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**Promoting Equality:  
A New Vision**

**2000**

## (e) Social Condition

### Issue

We were asked to consider whether social condition should be added as a prohibited ground of discrimination in the Act. None of the current grounds are specifically economic in nature. However, we certainly came to understand the close connection between many of the current grounds and the poverty and economic disadvantage suffered by those who share many of the personal characteristics already referred to in the Act.

This section deals with discrimination on the ground of social condition. A separate but related issue is whether the Act should guarantee certain social and economic rights. That issue is discussed in the next section of the report.

### What We Heard About Poverty

During our consultations we heard more about poverty than any other single issue. Many groups are very concerned by poverty in Canada and want government to do something to assist the economically disadvantaged.

We heard a great deal about the growing disparity between poor people and the affluent in Canada. We were struck by the desire expressed by the people who attended our consultations for an instrument to fight back. They wanted the Act to become that instrument.

**"Poor people face discrimination every day — indignities, lack of respect from the media, business, and all levels of government. A growing proportion of Canadians are living in poverty, and that poverty is deepening. Growing up in poverty has life-long effects on people's lives and their ability to be healthy and participate in their community." (End Legislated Poverty)**

**"Discrimination on the basis of poverty is not simply an attack on the dignity and equal citizenship of people living in poverty. It is itself a major cause of poverty." [...]**

**Systemic patterns of discrimination because of social condition in the private sector [...] exacerbate poverty. Here they are immune from Charter scrutiny and adequate human rights protections for the poor are therefore of even more critical importance [...]** Systemic issues of credit-worthiness assessment, deposit requirements, co-signor requirements and the like loom large in the denial of services, housing and

facilities to poor people." (Charter Committee on Poverty Issues)

**"It is possible that a more expansive application of this ground might have a considerable impact, for example, in corrections and conditional release, given that a large majority of federally sentenced offenders come from relatively disadvantaged socio-economic situations." (Solicitor General Canada)**

**"The problem with the term 'social condition' is that it is so lacking in specificity that it applies to every member of society and does so on numerous levels. It would appear not to be directed to protecting a particular group, but everybody. [...] A person's social condition at any particular point in time is not necessarily an immutable characteristic [...] and thereby fails the test of immutability. Nor is 'poverty' — if that is the actual characteristic sought to be protected under the description 'social condition' — an immutable characteristic of any individual. There is no question that poverty is an unfortunate occurrence in our society, but one that contains the possibility of being overcome given the variety of mechanisms in place to assist those who are in need." (Canadian Bankers Association)**

**"The immigration program strives for a balance between humanitarian, family reunification and economic objectives. 'Social condition,' if adopted as a ground of discrimination [...] could bring the CHRA into conflict with the economic objectives of the *Immigration Act* — that is to select and admit people to Canada that can contribute to the country's social and economic well-being [...] If the costs of immigration are seen to exceed the benefits, support for immigration overall could diminish." (Citizenship and Immigration Canada)**

**"Social condition enables us to recognize the specifics, characteristics and vulnerability of economically disadvantaged persons and to prohibit distinctions based on these objective data and even on stereotypes, disadvantages and prejudices." (Ligue des droits et libertés)**

### Bill S-11

In June 1998, the Senate passed Bill S-11 to add the ground of "social condition" to the Act. In the spring of 1999, the Bill was defeated in the House of Commons. At that time the Minister of Justice said she wished to address this issue within the comprehensive review of the Act this Panel was asked to conduct.

### Other Human Rights Legislation in Canada

The Québec *Charter of Human Rights and Freedoms* is the only provincial human rights law prohibiting discrimination on the ground of social condition. However, several other provinces and territories include narrower grounds, which cover characteristics that would likely be covered by the ground of social condition. Only the federal, New Brunswick and Northwest Territories acts offer no protection from similar discrimination. Newfoundland's legislation uses the term "social origin." Discrimination based on "source of income" (or "lawful source of income") is prohibited in the legislation of Nova Scotia, Alberta, British Columbia, Manitoba, Prince Edward Island and the Yukon. Ontario and Saskatchewan use the term "receipt of public assistance." These grounds do not always apply to all areas covered by the legislation. In British Columbia, for example, the prohibition of discrimination based on the source of income only applies to housing. Ontario prohibits discrimination based on the receipt of social assistance, but only in relation to accommodation (housing).

### International Obligations

Internationally, the United Nations Committee on Economic, Social and Cultural rights, in its concluding observations on Canada's performance under the *International Covenant on Economic, Social and Cultural Rights* in December 1998, expressed concern about this issue. The Committee urged federal, provincial and territorial governments "to expand protection in human rights legislation [...] to protect poor people in all jurisdictions from discrimination because of social or economic status."

### What Does "Social Condition" Mean?

We were asked by the Minister of Justice to consider the addition of a ground of "social condition" specifically. To consider this question, we need to determine what this might mean and, if we decide to recommend adding it to the Act, whether there should be a statutory definition.

The Québec experience with this ground provides the most guidance about its meaning. Jurisprudence has developed over time. The Québec courts and Tribunal have clarified the factors that should be considered in determining whether an act is discriminatory on the ground of social condition.

In the case of *Commission des droits de la personne du Québec v. Gauthier* (1993), the Québec Tribunal said: "[T]he definition of 'social condition' contains an objective component. A person's standing in society is often determined by his or her occupation, income or education level, or family background. It also has a subjective component, associated with perceptions that are drawn from these various objective points of reference. A plaintiff need not prove that all of these factors influenced the decision to exclude. It will, however, be necessary to show that, as a result of one or more of these factors, the plaintiff can be regarded as part of a socially identifiable group and that it is in this context that the discrimination occurred."

This language is generally consistent with guidelines concerning the meaning of social condition issued by the Québec Commission in 1994.

Though "social condition" does not mean the same thing as poverty, for the purpose of our examination, we will take it to refer to identifiable classes of individuals in disadvantaged social and economic situations. This identification rests on the social and economic indicators of disadvantage these individuals share (the objective component), as well as the way they are perceived by others (the subjective component). The idea that a group can suffer because of the perceptions of others and can be defined by those perceptions is contrary to the concept of equality. This is how stereotypes work.

### Is There a Need for the Ground of "Social Condition"? Does Such Discrimination Come Within Federal Jurisdiction?

Our research papers and the submissions we received provided us with ample evidence of widespread discrimination based on characteristics related to social conditions, such as poverty, low education, homelessness and illiteracy. We believe there is a need to protect people who are poor from discrimination.

Barriers to employment for the socially and economically disadvantaged do not differ a great deal between federal and provincial jurisdictions. Educational requirements set unnecessarily high can create a serious barrier. The unemployed have more difficulty finding a job than those who are employed. The requirement that job applicants pay for an aptitude test, or supply tools or expensive uniforms can also be barriers to employment for the poor.

Barriers to services exist within federal jurisdiction. In banking services, research papers and submissions made to the Panel referred to the attitudes of bank employees and the large number of identification documents required just for opening an account as major barriers. People with low incomes were less likely to have bank accounts than those with higher incomes. They are less likely to possess certain pieces of identification needed for these purposes. Some banks are moving out of lower income neighbourhoods. The freezing of funds from cashed cheques has a significant effect on the poor, who cannot afford to wait for the cheque to clear. People who are poor even have trouble cashing government cheques. We were told during our consultations that complaints were filed with the Commission on behalf of single mothers denied mortgages because they were on welfare or could not meet minimum income requirements. The complaints were dismissed because social condition was not a ground. In the case of *D'Aoust v. Vallieres* (1993), the Québec Tribunal held that the refusal of a mortgage by a provincially regulated financial institution was discrimination on the ground of social condition when evidence showed the complainant had sufficient means to obtain a mortgage, but was refused when the institution found out she was a welfare recipient.

We were told that people who are poor experience problems with telephone services. In its "Terms of Service" published in Telephone Directories, one company advises that generally, it cannot require deposits from an applicant or customer at any time unless:

- (a) the applicant or customer has no credit history with the company and will not provide satisfactory credit information;
- (b) has an unsatisfactory credit rating with the company due to payment practices in the previous two years regarding the company's services; or
- (c) clearly presents an abnormal risk of loss. These terms were approved by the CRTC. We were told in a submission of at least one complaint filed with the Commission challenging a company's decision to categorize a single mother on welfare, but with a spotless credit history, as "an abnormal risk of loss" solely because she was unemployed. According to the submission, the complaint was dismissed by the Commission because "social condition or receipt of public assistance is not a prohibited ground of discrimination under the CHRA."

Housing on Indian Reserves is another matter that falls within federal jurisdiction. In its Concluding

Observations on Canada's last report on compliance in 1998, the United Nations Committee on Economic, Social and Cultural Rights expressed "deep concern" about "the shortage of adequate housing, the endemic mass unemployment and the high rate of suicide, especially among youth in the Aboriginal communities."

Many of these factors, such as low income and lack of education, are also barriers facing groups characterized by other grounds, such as race and disability. A disproportionate number of people from the First Nations, for example, live in extreme poverty and have few educational and employment opportunities.

Some barriers related to poverty could be challenged on one or more of the existing grounds. However, these cases have rarely been successful. They are difficult to prove because they do not challenge the discrimination directly. Such a case may require complex expert testimony about the economic status of the group affected, since it may be necessary to show a disproportionate effect on a particular group. Evidence can be even more difficult to obtain if the case involves the interaction of multiple grounds. Perhaps more fundamentally, if a policy or practice adversely affects all poor people or all people with a low level of education, a ground-by-ground consideration of the issue can be seen as a piecemeal solution that fails to take into account the cumulative effect of the problem.

### Is "Social Condition" Similar to Other Grounds Now Included in the CHRA?

The Act's focus on the prohibition of discrimination on the listed grounds defines its purpose in many ways. The current grounds represent the kinds of distinctions that have had a discriminatory effect on individuals in the past and can be expected to continue to have this effect unless steps are taken to prohibit their unjustifiable use.

We thought it would be appropriate to consider whether the ground of social condition would result in similar protection for similar reasons.

In deciding whether an individual or a group are protected by the equality provisions of the Charter, the courts usually consider the following:

- (a) whether the personal characteristic is immutable because it is beyond the control of the individual or cannot be altered except at an unacceptable cost to the individual;
- (b) whether those possessing the characteristic lack political power;

- (c) whether there are historical patterns of discrimination against individuals with this characteristic;
- (d) whether members of the group experience similar social and economic disadvantage;
- (e) whether there is a relationship between the personal characteristic shared by members of the group and the grounds listed in the Charter.

The general definition of social condition we are using covers persons who experience patterns of social and economic disadvantage. The aim is to target protection by using personal characteristics in the same manner as equality concerns are raised under the Charter.

The Panel can hardly dispute the fact that characteristics such as poverty and a low level of education have historically been associated with patterns of disadvantage. However, some of the other criteria are open to debate. For example, some people escape poverty and improve their level of education. The Québec definition of social condition covers such situations as being on welfare. If those factors are treated as constituting singly a specific social condition, they do not appear immutable. It is fair to ask whether social condition at any time should be considered immutable.

Further, the courts have not often found such characteristics as occupation or job status, income level or source of income, residence or detention in a correctional facility to be protected grounds under the Charter. But there have been a few cases where the courts have protected from discrimination groups defined by a number of grounds at once, such as single motherhood, race and age.

Research done for the Panel shows that poverty is immutable in the sense that it is beyond the control of most poor, at least over considerable periods of their lives. There is evidence that poverty is inherited because individuals whose parents were poor are more likely to live in poverty. Similarly, there is a correlation between one's educational level and that of his or her parents. Our research also shows that while people may move from social assistance to a low-paying job to employment insurance, few actually move into income levels high enough to escape their condition of poverty.

We heard a great deal about prejudice against people just because they are poor. The National Anti-Poverty Organization stated before the Senate committee:

"[...]The issue here is not poverty itself, but, rather the gratuitous discrimination against the poor.[...] Those of us on the receiving end of this treatment understand what a blatant affront to human dignity

this treatment is." (Fred Robertson, NAPO testimony, Senate Standing Committee on Legal and Constitutional Affairs)

There is a difference between a valid justification for the refusal of a loan and a denial based on stereotypes about the poor.

We were given examples showing that prejudice against the poor goes so far as to question their concern for their children and their parental ability.

"What consigns children to poverty is a change in attitude of their parents.[...] To enter into parenthood single, as a lark, because you just felt it would be a fun thing to do, is impossibly selfish. We compound their [the parents'] folly by telling them not to bother learning how to feed their children a nutritious breakfast. Don't worry, we say. Send your kids to school and we'll set up a breakfast program. Do vast droves of kids starve to death during the summer vacation when the programs aren't available? Of course not. Their mothers are forced to feed them." (Breaking the poverty cycle, November 28, 1999, by Christina Blizzard — *Toronto Sun*)

"If we want children to get a good and healthy start in life, what we need more than anything else is responsible parents." (The Fraser Institute, Fraser Forum, January 1997, In the Interests of Children, Chris Sarlo)

"It might be good for teachers and health workers who come in contact with Canada's poorest parents to help them as well. It's possible that loving attention to one's children cannot be learned. But what a shame it would be if our compassionate society did not try to teach it." (Editorial — *Globe and Mail*, April 21, 1997)

"That's why health and education policy makers should help Canada's most needy children, often the poorest ones, by helping their mothers and fathers learn how to be better parents." (Editorial — *Globe and Mail*, April 21, 1997)

"In general, children in poor families have the parental deck stacked against them in the first three years of their life.[...] A supply-side approach to poverty would invest mightily in the time availability and parenting skills of poor parents.[...]" (William Thorsell — *Globe and Mail*, November 30, 1996)

Ontario Premier Mike Harris cut a \$37 welfare supplement for pregnant beneficiaries — expressing concern that the funds were squandered.

“What we’re doing, we’re making sure those dollars don’t go to beer, don’t go to something else, but in fact, if there are requirements for the health of the mother, they’ll get it from us. [...] But it won’t be a blanket cheque that can be spent on anything. It will be spent to the benefit of the child.” (Premier apologizes to welfare recipients, *Ottawa Citizen* — April 17, 1998)

He later apologized for the comment.

Our research produced the following quotation taken from a “confidential” memo about the groups used in political focus testing for the federal strategy on child poverty.

“Somewhat surprisingly, moral explanatory accounts of poverty were more common and powerful perceived causes of poverty: lack of responsibility, effort or family skills were universally cited explanations ... Most secure participants see children as deserving and their parents as less so [possibly unwitting agents of their children’s misfortune] [...]

Welfare recipients are seen in unremittingly negative terms by the economically secure. Vivid stereotypes [bingo, booze, etc.] reveal a range of images of SARs [Social Assistance Recipients] from indolent and feeble to instrumental abusers of the system. Few seem to reconcile these hostile images of SARs as authors of their own misfortune with a parallel consensus that endemic structural unemployment will be a fixed feature of the new economy.” (Obtained by Jean Swanson of End Legislated Poverty under Access to Information from HRDC)

There is an interrelationship between the ground of social condition and other grounds listed in the Act such as race, sex and disability. The severely disabled and single older women are among the poorest in Canada. Women still earn less than men on average. Illiteracy (in French or English at least) might be associated with disability or national or ethnic origin. Yet, as noted earlier, even taken together, those grounds do not encompass all people who are illiterate.

Many expressed the concern that social condition is too vague, unlike grounds such as sex and colour. The income and education criteria are relative. However, our research suggests that if we were to recommend a

narrower ground of discrimination, such as receipt of public assistance, the protection provided by the Act would become fragmented. Many would only be protected temporarily while on welfare and lose that protection when their source of income changed, even though the disadvantages they suffer might remain the same. The term “poverty” should be avoided because there is no consensus about its meaning or measurement. Our research tells us that the Low-Income Cut-off (LICO) set by Statistics Canada is used by most researchers in Canada, but Statistics Canada only sanctions its use as an indicator of “strained economic circumstances,” not as a poverty threshold. On the other hand, the very existence of stereotypes about the poor shows they are often seen and treated as a distinct group. Existing grounds such as age and disability are also relative, and there is considerable debate about how to define disability and race.

Some might say poverty and illiteracy are less likely to form part of an individual’s identity than sex or religion. On the other hand, our research shows that the persistence of such factors and the way they shape social and economic relationships suggest they are a part of one’s identity or perceived identity.

### Adding the Ground

We believe it is essential to protect the most destitute in Canadian society against discrimination. At the very least, the addition of this ground would ensure there is a means to challenge stereotypes about the poor in the policies of private and public institutions. We feel that this ground would perform an important educational function. It sends out a signal about assumptions and stereotypes to be taken into account by policymakers.

Litigation on this ground should not displace study, education and the need to look at other means to find solutions to the problems experienced by the people who are poor. The best way to combat poverty and disadvantage remains private and public activity aimed at improving the conditions of the socially and economically disadvantaged. Perhaps the addition of this ground will spark more of this activity. We hope so.

As a further step, the ground of social condition should be added to the list of grounds in the affirmative action or equity program defence. Public and private organizations should be able to have programs aimed at improving the conditions of individuals on the grounds specified in the Act, including this one.

We heard some concerns that adding this ground could overwhelm the Commission with claims based on social condition. However, the Québec experience does not suggest there would be a large number of claims on such a ground.

The Panel also believes that the Commission should carry out studies on social condition in the furtherance of its educational purpose.

### The Definition

The Panel believes that the ground of social condition should be defined in the Act in a manner similar to the Québec definition, with the addition of a provision limiting it to disadvantaged persons.

The Québec definition quoted above is not in fact a single definition, but a list of characteristics to look for in assessing whether an action is discriminatory. As the Québec Tribunal states, it is not necessary to prove the presence of all of these characteristics (objective and subjective) in a single case. But the characteristics must describe a socially identifiable group (the objective component). The subjective component is an important element of the definition because it helps distinguish between people perceived as part of a socially identifiable and stereotyped group, and other individuals, such as students, who may temporarily have a low income but are not subject to such perceptions of inferiority.

The fact that a tribunal must consider whether the claimant has shown the presence of a number of factors in what is alleged to be a discriminatory act, rather than a single personal characteristic as is the case with most of the other grounds, makes the tribunal's job harder. It would be simpler if the tribunal only had one factor to consider, for example, the level of income. However, the advantage of the multiple factor approach is that it reflects the subtlety of the perceptions about a group of disadvantaged individuals who may not all share the same characteristics, but who suffer from a similar sort of persistent disadvantage.

The Québec definition also contains factors that are a matter of degree, such as the level of income or wealth and education. This means that this ground is different from a ground such as sex. However, the Act prohibits discrimination on such grounds as disability, which is often a matter of degree. The fact that the definition contains a number of factors makes the definition more flexible and avoids the need to make specific rules about where to draw the poverty line, for example. This way, poverty would be considered as one factor in

determining whether a person's social condition has resulted in discriminatory government or private action. Other relevant factors could be considered and weighed to determine whether the treatment of this individual or group of individuals was based on this ground.

The Panel considered whether the ground should cover only disadvantaged persons or also persons distinguished as a group by their privileged position. In other words, we wondered whether the definition should be a neutral term like race or sex or refer to disadvantage like the ground of disability. There have been cases in Québec where the ground was held to prohibit discrimination against individuals with above average incomes or prestigious occupations. In our view, this is not appropriate for two reasons. First, we feel that the protection here is aimed at those who suffer disadvantage because of their social condition. Second, we do not want to propose a ground that is too broad. The Act could contain a definition similar to a proposed (but defeated) amendment to Bill S-11, which provided that "*social condition includes characteristics relating to social or economic disadvantage.*"

We believe the ground of social condition should be designed to protect persons whose situation of poverty is ongoing rather than persons who may temporarily find themselves in that condition.

### Possible Exemptions

It is clear that rights are not absolute. Any discussion of a right must consider whether other factors should be put in the balance with it.

Litigation on this ground would require the Tribunal to deal with economic and social issues that courts have not yet seen under the Charter. Most of the cases in Québec on the ground of social condition have concerned residential accommodation. These cases will have few equivalents in the federal sector because housing is a matter of provincial jurisdiction, though federal government housing policy and bank mortgages would fall within federal jurisdiction. Housing issues involving Aboriginal people living on reserves is also a matter within federal jurisdiction. There are only a few cases where complaints based on social condition in employment and services were successful in Québec.

The pattern of complaints in the federal sector could be substantially different. Many statutes and government programs make distinctions based on economic classifications. There are cases where the Tribunal and

the courts held that the concept of "services [...] customarily available to the general public" covers a broad range of governmental activity, including matters such as unemployment insurance, policing, immigration, employment and research grants, and even taxation under the *Income Tax Act*. And, as stated earlier in our Report, the Supreme Court of Canada has held that human rights legislation has primacy over other legislation. The Tribunal's remedial powers are also relatively broad.

The Panel is concerned that the addition of this ground may lead to considerable litigation over complex government programs and an overall reluctance by government to initiate social programs.

We could see challenges against many laws and programs, including tax and immigration laws, employment insurance and training programs, on the ground that they discriminate against the socially and economically disadvantaged. If those laws and programs are found to be services available to the general public and if the principle of primacy means they are inoperative where they conflict with the Act, the Tribunal would have the power to nullify legislative and government decisions that have very wide policy and budgetary implications. Of course, government agencies could put forward the *bona fide* justification in the case of services. This could involve the Tribunal in weighing policy choices like the courts are called on to do under the Charter. It is not clear how well the *bona fide* justification is suited to deal with these concerns. The Tribunal and the courts have not been very consistent in defining the defence they apply in primacy cases.

Recently, the courts have been tending to narrow the interpretation of the concept of "services" in cases where there may be a conflict with other statutes. Increasing their policy role might give the courts an incentive to continue narrowing the scope of the protection offered by the Act.

One way of limiting the effect of the ground would be to recommend a narrow definition of social condition. This does not seem to the Panel to be a good idea because it would limit the good that the addition of the ground might give and hinder the future development of the ground. Instead, we are recommending that the ground be defined in a manner similar to that developed in Québec, with the exception that it would be limited to people who are disadvantaged.

On the other hand, we believe that some government programs could involve the Tribunal in complicated policy issues on which it should not be in a position to second-guess the government. The complicated scheme of taxation under the *Income Tax Act* is a good example. Another might be immigration, where issues of control over entry into Canada are at stake. We believe the government should be able to adopt programs intended for certain categories of underprivileged without these programs being challenged because they do not address all categories of underprivileged. The government should be able to exempt such programs from the Act at least for a limited, renewable time. We feel there should be a time limit on the exemption because other exemptions we have been called upon to consider more than twenty years after passage of the Act were provisionally placed in the Act in 1977. This would allow the exemptions to be reduced as experience with litigation on this ground grows. It might be feasible to review the exemptions as part of the five-year review of the Act we are recommending in chapter twenty. The government should be able to justify any exemption made this way. Exemptions should not be used as an *ad hoc* way of avoiding scrutiny when the government simply wants to shield from litigation a service for which there is no provable justification. These exemptions are meant only for true government services, and not services provided by Crown Corporations or Departments that are similar to those in the private sector.

The ground would apply to services offered by the private sector too. However, these services are closer to the kind of services meant to be defended using the *bona fide* justification. In the *Dickason v. University of Alberta* (1992) case on mandatory retirement, the Supreme Court of Canada ruled that the kind of deference given to broad governmental decisions based on competing claims for resources should not be extended to the private sector.

Finally, we are aware that our recommendations concern only discrimination based on the condition of underprivileged persons and that the Act does not cover the whole reality of poverty, which comes under the general responsibility of government.

## Recommendations:

124. We recommend that social condition be added to the prohibited grounds for discrimination listed in the Act.

125. We recommend that the ground be defined after the definition developed in Québec by the Commission des droits de la personne and the courts, but limit the protection to disadvantaged groups.

126. We recommend that the Minister recommend to her Cabinet colleagues that the government review all programs to reduce the kind of discrimination we have described here and create programs to deal with the inequalities created by poverty.

127. We recommend that the Act provide for exemptions where it is essential to shield certain complex governmental programs from review under the Act.

128. We recommend that the Act provide that both public and private organizations be able to carry out affirmative action or equity programs to improve the conditions of people disadvantaged by their social condition, and the other grounds in the Act.

129. We recommend that the Commission study the issues identified by social condition, including interactions between this ground and other prohibited grounds of discrimination and the appropriateness of issuing guidelines to specify the constituent elements of this ground.