JUSTICE FOR ALL SHAPES AND SIZES: COMBATTING WEIGHT DISCRIMINATION IN CANADA

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Discrimination based on weight is widespread in society, but has only been addressed in limited ways by Canadian law. In recent cases, discrimination has been prohibited where an individual's obesity can be characterized as a real or perceived disability. The author suggests that this is not enough, and that what is needed is for body size to be its own prohibited category of discrimination under the Charter. *For reasons of immutability and historical disadvantage, weight should be accepted as an analogous ground under s. 15.*

La discrimination fondée sur le poids est largement répandue dans la société, mais n'a été abordée que sous des aspects limités dans le droit canadien. Dans des causes récentes, la discrimination a été interdite lorsque l'obésité d'une personne pouvait être caractérisée comme étant une invalidité réelle ou perçue. L'auteur laisse entendre que cela ne suffit pas; il fait notamment valoir que la dimension du corps doit être sa propre catégorie de discrimination en vertu de la Charte. *Pour des raisons d'immutabilité et de désavantage historique, le poids devrait être accepté comme un motif analogue en vertu de l'article 15.*

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I. INTRODUCTION

Discrimination based on weight is so widespread in our society that many people take it for granted. Not only are derogatory comments about heavier people commonplace and often accepted, but members of this group also experience significant disadvantage in many areas of life, including health, housing, education, and the workplace.[1] To date, Canadian law has addressed this discrimination in only a very limited way. In human rights law and, more recently, under the federal transportation framework, discrimination against an obese person has been prohibited when the individual's obesity can be characterized as a real or perceived disability.[2] In this article, I will argue that while the acceptance of severe obesity as a

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1 See e.g. The Council on Size and Weight Discrimination, "Weight Discrimination: Our Position," online: The Council on Size and Weight Discrimination <http://www.cswd.org/docs/discrimination.html>. See also Maureen J. Arrigo-Ward, "No Trifling Matter: How the Legal System Supports Persecution of the Obese" (1995) 10 Wis. Women's L.J. 27. This disadvantage will be discussed further in Part III.B, below.

2 See Part II, below. In most of the literature and jurisprudence, the word "obesity" is used and therefore it is difficult to avoid. However, when possible, I prefer to use the terms "heavier" or "larger," because "obesity" is a medical term with varying definitions and the discrimination extends beyond those who are clinically obese.

disability is a positive development, it does not do enough to combat the deep and ingrained prejudice society continues to hold against larger people, nor does it come close to remedying the disadvantages they face. In order to begin addressing these problems, what is needed is for weight or body size to be its own prohibited category of discrimination, both under s. 15 of the *Canadian Charter of Rights and Freedoms*[3] and under human rights statutes across the country.

In order to support this assertion, I will first review and examine the existing case law on obesity as a disability, showing why it is positive yet unsatisfactory. This is primarily because although it sends the message that this kind of discrimination is unacceptable, it only addresses a small fraction of the discrimination that occurs in society, and inconsistencies in human rights statutes in different provinces mean that some obese Canadians may receive no protection from discrimination whatsoever.

I will then review the factors that go into courts recognizing new categories of discrimination or "analogous grounds" under s. 15. Using this groundwork, I will present arguments demonstrating that weight is an appropriate category to be accepted as an analogous ground of discrimination under the *Charter*, and that therefore it should be read into or added to human rights codes.[4]

The first of these arguments will involve immutability — a factor the Supreme Court of Canada has indicated is required for a characteristic to be an analogous ground under s. 15.[5] I will assert that, based on medical evidence showing various involuntary and uncontrollable causes of obesity, coupled with the difficulties and dangers of weight loss, a person's weight is immutable enough to be considered an analogous ground. This is especially true in light of the other listed and analogous grounds that have been accepted. I will also suggest that the importance of immutability is limited due to heavy criticism and logical inconsistency in the way the factor has been applied.

Second, I will discuss historical disadvantage, another important factor in determining which grounds of discrimination should be prohibited under s. 15. I will argue that the historical disadvantage experienced by larger people is on par with that of other groups who have already been accepted as needing the protection of the *Charter* and human rights law. Further, I will illustrate that weight discrimination disproportionately affects members of other protected groups, namely women and racial minorities, further supporting the proposition that this kind of discrimination should be prohibited.

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3 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

4 Human rights legislation must conform to constitutional norms, and although provincial codes do not have to mirror the *Charter*, they do need to be interpreted in light of the *Charter*: *Vriend v. Alberta*, [1998] 1 S.C.R. 493, [*Vriend*]. In *Vriend*, the Supreme Court of Canada held that the omission of sexual orientation, an analogous ground under s. 15 of the *Charter*, from Alberta's *Individual's Rights Protection Act*, R.S.A. 1980, c. I-2, was a violation of s. 15. I am essentially arguing that the same analysis should apply to weight. Much of the discrimination that occurs is in contexts such as employment where the *Charter* would not directly apply, and therefore its inclusion in human rights codes is vital.

5 *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 195 [*Andrews*].

The concept of human dignity underlies s. 15 and the *Charter* as a whole and, as such, it will inform my entire discussion of weight discrimination. It will become clear that this kind of discrimination and, in some cases, courts' treatment of it, undermines larger people's dignity to such a reprehensible extent that it can no longer be tolerated in a society that claims to value equality.

II. CASE LAW ON OBESITY AS A DISABILITY

To begin, it is useful to summarize the limited case law addressing weight discrimination before explaining why these developments, though positive, are not enough to seriously combat the problem. As mentioned, these existing cases centre around obesity's inclusion as a disability under both human rights codes and the *Canada Transportation Act*,[6] which is governed by the same principles as human rights legislation.[7] I will describe each of these in turn.

A. HUMAN RIGHTS CASES

Because weight is not currently a protected category under any human rights code in Canada,[8] plaintiffs who are discriminated against for their weight, most commonly in the employment context, have brought their claims under the category of disability. They have done so with limited success. Whether an obese plaintiff's claim succeeds seems to depend greatly on the definition of "disability" in the particular code he or she is operating under, and how the tribunal or court in question interprets that definition. In this section, I will describe some of the leading human rights cases, both unsuccessful and successful. I will then discuss some Supreme Court of Canada disability jurisprudence, which provides some useful guidance on how future cases might be decided.

1. UNSUCCESSFUL CASES

The Ontario Board of Inquiry undertook an extensive analysis of weight discrimination in the employment context in *Ontario (Human Rights Commission) v. Vogue Shoes*.[9] The complainant, Carolyn Maddox, worked as a salesperson for Vogue Shoes, and at five feet, four inches, her weight varied between 177 and 200 pounds.[10] After seventeen years of employment, during which all parties agreed she was a very good worker,[11] the shoe company told Maddox that she would need to lose a large amount of weight in order to keep her job.[12] She subsequently resigned and lodged a complaint with the Human Rights

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6 S.C. 1996, c. 10 [*CTA*].
7 *Ibid.*, s. 171; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650 at para. 117 [*VIA Rail*].
8 The state of Michigan does in fact have a provision in its legislation prohibiting discrimination based on weight: *Elliott-Larsen Civil Rights Act*, Mich. Comp. Laws, ss. 37.2101-37.2804 (1979). It is the only such law in North America.
9 (1991), 14 C.H.R.R. D/425 (Ont. Bd. Inq.) [*Vogue Shoes*].
10 *Ibid.* at para. 37.
11 *Ibid.* at para. 36.
12 *Ibid.* at para. 2.

Commission alleging discrimination based on disability (called "handicap" in the statute at the time).[13]

The Board of Inquiry found as a fact that Vogue Shoes had imposed a restrictive condition on Maddox's employment because of her obesity, which fit the definition of discrimination from the relevant case law.[14] Significantly, the Board also recognized that obese individuals in general face significant stigma and discrimination in society.[15] However, the Board ultimately held that obesity did not qualify as a disability under the Ontario *Human Rights Code*'s[16] definition unless "it [was] an ongoing condition, effectively beyond the individual's control, which limits or is perceived to limit his or her physical capabilities."[17] In Maddox's case, although her weight was an ongoing condition it did not limit her physical capabilities, nor was it perceived as limiting them.[18] The shoe company's discrimination was motivated by simple distaste for Maddox's appearance rather than any perception that she was disabled and, thus, she had no redress under the *Code*.

The Board also discussed the statute's definition of disability, which restricted it to "any degree of physical disability, infirmity, malformation or disfigurement that is *caused by bodily injury, birth defect or illness*."[19] Despite acknowledging that the medical profession recognizes obesity as a disease,[20] with many complex causes beyond the individual's control,[21] the Board concluded that obesity was not a "disability caused by a disease" and thus not eligible for the *Code*'s protection.[22]

Another important human rights case involving obesity as a disability, which was unsuccessful for similar reasons, is *Saskatchewan (Human Rights Commission) v. St. Paul Lutheran Home of Melville, Saskatchewan*.[23] The complainant, Sandra Lynn Davison, was a nurse's aide whose application for employment at the St. Paul Lutheran Home was turned down for the sole reason that she was obese.[24] Davison was five feet, four inches tall, and weighed 330 pounds. She was described as being "punctual, pleasant, neat, courteous and in excellent health," and as being otherwise completely qualified for the position.[25] She alleged discrimination based on physical disability, due to her weight.[26] The Saskatchewan Court of Appeal upheld the denial of her claim, but not before condemning the type of discrimination she experienced:

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13 *Ibid.* I will be attempting to use the term "disability" even when courts and tribunals use "handicap." The Supreme Court of Canada has held that the two terms are interchangeable: *Quebec (Commision 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 SCC 27, [2000] 1 S.C.R. 665 [*Boisbriand*]. "Disability" is the term preferred by most disability advocates.

14 *Vogue Shoes*, *ibid.* at para. 54, citing *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Limited*, [1985] 2 S.C.R. 536 at 551.

15 *Vogue Shoes*, *ibid.* at para. 68.

16 R.S.O. 1990, c. H-19 [Ontario *Code*].

17 *Vogue Shoes*, *supra* note 9 at para. 70.

18 *Ibid.*

19 Ontario *Code*, *supra* note 16, s.10(1)(a) [emphasis added].

20 *Vogue Shoes*, *supra* note 9 at para. 79.

21 *Ibid.* at paras. 72-78.

22 *Ibid.* at para. 81. The same conclusion was reached in an earlier Ontario case, *Horton v. Niagara (Regional Municipality of)* (1987), 9 C.H.R.R. D/4611 (Ont. Bd. Inq.).

23 (1993), 108 D.L.R. (4th) 671 (Sask. C.A.) [*St. Paul Lutheran*].

24 *Ibid.* at 672.

25 See J. Paul R. Howard, "Incomplete and Indifferent: The Law's Recognition of Obesity Discrimination" (1995) 17 Advocates' Q. 338 at 367.

26 *St. Paul Lutheran*, *supra* note 23 at 675.

> [W]e think it offensive for an employer to treat one person less favourably than another, when considering them for employment, on the ground the one is overweight or homely or possessed of some such personal attribute having nothing to do with that person's ability to perform the work. Such treatment strikes at the dignity of the person. It constitutes an insensitive and often cruel blow to one's sense of self-worth and esteem. But, as counsel for the commission acknowledged, not all such acts are prohibited by the Code.[27]

As in *Vogue Shoes*, even though Davison was clearly discriminated against in a way the Court considered deplorable, this discrimination was not based on a ground that fit under the definition of disability in *The Saskatchewan Human Rights Code*[28] and was thus permissible. The Saskatchewan *Code* at the time contained a causation requirement similar to that of the Ontario *Code*, which mandated that the disability be "caused by bodily injury, birth defect or illness."[29] The Court interpreted "physical disability" to mean "a bodily condition which to some degree impairs the mechanical ability of a person to do something."[30] Although it accepted, based on this definition, that the Home had discriminated against Davison because of a real or perceived physical disability, the Court did not ultimately agree that it was a disability that was caused by illness.[31] The Court reached this result due to a finding that obesity was not the actual disability, but rather the cause of the disability.[32] Paul Howard points out that had this finding been combined with the acknowledgement of obesity as an illness in *Vogue Shoes*, the claim may have been successful.[33]

The failure of both of the above claims hinged on the legislation's inclusion of a causation requirement for disability, and the adjudicators' interpretation of that requirement. It should be noted that, although Saskatchewan's *Code* has been amended to eliminate the causation requirement,[34] human rights codes in six Canadian jurisdictions currently contain these types of clauses, under which an obesity claim has never been successful.[35] The following successful cases occurred in British Columbia, where the legislation did not contain a definition of disability, and thus did not require any proof of the obesity's underlying causes.

2. SUCCESSFUL CASES

Successful human rights complaints involving weight discrimination are rare and most seem to have succeeded not by showing that the claimant's obesity was an actual disability but, rather, that it was perceived as such by the claimant's employer.[36]

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27 *Ibid.*

28 S.S. 1979, c. S-24.1 [Saskatchewan *Code*].

29 *Ibid.*, s. 2(1)(d.1)(i). The Saskatchewan *Code* was amended in 2000 to remove this causation requirement: *The Saskatchewan Human Rights Code Amendment Act, 2000*, S.S. 2000, c. 26.

30 *St. Paul Lutheran*, *supra* note 23 at 676.

31 *Ibid.*

32 *Ibid.*

33 Howard, *supra* note 25 at 368.

34 See *supra* note 29.

35 Ontario *Code*, *supra* note 16; *Alberta Human Rights Act*, R.S.A. 2000, c. A-25.5, s. 44(1)(l); Newfoundland *Human Rights Code*, R.S.N. 1990, c. H-14, s. 2(l); New Brunswick *Human Rights Code*, R.S.N.B. 1973, c. H-11, s. 2; Prince Edward Island *Human Rights Act*, R.S.P.E.I. 1988, c. H-12, s. 1(1)(l); Yukon *Human Rights Act*, S.Y. 1987, c. 3, s. 34. See also Harriet Nowell-Smith & Hugh O'Reilly, "A Triumph of Substance over Form in how Discrimination Law Treats Obesity" (2003) 82 Can. Bar Rev. 618 at 683-84.

36 In British Columbia, although the Human Rights Tribunal has recognized that obesity, as a disability, can be grounds for discrimination, the only cases that have been successful are ones that were based on *perceived* disability: Nowell-Smith & O'Reilly, *ibid.* at 689.

The most groundbreaking of these was *Hamlyn v. Cominco Ltd.*[37] In *Hamlyn*, the complainant had been a long-time worker of the respondent steel company (Cominco) before being laid off due to a shutdown.[38] Cominco led Hamlyn to believe he would be rehired shortly thereafter when a temporary crew was brought in for some work related to the shutdown.[39] He was not in fact rehired at that time and the evidence showed the only reason for this was Hamlyn's weight, which fluctuated between 290 and 330 pounds.[40] The plant's general foreman had "happened to see [Hamlyn] at a Christmas party" and "thought [Hamlyn] looked heavier than his previous weight"; the foreman decided this "might affect his job performance."[41] After Hamlyn filed a civil suit, the plant made a settlement offer that included rehiring him if he agreed to lose a significant amount of weight.[42] These facts left little doubt, in the British Columbia Council of Human Rights' view, that the company's refusal to rehire Hamlyn was based on his weight.[43]

The issue, therefore, was whether Hamlyn's weight could be considered a disability or a perceived disability under s. 8 of the British Columbia *Human Rights Act*.[44] Cominco argued that Hamlyn's obesity was not a disability and therefore not covered.[45] Alternatively, if obesity was a disability, Cominco argued that in this case its decision was justified because it was a bona fide occupational requirement (BFOR) that plant employees be able to enter small, confined spaces.[46] Hamlyn contended that whether or not obesity was found to be a disability, Cominco had perceived his weight to be a disability and thus he should fall under the *Act*'s protection.[47]

The Council agreed.[48] The fact that the foreman, upon seeing Hamlyn at the party, had decided he was physically unfit to do his job due to his size, and had maintained that attitude, was enough to establish Hamlyn's size and weight as a perceived disability.[49] The Council also rejected the BFOR defence, in that the evidence showed that Hamlyn was perfectly capable of performing most aspects of his job despite his size.[50] Therefore, the Council concluded that Cominco was in breach of s. 8 of the British Columbia *HRA* as it had impermissibly discriminated against Hamlyn because of a perceived disability.[51]

There was some peripheral discussion of the causes of Hamlyn's obesity, with Cominco presenting evidence from Hamlyn's family doctor to the effect that Hamlyn's failure to lose weight was simply due to a lack of willpower.[52] Hamlyn countered with a detailed letter from a doctor specializing in endocrinology and metabolism, which indicated that "[t]he etiology

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37 (1989), 11 C.H.R.R. D/333 (B.C.C.H.R.) [*Hamlyn*].
38 *Ibid.* at para. 2.
39 *Ibid.*
40 *Ibid.* at para. 9; Howard, *supra* note 25 at 362.
41 Howard, *ibid.*
42 *Hamlyn*, *supra* note 37 at para. 3.
43 *Ibid.* at para. 4.
44 S.B.C. 1984, c. 22 [British Columbia *HRA*].
45 *Hamlyn*, *supra* note 37 at para. 5.
46 *Ibid.*
47 *Ibid.* at para. 10.
48 *Ibid.* at para. 19.
49 *Ibid.*
50 *Ibid.* at paras. 32-40.
51 *Ibid.* at para. 41.
52 *Ibid.* at para. 13.

of obesity seems to be multifactorial."[53] The Council did not reach a conclusion on this matter but, rather, sidestepped it with the use of the "perceived disability" analysis, wherein the causes of the disability are irrelevant and the crucial issue is whether the defendant perceived the obese claimant as disabled.[54]

Other British Columbia cases have followed the reasoning in *Hamlyn* with regards to perceived disability.[55] One example is *Rogal v. Dagliesh*,[56] in which the complainant, Dion Rogal, travelled from Regina, Saskatchewan to Langley, British Columbia for a job operating rides at a carnival.[57] Upon Rogal's arrival, Dagliesh, the owner of the rides, met with him briefly, described the job and the salary, and then the following day announced that Rogal was "too big and too heavy" for the carnival's lifestyle and that there were no uniforms in his size.[58] Dagliesh promptly dismissed Rogal and gave him the money for a one-way ticket back to Regina.[59]

Based on these facts and the evidence provided, using the reasoning in *Hamlyn* the British Columbia Human Rights Tribunal found that Dagliesh perceived Rogal to be unable to do the job solely because of his size, which amounted to discrimination based on a perceived disability.[60] It further found that there was no BFOR that carnival workers be a specific size and no evidence that Rogal could not be accommodated.[61]

The above two cases, with their use of the perceived disability analysis and the lower relevance they place on the causes of the obesity, clearly provide more opportunities for obese plaintiffs to succeed in their claims. It should be noted that under this framework, the obese complainant must still provide evidence showing that the employer did perceive him or her as being physically unable to properly perform the job due to his or her weight.[62] In *Rogal*, the Deputy Chief Commissioner (DCC) of the British Columbia Human Rights Commission, who was added as a party to the hearing, argued for eliminating this evidentiary burden on the obese claimant. Citing the widespread negative stereotypes and the pervasive mistreatment of obese people in society,

> [t]he DCC … submitted that, where there is widespread bias against a certain group in society, as has been shown against obese people … the complainant should not be required to present "concrete evidence" of a perception of disability on the respondent's part in order to establish a *prima facie* case of discrimination. The DCC stated that many complaints were not reaching the hearing stage and that many justifiable complaints were being dismissed because complainants could not establish the respondents' intent to discriminate.[63]

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53 *Ibid.* at para. 14.
54 *Ibid.* at para. 19.
55 See e.g. *Muir v. Emcon Services Inc.* (1991), 16 C.H.R.R. D/65 (B.C.C.H.R.), in which the complainant claimed that he was denied employment as a truck driver because of his obesity. The Council agreed, following *Hamlyn*, that obesity could be a disability under the British Columbia *HRA*, but held that it did not have enough evidence showing weight was a factor in the refusal to hire the claimant.
56 2000 BCHRT 22, 37 C.H.R.R. D/178 [*Rogal*].
57 *Ibid.* at paras. 7-8.
58 *Ibid.*
59 *Ibid.*
60 *Ibid.* at para. 35.
61 *Ibid.*
62 *Ibid.* at paras. 23-31.
63 *Ibid.* at para. 21, citing *R. v. Williams*, [1998] 1 S.C.R. 1128.

The Tribunal decided not to deal with the issues raised by the DCC, and so evidence demonstrating the employer's motive for discriminating remains necessary.[64] I will come back to this shortly when evaluating whether the law as it stands goes far enough in combatting weight discrimination in society.

In any case, despite the divergence seen in the interpretation of obesity as a disability in the above successful and unsuccessful cases, the Supreme Court of Canada has commented on the topic in a way that may be seen as unifying the different approaches in a somewhat sensible way.

3. GUIDANCE FROM THE SUPREME COURT OF CANADA

In *Boisbriand*, the Supreme Court of Canada addressed the meaning of "handicap" in the Quebec *Charter of human rights and freedoms*.[65] The Court's comments also apply to the definition of disability in the Canadian *Charter*[66] and, arguably, to interpretations of other provincial human rights codes' definitions.[67] The case is therefore useful in reconciling the divergent approaches to obesity outlined above.

Boisbriand did not involve obesity; rather, it involved three claimants who possessed physical conditions that did not result in any functional limitations, but who were nevertheless perceived as being limited and denied employment because of those conditions.[68] The employers claimed that the definition of "handicap" only encompassed ailments that resulted in functional limitations and that the claimants in this case were therefore not covered by the protections in the Quebec *Charter*. The Supreme Court disagreed, emphasizing the well-established existence of a subjective component to discrimination:

> [D]iscriminatory acts may be based as much on perception and myths and stereotypes as on the existence of actual functional limitations. Since the very nature of discrimination is often subjective, assigning the burden of proving the objective existence of functional limitations to a victim of discrimination would be to give that person a virtually impossible task. *Functional limitations often exist only in the mind of other people*, in this case that of the employer.
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> …
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> I am, therefore, of the view that the Charter's objective of prohibiting discrimination requires that "handicap" be interpreted so as to recognize its subjective component. A "handicap", therefore, includes *ailments which do not in fact give rise to any limitation or functional disability*.[69]

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64 *Rogal*, *ibid.* at para. 31.
65 R.S.Q. c. C-12 [Quebec *Charter*].
66 See *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703 [*Granovsky*], in which the Supreme Court affirmed the approach taken to disability in *Boisbriand* in the context of s. 15(1).
67 See *Boisbriand*, *supra* note 13 at paras. 27-36, 42, describing the objectives and quasi-constitutional nature of all Canadian human rights legislation and the requirement that such legislation be interpreted in light of the Canadian *Charter*. See also Nowell-Smith & O'Reilly, *supra* note 35 at 691.
68 *Boisbriand*, *ibid.* at para. 1.
69 *Ibid.* at paras. 39, 41 [emphasis added].

Handicap or disability, then, includes "both an ailment, even one with no resulting functional limitation, as well as the perception of such an ailment."[70] It can include someone who has no limitations at all in everyday life "other than those created by prejudice and stereotypes."[71] It may be "the result of a physical limitation, an ailment, a social construct, a perceived limitation or a combination of all of these factors."[72] The claimants in the case were held to fit under this expansive definition and were thus entitled to relief.[73]

The definition would also clearly include obesity and, in fact, the Supreme Court listed it — albeit in *obiter* — as an example of a condition that may result in a finding of discrimination based on perceived disability even where there are no functional limitations.[74]

In addition, the Supreme Court indicated in *Granovsky* that, for the purposes of s. 15 of the *Charter*, the causes of a disability and whether or not it is immutable are irrelevant.[75] Harriet Nowell-Smith and Hugh O'Reilly suggest that the Supreme Court's treatment of disability in these cases may mean that the causation-based definitions in some provincial codes, described above, will and should be legislatively removed or judicially read out in future cases.[76] In fact, at least one human rights commission has amended its policy guidelines to conform to the Supreme Court's definition, despite a causation-based definition in that province's code.[77] Nowell-Smith and O'Reilly also assert that if there were a *Charter* challenge, a court might find these causation-related definitions underinclusive and thus unconstitutional.[78]

The Supreme Court's approach to disability in the above cases is reflected in the Canadian Transportation Agency's subsequent decisions in regards to the duty to accommodate obese passengers when they have difficulty fitting into airline seats. I will describe those decisions next.

B. TRANSPORTATION CASES

In 1997, Linda McKay-Panos endured an Air Canada flight from Calgary to Ottawa, during which she was subjected to insensitive remarks, laughter, being bumped into by flight attendants' serving carts, and being made to sit in a seat that she was essentially spilling out of due to her obesity.[79] On her return flight, her only alternative to this indignity was to purchase two seats, or a business class seat, at exorbitant extra cost.[80] As a result, McKay-

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70 *Ibid.* at para. 72.
71 *Ibid.* at para. 77.
72 *Ibid.* at para. 79.
73 *Ibid.* at para. 85.
74 *Ibid.* at para. 48. It is also interesting to note that the Supreme Court included in the definition "discrimination based on the actual or perceived possibility that an individual may develop a handicap in the future" (at para. 81). This would seem to preclude employer arguments about the future health risks of obesity.
75 *Granovsky*, *supra* note 66 at para. 27.
76 Nowell-Smith & O'Reilly, *supra* note 35 at 697-98.
77 *Ibid.* at 697, citing Ontario Human Rights Commission, *Human Rights Policy in Ontario*, 3d ed. (Toronto: Ontario Human Rights Commission, 2001) at 201.
78 Nowell-Smith & O'Reilly, *ibid.* at 700, citing *Vriend*, *supra* note 4.
79 See *McKay-Panos v. Air Canada*, 2006 FCA 8, [2006] 4 F.C.R. 3 at paras. 4-6 [*McKay-Panos* (F.C.A.)].
80 *Ibid.* at paras. 8-9.

Panos filed a complaint with the Canadian Transportation Agency,[81] seeking redress for Air Canada's treatment of her and expressing concerns about the airline's policy of imposing higher fares on obese passengers when they need to be accommodated with additional seating.[82]

The Agency recognized that its decision could have a huge impact on the federal transportation network so it conducted an inquiry on the matter, the results of which were inconclusive.[83] In 2001, after further consultation and consideration, the Agency released its decision on the preliminary matter of whether or not obesity was a disability for the purposes of the *CTA*.[84]

The Agency began its analysis by confirming that the *CTA* is, in essence, human rights legislation and that it must receive the same "broad, liberal, and purposive interpretation" that is given to human rights codes.[85] It considered a plethora of evidence, much of it conflicting, on whether obesity was a disease and on health problems related to obesity and found that it was not conclusive in deciding whether obesity was a disability.[86] The Agency then considered obesity in the context of the World Health Organization's (WHO) International Classification of Functioning, Disability and Health (ICF) model of disability, a model that lists a number of factors — under the headings of impairments, activity limitations, and participation restrictions — for determining whether a person has a disability.[87] The ICF model "takes into account the social aspects of disability and does not see disability only as a 'medical' or 'biological' dysfunction," and it has been endorsed by all member states of the WHO, including Canada.[88]

The Agency found that according to the ICF model, some obese persons had impairments and experienced activity limitations and participation restrictions; as such, they were disabled.[89] It cautioned, however, that obesity, per se, was not a disability for the purposes of the *CTA*, but that whether an individual obese person is disabled for the purposes of the *CTA* needed to be decided on a case-by-case basis:

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81 The Agency has the power to "make regulations for the purpose of eliminating undue obstacles" to disabled people's mobility from the federal transportation network; it also has the power to inquire into and adjudicate complaints on related matters: *CTA*, *supra* note 6, s. 170.

82 *Decision No. 646-AT-A-2001* (12 December 2001) Canadian Transportation Agency Ruling, online: Canadian Transportation Agency <http://www.cta-otc.gc.ca/decision-ruling/decision-ruling.php?type=d&no-num=646-AT-A-2001&lang=eng> [*Calgary Decision*].

83 *Ibid.*

84 *Ibid.* The Agency needed to decide this before it decided McKay-Panos' complaint, as it needed to know if she was a person with a disability for the purposes of the *CTA*.

85 *Ibid.*, citing *C.N.R. v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114.

86 *Ibid.*

87 *Ibid.* For an overview of the ICF model, see World Health Organization (WHO) "International Classification of Functioning, Disability and Health (ICF)," online: WHO <http://www.who.int/classifications/icf/en/> [WHO, "ICF"]. As summarized by the Agency:

> Unlike the medical model, which focuses only on the medical condition of the person, the ICF looks at the medical condition (called impairment by the ICF) to then consider the activity limitations resulting from the impairment. The activity limitations are defined as difficulties an individual may have in executing a task or an action. Finally, under participation restrictions, consideration is given to the person's involvement in life situations to assess how this person is restricted to participate in life in society as a result of her activity limitations.

Decision No. 567-AT-A-2002 (23 October 2002) Canadian Transportation Agency Ruling, online: Canadian Transportation Agency <http://www.cta-otc.gc.ca/decision-ruling/decision-ruling.php?type=d&no-num=567-AT-A-2002&lang=eng> [*McKay-Panos* (CTA)].

88 WHO, "ICF," *ibid.*

89 *Calgary Decision*, *supra* note 82.

> [O]n the basis of the evidence presented, the Agency concludes that obese persons do not necessarily experience activity limitations and/or participation restrictions in the context of the federal transportation network … in order to find that an obese person is disabled for the purposes of the CTA, it is necessary to find that the person experiences activity limitations and/or participation restrictions in the context of the federal transportation network … fact-based evidence of the presence of activity limitations and/or participation restrictions is necessary to support a conclusion that a person who is obese is a person with a disability.[90]

The Agency concluded by saying it would now inquire into applications by McKay-Panos and other obese individuals in order to determine if they were disabled for the purposes of the *CTA*.[91]

The Agency heard McKay-Panos' application in 2002.[92] When framing her application, McKay-Panos relied on the ICF model and argued that she had an impairment, obesity, that resulted in activity limitations when she was required to sit in a seat that could not accommodate her size.[93] The Agency did not accept this approach because under the three-step analysis to determine whether there is an undue obstacle under the *CTA*,[94] the obstacle — the seat — must be considered at the second stage; that is, whether there is an obstacle. As such, it should not be considered at the first stage; that is, when asking whether the individual is disabled: "It is not the obstacle that makes a person deaf, blind or paraplegic and the Agency does not agree that it should be different in the case of obesity."[95]

Because McKay-Panos' evidence as to her activity restrictions was focused on the seat, and she did not present any evidence showing that she had trouble accessing the transportation system, the Agency concluded that she did not have a disability for the purposes of the *CTA* and thereby dismissed her application.[96] There was one dissenting member on the panel, who considered the fact that the Agency had accepted the ICF model in the *Calgary Decision* and argued that by ruling that the seat could not be considered and that McKay-Panos was not disabled, the Agency was essentially reversing the *Calgary Decision*.[97]

McKay-Panos appealed to the Federal Court of Appeal, who eventually sided with the dissenting member and found in favour of McKay-Panos.[98] The Court found that "[t]here is no basis for the conclusion that considering the seat at the disability stage would pre-empt or compromise the exercise of the Agency's jurisdiction at a later stage."[99] Just because an obstacle is found at the first stage of the test, it does not follow that the obstacle is undue, and therefore there are no legal consequences that must follow from the finding.[100] The Court

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90 *Ibid.*
91 *Ibid.*
92 *McKay-Panos* (CTA), *supra* note 87.
93 *Ibid.*
94 The steps to finding an undue obstacle under the *CTA* include finding that "1. there is a person with a disability; 2. this person has encountered an obstacle; and 3. the obstacle is undue": *McKay-Panos* (F.C.A.), *supra* note 79 at para. 29.
95 *McKay-Panos* (CTA), *supra* note 87.
96 *Ibid.*
97 *Ibid.*
98 *McKay-Panos* (F.C.A.), *supra* note 79 at para. 45.
99 *Ibid.* at para. 37.
100 *Ibid.* at paras. 38-39.

cited the Supreme Court of Canada's definition of disability in *Granovsky* as support for the proposition that disability does not exist in the abstract and must be determined with regard to context.[101] It reasoned that when enacting the *CTA*, Parliament had clearly had in mind disabled people "in the context of the federal transportation network who are confronted with 'an undue obstacle to [their] mobility.'"[102] Although the Agency likely had concerns about floodgates and balancing delicate interests, these were more appropriately addressed when determining the undueness of obstacles in the third stage of the test.[103] Accordingly, McKay-Panos was a person with a disability for the purposes of the *CTA* and the matter was referred back to the Agency to decide whether she had encountered an undue obstacle.[104]

Before the Agency decided on McKay-Panos' individual case it released the groundbreaking *Air Canada* decision,[105] in which it held that Air Canada and WestJet were required to institute a one-person, one-fare policy (1P1F).[106] This means that airlines must now provide an extra seat free of charge for obese passengers who are unable to fit into one seat, disabled passengers required to travel with an attendant, and any other passenger who requires extra seating as a result of disability.[107] In coming to its decision, the Agency cited its guiding principles of accessibility, which dovetail with those that guide the concept of accessibility in general human rights jurisprudence.[108] The principles of particular relevance to this decision were as follows: "persons with disabilities have the same rights as others to full participation in all aspects of society";[109] "persons with disabilities are to be treated with dignity and respect," which implies that "all persons with disabilities are entitled to be treated in the same manner regardless of the underlying reason for their disability";[110] and "persons with disabilities should not be placed at an economic disadvantage as a result of their disabilities and should not have to pay more for their transportation" than people without disabilities.[111]

With these in mind, the Agency found that the extra fares obese passengers and others needed to pay for extra seating were "an economic disadvantage which effectively limits travel opportunities in respect of employment, education, leisure, medical care and emergencies available to persons who require additional seating to travel by air."[112] The Agency further found that, although it would result in some additional cost, instituting the 1P1F policy would not impose undue hardship on the airlines.[113] This finding was influenced by the Supreme Court of Canada's direction in *VIA Rail* that although cost is a consideration in determining undue hardship, tribunals "must be wary of putting too low a value on accommodating the disabled."[114] In addition, the estimated cost of instituting the policy

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101 *Ibid.* at para. 40.
102 *Ibid.* at para. 41.
103 *Ibid.* at para. 43.
104 *Ibid.* at para. 45.
105 *Decision No. 6-AT-A-2008* (10 January 2008) Canadian Transportation Agency Ruling, online: Canadian Transportation Agency <http://www.cta-otc.gc.ca/decision-ruling/decision-ruling.php?type=d&no-num=6-AT-A-2008&lang=eng> [*Air Canada*].
106 *Ibid.* at para. 916.
107 *Ibid.*
108 *Ibid.* at para. 896.
109 *Ibid.* at para. 897.
110 *Ibid.* at para. 898.
111 *Ibid.* at para. 900.
112 *Ibid.* at para. 903.
113 *Ibid.* at para. 904.
114 *Supra* note 7 at para. 128, cited in *ibid.* at para. 905.

represented less than 0.2 percent of the airlines' gross passenger revenues, or an increase in ticket prices of 77 cents and 44 cents for Air Canada and WestJet, respectively.[115] The carriers were ordered to institute the 1P1F policy within twelve months.[116]

The airlines attempted to appeal the decision but leave to appeal was denied at both the Federal Court of Appeal[117] and the Supreme Court of Canada.[118] Disability advocates applauded the long-awaited victory, while the airlines, who are to develop their own screening process for the policy, insisted that their costs would be much higher than the Agency indicated, due to the policy being abused.[119] Meanwhile, McKay-Panos finally got a declaration from the Agency that the manner in which she was treated in her interactions with Air Canada over a decade earlier constituted an undue obstacle to her mobility.[120] Air Canada was ordered, in addition to instituting the 1P1F policy, to ensure its training program for employees included sensitivity training on providing services to and interacting with persons with disabilities, including those disabled by obesity.[121]

Having finished surveying the law as it relates to discrimination on the basis of weight, I will now evaluate how appropriate it will be as a tool in combatting the pervasive discrimination that still exists against larger people.

C. EVALUATION OF THE EXISTING LAW

The current approach to obesity as a disability, both under human rights law with the guidance of *Boisbriand* and *Granovsky*, and especially under the *CTA* decisions, is progressive and commendable. It is in line with modern "social model" theories of disability, which see disability as a social construct, rather than insisting on the outdated "medical model," in which disability is seen an illness within the individual.[122] This is illustrated by the Agency's use of the ICF model, as well as the Supreme Court's emphasis on the contextual nature of disability and the idea that other people's prejudices can sometimes be as disabling as an actual physical impairment.

The jurisprudence also sends an important message — that is, that obese people have the right not to be discriminated against in employment, and the right to be accommodated when facilities made with smaller people in mind present obstacles. This is a meaningful victory

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115 *Air Canada*, *ibid.* at paras. 904-907.

116 *Ibid.* at para. 918.

117 *Air Canada v. Canada (Canadian Transportation Agency)*, 2008 FCA 169, 167 A.C.W.S. (3d) 279.

118 *Air Canada v. Canada (Canadian Transportation Agency)*, [2008] S.C.C.A. No. 322 (QL).

119 See Janice Tibbets, "Disabled, obese allowed free extra plane seat: Top court refuses airlines' appeal of 'one-person, one-fare' ruling" *Canwest News Service*, online: canada.com <http://www.canada.com/Health/story.html?id=977633>.

120 *Decision No. 519-AT-A-2008* (16 October 2008) Canadian Transportation Agency Ruling, online: Canadian Transportation Agency <http://www.cta-otc.gc.ca/decision-ruling/decision-ruling.php?id=27802 &lang=eng>.

121 *Ibid.* at para. 50.

122 See WHO, "ICF," *supra* note 87 For an in-depth treatment of the different models of disability, see generally David Pfeiffer, "The Conceptualization of Disability" in Sharon N. Barnartt & Barbara M. Altman, eds., *Exploring Theories and Expanding Methodologies: Where We Are and Where We Need to Go* (Oxford: Elsevier Science, 2001) 29. See also Gareth Williams, "Theorizing Disability" in Gary L. Albrecht, Katherine D. Seelman & Michael Bury, eds., *Handbook of Disability Studies* (Thousand Oaks, Cal.: Sage Publications, 2001) 123.

and should not be underestimated. However, there remain significant shortcomings in the current law.

The human rights codes of six jurisdictions still contain causation-based definitions for disability, leaving open the possibility that tribunals and courts in those provinces could continue to conduct intrusive inquiries into why claimants are obese rather than focusing on the discrimination these claimants experience. Even if this type of approach is defeated by the Supreme Court's direction in *Boisbriand* and *Granovsky*, the fact still remains that the only successful employment cases involving obesity were won using the category of "perceived disability." While the expansive interpretation of perceived disability is encouraging, as it focuses on the employer's erroneous and prejudicial perception rather than on the causes of the claimant's obesity, the discrimination must still be due to "perceived disability" — and there must be evidence that this was the reason — for the claimant to be successful. This fails to capture a significant amount of the weight discrimination that occurs in the workplace and other contexts because it fails to capture the motivations behind that discrimination.

Although it is surely true that many employers mistreat, fire, or refuse to hire or promote obese people because the employers perceive those individuals to be physically unable to perform the required duties, there are many other reasons why weight discrimination happens. Lucy Wang argues that while obesity can indeed be an actual or perceived disability and that large people do suffer from weight-based disability discrimination as a result, perceived disability is not the primary cause for the great majority of weight discrimination.[123] Rather, she argues, most people who discriminate against larger people do so because of a mistaken assumption that it is their own fault they are heavy and that, as a result, they have some underlying character flaw:

> The majority of fat people are not discriminated against on the basis of an actual or perceived weight-based disability. Rather, they are discriminated against because employers perceive their weight as a signal of underlying personal flaws (for example, lack of discipline and self-control). Thus, neither [actual nor perceived disability] addresses the type of discrimination that fat people are most likely to encounter.[124]

Wang's claim is bolstered by evidence that at least some judges are influenced by the stereotype that being overweight is a completely voluntary decision.[125]

Another kind of weight discrimination that is not caught by the disability jurisprudence, and one arguably just as common as the type Wang describes, is the kind that is motivated

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123 Lucy Wang, "Weight Discrimination: One Size Fits All Remedy?" (2008) 117 Yale L.J. 1900 at 1924. Wang was writing in response to the leading American case on obesity as a perceived disability, *Cook v. Rhode Island*, 10 F.3d 17 (1st Cir. 1993), in which the Court stated: "In a society that all too often confuses 'slim' with 'beautiful' or 'good,' morbid obesity can present formidable barriers to employment. Where, as here, the barriers transgress federal law, those who erect and seek to preserve them must suffer the consequences." The American situation on obesity law is substantially similar to that of Canada: Howard, *supra* note 25 at 369.

124 Wang, *ibid*. Howard has also commented on this fundamental difference between disability discrimination and weight discrimination: Howard, *ibid.* at 385-86.

125 See Kimberly B. Dunworth, "*Cassista v. Community Foods, Inc.*: Drawing the Line at Obesity?" (1994) 24 Golden Gate U.L. Rev. 523 at 544-45, citing *Cassista v. Community Foods*, 856 P.2d 1143 (Cal. 1993).

by simple distaste for the appearance of larger people or, especially in the service industry, the perception that customers will share this distaste and prefer to be served by a thin person.[126] An example of this was seen in *Vogue Shoes* and, as mentioned, the fact that the discrimination was motivated by appearance and not perceived disability in that case was part of the reason that the claim was unsuccessful. Many commentators have asserted, unlike Wang, that prejudice against heavy people is largely a result of society's obsession with beauty and extreme thinness.[127] This type of discrimination is also not inflicted solely on people who can be categorized as "obese." Rather, people who are simply slightly larger than the exceedingly thin ideal also commonly experience mistreatment of this kind, and they cannot turn to disability law for a remedy.[128]

An example of the above underinclusiveness of disability law is illustrated in the American case of *Underwood v. Trans World Airlines*.[129] In *Underwood*, the plaintiff, an employee of Trans World Airlines, was fired because she had gained weight during her tenure and now exceeded the company's weight requirements; she was 5 feet, 4 inches tall and weighed 154 pounds.[130] She may have won her discrimination suit had her weight been high enough to classify her as "obese," but because she was merely "overweight" she had no redress.[131] While Scott Petersen suggests that such a case might be successful under a claim of perceived disability, it seems unlikely. When the individual's weight is only slightly above the perceived ideal, especially in an occupation as notoriously appearance-centred as that of a flight attendant, it is almost certain that the discrimination is motivated by concerns about a thin appearance rather than by a perception that the person's slightly elevated weight might affect job performance.

Perhaps because it is so commonplace, most people do not consider the above type of behavior to be discrimination; however, we would not tolerate similar attitudes limiting people's employment opportunities if they were in relation to race or gender rather than weight. As such, the legal solution to the problem of weight discrimination should at least hold the possibility of addressing all kinds of weight discrimination, not just the kind motivated by real or perceived disability, and not just the kind directed at the medically obese. That solution, as advocated by several American commentators, is for weight to be its own separate prohibited ground of discrimination.[132]

Although in the American context, such a move would likely require legislative amendments on both state and federal levels, in Canada the approach for doing this is already in place under s. 15 of the *Charter*. Several other prohibited analogous grounds, most notably sexual orientation, have been added to the grounds already listed in s. 15, and the need for provincial human rights codes to be interpreted in light of the *Charter* means that legislative change in each province may not be needed either. It is time for weight and size to be

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126 See Arrigo-Ward, *supra* note 1 at 57-59.
127 See e.g. Howard, *supra* note 25 at 348.
128 Arrigo-Ward, *supra* note 1 at 54-55.
129 710 F. Supp. 78 (S.D. N.Y. 1989) [*Underwood*].
130 See Scott Petersen, "Discrimination Against Overweight People: Can Society Still Get Away With It?" (1994-1995) 30 Gonz. L. Rev. 105 at 131.
131 *Ibid.* at 131-32.
132 See *ibid.* at 133; Arrigo-Ward, *supra* note 1 at 62; Donald L. Bierman, Jr., "Employment Discrimination Against Overweight Individuals: Should Obesity Be a Protected Classification?" (1990) 30 Santa Clara L. Rev. 951 at 974.

recognized as an analogous ground. In the next section I will explain the factors that go into courts' accepting something as an analogous ground and apply these to the category of weight to demonstrate its appropriateness for this constitutionally protected status.

III. WEIGHT AS AN ANALOGOUS GROUND UNDER SECTION 15 OF THE *CHARTER*

Section 15(1) of the *Charter* reads:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, *in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability*.[133]

The test for determining whether government action infringes s. 15 is, first, whether it creates a distinction based on a listed or analogous ground and, second, whether the distinction creates a disadvantage by perpetuating prejudice or stereotyping.[134] In applying the test, it is important to be mindful of the crucial underlying principle of human dignity[135] as well as the purpose of s. 15's substantive equality guarantee: "The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration."[136]

Thus, the discussion of whether weight should be an analogous ground must be informed by the ultimate goal of combatting discrimination, prejudice, and stereotyping in Canadian society. With this being said, there are two possible bases upon which a court could find that weight is an analogous ground of discrimination under s. 15. The most prominent and familiar of these is the idea that the listed and analogous grounds must consist of immutable personal characteristics.[137] However, this formulation has been heavily criticized and some have suggested that a better test — one that reflects more accurately what the Court is actually doing when it accepts analogous grounds — is to say that the protected grounds reflect groups that have historically experienced prejudice and disadvantage.[138]

In the sections that follow, I will discuss each of these potential requirements – immutability and historical disadvantage — and demonstrate that weight in fact passes both tests, and therefore should be recognized as an analogous ground of discrimination under s. 15.

A. IMMUTABILITY

At first glance, the concept of immutability may seem like a challenge to the idea of weight as an analogous ground, especially due to the common perception that heavy people have become that way due to their own weakness and that they could simply lose weight if

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133 *Charter*, *supra* note 3 [emphasis added].
134 *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483 [*Kapp*].
135 *Ibid.* at paras. 22-25.
136 *Ibid.* at para. 15, citing *Andrews*, *supra* note 5 at 171.
137 See Howard, *supra* note 25 at 388.
138 *Ibid.* at 390, citing Bruce Ryder, "Equality Rights and Sexual Orientation: Confronting Heterosexual Family Privilege" (1990) 9 Can. J. Fam. L. 39 at 77.

they had enough willpower. However, the medical evidence, some of which has already been accepted by Canadian courts and tribunals in the disability context,[139] shows that this perception is not the reality. The perception that larger people are at fault for their weight is "simplistic, inaccurate, and rooted in society's stereotype of the obese as persistent, compulsive gluttons who lack any will-power and abhor all exercise."[140]

There is a plethora of medical evidence to support the proposition that the above stereotype is faulty. Studies as early as the 1970s established that there is no statistically significant difference in caloric intake between obese people and people of "normal" weight.[141] It has also been shown that the number of fat cells in an individual's body is determined by the time a child is two years old.[142] Although there is no one medically agreed-upon cause for all obesity, studies have pointed to a number of different causal factors that both cause and maintain higher weights, none of which are under the control of the individual.[143] These well-documented factors include genetics;[144] brain disorders;[145] metabolic and endocrine dysfunctions;[146] and other medical and psychological disorders.[147] There is widespread agreement among medical experts that obesity has multiple causes and that, in any given individual case, it is nearly impossible to determine, let alone prove, the exact cause or causes.[148]

In addition to the causes of obesity generally being outside of the individual's control, there is also a consensus on the fact that it is extremely difficult to impossible for obese individuals to lose weight permanently.[149] In fact, in some cases, weight loss and diets can be both physically and psychologically dangerous, resulting in such undesirable results as metabolic slowing, which can lead to even more weight gain, and eating disorders, which can lead to serious health problems and even death.[150]

Clearly, then, obesity in many cases is beyond the control of the individual, and thus can accurately be described as an immutable characteristic. Even though it is clear that some individuals are able to exercise some degree of control over their weight, at least temporarily, this does not mean that weight should be discarded as a possible analogous ground of discrimination. It is important to be mindful of what the actual test of immutability under s. 15 requires and not to put too much emphasis on absolute immutability.

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139 See *Hamlyn*, *supra* note 37; *Vogue Shoes*, *supra* note 9.

140 Howard, *supra* note 25 at 340. See also Arrigo-Ward, *supra* note 1 at 29-30.

141 Howard, *ibid.* at 342; Bierman, *supra* note 132 at 957; Petersen, *supra* note 130 at 106.

142 Howard, *ibid.* at 343.

143 See generally *ibid.* at 340-47; Dunworth, *supra* note 125 at 544-45.

144 See Arrigo-Ward, *supra* note 1 at 30; Matthew A. Glover, "Employment & Disability Law — Americans With Disabilities Act of 1990 — The Weight of Personal Responsibility: Obesity, Causation, and Protected Physical Impairments" (2008) 30 U. Ark. Little Rock L. Rev. 381 at 384; Patricia Hartnett, "Nature or Nurture, Lifestyle or Fate: Employment Discrimination Against Obese Workers" (1993) 24 Rutgers L.J. 807 at 810.

145 Bierman, *supra* note 132 at 957; see also Jay R. Byers, "*Cook v. Rhode Island*: It's Not Over Until the Morbidly Obese Woman Works" (1995) 20 J. Corp. L. 389 at 399-400.

146 Glover, *supra* note 144 at 384; Howard, *supra* note 25 at 344.

147 Petersen, *supra* note 130 at 106.

148 Howard, *supra* note 25 at 342, 391.

149 See Arrigo-Ward, *supra* note 1 at 45-46.

150 *Ibid.* at 47-49; Byers, *supra* note 145 at 401.

A useful parallel to size and weight in the analogous grounds context is what occurred with the Supreme Court of Canada's treatment of sexual orientation. Twenty years ago, attitudes in Canadian society toward homosexuals were arguably similar to the way that obese people are viewed today.[151] In addition to widespread prejudice and discrimination, there was, and continues to be, controversy surrounding whether sexual orientation is caused completely by biological factors, environmental factors, or both.[152] For at least some people, there is an element of choice involved in their sexual preferences.[153] Nevertheless, in 1995 the Supreme Court recognized sexual orientation as an analogous ground.[154] This was a groundbreaking and commendable decision that led to many reforms in the law relating to same-sex relationships and ultimately resulted in the victory of same-sex marriage.[155] The Supreme Court did not make this decision because there was incontrovertible scientific evidence that every homosexual person in the country was biologically, genetically, and irreversibly homosexual. Rather, sexual orientation was an analogous ground because "whether or not sexual orientation is based on biological or physiological factors, which may be a matter of some controversy, it is a *deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs.*"[156]

It seems clear that the dimensions of a person's body are about as deeply personal as it gets: "As a bodily state, obesity is a deeply personal matter that involves intimate questions of how and what one eats, the activities in which one participates and how one's body functions."[157] Given the documented near-impossibility of permanent weight loss for obese individuals, not to mention the serious risks of dieting, weight must be, if not unchangeable, at the very least changeable only at unacceptable personal costs.[158] Not only is it futile to tell obese people that they must lose weight in order to escape discrimination, it is also morally unacceptable. As one commentator has noted, it is the equivalent to telling homosexuals that they could be straight if they exercised enough willpower.[159] We claim to live in a society that values and encourages diversity and difference,[160] not one where we all have to starve our bodies into cookie cutter dimensions in order to be entitled to dignity and respect.

Commentators have heavily critiqued these and other shortcomings to the idea of immutability in the analogous grounds context, and it is important to take these criticisms into account when considering the relative importance of immutability, as compared to other factors. Most notably, it has been repeatedly pointed out that not all of the listed or analogous

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151 For a comparison of the two potential grounds of discrimination, see Arrigo-Ward, *ibid.* at 44.

152 See generally Janet E. Halley, "Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability" (1994) 46 Stan. L. Rev. 503.

153 *Ibid.*

154 *Egan v. Canada*, [1995] 2 S.C.R. 513 at para. 5 [*Egan*].

155 *Civil Marriage Act*, S.C. 2005, c. 33. The federal government made same-sex marriage legal nationwide after appeal courts in several provinces held that it was a violation of s. 15 to limit marriage to a man and a woman: *EGALE Canada v. Canada (A.G.)* (2003), 225 D.L.R. (4th) 472 (B.C.C.A.); *Halpern v. Canada (A.G.)* (2003), 65 O.R. (3d) 161 (C.A.); *Hendricks v. Quebec*, [2002] R.J.Q. 2506 (Sup. Ct.).

156 *Egan*, *supra* note 154 [emphasis added].

157 Nowell-Smith & O'Reilly, *supra* note 35 at 685.

158 *Ibid.*

159 Arrigo-Ward, *supra* note 1 at 44.

160 See generally Jill McCalla Vickers, "Equality-Seeking in a Cold Climate" in Lynn Smith *et al.*, eds., *Righting the Balance: Canada's New Equality Rights* (Saskatoon: The Canadian Human Rights Reporter, 1986) 3.

grounds that have been recognized are in fact immutable.[161] The most obvious example is religion, a listed ground, which individuals can and do change.[162] The same could be said for marital status. Conversely, occupation and place of residence have both been held not to be analogous grounds and it is not clear why these should be considered less immutable than religion or marital status. As Dale Gibson points out:

> It would be highly fictitious to tell a native trapper from the Northwest Territories, or the spouse of a Nova Scotia fisherman, or a francophone shop clerk from Trois Rivières, that they are free to move anywhere in Canada. Because of the powerful deterrents to migration that so frequently exist in the real world, a person's place of residence is for many an "immutable" characteristic.… In many cases it is little less so than citizenship.[163]

In addition, as mentioned above, the Supreme Court has confirmed that the listed ground of disability does not need to be immutable to attract protection from discrimination.

It has been observed that what the listed and analogous grounds do in fact have in common is not immutability, but rather historical disadvantage, and that the Court should recognize that "discrimination on the basis of the enumerated and analogous grounds operates in diverse ways."[164] Historical disadvantage, prejudice, and stereotyping as a test for recognizing analogous grounds would seem to dovetail better with the purpose of s. 15; that is, the goal of combatting discrimination and preventing the perpetuation of prejudice and stereotypes. To rely too much on the immutability requirement in the weight context could actually have the opposite effect — it could in fact cause the perpetuation of stereotypes about larger people.

It seems clear that weight as a category of discrimination would likely pass the immutability test as laid out by the Supreme Court of Canada. Given the above analysis, however, it is perhaps preferable to focus on the historical disadvantage experienced by obese people. Even if the Court stays with immutability as the primary test for analogous grounds as it has in the past, historical disadvantage is still an important factor to be considered in any s. 15 analysis. As such, the next section will demonstrate the existence of historical disadvantage in the case of heavier people, simply bolstering my assertion that discrimination on this basis should be prohibited.

B. HISTORICAL DISADVANTAGE

The argument related to historical disadvantage as it relates to weight discrimination has two dimensions. First, it is clear that obese people experience significant disadvantage in many areas of life as a result of pervasive prejudice and stereotyping, which makes their situation similar to that of other protected minorities and, thus, similarly deserving of protection.[165] In addition, though, it has also been shown that weight discrimination has a

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161 Dale Gibson, "Analogous Grounds of Discrimination under the Canadian *Charter*: Too Much Ado About Next to Nothing" (1991) 29 Alta. L. Rev. 772; see also Ryder, *supra* note 138.
162 Gibson, *ibid.* at 775.
163 *Ibid.* at 787.
164 Ryder, *supra* note 138 at 79.
165 See Howard, *supra* note 25 at 355.

disproportionate effect on racial minorities and women, and thus magnifies the already severe disadvantages that those groups face. This is all the more reason to prohibit weight discrimination.

Many authors have noted the striking similarity between weight discrimination and other forms of historical prejudice, such as racial discrimination.[166] Because it is still so commonplace, while other forms of discrimination are slowly being eradicated, weight discrimination has been called "the last safe prejudice."[167] It is well-documented that prejudicial and hateful attitudes toward larger people are socialized and ingrained in school-age children.[168] In a widely-cited study, children preferred drawings of "a child in a wheelchair, a child on crutches, a child with a facial disfigurement, and a child with one hand missing" over an overweight child.[169] This deep-seated prejudice, of course, follows people into their adulthood and results in reduced opportunities and downright misery for larger people in many areas.

Evidently, from the cases surveyed above, discrimination occurs in the employment context. Numerous studies have been published on the extent of this discrimination, with varying results, but all showing that the problem is widespread and pervasive.[170] Some of these studies go back as far as 40 years, showing that while it may not have as long a history as, say, racial discrimination, the disadvantage imposed by weight discrimination is certainly long-lived enough to be considered "historical" for the purposes of this discussion. For example, a 1970s survey of American employers showed that "15.9 percent would not hire obese women [and] 43.9 percent considered obesity" to be valid grounds for not employing an applicant.[171] When they do manage to get hired, obese employees are less likely to be promoted, tend to make less money than their thin peers, and are commonly harassed in the workplace.[172] Another survey looking at wage discrimination against obese workers found that "each pound of fat could cost an executive a $1,000 per year."[173]

There is also evidence of pervasive discrimination in the delivery of health care.[174] Doctors tend to hold the same prejudices as the rest of the population and they commonly refuse to treat any other medical condition an obese person may have, attributing every ailment to the person's weight.[175] The discrimination does not end there; it occurs in insurance, housing, post-secondary education admittance, and even relationships and marriage.[176] This deplorable

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166 Petersen, *supra* note 130 at 105; Jane Byeff Korn, "Fat" (1997) 77 B.U.L. Rev. 25 at 38-39; Ritu Mahajan, "The Naked Truth: Appearance Discrimination, Employment, and the Law" (2007) 14 Asian Am. L.J. 165 at 165-66.

167 See Hartnett, *supra* note 144 at 808.

168 See generally Jessica Meyer, "Obesity Harassment in School: Simply 'Teasing' Our Way to Unfettered Obesity Discrimination and Stripping Away the Right to Education" (2005) 23 Law & Inequality 429.

169 Howard, *supra* note 25 at 348-49, citing Natalie Allon, "The Stigma of Overweight in Everyday Life" in Benjamin B. Wolman, ed., *Psychological Aspects of Obesity: A Handbook* (New York: Van Nostrand Reinhold, 1982) 130 at 147.

170 Howard, *ibid.* at 350.

171 *Ibid.*, citing Allon, *supra* note 169 at 131.

172 Howard, *ibid.* at 351.

173 *Ibid.*, citing Allon, *supra* note 169 at 139.

174 See generally Wang, *supra* note 123.

175 Arrigo-Ward, *supra* note 1 at 32-33.

176 See Petersen, *supra* note 130 at 109; Andrea M. Brucoli, "*Cook v. Rhode Island, Department of Mental Health, Retardation, and Hospitals*: Morbid Obesity as a Protected Disability or an Unprotected Voluntary Condition" (1994) 28 Ga. L. Rev. 771 at 795-96.

treatment has devastating effects on its recipients; obesity is inversely proportional to socio-economic status and obese people — particularly women — tend to internalize the hatred, resulting in low self-esteem, humiliation, and shame.[177] This psychological damage also leads to eating disorders, the alarming dangers of which I have already described.[178]

In addition to the above dramatic disadvantages it imposes, which are remarkably similar to the effects of racial and ethnic prejudice,[179] weight discrimination also has a disparate impact on both women and racial minorities, compounding the various challenges those groups already face. In the American context, members of the African-American and Hispanic populations are far more likely to be obese than members of the white majority.[180] In Canada, the proportion of the Aboriginal population that is overweight or obese is roughly double that of the non-Aboriginal population.[181] These racial minorities already face racism on a regular basis and they also tend to be economically less well-off than the majority. The fact that large numbers of them must suffer weight discrimination as well is an unacceptable additional burden, and one that must be addressed.

Many authors have posited that women also bear the brunt of weight discrimination in North America. This is partially because, like the above racial minorities, they are statistically more likely than men to be obese.[182] More importantly, though, weight discrimination adversely affects women because society's obsession with beauty and thinness is focused on women's bodies, and the beauty standard for women is more rigorous; as such, the stigma of obesity is arguably much more severe for women.[183] As a result, women are far more concerned about losing weight and may feel obligated to diet even when their weight is only slightly higher than average.[184] Women are also more likely to have negative self-images because of their weight and to develop eating disorders.[185] Their attitudes towards weight are often distorted, as represented by a survey showing the majority of respondents would rather lose weight than succeed at their jobs.[186]

Some American commentators have suggested that an obese woman suffering weight discrimination could be successful by launching a disparate impact claim under the gender protection of civil rights legislation.[187] No such case has been successful, however, due to the difficulty in proving disparate impact in individual cases.[188] Interestingly, one woman in Canada who endured derogatory comments about her weight in the workplace was successful when she sued for sexual harassment.[189] The Ontario Board of Inquiry reasoned that her co-

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177 See Arrigo-Ward, *supra* note 1 at 36.
178 *Ibid.*
179 See Hartnett, *supra* note 144 at 811; Howard, *supra* note 25 at 355.
180 See Wang, *supra* note 123 at 1905. See also Bierman, *supra* note 132 at 971.
181 See Statistics Canada, "Percentage overweight/obese (BMI ≥ 25) and obese (BMI ≥ 30), by sex and Aboriginal identity, household population aged 19 to 50, Ontario and western provinces, 2004," online: Statistics Canada <http://www.statcan.gc.ca/pub/82-003-x/2008001/article/10487/c-g/4060762-eng.htm>.
182 Wang, *supra* note 123 at 1905.
183 Howard, *supra* note 25 at 352.
184 *Ibid.* at 353.
185 *Ibid.*
186 *Ibid.* at 354.
187 See Carolyn May McDermott, "Should Employers be Allowed to Weigh Obesity in Their Employement Decisions? Cook v. Rhode Island, Department of Mental Health, Retardation & Hospitals," Note, (1995) U. Kan. L. Rev. 1999 at 201; Bierman, *supra* note 132 at 971; Hartnett, *supra* note 144 at 815.
188 Mahajan, *supra* note 166 at 178.
189 *Shaw v. Levac Supply Ltd.* (1990), 14 C.H.R.R. D/36 (Ont. Bd. Inq).

worker's insults — calling her a "fat cow" and a "horse" — were of a sexual nature because they "expressed or implied sexual unattractiveness on the part of" the claimant.[190] Because they were repetitive, they also had the effect of creating a hostile working environment. This is an interesting case in that it represents a unique recognition of the adverse impact that weight discrimination has on women. However, sexual harassment law is clearly not the answer to weight discrimination in general as it would capture even less of the discrimination than disability law does.

The better answer to the plethora of deplorable disadvantage just described is for weight to be recognized as an analogous ground of discrimination under s. 15 of the *Charter*, and read into human rights legislation accordingly. The above discussion makes clear that the factors of immutability and historical disadvantage that are present in other protected grounds are clearly present in the case of an individual's weight. It also makes it obvious that to do nothing would be to allow much needless suffering to continue.

IV. CONCLUSION

Weight discrimination seems to be a problem in many Western countries and the issue will only increase in importance as obesity rates continue to rise. As a society, we can only ignore the prejudice heavier people face for so long before something must be done to eradicate it. In Canada, we have started down that path. Courts and tribunals have recognized that in some cases obesity can be a disability or a perceived disability under human rights legislation and that, in those cases, employers cannot discriminate against obese employees. The Canadian Transportation Agency has held, and courts have affirmed, that obese passengers must be accommodated in the federal transportation network, including the right to an extra airline seat free of charge when needed. These decisions are praiseworthy but they do not go far enough; they only cover weight discrimination that is actually motivated by disability or perceived disability and they only cover discrimination against the medically obese.

Given the progress that has been achieved, particularly the recent groundbreaking victory in the airline context, now would be a perfect time for courts to go one step further and prohibit *all* weight discrimination by recognizing weight as an analogous ground under the *Charter*. It passes both possible tests for an analogous ground — immutability and historical disadvantage — and its inclusion would serve s. 15's purpose of combatting discrimination that results in prejudice and stereotyping of disadvantaged groups. Because obesity has been gaining recognition as a disability, it is possible that the public is now ready to accept such a move and would not see it as a dramatic change in the law. Looking back on the progress that has been made in the past decade toward full acceptance of homosexual Canadians in both the legal and social contexts, I would urge courts to lead the way toward the same type of acceptance for people of all different shapes and sizes. The goal of human dignity and equality for all Canadians — which underlies all human rights law — not only suggests this is the right thing to do, it mandates it.

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190 Howard, *supra* note 25 at 376.