

LESSONS TO BE LEARNED: THE DECISION OF THE SOCIAL BENEFITS TRIBUNAL
IN TRANCHEMONTAGNE V. ONTARIO (DIRECTOR, DISABILITY SUPPORT
PROGRAM)

CE QU'IL FAUT APPRENDRE TOUJOURS : LA DÉCISION DU TRIBUNAL DE L'AIDE
SOCIAL DANS LE CAS JURIDIQUE DE TRANCHEMONTAGNE V. ONTARIO
(DIRECTEUR, PROGRAMME ONTARIEN DE SOUTIEN AUX PERSONNES
HANDICAPÉES)

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Abstract

In April 2009, the Ontario Social Benefits Tribunal ended a 10-year battle for Appellants Norman Werbeski and Robert Tranchemontagne in its deliberation that the *Ontario Disability Support Program Act* violated their rights as enshrined in the *Ontario Human Rights Code* when it failed to recognize their alcoholism as a disability. Drawing specific excerpts from the Respondent's (Ontario government) defence and the Social Benefit Tribunal's decision, this essay looks at how government policy affects persons with substance addiction and argues that subsection 5(2) of the *Ontario Disability Support Program Act* places burdens on substance abusers and contributes significantly to their social stigma. The outcomes of excluding substance addiction from the United States Social Assistance Programmes are reviewed and referred to in analyzing the Ontario government's claims. The conclusion highlights how this case reflects key steps toward greater inclusion for persons with disabilities and in particular for those whose disability is addiction and alcoholism.

Key words: Social Benefits Tribunal, Ontario Disability Support Program Act, alcoholism, disability, stigma

Abstrait

En avril 2009, après dix ans, le Tribunal ontarien de l'aide social a mis fin au cas juridique des Appelants Norman Werbeski et Robert Tranchemontagne. Le Tribunal abordait la question de si la *Loi de 1997 sur le Programme ontarien de soutien aux personnes handicapées* a violé les droits de ces deux hommes, protégés dans le *Code ontarien des droits de la personne*, quand il n'a pas reconnu leur alcoolisme en tant qu'handicap. En utilisant des citations spécifiques de l'Intimé (le gouvernement ontarien) et la décision du Tribunal de l'aide social, ce discours aborde la question de comment la politique gouvernementale s'impose sur les personnes ayant une addiction (telle que l'alcool ou la drogue); constate que la Section 5(2) du *Programme ontarien de soutien aux personnes handicapées* impose des fardeaux sur les alcooliques et toxicomanes; et comment ladite section contribue au stigmatisme social envers eux. Les résultats sociaux de l'exclusion des alcooliques et toxicomanes des Programmes américains de soutien social seront vus et abordés afin d'analyser les revendications du gouvernement ontarien. La conclusion de ce discours souligne comment ce cas-ci est le résultant de certains étapes clés dans la lutte pour l'inclusion des personnes handicapées, surtout pour ceux ayant l'handicap de l'addiction.

Mots clés : Tribunal de l'aide social, Loi de 1997 sur le Programme ontarien de soutien aux personnes handicapées, alcoolisme, handicap, stigmat

When disability and law converge, we are often left with unanswered questions and contested debates that illuminate how far the quest for a fully inclusive society has truly come. Legal cases that bring into focus the complexities of disability challenge society's concepts not only of what is normal, but also of what qualifies as an "acceptable" disability. As well, the frequent involvement of discrimination and human rights in these cases demands a reconsideration of the common notions that society holds of acceptability. These considerations are necessary if groups who exist at society's margins are to be integrated fully. It is a challenge that, at best, propels us toward deeper understanding and greater tolerance acknowledging that, as the United Nations Declaration of Human Rights proclaims in Article 1, all persons are born free and equal in dignity and rights (United Nations, 1948).

There is potential for greater inclusivity within society, and one way that such potential is realized is through legislation that guides and informs. However, on the opposite side of the same coin there exists the commonly held belief that inclusion of all can be an idealistic notion that risks compromising the freedom and dignity that democratic states strive to uphold. This holds particularly true when our opinions of those who exist on society's margins are based on the belief that their plight is a result of supposed self-inflicted handicaps or moral failings.

An example of a marginalized group that continues to challenge society's moral concepts and tolerance are those who are addicted to substances, such as alcohol and drugs. The tendency to perceive alcoholism and drug addiction both as a weakened state and the failure of the individual to stay within the moral guidelines that society creates indirectly but significantly influences the design of welfare legislation and social benefit programmes. It is with the same guidelines that we frequently judge and condemn substance abusers and therefore justify exclusionary legislation.

One natural progression that results from viewing addiction as a moral fault is to punish the addict. This is carried out in vigilant program policies whose guidelines limit social assistance only to those who are deemed as deserving and who would genuinely benefit (Jones & Basser-Marks, 1999). The outcome of laws demarcating who deserves and who does not cannot only hinder the progress of inclusiveness, but also impede society's understanding of vulnerable groups, disability, and the concept of equality.

In April 2009, the Social Benefits Tribunal of Ontario ruled in favour of Appellants Norman Werbeski and Robert Tranchemontagne. By stating that subsection 5(2) of the *Ontario Disabilities Support Program Act (ODSPA)* contravened Section 1 of the *Ontario Human Rights Code (OHRC)* [Social Benefits Tribunal, Tribunal File No. 9910-07541 R, 0005-04579] the Tribunal determined subsection (5)2 of the *ODSPA* specifically precluded persons whose disability is substance addiction. It therefore violated their rights to equal treatment as set by the *OHRC*. Subsection 5(2) of the *ODSPA* states that 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.

Section 1 of the *OHRC*, however, proclaims that

Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability. (*Ontario Human Rights Code*, R.S.O. 1990, c.H.19, s.1; 1999. C.6, s.28 2001, c.32, s.27 (1); 2005, c.5, s.32 (1))

The Social Benefits Tribunal decision is a milestone for disadvantaged persons across the country. At least within Ontario, this decision challenges definitions of disability long embedded into social policy that clearly dictate who and who is not entitled to social benefits. Such decisions exemplify the government's growing recognition that there are significant limitations toward an inclusive society when policies guiding social benefits are designed to preclude those who need them most. However, it is a murkier determination as to whether that same acknowledgment has, or ever will, permeate society at large and affect deeply rooted social stigmas associated with substance addicts.

With this in mind, there are important lessons to be learned from the Social Benefit Tribunal's decision-making process in its final verdict. By understanding the premise of the arguments put forth by both the Appellants (Werbeski and Tranchemontagne) and the Respondent (Ontario government), and the Tribunal's consideration of both, it is the goal of this paper to elucidate not only on how the Tribunal reached its decision, but why such a decision is justified.

Each section of this paper draws on excerpts of the case. The first section looks at how government policy approaches persons with substance addiction. This section considers how exclusionary criteria within social policy deepen the stigma associated with addiction as well as the stigma that is deflected onto the communities in which addicts congregate, both of which further skew the existing negative perception of the addict. Section II will consider the Tribunal's determination that substance addiction in general and alcoholism in particular is a disability. This section explores some of the reasons why society resists accepting addiction as a disability, which is the issue at the core of the debate within the *Tranchemontagne* case.

Section III expands upon the disadvantages and burdens that subsection 5(2) of the *ODSPA* places upon substance abusers. To examine the question of whether stigma acts as a deterrent to addiction, thereby justifying the exclusion of addicts from social assistance programs, this section will briefly look at some of the outcomes of the specific exclusion of substance addiction in the *United States Supplemental Security Income Act* and the *Social Security Disability Insurance Act*.

In the concluding section, this paper comments on several ways that the Tribunal's decision and the very existence and process of this case within the Ontario court system reflects key steps toward greater inclusion for persons with disabilities and in particular for those whose disability is addiction and alcoholism. The Tribunal's verdict

exemplifies a very robust interpretation of disability and such outcomes encourage a reconsideration, or at the very least, a challenge to existing ways of interpreting disability. This is key to broadening society's understanding of the link between the greater inclusion of marginalized groups within social programs and the equality rights that are guaranteed to all (Rioux & Valentine, 2006).

Outcomes can be shaped by definitions, and the results are good indicators of whether or not the definition in question works. Much like the analogy of throwing a stone into a pond, the rippling effect of how disabilities are, and for that matter, are not defined and whether or not such definitions include substance addiction can have tremendous impact on the lives of many regardless of their direct, indirect, or non-existent relationship with alcoholism and/or drug addiction. Without a doubt, there will always be tensions surrounding the issue of whether alcoholics and substance addicts are deserving of social benefits. However, as the decision of the Social Benefit Tribunal demonstrates, if we are to move toward inclusivity, we must move away from dwelling on how disabilities are created and instead focus on outcomes that facilitate long-term and progressive integration of these marginalized groups into society.

Section I

The Respondent also argued that the intent and effect of subsection 5(2) is to enhance the dignity of the Appellants and those like them; that it is benevolent in nature in that the receipt of less financial assistance through OW is beneficial for those whose disability is substance dependence and that because there exists a strong possibility of total recovery from their disability, OW income assistance is a better fit. The Tribunal does not accept this argument. (Social Benefits Tribunal, p. 17)

In May and October of 1999 respectively, Norman Werbeski and Robert Tranchemontagne applied for income support under the *ODSPA*. Both Appellants argued that the debilitating and long-term effects of their known and chronic alcoholism was a disability, preventing them from sustaining any type of employment (*Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 S.C.R.513, 2006 SCC 14) and therefore, qualified both men for benefit payments under the *ODSPA*. The Tribunal's initial ruling was that both Werbeski and Tranchemontagne qualified for support payments under the Ontario Works benefits program (OW), but not under the *ODSPA* because of subsection 5 (2). The Appellants response was that this same section of the legislation contravened their rights as formed by Section 1 of the *OHRC*. The case was moved up to the Supreme Court of Canada, which ordered the Social Benefit Tribunal to reconsider their position. Upon this mandated review, it was found that both men had been discriminated against by the provincial government in the form of entitled support payments due to their disability. As such, the provincial government was ordered by the Tribunal to initiate payments to both men under the *ODSPA*.

Financially, the incentives for pursuing payments under the *ODSPA* instead of the *OWA* are clear. The maximum monthly payment provided by OW at the time of the trial was \$536 compared with a maximum monthly payment of \$959 provided by the

Ontario Disability Support Program (ODSP) (Erickson & Callaghan, 2005). The distinction between the payments is found in the purpose of both policies. However, it is the defence argument of the Ontario government that exemplifies why they hold that excluding substance addicts is justified.

The purpose of the OWA reads as follows: The OWA

- (a) recognizes individual responsibility and *promotes self reliance through employment*
 - (b) provides *temporary financial assistance* to those most in need while they *satisfy obligations to become and stay employed*;
 - (c) effectively serves people needing assistance
- (*Ontario Works Act*, S.O. 1997, Section 1, emphasis added).

Assuming a more long-term involvement, the ODSPA states its purpose is to establish a program that

- (a) provides income and employment supports to eligible persons with disabilities;
 - (b) recognizes that government, communities, families and individuals share responsibility for providing such supports;
 - (c) effectively serves persons with disabilities who need assistance; and
 - (d) is accountable to the taxpayers of Ontario.
- (*Ontario Disability Support Program Act*, S.O. 1997, Section 1).

As with most social assistance policies, there are qualification requirements that must be met in order to access financial benefits (Jones & Basser-Marks, 1999). While accessibility or lack thereof is determined by the policy's eligibility criteria, the ODSPA also defines what is considered by the Ontario government to be an acceptable disability. On a much more subtle, but equally important level, if addicts qualified under the OWA and were ineligible under the ODSPA, the Government's approach toward substance dependency would be primarily promoting "self reliance through employment" (OWA, S.O. 1997. Section 1[a]). The failure to recognize substance addiction as a disability through a determination of where it fits in social policy programs neglects the findings of a 2004 World Health Organization report that states that substance dependency is, in fact, "a medical disorder that could affect any human being" (World Health Organization, 2004, p. 248). As a result, both the purpose and criteria of social policy, and in particular that of the ODSPA, contribute significantly to the addiction stigma and serves to reinforce the extent to which society continues to negatively perceive addicts.

While the distinction of subsection 5(2) of the ODSPA demonstrates how exclusionary clauses contribute to the definition of disability, the specific exclusion of substance addiction from the ODSPA demonstrates the significant weight that legislation places on how disabilities are created. As Erickson and Callaghan (2005) point out, the ODSPA rationalizes its exclusion criteria on the "motivation-to-change" construct (p.100), which is a cornerstone in the Respondent's arguments. This

argument, combined with the Tribunal's initial response of qualifying the Appellants under the *OWA*, but not the *ODSPA*, indicates a preliminary conclusion that alcoholism is a temporary state that is best dealt with through provision of "temporary financial assistance" (*OWA*, 1997, Sect. 1, subsection b). Add to this the Respondent's additional claim that alcoholism is a short-term disability that justifies the expectation of a full recovery and therefore, a return to work (Social Benefits Tribunal, p. 19), and an even clearer picture emerges of how government's treatment of substance addiction and its rationale for doing so not only contributes to the stigma, but fertilizes the moral terrain upon which addicts are frequently judged. In addition to this, the medical profession's description of addiction as the effect of the "spirit of infirmity" and "learned helplessness" and its endorsement of the motivation-to-change approach purports that additional funds channelled to substance addicts will result in greater addiction (Social Benefits Tribunal, p.19). This suggests that addicts are quite capable of overcoming their addictions, but make a rational choice not to do so. This implication adds to the perception that if the addict is not clearly controlled by policy guidelines, he or she will take perpetual advantage of the entitlement programs that are put into place.

Room (2005) states that although alcoholism and drug addiction are categorized under an international classification of health disorders, in social terms "alcoholism and drug addiction are thoroughly moralized and derogated categories" (p.146). Citing a study released by the World Health Organization that places drug addiction and alcoholism at or near the top of conditions that garner social disapproval in Canada (WHO, 2004), the Tribunal's findings parallel Room's by acknowledging the "pre-existing stigma related to addictions" (Social Benefits Tribunal, p. 14). Stemming from this acknowledgment is a key component of the final decision in *Tranchemontagne* case. Although the Respondent's comments reflect a very real and common opinion of persons with substance addictions, it is disconcerting that the same opinion is reflected in subsection 5(2) of the *ODSPA*, adding to the stigma that is associated with them.

The use of exclusionary criteria by the *ODSPA* "forces persons with addictions to accept personal responsibility for their illness" (Sowers, 1998, p. 334) and deflects responsibility away from the government. By individualizing the burden of addiction, the government fails to consider how the stigma is not limited to addicts, but also extends to the communities in which they tend to co-habitat (Erickson & Callaghan, 2005). Stigma by association (Goffman, 2006) is a result of the ripple effect of addiction on the community, adding significant social and economic concerns to the issue. It can be argued that if substance addiction is continued to be regarded as a problem of the individual, then the ongoing government approach will be to "fix" that individual either through treatment, or in this context, by denying them greater income benefits and proper recognition as people with disabilities. The result is not only a failure to recognize and uphold equality rights for persons with addictions, but within the socio-economic realm, there is little attention paid to the importance of "building the economic resources and social capital of communities" (Erickson & Callaghan, 2005, p. 103). If the ODSP, as one of the two primary social benefit programs in Ontario omitted, or at the very least restructured, subsection 5(2) of the *ODSPA*, there is a potential to promote inclusivity through legislation. Such strategies might result in a better approach for communities

that are stigmatized by association, which in turn can provide the framework to provide opportunities for the addict to improve.

Section II

The Respondent argued that the Appellants and those who are denied income support by subsection 5(2) are better served by OW. The Respondent also maintained that because of the nature of their disability, the Appellants can be expected to recover and return to work. Their disability being of a short term nature, the Appellants are better served by the OW regime rather than the ODSP regime which is designed to provide for persons with long term disabilities (Social Benefits Tribunal, p.19).

Rioux and Valentine (2006) state that “arguments by governments grounded in economic rationalism or in biomedical views of disablement have led them to justify their ‘discretion’ over policy and spending at the expense of the exercise of rights for people with disabilities” (p.115). The Respondent’s argument is shaped to a great degree by the perception that alcoholism and consequently, other substance addictions, is an individual pathology. As an individual pathology, the costs associated with substance dependency are considered “an anomaly and social burden” (Rioux & Valentine, 2006, p.117), and this would suggest that there is an underlying motive to excluding substance addicts from the ODSP and from receiving its higher monthly payments. By classifying substance addiction as an individual pathology, the argument presented by the Respondent is that the best approach to substance dependency is its elimination, which is achieved by limiting the access substance addicts have to social benefits as outlined by the exclusionary clause of subsection 5(2) of the *ODSPA*. By hanging its hat on the individual pathology theory, the Ontario government justifies subsection 5(2) as well as its use of a cost-benefit analysis. Additionally, the qualification of substance addictions as individual pathologies that is reinforced by government social assistance programs compromises the concept of inclusivity and the realization of equality in two significant ways. Firstly, it creates gaps between disabled and non-disabled groups and secondly, it widens the distance between substance addicts and people with other types of disabilities.

Creating Gaps between Disabled and Non-Disabled Groups

Disability as an individual pathology theory has long been viewed as narrowly conceived and extremely limited (Rioux & Valentine, 2006). One of the goals of the disability community has been to educate society with the intent of replacing the misperception of disability as an individual pathology with the now commonly accepted and more robust theory that recognizes it as a social construct impacted by the overlap of physical environments, service provisions, and the way in which society is organized (Rioux & Valentine, 2006). Yet, while the social construction theory is accepted and lauded primarily as it pertains to both physical and intellectual disability, there seems to be resistance in extending and applying it to substance addiction.

Drawing on a classification scheme developed by Schneider and Ingram (1993), Brucker (2009) discusses the challenges concerning whether disability benefits ought to be provided for persons with substance addictions. The scheme defines four categories of target groups whose relationship with public policy and its payments is influenced by the social construction of and the current political power (or lack thereof) associated with their situation (Brucker, 2009). Her identification of each group is informed by whether the group's social construction is positive or negative and how this determination connects to its political strength or weakness. In this way, powerful, positive groups are identified as *advantaged*; powerful, negative groups are defined as *contenders*; weak yet positively constructed groups, *dependents* and the weak and negative groups, *deviants* (Brucker, 2009). Using this approach, Brucker argues that persons with disabilities can be identified as dependents, whereas substance abusers are classified as deviants. Brucker's classification takes steps toward clarifying how and why the distinctions between substance addicts and people with disabilities exist. This can contribute to a greater understanding of the continued resistance to accept substance dependency as being on par with other disabilities. As well, it is useful in understanding how our perceptions of one another and our given situations may contribute to the extent to which we accept marginalized groups in society. However, the constructs of substance addiction as an individual pathology may also be impacted by the way in which society perceives and participates in the use of alcohol and drugs.

Room (2005) defines four characteristics of alcohol and drugs that contribute to the way in which society perceives their use. Firstly, Room characterizes them as "valued physical goods" (Room, 2005, p. 144), which renders them as a commodity subject to trade and use. Here we might envision the consumption of expensive champagne purchased to commemorate the first anniversary of a successful company or the ingestion of cocaine purchased from an unknown source to celebrate the beginning of a new year. Secondly, their use is "a social behaviour" (Room, 2005, p.144), and as such there is a natural tendency to have both social and cultural connections to alcohol and drugs. This social connection creates a "social meaning" (Room, 2005, p.144) of the substance, establishing its use as being one that goes beyond the physical effect that it has on the user(s). In this second characteristic, we might consider the connection of comradeship at the local pub for an after-work drink or the group occupation of a low-income dwelling in the more dangerous part of town that has been established as the area's crack house. Thirdly, Room discusses how psychoactive substance use is a "peculiarly intimate behaviour" (Room, 2005, p.144) in that it is a substance taken into the body, and like other products that are consumed, has the potential of enhancing or diminishing nutrition, maximizing, or compromising pleasure. In this third example we might imagine the depressed individual consuming prescription anti-depressants to monitor and control their moods or the depressed individual who monitors their moods and anxiety by starting and carrying on their day by consumption of alcoholic beverages. Fourthly, the act of consuming psychoactive substances is presumably done to impact feeling and thinking (Room, 2005) and therefore alters behaviour. In this final characteristic, we might consider the employee stepping out for a cigarette during their hectic work day or a heroin user injecting into her arm before she begins her hectic work day.

The examples that are associated with each of Room's four characteristics of psychoactive substances are an attempt to demonstrate that there seem to be four distinct factors that impact society's perception and tolerance of substance addiction: its legal status, the level to which it is consumed, the frequency of use, and the context in which it is used. Contextualization of the recreational use of either drugs or alcohol within our own cultural and social experiences can distinguish the difference between recreational use and addiction. One's use of dependent substances as recreational, social, legal (or at least tolerated by the majority of society) tends to construe the conception that one's level of use is primarily gauged by self-control and discipline. Therefore, perception of our own ability to control the intake of addictive substances lends to a misperception that addiction is the result of a lack of self-discipline and a failure of personal will and strength.

Whose Disability Counts and Whose Doesn't

Secondly, by viewing substance addiction from the perspective of individual pathology, the *ODSPA's* explicit exclusion of substance addicts implies that substance dependency is not a legitimate disability. By doing so, it works to widen the gap not only between the non-disabled and disabled, but also between addicts and other people with disabilities. Distinctly defining what and what does not qualify as a disability under the *ODSPA* not only fails to include certain groups of persons, but also undermines the scope of Section 1 of the *OHRC* that maintains that "every person has a right to equal treatment with respect to services, goods..." (*OHRC R.S.O.1990, c.H.19, s.1; 1999 C.6, s.28, 2001, c.32, s.27 (1); 2005, c.5, s.32 (1)*). Furthermore, as Jones and Bassar Marks (1999) point out, "it is rare that a system is designed which really takes seriously the dignity of the person with a disability in (the) administrative process" (p. 369). This is clearly indicated by the Tribunal, which points out that in the context of *Tranchemontagne's* case, the financial threshold of assets and income that qualified applicants for ODSP are allowed is greater than that allowed by the OW (Social Benefits Tribunal, p. 16). Therefore, for persons whose disability is addiction and whose assets and income meet the financial eligibility of the *ODSPA* but exceed that of the *OWA*, eligibility under both *Acts* is denied.

It stands that a clear delineation of what is and is not an acceptable disability has long been a pillar within social assistance programs like the ODSP and accepted as a legitimate necessity in protecting the integrity of social entitlement (Jones & Bassar-Marks, 1999). And yet, the ongoing presence of such narrowly defined, exclusionary guidelines means significant disadvantages for marginalized persons in Ontario who are more apt to fall into the gaps that social policies create when defining disability.

Section III

The Tribunal finds that subsection 5(2) creates a distinction based on the personal characteristics, specifically the disability of the Appellants arising from their dependence on alcohol. The distinction imposes burdens and disadvantages on them that are not imposed on other disabled persons, withholding and limiting their access to income support and advantages available to other disabled persons. (Social Benefits Tribunal, p. 12)

The social constructions concerning alcoholism and drug abuse are, as Room (2005) states “heavily moralized territories often resulting in stigma and marginalization” (p. 143). For policy-makers, who choose to walk through such landscape, there ought to be a consideration of alternative approaches that work to diminish stigma. However, this often does not fare well on political agendas and election platforms, as political leaders and their policies may value stigma not as a restriction, but as a welcomed deterrent.

According to Room (2005) there are two literatures of stigma that are based on very different foundations. Firstly, there is the study of stigma associated with disability and illness, including mental illness that is focused on the value and necessity of neutralizing stigmas. This is evident in public policy initiatives that are designed with such intent in mind (Room, 2005). The second body of literature on stigma links it to crime. Here, stigma is considered a form of social control that can work as a common deterrent in upholding the seriousness of harsh imprisonment. If harsh imprisonment is applied too liberally, however, it can fail to maintain its influence in the management of undesirable behaviour (Room, 2005). The successful outcome of stigma as a form of social control relies on the notion that if no person is doing the stigmatized act then no person will be stigmatized. In this way, the deviant category as defined in Brucker’s classification would fail to exist. But does the idealistic conception of stigma as a valuable control method of addiction justify the advancement of the marginalization of substance addicts in society? In other words, if it is recognized that subsection 5(2) of the *ODSPA* contributes to the substance dependency stigma, does the potential of the stigma as a deterrent towards illegal drug use justify the burdens and disadvantages that are placed on substance addicts? In an attempt to answer this, we will briefly consider the United States Social Assistance Program as an example of a social policy approach that specifically excluded substance addiction from its eligibility criterion.

Bill 104-121

In 1996, the United States Congress passed *Bill 104-121* that altered the eligibility criteria in two American public assistance programs: Supplemental Security Income (SSI) and Social Security Disability Insurance (DI) (Roan Gresenz, Watkins, & Podus, 1998). While similar in their purposes, the original intent of the DI program was to replace lost income in families when the primary wage earner became disabled, whereas the SSI was designed to subsidize low levels of income earned by the disabled, blind, and elderly (Roan Gresenz et al., 1998). Within the SSI was a focused program, established in 1974, specifically for drug addiction and alcoholism. In the beginning, the population of this small, federally funded program was primarily made up of aging alcoholics who tended, more often than not, to suffer from alcohol-related impairments such as cirrhosis of the liver (Swartz, Baumohl, & Lurigio, 2004). However, toward the end of the program’s existence in the mid-1990s, almost 50% of the program participants were identified as illegal drug users. The negative profile of such statistics projected onto the American public the sensational portrayal of a social program that was “a wasteful entitlement that facilitated addiction by disbursing monthly checks to drug addicts” (Swartz et al., 2004, p. 97). The passing of the bill in 1996 idealized the theory that a loss of primary income would prompt substance abusers to return to work.

However, the likelihood of such outcomes was minimal given the extent of substance abuse and its related health problems (Roan Gresenz et al., 1998).

As argued above with direct reference to the *OWA*, such expectations only serve to emphasize substance addiction as an individual pathology, in which the individual is at fault for his or her moral failings. As such, the state interprets its responsibility toward substance addicts as one that is premised in fixing the problem of addiction by denying access to services that exist to uphold basic human rights such as equality and the right to health.

Although minimal and limited alternative support for substance addicts exists in the form of state general assistance (Roan Gresenz et al., 1998), the reality of the exclusionary criterion lies not only on the impact that *Bill 104-121* has had on substance addicts, but in the projection that many scholars have since made about the effect it would have on the American public. For example, along with a failure to integrate into the work force, Roan Gresenz et al. (1998) forecasted that the loss of monthly social assistance for substance abusers would generate an increased need for community programs that provide for the homeless such as shelters and soup kitchens. Linked to this same state of desperation and destitution is the potential for increased crime and homelessness. Furthermore, as Room (2005) indicates, the use of psychoactive substances not only results in health and social concerns for the user, it also has consequences of “injury and other harm to others and problems in work and family roles” (Room, 2005, p.146). Additionally, the extensive and complex social and health care systems that are put into place to handle health problems related to substance abuse can be significantly burdened when income support for addicts is decreased (Room, 2005; Roan Gresenz et al., 1998; Swartz et al., 2004). As Erickson and Callaghan (2005) have argued and as stated elsewhere in this paper, this is a reflection of the government’s failure to recognize the social and economic impact that denying addicts social assistance can have on communities and other persons.

Subsection 5 (2), par. (c) of the *ODSPA* states that a person is not eligible for income support if 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” (*ODSPA*, 1997). Similarly, in the United States, the SSI outlined the criteria used to determine whether or not drug addiction or alcoholism “is a *contributing* factor material to the determination of disability” (*Supplemental Security Income Act, Section 416.935, 1995*, emphasis added). By recognizing alcoholism and drug addiction as contributing factors to a disability, both *Acts* have found a way to provide accommodation in a limited manner that recognizes substance addiction without fully acknowledging that, in and of itself, addiction is a disability. Under both *Acts* a person who is physically disabled *and* an alcoholic, or an individual that is intellectually impaired *as well as being* a drug addict qualifies for income support. But the alcoholic and the drug addict without other disabilities do not. As another case in point, the *Americans with Disabilities Act (ADA)*, which was intended as a “broad, national civil rights-oriented mandate for the elimination of discrimination against individuals with disabilities” (Westreich, 2002, p.355 citing *American with Disabilities Act, Section 2: 1990*), states in Section 12114, that “a qualified individual with a

disability shall not include any employee or applicant who is currently engaging in the illegal use of drugs” (ADA, 1990, Section 12114, par. [a]).

These excerpts from Canadian and American legislations that are so very influential in the lives of addicts demonstrate how selective and conditional recognition of substance addiction within the context of other disabilities creates differential treatment among persons with disabilities. Westreich (2002) argues that this dichotomy reflects the challenge that exists for governments and society in “finding an acceptable definition of addiction that recognizes it as a physical and psychiatric illness without denying an element of personal responsibility with regard to substance abuse” (p. 355). There is a great deal to suggest that the legislation is basing its eligibility criterion not on those who are disadvantaged because of a disability, but on how disabilities were created and whether or not the cause of disability is socially acceptable.

In *Tranchemontagne*, the Social Benefits Tribunal states that, “it appears...that the legislature has differentiated between the Appellants group and other persons with the same disability as the Appellants, on the basis of *how* the disability rose” (Social Benefits Tribunal, p.17). When legislation is based upon how disabilities arise, it fails to guide society toward a greater concept of inclusivity. Admittedly, there is a challenge for governments and society to find a definition of addiction that strikes a balance between recognizing it as a disability and maintaining a level of personal responsibility for addicts. But perhaps striving to find a definitive version of what disability is and is not and then attempting to plug addiction into it should not be the primary objective, because when legislation addresses addicts from the base of *how* the disability was created, there seems to be little opportunity to focus on *what* addiction is. Instead, by moving away from how a disability was created, legislation becomes a force in educating society on *why* addiction is a disability. If policies go beyond how a disability was created, in particular as it pertains to substance addiction, there is opportunity to realize equal rights within social assistance programs. And by educating society on addiction and disability and creating awareness of the similar constructions that surround both, there is opportunity for marginalized groups to participate and integrate into society.

Section IV

...a positive intention cannot save the regulation... the legislature’s intention is much less important than the real effects of the scheme on the claimants...Groups that are subject to an inferior differential treatment based on an enumerated or analogous ground are not treated with dignity just because the government claims that the differential provisions are for their own good. (Social Benefits Tribunal, p.18)

By creating policy that recognizes the disabling effects of addiction, there is greater opportunity to create a deeper understanding of the variances that exist within society, to promote tolerance, and to diminish stigmas that obstruct those who seek to better their positions and themselves. Failing to include addicts as persons with disabilities might initially be viewed as the most progressive step toward ameliorating addiction and its rippling effects felt throughout the community. It might also be viewed

as a key factor in maintaining low-cost and even reducing a potentially significant strain on social welfare programs whose services ought to be reserved for those who deserve the support and whose disability is not self-inflicted. Additionally, proponents of keeping addicts on the outside of the inclusion framework might also consider it to be the most effective way to protect disability from negative social views that could hinder the progress made within the disabled community. It can be argued that when one type of substance addiction is established as a disability qualifying the individual for social assistance benefits, all substance addictions must also be given equal consideration and granted similar outcome. And within societies that struggle with the ongoing presence of addiction, the resentment that these outcomes would generate seems justified. However, while there are lessons to be learned from the Social Benefits Tribunal's ruling of *Tranchemontagne v. Ontario (Director, Disability Support Program)*, there are also four key lessons to draw from the fact that the case had legs and moved up the provincial justice system.

Firstly, the case itself is not only important to addicts and persons with disabilities. It is important to non-substance abusers and the non-disabled too because the realization of the rights of *all* persons who identify with a disability strengthens the rights of all (Senator Harkin, 136 Congressional Rec. S9684-03 as cited in Westreich, 2002, p. 357).

Secondly, by provoking a reconsideration of what society believed to be a clearly defined perimeter surrounding the issues of addiction, disability, and entitlement programs, the Tribunal has unleashed a debate on whether or not substance abuse ought to qualify as a disability. And what is important to realize is that the debate has begun and is indeed in progress. If the Tribunal had ruled against the Appellants, in all likelihood substance addicts, alcoholics, and subsection 5(2) of the *ODSPA* would be pushed far out of the public eye with very few persons being aware of the exclusionary clauses that are part of our social benefit programs.

Thirdly and equally important is that the case has inspired questions that have widened the scope of society's perception of addictions. In essence, the Tribunal's decision asks of the public, "what is a disability?" and such questions, in a proper forum, are explored and bring about a greater understanding of the complexities that surround people with disabilities.

Finally, the process of the *Tranchemontagne* case through the Ontario court systems and the Tribunal's decision is a solid example of the growing recognition by legislators that society's perception of substance abuse is influenced by the social policies that are in place. Indeed, perhaps the greatest lesson to be learned from this case is that by deciding to include alcoholism and other substance addiction as disabilities qualifying for income support in Ontario, the Tribunal and the legislation it presides over recognize the vital role they play in enhancing or diminishing inclusivity within the province.

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