

Appendix 5 – Understanding discrimination in a social context – “social construction of disadvantage”

More often than not, disadvantage arises from the way in which society treats particular individuals, rather than from any characteristic inherent in those individuals.^[1]

This statement by Supreme Court of Canada Justice J. LaForest illustrates the key element of a new approach in human rights case law and policy to understand the dynamic of discrimination. A few years ago, human rights law began to change by recognizing that the effect or impact of discrimination on a person is of more importance to determining the presence of discrimination than whether there was any malice or intent to discriminate. Many courts then began to look at the myths, stereotypes and perceptions that exist in the minds and attitudes of people that cause them to exclude others based on certain characteristics such as race, disability, gender, age or religion.

For instance, the Supreme Court of Canada shed new light on the approach to be taken in understanding disability. In *Mercier*,^[2] a case arising in Quebec (and featured as a case study in this package), the Supreme Court made it clear that disability must be interpreted to include its subjective component, since discrimination may be based as much on other people’s perceptions, myths and stereotypes, as on the existence of any actual functional limitations in the individual.

In the *Mercier* case, the applicant was denied employment or dismissed when the employer learned that she had certain medical conditions, even though the conditions might not posed any limitations. The employers argued that since the conditions did not have any impact on her ability to do the job, they could not be “disabilities” under Quebec’s human rights law. The Supreme Court of Canada disagreed.

The Supreme Court chose not to focus on whether the person actually had a disability or whether that disability actually impeded the person from doing their job. Instead, it looked at the situation from a socio-political dimension that emphasizes human dignity, respect and the right to equality. A disability may be the result of a physical limitation, an ailment, a perceived limitation or a combination of all these factors. But 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.

Another Supreme Court of Canada decision^[3] then confirmed that “social handicapping,” society’s response to a real or perceived disability, should be the main consideration when deciding if discrimination has occurred.

We must be very careful to test out the assumptions we make about people, whether they are applying for a job, a place to live or whether they simply buy a good or use a service. Is a person’s “failure to qualify” a result of actual limitations or is it society that imposes artificial limitations based on unfounded stereotypes or ignorance, or fails to prevent, remove or accommodate real or perceived differences? More scrutiny and awareness by courts, human rights tribunals, government and civil society in general will help to clarify and address this notion.

^[1] *Egan v. Canada*, [1995] 2 S.C.R. 513 at 551-2 (25 May 1995) online: Supreme Court of Canada www.lexum.umontreal.ca/csc-scc/en/index.html>.

^[2] *Québec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Québec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, 2000 SCC 27

(3 May 2000),].

[3] *Granovsky v. Canada (Minister of Employment and Immigration)*, 2000 S.C.C. 28 (18 May 2000)