file an application (or prior to recent amendments, a complaint) alleging discrimination in the areas of employment, housing, services

or contracts. There is therefore significant caselaw interpreting "disability" under the *Code.*

One of the most influential decisions in this respect was that of the Human Rights Board of Inquiry in *Ouimette v. Lily Cups Ltd.*[114] In this 1990 decision, the Board of Inquiry dismissed a complaint based on disability brought by a woman whose employment had been terminated because of absenteeism during her probation period, her absences being due to multiple relatively minor ailments – asthma and a bout of the flu. The Board of Inquiry found that the complainant did not have a "disability" within the meaning of the *Code*. In order to fall within the ambit of the *Code*, complainants were required to demonstrate that their impairment was long-lasting, severe and impacted on one of life's important functions – essentially a functional limitations test. A functional limitations approach became the basis of Ontario's human rights approach to defining disability throughout the 1990s.

The decision of the Supreme Court of Canada in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montreal (City)*[115] marked a significant shift in the approach to defining disability in human rights law. This case involved a complainant who had a bio-medical impairment (scoliosis), which caused her no functional limitations in her employment, but which nonetheless resulted in the denial of her employment application. The Quebec Commission dismissed the complaint on the ground that the complainant did not have a "handicap". The Supreme Court of Canada ruled that a broad approach to disability should be adopted, one which recognized the socio-political dimensions of the term. The emphasis should be on the right to equality, human dignity and respect, rather than on the presence or absence of a bio-medical condition. A disability may exist without proof of physical limitations: the emphasis should be on the effects of the distinction, exclusion or preference rather than on the precise cause or origin of the disability.

Following this decision, the Ontario Human Rights Commission reinterpreted the definitional provisions of the *Code* in its *Policy and Guidelines on Disability and the Duty to Accommodate*, adopting a broad social constructionist approach:

> "Disability" should be interpreted in broad terms ... Even minor illnesses or infirmities can be "disabilities", if a person can show that she was treated unfairly because of the perception of a disability. Conversely, a person with an ailment who cannot show she was treated unequally because of a perceived or actual disability will be unable to meet even the *prima facie* test for discrimination. It will always be critical to assess the context of the differential treatment in order to determine whether discrimination has taken place, and whether the ground of disability is engaged. .. The focus is on the *effects* of the distinction, preference or exclusion experienced by the person and not on proof of physical limitations or the presence of an ailment.

This significant transformation in the approach to disability was followed by a substantial increase in the number of disability-related complaints that the Ontario Human Rights Commission received and dealt with.[116]

4. Learning from Examples: Addictions

Approaches to addiction as a disability are inconsistent between various Ontario government programs and policies. Human rights approaches have generally included addictions as a form of disability. However, persons with addictions have been excluded from protections extended to persons with disabilities under other laws.

Drug and alcohol addictions are considered disabilities under human rights statutes, although the law regarding the nature and scope of the duty to accommodate addictions remains in flux.[117] The Ontario Human Rights Commission's *Policy on Drug and Alcohol Testing*[118] states that:

> The *Code* adopts an expansive definition of the term "handicap" which encompasses physical, psychological and mental conditions. Severe substance abuse is classified as a form of substance dependence[9], which has been recognized as a form of disability. Examples include alcoholism and the abuse of legal drugs (*e.g.* over the counter drugs) or illicit drugs. These types of abuse and dependence therefore constitute a disability within the meaning of the *Code*.

However, addiction has not until very recently been considered a disability for the purposes of eligibility for social assistance under the Ontario Disability Support Program. The *Ontario Disability Support Program Act* states that:[119]

> s. 5(2) A person is not eligible for income support if,
> (a) the person is dependent on or addicted to alcohol, a drug or some other chemically active substance;
> (b) the alcohol, drug or other substance has not been authorized by prescription as provided for in the regulations; and
> (c) the only substantial restriction in activities of daily living is attributable to the use or cessation of use of the alcohol, drug or other substance at the time of determining or reviewing eligibility.

That is, persons who are disabled exclusively by addictions could seek social assistance through the Ontario Works Program, but were not eligible for the supports available to other persons with disabilities through the Ontario Disability Support Program. This restriction has been the subject of a long-running court challenge. Very recently, the Ontario Superior Court of Justice ruled that the exclusion from ODSP benefits of persons who are disabled solely by their addictions is inconsistent with the Ontario *Human Rights Code*, and that persons with addictions are persons with a disability who are entitled to benefits under the ODSP.[120]

To some degree, the difference in approaches to addictions may reflect perceptions these conditions involve a degree of voluntariness that is not involved in other types of disability – that is, there is no true impairment. The Ontario Court of Justice referenced this element in dismissing a *Charter* challenge to smoking bans in prisons. Smokers, the Court ruled, did not have a "mental or physical disability", as

> Addiction to nicotine is a temporary condition which can be voluntarily overcome… It can hardly be compared with the disability of deafness under review in *Eldridge*.

Similarly, in *Tranchemontagne,* the government had argued in part that persons with addictions were uniformly capable of employment, and would benefit from the lower social assistance rates available through Ontario Works because this would limit the amount of money available to spend on their addiction. The exclusion of persons with addictions from the purview of the ODSP therefore did not injure their dignity interests.

In the smoking ban decision, the Court ultimately placed more importance on weighing the degree of disadvantage and marginalization associated with a condition in determining whether it is a disability. Smokers, the Court ruled, "are not part of a group 'suffering social, political and legal disadvantage in our society', unlike persons with addictions to alcohol, whose addiction interferes with their effective physical, social and psychological functioning."[121] In *Tranchemontagne*, the Court concluded that the exclusion of persons with addictions from ODSP was based on stereotypes and prejudicial views about addiction, and essentially denied their human worth. [122]

F. Mixed Models

In recent years, there has been a movement towards a multi-dimensional approach to disability, aimed at incorporating the insights of both impairment based models and those that adopt the social approach. The most prominent and influential of these is the WHO's recent *International Classification of Functioning, Disability and Health*, which replaces the *International Classification of Impairments, Disability and Handicaps.*

1. WHO International Classification of Functioning, Disability and Health

The WHO made a significant shift in approach to disability with the 2001 *International Classification of Functioning, Disability and Health* (ICF). The ICF is intended to provide a standard framework for the description of health and health-related states and to provide a tool for measuring function in society, regardless of the reason for a person's impairments.

The ICF approaches the notion of disability in a manner considerably more nuanced than its predecessor, attempting to synthesize the biomedical and social models of disability. The WHO describes the conceptual approach underlying the ICF as follows:

> ICF puts the notions of "health" and "disability" in a new light. It acknowledges that every human being can experience a decrement in health and thereby experience some degree of disability. This is not something that only happens to a minority of humanity. The ICF thus 'mainstreams' the experience of disability and recognises it as a universal human experience. By shifting the focus from cause to impact it places all health conditions on an equal footing allowing them to be compared using a common metric – the ruler of health and disability. Furthermore ICF takes into account the social aspects of disability and does not see disability only as a 'medical' or 'biological' dysfunction. By including Contextual Factors, in which environmental factors are listed ICF allows us to record the impact of the environment on the person's functioning.[123]

The WHO calls this a "biopsychosocial model" of disability.

The ICF has generally been welcomed as a significant advance on the ICIDH. However, some have criticized its retention of individualistic medical notions of disability and its causes as unnecessarily limiting the scope of disability and perpetuating the biomedical culture.[124] Concerns have also been raised regarding the attempt to integrate the medical and social models, on the basis that the social model is a paradigm, the application of which shifts the entire framework for social policy, and therefore cannot be implemented on a piecemeal basis.[125]

2. Statistics Canada Measures of Disability

Governments regularly attempt to measure the incidence and impact of disability in the populace. The information gathered provides a basis for policy and program development, as well as a basis for scholarly research. What is not measured will likely not be addressed; therefore, the approach to the measurement of disability has an important impact on the wellbeing of persons with disabilities.

In 1986, Statistics Canada carried out the *Health and Activity Limitations Survey* (HALS). This was a post-censal disability survey aimed at identifying the numbers and distribution of persons with disabilities in Canada, and the barriers that they faced. HALS was run a second time in 1991. HALS was based on the WHO's ICIDH, and defined disability as a limitation in daily activities resulting from an impairment associated with physical or mental conditions or health problems – that is, a functional limitations approach to disability.

Also of some relevance is the National Population Health Survey, a longitudinal study commenced in 1994. It does not deal directly with disability issues, but is of interest as it seeks to measure the health of Canadians, the relationship between health and activity limitations and some of the determinants of health. It is based on the Health Utility Index, a measure of functional ability that includes vision, hearing, speech, mobility, dexterity, cognition, emotion and pain/discomfort.[126]

The Government of Canada has more recently shifted away from these functional approaches in its statistical measurements, adopting the WHO's newer "biopsychosocial model" of disability. Statistics Canada's most recent and thorough exploration of the experience of people with disabilities in Canada was the *Participation and Activity Limitation Survey* (PALS). PALS was initially conducted in 2001; a second survey was completed in 2006. The intent of PALS was to develop a comprehensive national picture of many of the ways in which disability affects the lives of Canadians with disabilities. In designing the PALS survey, Statistics Canada took into account the criticisms of the ICIDH (and therefore the HALS) approach to disability, in particular its focus on disability as linearly caused by a disease or trauma, and its failure to recognize environmental factors in the causation and experience of disability.

PALS therefore adopted the WHO's 2001 ICF framework. It views disability as the interrelationship between body functions, activities and social participation, while recognizing that the environment provides either barriers or facilitators. A person is considered to have a disability if they have "a physical or mental condition or a health problem that restricts their ability to perform activities that are normal for their age in Canadian society". Under PALS, persons with disabilities are those who report difficulty with daily living activities, or who indicate that a physical or mental condition or a health problem reduces the kind or amount of activity that they can do. Survey responses to PALS therefore reflect the perceptions of participants and are subjective – obviously, a different approach from that of many government programs, which require independent professional assessment or other criteria to verify disability. [127]

PALS categorizes disability by type; the categories are different for children and adults because of the different experiences of these groups. Types of disabilities among children include chronic, delay, developmental, dexterity, hearing, learning, mobility, psychological, seeing and speech. The disability types for adults are agility, developmental, hearing, learning, memory, mobility, pain, psychological, seeing and speech. PALS also attempted to classify disabilities by their severity.

The PALS approach to identifying disability is now the standard for all Statistics Canada social surveys, whether they are dealing with Aboriginal issues, labour, health or education.

3. Developing a Mixed Model: Gender Identity

The law has not yet developed a consistent approach for addressing issues experienced by transgendered persons and related to gender identity. Part of the difficulty arises because the law has not recognized the transgendered community as one with unique experiences and challenges. For example, none of Canada's human rights statutes includes gender identity as a distinct source of discrimination and ground of protection.[128] Transgendered persons seeking protection from discrimination have therefore had to fit their experiences into existing human rights grounds: sex and/or disability.

Human rights tribunals and courts have, over the past ten years, consistently recognized that discrimination on the basis of gender identity, for example, in the provision of services such as access to sex-specific facilities, can be understood as a form of sex discrimination.[129] In 2000, the Ontario Human Rights Commission, in its *Policy on Discrimination and Harassment because of Gender Identity*, recognized discrimination on the basis of gender identity as a form of sex discrimination and indicated that it would receive and deal with human rights complaints on that basis.[130]

However, complaints regarding discrimination based on gender identity have also frequently been dealt with under the ground of disability, on the basis that the American Psychiatric Association has recognized Gender Identity Disorder as a psychiatric disorder with recognized diagnostic criteria and a set of treatment options that includes sex reassignment surgery. Most human rights complaints brought by transgendered persons are dealt with on the basis of *both* sex and disability. In a recent decision, the Human Rights Tribunal of Ontario stated that the grounds of sex and disability intersect with respect to transsexuals:

> While GID is the medical condition that constitutes a disability, the transition itself is a highly personal and sensitive decision that requires tremendous sacrifice and courage, and it falls clearly within the ground of sex. However, the transition also requires specialized medical care, in recognition of the physical and psychological aspects involved. Thus, the two grounds under the *Code* are necessarily intersectional… The danger in adopting the single axis of disability in this instance is that it negates the importance of the discrimination based on sex, and falls back to the bio-medical model of disability discourse, ignoring the social importance of their incomplete transitions to these complainant's lives, and thus negating the importance of their transsexuality to their own personhood.[131]

Despite the regular use of the ground of disability in addressing the rights of transgendered persons, this medicalization of the identities of transgendered persons is a source of criticism.[132] It is argued that transgendered persons should be able to receive accommodation and health-related treatments without the negative stereotyping of a psychiatric diagnosis. That is, there is an attempt

to move from a disability-rights based analysis to one which recognizes the unique forms of oppression experienced by transgendered persons and a develops a rights-based analysis specific to their circumstances, which would remove the gatekeeping power that the medical profession currently has over transgendered persons. [133]

V. TOWARDS A PRINCIPLED APPROACH

The pronounced shift among theorists, activists and policy makers away from a bio-medical and functional approach to disability, towards a social and human rights approach has not been mirrored in legislative definitions of disability in Ontario. There is a disjunction between current international and domestic policy frameworks and the legal approach embodied in statutes. Even the most recently enacted statutes, such as the *Accessibility for Ontarians with Disabilities Act* and the *Developmental Disabilities Act* have adopted definitions based on biomedical or functional approaches.

To some extent this may be ameliorated by the use of flexible interpretative approaches to statutory definitions, as is evidenced by the evolution in the interpretation and application of the definition of "disability" in Ontario's human rights law. Nevertheless, the disjunction is both striking and troubling.

What can explain the continued dominance of biomedical and functional definitions in legislation affecting persons with disabilities?

No doubt some of this is due to the power of the biomedical mindset, which remains the "commonsense" and dominant viewpoint in popular understanding. Programs and policies take as their starting point, not the development of a barrier-free society, but the amelioration of the disadvantage experienced by persons with disabilities. If this is the starting point, it is almost inevitable that programs must begin by identifying who, exactly, is to receive assistance.

As well, functional definitions allow policy developers and program administrators to focus scarce public resources on the most "deserving" persons with disabilities, those with the most "serious" or "substantial" needs or disadvantages. Functional criteria allow program providers to manage their caseloads and allocate their resources.

Perhaps just as importantly, many definitions of disability effectively operate as eligibility criteria for access to government programs and benefits. Functional definitions of disability are easy to administer. They can provide clear and easily determined answers to the question of who should be able to access a program or benefit. Decisions can be simply explained and made by persons with minimal training.

It is difficult to find models of legislation and programs that have thoroughly operationalized a social model of disability. A legislative shift from a functional definition to a social one requires a thorough re-imagining of assumptions and procedures. It may be a matter, not of answering questions differently, but of asking quite different questions. In the human rights context, a shift from a functional to a social definition of disability required that fewer questions be

asked regarding the nature of an individual's condition, and more asked about the nature and extent of the disadvantage experienced by persons with disabilities. Similarly, the provisions of the ICRPD regarding decision-making envision less focus on determining the "capacity" of individuals and more on the supports that individuals can be provided in order to maximize their autonomy.

All this raises many questions, some of which go to the heart of how the law interacts with persons with disabilities. The LCO welcomes your comments and thoughts related to the following three general areas:

Identifying the conceptual approach(es) to disability that should inform the LCO's framework for the law as it affects persons with disabilities:

This Paper has identified a number of conceptual approaches to understanding and defining disability, and provided some starting points for considering how these approaches may shape the law as it affects persons with disabilities.

- What are the advantages and disadvantages of the various approaches as bases for the development of laws affecting persons with disabilities?
- Is it necessary to have a single conceptual approach to disability as a basis for the law, or may there be a place for multiple or mixed approaches?
- If so, what contexts, considerations or principles should be taken into account in selecting a particular approach to disability as the basis for a particular law or program?

Experiences with the law and the various approaches to disability:

The LCO is interested in hearing about your experiences with legislation, regulations and programs embodying the various conceptual approaches to disability outlined in this Paper.

- If you are a person who has attempted to obtain access to rights and benefits under these laws and programs, or an advocate on behalf of persons with disabilities, does the approach to defining disability in a law or program affect your ability to effectively obtain access? If so, how?
- If you are a person or organization responsible for developing or applying the law as it affects persons with disabilities, what are the practical implications of the different conceptual approaches in terms of the implementation, application and enforcement of laws and programs?

Implementing the social model:

As this Paper outlines, while the social approach has been adopted by many policy makers and advocates, as well as in some key Supreme Court of Canada decisions related to disability, statutes and government programs generally

continue to rely upon bio-medical or functional approaches to disability. There are few examples of statutes and programs that are based on a social approach.

- Are you aware of laws or programs that are based on a social approach? What are the key features of these laws or programs?
- What changes to the scope, mandates, eligibility criteria or other features of current legislation or programs would necessary in order to implement a social approach?
- Are you able to identify significant barriers or challenges to the development of a legal framework based on a social approach?

These questions are not meant as to be exhaustive, but as a starting point to trigger comments and further questions. The LCO welcomes your comments and questions, both on the specific questions raised, and on other issues arising from this Paper.

VI. NEXT STEPS

The LCO is currently preparing a broad Discussion Paper related to this Project, slated for release in the early fall of 2009. The Discussion Paper will provide an overview and analysis of the current framework for disability law and principles that might be applied for analyzing the effectiveness and appropriateness of the current framework, and will raise key questions for consideration related to developing a principled approach to the law as it affects persons with disabilities.

Response to this Consultation Paper will assist in shaping the approach to disability issues that the LCO adopts for the purposes of this Project, and in considering how the law may best approach defining disability.

The LCO therefore invites consideration of the issues raised by this Paper. Submissions must be received by **Friday, August 28, 2009**.

You can mail, fax, or e-mail your comments to:

Law Commission of Ontario
"Disability Pre-Study"
Computer Methods Building, Suite 201, 4850 Keele Street,
Toronto, ON, Canada, M3J 1P3

Fax: (416) 650-8418
E-mail: LawCommission@lco-cdo.org

You may also post comments online at:
http://projects.lco-cdo.org/disabilitiesconsultation/

LCO staff would also be pleased to meet to discuss the issues raised by this paper, by telephone or in person.

If you have questions regarding this consultation, please call **(416) 650-8406** or use the e-mail address above.

VII. ENDNOTES

[1] Statistics Canada, Social and Aboriginal Statistics Division, *Participation and Activity Limitation Survey, 2006: Analytical Report* (Ottawa: Minister of Industry, 2007) at page 9. As is described in more detail later in the Paper, PALS uses a definition of disability based on the "biopsychosocial approach to disability" adopted by the World Health Organization in its *International Classification of Functioning, Disability and Health*.

[2] Statistics Canada, Social and Aboriginal Statistics Division, *Participation and Activity Limitation Survey, 2006: Analytical Report* (Ottawa: Minister of Industry, 2007) at page 11 and following.

[3] R.S.O. 1990, c. H.19.

[4] O. Reg. 350/06, Section 3.8, Barrier-Free Design.

[5] For example, in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, the Supreme Court of Canada ruled that the failure to provide sign language interpretation to Deaf patients seeking hospital services violated equality rights under the *Charter of Rights and Freedoms.* In *Battlefords District Cooperatives v. Gibbs,* [1996] 3 S.C.R. 566, the Supreme Court of Canada ruled that employer-sponsored benefit programs that provided lesser benefits to persons with mental disabilities than to persons with physical disabilities violated human rights laws. Recently, the Human Rights Tribunal of Ontario required the Toronto Transit Commission to provide stop announcements on both subway and bus services, in order to accommodate the needs of visually impaired passengers (*Lepofsky v. Toronto Transit Commission,* 2005 HRTO 36; 2007 HRTO 23).

[6] *Accessibility for Ontarians with Disabilities Act, 2005*, S.O. 2005, c. 11.

[7] *Developmental Disabilities Act*, *2008*, S.O. 2008, c. 14, not yet proclaimed in force.

[8] United Nations, *Convention on the Rights of Persons with Disabilities*, 13 December 2006, G.A. Res. 61/106.

[9] According to the PALS 2006 survey data, approximately one-quarter of Ontario parents of children with a disability indicated that their children were not receiving the necessary special education supports. Parents of children with unmet accommodation needs were significantly more likely to report that their child was struggling academically. See Statistics Canada, Social and Aboriginal Statistics Division, *Participation and Activity Limitation Survey, 2006: A Profile of Education for Children with Disabilities in Canada* (Ottawa: Minister of Industry, 2007) at pages 14 and 22.

[10] PALS 2006 data indicated that 51 per cent of Canadians with disabilities were employed at the time of the survey, as compared to 75 per cent of their non-disabled peers. Labour force participation for persons with disabilities is lower across all age groups. Persons with disabilities were also more likely to be employed in part-time or precarious work. See Statistics Canada, Social and Aboriginal Statistics Division, *Participation and Activity Limitation Survey, 2006: Labour Force Experience of Persons with Disabilities in Canada* (Ottawa: Minister of Industry, 2007)

[11] The average income for an Ontarian with a disability in 2006, based on PALS data, was $25,304, as compared to $38,358 for an Ontarian without a disability: Statistics Canada, Social and Aboriginal Statistics Division, *Participation and Activity Limitation Survey, 2006: Tables (Part V)* (Ottawa: Minister of Industry, 2007) at Table 1.3.

[12] Statistics Canada, *Criminal Victimization and Health: A Profile of Victimization Among Persons with Activity Limitations or Other Health Problems, 2004* (Ottawa: Minister of Industry, 2009) at pages 8, 10. Persons with activity limitations also tend to be less satisfied with police responses, feel less secure, and have a less favourable perception of the criminal justice system than those without such limitations.

[13] See *R. v. Kapp,* 2008 SCC 41, for the Supreme Court of Canada's most recent restatement of the section 15(1) test, and an important decision regarding the interpretation of section 15(2), in the context of the federal government's Aboriginal Fisheries Strategy. The Court ruled that a

distinction in a government program based on an enumerated or analogous ground will not constitute discrimination if it has an ameliorative or remedial purpose (although this need not be its sole purpose), and it targets a disadvantaged group identified by enumerated or analogous grounds. The legislative goal of a program will by the paramount consideration in determining whether it falls within the ambit of section 15(2).

[14] The most important of these cases was *Eldridge v. British Columbia (Attorney General)* [1997] 3 S.C.R. 624, which affirmed the duty of hospitals to provide Deaf patients with sign language interpretation, in order to ensure equal access to public services.

[15] R.S.O. 1990, c. H.19.

[16] Section 29 of the *Code* gives the Ontario Human Rights Commission broad powers to promote and advance human rights and to promote the elimination of discriminatory practices by, for example, developing policies and public education campaigns, undertaking enquiries, directing and encouraging research, and reviewing policies, programs and statutes. Part IV of the *Code* sets out the mechanism whereby applications may be brought to the Human Rights Tribunal of Ontario regarding allegations of discriminatory treatment.

[17] Statistics regarding human rights complaints from 1999 – 2008 can be accessed through the Annual Reports of the Ontario Human Rights Commission, available online at http://www.ohrc.on.ca/en/resources/annualreports.

[18] *Ontarians with Disabilities Act, 2001,* S.O. 2001, c. 32.

[19] *Accessibility for Ontarians with Disabilities Act, 2005*, S.O. 2005, c. 11.

[20] *Ontario Disability Support Program Act, 1997,* S.O. 1997, c. 25, Sched. B.

[21] *Workplace Safety and Insurance Act*, *1997*, S.O. 1997, c. 16, Sched. A.

[22] R.S.O. 1990, c. E.2, s. 8(3).

[23] R.R.O. 1990, Reg. 581.

[24] *Retail Sales Tax Act*, R.S.O. 1990, c. R.31, s.7(1), R.R.O. 1990, Reg. 1012, s. 2(3).

[25] *Ontario Disability Support Program Act, 1997*, O. Reg. 222/98

[26] *Child and Family Services Act*, R.S.O. 1990, c. C.11.

[27] *Day Nurseries Act*, R.R.O., 1990, Reg. 262.

[28] *Ontario Disability Support Program Act, 1997*, S.O. 1997, c. 25, Sched. B**,** O. Reg. 224/98 *Assistance for Children with Severe Disabilities.*

[29] R.S.O. 1990, c. L.8, s. 40.

[30] R.R.O. 1990, Reg. 194, *Rules of Civil Procedure*, Rule 7.

[31] R.S.O. 1990, c. E.23, s. 14.

[32] *Marriage Act*, R.S.O. 1990, c. M.3, s.7.

[33] S.O. 1996, c. 2, Schedule A.

[34] S.O. 1992, c. 30.

[35] R.S.O. 1990. c.M.7.

[36] See, for example, the discussion in C. Barnes, G. Mercer and T. Shakespeare, *Exploring Disability: A Sociological Introduction* (Cambridge: Polity Press, 1999) at pp. 17-18.

[37] There is a significant body of work on the diversity of cultural attitudes to disability. An influential starting point is B. Ingstad and S. Whyte, eds. *Disability and Culture* (Berkeley: University of California Press, 1995).

[38] *Consumer Protection Act*, *2002*¸S.O. 2002, c. 30, Sched. A, s. 15(1).

[39] *Election Act,* R.S.O. 1990, c. E.6, s. 24(1.1).

[40] *Building Code Act, 1992*, O. Reg. 350/06, s. 2.2.1.1.

[41] *Charitable Institutions Act*, R.S.O. 1990, c. C.9, s. 9.11(9).

[42] As a result, the Ontario Courts have issued a series of decisions reminding the Social Benefits Tribunal that the term "persons with disabilities" must be interpreted in a purposive manner, consistent with the aims of the statute: see, for example, *Ontario (Director of Disability Support Program) v. Gallier,* 2000 CarswellOnt 4559, [2000] O.J. No. 4541 (Ont. Div. Ct. Nov 09, 2000); *Gray v. Ontario Director of Disability Support Program)* 212 D.L.R. (4th) 353, 158 O.A.C. 244 (Ont. C.A. Apr 25, 2002); *Sandiford v. Ontario Director of Disability Support Program)* 195 O.A.C. 143 (Ont. Div. Ct. Jan 21, 2005).

[43] *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 S.C.R. 665.

[44] The decision of the Supreme Court of Canada 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)*, [2000] 1 S.C.R. 665 is discussed at greater length in section IV.E.3.Shortly after that decision, the Federal Court of Appeal took a rather different approach when interpreting the term "disability" under s. 42(2) of the Canada Pension Plan in *Villani v. Canada (Attorney General)* [2001] F.C.J. No. 1217 (FCA). That definition requires that a disability be "severe and prolonged". The Court emphasized that, given its remedial purpose, the legislation must be given a large and purposive interpretation. While the real life impact of a medical condition, including the applicant's education, employment experience and ability to carry out the activities of everyday life must be considered, so must also medical evidence and evidence of employment efforts and probabilities.

[45] Ontario Human Rights Commission, *The Opportunity to Succeed: Achieving Barrier-Free Education for Students with Disabilities* (Toronto: Ontario Human Rights Commission, 2003) at page 35. Available online at http://www.ohrc.on.ca/en/resources/discussion_consultation/ConsultEduDisablty2.

[46] Available online at www.socialunion.gc.ca/pwd/union/unison_e.html.

[47] Human Resources Development Canada, *Advancing the Inclusion of Persons with Disabilities* (Ottawa: December 2002).

[48] Human Resources Development Canada, *Defining Disability: A Complex Issue* (Ottawa: 2003).

[49] Human Resources Development Canada, *Defining Disability: A Complex Issue* (Ottawa: 2003) at 44.

[50] When the federal government re-examined the approach to disability in federal legislation and programs, it categorized conceptual models into three perspectives: impairment, functional limitations, ecological and, as a subset within the ecological model, the human rights perspective. See Office for Disability Issues, Human Resources Development Canada, *Defining Disability: A Complex Issue* (Ottawa: Human Resources Development Canada, 2003). Statistics Canada adopted this categorization in analyzing definitions of disability for the purposes of developing a new approach for the PALS survey, but elevated the human rights model into a fourth perspective: Human Resources Development Canada, *Disability in Canada: A 2001 Profile* (Ottawa: Human Resources Development Canada, 2003) at page 42.

[51] The bio-medical model of disability has been exhaustively described and critiqued by disability theorists. A thorough and readable overview of the discussion may be found in C. Barnes and G. Mercer, *Disability* (Cambridge: Polity Press, 2003).

[52] For this reason, this model has sometimes been described as the "individual" or the "personal tragedy" model.

[53] *Homes for the Aged and Rest Homes Act*, R.S.O. 1990, c. H.13, s. 19.2(10).

[54] *Day Nurseries Act*, R.R.O. 1990, Reg. 262, s. 1.

[55] Information regarding the Kingston Access Bus service and its eligibility requirements may be found online at www.kingston.org/kas.

[56] O.Reg. 181/98, *Identification and Placement of Exceptional Pupils,* s. 15.

[57] Ontario Human Rights Commission, *The Opportunity to Succeed: Achieving Barrier-Free Education for Students with Disabilities* (Toronto: Ontario Human Rights Commission, 2003) at 35. Also available online at http://www.ohrc.on.ca/en/resources/discussion_consultation/ConsultEduDisablty2.

[58] See the discussion in C. Barnes, G. Mercer and T. Shakespeare, *Exploring Disability: A Sociological Introduction* (Cambridge: Polity Press, 1999) at page 56 and following. Also see J. Swain, S. French and C. Cameron, "Practice: Are Professionals Parasites?" in *Controversial Issues in a Disabling Society* Philadelphia: Open University Press, 2003) at pages 131- 140.

[59] For a recent overview, see M. Sears, *The Medical Perspective on Environmental Sensitivities* (Canadian Human Rights Commission: May 2007).

[60] For example, in a decision under Alberta's human rights statute, the Alberta Court of Queen's Bench determined that it was not necessary for the cause of the complainant's sensitivity to

scents and perfumes to be diagnosed in order for it to be determined that she had a disability: *Brewer v. Fraser Miller Casgrain LLP* [2006] A.J. No. 265 (Alta Q.B.).

[61] C. Wilkie and D. Baker, *Accommodation for Environmental Sensitivities: A Legal Perspective* (Canadian Human Rights Commission: May 2007) at pages 9-11, available online at http://www.chrc-ccdp.ca/pdf/legal_sensitivity_en.pdf.

[62] For example, in *Macdonald v. SunLife Assurance Company* [2006] I.L.R. I-4471 (P.E.I. Supreme Court – Appeal Division) a claim for disability benefits was dismissed on the basis of competing medical evidence as to whether the claimant met the diagnostic criteria for environmental sensitivities and the degree to which her recurrent symptoms impaired her ability to function. In *Wachal v. Manitoba Pool Elevators*, [2000] C.H.R.D. No. 4 (C.H.R.T.), a human rights complaint was dismissed because there was insufficient evidence to link the complainant's disability with her absences.

[63] Concerns have been acknowledged by both the Ontario Human Rights Commission (*Human Rights Issues In Insurance: Consultation Report*, Toronto: 2001, at page 8) and Ontario's Information and Privacy Commissioner (*Annual Report, 2000).*

[64] New York and New Jersey prohibits employment discrimination based on specific genetic traits, such as sickle cell anemia, Tay-Sachs or cystic fibrosis traits: *New York Civil Rights Law*, s. 48; *New Jersey Civil Rights Law*, s. 10. New Jersey also prohibits employers from refusing to hire, requiring to retire or dismissing an employee on the basis of that individual's genetic information: *New Jersey Civil Rights Law,* s. 10. Texas prohibits employers from discharging or refusing to hire employees on the basis that the individual refuses to submit to genetic testing, and where the individual agrees to submit to genetic testing, the results cannot be the basis for discrimination: *Texis Labor Code*, s. 21.402.

[65] See D. Thable, "With Great Knowledge Comes Great Responsibilities: An Examination of Genetic Discrimination in Canada", (2006) 14 *Health Law Review* No. 3, 22-31; S. Labman, "Genetic Prophecies: The Future of the Canadian Workplace", (2004) 30 *Manitoba Law Journal* 227-247; T. Lemmens, "Genetics and Insurance Discrimination: Comparative Legislative, Regulatory and Policy Developments and Canadian Options", (2003) *Health Law Journal* 41-86.

[66] D. Thable, "With Great Knowledge Comes Great Responsibilities: An Examination of Genetic Discrimination in Canada", (2006) 14 *Health Law Review* No. 3, 22-31 at para. 8-14;

[67] T. Lemmens, "Genetics and Insurance Discrimination: Comparative Legislative, Regulatory and Policy Developments and Canadian Options", (2003) *Health Law Journal* 41-86 at para.111.

[68] Available online at http://www.who.int/classifications/icf/en.

[69] For an overview of the criticisms of the ICIDH see C. Barnes, G. Mercer and T. Shakespeare, *Exploring Disability: A Sociological Introduction* (Cambridge: Polity Press, 1999) at pages 22-27.

[70] *Highway Traffic Act*, R.R.O. 1990, Reg. 581, s. 1.

[71] Not yet in force; replaces the *Developmental Services Act*, R.S.O. 1990, c. D.11.

[72] *Education Act*, R.S.O. 1990, c. E.2, s. 1.

[73] See Ministry of Education, *Standards for School Board's Special Education Plans* (Ontario:2000), Appendix D, available online at www.edu.gov.on.ca/eng/general/elemsec/speced/guide/resource/iepresguide.pdf

[74] *Ontario Disability Support Program Act,* 1997, O. Reg. 224/98.

[75] *Day Nurseries Act*, R.R.O. 1990, Reg. 262, s. 66.5(2).

[76] *Ontario Disability Support Program Act, 1997*, S.O. 1997, c. 25, Sched. B.

[77] For example, persons who are in receipt of ODSP benefits are eligible for a specific rent scale under the *Social Housing Reform Act, 2000,* O. Reg. 298/01, Table 5, and for subsidization of child care costs under the *Day Nurseries Act*, R.R.O. 1990, Reg. 262, s. 66.2. Receipt of ODSP also makes an individual a "qualifying employee" for the purposes of the workplace accessibility tax incentive under the *Corporations Tax Act*, R.S.O. 1990, c. C.40, s. 13.3.

[78] *Ontario Disability Support Program Act, 1997*, S.O. 1997, c. 25, Sched. B, s. 4(1).

[79] *Retail Sales Act*, R.R.O. 1990, Reg. 1012, s. 10.

[80] *Day Nurseries Act*, R.R.O. 1990, Reg. 262, s. 1.

[81] *Nielson v. Sandman Four Limited* (1986), 7 C.H.R.R. D/3229.

[82] (1990) 12 C.H.R.R. D/19 (Ont. BOI). This decision is discussed at greater length at section IV.E.3.

[83] *Woolworth Canada v. Human Rights Commission of Newfoundland* (1995), 25 C.H.R.R. D/227, at 31.
[84] *Clarke v. Country Garden Florists* (1996), 26 C.H.R.R. D/24 (Nfld. Bd. Inq.).
[85] *Bielecky v. Young, McNamara* (1992), 20 C.H.R.R. D/215 (Ont. Bd. Inq.)
[86] *Lloyd v. Ontario (Director, Disability Support Program)*, (1997) 223 O.A.C. 385 (Ont. Div.Crt).
[87] *Health Care Consent Act*, *1996*, S.O. 1996, c. 2, Sched. A, 4(1); *Substitute Decisions Act, 1992*, S.O. 1992, c. 30, s. 6, 45.
[88] *Mental Health Act*, R.S.O. 1990, c. M.7, s. 20(1.1).
[89] *Courts of Justice Act*, RRO 1990, Reg. 194, s. 1.03.
[90] The primary case setting out the test for testamentary capacity is *Banks v. Goodfellow* (1870) LR. 5 Q.B. 549 (Eng. Q.B.).
[91] Section 7 of the *Marriage Act*, R.S.O. 1990, c. M.3, states that "No person shall issue a licence to or solemnize the marriage of any person who, based on what he or she knows or has reasonable grounds to believe, lacks mental capacity to marry by reason of being under the influence of intoxicating liquor or drugs or for any other reason."
[92] See, for example, *Re McElroy,* (1979), 22 O.R. (2d) 381 (Surr. Ct.), in which the deceased was found to have had capacity to marry, despite his lack of testamentary capacity. The Court found that the deceased at all times prior to and at the date of the marriage understood the duties and responsibilities which marriage created, and was mentally capable of understanding the contract he was entering into.
[93] *Health Care Consent Act*, *1996*, S.O. 1996, c. 2, Sched. A , s. 4(2); *Substitute Decisions Act, 1992*, S.O. 1992, c. 30, s. 2.
[94] Originally, there was an intention to create a comprehensive system around capacity assessment that would include standards for assessors, peer review, quality assurance practices discipline procedures, a code of ethics, and continuing education. Due to a change of government, this was not implemented. The current training program for capacity assessors requires only a single day. See J. Wahl, "Capacity and Capacity Assessment in Ontario", (May 2009), Paper prepared for the Canadian Bar Association's 2009 Conference on Elder Law at pages 16-17.
[95] United Nations, *Convention on the Rights of Persons with Disabilities*, 13 December 2006, G.A. Res. 61/106, Article 12.
[96] The *Representation Agreement Act* allows individuals to enter into representation agreements with support networks without first demonstrating that they meet the test for legal capacity. R.S.B.C. 1996, c. 405.
[97] This model is generally traced back to the 1976 manifesto of the British Union of the Physically Impaired Against Segregation (UPIAS), *Fundamental Principles of Disability.*
[98] The implications of this shift are considered in a Canadian context in J. Bickenbach, *Physical Disability and Social Policy* (Toronto: University of Toronto Press, 1993).
[99] For an overview of this critique, see T. Siebers, "Disability in Theory: From Social Constructionism to the New Realism of the Body" in L. Davis, ed., *The Disability Studies Reader,* 2nd ed. (Routledge: New York, 2007) at page 173 and following.
[100] C. Barnes and G. Mercer, *Disability* (Cambridge: Polity Press, 2003) at pages 69-70.
[101] See, for example, T. Shakespeare and N. Watson, "The Social Model of Disability: An Outdated Ideology?" in *Research in Social Science and Disability,* Vol. 2 (2001).
[102] There is extensive scholarship in the area of gender and disability, and growing bodies of literature in the areas of race, sexual orientation, and age and disability. An overview of the issues is provided by A. Vernon, "Multiple Oppression and the Disabled People's Movement" in T. Shakespeare, ed., *The Disability Reader: Social Science Perspectives* (London: Continuum, 1998) at page 201.
[103] In a 1991 decision, an Ontario Board of Inquiry ruled that a complainant's obesity was not a handicap within the meaning of the Ontario *Human Rights Code*, stating that obesity would only fall within the *Code*'s protections where it was caused by an illness, was an ongoing condition effectively beyond the individual's control and limited or was perceived to limit that person's abilities: *Ontario (Human Rights Commission) v. Vogue Shoes* (1991), 14 C.H.R.R. D/425. In Saskatchewan, the Court of Appeal found that obesity was not a disability within the protection of

human rights statutes as it was not caused by a bodily injury, defect or illness: *St. Paul Lutheran Home of Melville v. Davison* (1993), 19 C.H.R.R. D/437. However, in British Columbia, a complainant who was denied employment because he was "too big and too heavy" was found to have been discriminated against on the basis of *perceived* disability: *Rogal v. Dalgliesh* (2000), 37 C.H.R.R. D/178 (BCHRT).

[104] *McKay Panos v. Air Canada*, Canadian Transportation Agency, Decision 646-AT-A-2001 (December 12, 2001); [2006] F.C.J. No. 28 (FCA).

[105] *McKay-Panos v. Air Canada*, see above, at para. 40.

[106] *Cameron v. Nova Scotia (Attorney General)*, 172 N.S.R. (2d) 227 (N.S.S.C.).

[107] *Cameron v. Nova Scotia (Attorney General)*, 172 N.S.R. (2d) 227 (N.S.S.C.), at para. 175

[108] *Buffet v. Canadian Forces*, [2006] C.H.R.D. No. 41, 58 C.H.R.R. D/435 (Sept. 2006) at 104.

[109] D. Gilbert and D. Majury, "Infertility and the Parameters of Discrimination Discourse", in D. Pothier and R. Devlin eds., *Critical Disability Theory: Essays in Philosophy, Politics, Policy and Law*, (UBC Press: 2006).

[110] The scope, purposes and limits of the duty to accommodate in the context of disability themselves raise complex issues, which have been the subject of considerable caselaw and debate, and will be dealt with more fully in the LCO's forthcoming Discussion Paper.

[111] For a comprehensive articulation of this approach, see the Ontario Human Rights Commission's *Policy and Guidelines on Disability and the Duty to Accommodate* (2000), available online at www.ohrc.on.ca/en/resources/Policies/PolicyDisAccom2.

[112] United Nations, *Convention on the Rights of Persons with Disabilities*, 13 December 2006, G.A. Res. 61/106.

[113] R.S.O. 1990, c. H.19.

[114] (1990) 12 C.H.R.R. D/19 (Ont. BOI).

[115] *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 S.C.R. 665..

[116] For the fiscal year 1999-2000, just prior to the implementation of the *Policy and Guidelines on Disability and the Duty to Accommodate,* the Ontario Human Rights Commission received 702 complaints citing the ground of disability, making up 37 per cent of the 1861 complaints received. In the fiscal year 2001-2002, the Commission received 1183 complaints citing disability as a ground, making up 49 per cent of complaints received. By the fiscal year 2006-2007, disability was cited in 56 per cent of all complaints filed. Statistics regarding human rights complaints from 1999 – 2008 can be accessed through the Annual Reports of the Ontario Human Rights Commission, available online at http://www.ohrc.on.ca/en/resources/annualreports.

[117] The landmark case in Ontario remains the decision of the Ontario Court of Appeal in *Entrop v. Imperial Oil Limited* [2000] (189 D.L.R. 4th) 14, (Ont. C.A.). In that case, Imperial Oil's mandatory disclosure, testing and accommodation regime for persons with current or past addictions was found to violate the rights of persons with disabilities under the Ontario *Human Rights Code*. The Alberta courts have followed a different avenue, with a recent Court of Appeal decision upholding an employer's pre-employment drug testing policy: *Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root (Canada) Co.,* 289 D.L.R.(4th) 95, [2007] A.J. No. 1460.

[118] Ontario Human Rights Commission: Toronto, 2000, available online at http://www.ohrc.on.ca/en/resources/Policies/PolicyDrugAlch.

[119] *Ontario Disability Support Program Act, 1997*, S.O. 1997, c. 25, Sched. B..

[120] In *Tranchemontagne v. Ontario (Director, Disability Support Program),* [2006] 1 S.C.R. 513, 2006 SCC 14, the Supreme Court of Canada ruled that the Social Benefits Tribunal had the power to declare a provision of the ODSPA inapplicable on the basis that the provision was discriminatory, and remitted to the Social Benefits Tribunal for a ruling on the applicability of s. 5(2) of the ODSPA. In *Ontario (Director, Disability Support Program) v.* Tranchemontagne, 2009 CanLii 18295 (Ont. S.C.J.), the Court upheld the finding of the Social Benefits Tribunal that the exclusion of persons disabled solely by addiction from the Ontario Disability Support Program was inconsistent with the Ontario *Human Rights Code*.

[121] *McNeill v. Ontario (Ministry of the Solicitor General & Correctional Services)*, [1998] O.J. No. 2288 (Ont.Ct. of Justice).
[122] *Tranchemontagne v. Ontario (Director, Disability Support Program),* [2006] 1 S.C.R. 513, 2006 SCC 14*,* at para. 66, 67 and 74.
[123] World Health Organization, *Towards a Common Language for Functioning, Disability and Health* (Geneva: 2002) at 3.
[124] M.A. McColl et al., "Disability Policy Making: Evaluating the Evidence Base" in D. Pothier and R. Devlin, eds., *Critical Disability Theory, Essays in Philosophy, Politics, Policy and Law* (UBC Press: 2006) at pages 27-28 and C. Barnes, G. Mercer and T. Shakespeare, *Exploring Disability: A Sociological Introduction* (Cambridge: Polity Press, 1999) at page 27.
[125] Dave Gibbs, "Social Model Services: An Oxymoron?" in *Disability Policy and Practice: Applying the Social Model* (University of Leeds: The Disability Press, 2004) at pp. 152-153.
[126] For an overview of this Survey, see Statistics Canada, *National Population Health Survey Overview, 1996-97* (Ottawa: Ministry of Industry, 1998).
[127] Human Resources Development Canada, *Disability in Canada* (Ottawa: 2001) at pages 42 and following.
[128] In one of the earliest human rights cases related to gender identity, an attempt to add gender identity to a human rights complaint as a distinct analogous ground of discrimination was rejected by the British Columbia Human Rights Tribunal: *Sheridan v. Sanctuary Investments (No. 2)*, (1998), 33 C.H.R.R. D/464.
[129] See, for example, decisions in *Sheridan v. Sanctuary Investments Ltd. (No. 3)*, (1999), 33 C.H.R.R. D/467 (BCHRT); *Ferris v. O.T.E.U. Local 15,* (1999), 36 C.H.R.R. C.329 (BCHRT); *Mamela v. Vancouver Lesbian Connection* (1999) 36 C.H.R.R. D/318 (BCHRT); *Attorney General of Canada v. Canadian Human Rights Commission* (2003), 46 C.H.R.R. D/196 (FCT); *Forrester v. Peel (Regional Municipality) Police Services Board* [2006] O.H.R.T.D. No. 13.
[130] Ontario Human Rights Commission, *Policy on Discrimination and Harassment because of Gender Identity* (Toronto: 2000), available online at http://www.ohrc.on.ca/en/resources/Policies/PolicyGenderIdent.
[131] *Hogan v. Ontario (Minister of Health and Long-Term Care)* (2006) 58 C.H.R.R. D/317 (HRTO), at para. 431-432.
[132] There is, for example, an advocacy movement that seeks to have Gender Identity Disorder removed from the APA's DSM, on the basis that "… diagnosing normal variants of human gender identity and expression as psychiatric disorders encourages an adversarial relationship between psychiatry and sex and gender minorities. We also urge the APA to state that these diagnoses are misused by some people outside of psychiatry who wish to deny civil rights to trans and gender-variant people." (GID Reform Now, online at www.gidreformnow.com, accessed May 20, 2009.)
[133] These are complex issues and subject to ongoing debate. For a somewhat dated overview based on consultation with Ontario's transgendered community, see the Ontario Human Rights Commission's *Discussion Paper: Towards a Commission Policy on Gender Identity* (Toronto: 1999), available online at: http://www.ohrc.on.ca/en/resources/discussion_consultation/genderidentity. The British *Government Policy on Transsexual People* stated that "It is *not* a mental illness. It is a condition considered *in itself* to be free of other pathology (though transsexual people can suffer depression or illnesses like anyone else)." (Department of Constitutional Affairs, 2002, Available online at http://www.dca.gov.uk/constitution/transsex/policy.htm.)