

Prohibiting Discrimination Based on Social Condition Under BC's Human Rights Code

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People disadvantaged because of poverty, homelessness, or reliance on government assistance experience stigma and discrimination in virtually all aspects of economic, social, political, and cultural life, yet the *Human Rights Code RSBC 1996, c 210* (the “Code”) does not prohibit discrimination based on social condition.

Careful consideration of this legislative reform opportunity¹ must be informed and directed by the legislated purposes of the *Code*, which are as follows:

- a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political, and cultural life of British Columbia;
- b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;
- c) to prevent discrimination prohibited by this *Code*;
- d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this *Code*; and
- e) to provide a means of redress for those persons who are discriminated against contrary to this *Code*. [Emphasis added]

The new Human Rights Commission (the “Commission”), alongside the BC Human Rights Tribunal (the “Tribunal”), will be better equipped to fulfill the first two purposes if the *Code* is amended to prohibit discrimination and harassment based on social condition.

Rationale

People experiencing some combination of low-income status, homelessness or precarious housing, reliance on government income support programs,

unemployment or under-employment, and limited education face impediments to participation in the economic, social, political, and cultural life of BC. Some of these impediments are due to the material circumstances of people's lives and thus beyond the scope of the *Code*. Others arise because, as a province, there is substantial work to be done to promote a climate of understanding and mutual respect for people who experience deep economic and social disadvantage, including homelessness. By prohibiting discrimination based on social condition under the *Code*, BC will be better equipped to prevent discrimination against a very vulnerable group of residents and the *Code*'s purposes will be better served.

While people discriminated against based on social condition are disproportionately disadvantaged by other intersecting characteristics explicitly recognized in the *Code*, such as disability and race, there are also many people living in deep poverty who are not disadvantaged based on other protected characteristics. More critically, deep poverty, homelessness, and other characteristics related to social condition, whether episodic or chronic, are real and specific sources of disadvantage themselves. Currently, the *Code* offers no tangible protection to these people in BC.² Even where an individual complainant can access some protections based on grounds currently covered by the *Code*, the absence of a prohibition against discrimination on the basis of

¹ As recommended by Ravi Kahlon, the tenth Parliamentary Secretary for Sport and Multiculturalism, in “A Human Rights Commission for the 21st Century: British Columbians talk about human rights: A report and recommendations to the Attorney General of British Columbia” (2017) at p 33, available at <https://engage.gov.bc.ca/app/uploads/sites/213/2017/12/HRC-Final-Report.pdf>.

² See *Pivot Legal Society v Downtown Vancouver Business Improvement Association and another* (No. 6), 2012 BCHRT 23, rev'd *Vancouver Area Network of Drug Users v British Columbia Human Rights Tribunal*, 2015 BCSC 534, rev'd *Vancouver Area Network of Drug Users v Vancouver Business Improvement Association*, leave to appeal to the SCC refused, 2019 CanLII 6022 (SCC)

social condition means that human rights law and policy does not reflect their lived experience, and this lacuna will make it difficult for the Commission to prevent discrimination from happening in the first place.

The question of whether BC should prohibit discrimination based on social condition under the Code is not new.³ In 1998, the BC Human Rights Commission released *Human Rights for the Next Millennium*, which recommended that the Code be amended to include protections against discrimination based on social condition.⁴ The Commission provided two lesser alternatives in the event that the government decided not to proceed with that recommendation. Those were:

1. protections against discrimination based on “lawful source of income”; and
2. failing that, protection against discrimination in tenancy based on “lawful source of income.”⁵

Nearly 20 years later, the Code currently reflects the last option, which affords the lowest level of rights protection of all the suggested options. Rather than advancing human rights protections, this amendment only codified existing and ineffective protections provided for under residential tenancy law, creating minimal protection for people experiencing poverty and no protection at all for people experiencing homelessness.

Defining Social Condition

i. Comparative Analysis of Canadian Jurisdictions

BC would not be the first jurisdiction in Canada to adopt social condition in its human rights law. Codified protections in other jurisdictions can inform how BC may choose to define social condition within the Code.

Since its inception in 1975, the *Quebec Charter of Human Rights and Freedoms* has offered protection against discrimination and harassment based on social condition. However, there is no statutory definition of social condition in Quebec’s *Charter*. Instead, the concept has largely been defined by jurisprudence,⁶ including the Human Rights Tribunal of Quebec’s 1993 decision in *Québec v. Gauthier* which states that:

*The 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.*⁷

The objective and subjective components of social condition are both integral to understanding individual experiences of discrimination. Discrimination is most likely to arise where objective factors such as income, occupation, or level of education are linked to harmful stereotypes which create and perpetuate stigma.⁸ That stigma then creates the conditions for discriminatory attitudes, which can in turn lead to discriminatory behaviour at the individual level, and in some cases

³ This issue has also been considered at the federal level. Retired Supreme Court of Canada Justice, the Honourable Gérard La Forest, chaired a panel that recommended the inclusion of “social condition” in human rights legislation: Canada, Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision, Report of the Canadian Human Rights Act Review Panel*, (Ottawa: Department of Justice and Attorney General, 2000), available at <http://www.socialrightscura.ca/documents/legal/discrimination/Promoting%20Equality.pdf>.

⁴ See also Jenny Kwan’s proposed bill: Bill M-201, *Protection of the Homeless Act*, 2nd Sess, 39th Parl, British Columbia, 2010 (which proposed to amend the *Human Rights Code* to include “social condition” as a prohibited ground of discrimination to protect BC’s most vulnerable).

⁵ British Columbia Human Rights Commission (1998) *Human rights for the next millennium: Recommended BC Human Rights Code Amendments for British Columbians by British Columbians* available at http://www.bchrc.net/bc_hr_commission_archives.

⁶ Ontario Human Rights Commission “Social condition – an option for human rights commissions” retrieved 12 December 2019, available at www.ohrc.on.ca/en/human-rights-commissions-and-economic-and-social-rights/social-condition-%E2%80%93-option-human-rights-commissions

⁷ *Québec (Commission des droits de la personne) c Gauthier* (1993), 19 CHRR D/312 [*Gauthier*], cited in Wayne MacKay & Natasha Kim (2009) *Adding Social Condition to the Human Rights Act* Canadian Human Rights Commission at p 3 [MacKay & Kim].

⁸ MacKay & Kim, *supra* note 7 at p 3.

leads to the development of laws, policies and regulations that are systemically discriminatory in content or application.

Manitoba's *Human Rights Code* includes discrimination based on "social disadvantage", defined based on a closed list of factors such as "diminished social standing or social regard due to:

- a) homelessness or inadequate housing;
- b) low levels of education;
- c) chronic low income; or
- d) chronic unemployment or underemployment."⁹

The *Northwest Territories Human Rights Act* and *New Brunswick Human Rights Act* also prohibit discrimination on the basis of social condition. The Northwest Territories defines social condition as: "inclusion ... other than on a temporary basis, in a socially identifiable group that suffers from social or economic disadvantage resulting from poverty, source of income, illiteracy, level of education or any other similar circumstance."¹⁰

The inclusion of the caveat "other than on a temporary basis" in this definition imposes unreasonably restrictive legislative barriers to legitimate claims of discrimination as it could exclude people in dire, though temporary, circumstances requiring human rights protection. For example, Quebec courts have found social condition to include temporary situations, such as unemployment.¹¹ Discrimination experienced during a period of poverty or homelessness, such as denial of housing or employment, can exacerbate and perpetuate

economic marginalization possibly leading someone from a circumstance of temporary economic or social deprivation into chronic deprivation.

At the same time, homelessness and/or reliance on social assistance, even on an episodic basis, is sufficiently stigmatizing as to warrant protection against discrimination under the *Code*. The inclusion of "other than on a temporary basis" creates legal uncertainty and overly complicates the human rights analysis by adding the burden of establishing what constitutes more than 'temporary.'¹²

New Brunswick's *Human Rights Act* states that "social condition, with respect to an individual, means the condition of inclusion of the individual in a socially identifiable group that suffers from social or economic disadvantage on the basis of his or her source of income, occupation or level of education."¹³ This definition of membership in a "socially identifiable group that suffers from social or economic disadvantage" offers a more principled tool for restricting tenuous claims of discrimination based on social condition.

Ontario was most recently poised to consider social condition as a prohibited ground with the introduction of Private Member's Bill 164 *Human Rights Code Amendment Act, 2017*. Social condition would have applied with respect to services, goods and facilities, the occupancy of accommodation, the right to contract, employment and membership in various types of organizations.¹⁴ Upon dissolution of Ontario's 41st Parliament in May 2018, however, Bill

⁹*Human Rights Code*, CCSM, c H175, s 1

¹⁰*Human Rights Act*, SNWT 2002, c 18, s 1(1); Northwest Territories Human Rights Commission *Areas and Grounds* retrieved 12 December 2019, <http://nwthumanrights.ca/your-rights/areas-and-grounds>.

¹¹ *D'Aoust c Vallières* (1993), 19 CHRR D/322 (QBT), cited in OHRC "Social condition", *supra* note 6.

¹² Notably, Income Assistance is designed to be "temporary," but receipt of Income Assistance is also one of the most significant targets for discrimination based on social and economic status. Limiting claims based on temporality does not reflect the lived experience of discrimination in this regard. Furthermore, BC human rights law already provides means to dismiss tenuous or unmeritorious claims and has well-developed defences to discrimination such as *bona fide* occupational requirements and undue hardship. Notably, the Northwest Territories is the only jurisdiction to include such a restriction in legislation.

¹³ *Human Rights Act*, RSNB 2011, c 171, s 2. The *New Brunswick Act* provides at s 9 that discrimination based on social condition "shall be permitted if it is required or authorized by an Act of the Legislature". We do not recommend that BC include this exception. Discrimination based on social condition, like other forms of discrimination, is at odds with the purposes of the *Code* no matter if it comes from actions or decisions made by public or private actors or whether its basis is in legislation.

¹⁴ *Bill 164 An Act to amend the Human Rights Code with respect to immigration status, genetic characteristics, police records and social conditions* retrieved 12 December 2019, available at http://www.ontla.on.ca/bills/bills-files/41_Parliament/Session2/b164_e.pdf. Prior to being terminated, Bill 164 had passed second reading and debate, and was referred to the Standing Committee on Regulation and Private Bills.

164 died on the Order Paper and the opportunity extinguished.

ii. A Definition for BC

We recommend that BC adopt a definition of social condition that builds on those used by New Brunswick and the Northwest Territories' definitions, and borrows from Manitoba's definition of social disadvantage by including explicit recognition of housing status as an element of social condition, as follows:

Inclusion in a socially identifiable group that suffers from social or economic disadvantage on the basis of poverty, source of income, occupation, housing status, level of education, or any other similar circumstance.

To bring a claim of discrimination on the basis of social condition, an individual should not be required to prove that all of these factors influenced the decision or action, nor should any challenge to legislation be required to demonstrate a negative impact in relation to all of the factors listed. As has been the case in Quebec, the onus would be on an individual pursuing a claim to demonstrate that as a result of one or more of these factors, they “can be regarded as part of a socially identifiable group and that it is in this context that the discrimination occurred”.¹⁵

The inclusion of “other similar circumstance” reserves for the Tribunal the appropriate discretion to assess circumstances of social and economic discrimination on the evidence before them.

Scope of Protection

Currently, under the *Code*, protection against discrimination based on lawful source of income extends only to tenancy. People disadvantaged based on social condition are, in fact, vulnerable to

discrimination in most spheres of economic, social, political, and cultural life.

As such, the following sections of the *Code* should be amended as follows:

Sections 7-11 should be amended to add social condition to the provisions for prohibited discrimination with respect to publications, accommodations, services and facilities, the purchase of property,¹⁶ tenancy premises, and employment advertisements.

Sections 13-14 should be amended to add social condition to the provisions for prohibited discrimination with respect to employment, unions, and associations.

Section 41 should be amended to add social condition to the provision with respect to the granting of a preference to members of an identifiable group or class of persons by certain organizations.

Response to Identified Risks

The Ontario Human Rights Commission has identified and responded to several arguments made against the inclusion of social condition in human rights law.¹⁷ These include concerns that the addition of social condition would give too much discretionary power to an administrative agency, that complainants could abuse such broader jurisdiction, and that the new ground would permit human rights commissions to take governments to task for not providing an adequate standard of living for their citizens.

Including a prohibition against discrimination based on social condition in the *Code* would not expand the Tribunal's mandate, which is to accept, screen, mediate, and adjudicate human rights complaints.¹⁸ Nor would the remedies available under section 37 of the *Code* be expanded by the addition of a prohibition

¹⁵ *Gauthier*, *supra* note 8, cited in OHRC, “Social condition”, *supra* note 6.

¹⁶ This is not to say that someone lacking the financial means to purchase property should be afforded the legal right to do so regardless. Rather, this would protect service providers who seek to purchase property for the benefit of people stigmatized as a result of their social condition and would protect people who become financially able to purchase property but who nonetheless remain stigmatized either as a result of their history with poverty or other factors such as level of education.

¹⁷ OHRC “Social condition”, *supra* note 6.

¹⁸ British Columbia Human Rights Tribunal, “About Us”, retrieved 12 December 2019, www.bchrt.bc.ca/tribunal/about-us/index.htm.

on discrimination based on social condition. Thus, the Tribunal will necessarily remain focused on discrimination based on economic and social disadvantage rather than amelioration of such disadvantage.¹⁹ However, the newly established Commission, as opposed to the Tribunal, may choose, within its legislated mandate, to take a more holistic approach to the issue of poverty and disadvantage caused by poverty, in line with purpose (d) of the *Code*: to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this *Code*.

Operationalizing a Prohibition on Discrimination Based on Social Condition

Once the *Code* has been amended to include social condition as a prohibited ground of discrimination, the Province of BC should take the following steps to ensure that newly enshrined protections make a meaningful difference in the lives of people in BC who are discriminated against based on social condition:

1. Engage in a provincial education campaign to ensure that all people in BC who may suffer discrimination on the basis of social condition, and all people in BC who are prohibited under the *Code* from discriminating on the basis of social condition are aware of the change.
2. Engage in formalized, proactive education with professionals in healthcare settings, police, and private service providers (such as landlords and private security companies) to raise awareness of social condition as a prohibited ground of discrimination.
3. Engage in an audit of provincial and municipal laws and policies to identify potential discrimination based on social condition.
4. Make discrimination based on social condition a priority for systemic investigation by the Commission.
5. Engage in proactive education with municipalities to ensure that zoning and regulatory bylaws, and related public consultation processes, do not discriminate based on social condition.

¹⁹ For example, with respect to the current prohibition against discrimination in tenancy based on lawful source of income, it is outside the purview of the Tribunal's jurisdiction to consider whether the rent charged for a residential property is unaffordable to a person receiving government assistance. However, if a person believes they have been denied the opportunity to rent a property they can afford because they rely on government assistance, that would fall within the purview of the Tribunal.