

Perception, myths and stereotypes: The Supreme Court of Canada on the nature of disability

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In a decision centering on the interpretation of Quebec legislation, the Supreme Court of Canada has articulated a view of how physical disability in Canadian human rights legislation should be interpreted by courts and tribunals. In *City of Montreal v. Quebec Human Rights Commission* (May 3, 2000), a unanimous Court reasserts a broad and purposive approach to the interpretation of anti-discrimination statutes.

In 1992, Réjeanne Mercier believed she would soon have a job with the City of Montreal as a gardener-horticulturalist. She had completed her training, and all that remained was the pre-hiring medical examination. However, the exam revealed an anomaly in her spinal column, a minor thoracolumbar scoliosis. The City, concerned she would develop lower back pain during the course of her employment, declined to offer her the position. Mercier had never experienced any lower back pain, and two medical assessments concluded that she was perfectly able to perform the duties of the job.

Mercier was one of three Quebecers either refused employment or terminated based on an underlying health condition that the employer feared would compromise their ability to do their jobs. The three went to the Quebec Human Rights Commission, which in turn applied to the Human Rights Tribunal on their behalf.

In two of the cases, including that of Mercier, the Tribunal dismissed the complaints. Referring to the language of section 10 of the Quebec *Charter of Human Rights and Freedoms*, the Tribunal held that a "handicap" as used in that provision did not include a subjective perception of handicap. It ruled, therefore, that without actual functional limitations, a complainant had no remedy under the Quebec *Charter*.

Further, the Tribunal expressed the view that a person's state of health cannot be a "handicap" because such an interpretation would trivialize section 10 of the Quebec *Charter*, which was enacted to protect those people who are limited in the performance of everyday activities.

The Tribunal's ruling was overturned by the Quebec Court of Appeal, and the matter went to the Supreme Court of Canada. At issue was the interpretation of section 10 of the Quebec *Charter*, which provides: "Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on a handicap or the use of any means to palliate a handicap."

Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right."

BROAD INTERPRETATION OF HUMAN RIGHTS LEGISLATION

Noting the quasi-constitutional status of human rights legislation, the Court held that these statutes must be given a broad and flexible interpretation that allows the objectives of the legislation to be achieved as far as possible. Here, the objective of the Quebec *Charter*, as reflected in its preamble, suggested that the purpose was to protect the dignity and equality rights of all human beings and, by logical extension, to eliminate discrimination.

These objectives, the Court stated, cannot be achieved without the recognition that discriminatory acts may be based as much on perception, myths and stereotypes as on the existence of actual functional limitations. Moreover, the Court pointed out, adopting the Tribunal's view would lead to a bizarre result in the application of Quebec human rights law: "It would be strange indeed if the legislature had intended to enable persons with handicaps that result in functional limitations to integrate into the job market, while excluding persons whose handicaps do not lead to functional limitations. Such an approach appears to undermine the very essence of discrimination."

Accordingly, the Court held that the Quebec *Charter's* objective of prohibiting discrimination required that "handicap" be interpreted so as to recognize its subjective component. A "handicap", therefore, includes ailments which do not in fact give rise to any limitation or functional disability.

"DISABILITY" UNDER CANADIAN HUMAN RIGHTS LAW

The Court stated that human rights legislation must conform to constitutional norms, including those set out in the *Canadian Charter of Rights and Freedoms*. Because, the Court reasoned, the Quebec *Charter* must be interpreted in light of the Canadian *Charter* and the human rights legislation of other provinces, the question was whether the ground of discrimination found in section 15 of the Canadian *Charter* and in other human rights statutes includes disabilities which do not give rise to any functional limitation.

In the Court's view, it was clear that Canadian courts and tribunals do not adhere to a narrow definition of "disability": "Whatever the wording of the definitions used in human rights legislation, Canadian courts tend to consider not only the objective basis for certain exclusionary practices (i.e. the actual existence of functional limitations), but also the subjective and erroneous perceptions regarding the existence of such limitations. Thus, tribunals and courts have recognized that even though they do not result in functional limitations, various ailments such as congenital physical malformations, asthma, speech impediments, obesity, acne and, more recently, being HIV positive, may constitute grounds of discrimination. ...

Thus, by confining the availability of remedies to persons suffering from limitations in the performance of everyday activities, [the Quebec tribunal] imposed considerably narrower criteria than those applied under related legislation, including the term "mental or physical disability" in s. 15 of the *Canadian Charter*."

PUTTING AN END TO THE "SOCIAL PHENOMENON OF HANDICAPPING"

Having concluded that the word "handicap" in the Quebec *Charter* included an ailment resulting in no functional limitation and the perception of an ailment, the Court considered whether it was necessary to provide a more precise definition of the term for the purpose of applying the Quebec *Charter*. Rather than proposing an exhaustive definition, the Court proposed a series of guidelines that would allow courts and tribunals to keep up with the evolving biomedical, social and technological environment.

The Court adopted what it referred to as a multi-dimensional approach that, while not ignoring the biomedical basis of "handicap", embraced other factors as well: "Thus, a "handicap" may be the result of a physical limitation, an ailment, a social construct, a perceived limitation or a combination of all of these factors. Indeed, it is the combined effect of all these circumstances that determines whether the individual has a "handicap" for the purposes of the [Quebec] *Charter*. ...

Courts will, therefore, have to consider not only an individual's biomedical condition, but also the circumstances in which a distinction is made. In examining the context in which the impugned act occurred, courts must determine, *inter alia*, whether an actual or perceived ailment causes the individual to experience "the loss or limitation of opportunities to take part in the life of the community on an equal level with others". The fact remains that a "handicap" also includes persons who have overcome all functional limitations and who are limited in their everyday activities only by the prejudice or stereotypes that are associated with this ground."

Moreover, the Court stated, a "handicap" could exist even without proof of physical limitations or the presence of an ailment. Because the emphasis is on the effects of the discriminatory conduct rather than on the precise nature of the handicap, the cause and origin of the handicap are immaterial. Further, discrimination on the basis of handicap also includes discrimination based on the actual or perceived possibility that an individual may develop a handicap in the future.

The Court was careful, however, to exclude from its guidelines personal characteristics, such as eye colour, or "normal" ailments, such as colds. There is not, the Court stated, normally a negative bias against these kinds of characteristics or ailments that would create obstacles to an individual's full participation in society.

In conclusion, the Court described the aim of its multi-dimensional analysis as being "not only to

eliminate discrimination against persons with handicaps; its goal is also to put an end to the 'social phenomenon of handicapping' and to eliminate discrimination and inequality, generally".

The Court dismissed the City's appeal and upheld the decision of the Quebec Court of Appeal.

In Our View

The problem dealt with by the Court in this case would not, strictly speaking, arise in connection with Ontario's legislation, as the definition of the term "because of handicap" in the Ontario *Human Rights Code* refers to the belief that a person has or has had a disability. However, the fact that the Court has explicitly stated that it is not even necessary that the claimant suffer any disability at all, and its view that the emphasis should be on the effect of the discriminatory conduct rather than the nature of the disability itself is likely to have an impact across the country. Further, by extending the definition of discrimination on the basis of handicap to cover the actual or perceived possibility that an individual may develop a handicap in the future, the Court may have broadened even the Ontario definition. (See also ["Ontario Human Rights Commission issues guidelines on accommodating disability"](#) on our Publications page.)

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