

# Squeezing Size and Weight into Human Rights Law

## The Case for a Ground that Fits

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*The Ontario Human Rights Code provides legal protection against discrimination in the social areas of employment, membership, services, contracts, and housing based on several protected grounds. Contrary to popular fatphobic myths, research demonstrates that fatness is a characteristic that is either immutable or mutable only at great personal cost. Although fat people experience group disadvantage analogous to that associated with protected grounds like sex, race, and religion, “weight or size” is not a prohibited ground of discrimination under the Code. Fatphobia is a social justice issue and the Code must be amended to include “weight or size” as a prohibited ground. Legislative change is necessary to affirm the inherent dignity and worth of fat people and ensure that people of all sizes can participate as equals in their communities.*

### Introduction

Centuries ago, excess body fat signified wealth and prosperity because it implied that one was affluent enough to afford food and leisure. In the 20<sup>th</sup> century, these positive connotations dissipated and fat became associated with being lazy, gluttonous, immoral, and lacking self-discipline. Despite the similarities between being fat and other marginalized identities, many people fail to see fatphobia as a social justice issue because we view being fat as a choice (Stoll 2019). However, research overwhelmingly shows that weight loss can be dangerous and sustained weight loss is extremely difficult to achieve (Lyons 2009; Rothblum 2018). Although Canadians experience fatphobic discrimination in employment, healthcare, and other services, Ontario’s *Human Rights Code* (“Code”) provides them little recourse under the currently enumerated

grounds. This article will show that “size or weight” is analogous to other grounds protected by human rights legislation, as fat folks experience group disadvantage and are only able to change their size at great personal cost (Luther 2010). Consequently, this article will argue that the Ontario Legislature should amend the *Code* to add “size or weight” as a prohibited ground of discrimination to ensure that fat people have equal ability to participate in their communities.

### A Note on Language

Throughout this paper, I will use the term “fat” to describe a person who carries a large amount of flesh on their body. This term is preferable to the terms “overweight” and “obese” which are non-neutral terms introduced by the health industry to pathologize fatness (Stoll 2019). Since fatphobia has become prevalent in Western society, the term “fat” is often equated with negative connotations and interpreted as an insult. However, this paper seeks to disentangle the word “fat” from these negative connotations and remind the reader that “fat” is neutral descriptor of physical attributes. Reintegrating the term “fat” into our vocabularies is necessary to combat fatphobia because it paves the way for fat folks to accept, embrace, and celebrate their size (Fahs 2019).

### Debunking Social Myths

#### *Being Fat Is Unhealthy*

Discrimination against fat people is well documented and pervasive. However, many people believe that fat-

phobic discrimination is justified by medical research linking obesity to an increased risk of several diseases and overall mortality. However, the presentation of this research often fails to control for other significant health risk factors like diet and activity level (Vartanian and Smyth 2013). Researchers at the American Center for Disease Control and Prevention found that people falling within the “overweight” body mass index (“BMI”) actually tended to live longer than people classified as “normal weight.” Furthermore, they found that peo-

Fat people experiencing weight stigma also tend to engage in yo-yo dieting, which has been linked to heart disease, bone density loss, myocardial infarction, stroke, diabetes, suppressed immune function, and more. Even bariatric surgery, which involves surgical modification of the stomach and digestive system to induce weight loss, fails to produce significant and sustained weight loss in most patients (Lyons 2009). Ultimately, research has overwhelmingly shown that sustained weight loss is very rarely achieved (Gaesser 2009).

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ple classified as “underweight” had higher mortality rates than those in both the “overweight” and “obese” categories (Flegal et al. 2013). Additional research suggests that activity level, physical fitness, and overall diet quality are more important determinants of health than BMI (Vartanian and Smyth 2013). This research is supported by a study which found that physically fit individuals classified as “obese” had a lower mortality risk than unfit individuals classified in the “healthy” range (Lee, Blair, and Jackson 1999). These findings are consistent with the mission of the body-positive “Health at Every Size” movement, which emphasizes healthy behaviour changes over weight-based targets (Gallant and Lamb 2019).

### *Sustained Weight Loss Is Achievable*

Fatphobia is premised on the belief that body weight is within one’s own control and that anyone can lose weight if they simply eat less and exercise more (Forhan and Salas 2013). However, the stereotype that fat people are lazy and undisciplined because of their failure to permanently lose weight has little support in medical literature (Kristen 2002). Evidence suggests that underlying neural, physiological, and genetic factors contribute to higher body weights and make weight loss difficult (Vartanian and Smyth 2013). Furthermore, a randomized control trial testing the efficacy of popular diet plans demonstrated that even under optimal conditions, the average weight loss of participants was only 3.5 kg (Dansinger et al. 2005). Research also shows that the vast majority of those who are able to lose weight will regain the weight within two to five years (Vartanian and Smyth 2013). Further, dieters often end up gaining back more weight over time than they initially lost (Lyons 2009).

### *Weight Loss Improves Health*

Weight loss is often equated with health without consideration of the costs associated with bringing weight loss about. However, weight loss has been correlated with many negative health outcomes which often present greater health risks than excess body fat. For example, dieting has been linked to apathy, depression, irritability, anxiety, negative body image, and eating disorders (Lyons 2009). Specifically, growing evidence shows that individuals who try to achieve and maintain weight loss are at greater risk of developing binge eating disorder and bulimia nervosa (Tylka et al. 2014). Studies have also demonstrated that weight loss and weight fluctuations are correlated to risk of death from cardiovascular disease, even when controlling for initial weight, blood pressure, smoking, cholesterol level, and physical activity (Lissner et al. 1991). Those who seek to reduce their weight through bariatric surgery put themselves at significant risk of serious side effects including infections, malnutrition, pain, digestive and intestinal problems, internal bleeding, and death (Lyons 2009). Despite this evidence to the contrary, the medical community continues to pressure fat patients to lose weight as a catch-all mechanism of improving health.

### **The Manifestation of Fatphobic Discrimination**

#### *Overview*

Fatphobic discrimination often intersects with other forms of subordination. For example, women are disproportionately impacted by fatphobia because fat is deemed unattractive, and women are taught that the epitome of femininity is achieved by making oneself desirable to men (Bombak and Monaghan 2017). Furthermore, mothers are often blamed for the fatness of their children (Boero

2009). In this way, fatphobia and sexism combine to further marginalize women who do not live up to the standard of the ideal woman and mother. Fatphobia is also employed to mask and justify overt racism, as Black and Latinx communities tend to have higher BMIs and are often scolded for promoting “obesity” because of their historic tendency to celebrate larger body sizes (Stoll 2019). Furthermore, fatphobia is more likely to impact racialized communities, as Black and Hispanic populations are disproportionately classified as “obese” compared to White populations in the United States. Similarly, in Canada, Indigenous Canadians are categorized as “obese” at roughly twice the rate of non-Indigenous Canadians (Luther 2010). Another important intersection to consider is the correlation between low socio-economic status and high body weight (Tylka et al. 2014). While this is influenced by the fact that impoverished communities have lesser access to healthy food and exercise programs, existing as a fat person is also impoverishing. Given the prevalence of fatphobic discrimination, being fat attracts discrimination in education, employment, and healthcare, as well as downward social mobility in marriage (Stoll 2019).

The medical industry has played a pivotal role in exacerbating and perpetuating anti-fat sentiment in Western society. However, critics have argued that the so-called “obesity epidemic” is fabricated or blown out of proportion (Guthman 2013). For example, scholars argue that the classifications of “obese” and “overweight” are socially constructed categories rather than biological conditions (Ioannoni 2020). The medicalization of fatness has cast fat as a “health” problem, which perpetuates fatphobia in two significant ways. First, it renders fatphobia socially acceptable under the moral guise that policing fat bodies is done in fat people’s best interest (Felkins 2019). Second, it reinforces the idea that fat people have a moral obligation to shed pounds to achieve a “healthy” weight (Stoll 2019). Thereby, fat people experience constant pressure to produce and maintain a thin body as a condition of social approval (Bombak and Monaghan 2017).

### *Fatphobic Discrimination in Healthcare and Other Services*

Due to the medicalization of fat, fat people experience significant discrimination in healthcare. Fat people are typically counselled about their weight every time they visit a doctor, regardless of the reason for their visit (Tylka et al. 2014). Furthermore, when fat people bring medical concerns to their doctor’s attention, they frequently have their symptoms dismissed as being weight-related and are prescribed weight loss without any fulsome medical inquiry (Stoll 2019). This constant pressure to lose weight disrupts the patient–provider relationship, as fat patients

feel that they cannot visit their doctor for treatments unrelated to weight loss or without having lost any weight (Vartanian and Smyth 2013). Consequently, fat women are less likely to undergo preventative screenings which catch significant health problems in their early stages (Ioannoni 2020). For this reason, fat women experience higher rates of gynecological cancers (Stoll 2019).

Fatphobic discrimination in healthcare is also a significant issue for fat women who are pregnant, giving birth, or seeking to get pregnant. Research conducted in Canada on fat women’s experiences in reproductive healthcare found that fat women in all stages of reproductive care were made to feel that they were either at risk for potential health problems or a risk to their fetus/potential fetus (McPhail et al. 2016). However, these women typically received no information about how their higher weight could cause harm. Fat women also experience limited access to midwifery care, as midwives often refuse to take on patients classified as “obese” or are required to transfer “obese” patients to an obstetrician. Furthermore, fat women were frequently turned away from fertility care and advised to lose weight, often without any examination into whether weight was the cause of their fertility issues. Consequently, many participants engaged in weight-loss practices that they believed to be unhealthy and otherwise would not have engaged in if they had not been denied fertility care. In one of the study’s most striking revelations, a participant’s family doctor repeatedly refused to remove her intrauterine device, reasoning that it would be a disaster for the participant to become pregnant at her weight (McPhail et al. 2016). The medical overregulation of fat women seeking reproductive care may amount to modern-day eugenics, as discourses of risk are operationalized by medical professionals to prevent an “undesirable” population from reproducing (McPhail et al. 2016).

Furthermore, fatphobia exists across the service industry because it is often built into public spaces. For example, chairs and seats are designed to fit particular bodies and demarcate the space available for each person. Although air travel does not fall under the jurisdiction of the Code, commentary on the spatial exclusion of fat bodies on airplanes can be analogized to the larger issue of spatial fatphobic discrimination. Paradoxically, discussions about the inefficacy of airlines in accommodating fat bodies have centered on thin people’s discomfort with being forced into tight spaces alongside fat people. For example, American Senator Charles Schumer introduced an (ultimately unsuccessful) proposal to mandate minimum leg room requirements on commercial airplanes by commenting on the unpleasantness of sitting in-between two overweight people on a flight. However, when fat people highlight the inaccessibility of air travel, they are typically met with

online ridicule (Evans, Bias and Colls 2021). This suggests that there is a second, added element of spatial discrimination experienced by fat folks, as people tend to blame fat folks for taking up too much space rather than blame those responsible for designing seats that are too small.

### *Fatphobic Discrimination in Employment*

Multiple studies have shown that both men and women classified as “obese” by the medical industry experience significant discrimination in employment, including adverse treatment in hiring, salary, benefits, evaluations, and firing (Rothblum 2018). This discrimination is especially prevalent for fat women (Kristen 2002). An analysis of Canadian data revealed that there are significant negative associations between BMI and personal income for women classified as “obese” and that this pattern was consistent between both white and racialized women (Chu and Ohinmaa 2016). Weight discrimination in employment can discourage people from investing in their own human capital, as fat people may conclude that there is no value in pursuing higher education when they are less likely to derive a real world benefit from it in the labour market. As Kristen aptly describes it, “discrimination becomes a vicious cycle in which fat people are unable to secure employment for subjective reasons, are thereby discouraged from investing in their skills, and as a result become less objectively employable” (Kristen 2002). This theory is supported by research, which shows that “obesity” has a statistically significant negative effect on women’s participation in the Canadian labour market. The estimated impact revealed by this study is comparable to the impact of mental health or illicit drug use on labour market participation (Sari and Osman, 2018). Consequently, fatphobic discrimination seems to play a significant role in perpetuating the gendered wage gap.

### **How the Code Fails to Address Fatphobia**

There are two main ways that the Ontario *Human Rights Code* may currently provide protection against fatphobic discrimination. First, the medicalization of fatness may give some applicants protection under the ground of “disability or perceived disability.” Secondly, case law suggests that applicants may be able to recover for fatphobic harassment under the grounds of “sex” and “sexual harassment.” Furthermore, “genetic characteristics” may soon become a *Code* protected ground and offer some protection against fatphobic discrimination.

#### *A) Disability and Perceived Disability*

In 1991, the Ontario Board of Inquiry declined to recognize obesity as a “disability” under the *Code* (Ontario v. Vogue Shoes). More recently, the Human Rights Tribunal

of Ontario (“HRTO”) adopted a different approach and recognized obesity as a freestanding disability (Ball v. Ontario 2010). There, the HRTO held that the special diet allowance provided by Ontario to “obese” recipients of social assistance was discriminatorily low. Consequently, the HRTO ordered the respondent to provide special benefits to recipients with obesity to accommodate their unique needs. This suggests that fat persons medically diagnosed as obese can rely on the ground of “disability” to establish a right to weight-related accommodations. Applicants have also obtained human rights protection in cases of fatphobic discrimination using “perceived disability.” In Ketola v. Value Propane (2002), the Ontario Board of Inquiry confirmed that discrimination because of disability does not have to be tied to a person’s actual lack of ability, as discrimination can also occur when someone “seems sick” or “looks disabled.” Later, in Lombardi v. Walton Enterprises (2012), the HRTO held that the applicant was harassed on the ground of “perceived disability” (perceived obesity) when his colleagues sent him mean text messages calling him “fat.” Thus, applicants who are subject to explicitly weight-related put downs can likely rely on “perceived disability” to obtain redress for discrimination.

Although “disability or perceived disability” provides some protection against fatphobic discrimination, this protection is insufficient. First, it will not cover all cases of sized-based discrimination. Although the HRTO has accepted “obesity” as a freestanding disability, individuals who are not medically classified as “obese” may be left without protections and accommodations. Second, encapsulating size discrimination under “disability” further pathologizes fatness and perpetuates fatphobic myths equating fat and poor health (Lyons 2009). Most importantly, qualitative research suggests that fat folks are uncomfortable with their fatness being categorized as a disability (Kai-Cheong Chan and Gillick 2009). Because of this, reducing fatness to disability creates an unacceptable conflict with the aim to create “a climate of understanding and mutual respect for the dignity and worth of each person,” as set out in the *Code*’s preamble.

#### *B) Sex and Sexual Harassment*

The second way that the *Code* may address fatphobic discrimination is under the ground of “sex.” In Shaw v. Levac Supply (1990), an Ontario woman who endured derogatory comments about her weight in the workplace successfully sued her employer for sexual harassment. There, the Board emphasized that the *Code* must be interpreted purposively in light of its preamble, which makes it the public policy of Ontario to “recognize the dignity and worth of every person.” The Board reasoned that comments about a female co-worker’s unattractiveness constitute sexual harassment, as insinuating that you *would never* want to have sex with someone is the

inverse of insinuating that you *would* want to have sex with them. Therefore, comments suggesting that the applicant was physically unattractive were comments of a sexual nature. Later, in *Rampersadsingh v. Wignall* (2002), the Canadian Human Rights Tribunal relied on *Shaw* and held that the respondent's descriptions of the applicant as "fat" and a "Boy-George look-alike" constituted sexual harassment.

While these decisions are positive, they are approximately twenty years old and have not been relied on in recent

applicants may have to present onerous evidence including genetic testing results, expert evidence, and/or evidence describing the size and weight of their relatives. Essentially, the ground would impose a burden on applicants to establish that they are not blameworthy for their fatness because their genetics made them fat. This reinforces the idea that being fat is undesirable and an illegitimate choice. However, the prevailing view in anti-discrimination law is that marginalized groups should not have to prove that they *deserve* the right not to be discriminated against (Moreau

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human rights decisions. This jurisprudence also leaves open the question of whether fat men can establish that fatphobic comments made against them were discriminatory. Similarly, it is unclear whether a fat woman could establish that fatphobic comments from a straight woman or a gay man constitute sexual harassment because the reasoning from *Shaw* is rooted in the notion of sexual interest (*Shaw v. Levac Supply* 2004). Nonetheless, the usefulness of "sex" and "sexual harassment" in addressing fatphobic harassment may have been rendered moot by the decision in *Lombardi*, described above (*Lombardi v. Walton Enterprises* 2012).

### *C) Genetic Characteristics*

The proposed addition of "genetic characteristics" to *Code* grounds may provide another avenue for protection from fatphobic discrimination. This amendment was proposed through Bill 40, which defines "genetic characteristics" as "genetic traits of an individual, including traits that may cause or increase the risk to develop a disorder or disease" (Human Rights Code Amendment Act 2018). Any assessment of the potential efficacy of the ground of "genetic characteristics" in addressing fatphobic discrimination is necessarily speculative because the Bill has not yet been passed into law. However, the ground will likely engage fatphobic discrimination because scientists have identified more than 100 genes that contribute to the etiology of "obesity" (Atkinson 2005). The presence of a strong genetic component is also supported by a study of adopted children (Stunkard et al. 1986). Consequently, applicants may be able to establish that fatphobic discrimination constitutes unlawful discrimination based on "genetic characteristics."

To make out a successful "genetic characteristics" claim,

Individuals who are fat by choice or for non-genetic reasons still deserve protection from fatphobic discrimination. Therefore, even the most expansive application of "genetic characteristics" to fatphobic discrimination will be insufficient. A ground which encompasses all forms of fatphobic discrimination without further pathologizing fatness or imposing strenuous evidentiary burdens on applicants is necessary.

### **Is "Size or Weight" an Analogous Ground?**

The various avenues through which human rights protections have been extended to combat fatphobia suggest that adjudicators recognize the need for legal protections in this area but must get creative and sometimes stretch the law to provide it. Discrimination law engages the "wrongful differentiation" question: when is treating someone differently based on their possession of a certain trait morally wrong? (Moreau 2020). The answer to this question is more complex than asserting that it is wrong whenever we distinguish people based on traits which are arbitrary or irrelevant to the decision at hand (*McGill University Health Centre v. Syndicat des employés de l'Hôpital général de Montréal* 2007). When determining whether a trait should be a protected under a ground of discrimination, most Courts and Tribunals require the satisfaction of two criteria: the group possessing the trait must experience collective disadvantage and the trait must be either immutable or mutable only at great personal cost (Khaitan 2015).

### *A) Group Disadvantage*

Like the grounds already protected under the *Code*,

weight/size is a trait by which a social group (fat folks), are subordinated. As I previously explained, fat people experience group disadvantage in healthcare, services, and employment. Although fatphobic discrimination does not have as long a history as gender or race-based discrimination, the disadvantage it imposes has been documented for more than 40 years (Luther 2010). Like other subordinated social groups, fat people are the subject of pervasive stereotypes that allege that they are lazy, stupid, unclean, and lacking discipline (Forhan and Salas 2013; Ioannoni 2020). Fat people also have diminished access to power and authority, as they are perceived as being less competent, less trustworthy, and having lesser social status than their thin counterparts (Vartanian and Silverstein 2013). Additionally, fat folks are subordinated by structural accommodations like seats, clothing, and medical equipment designed under the presumption that users will be thin (Evans, Bias and Colls 2021; Maxwell and Sharma 2019). Consequently, fat people experience significant collective disadvantage.

### ***B) Immutability***

Grounds deserving of human rights protection must also be either unchangeable, or changeable only at great personal cost (Luther 2010; Khatian 2015; *McGill University Health Centre* 2007). Despite the myth that size is mutable, research has overwhelmingly shown that sustained weight loss is usually unattainable and/or unhealthy (Lyons 2009; Gaesser 2009). Furthermore, accepting weight as mutable disproportionately harms residents of low-income communities, as they often lack the resources to buy healthy food and the time/money to access exercise programs (Tylka et al. 2014). Even where weight loss is possible, size is not an attribute that people should be forced to change to access freedom from discrimination. The ground of “size or weight” is comparable to pregnancy, religion, and family status, which are in some sense within one’s control but involve highly important and personal choices. Likewise, the physical dimensions of a person’s body are a deeply personal matter, as they are contingent on individual decisions about what one eats, how one spends free time, and how one’s body feels and functions (Luther 2010). Even where weight/size is mutable, it is mutable at great personal cost. Accordingly, “size or weight” is an analogous ground and should be added to the *Code* to ensure that people of all sizes are afforded the dignity and respect they deserve.

### **Assessment of Potential Counterarguments**

Although no Canadian legislation currently prohibits fatphobic discrimination, weight-based discrimination

has been illegal in Michigan since 1978. Research suggests that this legislation is effective, as a study found that Michigan women experienced fewer gendered impacts of fatphobia than women in other states (Roehling et al. 2013). Furthermore, at least one study suggests that Canadians are supportive of weight-based civil rights protections, particularly in the context of employment (Puhl et al. 2015). However, Canadian legislatures are hesitant to pass fat-positive legislation.

In 2017, the Manitoba Legislature rejected a Bill that sought to amend Manitoba’s human rights code to ban discrimination based on “physical size or weight.” Critics of the bill argued it was too vague because the wording “physical size or weight” would be hard to enforce. One backbencher expressed this concern by stating, “I know I could lose a few pounds. But what are the measurements we are using?” (Lambert 2017). While this concern is understandable, it holds little weight in practice. To establish a case of discrimination, applicants have the burden of proving that they experienced an adverse impact with a nexus to a code ground (*Abbey v. Ontario* 2016). Given that many *Code* cases do not involve explicitly discriminatory behaviour, the HRTO is practised at determining whether adverse treatment is linked to a protected ground or is better explained through non-discriminatory factors.

Another critic of the Bill argued that it would run counter to provincial efforts to encourage people to live healthier lifestyles and reduce obesity rates (Lambert 2017). This argument is not very persuasive given the research linking weight loss with negative health outcomes (Vartanian and Smyth 2013). Furthermore, it is inconsistent with evidence showing that fatphobic stigma results in the perpetuation of obesity rather than the amelioration of it (Forhan and Salas 2013). Instead of motivating fat people to lose weight, studies show that weight-stigma makes them more likely to avoid physical activity (Vartanian and Shaprow 2008; Vartanian and Novak 2011; Bauer et al. 2004; Zabinski et al. 2003). Additional studies have demonstrated that “obese” individuals confronted with weight-stigma are more likely to overeat (Myers and Rosen 1999; Puhl and Brownell 2006). This evidence suggests that public health is better advanced by promoting inclusion than shaming fat people for their size.

### **Conclusion**

For the reasons described above, the Ontario Legislature should add “size or weight” to the list of prohibited grounds of discrimination under the *Code*. The term “size” is useful alongside “weight” to account for diversity of body composition. Drawing on the legislation in Michigan, there is no special size or weight at which legal protection against

discrimination is provided (State of Michigan Legislature 1976). Instead, any weight- or size-based discrimination in services, housing, contracts, employment, or membership will be illegal unless accommodation would constitute undue hardship or, in the employment context, size or weight corresponds to a bona fide occupational requirement. Fat people in Ontario should not have to shrink themselves or prove that they are not to “blame” for their fatness to be entitled to dignity and respect. Prohibiting discrimination based on “size or weight” is necessary to ensure that fat folks can live healthy lives, celebrate their identities, and participate as equals in their communities. Without this protection, the *Code* falls short of its aim to recognize the inherent dignity and worth of every person.

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## ELIZABETH GREENE

### Return of the Nobodies

We are the nobodies  
 overaged, oversized,  
 bulges in the wrong places,  
 invisible to judgements' eyes.  
 Curves undisguised by flowing clothes  
 bodies disjunct from strenuous souls.  
 Unseen, we watch and we record.

One by one we're no one.  
 Together we're a force.

i

Show me an extra fat cell  
 and I'll show you an unkindness  
 that's been absorbed and not passed on.

What if Rapunzel had stayed another twenty years in her tower  
 with no company besides the ever-souring witch?  
 If Beauty's Beast had turned into an ogre, not a prince—  
 She'd have to stay careful of the kids, and somethings give.  
 Even when the story gets back on track, some changes stay,  
 swelling the cells, filling out the skin.

Or take my cat Shekinah, whose careless mother  
 Binah was always dashing out to play—  
 two kittens died at five and seven days,