

Social condition as a prohibited ground of discrimination in human rights legislation: Review of the Quebec Charter of Human Rights and Freedoms

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Summary

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Summary

The purpose of this document is to examine the appropriateness of including social condition as a prohibited ground of discrimination in the exercise of the rights protected by the *Canadian Human Rights Act* and the reasons for doing so. As it now stands, the Canadian Act (section 2) protects Canadians from discriminatory acts based, *inter alia*, on national or ethnic origin. This provision is in line with the terms of article 1 of the *International Convention on the Elimination of All Forms of Racial Discrimination*, which defines racial discrimination as including, *inter alia*, discrimination based on ancestry or on national or ethnic origin. However, since they go beyond the concept of racial discrimination, the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* provide that the rights guaranteed by each of them are so protected without any distinction being made on the basis of national or social origin or property (article 2). In Quebec, the implementation of these international agreements that Canada has ratified has led to a refining of the statement of the grounds of discrimination under which an individual or a group may not be deprived of an equal chance to exercise the rights protected by the *Charter of Human Rights and Freedoms*. Section 10 of the Quebec Charter effectively contains a ban on discrimination based on social condition. This study aims to show how the addition of this prohibited ground of discrimination actually fits the modern context within which antidiscrimination law is now developing and how the inclusion of social condition as a prohibited ground of discrimination would, on the basis of Quebec's experience, be a useful, necessary and functional addition to the list of such grounds. However, this statement must be placed in context. In fact, as a prohibited ground of discrimination, social condition is a useful tool in the struggle against discrimination as long as it is not taken in isolation. The assertion of the principle of equality, just like the protection of certain economic and social rights in the *Canadian Human Rights Act*, would provide essential support for complete protection against instances of discrimination based on a person's social condition.

Social condition as a prohibited ground of discrimination:

The interpretation of social condition has often caused confusion between "social origin" and "social condition". While the former relates to a person's birth and past, the latter is more concerned about a person's present situation and obviously therefore includes what has in the past determined that person's rank and current position in society. A fuller understanding of the concept of social condition as a prohibited ground of discrimination also involves a subjective component, which essentially consists of the perceptions generated by objective factors. These representations are also capable of impacting on the treatment received by a person who is associated with a particular social group on the basis of these objective data. While each individual belongs to a social class, not everyone is the victim of discrimination based on his or her social condition. As a prohibited ground of discrimination, social condition is thus a changing concept that reflects the sociological theory of the person located in a social and economic space.

Consequently, evidence of a third party's negative perception of one or more of an individual's social attributes requires that the investigative process with respect to human rights be opened up to a multidisciplinary approach. More than the usual process of collecting facts is required for an understanding of processes that exclude, which are actually systems of exclusion. As a matter of fact, this is where we face a real challenge when we have to consider the inclusion of social condition as a prohibited ground of discrimination in antidiscrimination legislation.

For example, in an investigation following the receipt of a complaint of discrimination on the basis of social condition, an investigator could conclude after checking the facts with the person or institution that might have perpetrated a discriminatory act that the decision made (refusal of a loan or of access

to a program of social or professional integration, refusal to rent residential premises) was economically or administratively reasonable if the circumstances in which the investigation is conducted are limited to this complaint alone and do not allow the investigator to access data other than those disclosed by the parties. Furthermore, a multidisciplinary contribution to the investigative process may also bring to light in the course of the investigation the best solutions in terms of either individual or systemic remedies for the discriminatory situation. In cases involving social condition, the parties involved and the investigators rarely have at their disposal all the knowledge they require in order to resolve the problem.

In cases involving social condition, conclusive proof of a sociological or economic fact often constitutes a major part of the evidence of discrimination. However, the investigator will have to learn to include in his or her investigation scientific elements that the Tribunal may well find persuasive and useful in determining whether there was discrimination or in identifying possible remedies. This approach has implications for costs and operations that should not be ignored by an organization such as the Human Rights Commission.

At a time when social condition is marked by precariousness and mobility, it seems to us to be self-evident that legislation designed to eliminate discrimination must provide protection for individuals against the irrational judgments of third parties. The inclusion of social condition as a prohibited ground of discrimination does not give individuals any more rights than they have under the Act, which is itself subject to the *Canadian Charter of Rights and Freedoms*. However, such inclusion ensures that in a context in which cases of prejudicial exclusion are increasing, certain individuals will have as much right as others to enjoy the benefits of the law or to compete on a rational basis in the market for goods and services. The responsible exercise of citizenship has economic consequences. It would be wrong to conclude that these consequences violate the mechanisms of the free market. At the very most, they are corrective devices that are necessary in a democratic society.

Nor does the complex make-up of the social groups likely to be deprived of opportunities to exercise their rights in a discriminatory manner very effectively stand up to the argument that discrimination is not usually based solely on social condition. While grounds such as gender and social condition or ethnic origin and social condition are often combined, we must expect to encounter more and more situations where social condition will predominate as a ground of discrimination or new groups will emerge, in respect of which the field of human rights has not yet considered an egalitarian analysis. However, can we determine *in abstracto* the situations that may well involve discrimination based on social condition? Unless there is a major turn-around, a body of practices that were previously limited to the middle class will in future be required for the more disadvantaged segments of society, namely credit, transportation, technical and professional education, to name only a few. This is also difficult at a time when "administrative arrangements" are being made between the federal government, the aboriginal nations and the provinces to determine the area of jurisdiction to which certain public services will definitively belong and even to define the situations in which these services will be classified as public or private.

Social condition and the right to equality:

As it now stands, the *Canadian Human Rights Act* does not reflect an acceptance of the right to equality in accordance with the constitutional standard to which it is subject. A simple reference to the protection of equal opportunities for all Canadians would not reflect the importance that must be given to the fact that the members of a group of disadvantaged persons within Canadian society will often be deprived of the chance to exercise their rights with dignity because of historically- and sociologically-based prejudices or stereotypes. The lack of a guarantee of real equality in the *Canadian Human Rights Act* poses a major risk: on the one hand, by interpreting each of the prohibited grounds of discrimination in light of the principle of equal opportunity, the Act promotes a neutral vision of discrimination that is less likely to contribute to effective and differentiated correction of the remedies for discrimination. Also, and this applies particularly to social condition as a prohibited ground of discrimination, a Human Rights Tribunal could find that a person who is economically disadvantaged has been unjustly deprived of a careful and objective review of an application for a loan by a banking institution but would find it hard to require the institution in question to review its loan policy with a view to eliminating all discriminatory aspects. The principle of equal opportunity simply requires that everyone have the same chance to benefit when subject to the same policies.

Furthermore, confusion too often occurs between social condition as a prohibited ground of discrimination and the protection of an individual's economic and social rights. The purpose of a ground of discrimination is to protect the exercise of rights from discriminatory behaviours but it does not create a right. Its effectiveness is accordingly completely subject to all the rights that are otherwise

guaranteed and protected by antidiscrimination legislation. We must accordingly consider including in the Act a necessary balance between protection from discrimination on the basis of social condition and protection of a person's economic and social rights. While social condition goes to the heart of poverty in modern society, an interdependent reading of the status of human rights in international law allows us to demand that all human rights be so recognized.

The very close connection between a person's social condition and ability to benefit without discrimination from the measures and protection provided by society with respect to education and employment, for example, is so obvious that Quebec considers it to be an essential part of the very principle of equality. If it is not applied in the field of economic and social rights, social condition as a ground of discrimination prohibited by antidiscrimination legislation could well infringe the principle of equality by creating a completely imaginary gap between the causes and consequences of discrimination. By doing so, it deprives beneficiaries of the right to equality that is constitutionally protected by the *Canadian Charter of Rights and Freedoms* from access to corrective measures that have fundamental significance in the history of poverty and exclusion from society.

The link between social condition and the right to equality, even in the closed logic that marks the antidiscrimination legislation in which rights and the grounds of discrimination are limited to those recognized by the Act, becomes clear when the Act is applied. Because it will be realized that beyond the cliché that associates housing with social condition, this link depends on certain practices that have also marked the creation of social law in Canada. In fact, social law targets, categorizes and includes or excludes. The contribution of judicial decisions makes it necessary to review this practice, which belongs in the field of social policy and questions the wisdom of these methods by means of the right to equality. The inclusion of social condition as a prohibited ground of discrimination, when supported by guarantees specific to the right to equality, *civilizes* social policy without depriving the political realm of the right to express and democratically to consider the choices a society wishes to make.

Powers of Human Rights Tribunals:

Given the likely complexity of the situations in which discrimination on the basis of the social condition of a person or group would be alleged, the proposal supported by this research, which involves promoting the inclusion of an open and undefined concept based on specific situations of social condition, would well come into conflict with the position taken by the Supreme Court of Canada concerning what constitutes a question that may be subject to judicial review and the type of review that would be relevant to the particular case. The question would be couched as follows: would a possible finding by the Human Rights Tribunal of discrimination on the basis of social condition constitute a decision on a question of law or a question of fact.

The powers of the human rights commissions and tribunals should thus be clearly defined in their enabling legislation to give them all possible flexibility in performing their mandates. The courts display judicial restraint when they render decisions involving questions of fact. Where such questions arise, the standard of control will be that of patently unreasonable error. However, if they are not expressly or implicitly given the power to decide questions of law with respect to these questions, the standard of review will be whether the decision is correct. What will happen, then, where a decision involves a finding that a discriminatory act based on social condition has been perpetrated?

Since each case would probably be an exercise in interpreting a provision of the enabling legislation, it would probably acquire at the very least the character of a mixed decision of law and fact. This is why the useful inclusion of such a ground in the *Canadian Human Rights Act* seems to us to require unambiguous legislative authority for the Human Rights Tribunal to have express jurisdiction to interpret social condition as a prohibited ground of discrimination for the purpose of exercising its jurisdiction.