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Adding Social Condition to the
Canadian Human Rights Act

Wayne MacKay and Natasha Kim

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ADDING SOCIAL CONDITION TO THE CANADIAN HUMAN RIGHTS ACT
- Wayne MacKay and Natasha Kim

ABSTRACT

Almost a decade ago, in June 2000, the Canadian Human Rights Act Review Panel conducted a comprehensive review of the *Canadian Human Rights Act* [CHRA] and recommended that “social condition” be added as a prohibited ground of discrimination. Since then, no action has been taken to implement this recommendation, despite calls for action from international bodies, political actors, human rights agencies and organizations, and academic commentators to provide protections from discrimination for those suffering from social and economic disadvantage. The authors analyze the experiences at the provincial level with socio-economic grounds of discrimination, jurisprudential developments under the *Canadian Charter of Rights and Freedoms* related to claims based on socio-economic disadvantage, the broader proposal of incorporating justiciable social and economic rights into Canadian law, and the range of arguments both for and against recognizing social condition as a prohibited ground of discrimination. In the end, the authors recommend a feasible and practical means for adding social condition to the *Canadian Human Rights Act* so that it will provide predictability for administrators, adjudicators and respondents, as well as sufficient flexibility to reflect the multi-faceted and intersectional experience of discrimination of human rights claimants. While socio-economic inequality continues to be a significant and pressing problem in need of a multi-pronged and comprehensive solution, the addition of the ground of social condition to the CHRA will be one more tool in advancing the rights and interests of those on the very margins of Canadian society.

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EXECUTIVE SUMMARY

I. Introduction

Almost a decade ago, in June 2000, the Canadian Human Rights Act Review Panel conducted a comprehensive review of the *Canadian Human Rights Act* and recommended that “social condition” be added as a prohibited ground of discrimination. Since then, no action has been taken to implement this recommendation, despite calls for action from international bodies, political actors, human rights agencies and organizations, and academic commentators to provide protections from discrimination for those suffering from social and economic disadvantage. In considering the wisdom and feasibility of adding this ground to the *Canadian Human Rights Act*, it is necessary to analyze the federal, provincial, and international legal landscape in this area, to determine the definitional parameters of the ground, and to address the arguments both for and against the recognition of social condition as a prohibited ground of discrimination.

Therefore, after reviewing developments relating to social condition since the release of the Review Panel Report in 2000, in Part II, we conduct a comprehensive overview of the legal developments related to defining and implementing social condition or related grounds of discrimination in provincial and territorial human rights codes and under the *Canadian Charter of Rights and Freedoms*. In addition, we discuss the potential for the ground of social condition to better capture a more holistic experience of discrimination when socio-economic disadvantage intersects with other grounds of discrimination. In Part III of the paper, we explore the interconnection between protection from discrimination based on social condition and the broader question of the recognition of justiciable positive socio-economic rights. In Part IV, we address potential arguments against adding social condition, including administrative, definitional and institutional concerns, and in Part V, we address the legal, normative, institutional, practical, and persuasive arguments for the addition of the ground. In Part VI, we review possible options for addressing social condition and conclude with a three-part recommendation for adding social condition to the *Canadian Human Rights Act* in a controlled and defined manner.

II. What is Social Condition and how has it been Defined?

In examining the meaning of social condition, we look first to how it has been defined. Except at the federal level, all Canadian jurisdictions recognize some type of social or economic ground of discrimination in their human rights codes. Three Canadian jurisdictions have adopted social condition as a prohibited ground of discrimination: Quebec, New Brunswick and the Northwest Territories. The Quebec *Charter of Human*

Rights and Freedoms has included social condition since its inception in 1975, whereas New Brunswick and the Northwest Territories added the ground just recently, in part in response to the recommendation by the Canadian Human Rights Act Review Panel in 2000. While there has been little jurisprudence under these more recent provisions, the experience in New Brunswick and the Northwest Territories is an interesting contrast to Quebec, in that both jurisdictions opted for statutory definitions of the term; in addition, the New Brunswick Human Rights Commission adopted guidelines that build on the established jurisprudence for defining social condition in the Quebec context.

A common thread between these jurisdictions is the focus on addressing social and economic disadvantage, which is expressed in the statutory definitions in New Brunswick and the Northwest Territories and the result of an evolving jurisprudence in Quebec that developed the meaning of social condition to accord with the overall broad and purposive approach of human rights legislation. Both Quebec and New Brunswick also adopt an objective-subjective test for social condition in the guidelines of their respective human rights commissions. The objective component is the economic rank or social standing of an individual based on factors including income, occupation or level of education and the subjective component is the value attributed to an individual based on social perceptions or stereotypes associated with factors such as income, occupation or level of education. For example, level of income may be an objective element of social condition but it is the impact of that level on the position a person holds in society that is an element of social condition.

This test has evolved over time in Quebec to address discrimination against those suffering from social and economic disadvantage, such as social assistance recipients and workers in precarious and low-paying positions, who face discriminatory assumptions regarding, for example, their ability to pay for rent or goods and services. The Quebec case law has also recognized that temporary or mutable states, such as being a student, could form a social condition. The one case reported in the Northwest Territories has recognized seasonal workers as a social condition group, demonstrating a contextual approach to the statutory limitation to the definition of social condition in the Northwest Territories Human Rights Act that precludes “a condition...on a temporary basis.”

In the other provincial and territorial jurisdictions, narrower but related grounds of discrimination have been adopted, such as “receipt of public assistance”, “source of income” or “social origin”. An important distinction between these grounds and social condition is the potential for social condition to cover a much broader range and/or intersection of characteristics. The broad, multi-factored definition that has been adopted by the courts in Quebec and the legislatures in the Northwest Territories and in New Brunswick make it clear that the purpose of the ground extends beyond what exists in other jurisdictions. The legislative discussions leading up to the adoption of social condition in these three jurisdictions, as well as recommendations by human rights agencies in other jurisdictions to broaden protection to include social condition, make it clear that this breadth and flexibility is a valuable feature of the ground.

Significantly, our review of the human rights and *Charter* jurisprudence also reveals a gap at the federal level caused by the lack of protection based on social condition in the *Canadian Human Rights Act*, where claims in the realm of housing, employment, and private and public services at the federal level could be better addressed by social condition protection. Under the *Charter*, there has thus far been little success in

addressing equality claims involving a socio-economic aspect, unless claimants have been able to fit their experience of discrimination within the enumerated or established analogous grounds of section 15 of the *Charter*. Even in these successful cases, social condition could provide a more accurate reflection of discrimination claims by recognizing the manner in which social and economic disadvantage intersects with existing grounds of discrimination under the *Charter* and the *Canadian Human Rights Act*. Discrimination on multiple grounds is a complex dynamic, which must be recognized if human rights principles are to be respected and if human rights legislation is to be most effective and this is in itself a compelling reason to add social condition to the CHRA.

III. What is the Relationship between Economic and Social Rights and Social Condition as a Prohibited Ground of Discrimination?

It has been argued that, to address the pernicious problem of socio-economic disadvantage, what is needed more than protection from discrimination based on social condition is positive and justiciable economic and social rights to, for example, an adequate standard of living, education, and housing. While such an approach would be consistent with Canada's international human rights obligations under the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights*, it has not been realized through litigation under the *Canadian Charter*, through political efforts at constitutional reform, nor in the essentially symbolic commitments reflected in the economic and social rights enumerated in the Quebec human rights code.

Based on this analysis, the addition of social and economic rights as positive rights would be a significant and far reaching way to protect social condition under the *Canadian Human Rights Act*, however, the institutional and resource implications in adopting this option would go well beyond the mandate of our study. Nonetheless, the inclusion of protection from discrimination on the basis of social condition as a feasible measure that can be implemented in the short-term for furthering our international commitments and addressing the issue of socio-economic disadvantage until further study is conducted on incorporating positive economic and social rights into the Canadian legal landscape.

IV. What are the Arguments Against Including Social Condition as a Prohibited Ground of Discrimination in the *Canadian Human Rights Act*?

The arguments against including social condition in the CHRA can be categorized into administrative, definitional and institutional concerns. Administratively, there is a concern that the addition of a new ground, particularly one as broad and flexible as social condition, could lead to resource implications for the Canadian Human Rights Commission and Tribunal, resulting in backlog issues, the overshadowing of other grounds of discrimination and lengthy litigation. After examining the experience of the human rights commissions in Quebec, New Brunswick and the Northwest Territories, we

conclude that these potential issues are unlikely to raise significant problems at the federal level, particularly if a definition of social condition is adopted to provide greater certainty in its application.

There are also concerns that uncertainty with the definition of social condition could result in unintended effects, such as a significant redistribution of market resources or, conversely, protection for those respecting whom discrimination protection was not intended. These concerns support including a definition of social condition if it were to be added to the CHRA in order to ensure sufficient certainty for claimants and defendants so that they know in advance what would constitute discrimination on the basis of social condition. Conversely, the ground must not be defined so narrowly as to lose many of the benefits yielded by the dynamic and flexible nature of social condition and to result in the fragmentation or atomization of the protection provided by the CHRA.

Lastly, there are concerns related to the institutional competence of the statutory human rights regime to deal with matters of socio-economic inequality. First, it could be argued that the direct funding of public programs for those in need could more effectively address socio-economic disadvantage. While we agree that the addition of social condition alone is not sufficient to address the broader problem of poverty, the benefit it would provide in protecting the poor from discrimination on this ground has independent value. A second institutional argument is that adding social condition would afford the Canadian Human Rights Commission and Tribunal too much administrative discretion related to complex socio-economic issues. We also believe this concern can be addressed by an appropriate definition and existing rules of administrative law that control the exercise of administrative discretion.

V. What are the Arguments for Including Social Condition as a Prohibited Ground of Discrimination in the *Canadian Human Rights Act*?

There are a number of arguments for including social condition in the *Canadian Human Rights Act*. First, it would advance the purpose and principles of the CHRA by extending discrimination protection to one of the most marginalized and vulnerable groups in society. Second, the addition of social condition to the CHRA would build upon the existing infrastructure of the statutory human rights regime and the expertise of the Canadian Human Rights Commission and Tribunal, enabling the resolution of complaints in a more economical way and in a manner that permits a more authentic reflection of the experience of discrimination where multiple grounds are involved. Third, the inclusion of social condition could inform jurisprudential developments in the *Charter* field, both in the application of equality rights under section 15 of the *Charter* and in the consideration of broader socio-economic claims, due to the symbiotic relationship between the *Charter* and human rights codes. Fourth, the addition of social condition would be of practical benefit to those suffering from socio-economic disadvantage, not only because they would have a legal recourse for discrimination where there previously was none, but also because the statutory human rights regime would provide a more accessible venue for those who, by definition, lack resources to fund an expensive court challenge. In addition, the educational and symbolic value of adding social condition to the CHRA will send an important message to the public that they are

equally deserving of dignity and protection from discrimination. Lastly, the addition would respond to Canada's international commitments and the recommendations of human rights agencies and other commentators.

VI. What is the Best and Most Feasible Option for Adding Social Condition as a Prohibited Ground of Discrimination under the *Canadian Human Rights Act*?

After reviewing a number of possible options, we conclude that social condition should be added as a prohibited ground of discrimination under the *Canadian Human Rights Act*, but in a defined and controlled way in order to address potential concerns with the addition. Thus, we propose a three-part option. First, at least a minimal statutory definition should be included in the Act to focus the application of social condition on those who suffer from social and economic disadvantage, drawing on the approaches in New Brunswick and the Northwest Territories. This will anchor the definition in the statute and ensure that it covers those for whom it was intended. To ensure greater certainty in its application while maintaining some flexibility, the definitional parameters of the ground should be fleshed out through a delegated statutory instrument. This could take the form of binding regulations or non-binding policy directives. We prefer regulations, passed by Cabinet or the responsible Minister on the recommendation of the Commission, in order to establish greater certainty and accountability for the definition of the ground, while ensuring the expertise of the Commission informs the process. Additional policy guidelines could be adopted by the Commission for more detailed guidance on how the ground should be applied.

Second, we conclude that additional justifications or specific exemptions would not be required to accompany the inclusion of social condition, as the existing justification provisions in the CHRA would likely address most situations. This was also the approach taken in Quebec and the Northwest Territories.

Lastly, we recommend a measured approach to the application of the ground to complex statutory and administrative governmental schemes, such as income tax or immigration, which often make necessary economic distinctions. However, unlike New Brunswick and the recommendation of the Review Panel in 2000, we do not agree that a statutory exemption for legislative acts be adopted as this would too severely limit the application of social condition and its potential to provide real protection to those suffering from discrimination. Rather, we suggest that a delay in the coming into force be used, which will allow departments and agencies to put their houses in order while also providing a presumption of applicability to the entire federal sphere.

VII. Concluding Thoughts

There continues to exist a significant problem of poverty in Canada and one of its manifestations is in the form of social condition discrimination. The response of the legislative, executive and judicial branches of the Canadian state has not been adequate, in our view, and the addition of the ground of social condition to the CHRA in a controlled and defined way will be one more tool in advancing the rights and interests of those on the margins of Canadian society. Discrimination on the basis of poverty and social condition requires a multi-pronged approach and a human rights code that includes social condition is only one prong, albeit an important one. Parliament can position the Commission to take a lead in this important area and we hope and urge that Parliament has the courage to do so.

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I. Introduction and Overview

It is timely to enter the murky waters surrounding the recognition of social condition as a ground of human rights discrimination. The waters are murky in part because of the difficulty of defining social condition in a way that is broad enough to provide real protection for those in need but narrow enough to fit within the current human rights regime at the legislative, administrative and judicial levels. The inclusion of this ground of discrimination in the *Canadian Human Rights Act*¹ also raises important questions about the comparative competence of the legislative, administrative and judicial branches of the Canadian state. The legislative branch of the state prefers to safeguard a wide range of discretion on matters of economic and social policy and is reticent to have either courts or administrative agencies limiting their actions. However, if social condition discrimination is a form of human rights violation, then it should be enumerated, as are other forms of discrimination.

One of the central problems in this field is agreeing upon a workable definition that balances the various competing policies and interests at stake. This difficulty in defining the term and the need to put social condition on the human rights agenda is well-articulated in the following summary from Paul Kershaw's book, *Carefair: Rethinking the Responsibilities and Rights of Citizenship*, prepared by the Canadian Human Rights Commission ["the Commission"]:

The point is that social rights – the access established to social programming during the post-war social liberal movement – have become difficult to define. As collective memory begins to forget the hardships of the Depression and World War II – two events that shaped numerous generations – individuals have sought to compensate by developing new ideologies based on personal experience. That experience, however, lacks the same degree of inclusivity, shared memory, or cohesiveness, thus yielding multiple and competing notions of social formations. As a result, the discourse over social programming has become increasingly diversified and subjective.

Moreover, social programs designed to address inequality under social liberalism were relatively successful in generally bridging the economic gap between disparate groups. As social strata levelled off and society became more affluent, the issue of social condition was gradually superseded by other rights claimants.

As Michael Ignatieff remarks in his assessment on the evolution of social rights in defining social condition,

abundant societies that could actually solve the problem of poverty seem to care less about doing so than societies of scarcity that can't. This paradox may help to explain why the rights revolution of the past forty years has made inequalities of gender, race, and sexual orientation visible, while the older inequalities of class and income have dropped out of the registers of indignation. Abundance has awakened us to denials of self

¹ R.S.C. 1985, c. G-6, as amended [hereinafter "CHRA"].

while blinding us to poverty. We idly suppose that the poor have disappeared. They haven't. They've merely become invisible.

Increasingly, the visible rise of social inequalities in Canada and abroad has sparked a renewed debate on the inclusion of social condition within the framework of human rights. With growing income disparities, human rights organizations have expressed considerable concern at the discriminatory practices that have arisen as a product of the phenomenon, especially in the enactment of barriers to access. By incorporating social condition as a prohibitive ground of discrimination, the state would be obligated to extend protection against this vulnerable element of society.²

Also implicit in the debate about providing protection on the basis of social condition are the comparative roles of the state and the individual in Canadian society with respect to the status of poverty. This tension is accentuated by the tendency to use the terms “social condition”, “poverty” and “economic and social rights” loosely and interchangeably. This study will attempt to distinguish between the terms and focus on social condition as the heart of our mandate. We will also explore the arguments on both sides of expanding the *Canadian Human Rights Act* by adding this ground. So as to not keep the reader in suspense we do come down on the side of adding social condition in a defined and controlled way.

A. Report of the Canadian Human Rights Act Review Panel (2000)

On April 8, 1999, then federal Minister of Justice Anne McLellan established an independent panel to conduct a review of the *Canadian Human Rights Act*. The four-member Canadian Human Rights Act Review Panel [“the Panel”], chaired by the Honourable Gérard La Forest, was given the mandate to examine the CHRA, including its scope and jurisdiction, the complaints-based model, its purpose, and the grounds listed in it.³ This was the first comprehensive review of the CHRA since its enactment in 1977. Relevant for our purposes, this review included the possibility of adding new prohibited grounds of discrimination to the Act, including the ground of social condition. To assist in the review, we submitted to the Canadian Human Rights Act Review Panel a research paper on the topic of social condition, which included an overview of the law in the area, an analysis of the policy context, arguments for and against the inclusion of social condition as a prohibited ground of discrimination, and options for addressing the issue.⁴ The present paper, submitted to the Canadian Human Rights Commission, serves as an update of that work.

² P. Kershaw, *Carefair: Rethinking the Responsibilities and Rights of Citizenship* (Vancouver: H.B.C. Press, 2005). Also citing Michael Ignatieff, *The Rights Revolution* (Toronto: Anansi, 2000) at 92 (as summarized by Maciej Mark Karpinski in CHRC 2007 document “Social Condition”).

³ 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) (hereinafter *La Forest Report*) at 3.

⁴ A.W. MacKay, T. Piper and N. Kim, *Social Condition as a Prohibited Ground of Discrimination under the Canadian Human Rights Act* (December 1999), submitted to the Canadian Human Rights Act Review Panel.

1. *Recommendation by the Panel to include Social Condition*

The Panel submitted its Report to the Minister of Justice on June 21, 2000. Based on commissioned research and public consultations, the Panel concluded that social condition should be added as a prohibited ground of discrimination in the CHRA. It also made five related recommendations.

First, the Panel recommended that the ground be defined after the definition developed in Quebec, but expressly limited to the protection of disadvantaged groups. Noting that it did not consider social condition to be the same thing as poverty, the Panel endorsed the definition set out in *Québec v. Gauthier* in 1993 by the Quebec Tribunal on Human Rights:⁵

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. 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.⁶

The Panel noted that the multi-factored definition based on multiple characteristics would likely be more difficult for adjudicators to apply, but felt that it better reflected the subtleties of discrimination based on social condition and the need for flexibility it would require. The Panel also added that it believed the protection should apply to protect persons whose situation of poverty is ongoing rather than persons who may temporarily find themselves in that condition.⁷

Second, the Panel recommended the inclusion of exemptions where it is essential to shield complex governmental programs from review under the CHRA. While it noted that there were many areas of federal jurisdiction in both the public and private sectors in which protection from discrimination based on social condition could apply, it expressed concern with the application of the protections of the CHRA in complex areas of social and economic policy such as income tax and immigration. It also noted in particular that exemptions should be allowed for programs designed to benefit only certain categories of the underprivileged, such as employment insurance and training programs. However, it suggested that such exemptions should be time-limited and subject to regular review and justification. Its recommendation for exemptions was motivated by concerns that governments could be discouraged from initiating social programs; that there would be a greater potential for considerable litigation; that the *bona fide* justification to discrimination would be inadequate to address these types of distinctions; and that the Tribunal would have difficulty weighing complex policy choices.⁸

⁵ *La Forest Report*, *supra* note 3 at 107.

⁶ *Québec (Commission des droits de la personne) c. Gauthier* (1993), 19 CHRR D/312 [emphasis in original].

⁷ *La Forest Report*, *supra* note 3 at 111.

⁸ *Ibid.* at 111-12.

Third, recognizing that the Act cannot alone address the whole reality of poverty, which also requires broader public and private action aimed at improving the conditions of the socially and economically disadvantaged, the Panel recommended that social condition be added to the “affirmative action or equity program defence” in the Act so that both public and private organizations could be able to carry out affirmative action or equity programs to improve the conditions of people disadvantaged by their social condition.⁹ Similarly, it recommended that the government review all programs to reduce the kind of discrimination that is based on social condition and to create programs to deal with the inequalities created by poverty. Lastly, emphasizing the educational function of adding the ground, it suggested that the Canadian Human Rights Commission study the issues identified by social condition, including interactions between this ground and other prohibited grounds of discrimination, and to consider the appropriateness of issuing guidelines to specify the constituent elements of this ground.¹⁰

2. *What the Panel Heard During Public Consultations*

As part of its study, the Panel developed an elaborate consultation process. It held roundtable discussions with employers, labour organizations, government departments, non-governmental groups, and specialists in the area. It also held evening meetings with members of the general public in six cities across the country.¹¹ During these consultations, the Panel heard more about poverty than any other issue.¹² In particular, it heard evidence of stereotypes and prejudicial attitudes against the poor in general and social assistance recipients in particular, systemic patterns of discrimination that can reinforce a cycle of poverty, and the desire for social condition to be included in the CHRA so that there could be an instrument with which to fight back against a growing disparity between poor people and the affluent in Canada.¹³ However, the Panel also heard concerns about the ability to effectively define the ground of social condition, the potential conflict of social condition with the objectives of other laws and governmental programs and the non-immutability of social condition as a ground of discrimination.

3. *Recommendation of the Panel regarding Social and Economic Rights*

Although not expressly part of its mandate, during the public consultations many participants urged the Panel to consider, in addition to adding social condition as a prohibited ground of discrimination under the CHRA, the addition of social and economic rights. In contrast to being protected only from discrimination on a particular enumerated ground, social and economic rights would create a positive right to a particular benefit, such as a right to adequate health care, to a minimum standard of living, to education, or to housing.

⁹ *Ibid.* at 110.

¹⁰ *Ibid.* at 113.

¹¹ *Ibid.* at 3.

¹² *Ibid.* at 106.

¹³ *Ibid.* at 106-110.

While recognizing a connection between equality issues and social and economic rights and noting that Canada has existing international human rights obligations in this area, the Panel declined to recommend inclusion of social and economic rights in the CHRA. This decision was primarily motivated by concerns of uncertainty as to how they would be defined, interpreted and applied in the federal sphere, how they would operate in the legal context of the CHRA, and the political and policy implications of their inclusion. The Panel concluded:

Concerns such as these lead us to the conclusion that we should not recommend the addition of social and economic rights at this time and that the Tribunal be empowered to grant orders enforcing them. However, we do believe there is a role to be played by the Commission in monitoring Canada's compliance with international human rights treaties, either alone or in cooperation with provincial human rights commissions.¹⁴

4. (Lack of) A Federal Response to the La Forest Report since 2000

Aside from consequential amendments, the CHRA has not been amended since the *La Forest Report* was released in June 2000. Appearing before the House of Commons Standing Committee on Justice and Human Rights almost a year later, then Minister of Justice Anne McLellan stated as follows in response to a question from a committee member:

As you know, I undertook a major review of CHRA, the *Canadian Human Rights Act*, under the chairmanship of the former Supreme Court Justice Gérard La Forest. He and his commission reported to me last June. They have some 160 amendments for change. In fact, because there are so many amendments and they are so sweeping in nature, both in terms of the structure of the commission and the tribunal process as well as substantive grounds, for example, in relation to the adding of social condition and other things, we are engaged right now in an interdepartmental process.

His recommendations affect every department of government. There's not one department or agency that would not in some way be impacted by at least some of those 160 recommendations. So that process is being led by my department. In fact that is ongoing. But it is a major process because we have so many people to talk to. Then we have the federally regulated private sector, which is also dealt with under the *Canadian Human Rights Act*—for example, the telecommunications sector, the banking sector, railways, and so on.

So what we are doing now is engaging that process in relation to the specific recommendations. But, absolutely, I undertook this investigation because I believed that some twenty or more years after the CHRA it was time to review it. I think we've seen recently, from the commission itself commissioning that

¹⁴ *Ibid.* at 116.

in-house study of their internal management, that there are issues we need to address. We want an effective Human Rights Commission. We want an effective complaint system. We want legislation that reflects the modern realities of Canadian society.

That's not an easy task, but it's an important task. And in light of some things we saw last week, at least in terms of processes and structure, we need to work and move fairly quickly on this.

...I can't promise that I'm going to table proposed amendments to the CHRA. We may move on some structural changes in September, or even sooner if I could.

In terms of our consultations with other departments and the federally regulated private sector, I'm not sure we're going to be able to do that by September, but we are working on it. I give you my word that we are working diligently in terms of the implications of some of these recommendations.¹⁵

During the 39th Parliament, the issue was revisited in the same Standing Committee by then Minister of Justice Vic Toews on May 16, 2006. When asked whether his government would be moving forward on the Review Panel's recommendation to include social condition in the CHRA, Minister Toews stated:

On the specific issue with respect to the commission, I will take a look at the recommendations of Justice La Forest in his report. I can indicate that it is not on our priority list, but I'm willing to look forward to having any discussion on that particular issue.¹⁶

Government has since introduced a bill to repeal section 67 of the CHRA, which exempts from the application of the CHRA any provision of the *Indian Act* or any provision made under or pursuant to *Indian Act*.¹⁷ This was a recommendation of the Review Panel. However, to date, there has been no government initiative to add social condition as a ground of discrimination to the CHRA.

Despite the lack of federal government action to implement the recommendation of the Panel regarding the inclusion of social condition, members of the Bloc Québécois and the New Democratic Party have regularly raised the issue through private members' business.¹⁸ The Senate, which originally proposed the addition of social condition with

¹⁵ Canada, Parliament, House of Commons, Standing Committee on Justice and Human Rights, Minutes of Proceedings and Evidence, 37th Parl., 1st sess. (May 16, 2001).

¹⁶ Canada, Parliament, House of Commons, Standing Committee on Justice and Human Rights, Minutes of Proceedings and Evidence, 39th Parl., 1st sess. (May 16, 2006).

¹⁷ *An Act to amend the Canadian Human Rights Act*. Bill C-21. As introduced November 13, 2007 (originally introduced in the House of Commons on December 13, 2006, as Bill C-44) (Canada, 39th Parl., 2nd sess.), repealing s. 67 of the Act (before the Standing Committee on Aboriginal Affairs as of January 27, 2008).

¹⁸ See *Antipoverty Act (amendments to the Canadian Human Rights Act and Criminal Code)*. Bill C-322. As introduced in the House of Commons June 13, 2006 (Canada, 39th Parl., 1st sess.), adding social condition as a prohibited ground of discrimination and declaring the refusal by a financial institution to provide a banking service to an individual by reason only of the individual's low income to be a discriminatory practice. Bill C-322 was a reintroduction of Bill C-228 (Canada, 37th Parl., 2nd sess.),

its passage of Bill S-11¹⁹ in 1997 (later defeated in the House of Commons), has also revisited the matter. For instance, during a study on international human rights, the Senate Standing Committee on Human Rights specifically recommended an immediate amendment to the CHRA to include social condition as a prohibited ground of discrimination.²⁰

Similarly, the Canadian Human Rights Commission has recommended the inclusion of social condition,²¹ which has been conveyed to and encouraged by international bodies. For instance, in 2006, the International Labour Organization Committee of Experts on the Application of Conventions and Recommendations noted in relation to the implementation of the International Labour Organization Convention No. 111:

The Committee recalls that the *Canadian Human Rights Act* does not prohibit discrimination on the grounds of political opinion and social origin. The government states that the inclusion of social condition has been recommended by the Canadian Human Rights Commission, and that consultations were undertaken in 2004 on this issue with a variety of stakeholders, including employers, trade unions, NGOs and relevant ministries. As a result of these consultations, the government notes that there is a general recognition of the need to add social condition as a new prohibited ground.²²

debated once February 4, 2003, but was not votable, and Bill C-326 (Canada, 37th Parl., 1st sess.). See also Private Member's Motion M-46, as tabled October 16, 2007 (Canada, 39th Parl., 2nd sess.) by Ms. L. Davies: That, in the opinion of the House, the government should amend the *Canadian Human Rights Act* to include "social condition" as a prohibited grounds of discrimination (not debated as of March 31, 2008).

¹⁹ *An Act to amend the Canadian Human Rights Act in order to add social condition as a prohibited ground of discrimination*. Bill S-11. As passed by the Senate June 9, 1998 (Canada, 36th Parl., 1st sess.).

²⁰ Canada, Parliament, Senate, Standing Senate Committee on Human Rights, Report (*Promises to Keep: Implementing Canada's Human Rights Obligations*), 37th Parl., 1st sess. (December 2001).

²¹ Canada, Canadian Human Rights Commission, *Annual Report 2003* (Ottawa: Minister of Public Works and Government Services, 2003) at 53:

There are also other gaps in the legislation that the Commission proposes be filled. Chief among them is the addition of "social condition" as a ground of discrimination. Since 1976, when Canada ratified the International Covenant on Economic, Social and Cultural Rights, the government has had an obligation to look at poverty as a human rights issue. In many respects, Canada has fallen short in meeting this duty. The United Nations Committee on Economic, Social and Cultural Rights has commented on the persistence of poverty in our country for particularly vulnerable groups and has called on Canada to "expand protection in human rights legislation . . . to protect poor people . . . from discrimination because of social or economic status."

The Commission is therefore proposing that Parliament consider adding the ground of "social condition" to the *Canadian Human Rights Act* to respond to this need. Most provincial human rights codes include grounds related to poverty, such as "social condition" or "source of income." The idea is that a person's social condition must not be used to discriminate against him or her. For instance, financial institutions may assume that all people who have low paying jobs are an unacceptable risk for a loan. Or, an employer may impose unnecessary job requirements that deny employment to capable people who have low literacy skills as a result of their social disadvantage.

²² International Labour Organization, *Comments made by the Committee of Experts on the Application of Conventions and Recommendations, Direct Request* (CEACR 2006/77th Session), online: ILO <<http://webfusion.ilo.org/public/db/standards/normes/appl/appl-displayAllComments.cfm?hdoff=1&ctry=0110&conv=C111&Lang=EN>> (date accessed: March 5, 2008). The Committee concluded: "The Committee notes the importance of prohibiting discrimination on all the grounds enumerated in the Convention, including political opinion and social origin, and requests the

Thus, there continues to be advocacy from many different quarters to add the ground of social condition to the *Canadian Human Rights Act*. In addition to the Canadian Human Rights Commission itself, there is also diverse and widespread support from other bodies, such as the United Nations Committee on Economic, Social and Cultural Rights, opposition parties, committees of the Senate, academics and a wide-range of interest groups concerned with issues of poverty.

B. Overview of Other Developments Since the Panel Report

Outside of the federal government context, other developments that are relevant to the question of including social condition as a prohibited ground of discrimination include current demographic trends related to poverty, proposals and changes by human rights agencies, and academic and other commentary. The two most pressing reasons cited for the inclusion of social condition are the obligation to line up to our international commitments and the need to combat discrimination based on social condition, as one facet of the on-going fight against poverty in Canada.

1. Context: Statistics and the Face of Poverty in Canada

Since the *La Forest Report* in 2000, poverty in Canada continues to be a matter of pressing concern. Approximately 3.5 million Canadians were living in poverty in 2004 – more than 11% of the population. While the proportion of Canadian families living in poverty declined slightly, from 8.5% in 2003 to 7.8% in 2004, 684,000 families were living below the poverty line in 2004 with the rates of poverty highest among female single-parent families (35.6%). In 2005, nearly 1.7 million Canadians, or 5% of the population, relied on welfare, including almost half a million children. Notably, annual welfare benefits for a single person ranged from \$3,201 to \$7,189 across the provinces when the low income cut-off determined by Statistics Canada for the same year ranged from \$11,264 to \$17,219, depending on where a person lives in the country. Nevertheless, between 2004 and 2005, welfare benefits for single employable individuals went down in most provinces.²³

According to one study that looked at the “duration of poverty” between 1999 and 2004, approximately 4.5 million Canadians experienced poverty for at least one year, challenging the notion that poverty is a temporary or transitory state. Indeed, almost half a million lived in poverty for all six years of the study and, among children, 121,000 lived in poverty each year over that period. Notably, women were more likely than men to live in poverty for extended periods of time. Between 1999 and 2004, 2.5% of women lived in poverty for all six years, compared to 1.8% of men.²⁴

Government to take the necessary measures to amend the *Canadian Human Rights Act* to include these grounds, and to provide information on any action taken or envisaged in this respect.”

²³ Canadian Council on Social Development, *CCSD's Stats & Facts: Economic Security – Poverty*, online: CCSD < http://www.ccsd.ca/factsheets/economic_security/poverty/index.htm>.

²⁴ *Ibid.*

In addition, the stratification between the rich and the poor in Canada continues to widen, making disparities between socio-economic classes more acute. Between 1999 and 2005, the gap between the nation's families with the highest net worth and those with the lowest widened, in part because of gains in the value of housing; the median net worth of families in the top fifth of the wealth distribution increased by 19%, while the net worth of their counterparts in the bottom fifth remained virtually unchanged. In 2005, the top 20% of families held 75% of total household wealth in 2005, compared to 73% in 1999 and 69% in 1984, whereas the bottom 20% of families stagnated during the same period.²⁵

Statistics such as these led the Quebec Commission of Human Rights to declare that “[p]overty is the most pressing issue concerning Human Rights and Freedoms in today’s Quebec,”²⁶ even though Quebec was the first jurisdiction to recognize social condition as a prohibited ground of discrimination and is the only jurisdiction to enshrine economic and social rights in its *Charter of Human Rights and Freedoms*.²⁷ In particular, the Commission notes the strong interrelationship between poverty and the realization of social inclusion - including the effect of poverty on physical and psychological health, on fair working conditions, on access to education, and access to justice - and the intersection between poverty and other grounds of discrimination, noting the disproportionate number of single mother families, children, older persons, visible minorities, people with disabilities, and Aboriginal persons affected by poverty.

2. *Commentary by Human Rights Agencies*

Against this backdrop, the addition of human rights protection based on social condition has been considered and recommended by many human rights agencies in Canada, although only the legislatures in New Brunswick and the Northwest Territories have acted to legislate protection on this ground since the *La Forest Report*. Notably, on May 30, 2001, the Canadian Association of Statutory Human Rights Agencies (CASHRA) passed a resolution to promote the realization of the obligations in the United Nations Convention on Economic, Social and Cultural Rights. As described by the Quebec Human Rights Commission, this included promoting the inclusion of “social condition” as a prohibited ground of discrimination:

[TRANSLATION]

The resolution adopted by CASHRA, which is based on, among other things, the experience of Quebec, where social condition is a prohibited ground of discrimination, puts pressure on the governments concerned to add this ground to the list of grounds already prohibited by their respective statutes. Moreover, it commits CASHRA members to using the provisions of the International Covenant on Economic, Social and Cultural Rights as an interpretive tool in the

²⁵ Canada, Statistics Canada, *The Daily: Study: Inequality in Wealth* (December 13, 2006), <<http://www.statcan.ca/Daily/English/061213/d061213c.htm>> (date accessed: February 10, 2008).

²⁶ Quebec, Commission des droits de la personne et des droits de la jeunesse, *Poverty is the Most Pressing Human Rights Issue in Today's Quebec. Statement issued on the occasion of the World March of Women Against Poverty and Violence Against Women*, (October 2000) online: CDPDJQ <<http://www.cdpdj.qc.ca/en/publications/docs/poverty.PDF>> (date accessed: April 20, 2008).

²⁷ *Charte des droits et libertés de la personne du Québec*, L.R.Q., c. 12, s. 10 [hereinafter Quebec Charter].

enforcement and promotion of human rights and to referring to them in all of their activities.²⁸

As noted above, the Canadian Human Rights Commission has also proposed, most recently in its 2004 annual report,²⁹ that in order for the CHRA to fulfill one of the five key principles of Canadian human rights reform (i.e. comprehensiveness), it should be amended to recognize social condition as a prohibited ground of discrimination. In 2004, the Canadian Human Rights Commission conducted a series of public consultations on the future directions of the Commission. In its consultation document, *Looking Ahead*, it noted the following with regard to the issue of adding social condition to the CHRA as a prohibited ground of discrimination:

There are also gaps in the [CHRA] that the Commission proposes be filled. Chief among them is the addition of “social condition” as a ground of discrimination. Since 1976, when Canada ratified the *International Covenant on Economic, Social and Cultural Rights*, the government has had an obligation to look at poverty as a human rights issue. In many respects, Canada has fallen short in meeting this duty. The United Nations Committee on Economic, Social and Cultural Rights has commented on the persistence of poverty in our country for particularly vulnerable groups and has called on Canada to expand protection in human rights legislation . . . to protect poor people . . . from discrimination because of social or economic status.

More recently, in April 2006, the Commission appears to have taken a more cautious approach, noting in its submission to the United Nations Committee on Economic, Social and Cultural Rights³⁰ on the Fourth and Fifth Periodic Reports of Canada under the *International Covenant on Economic, Social and Cultural Rights*:³¹

However, in Canadian law the term “social condition” on its own is a broad and vague term which does not only refer to persons living in poverty, but also includes a wide range of groups in our society who do not require the same level of protection. One important safeguard may be to make it clear that to establish discrimination on the grounds of social condition, the victim must be a member of a socially disadvantaged group. In defining social condition in a federal context, it will be important to carefully consider the complexity of social programs, such as how the social benefit features of the income tax system could be shielded from undue interference as a result of human rights claims.

²⁸ As cited in Quebec, Commission des droits de la personne et des droits de la jeunesse, *Rapports d'activités et de gestion 2001* (2002) [French only] at 22.

²⁹ Canada, Canadian Human Rights Commission, *Annual Report 2004*, (Ottawa: Minister of Public Works and Government Services, 2005).

³⁰ The Committee on Economic, Social and Cultural Rights is a treaty-based body of the United Nations that is responsible for monitoring implementation of the International Covenant on Economic, Social and Cultural Rights.

³¹ *International Covenant on Economic, Social and Cultural Rights*, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (December 16, 1966), 993 U.N.T.S. 3 (entered into force: January 3, 1976) [hereinafter ICESCR].

The Commission believes that more research is required on a definition of social condition and its potential impact on other statutes and social programs. As a starting point, the Commission believes the CHRA should be amended to eliminate discrimination on the basis of source of income.

At the provincial level, as we noted in our 1999 report, a number of studies undertaken by human rights agencies have recommended inclusion of social condition, even though many of these jurisdictions already include protection on more narrowly-defined grounds such as source of income or receipt of public assistance. In British Columbia, reform was proposed to amend the British Columbia *Human Rights Code* to include social condition in 1998.³² The majority of the submissions heard by the Commission focused on how the term “lawful source of income” did not adequately protect poor people from discrimination in accommodation, service, facility, purchase of property, employment and by unions and associations.³³

In Saskatchewan, the Chief Commissioner of Human rights in Saskatchewan advocated the inclusion of social condition as a ground in their *Human Rights Code*, arguing that differences in social and economic status are as much a source of inequality as ancestry, gender and disability.³⁴

In 2001, a report commissioned by the Ontario Human Rights Commission examined the possibility of including “social condition” within the prohibited grounds of discrimination at the provincial level.³⁵ The report found that the addition of social condition would ensure greater protection of social and economic rights in Ontario, which currently only offers protection on source of income. According to the report, the addition of a ground that would deal more directly with the circumstances surrounding the experience of poverty would give human rights commissions more latitude in protecting and promoting social and economic rights.

3. *Organizations*

The International Centre for Human Rights and Democratic Development, through its 2004 report entitled *Renewing Canada’s Commitment to Human Rights: Strategic Actions for At Home and Abroad*, has commented on the topic of adding social condition to the federal, provincial, and territorial human rights statutes. Under the heading of “Urgent and Compelling Concerns”, the report echoes the *La Forest Report* and the United Nations Committee on Economic, Social and Cultural Rights, citing

³² See British Columbia, Human Rights Commission, *Human Rights for the Next Millennium*, (Vancouver; 1998) online: BCHRT < <http://www.bchrt.bc.ca/> > at recommendations 9(a), (b) and (c).

³³ S. Kilcommins, E. McClean, M. McDonagh, S. Mullally and D. Whelan, *Extending the Scope of Employment Equality Legislation: Comparative Perspectives on the Prohibited Grounds of Discrimination* (Report Commissioned by the Department of Justice, Equality and Law Reform - Ireland) (Dublin: Stationary Office, 2004), online: <<http://www.ucc.ie/en/lawsite/research/research-projects/>> (date accessed: February 4, 2008.) at 77.

³⁴ See Saskatchewan, Human Rights Commission, *Annual Report 2000-01*, online: <<http://www.shrc.gov.sk.ca/publications.html>>.

³⁵ Ontario, Human Rights Commission, *Human Rights Commissions and Economic and Social Rights* (2001), online: <http://www.ohrc.on.ca/en/resources/discussion_consultation/EconomicSocialRights/pdf> (date accessed: April 20, 2008).

Canada's international commitments and its insufficient domestic efforts to reduce poverty as justification for issuing the following statement,

We urge the Government of Canada, along with the provinces which have not yet done so, to include social condition as a prohibited ground of discrimination in their respective human rights legislation.³⁶

The Centre for Equality Rights in Accommodation [CERA] advocates the inclusion of social condition as being preferable to other more restrictive grounds such as "source of income" and "public receipt of assistance". This position is due to the intersectional aspect of the ground (described below) and CERA's belief that the inclusion of social condition will enhance the protection of other grounds. CERA notes that there has been a tendency, particularly in Quebec, to use social condition as a proxy for discrimination based on source of income, and thus advocates a broad, liberal and flexible interpretation of the potential ground. CERA believes that if social condition is interpreted in this manner, it could prove to be an effective tool for the promotion of social and economic rights in Canada.³⁷

These organizations lend their voice to the position advocated by the National Association of Women and the Law [NAWL] in 1998 and in papers commissioned by the Status of Women Canada, which we discussed in our 1999 paper. As noted there, these authors were particularly concerned with the intersection between the ground of social condition and the socio-economic inequality of women in Canada and advocated the inclusion of social condition as one element of a broader plan for addressing socio economic disadvantage. NAWL called upon the Prime Minister as recently as June 28, 2006³⁸ to take steps to satisfy the government's international obligations on socio-economic rights, including the inclusion of social condition as a protected ground of discrimination under the CHRA.³⁹

4. *Academic Commentary*

In the past decade, the debate surrounding social and economic rights, including the possibility of adding social condition to human rights legislation, has received an increasing amount of attention in academic discourse. There is a remarkable degree of consensus that something must be done to address the pressing problem of socio-economic disadvantage in Canada, but predictably somewhat less consensus about precisely how the issue is best addressed. Nonetheless, what appears from a review of the academic literature is that the addition of social condition as a prohibited ground of discrimination in the *Canadian Human Rights Act* would be a positive step in tackling the

³⁶ Rights & Democracy, *Renewing Canada's Commitment to Human Rights: Strategic Actions for at Home and Abroad* (Montreal: International Centre for Human Rights and Democratic Development, 2004) at 57.

³⁷ Centre for Equality Rights in Accommodation, *Human Rights: Prohibited Grounds of Discrimination*, online: Canada Housing Equality Resources <<http://www.equalityrights.org/cher/index.cfm?nav=hr&sub=pro>> (date accessed: March 1, 2008).

³⁸ A. Côté, *Press release: letter from National Association of Women and the Law to Prime Minister Stephen Harper* (June 28, 2006), online: NAWL <<http://www.nawl.ca/ns/en/Actions/act-cescr-en.html>> (date accessed: March 1, 2008).

³⁹ National Association for Women and the Law, *Social and Economic Right for Women*, online: NAWL <<http://www.nawl.ca/ns/en/is-serights.html>> (date accessed: March 1, 2008).

problem of social and economic disadvantage. Before we turn our focus to the arguments made explicitly in this regard, we should take a brief detour through the two other remedies that have been proposed by academic commentators: economic rights under the Constitution and positive social and economic rights in human rights legislation.

It is difficult to find a scholar in the field of social and economic rights that does not advocate the recognition of these rights under the *Canadian Charter of Rights and Freedoms*.⁴⁰ This predominant view recognizes dually that the best way to address socio-economic disadvantage is through positive rights and that positive protections, such as rights to food or shelter, can only be guaranteed in the public domain. This would seem to suggest the need for government-funded public policy programs, but calls for such programs often go unheeded: "Poverty and homelessness in Canada is more abhorrent because it is completely unnecessary and almost invariably a matter of legislative or administrative choice. Our governments have chosen to ignore the interests of the most marginalized and disadvantaged groups."⁴¹ This being the case, academics such as Bruce Porter argue that these decisions must not be immune from judicial review under the *Charter*, and that such review does not exceed the competence or legitimate role of the courts.

Porter notes a widening gulf between Canada's human rights culture and the international human rights movement.⁴² This view is echoed by much of the literature on the Canadian human rights regime.⁴³ His concern is that our approach thus far to social and economic rights in Canada leaves us structurally incapable of redressing this gap. He and other scholars feel that the *Canadian Charter of Rights and Freedoms* would be the ideal venue in which to fulfill the promise of international guarantees such as the *International Covenant on Economic Social and Cultural Rights*, to which Canada is a signatory.⁴⁴

Courts in Canada need to interpret and apply the rights in the *Charter* in a manner that recognizes the interdependence and indivisibility of all human rights and to bring within its scope critical issues of poverty and homelessness among vulnerable groups. This means that social and economic rights such as the right to an adequate standard of living, including adequate food, clothing and housing, must be recognized as

⁴⁰ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*]. Indeed, even under the current Charter equality analysis, there is more that could be done to address the problems of social and economic disadvantage. See N. Kim & T. Piper, "Gosselin v. Quebec: Back to the Poorhouse", (2003) 48 R.D. McGill 749.

⁴¹ B. Porter, "ReWriting the Charter at 20 or Reading it Right: The Challenge of Poverty and Homelessness in Canada," *Conference Proceedings at the Canadian Charter of Rights and Freedoms, Twenty Years Later* (Ottawa: Canadian Bar Association, 2001).

⁴² B. Porter, "Judging Poverty: Using International Human Rights Law to Refine the Scope of Charter Rights" (2000) 15 J. of Law & Soc'l Pol. See also M. Jackman and B. Porter, "Socio-Economic Rights Under the Canadian Charter" in M. Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, 2007).

⁴³ B. Porter, "Socio-Economic Rights Advocacy - Using International Law: Notes from Canada" (1999) 2 Economic and Social Rights Review, online: CERA <<http://www.equalityrights.org/cera/docs/treaty.htm>> (date accessed: April 20, 2008). See also L.A. Iding, "In a Poor State: The Long Road to Human Rights," (2003) 41 Alta. L. Rev. 513 – 525.

⁴⁴ M. Jackman and B. Porter, *supra* note 42.

rights which can be claimed and adjudicated by way of existing Charter rights, as well as through other areas of law.⁴⁵

Constitutional protection is an ambitious goal, with which we do not disagree, however, practicality sometimes may require a more incremental approach to change.

For instance, Lynn Iding agrees that positive economic rights must be interpreted to exist under the *Charter*, but equality protections in human rights legislation can also have a positive impact:

The line between negative and positive rights is not always clear.

Prohibition of discrimination, if applied to its full extent, may have the implicit effect of creating a positive right if the only thing preventing a claimant from accessing the goal in question is discrimination.⁴⁶

In other words, protection from discrimination can have substantive results through human rights regimes, which also have the benefit of dedicated administrative resources and jurisdiction over public and private actors.

The notion of the false dichotomy between negative and positive rights – the indivisibility of human rights – has also been cited by others as a justification for taking the step towards broader social and economic rights protection under the *Charter* and the CHRA, which already recognize the obligation for substantive equality protections. Martha Jackman argues that “recognizing social and economic rights as fundamental components of equality rights is consistent with the evolving equality rights analysis of the Supreme Court of Canada, as well as with its emerging jurisprudence on the role of international law in interpreting the Canadian Charter and human rights legislation.”⁴⁷ Thus, including such positive rights in human rights legislation would affirm the inherent connection between social and economic rights and equality rights, ensuring that protection for claimants is real and not downgraded to mere lip service to “principles”⁴⁸ and, perhaps most importantly, ensuring access to justice. Jackman states:

A procedure for claiming social and economic rights must respond to the needs of the most disadvantaged members of society. Human rights tribunals are more accessible, less expensive and less tied to legal procedures than are the courts. Advocates before human rights tribunals do not need to be lawyers, and tribunal members can be chosen for their expertise in human rights, without the requirement that they have formal legal training or accreditation. Racialized women, women with disabilities, and other members of equality seeking groups are better represented on human rights tribunals than on courts. Human rights tribunals will therefore

⁴⁵ B. Porter, *supra* note 42 at 3.

⁴⁶ L. Iding, *supra* note 43 at para 22.

⁴⁷ M. Jackman and B. Porter, “Women's Substantive Equality and the Protection of Social and Economic Rights Under the *Canadian Human Rights Act*,” in *Women and the Canadian Human Rights Act: A Collection of Policy Research Reports* (Ottawa: Status of Women Canada, 1999) at 10. See also *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391, [2007] 2 S.C.R. 391, 2007 SCC 27 [hereinafter “*Health Services*”].

⁴⁸ M. Jackman and B. Porter, *ibid.* at 10.

provide a more accessible and responsive forum for the consideration of social and economic rights claims.⁴⁹

These arguments have also led legal scholars to advocate the much more straightforward inclusion of “social condition” or “poverty” in human rights legislation as a pragmatic and feasible part of a more comprehensive scheme involving not only the administrative branch of government, but also the executive and the courts.

Some time ago Martha Jackman posited that the failure to include poverty under provincial and federal human rights codes constitutes a violation of section 15 of the *Charter*.⁵⁰ She encouraged the courts to read into human rights codes “poverty” as a prohibited ground of discrimination. Jackman supports the use of human rights codes to provide protection to Canadians living in poverty since the codes prohibit discrimination on the basis of “services, goods and facilities; discrimination in accommodation and employment; and discriminatory publications”.⁵¹ Hence, human rights codes, in addition to being more accessible, have a more direct impact on the daily interactions of Canadians living in poverty. Jackman highlights that legislation protecting historic and systemic discrimination has not helped those whom she believes are suffering from the greatest disadvantage. She concludes that such an omission “reflects, reinforces, and facilitates continued systemic bias against them in Canadian society”.⁵²

In a similar vein, Sheilagh Turkington has advocated the expansion of the grounds of discrimination under the *Ontario Human Rights Code* to include poverty.⁵³ According to Turkington, one of the benefits of including “povertyism” in human rights legislation is that complainants are given access to the remedial potential of Boards of Inquiry which can, among other remedies, require extensive education and training on “issues surrounding the protected ground found to have been discriminated against”.⁵⁴ Another benefit of the remedial powers of the Boards of Inquiry is the power of on-going monitoring. Turkington also highlights the mandate of a human rights commission to educate and the role this could play in opening dialogue and fostering understanding. Finally, including a ground of poverty would allow a mechanism for individuals living in poverty to gain access to the goods, services and facilities which they may have otherwise been denied. Turkington emphasizes that the inclusion of “povertyism” in the provincial human rights code must be borne of a process of consultation with those who would be affected by its inclusion, the poor. Hence “the addition of ‘poverty’ cannot be a strictly legal strategy; it must be primarily both social and political.”⁵⁵ Finally, echoing the general view in the academic literature, she argues that reform of human rights codes (by adding poverty as a prohibited ground of discrimination) should only be seen as one element of an overall strategy to eliminate poverty, not as a solution in and of itself.

⁴⁹ *Ibid.* at 21.

⁵⁰ M. Jackman, “Constitutional Contact with the Disparities in the World: Poverty as a prohibited ground of discrimination under the Canadian Charter and human rights law,” (1994) 2 *Rev. Const. Studies* 76.

⁵¹ *Ibid.* at 111.

⁵² *Ibid.*

⁵³ S. Turkington, “A Proposal to Amend the Ontario Human Rights Code: Recognizing Povertyism”, (1993) 9 *J. L. & Soc Pol’y* 134.

⁵⁴ *Ibid.* at 169.

⁵⁵ *Ibid.* at 177.

The arguments of both Jackman and Turkington highlight the unique forum of human rights commissions for addressing the situation of social and economic disadvantage and social condition. This in turn raises the important issue of institutional competence, which also has been addressed in the academic literature. Human rights scholar A. Wayne MacKay argues that “due to their flexibility and accessibility, Human Rights Tribunals should supplement the role of the courts and legislatures in giving effect to social and economic rights, which should form part of a holistic package of rights in Canada.”⁵⁶ Not only does implementation of social and economic rights through administrative tribunals respect the principle of legislative supremacy, they also provide more flexibility in remedies and dispute resolution mechanisms. Furthermore, human rights tribunals have additional jurisdiction over the private sector, and are more accessible to claimants in terms of costs than the courts. Thus, the addition of social condition to the CHRA would provide a dimension of supplemental protection to Canadians which is currently lacking in the federal human rights scheme, while remaining consistent with it. This sentiment was echoed by the Review Panel in the *La Forest Report*:

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.⁵⁷

Murray Wesson puts the protection afforded in a slightly different way. “Dignity”, he argues, “is the touchstone of equality”.⁵⁸ Equality must refer to equality of something – be it resources, or opportunity. In a sense, social and economic rights aim at both of these. The addition of social condition as a prohibited ground of discrimination in the CHRA also aims for equality of dignity and that is certainly an integral piece in the larger puzzle of addressing social and economic disadvantage. To meet this objective, Wesson proposes that social condition be defined as “those individuals who cannot reasonably be expected to meet their socio-economic needs with their own resources.”⁵⁹ In other words, it would include both those reliant on social services and those who need them. While Wesson is one of few commentators that actually propose a definition of social condition, the emphasis on socio-economic disadvantage by all of the above commentators is consistent with the current approach to defining social condition in those jurisdictions that recognize it, which we will discuss in the next section.

⁵⁶ A. Wayne MacKay, “Social and Economic Rights in Canada: What Are They and Who Can Best Protect Them?” *Canadian Issues* (Montreal: Fall 2007) 37- 41, at 37.

⁵⁷ *La Forest Report*, *supra* note 3 at chapter 17e.

⁵⁸ M. Wesson, “Social Condition and Social Rights” (2006) 69 Sask. L.R. 101 at para 5.

⁵⁹ *Ibid* at 106, para 16.

II. What is Social Condition and how has it been Defined?

A. Context: The Broad and Purposive Approach to Anti-Discrimination Laws

At least since the 1960s, Canada has attacked the pernicious problems of discrimination by way of increasingly comprehensive human rights codes. The high cost and limited success of pursuing discrimination complaints in courts⁶⁰ and the relative ineffectiveness of quasi-criminal statutes, led to the adoption of an administrative model in the form of human rights commissions. These commissions have a multi-faceted mandate including the resolution of individual complaints, advice to governments, education and community outreach. These agencies were intended to be more accessible to the victims of discrimination and in theory provide more speedy resolution of disputes. The focus of the commissions' work is conciliatory and settlement-focused but more adversarial and adjudicative tribunals are available as a harder-line approach or, as the late Walter Tarnopolsky called it, as the "iron hand in the velvet glove."⁶¹

Over the years, human rights codes became increasingly comprehensive as more grounds of discrimination were added and the number of complaints grew. The range of services offered by human rights commissions also grew, although there was not always a corresponding increase in their budgets. The comprehensive nature of human rights codes was judicially noted in the Supreme Court of Canada as a central reason for denying a claim for a tort of discrimination in the courts.⁶² However, courts as well as commissions have continued to play an important role in shaping human rights law as courts must interpret the scope of the statutes and be available for review and appeal of Commission and Tribunal decisions.

Human rights statutes in Canada cover three primary areas, including employment, accommodations, and services, both in the public and private sectors. The purpose of this comprehensive scheme can be best explained by section 2 of the CHRA:

2. The purpose of the Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.⁶³

The Commission, on behalf of the complainant, must establish that the respondent discriminated, directly or indirectly, on a prohibited ground under the CHRA. The

⁶⁰ *Christie v. York* [1940] S.C.R. 13.

⁶¹ W. Tarnopolsky, "The Iron Hand in the Velvet Glove": Administration and Enforcement of Human Rights Legislation in Canada" (1968), 46 Can. Bar Rev. 565.

⁶² *Seneca College v. Bhaudaria* [1981] 2 S.C.R. 181.

⁶³ CHRA, *supra* note 1, s. 2 as am. by S.C. 1996, c. 14, s.1.

discrimination caused by the practice of the respondent must be one included under the provisions and jurisdiction of the CHRA. The pursuit of substantive equality for all persons has been primarily affected by giving human rights legislation a broad and liberal interpretation.

Human rights statutes were designed to be remedial and focused on compensating the victims rather than punishing the perpetrators of discrimination and the courts adopted a broad and purposive interpretation of these statutes. Discrimination was broadly defined as being both intentional and unintentional, so that actions or rules with an unintended adverse effect on particular groups or individuals were found to also be a violation of the statutes. Indeed, the courts have treated human rights codes as quasi-constitutional in nature and thus above a regular statute while being less than constitutional in nature. As quasi-constitutional documents, human rights codes enjoy similar principles of interpretation afforded to constitutional documents, including a “large and liberal”, purposive and contextual approach. This principle was best described by McIntyre J. in *O’Malley* regarding the Ontario Human Rights Code:

The accepted rules of construction are flexible enough to enable the Court to recognize in the construction of a human rights code the *special nature and purpose of the enactment* ... and give to it an interpretation which will *advance its broad purposes*. Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary -- and it is for the courts to seek out its purpose and give it effect. The Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is *the result or the effect of the action complained of which is significant*. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory.⁶⁴

The result of this approach is to ensure the intent and purpose of the CHRA – to eliminate discrimination – is given effect and respect without being unduly restricted by strict rules of interpretation.

However, commissions have to balance the protection of people against discrimination, with the fair treatment of those who have allegedly discriminated.⁶⁵ One way of providing this balance is to provide reasonable defences to employers and service providers in both the public and private sectors. In addition to some specific defences for mandatory retirement (in some cases), pension schemes, and valid equity programs, the main justifications are in the form of bona fide justifications or qualifications. The burden of establishing these justifications rests with the respondents to establish on a balance of probabilities, once the claimant has proven discrimination on a similar standard of proof.

⁶⁴ *O’Malley v. Simpsons Sears* [1985] 2 S.C.R. 536 at 547. [Emphasis added.]

⁶⁵ The difficulty of striking this balance is exemplified in *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307.

It is noteworthy that these justifications are not called defences because if a justification is established there is deemed to have been no discrimination at the end of the day.

Bona fide justifications used to be reserved for cases of direct or intentional discrimination while a duty to accommodate up to the point of undue hardship was used for cases of indirect or adverse effects discrimination. There is now one unified justification test for discrimination whether the form of discrimination is direct or indirect. In a pair of cases, *Meiorin*⁶⁶ and *Grismer*,⁶⁷ the Supreme Court articulated the test in the following terms:

1. Whether or not the standard (procedure) was adopted for a purpose rationally connected to performance of the function being performed;
2. Whether the particular standard was adopted in a good faith belief that it is necessary to the fulfillment of the legitimate purpose or goal;
3. Where the standard is reasonably necessary to accomplish the legitimate purpose or goal, the defendant may claim it cannot accommodate persons with the characteristics of the claimant without incurring undue hardship, whether the hardship takes the form of impossibility, serious risk or excessive cost.⁶⁸

This is a high standard to meet and it has essentially been incorporated directly into section 15 of the *Canadian Human Rights Act*.⁶⁹ The effect of this new test for justification is to emphasize a point made earlier in *Central Okanagan School District v. Renaud*⁷⁰ that some degree of hardship on the part of both public and private respondents is acceptable and to justify alleged discrimination the respondent must show that the burden is undue, even after all available options have been explored. As part of promoting human rights, justifications, unlike the grounds of discrimination, are to be strictly construed.

The flavour of the *Meiorin* decision is revealed in the following quotations from the case, which started as a decision by a human rights tribunal based upon a complaint of sex discrimination. Madam Justice McLachlin, speaking for the Court, makes the following statements about the nature of equality and discrimination:

41 Although the practical result of the conventional analysis may be that individual claimants are accommodated and the particular discriminatory effect they experience may be alleviated, the larger import of the analysis cannot be ignored. It bars courts and tribunals from assessing the legitimacy of the standard itself. Referring to the distinction that the conventional analysis draws between the accepted neutral standard and the duty to accommodate those who are adversely affected by it, Day and Brodsky, *supra*, write at p. 462:

⁶⁶ *British Columbia v. B.C.G.S.E.U.*, [1999] 3 S.C.R. 3 [hereinafter “Meiorin”].

⁶⁷ *B.C. Superintendent of Motor Vehicles v. B.C. (Council of Human Rights)*, [1999] 3 S.C.R. 868 [hereinafter “Grismer”].

⁶⁸ *Ibid.*

⁶⁹ CHRA, *supra* note 1, s. 15.

⁷⁰ [1992] 2 S.C.R. 970 at 974.

The difficulty with this paradigm is that it does not challenge the imbalances of power, or the discourses of dominance, such as racism, able-bodyism and sexism, which result in a society being designed well for some and not for others. It allows those who consider themselves "normal" to continue to construct institutions and relations in their image, as long as others, when they challenge this construction are "accommodated".

Accommodation, conceived this way, appears to be rooted in the formal model of equality. As a formula, different treatment for "different" people is merely the flip side of like treatment for likes. Accommodation does not go to the heart of the equality question, to the goal of transformation, to an examination of the way institutions and relations must be changed in order to make them available, accessible, meaningful and rewarding for the many diverse groups of which our society is composed. Accommodation seems to mean that we do not change procedures or services, we simply "accommodate" those who do not quite fit. We make some concessions to those who are "different", rather than abandoning the idea of "normal" and working for genuine inclusiveness...

42 This case, where Ms. Meiorin seeks to keep her position in a male-dominated occupation, is a good example of how the conventional analysis shields systemic discrimination from scrutiny. This analysis prevents the Court from rigorously assessing a standard which, in the course of regulating entry to a male-dominated occupation, adversely affects women as a group. Although the government may have a duty to accommodate an individual claimant, the practical result of the conventional analysis is that the complex web of seemingly neutral, systemic barriers to traditionally male-dominated occupations remains beyond the direct reach of the law. The right to be free from discrimination is reduced to a question of whether the "mainstream" can afford to confer proper treatment on those adversely affected, within the confines of its existing formal standard. If it cannot, the edifice of systemic discrimination receives the law's approval. This cannot be right.⁷¹

These observations about the nature of equality, the purpose of accommodation and the value of a substantive effects-based analysis are valuable in understanding the sometimes-subtle process of exclusion. Acknowledging that the advocated purpose of human rights legislation is the "removal of discrimination", accommodation, and substantive social equality, the inclusion of "social condition" in the CHRA would certainly be an appropriate means to this end.

⁷¹ *Meiorin*, *supra* note 66 at paras. 41-42.

Justifications within human rights codes can be distinguished from the section 1 reasonable limits clause in the *Charter of Rights* by the broader societal focus of the latter. Justifications are to be considered in the specific context of the case in issue whereas the broader language of section 1 of the *Charter* allows for larger policy considerations (even beyond the particular case in issue) to be weighed in the balance. In spite of this distinction, some provinces, such as Nova Scotia and Alberta, do provide a reasonable limits defence within their statutes.⁷² The possible inclusion of this larger defence was advocated in our earlier paper to the La Forest Review Panel and will be discussed later on in the section on recommendations.⁷³

This rather lengthy contextual analysis is intended to set the stage for the need to define social condition in a manner that fits within the equality world as articulated in the various human rights codes and the *Charter of Rights*. The broad definition of economic and social rights as defined at the international level (discussed later) does not fit as easily within the current model. Economic and social rights are defined internationally as positive rights that would entitle people to programs, services and benefits that go beyond rights of non-discrimination. This would involve human rights commissions in a regulatory role that would involve changes to the administrative structure that go beyond the mandate of this study. We will also return to this point in the recommendations section.

B. Provincial Approaches

1. “Social Condition”

a) Quebec

In our 1999 paper, we provided a comprehensive review of the Quebec experience with the inclusion of social condition as a prohibited ground of discrimination, which has been part of the Quebec *Charter of Human Rights and Freedoms* since its adoption in 1975.⁷⁴ Section 10 reads:

10. Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.

Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.

The non-discrimination right in section 10 is exercisable as a modality of a certain right, such as the right to non-discrimination in employment (sections 16 to 19), in the completion of a juridical act, such as a contract for goods, services or accommodations (sections 12 to 13), or in the posting of notices (section 11). While there is a general

⁷² *Human Rights Act*, R.S.N.S. 1989, c. 214, s. 6(f)(ii), as am. by S.N.S. 1991, c. 12 and *Alberta Human Rights, Citizenship and Multiculturalism Act* R.S.A. 1980, c. H-11.7, s. 11.1.

⁷³ A.W. MacKay, T. Piper and N. Kim, *supra* note 4 at 151-153.

⁷⁴ *Quebec Charter*, *supra* note 27, s. 10.

defence provision at section 9.1 for the exercise of “fundamental freedoms and rights” (i.e. those in sections 1 to 9, such as freedom of expression),⁷⁵ the equality provisions in the Quebec Charter are made explicitly subject only to specific exceptions, such as discriminating on the basis of age as provided by law (section 10), leasing rental premises to a family member (section 14), making distinctions in employment based on aptitudes or for an ameliorative purpose (section 20), or making distinctions on specified grounds based on actuarial data in an insurance or pension plan (section 20.1). Consistent with Supreme Court jurisprudence on section 10, the Quebec tribunal and courts generally approach section 10 on the basis of a three-part test:

It appears from s. 10 of the *Charter of human rights and freedoms* that three elements are necessary to establish discrimination: (1) a “distinction, exclusion or preference”, (2) based on one of the grounds listed in s. 10, and (3) which “has the effect of nullifying or impairing” the right to full and equal recognition and exercise of a human right or freedom.⁷⁶

Recently, the Supreme Court of Canada has also confirmed that the *Meorin* approach should apply equally in the Quebec context.⁷⁷

At the time of our 1999 research paper, Quebec was the only jurisdiction in Canada with social condition protection and through judicial consideration, academic analysis and the issuing of guidelines by the Quebec Commission, a definition of the ground was formulated over the course of approximately 20 years. The key elements that are defined as part of “social condition” include:

- An objective component regarding the economic rank or social standing of an individual based on factors such as income, occupation or level of education and a subjective component regarding the value attributed to an individual based on social perceptions or stereotypes associated with factors such as income, occupation or level of education;⁷⁸ in other words, level of income may be an objective element of social condition but it is the impact of that level on the position a person holds in society that is an element of social condition;⁷⁹

⁷⁵ *Ibid.*, s. 9.1. Section 9.1. reads:

9.1 In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Québec.

In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law.

In *Irwin toy ltd. v. Quebec (Attorney general)*, [1989] 1 S.C.R. 927, the Supreme Court applied section 9.1 to justify a limit on freedom of expression under the Quebec Charter in the same way it applied section 1 under the *Canadian Charter*.

⁷⁶ *Forget v. Quebec (Attorney General)*, [1988] 2 S.C.R. 90, applied more recently in *Brossard (Town) v. Quebec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279

⁷⁷ *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Maksteel Québec Inc.*, [2003] 3 S.C.R. 228 at para. 12.

⁷⁸ See *Gauthier*, *supra* note 6, *Centre Hospitalier Regina Limitée c. Commission des droits de la personne du Québec et Laurin* (1985), 7 C.H.R.R. D/3359, *D’Aoust c. Vallières*, (1994) 19 CHRR D/322 (TDPQ), *Leroux et CDPQ c. J.M. Brouillette Inc.*, [1994] JTDPQ No. 16.

⁷⁹ *Québec (CDP) c. Whittom (re Drouin)*, [1997] A.Q. No. 2328 (C.A.). Put another way, Alberte Ledoyen in *La Condition sociale comme critère de discrimination : document de travail* (Montreal: Commission des

- Social condition is more dynamic than the concept of social origin; it encompasses one's social origin and refers to a present situation rather than one's background or history;⁸⁰
- Social condition should be looked at holistically and based on the ensemble of factors within the social context; not all criteria (e.g. income, occupation and education) need be present to establish discrimination based on social condition⁸¹ and an openness to looking at the multiplicity of factors influencing discrimination should be encouraged;⁸²
- Social condition can be a temporary state and need not be immutable like sex or race;⁸³ and
- All members of a certain social condition need not be targeted by the measure nor need social condition be the only basis for discrimination.⁸⁴

In summary, the Quebec definition of social condition includes both social and economic aspects and is much more dynamic and flexible than more traditional grounds of discrimination, such as sex or race, may be. Moreover, the case law developed to approach social condition in a manner that emphasized the purpose of human rights legislation,⁸⁵ rejecting early decisions that indicated a doctor's level of income⁸⁶ or being

droits de la personne, January 1994) at 8, emphasized the need to examine social condition in the context of socio-economic hierarchal structures in society:

[TRANSLATION]

It should be borne in mind that, according to the dictionary, the term (social) "condition" refers to any situation that has an impact on the place attributed to a person within a social hierarchy. The definition of the concept covers both objective (situation) and subjective elements (attributed). As social condition is attributed to a person, a person's social condition therefore results from a judgment made about that person, associating his or her objective situation with a specific social category, which stems from a mental reference scheme. ... This social hierarchy and the positions it implies are the result of visions of the world specific to that type of society, that is, a particular cosmogony, source of social tradition and organization, that legitimizes individual and collective social positions.

⁸⁰ *Gauthier*, *supra* note 6; *D'Aoust*, *supra* note 78; Quebec, National Assembly, Commission permanente de la Justice, *Journal des débats* (3rd sess., 30th leg.) at B-5044 (J. Morin).

⁸¹ *Gauthier*, *supra* note 6.

⁸² Quebec, Commission des droits de la personne et des droits de la jeunesse, *Lignes directrices sur la condition sociale* (March 2004) [hereinafter "Lignes directrices"].

⁸³ *Gauthier*, *supra* note 6.

⁸⁴ *Guay et Commission des droits de la personne et des droits de la jeunesse c. Briand*, [1997] JTDPQ No. 18.

⁸⁵ See e.g. *Couet c. Québec (Procureur général)*, [1997] A.Q. No. 3559, finding that the status of being a "snowbird" could not found a claim based on social condition because it did not engage social prejudices based on one's place in society, education or income.

⁸⁶ *Guimond c. Université de Montréal*, [1985] 1985-03-29 (C.S.). But see *Skelly and Quebec Human Rights Commission v. O'Hashi*, [1996] JTDPQ No. 32 at para. 62, finding that there was no harassment based on social condition by a doctor towards a nurse because "we are dealing with a nurse and a doctor,

a judge⁸⁷ could constitute a social condition deserving of human rights protection or that found that being a recipient of social assistance was not a social condition.⁸⁸

Since our 1999 paper, Quebec courts and the Tribunal have consistently confirmed the broad definition of social condition aimed at situations of socio-economic disadvantage. Receipt of social assistance has repeatedly been found to be a social condition by the Tribunal and the courts. This has occurred most often in the area of tenancy where landlords have refused to rent premises to social assistance recipients based on assumptions of their ability to pay,⁸⁹ even if it was only an influential factor in a discriminatory practice.⁹⁰ Receipt of social assistance was also found to ground a complaint of discrimination in the context of services in *Sejko c. Gabriel Aubé inc.* In that case, a company refused to complete a purchase contract with a social assistance recipient because of assumptions that she had more free time to cause problems given that she was not employed.⁹¹ In *Lambert c. Québec (Procureur général)*, the Quebec Court of Appeal found that a distinction on social condition existed against beneficiaries of a work assistance program receiving public assistance because they were paid an hourly wage lower than the minimum wage. However, in that case, the Court decided no discrimination existed because the program was designed to benefit participants in the program so the distinction did not offend human dignity.⁹²

In addition to receipt of public assistance, one's type of occupation was found to ground a claim in social condition in *Bia-Domingo c. Sinatra*.⁹³ The Tribunal found that a landlord discriminated in refusing to rent to a freelance writer whose type of work was associated with a low level of income. Drawing on expert evidence presented by the Commission, the Tribunal noted that freelance or precarious work fit within the recognized definition of social condition:

[TRANSLATION]

Freelance work and precarious work therefore entail some of the elements of social condition, essentially type of employment and the low income generated by such work. Furthermore, the situation of freelance workers whose employment is precarious also entails a subjective element, as perceptions are connected to the various objective data. Consequently, the Tribunal concludes that individuals who are freelancers whose employment is precarious and characterized by low income

two professionals working in the field of health care services. Although their respective duties are different, both of them have substantially the same social condition.”

⁸⁷ *Droit de la famille* - 1473, (1991) R.D.F. 691 (C.S.); see *Vaillancourt c. Centre communautaire juridique Laurentides-Lanaudière*, J.E. 93-1412 (C.S.), where being an articling student compared to a full member of the Bar could not find a claim based on social condition.

⁸⁸ *Québec (Commission des droits de la personne) c. Paquet*, (1981) 2 C.H.R.R. D/444 (C.P.), overturned in *Gauthier*, *supra* note 6.

⁸⁹ See e.g. *J.M. Brouillette*, *supra* note 78; *Reeves et Québec (CDPDJ) c. Fondation Abbé Charles-Émile Gadbois*, [2001] JTDPQ No. 13; *Lavigne et Québec (CDPDJ) c. Latreille*, [2000] JTDPQ No. 12.

⁹⁰ *Commission des droits de la personne et des droits de la jeunesse c. Huong*, [2005] JTDPQ No. 4, at para. 33: [TRANSLATION] “The Tribunal wishes to point out that it is not necessary for a refusal to rent an apartment to be entirely based on a discriminatory ground: it suffices, in fact, for the discriminatory ground to have influenced the decision.”

⁹¹ *Sejko c. Gabriel Aubé inc.*, [1999] JQ No. 2858 (CQ).

⁹² *Lambert c. Québec (Procureur général)*, [2002] JQ No. 364 (C.A.) leave to appeal to SCC dismissed: [2002] CSCR no 228. See further *infra* Part II,C,1,c).

⁹³ *Bia-Domingo et Québec (CDPDJ) c. Sinatra*, [1999] JTDPQ No. 19.

may, under the *Charter*, be protected against discrimination based on social condition.⁹⁴

The Tribunal also emphasized that social condition must be interpreted with sufficient flexibility to assure continued protection in the context of evolving political and social circumstances.⁹⁵ This is consistent with the broad purposive approach taken to both the *Canadian Charter of Rights* and human rights code interpretation.

In line with this approach and in contrast with early cases on social condition, the courts have been reluctant to find that a professional occupation characterized by a higher level of income constitutes a social condition. For instance, in *Ordre des comptables généraux licenciés du Québec c. Procureur général du Québec*, the Court of Appeal found being a licensed as opposed to a chartered accountant was not a social condition.⁹⁶ While noting that one's profession can influence one's social condition, the court emphasized the purpose of the CHRA to protect vulnerable groups in society who cannot easily escape their condition:

[TRANSLATION]

This is quite different from the notion of social condition as defined by case law. That notion generally refers to rank, a person's place in society. In the more specific context of an allegation of discrimination, this notion has been applied to disadvantaged or vulnerable individuals who suffer rather than benefit from their social condition.⁹⁷

Similarly, the Court of Appeal found that being an optician who is charged higher professional fees for having multiple places of business was not a social condition.⁹⁸ This is in line with the approach rejecting that one's occupation or level of income alone, apart from social perceptions related to it, can constitute a social condition.⁹⁹

As noted in our 1999 paper, the Court of Appeal recognized in *Levesque v. Quebec (Attorney General)*, that the status of a student could be a social condition, although it was not found to be in that case where a student was cut off social assistance because she went back to school full-time and could benefit from student aid.¹⁰⁰ More recently, in 2003, the Court of Appeal affirmed that level of education could determine one's social condition, but found it did not in the context of an automobile accident

⁹⁴ *Ibid.* at paras. 55-56. See also *Lignes directrices*, *supra* note 82 at 8: [TRANSLATION] "In other words, only precariousness combined with a low-paying job is likely to be considered to be the equivalent of a poor economic condition."

⁹⁵ *Bia-Domingo*, *ibid.* at para. 45.

⁹⁶ *Ordre des comptables généraux licenciés du Québec c. Procureur général du Québec*, [2004] J.Q. No. 4881 (C.A.).

⁹⁷ *Ibid.* at para. 70.

⁹⁸ *Farhat c. Ordre des opticiens d'ordonnances du Québec*, [1998] A.Q. No. 3661.

⁹⁹ See *Québec (Procureur général) c. Modes Cohoes Inc.*, [1993] A.Q. No. 1852 (C.A.) at para. 17 : [TRANSLATION] "Moreover, the appellant cannot argue that the right to earn a living is included in the ground of social condition, as ... our Court has already described the factors for evaluating "social condition", which are far from being limited to a person's income; see also *Patry c. Barreau du Québec*, [1991] A.Q. No. 1237 (Que. C.S.), finding that refusal of membership to the Bar because one was a police officer was not discrimination based on social condition because there was no reference to the class or social rank of the plaintiff.

¹⁰⁰ (1987), 10 Q.A.C. 212 (C.A.).

insurance indemnity scheme where indemnities were accorded at different levels based on one's level of education.¹⁰¹ Indeed, despite this openness to the possibility expressed by the Court of Appeal, there does not appear to be a case where the status of student or one's level of education was found to ground a finding of discrimination based on social condition. Two cases found that it was not discrimination based on social condition to require a certain level of education for employment or membership in a profession.¹⁰² Indeed, in 2007, the Court of Appeal appeared to take a different approach in finding that the status of student could not be a social condition because it was deliberately chosen and could be changed,¹⁰³ seemingly contradicting its past recognition that being a student could be a social condition and that social condition could encompass temporary states.

In contrast, the courts have been consistent in continuing to find that having a criminal record does not come within the definition of social condition. As in other early cases, in 1981 in *Commission des droits de la personne du Québec v. Ville de Beauport*, it was held that a criminal record stems from one's unlawful conduct rather than one's social rank:

. . . discrimination based on an individual's criminal record is not based on the individual's "social condition", because it is not based on the position that he or she holds in society; rather, it is based on the unlawful conduct engaged in by the individual, regardless of the position he or she occupies in the social order.¹⁰⁴

In 1982, the Quebec National Assembly rejected a recommendation by the Quebec Commission that the Quebec Charter be amended to state that social condition should be interpreted as including having a criminal record, opting instead to enact section 18.2 of the *Charter*, which provides a limited protection against discrimination based on criminal conviction in the realm of employment.¹⁰⁵ Courts have taken this as a confirmation that having a criminal record cannot be the basis of discrimination based on social condition. For instance, in *Wagner c. ING, Le Groupe Commerce, Cie d'assurance*, the Court of Quebec found that it was not discriminatory for an insurance company to treat a contract as void *ab initio* because the complainant did not disclose her partner's criminal record. It held:

[TRANSLATION]

Having one or more criminal records is also not a social condition within the meaning of section 10 of the *Charter of human rights and freedoms*. One cannot

¹⁰¹ *Champagne c. Société de l'assurance automobile du Québec*, [2003] JQ No. 13948 (C.A.).

¹⁰² *Québec (Procureur général) c. Choinière*, [1999] JQ No. 766 (C.S.), where preference was given to college graduates in a public service competition; *Fleurent c. Association des courtiers et agent immobiliers du Québec*, [2004] JQ No. 3902 (C.S.), where college courses were required for admission into the profession.

¹⁰³ *Harvey c. Québec (Procureur général)*, [2007] JQ No. 892 (C.A.), rejecting an application for a class action on behalf of students who were prevented from paying into the Quebec Pension Plan under the *Loi sur le régime de rentes du Québec*, which only workers paid into.

¹⁰⁴ [1981] C.P. 292, as translated in *Maksteel*, *supra* note 77.

¹⁰⁵ *Quebec Charter*, *supra* note 27, s. 18.2. Section 18.2 currently reads: "No one may dismiss, refuse to hire or otherwise penalize a person in his employment owing to the mere fact that he was convicted of a penal or criminal offence, if the offence was in no way connected with the employment or if the person has obtained a pardon for the offence."

conclude otherwise, as it would mean granting a right to a person who has broken social rules designed to ensure the protection and fulfillment of all individuals simply because the particular situation of being a convicted offender has been integrated into social condition.¹⁰⁶

In the same vein, in *St-Jacques c. Phil Larochelle Equipement Inc*, the Tribunal held that being charged with an offence, as opposed to having a criminal conviction, could not be a social condition.¹⁰⁷

In summary, while the definition of social condition has remained relatively stable over the last decade or so and has emphasized a purposive approach in protecting vulnerable socio-economic groups, the cases have also tended to confine social condition almost exclusively to the receipt of social assistance. The *Bia-Domingo* case recognized that low income associated with precarious types of work could also fall under social condition and the door to recognizing level of education as the basis for social condition has not been closed. However, almost all successful findings of discrimination have focused on receipt of public assistance, which, as will be reviewed in the next section, is already recognized as a ground of discrimination in many other provincial human rights codes.

b) New Brunswick

The *New Brunswick Human Rights Act*¹⁰⁸ was amended in 2004 to include “social condition” as a prohibited ground of discrimination. This amendment came into force January 31, 2005.¹⁰⁹ Along with the inclusion of “social condition” as a ground of discrimination, the amendment included a definition of the term in section 2 of the NBHRA:

“social condition”, in respect of 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;¹¹⁰

Prior to this amendment, New Brunswick did not have any economically related ground of discrimination, such as receipt of public assistance or source of income, in its human rights legislation. The amendment to include “social condition” was supported by the 2004 New Brunswick Human Rights Commission, *Position Paper on Human Rights Renewal in the Province of New Brunswick*,¹¹¹ which relied on the *La Forest Report*, among others, as justification of its position supporting the addition of “social condition”.

¹⁰⁶ (2001) JQ No. 1409 (CQ) at paras 20-21.

¹⁰⁷ [1998] JTDPQ No. 37.

¹⁰⁸ *New Brunswick Human Rights Act*, R.S.N.B. 1973, c. H-11, s. 2, as am. by *An Act to Amend the Human Rights Act*, R.S.N.B. 2004, c.21 [hereinafter NBHRA].

¹⁰⁹ *An Act to Amend An Act to Amend the Human Rights Act*, R.S.N.B. 2004, c.44, delaying the coming into force of the adding of social condition as a prohibited ground until January 31, 2005.

¹¹⁰ NBHRA, *supra* note 108. The NBHRA is divided into a number of different protected areas of discrimination, each with their own list of protected grounds: employment (section 3), property interests and housing (section 4), services (section 5), publications (section 6), and professional, business and trade associations (section 7). Social condition has been added as a protected ground in each section.

¹¹¹ New Brunswick, Human Rights Commission, *Position Paper on Human Rights Renewal in the Province*

The effect the amendment would have on existing governmental statutes and programs was the only argument for not adding social condition identified by the paper. In response to this argument against the addition of social condition, section 7.01 of the NBHRA was included. It states the following:

Despite any provision of this Act, a limitation, specification, exclusion, denial or preference on the basis of social condition *shall be permitted if it is required or authorized by an Act of the Legislature.*¹¹²

This exclusion is unique amongst the three Canadian jurisdictions that protect social condition under their human rights legislation. The effect of this exclusion would appear to exempt Acts of the New Brunswick legislature from being subjected to human rights scrutiny with respect to social condition, as well as decisions taken pursuant to those Acts.

To date, no complaint based on the ground of “social condition” has reached the stage of going before the New Brunswick Board of Inquiry, and as such there are no decisions on record. However, there is guidance from the New Brunswick Human Rights Commission’s *Guideline on Social Condition*¹¹³ about how to interpret the sections of the NBHRA relating to “social condition”. The *NBHRC Guideline* explicitly states that the grounds protected under the NBHRA are to be interpreted in line with Canada and New Brunswick’s obligations under the *Charter* and the *International Covenant on Economic, Social and Cultural Rights*.¹¹⁴ The *NBHRC Guideline* specifically refers to New Brunswick’s commitments under Article 11 of the ICESCR, where it, along with the rest of Canada, has agreed to uphold the “right to a decent standard of living.”¹¹⁵ It should be noted that although this commitment does exist, the protection of social condition under the NBHRA does not confer any positive rights on those protected by it.

The *NBHRC Guideline* further states that the interpretation of the ground of social condition should follow the Quebec case law on this ground. The *NBHRC Guideline* advocates that judicial bodies interpret the ground in accordance with the Quebec case of *Gauthier*,¹¹⁶ stating that the NBHRA definition of “social condition”,

...contains an objective element and a subjective element. The objective element is the occupation, source of income or level of education of a person. The subjective element is society’s perception of these objective facts.¹¹⁷

Furthermore, the *NBHRC Guideline* follows a number of Quebec cases in its issuance of the following directive,

According to court and tribunal decisions, only one of the above factors (source of income, occupation or level of education) need be present in order for discrimination on the basis of social condition to occur, but any

of *New Brunswick* (Fredericton: New Brunswick Human Rights Commission, 2004) at 7.

¹¹² NBHRA, *supra* note 108, s.7.01.

¹¹³ New Brunswick, Human Rights Commission, *Guideline on Social Condition*, adopted on January 27, 2005 [hereinafter *NBHRC Guideline*].

¹¹⁴ ICESCR, *supra* note 31.

¹¹⁵ *NBHRC Guideline*, *supra* note 113 at page 3, paraphrasing Article 11 of the ICESCR.

¹¹⁶ *Gauthier*, *supra* note 6.

¹¹⁷ *NBHRC Guideline*, *supra* note 113 at 3.

combination of these factors is also sufficient. A person's social condition may be the person's actual social status, or merely a perceived social condition upon which discrimination is based. Social condition may also be a temporary condition, such as unemployment.¹¹⁸

The *NBHRC Guideline* identifies situations and circumstances in which there would likely be a finding of discrimination based on "social condition" under each of the areas of: housing, employment, the service sector, and other. Under the area of housing, the *NBHRC Guideline* states that,

Discrimination based on social condition occurs when a landlord refuses to rent to someone based on the assumption that he or she is unable to pay simply because he or she is receiving social assistance, employment insurance, disability insurance or a pension.¹¹⁹

As well, the *NBHRC Guideline* warns against the use of rent/income ratios, or minimum income requirements for tenancy, as these requirements would constitute adverse effect discrimination. What is recommended is that landlords must conduct an individual assessment of the likelihood of payment in accepting or refusing to rent; the *NBHRC Guideline* relies on both Quebec and Ontario case law as justification for this recommendation.¹²⁰

Under the area of employment, the *NBHRC Guideline* gives examples of conduct that may give rise to a complaint under social condition. The *NBHRC Guideline* states that questions about whether potential employees have ever been a recipient of social assistance, or are presently collecting workers' compensation, will be regarded as discriminatory. Harassment of an employee whose occupation has a low status, or the failure to investigate complaints or allegations of such harassment, will also be regarded as discrimination. The *NBHRC Guideline* further states that not every difference in treatment will be regarded as discrimination, and that bona fide occupational requirements are not discriminatory.¹²¹

In the service sector area, the *NBHRC Guideline* is brief, but states firmly that those in the service sector must not deny services or discriminate against clients or potential clients based on their social condition. This includes the manner in which services are offered or denied, and the harassment of clients based on their condition.¹²² The *NBHRC Guideline* also identifies two further examples of social condition discrimination under the category of other. The *NBHRC Guideline* warns against discriminating on the basis of social condition in signs, and discriminatory, differential treatment affecting membership based on social condition by a professional, business or trade organization.

¹¹⁸ *NBHRC Guideline, ibid.* at 4. This quote is in reference to three Quebec cases: (1) *Commission des droits de la personne c. Ianiro*, (1997), 29 C.H.R.R. D/79 (T.D.P., Que.), (2) *Commission des droits de la personne et des droits de la jeunesse c. Sinatra* (1999), (3) C.H.R.R.D/218 (T.D.P. Que.), (3) *Johnson c. Commission des affaires sociales*, [1984] C.A. 61 (Que.).

¹¹⁹ *NBHRC Guideline, supra* note 113 at 5.

¹²⁰ *Whittom, supra* note 79. *Shelter Corporation v. Ontario (Human Rights Commission)* (2001), 39 C.H.R.R. D/111 (Ont. Div. Ct).

¹²¹ *NBHRC Guideline, supra* note 113 at 6.

¹²² *NBHRC Guideline, supra* note 113 at 6.

Finally, the *NBHC Guideline* identifies two defences to social condition discrimination available to those subject to the NBHRA's prohibitions, stating at page 8 that the NBHRA,

... does not prevent employers, landlords or service providers from:

- Establishing and enforcing bona fide occupational or other qualifications based on an individual's social condition (e.g. education or professional status); or
- Managing performance and setting expectations with respect to workplace productivity.¹²³

The first defence simply seems to confirm that bona fide qualifications and justifications can be applied to alleged social condition discrimination in the same way that they apply to any other ground of discrimination. The second one concerning performance management and establishing workplace standards or expectations, appears to clarify that matters such as education levels and experience can be the basis of relevant and non-discriminatory distinctions. The New Brunswick definition in both its statute form and its elaborating guidelines clearly draws upon the years of experience in Quebec with social condition. New Brunswick provides one model to follow at the federal level; the Northwest Territories offers another approach.

c) The Northwest Territories

The *Northwest Territories Human Rights Act* specifies in section 5(1) that:

For the purposes of this Act, the prohibited grounds of discrimination are race, colour, ancestry, nationality, ethnic origin, place of origin, creed, religion, age, disability, sex, sexual orientation, gender identity, marital status, family status, family affiliation, political belief, political association, *social condition* and a conviction for which a pardon has been granted.¹²⁴

The ground of social condition was included in the original version of the NWTTHRA, which was brought into force July 1, 2004. This inclusion was backed by significant public support, as well as the Standing Committee of Social Programs, a committee created by the Northwest Territories Legislature to consider the NWTTHRA in the context of human rights legislation across the country, and in particular to hear the views and suggestions of residents of the Northwest Territories. The NWT Council for Disabilities, the National Anti-Poverty Organization, Status of Women Council, EGALE Canada and the NWT Federation of Labour were among the organizations who supported the reference to social condition.

Along with the inclusion of "social condition" as a ground of discrimination, section 1(1) of the NWTTHRA includes a definition of the term:

"social condition", in respect of an individual, means the condition of inclusion of the individual, other than on a temporary basis, in a socially identifiable group that suffers from social or economic

¹²³ *NBHC Guideline*, *supra* note 113 at 8.

¹²⁴ *Human Rights Act*, S.N.W.T. 2002, c.18 [hereinafter NWTTHRA, emphasis added].

disadvantage resulting from poverty, source of income, illiteracy, level of education or any other similar circumstance.¹²⁵

This definition has been the subject of some debate, as identified in the 2002 *Report on Bill 1, Human Rights Act*¹²⁶ by the Northwest Territories Standing Committee of Social Programs. At issue was the narrow scope and ambiguity of the definition. Human rights groups expressed concern that the requirement that the complainant be part of a “socially identifiable” group unnecessarily narrows the definition, and may be subject to strict interpretation on behalf of the courts. A further concern heard by the Standing Committee on Social Programs is that the definition is ambiguous, and may be difficult to apply in practice.

However, suggestions that “social condition” be replaced with more specific terms such as “poverty” or “net source of income” were rejected by the Standing Committee, who believed that any uncertainty and ambiguity created by including “social condition” would be reduced through court interpretation. Further, the committee determined that the ambiguity surrounding “social condition” is outweighed by the potential the ground has to advance equality rights, as more precise terms such as “poverty” or “net source of income” may not sufficiently protect individuals from discrimination based on complex socio-economic factors. It is important that the ground reflects the complexity of the discrimination that it is designed to remedy.

The only human rights complaint filed under the ground of “social condition” to make it to the Northwest Territories Human Rights Adjudication Panel (“Panel”) has been *Mercer v. Northwest Territories and Nunavut (Workers' Compensation Board)*.¹²⁷ In this case, the Panel noted the shortage of jurisprudence on the issue of social condition. The Panel thus followed the *NBHRC Guideline* noting that “the prohibited ground of social condition ‘contains a subjective and an objective element.’”¹²⁸ The Panel expanded somewhat on this concept, stating that,

part of the concept may be more tangible, such as occupation, source of income, and level of education. But there is also the subjective part of this concept, that is, society’s perception of these objective facts. The objective and subjective elements must also be kept in mind when dealing with this issue.¹²⁹

Further, the Panel took a broad perspective on the interpretation of “social condition”, stating that this is in line with Supreme Court of Canada decisions advocating a liberal and purposive interpretation to be given to human rights legislation.¹³⁰

The Panel then determined that in order to fall within the statutory definition of social condition in the NWTTHRA, an individual must satisfy a four-part test. The individual must (1) be part of a socially identifiable group, (2) on other than a temporary

¹²⁵ *Ibid.*

¹²⁶ Northwest Territories, Legislative Assembly, Standing Committee of Social Programs, *Report on Bill 1, Human Rights Act*, (N.W.T. Committee Report 10-14(5), 2002) (Chair: Brendan Bell).

¹²⁷ (2007), CHRR Doc. 07-479 (N.W.T.H.R.A.P.) [hereinafter *Mercer*].

¹²⁸ *Ibid.* at para 12.

¹²⁹ *Ibid.* at para 12.

¹³⁰ *Ibid.* at para 27, citing *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, [2000] S.C.J. No. 24 and *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571.

basis, and (3) that group must suffer from either (a) social disadvantage or (b) economic disadvantage, (4) resulting from one or more of the following: (a) poverty, (b) source of income, (c) illiteracy, (d) level of education, or (e) any similar circumstances.¹³¹

In *Mercer*, the complainant was a seasonal worker, from Newfoundland, injured while seasonally employed as a truck driver in the Northwest Territories. As a result, he applied for and was granted total disability compensation from the Northwest Territories and Nunavut Workers' Compensation Board ["WCB"]. However, in the calculation of his remuneration under the disability compensation scheme the WCB refused to include Mr. Mercer's yearly income from Employment Insurance ["EI"]. Mr. Mercer filed a human rights complaint alleging that the WCB discriminated against him by excluding his EI benefits from the calculation of his remuneration.

The complaint was brought before the Panel, who determined that the complainant was discriminated against by the WCB on the basis of social condition. The Panel determined that Mr. Mercer did in fact satisfy the four-part test, and therefore did fall within the definition of social condition in the NWTTHRA. He satisfied the first part of the test, as the Panel found that seasonal workers from areas of high unemployment were a socially identifiable group. These workers are required to work away from home, often outside their home province, earn less than national and provincial average salaries, have lower education levels, and have fewer employment opportunities. Mr. Mercer also satisfied the second part, in that he was a seasonal worker whose period of employment fluctuated over the years, which was a characteristic of the group as a whole; thus, it was not a temporary condition. The third part was satisfied, as the Panel determined that seasonal workers suffered from both social and economic disadvantage, noting that the interconnectedness of both makes them difficult to separate. Seasonal workers are required to work away from home, often outside their home provinces, and those receiving EI are often marginalized and stereotyped as lazy. Further, seasonal workers do not have the job security and employment benefits available to permanent employees. The fourth and final part of the test was also satisfied, as the Panel determined that the social and economic disadvantage derived from a combination of factors, such as the source of income and the low level of education, which results in social and economic disadvantage such as fewer job opportunities and lower incomes.

Further, after finding that the relevant comparator groups should be workers who are employed on a permanent basis within jurisdictions with higher employment levels, and workers who are better educated, have more job opportunities and earn salaries more in keeping with the average salary of Canadians, the Panel concluded that the policy of the WCB did adversely affect the complainant. The policy did not recognize that seasonal workers are reliant on EI for part of their yearly income, and it reinforced the stereotype that seasonal workers received EI by choice, further lowering their self-esteem. As a result, the Panel ordered the WCB to amend the policy and put the complainant in the position he would have been but for the discriminatory policy.

d) Differences in Provincial/Territorial Approaches to Defining Social Condition

The approach to defining social condition differs between the three provincial/territorial jurisdictions that now recognize the ground. First, the vehicles differ. The Quebec Charter does not include a statutory definition, but the meaning of

¹³¹ *Mercer, ibid*, at para. 13.

social condition has evolved through guidelines and case law. In contrast, both New Brunswick and the Northwest Territories have adopted statutory definitions but, while these two jurisdictions added the ground in their human rights legislation within one year of each other, there are still differences in their approaches to doing so. For instance, the New Brunswick Commission has provided guidelines to assist in the implementation of the ground whereas the Northwest Territories have not.

Second, there are differences in term of the content of the definition. All three jurisdictions provide that only a social condition associated with “social or economic disadvantage” is worthy of protection, but whereas this is defined expressly in the legislation in New Brunswick and the Northwest Territories, it has resulted through years of case law in Quebec eventually linking the protection with the purpose of human rights legislation. Similarly, there are differences in the factors or characteristics that may underlie a claim based on social condition. The Quebec approach is flexible and recognizes a non-exhaustive list of factors, such as “income, occupation or education”. The Northwest Territories also provides an open-ended list, but with a longer list of factors including “poverty, source of income, illiteracy, level of education or any similar circumstance.”¹³² In contrast, New Brunswick’s definition states that for one to be discriminated against under the ground of social condition, one must “suffer from social or economic disadvantage on the basis of his or her source of income, occupation or level of education.”¹³³ This closed list would seem to necessarily exclude other potential factors, such as simply level of income. Conversely, the Northwest Territories definition does not expressly include “occupation” despite the precedents in both Quebec and New Brunswick. However, the “broad perspective on the interpretation of ‘social condition’”¹³⁴ advocated by the Panel in *Mercer* would likely include occupation in the definition, as it would fall within “any similar circumstance”; indeed, that case recognized the characteristics of seasonal work as a factor in perpetuating social and economic disadvantage such as stereotypes, job insecurity and low levels of income.

Lastly, there are differences in the limitations included in the definition. The Quebec Commission and courts have maintained a fairly broad definition of social condition with relatively few limitations, although, as discussed above, it has not been successfully applied to many cases outside the general category of receipt of public assistance. In contrast to precedent in Quebec, the Northwest Territories statutory definition expressly excludes a social condition experienced “on a temporary basis”, although the *Mercer* decision may appear to indicate that this limitation does not encompass situations such as the temporary unemployment experienced by a seasonal worker. More significantly, the New Brunswick legislation includes a statutory exemption from scrutiny under the NBHRA for “a limitation, specification, exclusion, denial or preference on the basis of social condition” authorized by an Act of the Legislature.¹³⁵ This exclusion severely limits the scope of the ground of social condition in the NBHRA.

¹³² NWTHRA, *supra* note 124.

¹³³ NBHRA, *supra* note 108, s. 2. The NBHRA is divided into a number of different protected areas of discrimination, each with their own list of protected grounds: employment (section 3), property interests and housing (section 4), services (section 5), publications (section 6), and professional, business and trade associations (section 7). Social condition has been added as a protected ground in each section.

¹³⁴ *Mercer*, *supra* note 127 at 27

¹³⁵ NBHRA, *supra* note 108, s. 7.01.

In summary, it is clear that there are a number of different approaches to adopting social condition as a prohibited ground of discrimination. However, common themes that run through these examples are that social condition is based on certain common factors, including income, occupation, and education and that it is aimed at situations of social and/or economic disadvantage. It is also clear that social condition has the potential to be much more broadly applied than more narrowly defined grounds recognized in a number of other jurisdictions, including “source of income” or “receipt of public assistance”.

2. Compared to “Source of Income” and “Receipt of Public Assistance”

Seven provinces/territories include “source of income” as a ground of discrimination in their human rights legislation.¹³⁶ A further two include the slightly narrower ground of “receipt of public assistance”.¹³⁷ There is a notable degree of variation with respect to the areas which source of income or receipt of public assistance (SOI/RPA) applies from province to province. A brief review of each of the provincial human rights policies on SOI/RPA serves as a natural starting point from which to consider the distinction between source of income and social condition.

Alberta:¹³⁸ The *Human Rights, Citizenship and Multiculturalism Act* covers “source of income” which has been defined as lawful income that commonly attracts a social stigma to its recipients. Such income typically includes social assistance, and income supplements for seniors. Income that does not result in social stigma is not protected.¹³⁹ In this sense it is more similar to receipt of public assistance, since it would not cover certain sources of income such as spousal support. It applies to all areas covered by the Alberta statute.¹⁴⁰

British Columbia:¹⁴¹ The British Columbia *Human Rights Code* covers “source of income” only in relation to “tenancy premises”, and thus excludes provision of goods/services, facilities, employment, etc. However, despite being narrow in application, it is wide in definition, including all lawful sources of income, such as employment earnings, welfare assistance, pensions, spousal support, employment insurance, student loans, grants and scholarships.¹⁴² In *Morey v. Fraser Health Authority*¹⁴³, a complainant unsuccessfully tried to bring a claim on the ground of source of income in the context of employment (i.e., receipt of disability benefits). This is not

¹³⁶ These include Alberta, British Columbia, Manitoba, Nova Scotia, Prince Edward Island, the Yukon, and Nunavut. In all of these jurisdictions, the ground is restricted - either explicitly in the Act or through regulations, guidelines, or judicial interpretation - as ‘lawful’ source of income.

¹³⁷ These jurisdictions are Ontario and Saskatchewan.

¹³⁸ *Supra* note 72. Source of income was added in 1996 following a recommendation by the Alberta Human Rights and Citizenship Commission in 1994.

¹³⁹ Alberta, Human Rights and Citizenship Commission, *Source of Income: Information Sheet*, online: AHRCC < <http://www.albertahumanrights.ab.ca/SourceOfIncome.pdf> > (date accessed: April 21, 2008).

¹⁴⁰ *Supra* note 72; this includes employment practices; employment applications, advertisements or interviews; tenancy; goods, services, accommodation or facilities; statements, publications, notices, signs, symbols, emblems or other representations; and membership in a trade union, employers' organization or occupational association.

¹⁴¹ *Human Rights Code*, R.S.B.C. 1996, c.10.

¹⁴² Kilcommins et al., *supra* note 33.

¹⁴³ *Morey v. Fraser Health Authority*, [2004] B.C.H.R.T.D. No. 182, 2004 BCHRT 224.

covered in the British Columbia *Human Rights Code*, but in virtually all the other provinces.

Manitoba:¹⁴⁴ The Manitoba *Human Rights Code* covers “source of income” and examples of application provided by the Manitoba Human Rights Commission include such sources of income as employment earnings, social assistance, pension, alimony, child support, employment insurance, student loans, grants and scholarships.¹⁴⁵

Nova Scotia:¹⁴⁶ The Nova Scotia *Human Rights Act* prohibits discrimination based on source of income covering all areas to which the Act applies.¹⁴⁷

Ontario:¹⁴⁸ The Ontario *Human Rights Code* covers discrimination based on “receipt of public assistance” but only in the area of occupancy of accommodation. This provision includes the right to enter into an occupancy agreement and also the right to be free from discrimination in all matters relating to the accommodation. However, this ground does not currently extend to any of the other areas dealt with by the Ontario *Human Rights Code*.

Prince Edward Island:¹⁴⁹ Under the *Human Rights Code* in Prince Edward Island, discrimination is prohibited on the basis of “source of income” in the areas of employment, volunteering, and accommodations, services or facilities available to the public, membership in professional, business or trade associations and employee organizations, leasing or selling property, publishing, broadcasting and advertising.

Saskatchewan:¹⁵⁰ The Saskatchewan *Human Rights Code* covers “receipt of public assistance”, which is defined as “the receipt of: (i) assistance as defined in *The Saskatchewan Assistance Act*; or (ii) a benefit as defined in *The Saskatchewan Income Plan Act*. This applies to employment, education, public services, housing, contracts, publications, professional associations and trade unions.

Yukon: The Yukon *Human Rights Code* covers “source of income” and applies to providing goods and services to the public, employment or application for employment, membership in trade unions or other work-related associations, tenancy or sale of property, and public contracts.¹⁵¹

Nunavut: The Nunavut *Human Rights Act* provides protection against discrimination based on “lawful source of income” in all the areas covered by the Act.¹⁵²

Based on interpretation, the above jurisdictions generally provide for the defence of “actual ability to pay” in relation to source of income discrimination. That is to say, in the provision of the accommodations, goods or services covered by the provincial Human

¹⁴⁴ *Human Rights Code*, C.C.S.M., c. H-175, s. 9(2).

¹⁴⁵ Manitoba, Human Rights Commission, *Factsheet*, online: <<http://www.gov.mb.ca/hrc/english/publications/factsheets/prohib.html>> (date accessed: February 4, 2008).

¹⁴⁶ *Supra* note 72, s. 5(1).

¹⁴⁷ *Ibid.* The Act applies to: the provision of or access to services or facilities; accommodation; the purchase or sale of property; employment; volunteer public service; a publication, broadcast or advertisement; membership in a professional association, business or trade association, employers organization or employees organization.

¹⁴⁸ *Human Rights Code*, R.S.O. 1990, c. H.19, s. 2(1).

¹⁴⁹ *Human Rights Act*, R.S.P.E.I. 1988, c. H-12.

¹⁵⁰ *Human Rights Code*, S.S. 1979, c. S-24.1, s. 2(1)(m.1).

¹⁵¹ See *Campbell v. Yukon Housing Corp.*, (2005), CHRR Doc.05-787 (Y.T. Bd. Adj.).

¹⁵² S.Nu. 2003, c.12.

Rights Acts, it is acceptable for the provider to assess someone's actual ability to pay for the good/service in question, regardless of their source of income.

The more interesting cases in these jurisdictions involve multiple grounds of discrimination. For instance, the case of *Garbett v. Fisher*¹⁵³ involved a 16 year old claimant on social assistance. The awkward pigeon-holing analysis undertaken by the Tribunal in this case indicates one use to which the ground of 'social condition' could have been put. In *Trudeau v. Chung*¹⁵⁴, the complainant was receiving a long-term disability pension. He was refused an apartment on the basis that he was unemployed and on sick leave. The status of being unemployed or on sick leave is not a prohibited ground of discrimination yet it was found that the policy of refusing unemployed tenants had an adverse impact on the complainant due to his disability.

It seems that these claims would have been a better fit under social condition, were that ground available to the claimants, since the courts/tribunals in these cases were forced to decide on the basis of one ground, as opposed to treating the claimant in a more holistic fashion. As noted by Iding, "Those living in poverty are often members of other marginalized groups, as poverty is frequently a result of other forms of inequality, such as those based on race or disability."¹⁵⁵ The value of social condition as supporting a more holistic and intersectional approach to discrimination will be explored later in this study.

What is clear from a review of the legislation and jurisprudence on source of income is that the protection it affords is fairly limited. As such, it fails to address the full scope of the problems faced by most claimants based on their education, employment, absence of resources of various kinds, and family origins, or a combination of these factors. It is clear that the circumscribed protection afforded by 'source of income' as a prohibited ground of discrimination is not particularly effective in responding to the problem of socio-economic disadvantage, which often manifests itself in more varied and multifarious ways than simply from where a given individual receives their income. In addition to providing fuller protection to disadvantaged individuals, it is likely that the addition of "social condition" into human rights legislation would serve an educational function.¹⁵⁶ These limited grounds send the message that it is unacceptable to discriminate against someone based on where they get their income, but does not make it clear that the factors underlying this situation – oftentimes, their social condition – are also worthy of concern and redress. This is an educational function which is not accomplished under the existing "source of income" regime. We will return to this theme in the later section on arguments in favour of adding social condition to the CHRA.

That source of income is insufficient to rise to the challenges posed by socio-economic disadvantage is evident in the reform proposals undertaken by many of the provinces that currently employ it in their human rights regimes, as noted above.¹⁵⁷ That these studies concluded it was preferable to replace source of income/receipt of public assistance with "social condition", in addition to the substance of their findings, is in itself an indicator of the challenges in dealing with the reality of socioeconomic disadvantage under the current regime.

¹⁵³ *Garbett v. Fisher* (1996), 25 CHRR D/379, [1996] O.H.R.B.I.D. No. 12, (Ont Bd. Of Inq.).

¹⁵⁴ *Trudeau c. Chung* (1992) 16 CHRR D/25 (B.C. H.R.T.).

¹⁵⁵ Iding, *supra* note 43 at para 2.

¹⁵⁶ This was also noted in the *La Forest Report*, *supra* note 3.

¹⁵⁷ See above, Part I.B.2.

3. *Compared to “Social Origin”*

Newfoundland is the only province to include “social origin” as a prohibited ground of discrimination in its human rights legislation.¹⁵⁸ It applies to accommodations, services, facilities, or goods, as well as employment and discriminatory publications. The first and apparently only case to consider this ground of discrimination was *Halleran v. House of Haynes (Restaurant) Ltd* (1993)¹⁵⁹, in which the complainant asserted that her employer had discriminated against her by repeatedly calling her a “baywoman” in reference to her origin from a rural Newfoundland community. The term “baywoman” is a well-known slur in the province. Considering both a dictionary meaning and a broad and liberal interpretation of remedial legislation, the Tribunal found social origin to have a fairly common sense meaning, encompassing heritage/ancestry, “beginning or derived from a source,”¹⁶⁰ and having a geographical component.

It seems clear, then, that social origin is a far narrower ground than social condition,¹⁶¹ and it has been recognized in Quebec as being encompassed by social condition. Insofar as remedying the problems of socio-economic disadvantage discussed above, social origin in its current jurisprudential incarnation, is even less broad than “source of income”.

4. *Summary: Definition of Social Condition*

In summary, social condition is a much broader concept than source of income or source of origin, although, in application, there appears to have been little distinction in the cases based on “social condition” in the Quebec jurisprudence and those cases based on receipt of social assistance or source of income. As discussed above, in Quebec, social condition has been used primarily to address discrimination in the tenancy context where landlords have refused to rent to social assistance recipients, which is a situation equally covered by the narrower grounds. There is, as of yet, too little precedent in New Brunswick and the Northwest Territories to evaluate how broadly the definitions are to be applied.

However, an important distinction is the potential for social condition to cover a much broader range and/or intersection of characteristics. Thus, it has been recognized as covering precarious or freelance work in Quebec and seasonal work in the Northwest Territories. Similarly, the door to recognizing students or level of education as a social condition has been left open, although not yet the basis for a successful challenge. The broad, multi-factored definition that has been adopted by the courts in Quebec and the legislatures in the Northwest Territories and in New Brunswick make it clear that the purpose of the ground extends beyond what exists in other jurisdictions. The legislative discussions leading up to the adoption of social condition in these three jurisdictions make it clear that this breadth and flexibility is precisely why it was chosen. At the same time, the complexity and uniqueness of the ground itself may result in a

¹⁵⁸ *Human Rights Code*, R.S.N. 1990, c. H-14.

¹⁵⁹ *Halleran v. House of Haynes (Restaurant) Ltd*, [1993] N.H.R.B.I.D. No. 2 (sub nom *House of Haynes (Restaurant) Ltd. v. Snook* (1994), 24 C.H.R.R. D/269).

¹⁶⁰ *Ibid.* at paras 31-33.

¹⁶¹ *Iding*, *supra* note 43 at para 4.

reluctance to accept a broader application than what has currently evolved. As explained by Alberte Ledoyen:

[TRANSLATION]

Empirical social condition, as established by the experts, refers to a configuration of several categories and not, unlike most of the other grounds of section 10, to a duality, the elements of which are directly opposable, such as sex (men/women), colour (white/non-white), disability (disabled/not disabled) and national origin (Canadian/foreign). These configurations are constructed, first, by reference to various theories and issues and, second, based on isolated criteria that cannot reflect social reality as a whole, social reality thus being reduced to inevitable theoretical and methodological choices. This is why it is impossible to adopt a single classification that objectively reflects the reality of social conditions that can give rise to discrimination. This does not mean that economic and status conditions are not socially and objectively distinct and do not lead to behaviours guided by these conditions, but rather that the distinctions have many forms and can be reduced only with difficulty without distorting the reality they reflect, making it necessary to envisage several configurations based on the aspect of a reality an issue requires. With most empirical studies addressing the statistical relationship between various phenomena, the requirements of quantitative methods cause reality to be narrowed. This is the main reason for the difficulty of operationalizing a general configuration of social conditions defined on the basis of the three indicators of education, occupation and income.¹⁶²

In other words, the multiplicity and flexibility that inheres in the ground of social condition is at once the basis for its broader potential at addressing discrimination based on socio-economic disadvantage and the basis for reluctance in operationalizing protections against discrimination based on social condition on a more transformative scale. While the extremes may be clearly defined – i.e. professionals do not have a “social condition” and social assistance recipients do – the middle is still in need of some elucidation. To this end, because of its contextual and relational nature, it is necessary to examine the application of social condition in actual context by examining the practices by which claims of discrimination have arisen.

C. Practices Leading to Discrimination based on Social Condition

The definition of social condition is important for understanding the types of characteristics or socio-economic circumstances that will ground a complaint for discrimination. Equally important for evaluating the impact of including social condition in the *Canadian Human Rights Act* is an understanding of the types of practices in which discrimination may be found. In this part, we will first look at the provincial/territorial experience in reviewing in what types of cases discrimination has been found to be present. Second, we will identify some of the areas of federal jurisdiction where discrimination on social condition could be found to apply.

¹⁶² *Supra* note 79 at 15.

1. *Provincial/Territorial Experiences*

A recurrent concern with the addition of social condition is that it raises uncertainty as to how it may be applied by tribunals and the courts. The La Forest Panel heard such concerns from, for example, the Canadian Bankers Association and government departments, such as Citizenship and Immigration Canada.¹⁶³ Indeed, the Panel specifically recommended that complex governmental programs, such as income tax, immigration and employment insurance programs, be exempted from review under the CHRA.

However, a review of the provincial/territorial experience, for the most part, does not justify concerns that the addition of social condition as a ground of discrimination will open up governmental programs to challenges. Particularly based on the Quebec experience, there has been very little success in cases other than those between private actors in the context of a contractual exchange, such as a refusal to lease accommodations. In these cases, clearly discriminatory attitudes are redressed through the Quebec Charter, as are seemingly objective standards that may have an adverse effect on those covered by social condition. However, challenges to employment standards or governmental programs have rarely been successful.

a) Addressing Discriminatory Attitudes based on Prejudgments and Stereotypes

A key function of human rights codes is to educate and remedy actions based on discriminatory beliefs or stereotypes. This is true for all grounds of discrimination, including for social condition where stereotypes may attach to someone based on their occupation, level or source of income, or other personal characteristics.

[TRANSLATION]

The use of an indicator such as occupation, for example, by the layperson to uncover another person's social condition is the result of socio-economic stereotypes associated with particular occupations. ... Some commonly known occupations suggest low income and/or little or no prestige to the layperson. Servant, restaurant waiter, gas jockey, mechanic, schoolmarm, beadle, baker are all professions or occupations that "speak" of social condition. ... The points of reference used to understand social condition are therefore more useful if they correspond to collective images or (necessarily stereotypical) representations of the social condition that they signify.

Some economic situations, like a level of income insufficient to live decently, socially refer to poverty, such as an involuntary, prolonged absence from work requiring relief or compensation from the government (social assistance, unemployment benefits, work accident benefits, etc). Some of these situations are perceived in a particularly negative light given that, in the collective imagination, they are often associated with a vice (such as laziness or alcoholism) or a lack of responsibility.¹⁶⁴

¹⁶³ *La Forest Report*, *supra* note 3 at 106.

¹⁶⁴ A. Ledoyen, *supra* note 79 at 30.

In the jurisprudence on social condition, the objective of addressing these sorts of stereotypes and presumptions has formed the basis for most successful cases.

As in cases prior to our 1999 study, a refusal to lease rental accommodations simply because someone was in receipt of social assistance has been found to be discriminatory. This is in line with human rights jurisprudence generally that does not allow freedom of contract to be exercised in a discriminatory manner. In the Quebec context, the Quebec Charter recognizes a right to property,¹⁶⁵ but tribunals have consistently held that landlords cannot exercise this right in a discriminatory manner. For example, in *Briand*, the Commission noted:

[TRANSLATION]

Landlords have the right to demand the payment of rent. They also have the right to require tenants to provide a surety for the payment of the rent and even to ensure that the individuals wishing to rent their apartments have the ability to pay the rent. ... It has been said that the *Charter of human rights* did not want to force individuals to give handouts or to help those that are disadvantaged, unhappy, on social assistance, unemployed or bankrupt, for example. However, one cannot conclude that the Charter did not want to restrict the right of free contract. To the contrary, landlords never have the right to discriminate ... “property rights cannot trump equality guarantees.”¹⁶⁶

The courts have thus held that there must be some individual verification of one’s ability to pay, such as credit checks or references from past landlords, before prejudging individual capacities. For instance, the Tribunal has noted that refusing to lease to a social assistance recipient is based on prejudices and stereotypes that those in receipt of public assistance are unable to meet their financial obligations or less able than those that receive work income.¹⁶⁷ Moreover, a lessor cannot generalize from past negative experiences with other social assistance recipients so as to stereotype or prejudge against the entire group:

[TRANSLATION]

Landlords cannot rely on previous negative experiences they may have had with renters affected by the same social condition to justify a refusal to lease accommodation on a prohibited ground. In fact, this would be to make an abusive generalization, the effect of which would be to attribute the same negative characteristics to a group of people on the basis of their all belonging to a group protected by the Charter.¹⁶⁸

¹⁶⁵ Quebec Charter, *supra* note 27, s. 6. Section 6 provides: “Every person has a right to the peaceful enjoyment and free disposition of his property, except to the extent provided by law.”

¹⁶⁶ *Briand*, *supra* note 84 at paras. 21-22.

¹⁶⁷ See e.g. *Huong*, *supra* note 90; *Lavigne*, *supra* note 89; *Quebec (Commission des droits de la personne et des droits de la jeunesse) c. Bernier*, [2005] JTDPQ No. 2.

¹⁶⁸ *Reeves*, *supra* note 89. But see *Guittard c. Clinique dentaire Forcier*, [1998] JTDPQ No. 41, where no discrimination was found because the refusal of services was not linked to a ground of discrimination; although the tribunal declined to draw any negative inferences from comments made by a dentist that social assistance recipients often missed appointments and had bad mouth hygiene: [TRANSLATION] “these are not prejudices, that is, a hasty generalization of a judgment formed in advance, but the facts as he had observed them in his practice.”

At the same time as requiring landlords to ensure their decisions are based on an individualized assessment of prospective tenants' capacity to pay, the obligation is clearly on the renter to prove their capacity to do so.¹⁶⁹

In *Bia-Domingo*, the obligation to act on one's actual ability to pay rather than on prejudgments was extended to those with a lower income derived from freelance or precarious work.¹⁷⁰ In *Sejko*, this reasoning was applied to a contract for purchase, where the seller refused to sell to a social assistance recipient based on a presumption that she would cause problems and be more litigious since she had more time as a result of not being employed.¹⁷¹ Similarly, in *D'Aoust*, a credit union's policy of not lending to social assistance recipients was discriminatory because it reflected a prejudgment of unreliability and assumed she would not respect her financial obligations.¹⁷² However, the Tribunal implicitly endorsed the refusal by another credit union of the complainant's loan application where the refusal was based on an analysis of her level of income.

The vast majority of jurisprudence involving source of income or receipt of public assistance as a prohibited ground of discrimination also focuses on the provision of rental housing. Furthermore, the case law recognizes a distinction between actual and perceived inability to pay; the former being acceptable and the latter not. Successful claimants, predictably, were found to suffer from discrimination where the refusals of landlords were based on the negative perceptions of the capabilities and qualities of those receiving social assistance. For instance, in the case of *Spence v. Kolstar*,¹⁷³ the Manitoban complainant was denied rental of an apartment on the basis that he was a recipient of social assistance. The tribunal found that the landlord consistently applied different and more onerous criteria for such tenants, and furthermore that such criteria presupposed that tenants receiving social assistance were "unreliable and untrustworthy". On this basis, the complainant was successful. A similar case involving a single mother, *Willis v. David Anthony Phillips Properties*,¹⁷⁴ involved refusal of accommodation based on the complainant's receipt of a "mother's allowance". In *409205 Alberta Ltd. v. Alberta (Human Rights and Citizenship Commission)*,¹⁷⁵ the claimant was receiving Alberta Assured Income for the Severely Handicapped. The Tribunal found that the landlord singled the claimant out for rental increases in an attempt to end the rent subsidy payments, and awarded him damages for injury to his dignity and self-respect, in addition to special damages from the loss of the rent subsidy. The theme running through these

¹⁶⁹ *Marois et Quebec (Commission des droits de la personne et des droits de la jeunesse) c. Lauréat Richard inc.*, [2001] JTDPQ No. 6, finding no discrimination because the social assistance recipient gave proof of a lower income than she claimed; duty on renter to provide necessary information to justify her ability to pay and no duty on landlord to simply accept the word of the renter without proof. See also *Quebec (Commission des droits de la personne et des droits de la jeunesse) c. Jean-Paul Desroches inc.*, [2007] JTDPQ No. 28, finding no discrimination for failure to rent to a single mother in receipt of CSST while on maternity leave because a landlord has the right to ensure potential tenants have the capacity to pay and she did not provide documentary proof of her capacity.

¹⁷⁰ *Bia-Domingo*, *supra* note 93.

¹⁷¹ *Sejko*, *supra* note 91.

¹⁷² *D'aoust*, *supra* note 78.

¹⁷³ *Spence v. Kolstar* (1985), 7 CHRR D/3593, D/3599.

¹⁷⁴ *Willis v. David Anthony Phillips Properties* (1987), 8 CHRR D/3847.

¹⁷⁵ *409205 Alberta Ltd. v. Alberta (Human Rights and Citizenship Commission)*, 2002 ABQB 681, [2002] A.J. No. 910

cases seems to be stereotyping of individuals who receive various forms of social assistance.¹⁷⁶

b) Blanket Policies with an Adverse Effect are Discriminatory

The jurisprudence in Quebec has also developed to prohibit what is traditionally known as adverse effect discrimination. Thus, it has been found to be discriminatory to base rental decisions on the percentage of one's monthly income because individuals on the threshold of poverty will devote a higher percentage of income to shelter.¹⁷⁷ Similarly, it is discriminatory to have a blanket policy requiring a cosigner in receipt of work income for all recipients of social assistance; in *Reeves et Québec (CDPDJ) c. Fondation Abbé Charles-Émile Gadbois*, the Tribunal noted that landlords have a right to ask for a guarantee in certain circumstances, but it must be based on an individualized assessment of reliability:

[TRANSLATION]

[B]efore imposing such a requirement, landlords have to make a general enquiry into a potential renter's ability to pay to evaluate whether there is a real risk. The Tribunal is of the opinion that landlords cannot automatically apply a policy requiring a solvent endorser for all income security recipients without first verifying the particular circumstances of each request to rent accommodation.¹⁷⁸

A similar approach is endorsed in the New Brunswick Commission guidelines on social condition.¹⁷⁹

In contrast, educational standards as the basis of hiring decisions have not been found to be discriminatory. In *Québec (Procureur général) c. Choinière*, the Superior Court found no discrimination in a policy that gave preference to college graduates in the context of a public service competition.¹⁸⁰ Similarly, the court found it was not per se discriminatory to require a level of education for professional certification in *Fleurent c. Association des courtiers et agent immobiliers du Québec*.¹⁸¹ *Fleurent* was one of the very few cases where there was any discussion of accommodation. In that case, certain college-level courses were mandated by regulation in order to be certified as a "courtier en immeubles." The body responsible for certifications permitted an individual, who only had a grade 12 education and whose certification had lapsed, to take the necessary exams rather than the courses themselves. The court rejected the individual's claim of discrimination based on social condition, after he had twice failed the exams, and took into account that he was accommodated by being allowed to take the exams as a recognition of his prior experience.

In general, the Quebec jurisprudence on social condition rarely analyzes discrimination claims expressly in terms of a duty to accommodate or *bona fide*

¹⁷⁶ Other illustrative cases include *Iness v. Caroline Co-operative Homes Inc.*, [2006] O.H.R.T.D. No. 19 (immigrant mother on social assistance), *McEwen c. Warden Building Management Ltd* (1993), 26 CHRR D/129 (mother's allowance).

¹⁷⁷ *Brouillette*, *supra* note 78; *Whittom*, *supra* note 79, citing sociological expert evidence.

¹⁷⁸ *Reeves*, *supra* note 89 at paras. 53-54.

¹⁷⁹ *NBHRC Guidelines*, *supra* note 113.

¹⁸⁰ *Choinière*, *supra* note 102.

¹⁸¹ *Fleurent*, *supra* note 102.

justifications. One can infer from the results of the cases discussed above, however, that a low income or receipt of public assistance is not alone a justification for refusing to contract with someone based on their social condition. Moreover, it could be concluded that there is a duty to accommodate in the sense that it is incumbent on lessors or service providers to make an individualized assessment of one's capacity to pay and to take steps to verify references rather than drawing assumptions based on their status or level of income.

That said, the Quebec Commission has recognized the particular challenges of uncovering social condition discrimination in the area of housing due to systemic factors that intersect to create barriers to housing, which has not often appeared to inform the analysis at the adjudicative level:

[TRANSLATION]

...individuals who are socio-economically disadvantaged are turned away when it comes to accessing housing: they are refused either bluntly, because they receive social assistance, for example, or indirectly, through the requirement for a credit check or endorser, or by being told that the percentage of their income that they spend on housing is too high, without landlords checking their rent payment record. This exclusion is often camouflaged by the obligation to complete a rent application form, which is examined out of view and on the basis of unadvertised criteria.

The difficulties arising from discrimination in access to housing are also amplified by the state of the rental market. The options for socially disadvantaged people have in fact reduced considerably under the weight of various factors, including a shortage in the stock of affordable housing available on the private market, consecutive increases in the cost of housing and the proportion of income required by tenants, the public sector's failure to provide adequate affordable housing to satisfy needs, and the failure to adequately satisfy these needs through other forms of benefits.¹⁸²

As a result, those suffering from socio-economic disadvantage need to devote more energy and resources to finding and keeping housing, with resultant physical, psychological and financial effects that reinforce and aggravate poverty and its consequences. This recognition by the Commission would appear to advocate a more nuanced and accommodative approach to tenancy cases, and social condition cases generally, in order to recognize the complex systemic barriers and effects that may underlie human rights complaints.

c) Challenges to Social Programs are Rarely Successful

Despite an established jurisprudence recognizing both “direct” and “indirect” discrimination based on social condition in areas such as tenancy, the Quebec courts have tended not to find discriminatory practices when dealing with governmental programs. For instance, in *Lambert c. Québec (Procureur général)*, the claimant was part of a work

¹⁸² Quebec, Commission des droits de la personne et des droits de la jeunesse, *Mémoire à la Commission de l'aménagement du territoire de l'Assemblée nationale: Les interventions dans le domaine du logement: une Pierre angulaire de la lutte contre la pauvreté et l'exclusion* (October 2002) at 9-10.

assistance program under which his hourly wage was lower than the minimum wage.¹⁸³ Despite recognizing a distinction based on his status as an income assistance recipient, the Court of Appeal found no discrimination because there was no offence to dignity in the sense that [TRANSLATION] “the Act relies on stereotypes, or its effect is to reinforce these stereotypes with respect to certain individuals or groups of individuals.” Without explicitly structuring its analysis in this way, the Court appeared to feel that the ameliorative purpose of the law to enhance employability and to reintegrate recipients into the work force was sufficient to shield it from the purview of the Act for distinctions based on social condition:

[TRANSLATION]

Far from violating human dignity, the measures are specifically designed to improve the situation of individuals within Quebec society who are disadvantaged. These individuals cannot, in the same breath, avail themselves of the exclusivity of these measures and complain, when they are applied, that they are not considered, under certain limited aspects, to be regular labour market employees.¹⁸⁴

Similar results have occurred in challenges to student loan programs, which have as their object student assistance.¹⁸⁵ While also due to a hesitance to find the status of student or one’s level of education as a social condition, other challenges have failed against automobile insurance indemnity rates based on level of education,¹⁸⁶ the contribution rules to the Quebec Pension Plan,¹⁸⁷ and public service pay scales for summer students vis-à-vis occasional workers.¹⁸⁸

In *Villeneuve c. Québec (Procureur général)*,¹⁸⁹ a group of doctors who were general practitioners challenged a government program that hired foreign doctors who were able to be remunerated at specialist rates depending on their practice areas. While the court also found that there was no social condition applicable in the case, it went on to find that the program had no discriminatory purpose or effect because there was no prejudice to the general practitioners when the program was looked at contextually. Rather, foreign doctors were subject to many restrictions, chosen exceptionally for pressing needs in remote regions where resident doctors chose not to practice and were relatively disadvantaged. While we would not necessarily disagree with the result in this case, it reinforces the apparent trend to immunize government programs from strict scrutiny for social condition discrimination, particularly where programs are instituted for the benefit of the disadvantaged.

¹⁸³ *Lambert*, *supra* note 92.

¹⁸⁴ *Ibid.* at para. 95.

¹⁸⁵ *Québec (Procureur général) c. Racine*, [2007] J.Q. No. 5715 (CQ), where a shorter prescription period applying to student loans was not discrimination against students based on their social condition because no evidence was presented, all students were treated the same, and the program was actually intended to help students finish their studies. See also *Lévesque*, *supra* note 100, where the availability of student aid was a factor in finding no discrimination for cutting off one’s social assistance on return to school full time.

¹⁸⁶ *Champagne*, *supra* note 101.

¹⁸⁷ *Harvey*, *supra* note 103.

¹⁸⁸ *George c. Québec (Procureur général)*, [2006] JQ No. 11047 (C.A.).

¹⁸⁹ [1998] A.Q. no 5 (C.A.), affirming [1993] A.Q. No. 554 (C.S.).

In contrast to this line of cases in Quebec, the first and only case currently arising under the new protection against discrimination based on social condition under the *Northwest Territories Act* was a successful challenge to the workers' disability compensation scheme. As discussed above, the Adjudication Panel in *Mercer* found the policy of refusing to include employment insurance benefits in the yearly income of seasonal workers to be discriminatory because it adversely affected seasonal workers reliant on employment insurance for part of their yearly income. As a result, it reinforced the stereotype that seasonal workers were unemployed and reliant on benefits by choice, further lowering their self-esteem. The Panel ordered the Workers' Compensation Board to amend the policy and to provide an individual remedy.¹⁹⁰

While New Brunswick has not yet considered a case under its new protections against discrimination based on social condition, it is unlikely that a similar case would be successful because the New Brunswick *Human Rights Act*, as discussed above, explicitly exempts any distinction based on social condition that is authorized by law.¹⁹¹

2. Discriminatory Practices with a Social Condition Dimension under Federal Jurisdiction

In evaluating the question of whether social condition should be added to the *Canadian Human Rights Act*, a relevant inquiry is the extent to which protection on this ground would have applicability in areas of federal jurisdiction. Given the number of cases that have been based on matters of tenancy and, to a lesser extent, the fact that social assistance is a matter of provincial jurisdiction, there could be an argument that social condition has less relevance in the federal arena. However, lower income individuals face barriers in almost all aspects of society, not simply in the provision of affordable housing, but also employment, and access to services most others take for granted. As recognized by the La Forest Panel, there is "ample evidence of widespread discrimination based on characteristics related to social conditions, such as poverty, low education, homelessness and illiteracy," and there is a need for protection from discrimination based on social condition at the federal level.¹⁹² "Despite facing such strong barriers to equal participation in society, and despite being harshly stigmatized, poor people have no legal recourse for discrimination on the basis of poverty or social condition."¹⁹³

a) Housing and Accommodation: the Federal Role in Housing

While tenancy and accommodation issues are generally matters of a merely local or private nature in the province,¹⁹⁴ there is clearly a federal role in housing. Section 6 of the CHRA provides that discrimination is prohibited on an enumerated ground in "the provision of commercial premises or residential accommodation." Thus, any commercial

¹⁹⁰ *Mercer*, *supra* note 127.

¹⁹¹ NBHRA, *supra* note 108, s. 7.01.

¹⁹² *La Forest Report*, *supra* note 3 at 107-8.

¹⁹³ *Iding*, *supra* note 43.

¹⁹⁴ *Constitution Act, 1867*, 30 & 31 Vict. c. 3 (U.K.), s. 92(16) or a matter of property and civil rights under s. 92(13).

or residential tenancy matters would come under the purview of the CHRA if it relates to federal land.

More subtly, the federal government often has an impact on housing matters that generally fall under provincial jurisdiction. This came to the forefront in the matter of *Canada Mortgage and Housing Corp. v. Iness*.¹⁹⁵ In this case, a single mother, who had immigrated to Canada and was in receipt of social assistance, was subject to a significant rent increase when the housing co-operative in which she lived changed the way it calculated the housing charge for social assistance recipients as a result of an operating agreement with the federal Canadian Mortgage and Housing Corporation [“CMHC”]. The Ontario Court of Appeal held that the terms of the grant by CMHC to the housing co-operative was a valid exercise of the federal spending power and, thus, the *Ontario Human Rights Code* had no jurisdiction over the CMHC in the case.¹⁹⁶

As recognized at the provincial level, the relation between social condition and housing is particularly important. The Quebec Court of Appeal has noted that: “[H]ousing, even more than employment, represents a basic need of every individual in our society [...] one’s choice in housing, apart from corresponding to one’s means, is highly personalized.”¹⁹⁷ In other words, simply because one is of limited means does not mean they should be subject to inadequate housing or to only the housing chosen by the property owner for social assistance recipients if they have the capacity to pay.¹⁹⁸ In addition, following an analysis of complaints, the Quebec Commission concluded that one of the most vulnerable category of persons in relation to discrimination in housing were those covered by social condition; notably, the group covered by “race, colour, ... ethnic or national origin” was the second most vulnerable group and the Commission found significant overlap in the characteristics of complaints for these two groups due to the influence of socio-economic factors arising in both.¹⁹⁹ This is another illustration of how social condition advances a holistic approach to human rights. Lastly, the jurisprudence emphasizes the relevance of considering Canada’s international obligations related to housing when considering claims based on social condition. For instance, in *Quebec (Commission des droits de la personne et des droits de la jeunesse) c. Bernier*, the Tribunal noted:²⁰⁰

[TRANSLATION]

Housing is a basic need, and discrimination based on one of the grounds listed in the *Charter* in the search for and access to such a basic asset is prohibited. At the international level, the International Covenant on Economic, Social and Cultural Rights sets out an individual’s right to adequate housing, which must be exercised

¹⁹⁵ (2004), 49 C.H.R.R. D/29 (Ont. C.A.).

¹⁹⁶ In *Iness*, *supra* note 176, the Ontario Human Rights Tribunal found the housing co-operative itself liable for discrimination for its actions, including posting notices that singled out social assistance recipients and failing to take steps to clarify or dispute the terms of the operating agreement with CMHC despite requests by the complainant.

¹⁹⁷ *Desroches c. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, [1997] R.J.Q. 1540 (C.A.).

¹⁹⁸ See e.g. *J.M. Brouillette*, *supra* note 78, where the Tribunal held the landlord’s policy of renting only old and not new premises to social assistance recipients discriminatory.

¹⁹⁹ *Logement: une Pierre angulaire*, *supra* note 182 at 9. In 2001 and 2002, social condition was the basis of 40% of discrimination in housing cases.

²⁰⁰ *Bernier*, *supra* note 167 at paras. 37-38. See also, e.g., *Quebec (Commission des droits de la personne et des droits de la jeunesse) c. Gagné* [2003] J.T.D.P.Q. No. 5.

without discrimination. The Committee on Economic, Social and Cultural Rights, the body that monitors the implementation of the Covenant, pointed out in its *General comment 4, The right to adequate housing*, that:

In the first place, the right to housing is integrally linked to other human rights and to the fundamental principles upon which the Covenant is premised. ... As both the Commission on Human Settlements and the Global Strategy for Shelter to the Year 2000 have stated: “Adequate shelter means ... adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities - all at a reasonable cost”.

Indeed, the issues of federal jurisdiction over housing, the current lack of protection at the federal level against discrimination based on social condition, and our international obligations also intersect in relation to human rights protections for Aboriginal peoples.

b) Section 67 of the Canadian Human Rights Act and Aboriginal peoples

Section 67 of the CHRA currently provides: “Nothing in this Act affects any provision of the *Indian Act* or any provision made under or pursuant to that Act.” In studying this provision, the La Forest Panel noted that the blanket exemption in section 67 was not appropriate in light of “truly universal values [of equality] that have been accepted internationally.”²⁰¹ The Panel recommended that section 67 be repealed until such time that Aboriginal human rights codes apply under self-governing agreements.²⁰² On December 13, 2006, the federal government introduced a bill (Bill C-21) to repeal section 67.²⁰³

In our 1999 paper, we discussed the applicability of protection from discrimination based on social condition to housing matters on reserve lands, over which the federal Parliament has exclusive jurisdiction. At the time, a Motions Judge of the Federal Court had found in *Laslo v. Gordon Band Council* that section 67 should be read narrowly so as not to apply to the housing policy of a Band Council denying housing to Aboriginal women and their children who were reinstated with “Indian status” after having lost it for marrying “non-Indians” before 1985.²⁰⁴ However, this decision was subsequently overturned by the Federal Court of Appeal in 2000.²⁰⁵ The Court of Appeal determined that the housing decision was by necessary implication a provision made pursuant to section 20 of the *Indian Act*, which provides: “No Indian is lawfully in

²⁰¹ *La Forest Report*, *supra* note 3 at 130.

²⁰² *Ibid.* at 132. The Panel also recommended an interpretive provision be incorporated in the Act to ensure that Aboriginal community needs and aspirations are taken into account in interpreting the rights and defences in the Act in cases involving Aboriginal governments.

²⁰³ Bill C-21, *supra* note 17. Bill C-21 was reported from the House of Commons Standing Committee on Aboriginal Affairs with a number of amendments on February 4, 2008, including an interpretive clause and an extended transition period exempting claims against Aboriginal government or band council for 36 months after Royal Assent. As of April 2008, the bill was at report stage and these committee amendments had not yet been considered by the House of Commons.

²⁰⁴ (1996), 31 C.H.R.R. D/385 (F.C. T.D.).

²⁰⁵ *Laslo v. Gordon Band (Council)*, [2000] F.C.J. No. 1175 (C.A.).

possession of land in a reserve unless, with the approval of the Minister, possession of the land has been allotted to him by the council of the band.” This precedent appears to close the door to human rights protection against discrimination in housing decisions for Aboriginal people on reserve in light of jurisdictional impediments for provincial human rights bodies and section 67 of the federal CHRA, unless section 67 is repealed.²⁰⁶

As noted in our previous paper, *Laslo* did not directly raise issues of social condition, although the intersectional nature of the grounds of discrimination on which it was brought (i.e. sex, race and marital status of the complainant and her husband) would make it an interesting opportunity to explore the capacity of social condition to cover multiple discrimination claims. Similarly, as noted by the La Forest Panel:

A disproportional 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...Perhaps even 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.²⁰⁷

In any case, *Laslo* demonstrates that a role exists for the *Canadian Human Rights Act* in the realm of housing if section 67 is repealed as contemplated by Bill C-21.

c) Employment

Employment is clearly one area in which protection from discrimination based on social condition can be equally applicable between the federal and provincial spheres:

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.²⁰⁸

While the provincial case law has not established a successful precedent in the employment context as related to social condition, it has offered examples of where such claims could arise. For instance, in *Québec (Procureur général) c. Choinière*, a challenge

²⁰⁶ Notably, similar results have been found in the context of providing educational services to “status Indians” in *Canada (Canadian Human Rights Commission) v. Canada (Department of Indian Affairs and Northern Development) (re Prince)*, [1994] F.C.J. No. 1998 (F.C. T.D.), although s.67 has been found not to apply to decisions that cannot be directly connected to provisions of the *Indian Act* in the context of employment (*Bernard v. Waycobah Board of Education*, (1999) 36 C.H.R.R. D/51 (C.H.R.T.) and *Bressette v. Kettle and Stoney Point First Nation Band Council (No. 1)*, [2003] C.H.R.D. No. 38) or in the provision of social assistance to band members (*Ennis v. Tobique First Nation*, [2006] C.H.R.D. No. 21 and *MacNutt v. Shubenacadie Indian Band Council*, [1998] 2 F.C. 198; aff'd, [2000] F.C.J. No. 702, (2000), 37 C.H.R.R. D/466 (F.C.A.)).

²⁰⁷ *La Forest Report*, *supra* note 3 at 108.

²⁰⁸ *La Forest Report*, *supra* note 3 at 107.

was made to the preference given to college graduates in the context of a public service competition.²⁰⁹ Similarly, in *George c. Québec (Procureur général)*, an application was brought to start a class action challenging policy directives that established different hiring requirements and pay scales for summer students versus occasional employees in the Quebec public service.²¹⁰ Cases such as these would have equal applicability to hiring practices in the federal public service. Other examples cited by the La Forest Panel, such as the purchase of uniforms or tools, have not yet been judicially examined in the provincial context.

As noted in the New Brunswick Guidelines on Social Condition, the most obvious or direct forms of discrimination would be prohibited in employment, such as:

- Asking a potential employee during an interview if they have ever been in receipt of social assistance;
- Asking an applicant's references about whether the applicant is receiving a worker's compensation pension;
- Harassment of an employee whose occupation has a low status or a failure to investigate allegations of such harassment.²¹¹

Similarly, the Guidelines emphasize that the usual defences would be applicable to claims of discrimination in the employment context, notably if the employer can establish that their practices are a bona fide occupational requirement, such as managing performance and setting expectations with respect to workplace productivity.²¹²

In light of the goals of human rights codes to promote social inclusion of vulnerable groups, protection in employment would seem to be particularly important in the case of social condition. As established above, one's occupation or lack thereof is a primary determinant of one's socio-economic rank or standing. Barriers to participation in the workforce based on social condition are likely to reinforce the social and economic disadvantage of the members of these groups. Moreover, in lower-paying, precarious or less professionalized jobs, the power imbalance between the employer and employee is likely to be further aggravated, heightening the need for legal protections from discrimination, whether intentional or based on systemic barriers to inclusion.

d) Private Sector Services: Banking, Telecommunications and Broadcasting

Section 5 of the CHRA provides:

It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public

- (a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or
- (b) to differentiate adversely in relation to any individual, on a prohibited ground of discrimination.²¹³

²⁰⁹ *Choinière, supra* note 102.

²¹⁰ *George, supra* note 188.

²¹¹ *NBHRC Guidelines, supra* note 113 at 6.

²¹² *Ibid.* at 7.

²¹³ CHRA, *supra* note 1, s. 5.

The CHRA would thus apply to services provided by federal works and undertakings such as banking, telecommunications, and broadcasting services.²¹⁴ Protection for social condition could apply at the federal level to address discriminatory attitudes in the context of the provision of such services,²¹⁵ as well as more indirect discrimination practices resulting from seemingly neutral policies in these industries.

In our 1999 paper, we provided a comprehensive overview of major barriers to accessing banking services for those that may be covered by “social condition,” based on characteristics such as income, education and receipt of social assistance, as well as age. According to a study by the Association coopérative d’économie familiale [“ACEF”],²¹⁶ excessive identification requirements, which disproportionately impact those with a lower income who are less likely to have such documents, were imposed to open an account or to simply cash a cheque. Similarly, requirements for a minimum deposit to open an account and the holding of deposited funds for a fixed number of days were conditions imposed on recipients of social assistance by many of the banks surveyed, despite the low risk associated with government social assistance cheques. More directly, the ACEF study observed overtly discriminatory attitudes by some banking clerks when dealing with lower income clients. More systemically, the study demonstrated that banks were increasingly disappearing from lower income neighbourhoods and moving towards a higher dependence on computer and phone equipment for electronic commerce, further aggravating barriers to accessing banking services. As we concluded in 1999:

A key theme running through the barriers to accessibility to banking services outlined is the arbitrariness of banking policies which bear no relation to legislative requirements or practical realities. In addition, a further important idea encouraged by the report is that lower-income persons are potentially profitable to banks and investment in economically disadvantaged areas would not necessarily disadvantage a bank. Another key theme is the lack of government intervention to improve access for lower income persons and the potential impetus such legislation would provide to banks... The ACEF report makes it clear that the inclusion of social condition in the Act could resolve much of the discrimination faced in the banking industry.²¹⁷

This conclusion was endorsed by the La Forest Panel²¹⁸ and also finds precedent in the provincial jurisprudence. In Quebec, in *D’Aoust c. Vallières*, a provincial credit union was found to discriminate against a social recipient for failing to lend to her based on a prejudgment that she would not respect her financial obligations.²¹⁹ The Quebec Commission has also reported settlements with provincial institutions for imposing monthly fees on bank accounts with a balance of less than \$100²²⁰ or for refusing to issue

²¹⁴ *Constitution Act, 1867*, *supra* note 194 ss. 91(15), 91(29) and 92(10).

²¹⁵ See *e.g.*, *Sejko*, *supra* note 91, in the context of a purchase contract.

²¹⁶ Association coopérative d’économie familiale, *The Highs and Lows of Access to Banking Services in Canada: A Report to Industry Canada* (Montreal: ACEF, 1996).

²¹⁷ A.W. MacKay et al., *supra* note 4 at 63-64.

²¹⁸ La Forest Report, *supra* note 3 at 108.

²¹⁹ *D’Aoust*, *supra* note 78.

²²⁰ *P.G. et Une institution financière*, (November 2001), cited in Quebec, Commission des droits de la personne et des droits de la jeunesse, *Rapport d’activités et de gestion 2001* at 88, online: <www.cdpdj.qc.ca/fr/publications/docs/RA_2001.pdf> (date accessed: January 6, 2008).

a credit card to a recipient of income security.²²¹ Similarly, it has been established in the tenancy context that blanket policies of requiring guarantors or cosignors from social assistance recipients is discriminatory for not ensuring an individualized verification of one's ability to pay.²²²

Similar practices in the provision of utilities may also impact lower income clients and thus have relevance to social condition protection at the federal level. During its public consultations, the La Forest Panel noted:

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."²²³

This example starkly demonstrates that, like in the banking sector, decisions related to the provision of services by utilities are often based on a disconnection from practical realities in the case of social assistance recipients. Someone receiving social assistance is essentially guaranteed a set level of income, which should logically support her capacity to pay and arguably is more secure than work income. An assumption that she poses an abnormal risk of loss, particularly in spite of a good credit history, evidences a stereotype on the part of service-providers that social assistance recipients are less reliable or less responsible with their money than those in receipt of income from work in the labour market.

A final example of where protection against discrimination based on social condition may have applicability to services in the federal sector is in broadcasting. In the case of *Front commun des personnes assistées sociales du Québec v. Canada (Canadian Radio-Television and Telecommunications Commission)*, a network broadcast a program that made derogatory comments against persons receiving social assistance. Following a complaint, the Canadian Radio-Television and Telecommunications Broadcasting Commission determined it did not meet the high standards of broadcasting required under the Broadcasting Regulations, but that it could not be found to have contravened the regulations prohibiting abusive comments because social condition was not a ground

²²¹ *Commission des droits de la personne et des droits de la jeunesse pour F. Bouchard et Visa Desjardins*, (December 1998) cited in Quebec, Commission des droits de la personne et des droits de la jeunesse, *Rapport d'activités et de gestion 2001* at 51, online: <www.cdpcj.qc.ca/fr/publications/docs/RA1998.pdf> (date accessed: January 6, 2008).

²²² *Reeves*, *supra* note 89.

²²³ *La Forest Report*, *supra* note 3 at 108.

listed under that regulation. This decision was upheld by the Federal Court of Appeal, noting that it would introduce considerable ambiguity and uncertainty to add social condition, particularly in the context of a penal provision, where such addition was not contemplated by Parliament or the offender.²²⁴ As a result, the complainant was provided a very limited remedy for addressing the broadcasting of prejudicial comments against social assistance recipients. Due to the involvement of the CRTC and the application of the broadcasting regulations, this case is also related to the relevance of adding social condition to address public sector policies and programs.

e) Public Sector “Services”

Section 66 of the CHRA provides that “[t]his Act is binding on Her Majesty in right of Canada”, which makes the CHRA equally applicable to actions of the government and federal legislation. As noted by the La Forest Panel:

Many statutes and government programs make distinctions based on economic classification. 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...the Supreme Court of Canada has held that human rights legislation has primacy over other legislation.²²⁵

The provincial human rights case law (discussed above) and the *Canadian Charter* jurisprudence (discussed further below) provide a myriad of examples of where social condition claims may arise in relation to government services. For instance, the inclusion/deduction system for child support under the *Income Tax Act* was challenged in *Thibaudeau v. Canada (Minister of National Revenue)*; while subsequently reversed at the Supreme Court of Canada,²²⁶ the Federal Court of Appeal had found discrimination under section 15 of the *Charter* based on the status of being “a separated custodial parent” or “family status.”²²⁷ The claim itself was brought on the grounds of sex, civil status or social condition, the complainant arguing that “divorced women have a unique social condition because of her income and level of education and are in a disadvantaged position in society.”²²⁸ Other cases have challenged reductions in government benefits,²²⁹

²²⁴ [2003] FCJ No. 1609 (Fed. C.A.).

²²⁵ *La Forest Report*, *supra* note 3 at 111-12.

²²⁶ [1995] 2 S.C.R. 627.

²²⁷ [1994] 2 FC 189 (Fed. C.A.).

²²⁸ “Social condition” was not directly addressed by the majority judgment, which preferred to decide the case on other grounds, but note that the dissenting appeal judge decided at para. 97 that there was no discrimination on social condition because the condition was the result of the discrimination not the cause and the legislative provision was designed to ameliorate the situation due to divorce or separation. See also *Schaff v. Canada*, [1993] T.C.J. (T.C.C.), finding that although poor, single motherhood was a personal characteristic that could be considered an analogous ground under s.15, there was no discriminatory effect from the inclusion/deduction system because poverty is not caused by the inclusion-deduction system; rather, it could create a potential tax advantage.

²²⁹ See *MacKay v. British Columbia (Ministry of Social Development and Economic Security)*, [2002] B.C.J. No. 553 (S.C.), challenging the reduction of social assistance for those receiving Canada Pension Plan benefits; *Falkiner v. Ontario (Ministry of Community and Social Services)*, [2002] O.J. No. 1771, 59 O.R. (3d) 481 (C.A.), leave to appeal to SCC granted but appeal discontinued Sept. 1, 2004, and *Masse v.*

differential treatment under employment assistance programs,²³⁰ and challenges to student loan programs.²³¹ Similarly, provincial cases challenging the disproportionate impact of some criminal prohibitions on poor people²³² or the impact of remedy enforcement on the impecunious²³³ could have equal applicability to federal laws.

Notably, very few of these cases have actually been successful in either the human rights or *Charter* context. In general, tribunals and courts have found that the programs in question are intended for ameliorative purposes and thus not discriminatory under the law or that, in the *Charter* context, poverty could not be considered to be an analogous ground. These trends in the jurisprudence raise important considerations for whether an exemption for government programs would be required if social condition were to be added to the CHRA, which will be discussed further below. However, for present purposes, the cases demonstrate the applicability of social condition protection at the federal level in this area. As the above indicates, there is ample scope for social condition at the federal level, as well as provincial levels.

f) Discrimination Practices arising from Demographics: Aging “Baby Boomers” and New Immigrants

Another emerging area of discrimination is the result of demographics: as the work force ages and “baby boomers” retire, their places in the workplace are increasingly being occupied by new immigrants. Both these retirees and their immigrant replacements will face discrimination, not just in relation to enumerated grounds such as age, race or national origin but also discrimination that is socio-economic in nature that might be more effectively addressed by the ground of social condition. The types of barriers faced by both retiring “baby boomers” and new immigrants are likely to be complex and intersectional in nature and will almost certainly have economic dimensions. Some retirees will have a difficult time making ends meet on pension income (if they have pensions) and new immigrants who are either unable to get jobs or are underemployed will also face significant economic challenges.

In respect to the growing numbers of people who are retiring there is likely to be a particularly negative impact on women who are less likely than men to have adequate pensions and are part of the phenomenon that former Justice L’Heureux-Dubé refers to as the feminization of poverty.²³⁴ This is further evidence of the intersection of various grounds of discrimination to produce a unique kind of human rights violation, one aspect of which could be covered by social condition. The retirement of the “baby boomers” in record numbers will create significant societal dislocations, and the addition of social

Ontario (Ministry of Community and Social Services), [1996] O.J. No. 363 (Gen. Div.), involving the reduction of social assistance benefits;

²³⁰ *Lambert*, *supra* note 92.

²³¹ See *e.g. Racine*, *supra* note 185.

²³² See *e.g. R. v. Banks*, [2007] O.J. No. 99 (C.A.), upholding [2005] O.J. No. 98 (S.C.J.), leave to appeal dismissed [2007] S.C.C.A. No. 139, challenging provincial legislation restricting “squeegeeing” for its impact on poor people.

²³³ *Tupper v. Nova Scotia (Attorney General)*, [2007] N.S.J. No. 341 (S.C.).

²³⁴ *Moge v. Moge* [1992] 3 S.C.R. 813 at 853, per L’Heureux-Dubé, affirmed in *Marzetti v. Marzetti* [1994] 2 S.C.R. 765, per Iacobucci for a unanimous Court.

condition to the CHRA would provide one additional tool in responding to the resulting individual and social problems.

In respect to the new immigrants pursuing the jobs vacated by the retiring “baby boomers” there will be issues related to occupation, educational levels and comparative qualifications that might well be captured in the concept of social condition. While the La Forest Report recommends exempting immigration from the reach of social condition, we think it was more the statutory regime itself governing immigration, rather than individual manifestations of discrimination in respect to how the laws are applied. We will return to whether immigration should be removed from the reach of social condition discrimination in the recommendation section of this study.

Old age pensions and supplementary benefits, “including survivors and disability benefits irrespective of age”, fall within federal constitutional jurisdiction and this jurisdiction is to be exercised in conjunction with provincial laws within their jurisdictions.²³⁵ Furthermore, immigration is a concurrent power shared between the federal and provincial levels of government and thus would leave some scope for the application of the *Canadian Human Rights Act*, as well as provincial human rights codes.²³⁶

In *Hodge v. Canada (Minister of Human Resources Development)*,²³⁷ a claim for survivor’s benefits under the Canada Pension Plan (CPP) was denied on the basis that the claimant fell within the category of “former spouses” not entitled to CPP benefits. Betty Hodge argued that, as a “separated common law spouse”, she should be compared to “separated married spouses” and therefore entitled to the CPP benefits. If social condition or poverty were available as grounds of discrimination under either the *Canadian Human Rights Act* or as an analogous ground or discrimination under section 15 of the *Charter*, perhaps she could have succeeded on that ground or the intersection of social condition with other grounds. While Ms. Hodge’s age is not indicated in the case, this is the kind of claim that might well be made by the aged and the inclusion of social condition would improve their protection.

Both pension schemes and immigration regimes are complex statutory and regulatory structures, and the application of a new social condition ground of discrimination would have to be handled with care. There may even be need for special justifications or partial or temporary exemptions but there is no denying the potential for social condition discrimination against both aging retirees and new immigrants. How to handle these changing Canadian demographics and the inherent human rights dimensions of the change are worthy of serious and speedy consideration by the Canadian Human Rights Commission and other agencies.

D. Section 15 of the Charter and Social Condition

Since the arrival of the *Canadian Charter of Rights and Freedoms* in 1982, and in particular since the section 15 equality provision came into effect in 1985, there has been a symbiotic and mutually reinforcing relationship between the *Charter* and human rights

²³⁵ *Constitution Act, 1867*, *supra* note 194, s. 94A.

²³⁶ *Ibid.*, s. 95.

²³⁷ [2004] 3 S.C.R. 357.

codes. In some cases the human rights codes have been used to enrich and expand the meaning of section 15 of the *Charter* and in others the *Charter* has been used to expand the scope of human rights codes. Thus, we will examine the section 15 *Charter* jurisprudence related to the concept of social condition and the impact of the trends under the *Charter* on the question of whether social condition should be recognized as a prohibited ground of discrimination in the *Canadian Human Rights Act*. To do so, however, we will first set the stage with a discussion of the equality law under the *Charter* and its links to human rights codes.

1. *Section 15 Jurisprudence*

With its very first case on section 15 of the *Charter*, the Supreme Court of Canada sent a message that not all distinctions would be offensive to the *Charter*. However, unlike the closed lists of grounds in human rights codes, section 15 of the *Charter* is more open-ended and allows for protection on analogous grounds as the courts may deem appropriate as society changes and evolves. This encourages the “living tree” interpretation of the Constitution. In *Andrews v. Law Society of British Columbia*,²³⁸ the Supreme Court of Canada held that the intended beneficiaries of equality were not only the expressly enumerated groups, but also analogous groups who could be described as discrete and insular minorities that experience disadvantage in society at large. This position was most clearly articulated by Justice Wilson in the following passage:

I emphasize...that [the protection of specific groups] is a determination which is not to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of our society. While legislatures must inevitably draw distinctions among the governed, such distinctions should not bring about or reinforce the disadvantage of certain groups and individuals by denying them the rights freely accorded to others.

... [I]t is not necessary in this case to determine what limit, if any, there is on the grounds covered by s. 15 and I do not do so.²³⁹

In *Andrews* itself, the Court concludes that citizenship meets the test for an analogous ground under section 15 of the *Charter*. It reached this conclusion even though it is not an immutable characteristic like race or gender (with some exceptions). Of course, religion is also a mutable characteristic, but one that has been protected as an enumerated ground of discrimination. In *R. v. Turpin*,²⁴⁰ the Court drew the line at province of residence and reinforced this conclusion in *R. v. S. (S.)*.²⁴¹ Unlike citizenship or religion, province of residence can be changed fairly easily. More importantly, province of residence was seen as less likely to subject the relevant group to stereotyping and other

²³⁸ [1989] 1 S.C.R. 143.

²³⁹ *Ibid.* at 152-53.

²⁴⁰ [1989] 1 S.C.R. 1296.

²⁴¹ [1990] 2 S.C.R. 254.

forms of discrimination. In *Corbière v. Canada*,²⁴² “Aboriginality residence” was held to be an analogous ground because of the disadvantages and stereotyping faced by off-reserve Aboriginals. How these arguments might relate to the inclusion of social condition as an analogous ground under the *Charter* will be explored later.

Building upon *Andrews*, the Supreme Court has expanded the analogous grounds to include common law spouses in *Miron v. Trudel*,²⁴³ and gays and lesbians in *Egan v. Canada*²⁴⁴ and *Vriend v. Alberta*.²⁴⁵ In reaching these conclusions, the Court relied upon the historical disadvantage of these groups. Many other groups who made claims to the benefits of section 15, such as corporations, were denied.²⁴⁶

Chief Justice McLachlin (writing as a puisne Justice) in *Miron v. Trudel* summarizes the factors that can lead to a finding that a particular basis of discrimination is an analogous ground under section 15 of the *Charter*.

One indicator of an analogous ground may be that the targeted group has suffered historical disadvantage, independent of the challenged distinction: *Andrews, supra*, at p. 152 per Wilson J.; *Turpin, supra*, at pp. 1331-32. Another may be the fact that the group constitutes a “discrete and insular minority”: *Andrews, supra*, at p. 152 per Wilson J. and at p. 183 per McIntyre J.; *Turpin, supra*, at p. 1333. Another indicator is a distinction made on the basis of a personal characteristic; as McIntyre J. stated in *Andrews*, “(d)istinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual’s merits and capacities will rarely be so classed” (pp. 174-75). By extension, it has been suggested that distinctions based on personal and immutable characteristics must be discriminatory within s. 15(1): *Andrews, supra*, at p. 195 per La Forest J. Additional assistance may be obtained by comparing the ground at issue with the grounds enumerated, or from recognition by legislators and jurists that the ground is discriminatory: see *Egan v. Canada, supra*, per Cory J.

All of these may be valid indicators in the exclusionary sense that their presence may signal an analogous ground. But the converse proposition – that any or all of them must be present to find an analogous ground – is invalid. As Wilson J. recognized in *Turpin* (at p. 1333), they are but “analytical tools” which may be “of assistance”.²⁴⁷

Madam Justice L’Heureux-Dubé, writing in *Corbière v. Canada*,²⁴⁸ provides a similar list of indicators of analogous grounds, but she expressly refers to human rights codes as

²⁴² [1999] 1 S.C.R. 493.

²⁴³ [1994] 2 S.C.R. 418.

²⁴⁴ [1995] 2 S.C.R. 513.

²⁴⁵ [1998] 1 S.C.R. 493.

²⁴⁶ See e.g. *Dywidag Systems International, Canada v. Zutphen Brothers Construction*, [1990] 1 S.C.R. 705; *Aluminum Co. of Canada v. The Queen* (1986), 55 O.R. (2d) 522 (Div. Ct). See also P. Hogg, *Constitutional Law of Canada*, 3rd ed. (Scarborough: Carswell, 1992).

²⁴⁷ *Miron, supra* note 243 at paras. 148-149.

²⁴⁸ *Corbière, supra* note 242.

one indicator of the kinds of grounds that should be seen as the basis of discrimination. Thus, the human rights codes can be used to expand the equality provisions of the *Charter*, as well as the other way around. This is part of the symbiotic and mutually reinforcing nature of these legal instruments which has alarmed critics from the right, such as Professors F.L. Morton and R. Knopff.²⁴⁹

The center of the section 15 equality universe is now *Law v. Canada (Min. of Employment and Immigration)*.²⁵⁰ Justice Iacobucci, writing for a unanimous Supreme Court of Canada, formulated a single test for equality focused on the concept of human dignity. Only distinctions on a personal characteristic (enumerated or analogous grounds) that offend human dignity fall within the scope of section 15 of the *Charter*. He defines human dignity broadly in the following terms:

What is human dignity? There can be different conceptions of what human dignity means. For the purpose of analysis under s. 15(1) of the *Charter*, however, the jurisprudence of this Court reflects a specific, albeit non-exhaustive, definition. As noted by Lamer C.J. in *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at p. 554, the equality guarantee in s. 15(1) is concerned with the realization of personal autonomy and self-determination. Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?²⁵¹

He goes on in the *Law* case to re-emphasize that equality is a comparative analysis (claimant group and comparator group) and an analysis that must be conducted in a contextual fashion, taking account of the following four context factors:

1. Pre-existing Disadvantage;
2. Relationship Between Grounds and the Claimant's Characteristics or Circumstances;
3. Ameliorative Purpose or Effect;
4. Nature of the Interest Affected.

²⁴⁹ F.L. Morton and R. Knopff, *The Charter Revolution and the Court Party* (Peterborough Ont.: Broadview Press, 2000).

²⁵⁰ [1999] 1 S.C.R. 497.

²⁵¹ *Ibid.*

Even using the same test the Supreme Court Justices often fail to agree on the difficult policy choices inherent in section 15 *Charter* analysis. The Justices, like Canadians more generally, do not always agree on the proper scope of equality in Canada. In *Canadian Foundation for Children Youth and the Law v. Canada*, the majority of the Court finds that section 43 of the *Criminal Code* (allowing reasonable physical correction of children) does not violate section 15 of the *Charter* nor offend the human dignity of the children concerned.²⁵² In *Auton v. British Columbia (A.G.)*, by narrowly defining the comparator group, the Court denied government funding for specific therapies for children with autism.²⁵³ By this device or by engaging in the interest balancing at the rights violation stage, as the majority did in the *Children's Foundation*, some critics argue that the Court has retreated to a more formal (less substantive) version of equality.²⁵⁴ We have explored this *Charter* evolution in some detail, as we suggest that the Court is in somewhat of a retreat on equality, leaving the legislatures and human rights codes in a more important leadership role.

While the form of section 15 of the *Charter* may differ from human rights legislation, they do share common purposes and effects. It also seems to us that the language of human dignity, discrete and insular minority and democratic marginalization may be useful reference points for who should be protected and included in human rights codes. We also argue that legislators should be willing to lead on matters of equality and not merely follow the courts as they have done on matters of gay and lesbian rights.

2. *The Interrelationship Between Human Rights Codes and the Charter*

[D]iscrimination in a substantive sense involv[es] factors such as prejudice, stereotyping, and disadvantage. Of fundamental importance, ...the determination of whether each of these elements exists in a particular case is always to be undertaken in a *purposive* manner, taking into account the *full social, political, and legal context* of the claim.²⁵⁵

The recent history of Canadian human rights jurisprudence has consistently emphasized a purposive, liberal, and contextual approach to interpretation of the *Charter* and federal and provincial human rights codes. One can see the way the courts have used human rights statutory and constitutional instruments to aid each other in fulfilling the common purpose of the enactments:

It is clear that the purpose of s.15 [of the *Charter*] is to ensure equality in the formulation and application of the law. The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as

²⁵² [2004] 1 S.C.R. 76.

²⁵³ [2004] 3 S.C.R. 657.

²⁵⁴ D. Pothier, "Equality as a Comparative Concept: Mirror Mirror on the Wall, What's the Fairest of Them All" (2006) 33 Sup. Ct. L. Rev. (2d) 135 and W. MacKay "In Defence of the Courts: A Balanced Judicial Role in Canada's Constitutional Democracy" (2007) 21 N.J.C.L. 184.

²⁵⁵ *Law, supra* note 250 at para. 30. [Emphasis added.]

human beings equally deserving of concern, respect and consideration. It has a large remedial component.²⁵⁶

The [Ontario Human Rights] Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination.²⁵⁷

In *Andrews*, the court drew on the substantive definition of equality developed in human rights jurisprudence as part of its contextual analysis to inform the definition of discrimination under section 15.²⁵⁸ Similarly, in *Eldridge*, the court employed the language of human rights jurisprudence in imposing the obligation of “reasonable accommodation ... to the point of undue hardship” on governments in the case of adverse effect discrimination.²⁵⁹ Most recently, in *Meiorin*, McLachlin J., as she then was, drew upon the *Charter* jurisprudential analysis of the Court when adopting a more unified approach in assessing discrimination under human rights codes.

In the *Charter* context, the distinction between direct and adverse effect discrimination may have some analytical significance but, because the principal concern is the effect of the impugned law, it has little legal importance... I see little reason for adopting a different approach when the claim is brought under human rights legislation which, while it may have a different legal orientation, is aimed at the same general wrong as s.15(1) of the *Charter*.²⁶⁰

²⁵⁶ *Andrews*, *supra* note 238 at 171.

²⁵⁷ *O'Malley*, *supra* note 64 at 551, cited in *Andrews* in informing the definition of equality for s.15 of the *Charter*.

²⁵⁸ *Andrews*, *supra* note 238.

²⁵⁹ *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at para. 79.

²⁶⁰ *Meiorin*, *supra* note 66 at paras. 47-48.

While the complementarity between human rights legislation and s.15(1) of the *Charter* was one of the reasons for adopting a new unified test in *Meiorin*, *supra* note 66, the Supreme Court has been fairly consistent in its recent jurisprudence in distinguishing between the *Law* and *Meiorin* tests for the different contexts of *Charter* claims and statutory human rights codes respectively, although it often draws on cases from the other context for elaborating specific human rights principles or applications of those principles to certain facts: see e.g., *B. v. Human Rights Commission (Ontario)*, [2002] 3 S.C.R. 403 at para. 55, citing *Law* in discussing the definition of grounds under human rights legislation; *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772 at paras.32-35, discussing human rights statutes in elaborating the value of freedom of religion in the *Charter* context; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*, [2000] 1 S.C.R. 665, citing both *Charter* and human rights jurisprudence in defining the meaning of “handicap” under the *Quebec Charter* and noting: “While there is no requirement that the provisions of the Charter mirror those of the Canadian Charter, they must nevertheless be interpreted in light of the Canadian Charter”.

However, at the Tribunal level, there has been some debate as to the extent to which the *Law* test for discrimination under the *Charter* should apply in the application of human rights legislation. In *Wignall v. Canada (Department of National Revenue)*, [2003] F.C.J. No. 1627 (Fed. Ct.), the Federal Court found it was a reviewable error for the Canadian Human Rights Tribunal to apply the *Law* test to a complaint of discrimination under the CHRA; see also *Powell v. TD Canada Trust*, [2007] F.C.J. No. 1579 (Fed. Ct.); *Withler v. Canada (Attorney General)*, 2006 B.C.J. No. 101 (B.C. Sup. Ct.); and *Marakkaparambil v. Ontario (Health and Long-Term Care)*, 2007 HRTO 24, rejecting a motion to dismiss a complaint that had

Human rights legislation and the *Charter* are fundamentally interconnected in the goals and purposes they seek to achieve. Human rights codes are seen as “quasi-constitutional” documents²⁶¹ – an aid to ensuring the constitutional goal of social equality is substantively realized.

Human rights codes are documents that embody fundamental principles, but which permit the understanding and application of these principles to change over time. These codes leave ample scope for interpretation by those charged with that task. The “living-tree” doctrine, well understood and accepted as a principle of constitutional interpretation, is particularly well suited to human rights legislation. The enumerated grounds of discrimination must be examined in the context of contemporary values, and not in a vacuum.²⁶²

In this way, human rights codes may be seen as a limb of the “tree” which encompasses the *Charter* equality guarantees, which continues to grow and evolve at pace with social values and an ever changing and evolving Canadian society.

However, although conjoined in a common purpose, the framework of the *Charter* differs from the human rights codes in the following aspects:

already been rejected on *Charter* grounds because the outcome could be different under the Human Rights Code.

But lower level bodies have applied the *Law* test in the statutory human rights context. This has generally been the case where there were concerns that a traditional analysis could unduly interfere with complex governmental policy: see *Gwinner v. Alberta (Human Resources and Employment)*, (2002), 217 D.L.R. (4th) 341 (Alta. Q.B.), aff’d [2005] 354 A.R. 21 (C.A.), where the Queen’s Bench held that it was appropriate to apply *Law* in “some cases”, such as those “where there is a human rights equality challenge to legislation which sets up a government program of financial support that is alleged to be discriminatory”, but that the *Law* third-step dignity analysis could be avoided in most human rights complaints; *BC Government and Service Employees Union v. British Columbia (Public Service Employee Relations Commission)*, (2002), 4 B.C.L.R. (4th) 301 (C.A.), finding that the *Law* test and *Charter* precedents could apply as a “cluster of points of reference” rather than as a “strict test” to a collective agreement that was found to be integrated with the employment insurance scheme; *Saskatchewan (Department of Finance) v. Saskatchewan (Human Rights Commission)*, (2004), 254 Sask. R. 185 (C.A.), where the Court of Appeal applied the *Law* test in a challenge to the disability income plan without any discussion of whether it would be appropriate; *Armstrong v. B.C. (Ministry of Health) (No. 5)*, 2008 BCHRT 19, where the Tribunal used a *Law* analysis to supplement a traditional human rights analysis for situations where there are “governmental overtones” in areas of complex policy such as the allocation of health care funding services, relying on *Preiss v. B.C. (Ministry of Attorney General)*, 2006 BCHRT 587; and *Lane v. ADGA Group Consultants Inc.*, 2007 HRTO 34, where the Tribunal felt it was necessary to rely on the comparator group directive in the *Law* test in cases of challenges to government programs. As a result, some Tribunals have opted to do analyses under both tests: *Hogan v. Ontario (Health and Long-Term Care)* (2006), 58 C.H.R.R. 317 (Ont. H.R.T.), where the majority and dissenting judgments analyzed the claims under both the *Meiorin* and *Law* tests.

This will be an important analytical question to resolve if social condition is added to the CHRA as an application of the *Law* test could have a more restrictive approach to claims of discrimination based on socio-economic grounds as it has in the *Charter* context, discussed further in the next section.

²⁶¹ *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321 at 339.

²⁶² *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 at 621.

To begin with, discrimination in s. 15(1) is limited to discrimination caused by the application or operation of law, whereas the Human Rights Acts apply also to private activities. Furthermore, and this is a distinction of more importance, all the Human Rights Acts passed in Canada specifically designate a certain limited number of grounds upon which discrimination is forbidden. Section 15(1) of the *Charter* is not so limited.²⁶³

In addition, the “defences” or “justifications” in the *Charter* and the human rights statutes vary. While the government may justify a finding of discrimination on policy grounds under section 1 of the *Charter*, in human rights codes there will be no finding of discrimination if the practice is found to be a *bona fide* justification or within a statutory exemption. Further, the scope of the codes is limited to areas of accommodation, services and employment whereas the *Charter* encompasses all government activity; and, although both are remedial in purpose, the practical effects of pursuing remedies in each are quite different.

In terms of remedies, the *Charter* has the remedial power of striking down or altering the impugned legislation under section 52 of the *Constitution Act, 1982*,²⁶⁴ as well as broad powers to remedy discriminatory government action on an individual level under section 24 of the *Charter*. Similarly, human rights tribunals are also given broad powers to cease, prevent and redress the discriminatory practice,²⁶⁵ and at least one commentator believes they are a better forum for devising effective and creative solutions to discrimination in that the remedies would be unavailable through the expensive court process and commission remedies would have a more immediate effect for a greater number of people.²⁶⁶ Lastly, and most importantly, the legal status of each document is fundamentally different. Although there have been numerous times where human rights statutes have been used to inform the development of section 15, the inclusion of section 15 of the *Charter* in the *Constitution Act, 1982* mandates some conformity between human rights statutes and the *Charter* itself. It is a two-way street.

There have been many cases where the *Charter* has been used to challenge human rights statutes to ensure the legislation conforms to the values and norms enshrined in the Constitution.²⁶⁷ Thus, we will evaluate “social condition” as a potential analogous ground under section 15 of the *Charter* and whether there may be a constitutional obligation to include “social condition” in the CHRA.

3. *Social Condition and Charter Jurisprudence Generally*

Different aspects of what may constitute social condition have come before all levels of courts. Some of these claims have come in the form of section 15 *Charter* challenges. However, the Supreme Court of Canada has repeatedly affirmed that it does

²⁶³ *Andrews*, *supra* note 238.

²⁶⁴ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

²⁶⁵ CHRA, *supra* note 1, s. 53(2).

²⁶⁶ *Turkington*, *supra* note 53.

²⁶⁷ See *e.g. McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 and *Vriend*, *supra* note 245.

not perceive the *Charter* as a vehicle for the protection of economic rights. As stated by L’Heureux-Dubé in her dissent in *Egan v. Canada*:

As I note earlier, the *Charter* is not a document of economic rights and freedoms. Rather, it only protects “economic rights” when such protection is necessarily incidental to protection of the worth and dignity of the human person.²⁶⁸

The reluctance of the court to engage itself in an allocation of economic rights is justified by judicial deference to the legislature in matters of complex, socio-economic policy, leaving the role of determining this policy to elected politicians. This deference to the legislature is demonstrated in judgments such as *R.J.R. MacDonald Inc. v. Canada (Attorney General)*²⁶⁹ and *Eldridge v. British Columbia (Attorney General)*.²⁷⁰ In *RJR MacDonald*, La Forest J., in dissent, states that:

Courts are specialists in the interpretation of legislation and are, accordingly, well placed to subject criminal justice legislation to careful scrutiny. However, courts are not specialists in the realm of policy-making, nor should they be. This is a role properly assigned to the elected representatives of the peoples, who have at their disposal the necessary institutional resources to enable them to compile and assess social science evidence, to mediate between competing social interests and to reach out and protect vulnerable groups.²⁷¹

The reluctance of the Supreme Court to interpret the *Charter* so as to enforce social and economic rights has been followed by the provincial courts in their adjudication of *Charter* challenges. In fact, as will be shown below, the primary justification for refusing to recognize a particular “social condition” or group as analogous to an enumerated ground under the *Charter* has been deference to Parliament in issues of social and economic policy. For example in *Gosselin v. Quebec (Attorney General)*,²⁷² the Quebec Superior Court held that:

[TRANSLATION]

²⁶⁸ *Egan*, *supra* note 244 at 544, per L’Heureux Dubé J.:

We can further inform our understanding of the purpose of s. 15 by recognizing what it is not. The *Charter* is a document of civil, political and legal rights. It is not a *Charter* of economic rights. This is not to say, however, that economic prejudices or benefits are irrelevant to determinations under s. 15 of the *Charter*. Quite the contrary. Economic benefits or prejudices are relevant to s. 15, but are more accurately regarded as symptomatic of the types of distinctions that are at the heart of s. 15: those that offend inherent human dignity.

²⁶⁹ [1995] 3 S.C.R. 199.

²⁷⁰ *Eldridge*, *supra* note 259.

²⁷¹ *RJR MacDonald*, *supra* note 269 at para. 68. Later in the judgment La Forest J. states: “it is not the role of this Court to substitute its opinion for that of Parliament concerning the ideal legislative solution to this complex and wide-ranging social problem.” See also *McKinney*, *supra* note 267, per La Forest J.; *Egan*, *supra* note 244, per Sopinka J.; and *Andrews*, *supra* note 238, per La Forest J.

²⁷² [1992] R.J.Q. 1657 at 1658 (C.S.), aff’d [1999] R.J.Q. 1033 (C.A.), aff’d [2002] 4 S.C.R. 429. See also *Alcorn v. Canada (Commissioner of Corrections)*, [1999] F.C.J. No. 330 (T.D.); *Clark v. Peterborough Utilities Commission*, (1995) 24 O.R. (3d) 7 (Ont. Gen. Div.); *Masse*, *supra* note 229.

The *Charter* does not interfere with parliamentary supremacy ... If they were to be seen as positive obligations, the courts would, through their approval or disapproval, ultimately decide political choices... However, the *Charter* does not grant such a role to the judiciary. The courts must not substitute their judgment in social and economic matters for the judgment of legislative bodies elected for that purpose.²⁷³

When put to the test on appeal in *Gosselin*, the majority of the Supreme Court also failed to rise to the challenge of interpreting section 15 of the *Charter* to address social and economic disadvantage.²⁷⁴ Forcing young people to live below the poverty line by providing low levels of social assistance was not viewed as a violation of their dignity. The good intentions of the legislators were considered at the first stage of *Charter* analysis (the violation stage) and the majority of the Court concluded that there was no breach of equality. This decision has been criticized as advancing stereotypes about the young and putting too high a burden on *Charter* claimants.²⁷⁵ It also represents a general retreat on equality whereby conflicting rights are balanced at the violation stage rather than as part of a section 1 justification. This puts the burden of proof on the claimant rather than the state and makes it easier to justify *Charter* violations.

In the *Gosselin* case the majority of the Supreme Court of Canada was also troubled by the class action aspect of her claim and put a very high burden of proof upon Ms. Gosselin that is appropriately criticized in some academic circles.²⁷⁶ It also appears that the Court was concerned about mandating the Quebec National Assembly to pay large sums of money to a group of ill-defined claimants. The case concentrated on age as the sole ground of discrimination and largely ignored issues of mental disability and poverty, which were present as well. This runs counter to the trend of taking a more holistic approach to discrimination complaints and recognizing the intersection of various grounds of discrimination. The Supreme Court did not seize the opportunity to explore social condition and or poverty as possible analogous grounds under section 15 of the *Charter*. Furthermore, by balancing the competing policy interests at the violation stage rather than at section 1 reasonable limits stage, the majority of the Supreme Court signaled a general retreat on equality, to which we referred earlier.

While courts continue to play their traditional roles as protector of the Constitution, promoter of fair process and preventer of arbitrary action by the state, they have generally avoided entering the contested domain of social and economic policy. This hesitance should be reconsidered and judges should be open to expanding their role in the socio-economic domain – albeit with caution and respect for the other branches of government. However, to date the *Charter* has not offered much support on poverty issues.

Since the advent of the *Charter* in 1982, and the use of s. 15(1) of the *Charter* to both prevent discrimination and promote equality, case law has gradually embraced various forms of grounds analogous to the enumerated ones explicitly set out in the

²⁷³ *Gosselin* (C.S.), *ibid.* at 1670.

²⁷⁴ *Gosselin* (S.C.C.), *ibid.*

²⁷⁵ Kim & Piper, *supra* note 40.

²⁷⁶ *Ibid.*

Charter. These grounds have grown from singular in their application, to intersectional, paving the way for a more holistic approach to equality. The grounds have also expanded their meaning from narrow to broad, allowing claimants in *Eldridge*²⁷⁷ but not in *Egan*²⁷⁸ to gain full access to government schemes normally closed to Canadians of their status. In a series of later cases the Supreme Court did advance the rights of gays and lesbians including providing access to government finances. The *Law* test, though continuously upheld as the standard mode of analysis for section 15(1) claims, has received legitimate criticism, specifically with regards to comparator analyses in the 2004 cases of *Auton v. British Columbia (Attorney General)*²⁷⁹ and *Newfoundland Association of Public Employees v. Newfoundland*.²⁸⁰

In both these latter cases the Supreme Court was willing to defer to the legislative branch of government with respect to the expenditure of taxpayers' money. In *Auton*, the Supreme Court concludes that the therapy sought to be funded was untested and outside the scope of the relevant legislation and disagreed with the comparator ground as defined by the claimant.²⁸¹ In the *N.A.P.E.* case, the Court was willing to recognize the crisis state of the government's financial situation as a reasonable basis for renegeing on an agreed-upon pay equity settlement for women within the relevant union.²⁸² These cases clearly demonstrate the reluctance of the courts to second-guess the elected legislative branches of governments on matters of economic and social policy. This extends to both a refusal to read positive economic rights into section 15 (perhaps contrary to the promise of *Eldridge*²⁸³) and a resistance to social condition or poverty as an analogous ground of discrimination under section 15 of the *Charter*.

4. Social Condition or Poverty as an Analogous Ground

As part of the general test for discrimination under section 15, there must be a distinction made on a *personal characteristic*.²⁸⁴ There are many factors which contribute to this determination, but there is no strict, conclusive or closed list of indicia.²⁸⁵ However, some common factors include: irrelevancy of the characteristic (similar to those grounds already included), membership in a group which has suffered historical disadvantage (discrete and insular minority), immutability of the characteristic, and general societal disadvantage.²⁸⁶ Again, none of these are conclusive or mandatory in the analysis of inclusion as an analogous ground, however, social condition does conform to many of these factors.

Like other prohibited grounds, social condition may be seen as an "irrelevant" characteristic by which employment, services and accommodation may be denied. In *Miron v. Trudel*, McLachlin J., as she then was, made the following statement:

²⁷⁷ *Eldridge*, *supra* note 259.

²⁷⁸ *Egan*, *supra* note 244.

²⁷⁹ *Auton*, *supra* note 253.

²⁸⁰ [2004] 3 S.C.R. 381 [hereinafter *N.A.P.E.*].

²⁸¹ *Auton*, *supra* note 253.

²⁸² *N.A.P.E.*, *supra* note 280.

²⁸³ *Eldridge*, *supra* note 259.

²⁸⁴ *Andrews*, *supra* note 238.

²⁸⁵ *Miron*, *supra* note 243.

²⁸⁶ *Andrews*, *supra* note 238.

[I]n determining whether a particular group characteristic is an analogous ground, the fundamental consideration is whether the characteristic may serve as an irrelevant basis of exclusion and a denial of essential human dignity in the human rights tradition. In other words, may it serve as a basis for unequal treatment based on stereotypical attributes ascribed to the group, rather than on the true worth and ability or circumstances of the individual?²⁸⁷

In this same decision, now Chief Justice McLachlin also holds that there is no absolute requirement that an analogous ground be immutable and that it can be temporary or changeable. The stigma and stereotyping of individuals in poverty or in a certain occupation often overshadow “the true worth and ability or circumstances” of individuals.

The stigma of poverty is a special type of stigma which attributes to the poor a status of being ‘less than human.’” ...[P]eople perceive poverty to be the result of individual characteristics of people living in poverty... So, for example, a common stereotype illustrating this stigma would be that of the person on welfare as lazy and unmotivated, as a spendthrift in need of personal correction. The assumption is that poverty arises out of lack of effort and thrift. Therefore, anyone who is poor must be lazy and irresponsible. This logic stands behind povertyism: the logic translates incorrect assumptions about poverty into assumptions about the people who are poor.²⁸⁸

Further, the widespread nature of stereotypical beliefs has often caused historical disadvantage to people in the institutionalization and development of stereotypes.²⁸⁹ Lastly, one’s social condition could be compared to such categories as religion or citizenship; although not necessarily immutable in the strict sense, it is often a very difficult individual characteristic to change.

Similarly, Wilson J. in *Andrews* also identified indicators such as whether the persons characterized by the trait in question are “lacking in political power”, “vulnerable to having their interests overlooked and their rights to equal concern and respect violated”, and “vulnerab[le] to becoming a disadvantaged group” on the basis of the trait.²⁹⁰ In this sense, individuals living in poverty are some of the most disadvantaged in our liberal democracy:

In a welfare state, people in poverty are in heightened contact with law-making bodies and legal structures. That contact, however, is not as a participant or as a citizen perceived of as an equal active member of a social contract. Instead, people in

²⁸⁷ *Miron*, *supra* note 243 at 495.

²⁸⁸ Turkington, *supra* note 53 at 140-41, citing C.I. Waxman, *The Stigma of Poverty: A Critique of Poverty Theories and Policies*, 2nd ed. (New York: Permagon Press, 1983) at 70. [Emphasis added]

²⁸⁹ Turkington, *ibid.* at 147-68, tracing the “poor laws” from feudal Britain to contemporary Canada.

²⁹⁰ *Andrews*, *supra* note 238.

poverty are subject to the expectations and assumptions, the beliefs and values of the economically privileged in society.²⁹¹

The review of the experiences of the two provinces and one territory that have adopted social condition, discussed above, reveal a tendency to break down the concept of social condition into more manageable components; such as occupation, source of income, and education. While this does help to define and clarify the concept of social condition, it also has the effect of atomizing the concepts of both social condition and poverty, making it harder to confront the problems of discrimination in a holistic way. The Northwest Territories is the only province that expressly refers to poverty as an aspect of social condition. More often it is seen as the other way around - that social condition is one aspect of the larger concept of poverty.

Sheila Turkington and others advocate the use of the term poverty rather than social condition as better capturing the kind of problems and disadvantages faced by the poor in Canada.²⁹² However, both legislatures and courts have been reluctant to even embrace the narrower concept of social condition so the likelihood of adding poverty as a ground of discrimination, either by way of human rights codes or the *Charter* seems remote at the present time. The term poverty would be more holistic perhaps but that is a future issue and social condition offers a manageable way to solve at least some of the problems. Is a person incapable of providing for herself the basic necessities of life – food, shelter and clothing – any less disadvantaged than a person who is unable to provide the very same necessities for himself or herself solely because of their race? It may be argued that although legislators and policy makers need to seek out and address the reasons that give rise to the poverty in the first place, it is not for the courts to do the same. However, in atomizing poverty, they are no longer addressing the reason for the discrimination but the circumstances that led up to it. By deferring discrimination cases that give rise to social and economic policy discourse to legislators, the courts are essentially leaving the victim with no judicial recourse. It can be argued that it is the courts' responsibility to recognize the disadvantages of Canada's citizens and to give as equal treatment to individuals with intersectional grounds as to those with grounds comprised of often impossible to qualitatively define causes.²⁹³ Thus, it is possible for social condition, appropriately defined, to be considered an analogous ground under the *Charter*.²⁹⁴ However that has not happened to date and from the current vantage point looks doubtful.

Consistent with this more atomized approach to social condition and poverty the section 15 *Charter* cases in this area can be grouped into various categories. We did this in our 1999 Report to the La Forest Review Panel at some length, and we will not repeat that here.²⁹⁵ The categories that we reviewed are as follows:

1. Occupation and Employment Status
2. Income Level and Source of Income

²⁹¹ Turkington, *supra* note 53 at 143.

²⁹² *Ibid.*

²⁹³ *Ibid.*

²⁹⁴ See also *Dartmouth Halifax (County) Regional Housing v. Sparks* (1993), 101 D.L.R. (4th) 224 (N.S.C.A.).

²⁹⁵ MacKay, Piper and Kim, *supra* note 4 at 34.

3. Residence
4. Prisoners
5. Single mother / sole support parents

As we previously discussed, most of the claims in the above areas did not succeed and only “Aboriginality residence” in *Corbière* was upheld at the Supreme Court of Canada level.²⁹⁶ Occupation and employment status,²⁹⁷ income levels, criteria for government benefits, residence and status as a prisoner, even a poor prisoner,²⁹⁸ did not result in an analogous ground of social condition.²⁹⁹

More success for poverty claimants has been achieved at lower court levels in respect to multiple grounds of discrimination which include, among other factors, source of income or status as a single mother. It is important to note, however, that even in the cases where the claimants succeeded the judges stopped short of finding that social condition or poverty was a stand alone analogous ground of discrimination. They relied instead on intersectionality in the particular cases.

The Supreme Court of Canada held in *Thibaudeau v. Canada*³⁰⁰ that “level of income” is not an analogous ground for the purpose of finding discrimination under section 15 because it is not a personal characteristic. This holding was followed in later cases such as *Guillemette v. Canada*, where the plaintiff argued that progressive income tax rates discriminated against individuals based on their level of income.³⁰¹ The court rejected the argument that since, income level was an analogous ground for the purpose of affirmative action programs under section 15(2),³⁰² level of income should also be recognized as an analogous ground under section 15.³⁰³

When evaluating section 15 claims under the *Charter*, the courts have rejected those based on level of income in cases where the plaintiff could allege no real disadvantage. The *Charter* was not used to protect claims where an individual in a situation of economic advantage attempted to use the *Charter* to obtain tax breaks or other benefits. However, in instances where plaintiffs sought *Charter* protection due to their low income or receipt of social assistance, the courts have provided that protection

²⁹⁶ *Corbière*, *supra* note 242. While L’Heureux-Dubé did a wide ranging analysis, the case was not really tied to economic or social status and she reaffirmed that residence generally is not an analogous ground.

²⁹⁷ *Baier v. Alberta*, 2007 SCC 31, reiterated that occupation is not an analogous ground.

²⁹⁸ *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519, per Gonthier J., dissenting also failed to recognize Aboriginal prisoners.

²⁹⁹ MacKay, Piper and Kim, *supra* note 4 at 34.

³⁰⁰ *Thibaudeau*, *supra* note 226.

³⁰¹ *Guillemette v. Canada*, [1997] T.C.J. No. 589.

³⁰² In this case, the plaintiff referred, in particular, to the Child Tax Credit, the GST Credit, Guaranteed Income Supplement and Old Age Security payments as evidence that legislation has been enacted with the purpose of improving the conditions of people who suffer disadvantage on the basis of their level of income.

³⁰³ See also *Vosicky v. R.* (1996), 96 D.T.C. 6580 (F.C.A.), where Hugessen J. held that the establishment of different tax rates for different income brackets does not constitute discrimination on a ground enumerated in s. 15 or on any analogous ground. See also *Netupsky v. Canada*, [1996] F.C.J. No. 236 (C.A.), where the court found that “it is well established that laws can draw a distinction between persons as long as it is not based on personal characteristics. No such distinction is made here as the only distinguishing characteristic involved is relative wealth and income;” *Reesink v. Canada*, [1998] T.C.J. No. 100 at para. 17, where Lamarre J. held that “Students who work cannot constitute a group within the meaning of s. 15 of the *Charter* as income level is not a characteristic attaching to the individual.”

in a limited number of cases. For example, in *Federated Anti-Poverty Groups of British Columbia v. British Columbia (Attorney General)*, an application to strike a section 15 *Charter* argument from the plaintiff's statement of claim was refused by Parrett J. who concluded:

Applying s. 15 of the *Charter*, it is clear that persons receiving income assistance constitute a discrete and insular minority within the meaning of s. 15. It may reasonably be inferred that because recipients of public assistance generally lack substantial political influence, they comprise "those groups in society whose needs and wishes elected officials have no apparent interest in attending."³⁰⁴

In that case the plaintiff challenged the validity of part 2 of the *Guaranteed Available Income for Need Act*, which vested in the Crown an individual's right to maintenance, in particular rights to claim, vary or enforce maintenance.

Schaff v. Canada provides another instance where the courts acknowledged poverty as an analogous ground of discrimination.³⁰⁵ The plaintiff in *Schaff* was a female, single parent living in poverty who challenged the requirement that she include maintenance payments in her income for the purpose of taxation, pursuant to section 56(1)(b) of the *Income Tax Act*. Although the claim ultimately failed since section 56(1)(b) was found not to be discriminatory, the court held that:

The appellant in my opinion is part of a "discrete and insular minority" worthy of protection under s. 15 of the *Charter*. More specifically, *poverty is a personal characteristic* that can form the basis of discrimination. The appellant is a member of a narrower analogous group found in *Thibaudeau*, *supra*. The appellant's group is only distinguished by its poverty."³⁰⁶

This is a particularly broad statement that has not been picked up and followed in later cases.

Further recognition of poverty as a personal characteristic, leading to its characterization as an analogous ground, is found in *Dartmouth/Halifax County Regional Housing Authority v. Sparks*.³⁰⁷ In that case, public housing tenants were unable to avail themselves of the security of rental tenure which was available to non-public housing tenants pursuant to sections 10(8)(d) and 25(2) of the *Residential Tenancies Act*. The court held that the provisions of the *Act* violated the *Charter*, stating in the course of its judgment that:

Low income, in most cases verging on or below poverty, is undeniably a characteristic shared by all residents of public housing...

³⁰⁴ (1991) 70 B.C.L.R. (2d) 325 (S.C.).

³⁰⁵ *Schaff*, *supra* note 228.

³⁰⁶ *Ibid.* at para 52. [Emphasis added.]

³⁰⁷ *Sparks*, *supra* note 294.

Single mothers are now known to be the group in society most likely to experience poverty in the extreme. It is by virtue of being a single mother that this poverty is likely to affect the members of this group. This is no less a personal characteristic of such individuals than non-citizenship was in *Andrews*. To find otherwise would strain the interpretation of “personal characteristic” unduly...

The public housing tenants group as a whole is historically disadvantaged as a result of the combined effect of several personal characteristics listed in s. 15(1). As a result, they are a group analogous...³⁰⁸

Hence, the court found that low income and poverty constitute personal characteristics worthy of protection under section 15 of the *Charter*. In the particular circumstances of *Sparks*, individuals with a low income, combined with characteristics such as single motherhood and race, occupied the social condition of “public housing tenant,” as an analogous ground under section 15 of the *Charter*.

Consistent with *Schaff* and *Sparks*, which relied on the claimants being single support mothers in finding an analogous ground, McLachlin J. (as she then was, supported by L’Heureux-Dubé J.) asserted in her dissenting judgment in *Thibaudeau* that “the status of separated or divorced custodial parent constitutes an analogous ground of discrimination within the meaning of section 15(1) of the *Charter*.”³⁰⁹ As L’Heureux Dubé J. elaborated, the dissolution of a relationship with children often leaves custodial parents in difficult economic circumstances; in addition, separated and divorced custodial parents are largely women who are politically invisible, “economically vulnerable, and socially disempowered”.³¹⁰ As a highly vulnerable group, united by various personal characteristics, this group is appropriate for protection as an analogous ground under section 15. However, this was not the majority judgment.³¹¹ Notably, in *Schaff v. Canada*,³¹² the plaintiff ultimately lost her case, although the court did recognize that a single mother living in poverty was a member of a group constituting an analogous ground under section 15 of the *Charter*.

However, despite the (mostly *obiter*) opinions expressed on social condition or low income as an analogous ground in the previous judgments, other courts have come to different conclusions. In *Massé* where the applicants asked the Ontario court to quash legislation which reduced social assistance rates by 21%. In spite of strong evidence which showed that the cuts would cause large-scale suffering, especially with regards to

³⁰⁸ *Ibid.* at 234.

³⁰⁹ *Thibaudeau*, *supra* note 226 at para 212. The recognition of separated or divorced custodial parents as a group requiring *Charter* protection under s. 15 was supported in the dissenting judgment of Corbett J. in *Massé*, *supra* note 229.

³¹⁰ *Thibaudeau*, *ibid.* at para 44.

³¹¹ The majority decided *Thibaudeau* on the basis that the impugned legislative provision did not impose a burden or withhold a benefit so as to attract the application of s. 15(1) of the *Charter*.

³¹² *Schaff*, *supra* note 228.

homelessness and hunger, the court held that social and economic rights cannot be enforced by the courts.³¹³

In *Clark*³¹⁴ the court found that section 50(4) of the *Public Utilities Act* which allows corporations to “require any consumer to give security for the payment of the proper charge” did not violate the applicants’ section 15 rights. The plaintiffs were recipients of social assistance; the legislation applied only to non-landowners since liens were taken on land as security. The Peterborough Utilities Commission [“PUC”] had adopted a policy whereby payment of a cash security deposit of two or three months’ average billings was required from a residential tenant who could not show “a satisfactory payment history or other reasonable assurance of payment of future charges”. The court held that even though many tenants will be disadvantaged on grounds such as sex, disability, ethnicity, aboriginal and single mother status, that their disadvantage is not a result of the PUC policy, but rather of problems in public assistance and cruel economic conditions. The court found no violation of the plaintiffs’ section 15 *Charter* rights, citing *Andrews*: “[m]uch economic and social policy-making is simply beyond the institutional competence of the courts; their role is to protect against incursions on fundamental values, not to second-guess policy decisions.”³¹⁵

However, a markedly different approach was taken by the Ontario Court of Appeal in *Falkiner v. Ontario (Ministry of Community and Social Services)*, where the Court adopted an intersectional approach to the discrimination claim, looking at the intersecting characteristics of sex, single parenthood and receipt of social assistance.

Because the respondents' equality claim alleges differential treatment on the basis of an interlocking set of personal characteristics, I think their general approach is appropriate. Multiple comparator groups are needed to bring into focus the multiple forms of differential treatment alleged...

I believe that undertaking different comparisons to assess different forms of differential treatment is consistent with the Supreme Court's directive to apply the *Law* analysis flexibly. This flexible comparative approach reflects the complexity and context of the respondents' claim and captures the affront to their dignity, which lies at the heart of a section 15 challenge. I have concluded that the respondents have received differential treatment on the basis of sex, marital status and receipt of social assistance.³¹⁶

³¹³ *Massé, supra* note 229 at 46, O’Brien J.: “much economic and social policy is simply beyond the institutional competence of the courts.”

³¹⁴ *Clark, supra* note 272.

³¹⁵ *Ibid.*, citing *Andrews*, [1989] 1 S.C.R. 143 at 194. The court also states that land-ownership is not a personal characteristic, therefore it cannot constitute an analogous ground.

³¹⁶ *Falkiner, supra* note 229 at paras. 72-81. This judgment upheld the dissenting view of Rosenberg J. in [1996] O.J. No. 3737 (Gen. Div.) at para. 85:

They have been subject to invasions of privacy. They have been prosecuted disproportionately. They have been stigmatized and are often ashamed of their position. They are viewed as parasites and inferior and deemed personally inadequate and lazy. They have feelings of humiliation and isolation by the investigations necessary under the spouse-in-the-house rule. A high percentage of them suffer from depression

See also *R. v. Rehberg* (1993), 127 N.S.R. (2d) 331, 355 A.P.R. 330 (N.S.S.C.).

Specifically on the question of whether receipt of social assistance was an analogous ground under section 15, the Court overturned the decision of the Divisional Court in *Massé*, finding that recognition of receipt of social assistance was appropriate in furthering the protection of human dignity, particularly in light of the evidence of historical disadvantage:

[84] Additionally, however, I consider that the respondents have been subjected to differential treatment on the analogous ground of receipt of social assistance. Recognizing receipt of social assistance as an analogous ground of discrimination is controversial primarily because of concerns about singling out the economically disadvantaged for *Charter* protection, about immutability and about lack of homogeneity... These concerns have some validity but I think that recognizing receipt of social assistance as a ground of *Charter* protection under s. 15(1) is justified for several reasons...

[86] Here, the Divisional Court, relying on the record before the Board, found at para. 86 that there was “significant evidence of historical disadvantage of and continuing prejudice against social assistance recipients, particularly sole-support mothers”. This evidence showed:

Single mothers make up one of the most economically disadvantaged groups in Canada.

Social assistance recipients have difficulty becoming self-sufficient, in part because of their limited education and lack of employability.

Social assistance recipients face resentment and anger from others in society, who see them as freeloading and lazy. They are therefore subject to stigma leading to social exclusion.

All sole support parents are subject to stigmatization, stereotyping and a history of offensive restrictions on their personal lives, and these disadvantages are particularly felt by sole support mothers.

Sole support parents on social assistance are politically powerless.³¹⁷

The Court of Appeal rejected traditional concerns that social assistance recipients are not generally an immutable or homogenous group, opting for a more contextual analysis of the claim. Notably, it referred to the enumeration of receipt of public assistance under human rights statutes in supporting its finding that receipt of social assistance was an analogous ground for the purposes of the *Charter*.

The Ontario Court of Appeal judgment in *Falkiner* provides a valuable precedent in this area. Poverty can either be viewed as an amalgamation of a variety of divergent

³¹⁷ *Ibid.* at paras. 84-86.

characteristics such as sex, race, and other grounds, or it could be more usefully and accurately viewed holistically, such that when considering an individual's situation, account is taken of poverty as a whole, and of the actual situation, and whether that situation is worthy of redress. Such an approach is not incompatible with a *Law*-type section 15 analysis. To recognize poverty as a ground and in a holistic manner, we suggest, is implicitly sanctioned in the *Law* test itself, under the contextual factor of historical disadvantage. Nevertheless, even after the decision in *Falkiner*, that is not what the great majority of the courts have concluded on this issue and there are few signs of change on the horizon for section 15 interpretation in this regard, particularly where there are no other enumerated or well-established analogous grounds at play, such as single motherhood.

For instance, in *Affordable Energy Coalition (Re)*³¹⁸, the claimants were all economically disadvantaged and consequently unable to afford recently raised monthly electricity costs. Taking the lead from recent court jurisprudence, poverty was not recognized as an analogous ground or that poor persons made up an historically disadvantaged group. Without this ground, the claimants were at a loss for a uniting factor that allowed them to claim common disadvantage. The Tribunal member writes: "If a person obtains employment, or receives a gift, they would escape from poverty at no great difficulty or cost." It has been shown through countless empirical studies and the application of common sense that poverty, though mutable, is something that is changed oftentimes at impossible costs and for many is virtually unchangeable. It is at the very least constructively immutable and should not be ruled out on that basis. Poverty is a long-term condition that does not easily admit of drastic change. A comment so wilfully blind to the plight of such a significant spectrum of the Canadian population (approximately 10%) shows the great disparity between the case law against adding social and economic disadvantage as a ground for discrimination under the *Charter* and the reality of the poor.

There have also been some provincial cases challenging the disproportionate impact of some criminal and regulatory provision on the poor. In *R. v. Banks*³¹⁹ there was an unsuccessful challenge of a provincial law restricting "squeegeeing" as a form of begging because of its disproportionately negative impact on the poor. Similarly, in *Tupper v. Nova Scotia (A.G.)*,³²⁰ there was a challenge to a fine provision because of its impact as a penalty option on the impecunious. In neither of the above cases were the courts willing to find discrimination on the basis of poverty or social condition.

In summary, the *Charter of Rights* has not proven to be an effective vehicle for the advancement and protection of unequal treatment on the basis of social and economic disadvantage. Not only have courts been reluctant to interpret *Charter* rights as having positive socio-economic dimensions (with a few notable exceptions), but the section 15 *Charter* jurisprudence has shied away from recognizing socio-economic grounds alone as analogous in the context of negative rights claims (thou shalt not) rather than those proposing the positive allocations of economic resources. Notwithstanding the bold flirtation of Justice La Forest with an expansive interpretation of rights in *Eldridge*,³²¹

³¹⁸ (2008) N.S.UARB 11 [N.S. Util. and Rev. Bd.].

³¹⁹ *Banks*, *supra* note 232.

³²⁰ *Tupper*, *supra* note 233.

³²¹ *Eldridge*, *supra* note 259.

there is no clear indication that this willingness to consider rights of accommodation for the disabled would be extended to those who are disadvantaged on the basis of poverty, purportedly on the basis that to do so would run counter to the many judicial pronouncements against judicial interference in matters of social and economic policy.

5. *Under-Inclusiveness of Grounds and the Charter*

As mentioned earlier, the constitutional status of the *Charter* makes it fundamentally different – though not opposed – to human rights statutes. Thus, it is desirable that the *Canadian Human Rights Act* conforms to the principles, values and rights of the *Charter*. The most recent case advocating this approach is *Vriend*.³²² In *Vriend*, it was found that the exclusion of sexual orientation as a prohibited ground under the Alberta *Individual Rights Protection Act* was contrary to section 15 of the *Charter* and the equality rights set out therein. In many ways, a possible challenge on the basis of social condition would mirror the *Vriend* case.

Firstly, it is the under-inclusiveness of the code which is problematic, as it does not include “social condition”. The impact of the under-inclusion results in a distinction created by “law” which violates the very purpose of equality – whether it be equality before or under the law, or equal protection or benefit of the law. While it is still undecided whether the government is obligated to take positive action in the redress of social inequality,³²³ it has been made clear in numerous cases that once the government confers a benefit, it should not do so in a discriminatory manner. “[Section 15 of the *Charter*] does require that the government not be the source of further inequality”³²⁴ which could be the effect of excluding social condition as a prohibited ground of discrimination under the CHRA.

Secondly, the on-going decision by the Parliament to *not* include social condition could be seen as a positive “government action” as it was in *Vriend* when the Alberta legislature had rejected the inclusion of sexual orientation. Thirdly, the CHRA is part of a “comprehensive code of human rights provisions”, the exclusion from which could imply government approval of discrimination on this ground. The *impact* of the distinction would be discriminatory since it would withhold access to the CHRA, and thus impose a disadvantage on one group compared to another.

Lastly, the analysis to be undertaken must be performed in a “substantive” sense – that is, the comparative analysis of section 15 must consider factors of substantive rather than formal equality between comparator groups. The *Vriend* case provides a good analogy; after rejecting a comparative analysis *within* prohibited grounds, the Court addressed the “more fundamental” distinction between homosexuals and heterosexuals:

³²² *Vriend*, *supra* note 245. Although there have been other cases where provisions of the *Act* have been challenged as unconstitutional, such as *McKinney*, *supra* note 267 and *Re Blainey and Ontario Hockey Association* (1986), 54 O.R. (2d) 513 (C.A.).

³²³ B. Porter, “Beyond Andrews: Substantive Equality and Positive Obligations After *Eldridge* and *Vriend*” (1998) 9 *Constit. Forum* 71, at 80-81, discussing the positive obligations on governments ensuing from international covenants and interpretations of the Supreme Court of Canada judgments in *Vriend* and *Eldridge*.

³²⁴ *Thibaudeau*, *supra* note 226 at 655. See also *Egan*, *supra* note 244; *Schachter v. Canada*, [1992] 2 S.C.R. 679; and *Haig v. Canada*, [1993] 2 S.C.R. 995.

This distinction may be more difficult to see because there is, on the surface, a measure of formal equality: gay or lesbian individuals have the same access as heterosexual individuals to the protection of the IRPA in the sense that they could complain to the Commission about an incident of discrimination on the basis of any of the grounds currently included. *However, the exclusion of the ground of sexual orientation, considered in the context of the social reality of discrimination against gays and lesbians, clearly has a disproportionate impact on them as opposed to heterosexuals.* Therefore the IRPA in its underinclusive state denies substantive equality to the former group.³²⁵

Thus, it is theoretically possible that, if challenged, a governmental decision to exclude social condition could be found unconstitutional. The foregoing analysis is speculative in the sense that there is no judicial or factual context in which to place the discussion. Indeed, the above analysis suggests that the courts are not inclined to find that social condition is an analogous ground and therefore human rights codes would be entitled to exclude it, even in a comprehensive code. What can be inferred, however, is that the constitutional guarantee of equality strongly encourages the inclusion of groups vulnerable to discriminatory practices within the CHRA's protective framework. It does not, however, extend to all disadvantaged groups. Even if the exclusion of social condition were to be found as a violation of section 15 of the *Charter*, the justification under section 1 would be yet another hurdle to surpass.

6. *Section 1 Justification and Socio-Economic Policy*

Section 1 of the *Charter* allows the government to prove that any limit imposed on rights and freedoms may be justified in a free and democratic society. A major factor which influences the standard of proof in this context, is that of socio-economic policy. The need for flexibility in this area was emphasized by La Forest J. in the first section 15 case, *Andrews*:

I am convinced that it was never intended in enacting s. 15 that it become a tool for the wholesale subjection to judicial scrutiny of variegated legislative choices in no way infringing on values fundamental to a free and democratic society. Like my colleague, I am not prepared to accept that all legislative classifications must be rationally supportable before the courts. Much economic and social policy-making is simply beyond the institutional competence of the courts: their role is to protect against incursions on fundamental values, not to second guess policy decisions.³²⁶

³²⁵ *Vriend*, *supra* note 245 at para. 82, per Cory J. [Emphasis added.]

³²⁶ *Andrews*, *supra* note 238 at 194.

The need for flexibility in this area, as a correlative of the separation of government powers has influenced all future decisions in this area. The most obvious example is *McKinney*, where La Forest J. explicitly recognized the need to relax the government standard of proof under section 1 when dealing with complex, and often contradictory issues of social and economic policy.

When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices.³²⁷

And later, he wrote:

By the foregoing, I do not mean to suggest that this Court should, as a general rule, defer to legislative judgments when those judgments trench upon rights considered fundamental in a free and democratic society. Quite the contrary, I would have thought the *Charter* established the opposite regime. On the other hand, having accepted the importance of the legislative objective, one must in the present context recognize that if the legislative goal is to be achieved, it will inevitably be achieved to the detriment of some. Moreover, attempts to protect the rights of one group will also inevitably impose burdens on the rights of other groups. There is no perfect scenario in which the rights of all can be equally protected.³²⁸

The flexible application of section 1 of the *Charter* in respect to economic and social matters has again been reasserted in *N.A.P.E.*,³²⁹ where promised pay equity payments were rolled back because of financial exigency and the Supreme Court saved the equality violation. In a careful review of the “rights v. costs debate” Justice Binnie does acknowledge the relevance of costs in at least abnormal contexts. He also, reaffirms the importance of deference to the legislature when balancing conflicting rights in society. The need to defer to the legislative branch in times of financial crisis was affirmed and while not stating this point, the effect is that equality can and does have financial limits. This would also be true in respect to social condition discrimination.

These comments are particularly apt regarding the question of social condition. While legislative protection would undoubtedly be a laudable policy goal, there are numerous questions to be addressed before such changes could be afforded. The extent, the method, the objects and implementation – all of these questions would substantially mitigate against any positive findings by the courts in this area. Further, the appropriateness of the court in addressing these concerns is also a difficulty. And lastly, the result would most likely become a piecemeal solution to a complex and wide-ranging

³²⁷ *McKinney*, *supra* note 267 at 285.

³²⁸ *McKinney*, *ibid.* at 314-15.

³²⁹ *N.A.P.E.*, *supra* note 275.

area of socio-economic policy issues. Thus, the need for a legislative response to social condition is paramount, not only for practical reasons, but legal, constitutional, and policy ones as well.

E. Social Condition's Fit with Other Prohibited Grounds: The Issues of Multiple Discrimination and Intersectionality

The addition of social condition as a prohibited ground of discrimination provides the potential of better reflecting the realities of discrimination in that it, in many ways, offers a means for recognizing the way social and economic disadvantage intersects with other grounds of discrimination already recognized in the *Canadian Human Rights Act*. The value of approaching human rights discrimination in a holistic and intersectional way has been recognized in academic circles, at least since the pioneering work of Nitya Iyer (formerly Duclos), building on the work of American commentators in this area.³³⁰ As she points out, people are complex and have more than one defining characteristic so trying to pigeon-hole them into one particular enumerated ground of discrimination can be quite difficult. Furthermore, the kind of discrimination faced by an Aboriginal woman, as one example, may have its own unique dimensions which are often more than the sum of sex and Aboriginal discrimination added together. Failing to do an intersectional analysis can result in disadvantaged individuals falling through the cracks of human rights protection. As Dianne Pothier correctly observes, the grounds of discrimination should reflect the real lived experiences of those most likely to be victims of human rights violations.³³¹

In a more recent article on the topic Denise Réaume states the case for intersectionality both clearly and effectively:

Nitya Duclos has effectively illustrated how the pigeonholes that currently define the prohibited grounds of discrimination can work injustice upon those who find themselves disadvantaged because of a combination of enumerated attributes. The itemization of grounds encourages adjudicators to analyze fact situations through the lens of one alleged ground of discrimination at a time. In analyzing what is wrong with this approach, we can illustrate once more the value of going beyond the enumerated grounds of discrimination as inert categories stating conditions for the imposition of liability, to articulate principles explaining why discrimination on these bases is unacceptable.³³²

She continues by emphasizing the advantages of this more holistic approach to human rights:

³³⁰ N. Duclos, "Disappearing Women: Racial Minority Women in Human Rights Cases" (1993), 6 Can. J. Women and Law 25 and N. Iyer, "Categorical Denials: Equality Rights and Shaping of Social Identity," (1994) 19 Queen's L. J. 194.

³³¹ D. Pothier, "Connecting Grounds of Discrimination to Real people's Real Experiences" (2001) 13 Can. J. Women and Law 37.

³³² D.G. Réaume, "Of Pigeonholes and Principles: A Reconsideration of Discrimination Law", (2002) 40 Osgoode Hall L. J. 113 [footnotes omitted].

This would make it natural to examine hard cases not by merely looking for a perfectly fitting pigeonhole, but by examining whether the case in hand exemplifies the form of harm that statute seeks to protect against.

In other words, focusing on only one of two interacting grounds of discrimination extends the pigeonholing approach beyond the drafting style of the statute to our understanding of the harm of discrimination, preventing adjudicators from seeing the whole wrong and its impact on the whole person.

Similarly, it is possible that an employer's policies, while not grounded in prejudice, could have side effects that disproportionately affect not all members of a racialized minority or all women, but primarily racial minority women. Imagine a case in which an educational requirement is imposed which, because of different social conditions affecting black women is harder for them than for white women or black men to meet. If this barrier cannot be justified according to the usual tests, why should it be allowed to stand once its effect on vulnerable members of society in restricting opportunity is established? Again, the assumption that the enumerated grounds are homogenous carries the implication that any given act will affect all members of a particular category in exactly the same way. More careful analysis of intersectionality cases demonstrates the falsity of this premise. If we let these cases be an opportunity for understanding the subtleties of discrimination and its harmful effects, rather than an exercise in fitting human beings into prefab categories, they will often go from being hard cases to being easy ones – from no discrimination to multiply grounded discrimination.³³³

Bruce Porter, the long time and effective advocate of rights for the poor, illustrates the value that a ground of poverty or social condition could have in advancing an intersectional and more inclusive approach to human rights analysis.

In the area of sex equality, successful challenges to “spouse in the house” rules, first in Nova Scotia in the *Rehburg* case, and more recently in Ontario in the *Falkiner* decision, represent important litigation successes recognizing the intersectionality of poverty and sex discrimination in a manner that was emphasized by women's groups in 1985. In the area of race, the *Sparks* case in Nova Scotia, finding that the exclusion of public housing tenants from security of tenure provisions constitutes discrimination because of race, sex and poverty and extending protections to conform with section 15, represents, again a leading case internationally in the area of race, housing and poverty.³³⁴

³³³ *Ibid.* at paras. 36, 38 and 42.

³³⁴ B. Porter, “Twenty years of Equality Rights: Reclaiming Expectations”, (2005) 23 Windsor Y.B. Access Just. 145 [footnotes omitted, but all three cases are cited in the earlier section on *Charter* equality].

In addition, the Supreme Court also has judicially noticed the specific interrelationship between gender and poverty:

In Canada, the *feminization of poverty is an entrenched social phenomenon*. Between 1971 and 1986 the percentage of poor women found among all women in this country more than doubled. During the same period the percentage of poor among all men climbed by 24 percent.³³⁵

Indeed, the Court has not been the only authoritative body to recognize the devastating prevalence of poverty among women.

The United Nations Committee on Economic, Social and Cultural Rights, the United Nations Committee on Human Rights, and the United Nations Committee on the Elimination of Discrimination Against Women have all cited Canada for the high rates of poverty among women, especially single mothers and Aboriginal women.³³⁶ The poverty rates for women are higher than those of men regardless of demographic category and in 1996, 60.8% of single mothers were living in poverty.³³⁷ In 1985, 47.2% of Aboriginal families on reserves fell below the poverty line (compared to 14.4% of Canadian families as a whole) and in 1995, 44% of Aboriginal families off reserves fell below the poverty line.³³⁸ Lastly, individuals with disabilities are also at greater risk of falling below the poverty line; in 1991, 21.9% of people with disabilities were below the poverty line compared to only 12.6% of those without disabilities.³³⁹ This figure also varies according to gender: 18.2% of men with disabilities fell below the poverty line, whereas 25.1% of women with disabilities live in poverty.³⁴⁰ Statistics Canada has also identified that “[a]mong the unattached, the elderly and women are particularly prone to low income.”³⁴¹ Similarly, although statistics on Aboriginal women specifically are unavailable, the employment rate, income level, and education level of Aboriginal peoples are all significantly lower than the general population.³⁴²

³³⁵ *Moge*, *supra* note 233 at 853, per L’Heureux-Dubé J. [emphasis added], affirmed in *Marzetti*, *supra* note 233, per Iacobucci J. for a unanimous court.

³³⁶ See United Nations, Committee on Economic, Social and Cultural Rights, *Report on the 18th and 19th Sessions* (27 April – 15 May 1998, 16 November – December 1998), UN ECS, 1999, Supp. No. 2, at paras. 429, 404; National Association of Women and the Law, “UN Human Rights Committee finds social programme cuts discriminate against women” (12 April 1999), online: PovertyNet <<http://povnet.web.net/NAWLpr-apr12.htm>> (date accessed: September 5, 1999); United Nations, Committee on the Elimination of Discrimination Against Women, “Canada” (1998) 5 I.H.R.R. 519 at paras. 6, 17, 19, 22, and 27.

³³⁷ National Anti-Poverty Organization, *The 50th Anniversary of the UN Declaration: A Human Rights Meltdown in Canada* (Geneva: Human Resource Development Canada, 1998) at 22 [hereinafter “Meltdown”].

³³⁸ *Ibid.*, at 22. These statistics emphasize the importance of having grounds to deal with poverty if the Bill to repeal s. 67 of the CHRA passes and Aboriginal claims increase.

³³⁹ *Ibid.* at 24.

³⁴⁰ *Ibid.*

³⁴¹ *Ibid.*. See also Canada, *Statistical Annex to the Third Report of Canada on the International Covenant on Economic, Social and Cultural Rights* (Ottawa: Canadian Heritage, 1997) at 35 [hereinafter *Statistical Annex*]. L’Heureux-Dubé J. also recognized the povertization of elderly women in *McKinney*, *supra* note 266.

³⁴² *Statistical Annex*, *ibid.* at 21.

Thus, we have identified at least seven relevant characteristics that tend to intersect with social condition: age, Aboriginal origin, sex, race or ethnic origin, disability, family status, and marital status. Certainly, it could be surmised that other categories or other combinations of characteristics would also affect the social condition of individuals.³⁴³

However, without adequate protection against discrimination on the basis of social condition, the risk of individuals “falling through the cracks” remains ever apparent for claimants who straddle an enumerated category and an unenumerated ground. For example, a racial minority woman in poverty may face the judgment that her discrimination stemmed from her socio-economic status, and not her race or sex, and therefore she is not protected under human rights legislation. Conversely, the problem identified by Nitya Iyer of “pushing others through the cracks” is equally possible.³⁴⁴

Currently, claims based on social condition can only be argued if the individual can “fit” in one of the enumerated grounds (for example, a woman or a visible minority), but those who do not “own” any of the enumerated characteristics (for example, a white male living in poverty) are left without a remedy.³⁴⁵ Thus, the white male would be “pushed through the cracks” because he would be precluded from bringing a claim under the current enumerated grounds of the CHRA.

The CHRA does expressly provide that “a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.”³⁴⁶ However, there has been no real judicial exploration of section 3.1 of the CHRA with its direct statutory encouragement of intersectionality or at least plurality. It is most often referred to in cases involving more than one ground where tribunals are attempting to determine the best fit with one or more of the relevant grounds.³⁴⁷ This section does not seem to have advanced a holistic approach to human rights violations to date.

Until recently, intersectionality was not the mode of analysis at the provincial level any more than the federal. Denise Réaume in her article describes the early situation in cases involving multiple grounds of discrimination and the tendency towards pigeon holes in cases like *Alexander v. British Columbia*³⁴⁸, which she describes as follows:

Aboriginal woman with a physical disability refused service at a bar because bartender thought she was drunk – The tribunal found for the complainant, but characterized the discrimination as being solely on the basis of disability. Here, the worry is that the adjudicator’s tendency to focus on a single (perhaps the strongest) ground for the complaint means

³⁴³ For instance, the poverty of refugees (national origin) has been documented, especially in relation to individuals with disabilities or single mothers: C. Tie, *Draft Statement to the UN Committee on Economic, Social and Cultural Rights* (Geneva: Canadian Council for Refugees, Canadian Council for Churches & Inter-Church Committee for Refugees, 1998), online: Canadian Non-Governmental Organizations <<http://www.web.net/~ngoun98/interchurch.htm>> (date accessed: September 5, 1999).

³⁴⁴ Iyer, *supra* note 330.

³⁴⁵ Interview with Vince Calderhead about his experiences with Nova Scotia Legal Aid.

³⁴⁶ CHRA, *supra* note 1, s. 3.1.

³⁴⁷ *Lincoln v. Bay Ferries Ltd.* [2004] F.C.J. No. 941, [2004] F.C.A. 204 (FCA). [2002] CHR D No. 5 (Can. Trib.).

³⁴⁸ (1989), 10 CHRR D/5871.

that the full flavour of the injury is overlooked. Perhaps the adjudicator read these facts correctly – perhaps the respondent would have treated anyone with this disability in the same way, regardless of her race. But it would scarcely stretch credulity to imagine that the respondent was influenced by the fact that the complainant was Aboriginal, perhaps assuming too quickly that she must be drunk because she was Aboriginal. In focusing exclusively on the disability basis of the complaint, the tribunal missed an opportunity to examine how much more insulting it is likely to be to a First Nations person than to others to be treated this way. In other words, using the enumerated grounds as pigeonholes – as mutually exclusive logical categories into only one of which a single individual can fit – obscures a central issue in the case: what harm was done to the complainant by the respondent’s behaviour?³⁴⁹

More recently some provincial human rights tribunals have recognized intersectionality and adopted a more inclusive and holistic approach. One example is *Comeau v. Côté* in which a complaint was substantiated on the basis of age and perceived disability in the employment context.³⁵⁰ The Tribunal member states:

Although it is difficult to assess how much of the hurt and humiliation was attributed to the perceived disability and how much to the perception that his age hampered his performance, I am satisfied that this intersectionality of prohibited grounds had a greater impact on Mr. Comeau’s dignity, feelings and self respect than would discrimination on either ground in isolation.³⁵¹

In another case, *Baylis-Flannery v. Walter DeWilde (Tri Community Physiotherapy)*,³⁵² the Tribunal found that the intersectionality of discrimination based upon sex and race exacerbated the complainant’s mental anguish:

[R]eliance on a single axis analysis where multiple grounds of discrimination are found, [which] tends to minimize or even obliterate the impact of racial discrimination on women of colour who have been discriminated against on other grounds, rather than recognize the possibility of the compound discrimination that may have occurred.³⁵³

Finally in *Radek v. Henderson Development Canada Ltd.*³⁵⁴ the complainant substantiated individual and systemic discrimination on the basis of race, colour, ancestry and disability. The complainant was an Aboriginal woman living in poverty. In rendering the decision the Tribunal member recognizes the interconnection of the various grounds and the links to the unenumerated ground of poverty.

³⁴⁹ D.G. Réaume, *supra* note 332.

³⁵⁰ [2003] B.C.H.R.T.D. No. 32, [2003] BCHRT 32.

³⁵¹ *Ibid.*

³⁵² *Baylis-Flannery v. Walter DeWilde c.o.b. as Tri Community Physiotherapy (No. 2)* (2003), 48 C.H.R.R. D/197 (Ont. H.R.T.).

³⁵³ *Ibid.* at para. 44.

³⁵⁴ *Radek v. Henderson Development (Canada) Ltd.*, [2005] B.C.H.R.T.D. No. 302, 2005 BCHRT 302.

Ms. Radek has alleged discrimination on the basis of a number of intersecting grounds: race, colour, ancestry and disability. She is a middle-aged Aboriginal woman with a disability. She is multiply disadvantaged on a number of grounds protected by the Code. These grounds cannot be separated out and parsed on an individual basis. ... Ms. Radek is also economically disadvantaged. She has a limited income. She lives “on disability” and requires subsidized housing. She lives in the Downtown Eastside. Poverty and economic circumstances are not prohibited grounds of discrimination under the Code. Nonetheless, Ms. Radek’s economic circumstances were part of who she was and how she presented on May 10. They are integrally interrelated with Ms. Radek’s identity as an Aboriginal, disabled woman.³⁵⁵

It is this interconnection between various grounds of discrimination, including poverty, that the Supreme Court of Canada was unwilling to explore in *Gosselin v. Quebec (A.G.)*.³⁵⁶ The central defining feature of Ms. Gosselin’s situation was poverty and issues of age and possible disability intersected with that reality. The majority of the Supreme Court were unwilling to adopt this holistic approach to the case.³⁵⁷

The complex dynamic of multiple grounds of discrimination can no longer be ignored or circumvented if adherence to human rights principles is to be maintained. The inclusion of social condition has the potential of finally rendering visible the heretofore invisible dynamic of real peoples’ experiences of discrimination. In conjunction with section 3.1 of the CHRA, the “fit” of social condition with other prohibited grounds is not only appropriate, but also vital in recognizing and achieving the ameliorative purposes of human rights. Another advantage of adding social condition, is the recognition that sometimes overlapping or “compound discrimination” creates a form of discrimination that is “not a denial that various forms of discrimination can and often do compound each other so as to increase the overall burden of inequality, but rather that race and gender may intersect and interact to produce an altogether different form of oppression.”³⁵⁸ It is this “altogether different” form of oppression that social condition may be helpful in addressing.

Discrimination on multiple grounds is a complex dynamic which must be recognized if human rights principles are to be respected and if human rights legislation is to be most effective. The inclusion of social condition has the potential to seal some of the cracks that currently exist in human rights legislative schemes. Thus, the fit with other grounds would be not only one of novel protection for certain claimants (e.g. the poor, uneducated white male), but also additional crack-sealing protection for claimants whose real lived experience, the totality of their characteristics, may not be a neat and clean fit with the current enumerated grounds. This would add appreciably to the protection offered under the *Canadian Human Rights Act* and this is in itself a compelling reason to add social condition to the CHRA.

³⁵⁵ *Ibid.* at paras. 463 and 467.

³⁵⁶ *Gosselin*, *supra* note 271.

³⁵⁷ Kim and Piper, *supra* note 40.

³⁵⁸ Douglas Knopp, “‘Categorical’ Failure: Canada’s Equality Jurisprudence – Changing Notions of Identity and the Legal Subject”, (1997), 23 *Queen’s L.J.* 201.

III. What is the Relationship between Economic and Social Rights and Social Condition as a Prohibited Ground of Discrimination?

A. *International Human Rights Commitments*

As discussed in our 1999 paper, Canada has signed and ratified many international documents and treaties which affirm its commitment to human rights, both domestically and internationally. While there have been few international developments since the *La Forest Report*, international legal obligations and Canada's distinctive reputation as a role model and leader in the international community are important factors to emphasize when considering changes to the domestic scheme of human rights protection.

The foundational international human rights document is the *Universal Declaration of Human Rights*, adopted in 1948, however, we will be focusing on the two major covenants stemming from this document because of their different legal nature and effect: (1) The *International Covenant on Economic, Social and Cultural Rights*;³⁵⁹ and (2) The *International Covenant on Civil and Political Rights*.³⁶⁰ Although the documents are partitioned into civil and political rights versus economic, social and cultural rights, it is very difficult to have one without the other. According to international law scholar, Craig Scott, all human rights are inherently related;³⁶¹ and the categorical separation of "human rights" presents the danger of reifying "rights" into an objective existence while losing sight of the "human" element.³⁶²

Before discussing the specific aspects of the Covenants, it is useful to note the actual effect and power of international documents within the domestic context. Canada ascribes to what Matthew Craven calls a "dualist" view of international law.³⁶³ In short, domestic law and international law are seen as divided, and unless treaty provisions are incorporated and applied as national law, they are of no legal effect in Canada. However, this is not to say Canada may escape its international obligations under the Covenants.

Articles 2 of both Covenants do impose *legal* obligations on Canada to comply with the principles stated therein.³⁶⁴ By ratifying documents, Canada has shown a

³⁵⁹ ICESCR, *supra* note 31.

³⁶⁰ GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171 (entered into force March 23, 1976, accession by Canada May 19, 1976) [hereinafter ICCPR]

³⁶¹ C. Scott, "Reaching Beyond (Without Abandoning) the Category of "Economic, Social and Cultural Rights"" (1999) 21 Hum. Rts. Q. 633 at 634.

³⁶² *Ibid.*

³⁶³ M. Craven, "The Domestic Application of the International Covenant on Economic, Social and Cultural Rights" (1993) 40 Netherl. Int'l L. Rev. 367 at 373.

³⁶⁴ ICESCR, *supra* note 31, art. 2 reads in part:

1. Each State Party to the present Covenant undertakes to *take steps*, ... with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate mean, including particularly the adoption of *legislative measures*.
2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or *social origin, property*, birth or *other status*. [Emphasis added.]

ICCPR, *supra* note 360, art. 2 reads in part:

commitment to human rights to the United Nations, the International Community, and the people of Canada; to contravene these obligations would gravely injure Canada's reputation in the International Community as well as the confidence held by the Canadian electorate in government institutions. The central obligation of the Covenants is a *duty* to give effect to the rights within the domestic legal order, with particular regard to the legislative measures of protection and the creation of effective legal rights of action on behalf of individuals or groups who feel that their rights are not being fully realized.³⁶⁵ In addition, the Supreme Court of Canada has evinced a commitment to interpret human rights jurisprudence in a manner consistent with Canada's obligations under the Covenant.³⁶⁶ Furthermore, the preamble to the *Northwest Territories Human Rights Act*, explicitly states that it is in accordance with the *Universal Declaration of Human Rights* as proclaimed by the United Nations.³⁶⁷

Now that this background has been set, it is necessary to examine the extent of Canada's international obligations within the context of including "social condition" as a ground of discrimination in the *Canadian Human Rights Act*.

1. *International Covenant on Economic, Social and Cultural Rights*

The pertinent sections of the ICESCR to the discussion of social condition are Article 2 and Article 11:

Article 2

1. Each State Party to the present Covenant *undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.*

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion,

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory...the rights recognized in the present Covenant, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or *social origin, property, birth, or other status.*

2. Where not already provided for by the existing legislative or other measures, each State Party to the present Covenant *undertakes to take the necessary steps...to adopt such legislative or other measures* as may be necessary to give effect to the rights recognized in the present Covenant. [Emphasis added.]

³⁶⁵ United Nations, Committee on Economic, Social and Cultural Rights, *General Comment No. 9* (1999), 6 I.H.R.R. 289 at 289-290.

³⁶⁶ See *R. v. Sharpe*, 2001 SCC 2 at 171 and 175 recognizing that international norms are relevant sources for interpreting rights domestically; *Baker v. Canada*, [1999] 2 S.C.R. 817 endorsing the inclusion of the principles of the *International Covenant on the Rights of the Child* in interpreting domestic legislation; *Irwin Toy*, *supra* note 75 at 633 interpreting the section 7 guarantee of the *Canadian Charter of Rights and Freedoms* in accordance with international instruments.

³⁶⁷ *NWTHRA*, *supra* note 124.

political or other opinion, national or *social origin, property, birth or other status*.

Article 11

1. The States Parties to the present Covenant recognize the *right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions*. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.³⁶⁸

The social and economic obligations to which Canada has committed itself through the ratification of the ICESCR are significant. Under Article 2(1), States Parties are obliged to take *positive steps* to implement ICESCR rights, through all appropriate means, particularly through the adoption of legislative measures. As stated in the *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, “[a]t the national level States Parties shall use all appropriate means, including legislative, administrative, judicial, economic, social and educational measures, consistent with the nature of the rights in order to fulfil their obligations under the Covenant ... [l]egislative measures alone are not sufficient to fulfil the obligations of the Covenant”.³⁶⁹ Furthermore, the rights identified in Article 11 oblige States Parties to recognize a number of social and economic rights, particularly with regards to the right of everyone to adequate food, clothing, and housing, and the continuous improvement of living conditions. Read as a whole, the ICESCR requires that Canada confer a number of positive and negative economic and social rights on its citizens.

In August 2005, Canada presented its fifth report on the implementation of the ICESCR to the United Nations Committee on Economic, Social and Cultural Rights.³⁷⁰ This report details many of the programs instituted to reduce poverty in Canada since 1998, the year the Committee addressed concern about the rampant level of poverty in a country as prosperous as Canada.³⁷¹ Since that time, the government of Canada has put in place a number of initiatives, such as the National Child Benefit, early learning and child-care initiatives, and affordable housing initiatives, which are focused on improving Canada’s poverty crisis. As stated in the *Fifth Report on the ICESCR*, these initiatives, particularly the National Child Benefit, have improved the financial situation of a

³⁶⁸ ICESCR, *supra* note 31, arts. 2, 11. [Emphasis added.]

³⁶⁹ *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, U.N. Doc. E/CN.4/1987/17, Annex at para. 17 and 18 [hereinafter the *Limburg Principles*].

³⁷⁰ Canada, Canadian Heritage, *Fifth Report of Canada: The International Covenant on Economic, Social and Cultural Rights* (Ottawa: Minister of Public Works and Government Services Canada, 2005) [emphasis added] [hereinafter *Fifth Report on the ICESCR*]

³⁷¹ United Nations Development Program, *Human Development Report 1998*, (New York: Oxford University Press, 1998). At the time, Canada ranked tenth out of seventeen industrialized countries on the UN’s Human Poverty Index.

significant number of families previously living below the poverty line.³⁷² However, while Canada should be applauded for taking these important steps, it does not appear to have done enough to address poverty; as of 2007/2008, Canada ranks fourth on UNDP's Human Development Index and ranks eighth out of the nineteen selected OECD countries on the Human Poverty Index.³⁷³ As with many poverty-reducing initiatives, those instituted by Canada focus heavily on improving the situations of the richest of the poor, who can most easily be brought out of poverty and reduce the poverty rate.³⁷⁴

The UN Committee on Economic, Social and Cultural Rights stated in its 2006 report that it “regrets that most of its 1993 and 1998 recommendations (for bringing Canada in compliance with its obligations under the ICESCR) ... have not been implemented”. The report further condemns Canada for its “restrictive interpretation of its obligations under the Covenant, in particular its position that it may implement the legal obligations set forth in the Covenant by adopting specific measures and policies rather than by enacting legislation specifically recognizing economic, social and cultural rights.”³⁷⁵ While the addition of “social condition” as a protected ground of discrimination under the CHRA will not by itself be enough to realize Canada's obligations under the ICESCR, it will address what has been identified by the UN as something that is lacking from Canada's human rights legislation.

2. *International Covenant on Civil and Political Rights*

In many ways, the ICCPR mirrors the *Canadian Charter of Rights and Freedoms* due to its emphasis on civil, political and legal rights such as freedom of association, the right to a fair trial, and democratic rights. Conversely, human rights legislation can be seen as the parallel of the ICESCR because of their joint concern over areas such as employment, accommodations and services, although these statutes tend to focus on anti-discrimination only.³⁷⁶ However, it is important here to reiterate the *interrelatedness* of human rights in both contexts; the ICCPR and the ICESCR intersect in the path to fulfilling equality goals much in the same way human rights codes and the *Charter* chart the progress of equality rights on the Canadian scene. Moreover, Canadian and international human rights documents are also interconnected, as pointed out by former Chief Justice Dickson in *Reference Re Public Service Employee Relations Act (Alta)*:

The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of the “full benefit of the *Charter's* protection”. I believe that the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.³⁷⁷

³⁷² *Fifth Report on ICESCR*, *supra* note 370 at 41.

³⁷³ United Nations Development Program, *Human Development Report 2007/2008: Fighting Climate Change: Human Solidarity in a Divided World* (New York: Palgrave MacMillan, 2007).

³⁷⁴ Wesson, *supra* note 66 at 109.

³⁷⁵ United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, *Concluding Observations on Economic, Social and Cultural Rights Canada*, 2006.

³⁷⁶ But see the discussion of the Quebec *Charter*, *infra* Part III.D.

³⁷⁷ [1987] 1 S.C.R. 313 at 349.

Keeping this in mind, articles 2 and 26 of the ICCPR are most pertinent to our discussion:

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or *social origin*, property, birth or *other status*.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated *shall have an effective remedy*, notwithstanding that the violation has been committed by persons acting in an official capacity...

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or *social origin*, property, birth or *other status*. [Emphasis added.]

As discussed above, article 2 imposes a legal obligation on the country to undertake necessary steps to give effect to the rights under the Covenant and to do so *without discrimination*. Article 26 reiterates this point. It is notable that the ground enumerated in both the ICESCR and the ICCPR is termed “social origin” rather than “social condition”, but, unlike human rights legislation, the grounds in both Covenants are meant to be illustrative rather than exhaustive by the inclusion of “other status”.³⁷⁸

Lastly, under the obligations of article 2(3)(a), Canada has a duty to provide an *effective* legal remedy to all individuals who feel their rights under the Covenant have been infringed. Currently, there is no such avenue for people who have experienced discrimination on the basis of social condition, with the limited exceptions of the provincial human rights acts of Quebec, New Brunswick, and the Northwest Territories. The *Charter* applies only to governmental action and the Supreme Court of Canada has

³⁷⁸ M.C.R. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford: Clarendon Press, 1995) at 168 and 175 (discussing the inclusion of “wealth” as a substantive ground of discrimination).

taken a relatively restrictive approach to rights claims with a socio-economic dimension.³⁷⁹ Moreover, the Supreme Court has ruled against developing a tort of discrimination which consequently precludes a direct judicial remedy.³⁸⁰ Thus, it appears Canada is obligated by the equality provisions and its undertaking under articles 2 of the United Nations Covenants to provide claimants with an effective remedy against instances of discrimination on the basis of social condition – one method to do so would be to include social condition as a prohibited ground under the *Canadian Human Rights Act*.

3. *Other International Documents*

There are numerous international and multi-national instruments which provide for the protection of human rights. Although Canada is not a party to all of them, the symbolic importance of these documents is significant for illustrating the existing human rights norms in the global community. For example, the Organization of American States' *American Convention on Human Rights* includes protection on the grounds of "social origin...or any other social condition."³⁸¹ Similarly, the Council of Europe prohibits discrimination on the basis of "social origin...or other status" in its Convention for the Protection of Human Rights and Fundamental Freedoms.³⁸² Interestingly, Britain – from whom Canada inherited its dualist view of international law – has incorporated the rights under the European Convention in its first *Human Rights Act*, which came into force in 1998.³⁸³ Thus, the absence of protection available for those discriminated against on the basis of their social condition or status within Canada appears to be out of step with the international equality protections that have been afforded for decades.

4. *Relationship to Domestic Rights*

Defining social and economic rights is not a simple matter. There is no all encompassing definition in the *International Covenant on Economic, Social and Cultural Rights*, but rather a collection of rights including education, health, social and economic supports and other forms of minimal guarantees of economic subsistence. This *Covenant* along with its more clearly defined companion, the *International Covenant on Civil and Political Rights*, were intended to give effect to the broad guarantees in the *Universal Declaration of Human Rights*, adopted by the United Nations in 1948.³⁸⁴ Some have

³⁷⁹ Though it should be noted that the jurisprudence in the lower courts is conflicted, with most cases finding that 'social condition' was not an analogous ground, and others suggesting that social condition or "poverty" might be; see *e.g. Sparks, supra* note 294; *Rehberg, supra* note 316; and *Falkiner, supra* note 229, none of which have been heard on appeal to the Supreme Court of Canada, as discussed above.

³⁸⁰ *Bhadauria, supra* note 62.

³⁸¹ *American Convention on Human Rights*, November 22, 1969, O.A.S. T.S. No. 36, 1144 U.N.T.S. 123, art. 1 (Canada has not signed this Convention but is a party to its forerunner, the *American Declaration of the Rights and Duties of Man* which includes in article 2 that "All persons ... have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.").

³⁸² *European Convention for the Protection of Human Rights and Fundamental Freedoms*, September 3, 1953, 213 U.N.T.S. 222, art. 14 [hereinafter *European Convention*].

³⁸³ *Human Rights Act* (U.K.), 1998, c. 42.

³⁸⁴ *Universal Declaration of Human Rights*, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

suggested that the separation of civil and political rights from their economic, social and cultural cousins distorts the intimate and holistic connection between all these rights. We agree with this assertion. While the link between “cultural” as well as social and economic rights makes sense at an international level, it makes less sense in a Canadian context, where cultural rights may well be a third broad category of rights.

Even if the international commitments did offer more guidance, their enforceability at the international level is suspect and their impact within Canada indirect at best. However, since the arrival of the *Charter*, courts generally, and the Supreme Court of Canada in particular, have paid more attention to international human rights commitments and they have often been regarded as persuasive in interpreting the *Canadian Charter of Rights*. This view was articulated early in the evolution of *Charter* interpretation.

The general principles of constitutional interpretation require that these international obligations be a relevant and persuasive factor in *Charter* interpretation. As this Court stated in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344. interpretation of the Charter must be “aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*’s protection.” The content of Canada’s international human rights obligations is, in my view, an important indicia of the meaning of “the full benefit of the *Charter*’s protection.” *I believe that the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.*

*In short, though I do not believe the judiciary is bound by the norms of international law in interpreting the Charter, these norms provide a relevant and persuasive source for interpretation of the provisions of the Charter, especially when they arise out of Canada’s international obligations under human rights conventions.*³⁸⁵

As encouraging as that sounds it was articulated in the context of civil and political rights under the *Charter* and not social and economic ones. Although the right to strike could certainly be viewed as an economic right as well as the civil right to freedom of association, the focus was on association. This emphasizes the artificial nature of the distinction between the different categories of rights within the two International Covenants and the importance of how a right is categorized.

Internationally, the United Nations Committee on Economic Social and Cultural rights, in its December 1998 Concluding Observations on Canada’s performance under the ICESCR, expressed concern about Canada’s record on social and economic rights. 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.”³⁸⁶ More general concerns about Canada’s failure to live up to its international commitments in this area were also

³⁸⁵ *Reference Re Public Service Employee Relations Act (Alberta)*, *supra* note 377 at paras 57-63. [Emphasis added.]

³⁸⁶ Cited in *La Forest Report*, *supra* note 3 at 107.

expressed in a series of earlier United Nations Reports under the Covenants and more recent ones as well. As of yet, the *Charter* and most human rights codes have not been vehicles for realizing these commitments, although the Supreme Court has relied on international documents in evaluating other rights claims under the *Charter*.

In *Suresh v. Canada (Minister of Citizenship and Immigration)*, the Supreme Court stated that Canada's international obligations can assist courts charged with interpreting the *Charter's* guarantees.³⁸⁷ Similarly, in *Canada (Human Rights Commission) v. Taylor*, the Court extended this principle in reviewing the *Canadian Human Rights Act* by looking to international human rights documents and jurisprudence in determining that the prohibition on hate propaganda was a reasonable limit on freedom of expression under section 1 of the *Charter*.³⁸⁸ This principle was taken a step further in the case of *Health Services and Support -- Facilities Subsector Bargaining Assn. v. British Columbia*, which stated that Canada's adherence to international documents recognizing a right to collective bargaining also supports recognition of that right in section 2(d) of the *Charter*.³⁸⁹ In that case, the Court cited the ICESCR, the ICCPR, and the International Labour Organization's *Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize*,³⁹⁰ and found that "the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified."³⁹¹

In light of this recent judgment that the *Charter* should, where possible, be read so as to provide at least as great a level of protection as international human rights documents which Canada has endorsed and ratified, it may be easier in the future for lower courts, when considering the social condition as an analogous ground of discrimination under section 15, to cite this precedent in support of the position that social condition is in fact an analogous ground. Given the Court's finding with respect to reading the *Charter* in accordance with the ICESCR and ICCPR, this seems to be a persuasive argument. Further developments in this area should be monitored with interest.

Finally, we should briefly comment on the relationship of these international documents to the matter at hand. It must be noted that there is a significant difference between most of the rights enshrined in the ICESCR and the protection afforded by the addition of social condition as a prohibited ground of discrimination in the CHRA. That is, the rights in the ICESCR are essentially positive in nature, guaranteeing, *inter alia*, rights to food and shelter. It is clear that social condition would not directly encompass such positive rights, but only provide protection for discrimination based on social condition – an exercise in negative rights (freedom *from* discrimination). However, this is not to say that the addition of social condition would not further the commitments Canada made when ratifying the ICESCR and ICCPR. Parties to the Covenants pledged to undertake steps to achieve the rights enshrined therein. To provide protection for discrimination on the basis of social condition, where no protection existed previously, is certainly such a step.

³⁸⁷ [2002] 1 S.C.R. 3, 2002 SCC 1 at para. 46

³⁸⁸ [1990] 3 S.C.R. 892.

³⁸⁹ *Health Services*, *supra* note 47.

³⁹⁰ 68 U.N.T.S. 17 [hereinafter "*Convention No. 87*"].

³⁹¹ *Health Services*, *supra* note 47 at para. 71.

B. Economic and social rights under the Canadian Charter

The *Canadian Charter of Rights and Freedoms* has had a profound impact on Canada in its first twenty-five years. However, its impact on social and economic rights has been small. When there has been a significant social or economic consequence, it has been incidental rather than direct or intentional. Courts have continued to be deferential to the elected branch of government on matters of broad social and economic policy, involving as they do, conflicting social fact evidence and the allocation of scarce resources and, thus, questions of comparative institutional competence.³⁹²

1. Comparative Institutional Competence

In broad terms there are three major forums domestically for realizing social and economic rights – elected legislatures, appointed courts and delegated administrative tribunals. Even after the *Charter*, courts continue to be deferential to the elected legislatures when it comes to both the articulation and implementation of social and economic policy. This is particularly true if there are issues of conflicting social science evidence and/or the allocation of scarce resources.³⁹³ The role the courts are willing to play may also depend upon how they characterize the right in question. In *Chaoulli v. Quebec (A.G.)*,³⁹⁴ the majority of the Supreme Court defined access to private health care as a matter of security of the person and even life, while the dissenters defined the issue in terms of broad health policy thus falling more appropriately within the political realm. How the right is categorized is vital to whether it will receive *Charter* protection.

The limited role of the courts in advancing social and economic rights through the *Charter of Rights* should not really be surprising. There are few social and economic rights in the text of the *Charter* itself. This means that two of the documents broadest sections – the guarantees of life, liberty and security of the person (section 7) and equality (section 15) – have had to be argued as embracing a socio-economic component. These arguments have been hard to make and have rarely met with success.

The exclusion of express guarantees of economic and social rights in Canada's *Charter* was not accidental. Government drafters steeped in the traditions of parliamentary supremacy saw matters of social and economic policy as outside the proper scope of the courts and more appropriate for the legislative branches. What might broadly be termed as the “left” in Canada was generally opposed to the *Charter* as promoting an illusion of rights, and thus did not lobby to have social and economic rights included within the *Charter* text.³⁹⁵ While women, people with disabilities and Aboriginals were lobbying to be fully included in the *Charter* text, the advocates of social and economic rights were largely boycotting the process. The only recourse for judges wanting to read social and economic rights into the *Charter* is to broadly interpret sections 7 and 15 of the document. The section 15 analysis appears in the preceding Part II A and B so we will now turn to section 7 of the *Charter*.

³⁹² *McKinney*, *supra* note 267, dealing with mandatory retirement in universities, is a clear articulation of this deferential role for courts.

³⁹³ See *e.g. McKinney*, *ibid.* and *Egan*, *supra* note 244.

³⁹⁴ [2005] 1 S.C.R. 791.

³⁹⁵ See W. Schabas in *Canadian Rights and Freedoms: 25 Years under the Charter*, Conference proceedings (Ottawa: Association of Canadian Studies, April 16-17, 2007).

2. Section 7: *Chaoulli* as the Exception to the Rule

The question of economic rights reared its head early in *Charter* jurisprudence but in the context of corporate rights in *Irwin Toy v. Quebec (A.G.)*:

What is immediately striking about [s. 7] is the inclusion of “security of the person” as opposed to “property” ... First, it leads to a general inference that economic rights as generally encompassed by the term “property” are not within the perimeters of the s. 7 guarantee. *This is not to declare, however, that no rights with an economic component can fall within “security of the person.” Lower courts have found that the rubric of “economic rights” embraces a broad spectrum of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property – contract rights.* To exclude all of these at this early moment in the history of *Charter* interpretation seems to us to be precipitous. We do not, at this moment, choose to pronounce upon whether those economic rights fundamental to human life or survival are to be treated as though they are of the same ilk as corporate-commercial economic rights. In so stating, we find the second effect of the inclusion of “security of the person” to be that a corporation’s economic rights find no constitutional protection in that section.³⁹⁶

While closing the door on economic rights for corporations, the Supreme Court left the window open for “economic rights fundamental to human life or survival.” It is a window that is still open but also not yet entered. Former Justice Louise Arbour in *Gosselin v. Quebec (A.G.)*, in a spirited dissent, argued that section 7 should apply to prevent social assistance falling below the poverty level for young people like Ms. Gosselin.³⁹⁷ The majority of the Supreme Court did not feel that *Gosselin* was the case to expand the law but did not close the *Irwin Toy* window for a future case.

In the very different context of access to health care in a reasonable time, the majority of the Supreme Court did take an expansive approach to section 7 of the *Charter*, but not under the banner of economic rights but rather the fundamental rights to life and security of the person.³⁹⁸ This decision has been much criticized³⁹⁹ by academics and even Professor Martha Jackman, who has generally supported a broad role for the courts in advancing social and economic rights, was forced to rethink her position.³⁹⁹ However, it has also been described as a positive step towards extending section 7 of the *Charter* to embrace economic rights.

³⁹⁶ *Irwin Toy*, *supra* note 75 at para. 95.

³⁹⁷ *Gosselin*, *supra* note 272, per Arbour J. Interestingly, Louise Arbour continues her crusade for social and economic rights for the poor in her new role as United Nations High Commissioner for Human Rights in Geneva.

³⁹⁸ *Chaoulli*, *supra* note 394.

³⁹⁹ M. Jackman, “The Last Line of Defence for [Which?] Citizens: Accountability, Equality and the Right to Health in *Chaoulli*” (2006) 44 *Osgoode Hall L.J.* 349.

... the decision may yet have a surprisingly progressive influence on *Charter* jurisprudence. By establishing the connection between deprivations of the basic necessities of life and fundamental rights, *Chaoulli* may well be the first step through the doors left open in *Irwin Toy* and *Gosselin* ... If state obligations to those in need are not foreclosed under the constitution .. then it is hard to imagine more compelling settings for elaborating such obligations than in the basic need for health care and sustenance of those dependent on state support.⁴⁰⁰

Professor MacKay in a recent article made the following analysis of *Chaoulli* as the exception to the normal rule of judicial restraint in respect to section 7 of the *Charter*. It is not surprising that the Justices of the Supreme Court of Canada were so divided in *Chaoulli* on the issue of private health care, which has sparked wide public debate. What is more surprising is that a majority of the Justices were willing to second guess the legislators on this contested public issue. It is also surprising that the McLachlin group in *Chaoulli* were willing to take such a broad approach to section 7. At a time when the Supreme Court of Canada appears to be retreating from earlier expansive rulings on equality in section 15 of the *Charter*, some Justices appear to be more “activist” in their interpretation of section 7 of the *Charter* in both the health care and the national security contexts.

It would appear that the courts are more comfortable in defining the limits of liberty and security of the person than they are in delineating the scope of equality in Canadian society...It is also noteworthy that those in *Chaoulli* who found a section 7 violation, characterized the rights in issue as ones of psychological security rather than economic rights. There is also great emphasis on the fact that the violations of rights must be serious and on the facts of the *Chaoulli* case even life threatening.

It would also be fair to say that the *Chaoulli* case is exceptional in respect to extending section 7 of the *Charter of Rights* outside the criminal and quasi-criminal domains. Even in the domain of liberty and security of the person the courts have been quite cautious in using the *Charter* to second guess the decisions of the elected branch of government. In that sense the *Chaoulli* decision is the exception that proves the rule, rather than an illustration of an activist judicial rule. The way in which the case was decided reinforces the extent to which the Supreme Court of Canada is willing to be deferential to the legislature when contested matters of public policy are at issue. Remember that Madam Justice Deschamps decided the matter on the basis of the *Quebec Charter of Human Rights* (a regular statute) rather than a constitutional document. The rest of the Court split 3/3 on whether there was a constitutional violation. The process if not the

⁴⁰⁰ L. Sossin, “Towards a Two-Tier Constitution? The Poverty of Health Rights” in Colleen M. Flood, Kent Roach & Lorne Sossin, eds., *Access to Care, Access to Justice: The Legal Debate Over Private Health Insurance in Canada* (Toronto: University of Toronto Press, 2006) 161 at 178.

substance of the *Chaoulli* decision, was respectful to and even deferential to the elected legislators.⁴⁰¹

Far more typical of the Supreme Court of Canada's restrained approach to section 7 of the *Charter* are the following comments of the late Chief Justice Lamer in *Reference Re ss. 193 and 195 of the Criminal Code (the Prostitution Reference)*:

[T]he increasing role of administrative law in .. modern society [which has provided the state with an avenue to regulate and control individual activity and situations, including social welfare, and has further created bodies ... that assume control over decisions affecting an individual's liberty and security of the person. [Due to the fact that this involves the restriction of these rights,]... the judiciary has always had a role to play as guardian of the administration of the justice system. There are also situations in which the state restricts other privileges or ... "liberties" in the guise of regulation, but uses punitive measures in cases of non-compliance ... In all these cases, in my view, the ... interests protected by s. 7 would be restricted, and one would then have to determine if the restriction was in accordance with the principles of fundamental justice. By contrast, as I have stated, there is the realm of general public policy dealing with broader social, political and moral issues which are much better resolved in the political or legislative forum and not in the courts.

[I]t is my view that work is not the only activity which contributes to a person's self-worth or emotional well-being. If liberty or security of the person under s. 7 of the *Charter* were defined in terms of attributes such as dignity, self-worth and emotional well-being, it seems that liberty under s. 7 would be all inclusive. In such a state of affairs there would be serious reason to question the independent existence in the *Charter* of other rights and freedoms such as freedom of religion and conscience or freedom of expression.

The rights under s. 7 do not extend to the right to exercise their chosen profession.⁴⁰²

Later in *New Brunswick (Minister of Health and Community Services) v. G(J)*, the late Chief Justice Lamer again emphasizes the need to avoid too broad an interpretation of section 7 of the *Charter*.⁴⁰³ In order to trigger section 7, he concludes that there must be a state interference which affects an individual interest of fundamental importance or has a serious and profound effect on a person's psychological integrity.

[I]t is clear that the right to security of the person does not protect the individual from the ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action. If the

⁴⁰¹ MacKay, "In Defence", *supra* note 254.

⁴⁰² *Reference re ss. 193 & 195.1(1)(c) of the Criminal Code (Canada)*, [1990] 1 S.C.R. 1123, 56 C.C.C. (3d) 65 (S.C.C.).

⁴⁰³ [1999] 3 S.C.R. 46.

right were interpreted with such broad sweep, countless government initiatives could be challenged on the ground that they infringe the right to security of the person, massively expanding the scope of judicial review, and, in the process, trivializing what it means for a right to be constitutionally protected.⁴⁰⁴

There are many more cases that could be analyzed, but that is for another day. The net effect is that the scope of section 7 outside the criminal and quasi-criminal domains has been quite limited. Thus the guarantee of “security of the person” within section 7 does not offer much scope for economic and social rights of a positive nature. Former Justice Louise Arbour (now United Nations Chief Commissioner for Human Rights) was one of the few Supreme Court Justices who advocated an expansive and more positive interpretation of section 7 but she now operates at the international rather than the domestic level.

There are commentators, such as Lynn Iding,⁴⁰⁵ who do advocate the *Charter* as the best venue for the protection of economic and social rights under sections 7 and 15 of the *Charter* but they have not caught the fancy of the judges to date. The best that can be said is that the Supreme Court has not closed the window that was opened a crack in *Irwin Toy*,⁴⁰⁶ nor have they made any serious efforts to enter the room through either the door or the window. Courts are an unlikely venue for implementing Canada’s international human rights obligations.

Martha Jackman and Bruce Porter argue in their paper for Status of Women Canada that the positive rights analysis in *Eldridge* can provide the basis for restructuring rights under the *Canadian Human Rights Act* on positive rights regulatory model.⁴⁰⁷ Suffice for present purposes to say that we do not see *Eldridge* or other cases as a likely foundation for positive or negative social and economic rights in the *Charter*. That is not to deny the scope for the advancement of such rights through the *Charter*, but it is not a practical vehicle for the protection of social and economic rights in society. The institutional competence of courts to properly deal with such matters has been frequently raised by the courts themselves, and is a serious limit on the articulation of socio-economic rights via the *Charter*.

C. The Socio-Economic Charter: The Challenge of Constitutional Reform

Recognizing the limits of the *Charter of Rights* as a vehicle for social and economic rights, some anti-poverty activists turned to the process of constitutional reform as a way of advancing their cause. Other than the broad language of some of the rights in the *Charter*, such as in sections 7 and 15, there was little in the 1982 round of constitutional change for those concerned with social and economic disadvantage. Other parts of the *Constitution Act, 1982*, such as section 36, were more explicit in their

⁴⁰⁴ *Ibid.* at para. 59.

⁴⁰⁵ Iding, *supra* note 43.

⁴⁰⁶ *Irwin Toy*, *supra* note 75 at para. 95. In *Gosselin*, *supra* note 272, McLachlin C.J. for the majority leaves the window open to positive economic and social rights (para. 83) but only Arbour J. is willing to apply section 7 in this deserving case. The Court’s failure to extend to Ms. Gosselin either the protections of sections 7 or 15, has been critiqued in Kim and Piper, *supra* note 40.

⁴⁰⁷ Jackman & Porter, “Women’s Substantive Equality”, *supra* note 47.

reference to matters of economics but no more promising in terms of delivering real redress to those who suffered from unequal distribution of resources in society.

Section 36 of the *Constitution Act, 1982*, reads as follows:

- 36.** (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the Government of Canada and the provincial governments, are committed to
- (a) promoting equal opportunities for the well-being of Canadians;
 - (b) furthering economic development to reduce disparity in opportunities; and
 - (c) providing essential public services of reasonable quality to all Canadians.
- (2) Parliament and the Government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.⁴⁰⁸

The above section identifies as an objective the elimination of regional disparities in Canada and the delivery of social and economic programmes on a basis of equality. While this is a laudable goal, it is merely an objective rather than a guarantee of rights. This section also leaves the issue of socio-economic rights with the majoritarian political process rather than the courts, and thereby reinforces the non-justiciable nature of these rights. There has been virtually no judicial interpretation or use of this section in the 25 years since it was created.⁴⁰⁹ To speak of social and economic rights as objectives and principles, rather than rights, is to downgrade their level of protection.

The failed Meech Lake round of constitutional amendments did not substantively address matters of socio-economic rights but focused almost exclusively on the reconciliation of Quebec with the rest of Canada. However, the next round of constitutional change in the early 1990s did include arguments for a *Socio-Economic Charter* as an express constitutional protection of these rights. In spite of bold claims for a broad-based and justiciable economic *Charter* advanced by various interest groups and academics,⁴¹⁰ the version of the *Socio-Economic Charter* that survived as part of the Charlottetown Accord was a non-justiciable *Charter* that was both general and diluted in form. The text of this version is presented in Appendix II of our 1999 Study. Even in this reduced form it failed to pass constitutional muster and was defeated with the rest of the *Charlottetown Constitutional Accord* in a national referendum on October 26, 1992.⁴¹¹

⁴⁰⁸ *Constitution Act 1982*, *supra* note 264, s. 36.

⁴⁰⁹ See *Reference Re Canada Assistance Plan (BC)*, [1991] 2 S.C.R. 525.

⁴¹⁰ See e.g. M. Jackman "When a Social Charter Isn't: When a Tory majority recommends a social covenant let the buyer beware" (1992) 70 *Constitutional Forum* 8.

⁴¹¹ *The Charlottetown Accord* also had extensive provisions on Aboriginal rights that were defeated. There are still the Aboriginal and treaty rights constitutionalized in s. 35 of the *Constitution Act, 1982*. This section could have significant economic and social dimensions but that is beyond the scope of this study.

The generalized language of the proposed constitutional amendment is not very helpful in defining what is meant by social and economic condition. Indeed, the focus of the exercise was more on the setting of legislative objectives and ideals rather than a concrete definition of rights. Furthermore, the failure of the *Charlottetown Accord* sent a clear message to Canadian politicians that the process of constitutional amendment in Canada was a difficult, if not impossible one, in the foreseeable future. This is particularly true for wide-ranging constitutional amendment - such as those proposed and defeated in the Meech Lake and Charlottetown rounds of constitutional change.

Since the failure of the *Charlottetown Accord*, multi-lateral constitutional amendment initiatives have been largely removed from the political agenda. Rather than going down the rough road of constitutional amendment, governments have embarked upon a course of co-operative federalism that has resulted in the 1999 *Social Accord*. This generally worded document (which we include in Appendix III to our 1999 Study) seems to further decentralize social and economic policy but offers little or no guidance as to how we should define social and economic rights or social condition in particular.

D. Economic and Social Rights under the Quebec Charter

Quebec is the only jurisdiction in North America to recognize economic and social rights as a part in its human rights code,⁴¹² which it does in Chapter IV of the *Quebec Charter* under the heading “Economic and Social Rights”.⁴¹³ While it has been noted that some of the enumerated rights in the chapter may be better placed elsewhere in the *Charter* - representing [TRANSLATION] “a certain conceptual confusion on the part of the legislature”⁴¹⁴ – similar to international documents, the Quebec Charter includes a recognition of rights to education, to an adequate standard of living and to fair conditions of employment under this heading:

40. Every person has a right, to the extent and according to the standards provided for by law, to free public education.

45. Every person in need has a right, for himself and his family, to measures of financial assistance and to social measures provided for by law, susceptible of ensuring such person an acceptable standard of living.

46. Every person who works has a right, in accordance with the law, to fair and reasonable conditions of employment which have proper regard for his health, safety and physical wellbeing.

However, there are three important observations regarding these sections. First, each section contains an internal limitation to the rights recognized therein; the rights are not freestanding like in other parts of the *Charter*, but exist to the extent “provided for by law”. Second, this part of the *Charter* is not subject to the non-derogation or precedence

⁴¹² P. Bosset, “Les droits économiques et sociaux: parents pauvres de la Charte?” in Quebec, Commission des droits de la personne et des droits de la jeunesse, *Après 25 ans: La Charte québécoise des droits et libertés* (Étude n° 5) at 238.

⁴¹³ Quebec Charter, *supra* note 27. Notably, the preamble to the *Charter* expressly recognizes international human rights obligations.

⁴¹⁴ Bosset, *supra* note 412.

clause in relation to other statutes, which applies to other rights, such as the right to non-discrimination.⁴¹⁵ And third, these rights cannot generally form the foundation of a complaint to or investigation by the Commission.⁴¹⁶ These substantive and procedural restrictions to the economic and social rights in the *Charter* have led them to be referred to as [TRANSLATION] “the *Charter*’s poor relations”.⁴¹⁷ At the same time, commentators have noted the symbolic importance of recognizing social and economic rights in the *Charter* at all, even though this recognition has yet to bear out substantial results in the case law:

[TRANSLATION]

Although economic and social rights do not explicitly take precedence over statutes, as, in principle, other Charter rights and freedoms do, their inclusion in such a fundamental document is not purely symbolic. The *Charter* makes it necessary to consider the question of the protection of economic and social rights from a qualitatively different perspective, one that is appropriate to a quasi-constitutional instrument, and not as a mere branch of administrative law. However, although the recognition of economic and social rights is one of the elements that make the Quebec Charter an unprecedented, unique legislative document, this feature has hardly been reflected in case law to date.⁴¹⁸

The Supreme Court of Canada recently considered section 45 – the right to an adequate standard of living – in *Gosselin v. Quebec*.⁴¹⁹ Speaking for the majority, Chief Justice McLachlin found that the wording in section 45 weighed in favour of a restrictive interpretation of the right so that it would be beyond the purview of judicial review to examine the adequacy of financial assistance measures provided by law:

These provisions require the state to take steps to make the Chapter IV rights effective, but they do not allow for the judicial assessment of the adequacy of those steps... Was s. 45 intended to make the adequacy of a social assistance

⁴¹⁵ Section 52 of the Quebec Charter provides:

52. No provision of any Act, even subsequent to the Charter, may derogate from sections 1 to 38, except so far as provided by those sections, unless such Act expressly states that it applies despite the Charter.

⁴¹⁶ Section 71 of the Quebec Charter provides:

71. The Commission shall promote and uphold, by every appropriate measure, the principles enunciated in this Charter.

The responsibilities of the Commission include, without being limited to, the following:

(1) to make a non-adversary investigation, on its own initiative or following receipt of a complaint, into any situation, except those referred to in section 49.1, which appears to the Commission to be either a case of discrimination within the meaning of sections 10 to 19, including a case contemplated by section 86, or a violation of the right of aged or handicapped persons against exploitation enunciated in the first paragraph of section 48;...

74. Any person who believes he has been the victim of a violation of rights that is within the sphere of investigation of the Commission may file a complaint with the Commission.

⁴¹⁷ Bosset, *supra* note 412.

⁴¹⁸ Quebec, Commission des droits de la personne et des droits de la jeunesse, *Mémoire à la Commission des affaires sociales de l'Assemblée nationale: Projet de loi n° 112, Loi visant à lutter contre la pauvreté et l'exclusion sociale* (September 2002) at 31 [hereinafter “*Mémoire: Projet de loi no 112*”].

⁴¹⁹ *Gosselin*, *supra* note 272.

regime's specific provisions subject to judicial review, unlike the neighbouring provisions canvassed above? Had the legislature intended such an exceptional result, it seems to me that it would have given effect to this intention unequivocally, using precise language...

S. 45 of the Quebec Charter is highly equivocal. Indeed, s. 45 features two layers of equivocation. Rather than speaking of a right to an acceptable standard of living, s. 45 refers to a right to measures. Moreover, the right is not to measures that ensure an acceptable standard of living, but to measures that are susceptible of ensuring an acceptable standard of living. In my view, the choice of the term "susceptible" underscores the idea that the measures adopted must be oriented toward the goal of ensuring an acceptable standard of living, but are not required to achieve success. In other words, s. 45 requires only that the government be able to point to measures of the appropriate kind, without having to defend the wisdom of its enactments. This interpretation is also consistent with the respective institutional competence of courts and legislatures when it comes to enacting and fine-tuning basic social policy...⁴²⁰

The implication of this judgment is that, while the scope of section 45 is quite limited under the *Charter*, the provincial government would be required to, at a minimum, have some measures in place that are "susceptible of ensuring an acceptable standard of living". Thus, presumably, the government could not repeal social assistance entitlements and other benefit programs completely, which is in contradiction to the trend under the *Canadian Charter* case law that indicates there is no obligation on governments to *provide* programs as opposed to providing programs without discrimination. In addition, the Chief Justice noted that, despite the exclusion of section 45 and other economic and social rights from the non-derogation clause in section 52 of the Quebec Charter, a remedy may still exist for violations, being that of a declaration:

The Quebec Charter is a legal document, purporting to create social and economic rights. These may be symbolic, in that they cannot ground the invalidation of other laws or an action in damages. But there is a remedy for breaches of the social and economic rights set out in Chapter IV of the Quebec Charter: where these rights are violated, a court of competent jurisdiction can declare that this is so.⁴²¹

However, the dissenting judges in the case took different approaches to the scope of section 45. Justice L'Heureux-Dubé was the only judge to find that section 45 could ground an independent claim to a basic level of financial assistance. Justice Bastarache found that section 45, although it could not result in the invalidation of legislation due to its exclusion from section 52, could ground an individual remedy if a private actor or

⁴²⁰ *Ibid.* at paras. 92-93, per McLachlin CJ [emphasis in original]. Compare the reasons of L'Heureux-Dubé J., dissenting, finding a violation of s.45 in light of the intention of s.45 to implement Canada's international human rights obligations, thus protecting a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of subsistence needs and the provision of basic services.

⁴²¹ *Ibid.* at para. 96. [Emphasis in original.]

state official violated section 45 rights. Moreover, section 45, even if non-justiciable, “still has moral and political force.”⁴²² Justice Lebel, in contrast, after reviewing the Quebec case law, found that section 45 is justiciable and can have independent content in exceptional cases,⁴²³ but primarily operates in conjunction with the section 10 equality right in order to protect a right of access to measures of financial assistance:

The symbiosis between s. 10 and the other rights and freedoms is a direct result of the wording of s. 10, which creates not an independent right to equality but a method of particularizing the various rights and freedoms recognized (*Desroches v. Commission des droits de la personne du Québec*, [1997] R.J.Q. 1540 (C.A.), at p. 1547). Section 10 sets out the right to equality, but only in the recognition and exercise of the rights and freedoms guaranteed. Accordingly, a person may not base an action for a remedy on the s. 10 right to equality as an independent right. However, a person may join s. 10 with another right or freedom guaranteed by the *Quebec Charter* in order to obtain compensation for a discriminatory distinction in the determination of the terms and conditions on which that right or freedom may be exercised.⁴²⁴

Similar to the decision of the Chief Justice, Lebel J. also left the door open to the possibility of section 45 encompassing “a minimum duty to legislate” involving, “at a minimum, the creation of a legal framework that favours the attainment of social and economic rights.”⁴²⁵

The close connection between economic and social rights under Chapter IV and the section 10 equality right in the *Charter* has also been emphasized by the Quebec Court of Appeal. In a case dealing with the right to free public education under section 40, the Court found that the content of the right in section 40 derived its meaning from the existing laws regarding education: [TRANSLATION] “[section 40 of the Charter] cannot add other rights ... and can only be virtually enjoyed to the extent of and according to the standards provided by the Act.”⁴²⁶ While less clear in the Court of Appeal judgment, the Superior Court explicitly made a connection between sections 40 and 10: [TRANSLATION] “if section 10, when considered in isolation, cannot benefit from the effect of the non-derogation provision set out in section 52, it can do so

⁴²² *Ibid.* at para. 303.

⁴²³ *Ibid.*, per Lebel J., citing *Johnson v. Commission des affaires sociales*, [1984] C.A. 61, in which the Court of Appeal relied on s. 45 of the Quebec Charter in holding that a statutory provision declaring a person who is unemployed because of a labour dispute to be ineligible for social assistance could not be applied to a striker because, while the legislation was perfectly valid, it resulted in effects not intended by the legislator. Lebel J. distinguished the *Johnson* case as follows, at para. 426:

It is difficult to view *Johnson* as an express recognition of the binding effect of s. 45. For one thing, it is obvious that the Court of Appeal was influenced by the exceptional circumstances in the case before it: a worker who had been on probation had been unable to participate in the strike vote and was not entitled to union benefits. The court was dealing with legislation that was perfectly valid but that produced effects the legislature had not anticipated.

⁴²⁴ *Ibid.* at para. 248.

⁴²⁵ *Ibid.* at para. 429.

⁴²⁶ *Quebec (Commission des droits de la personne) c. C.S. de St-Jean-sur-Richelieu*, [1994] R.J.Q. 1227 (C.A.).

indirectly when the proceeding in which it is invoked as a main issue also involves the right to equality, which is protected by the non-derogation provision.”⁴²⁷

At a practical level, these decisions leave little scope for an independent operation of social and economic rights under the Quebec Charter, except for perhaps a minimal duty to legislate or to “take steps” to realize these rights and to do so without discrimination. In other words, the Quebec Charter requires at least a minimum duty, if not a minimum content, in relation to economic and social rights, which is at least more than is recognized in the human rights codes of other Canadian jurisdictions. In addition, the *Charter* offers some scope to the Commission to undertake activities for the promotion of economic and social rights under the *Charter*, including pointing out legislation that may be inconsistent with the principles of *Charter* guarantees.⁴²⁸ For example, following an extensive consultation process in 2000, on the occasion of the 25th anniversary of the Quebec Charter, the Quebec Commission found:

[TRANSLATION]

... have resulted in broad consensus for the strengthening of the social and economic rights guaranteed by the Charter ... An essential component of the human rights corpus, social and economic rights should no longer be considered to be the “poor relatives” of the Quebec Charter of which they are undoubtedly one of the most distinctive aspects.⁴²⁹

As a result, the Commission recommended that these rights be included in the non-derogation provision and that the limiting language be replaced with a protection for [TRANSLATION] “an essential body of rights enforceable against public authorities;” it concluded that this would create “a more satisfying balance ... between the solemn statement of social and economic rights and the discretion that must necessarily be awarded to the legislature in this respect.”⁴³⁰ The Commission suggested that, if there were concerns regarding the effect of justiciable socio-economic rights on legal order, then there could be a delay in the coming into force or applicability to laws until the government has time to review and update effected laws.

⁴²⁷ *Quebec (Commission des droits de la personne) c. C.S. de St-Jean-sur-Richelieu*, [1991] R.J.Q. 3003 (TDP) at 3037, aff’d [1994] R.J.Q. 1227 (C.A.).

⁴²⁸ See Quebec Charter, *supra* note 27, s.71:

71. The Commission shall promote and uphold, by every appropriate measure, the principles enunciated in this Charter.

The responsibilities of the Commission include, without being limited to, the following:...

(6) to point out any provision in the laws of Québec that may be contrary to this Charter and make the appropriate recommendations to the Government...

The Commission also regularly provides advice to the National Assembly regarding bills under consideration in relation to their potential impact on Charter rights.

⁴²⁹ *Mémoire: Projet de loi n° 112*, *supra* note 418 at 38.

⁴³⁰ *Ibid.* at 39, citing guarantees in Italy, Japan, Spain, Portugal, and South Africa and the fact that the language has been used to essentially give “carte blanche” to the legislator.

IV. What are the Arguments Against Including Social Condition as a Prohibited Ground of Discrimination in the *Canadian Human Rights Act*?

The arguments against social condition can be seen as fitting into one of three broad categories: practical, definitional, and institutional. We will attempt to highlight these pragmatic concerns, many of which were also raised in our 1999 paper.

A. Practical Administrative Concerns

1. *Limited Resources and Backlog*

The inclusion of social condition as a prohibited ground of discrimination must take place in the context of the limited resources available to administrative agencies, such as the Canadian Human Rights Commission. As a consequence of the limited resources available to it, there may be an impact on the capacity of the Canadian Human Rights Commission to deal with complaints promptly. The Commission's funding has been somewhat reduced from approximately \$23.6 million in 2002-2003 to \$21.1 million in 2006-2007.⁴³¹ One could argue that the inclusion of a new ground of discrimination, social condition, would likely lead to a higher volume of complaints and delays in processing complaints, undermining the fairness, credibility and effectiveness of the Commission.⁴³²

The 1998 Annual Report of the Canadian Human Rights Commission stated: “[f]inancial restraint, program cutbacks... all of these make speedy and satisfactory resolution of complaints a daunting task.”⁴³³ The Auditor General had also expressed concerns about major delays in processing human rights complaints in a 1998 report (the most recent addressing the Canadian Human Rights Commission):

10.36 The Commission is required by legislation to deal with almost all of the complaints it receives and the Tribunal is required to deal with all complaints referred to it by the Commission. *The responsibilities conferred have increased as a result of the expansion of the prohibited grounds of discrimination by courts and Parliament.*⁴³⁴

Therefore, the inclusion of social condition as a prohibited ground of discrimination could increase the burden on the limited resources of the Human Rights Commission.

⁴³¹ Canada, Canadian Human Rights Commission, *Departmental Performance Report 2006-2007* (2007), Section III, online: Treasury Board of Canadian Secretariat <<http://www.tbs-sct.gc.ca/dpr-rmr/2006-2007/inst/hrc/hrctb-eng.asp>> (date accessed: March 2, 2008) [hereinafter *CHRC DPR*]

⁴³² Canada, *Report of the Auditor General* (1998) at paras. 10.58 and 10.38., online: Office of the Auditor General <http://www.oag-bvg.gc.ca/internet/English/aud_ch_oag_199809_10_e_9316.html> (date accessed: 2 March 2008) [hereinafter *Auditor General's Report*].

⁴³³ Canada, Canadian Human Rights Commission, *Annual Report 1998* (Ottawa: Minister of Public Works and Government Services, 1999) at 73.

⁴³⁴ Auditor General's Report, *supra* note 432 at para. 10.36. [Emphasis added.]

This could result in greater backlog, less efficiency and undermine the Commission's reputation, impartiality and fairness.

However, these concerns have largely been allayed. In the most recent Annual Report⁴³⁵, the statistics paint a different picture. The following data show that the Commission's business model, implemented in 2002, is producing the intended results. The complaint workload is in check and productivity has substantially increased. Progress is measured against the year 2002, when the Commission began implementing refinements to its business model.

Figure 1 – Cases In, Cases Out

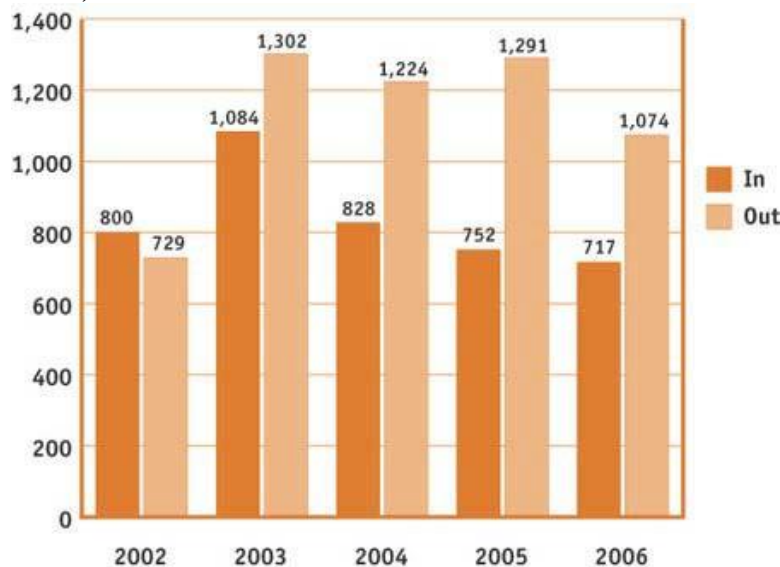
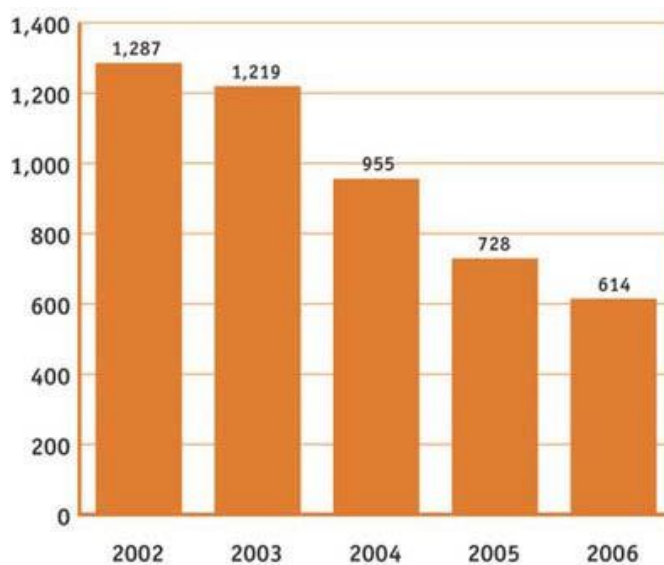


Figure 2 – Cases Inventory



⁴³⁵ Canada, Canadian Human Rights Commission, *2006 Annual Report* (2006) at 7; online: Minister of Public Works and Government Services 2007 <http://www.chrc-ccdp.ca/publications/ar_2006_ra/toc_tdm-en.asp> (date accessed: 2 March 2008) [hereinafter *2006 Annual Report*]

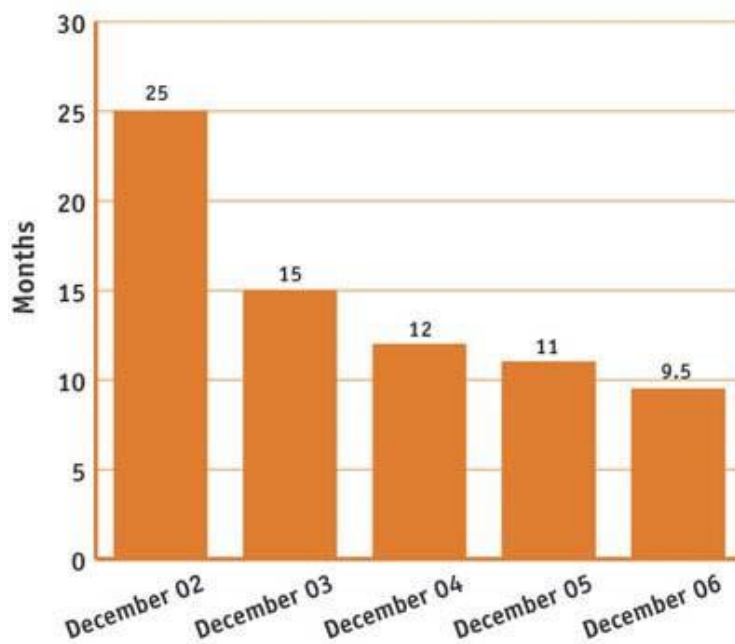
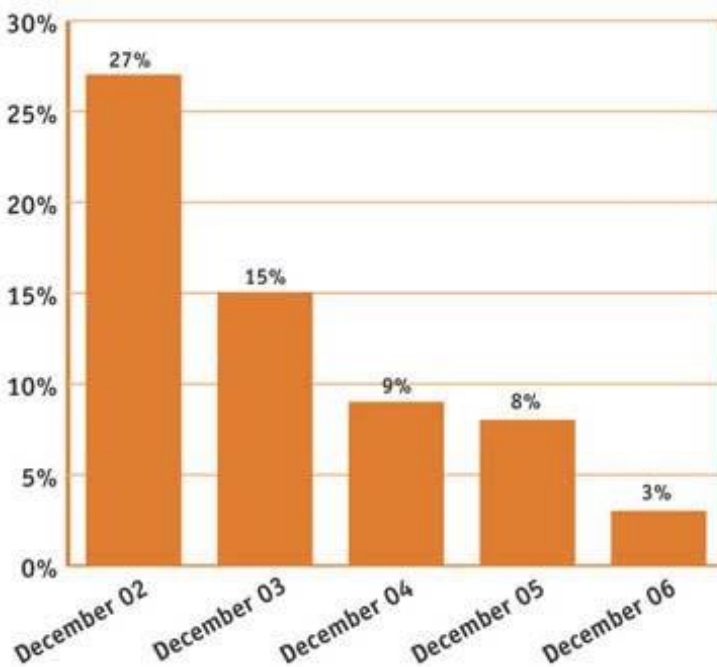
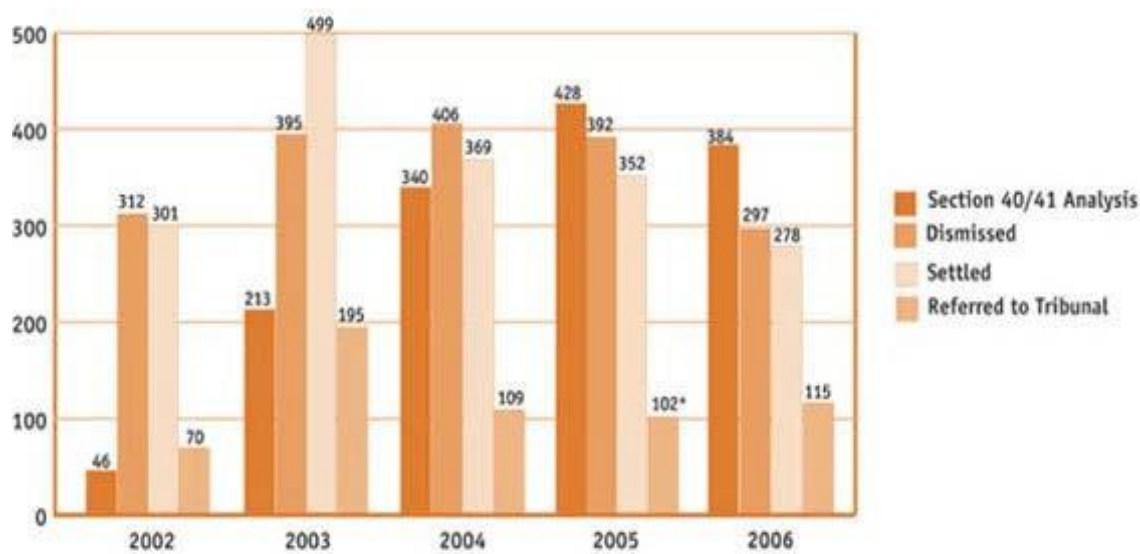
Figure 3 – Average Age of Active Caseload**Figure 4 – Cases Two Years or Older**

Figure 5 – Final Decisions by Type

While these statistics are clearly very positive with respect to backlog and Commission efficiency, one might still argue the influx of new cases brought about by the added protection of social condition would deal some reverses to this heartening trend.

However, this seems somewhat unlikely if we consider the experience of New Brunswick, which added social condition as a prohibited ground in its provincial human rights legislation in 2005. It is clear that the addition of this new ground and this novel protection did not lead to a substantial influx of new claims. In 2004-2005 (before social condition came into effect as an enumerated ground), New Brunswick's Human Rights Commission received 237 new complaints.⁴³⁶ In 2005-2006 (the first year the new ground was in effect) there were 205 new complaints, with social condition accounting for 13 complaints, or 4% of this total.⁴³⁷ In 2006-2007, the Commission received 174 new complaints, with claims under the ground of social condition accounting for just 8 complaints, or 3% of the total.⁴³⁸ The experience in Northwest Territories is quite similar, in the first three years of the existence of the *Northwest Territories Human Rights Act*, only six out of one hundred thirteen complaints, again less than six percent, included the ground of social condition.⁴³⁹ Social condition occupies a similarly low proportion of cases in Quebec, having in recent years declined to about 4% of new files opened by the Commission.

⁴³⁶ New Brunswick, *Annual Report 2004-2005*, Appendix D. online: New Brunswick Human Rights Commission < <http://www.gnb.ca/hrc-cdp/e/docs.htm> > (date accessed: March 2, 2008).

⁴³⁷ New Brunswick, New Brunswick Human Rights Commission, *Annual Report 2005-2006*, Appendix D. online: New Brunswick Human Rights Commission < <http://www.gnb.ca/hrc-cdp/e/docs.htm> > (date accessed: March 2, 2008)

⁴³⁸ New Brunswick, New Brunswick Human Rights Commission, *Annual Report 2006-2007*, Appendix D, online: New Brunswick Human Rights Commission < <http://www.gnb.ca/hrc-cdp/e/docs.htm> > (date accessed: March 2, 2008).

⁴³⁹ Northwest Territories, Human Rights Commission, *Annual Report 2004-2005* (Yellowknife: Northwest Territories Human Rights Commission, 2005); Northwest Territories, Human Rights Commission, *Annual Report 2005-2006* (Yellowknife: Northwest Territories Human Rights Commission, 2006); Northwest Territories, Human Rights Commission, *Annual Report 2006-2007* (Yellowknife: Northwest Territories Human Rights Commission, 2007).

Table 1: Files related to social condition opened by the Quebec Human Rights Commission

	Employment	Tenancy	Goods and services	Access to transportation and public places	Other	Total	Total complaints	%
2006-2007 ⁴⁴⁰	1	11	3	1		16	414	3.9
2005-2006 ⁴⁴¹	10	17	4	1		32	728	4.4
2004-2005 ⁴⁴²	6	17	5	3		31	817	3.8
2002-2003 ⁴⁴³	9	33	13	1		56	1226	4.6
2001 ⁴⁴⁴	5	71	16	1		93	1058	8.8
2000 ⁴⁴⁵	11	38	18			67	898	7.5
1999 ⁴⁴⁶	13	32	9	3		57	883	6.5

If the federal experience is similar to that of New Brunswick, the Northwest Territories and Quebec, and there is no *prima facie* reason to think it will be substantially different, the problem of limited resources and backlog is not a serious impediment to including social condition in the CHRA. Moreover, it is possible that social condition may consolidate complaints that have been presented under other grounds or under multiple grounds, as discussed in the section on multiple discrimination and supported in the literature and case law.⁴⁴⁷ However, it may be advisable to increase

⁴⁴⁰ Quebec, Commission des droits de la personne et des droits de la jeunesse, *Rapport d'activités et de gestion 2006-2007*, online : <www.cdpcj.qc.ca/fr/publications/docs/RA_2006_2007.pdf> (date accessed: January 6, 2008).

⁴⁴¹ Quebec, Commission des droits de la personne et des droits de la jeunesse, *Rapport d'activités et de gestion 2005-2006*, online : <www.cdpcj.qc.ca/fr/publications/docs/RA_2005_2006.pdf> (date accessed: January 6, 2008).

⁴⁴² Quebec, Commission des droits de la personne et des droits de la jeunesse, *Rapport d'activités et de gestion 2004-2005*, online : <www.cdpcj.qc.ca/fr/publications/docs/RA_2004_2005.pdf> (date accessed: January 6, 2008).

⁴⁴³ Quebec, Commission des droits de la personne et des droits de la jeunesse, *Rapport d'activités et de gestion 2002-2003*, online : <www.cdpcj.qc.ca/fr/publications/docs/RA_2002_2003.pdf> (date accessed: January 6, 2008).

⁴⁴⁴ Quebec, Commission des droits de la personne et des droits de la jeunesse, *Rapport d'activités et de gestion 2001*, online : <www.cdpcj.qc.ca/fr/publications/docs/RA_2001.pdf> (date accessed: January 6, 2008).

⁴⁴⁵ Quebec, Commission des droits de la personne et des droits de la jeunesse, *Rapport annuel 2000*, online : <www.cdpcj.qc.ca/fr/publications/docs/RA_2000.pdf> (date accessed: January 6, 2008).

⁴⁴⁶ Quebec, Commission des droits de la personne et des droits de la jeunesse, *Rapport annuel 1999*, online : <www.cdpcj.qc.ca/fr/publications/docs/RA_1999.pdf> (date accessed: January 6, 2008).

⁴⁴⁷ See Turkington, *supra* note 53 at 180: “Adding poverty to the *Ontario Human Rights Code* is not an attempt to protect a large group of people currently unprotected by the Code. Adding poverty would provide a different kind of protection to subgroups of people who are currently only partially protected by

the funding to the Commission if social condition were to be added to the CHRA to ensure not only the timely and effective resolution of cases, but to build the capacity and expertise of the Commission in this new area.

2. *Overshadowing Other Grounds*

As a related argument, the inclusion of social condition as a prohibited ground of discrimination could overshadow other grounds of discrimination; its inclusion could monopolize the Commission's resources towards the resolution of complaints based on social condition to the detriment of complaints on other established grounds. Such a situation has happened at the Prince Edward Island Human Rights Commission where complaints based on the ground of "political belief" have overshadowed complaints on other grounds.

Though political belief has been included in the *P.E.I. Human Rights Code* since its inception, complaints on that ground increased after the provincial election in 1996 from low single digits to over 600 complaints in one year. As the 1996/97 annual report⁴⁴⁸ highlights "[f]ollowing the provincial election on November 18, 1996, a staggering number of complaints of discrimination on the basis of political belief were filed... often from government employees who had held a seasonal, contract or term position for up to ten years or longer."⁴⁴⁹ The Chairperson put the problem into perspective by pointing out that the P.E.I. Human Rights Commission received 1.5 times the number of complaints received by the Nova Scotia, New Brunswick and Newfoundland Commissions combined yet operated on 8% of their budget.

This strange anomaly only occurred that single year, and in every subsequent year, regardless of elections, complaints on this ground have returned to the single digits.⁴⁵⁰ The overshadowing of other grounds by the ground of political belief in P.E.I. in 1996/97 was due to particular circumstances including the election and widespread patronage hirings. Hence it does not provide an accurate reflection of the situation at the Canadian Human Rights Commission if social condition were added as a prohibited ground of discrimination. A more accurate comparison would be with New Brunswick, the Northwest Territories or Quebec (see above). Further, the distribution of complaints in Quebec by prohibited ground closely matches the distribution in provinces which have no ground of social condition or which have grounds such as source of income.⁴⁵¹ These data indicate that concerns about social condition overshadowing current grounds are largely unfounded.

the *Ontario Human Rights Code*." See also *Fournier c. Poisson* (1980), 1 C.H.R.R. D/15 at D/15 (Que. Prov. Ct.): "First, "social condition" concerns many areas, including those specifically listed in section 10, including race, sex, sexual orientation, civil status, religion, political convictions, language, ethnic or national origin." [hereinafter *Fournier*].

⁴⁴⁸ Prince Edward Island, Human Rights Commission, *Annual Report 1996/97* (Charlottetown: PEIHR, 1997).

⁴⁴⁹ *Ibid.*

⁴⁵⁰ Prince Edward Island, Human Rights Commission, *Annual Reports 1999-2006* online: PEI Human Rights Commission < <http://www.gov.pe.ca/humanrights/index.php3?number=72437&lang=E>> (last accessed March 2, 2008). There were 40 complaints in 1998/99, 6 in 1999/00, 3 in 2000/01, 8 in 2001/02, 5 in 2002/03, 8 in 2003/04, 5 in 2004/05, and zero in 2005/06.

⁴⁵¹ MacKay, Piper, and Kim, *supra* note 4 at 121-122.

3. *Lengthy Litigation*

If social condition were included as a prohibited ground of discrimination in the *Canadian Human Rights Act* it is possible that more cases would be heard and lengthy litigation could ensue in relation to the definition or application of the ground. Moreover, if, as we surmise, the addition of the ground would provide better “fit” for claims based on multiple grounds, there could be an increase in the number of complaints proceeding to a hearing to deal with section 3.1 of the CHRA, which has not yet been well-developed in the jurisprudence. This could increase the amount of time spent at the Tribunal stage if a hearing is conducted. Despite the statistics from the Canadian Human Rights Commission’s *2006 Annual Report* regarding resolution of complaints,⁴⁵² the time it takes the Tribunal to conduct hearings and render a decision is still a somewhat lengthy process.

If social condition were included in the *Canadian Human Rights Act* without a definition this would certainly increase the scope for lengthy litigation due to the indeterminacy of the definition. Initially at least, the contest over the definition of social condition could also increase the probability of requests for judicial review by the parties, and increase the length of time of these reviews. A lack of a definition of social condition may also cause complaints that might otherwise be resolved in mediation to proceed to a hearing since it may be perceived as an opportunity to challenge the Human Rights Commission. These theories are speculative since there is no empirical data available.

If social condition were included with a definition, however, the potential for challenges might be somewhat reduced although litigants could still contest the interpretation of the definition. The length and complexity of this litigation would depend on the definition adopted in the CHRA (and/or attendant subordinate legislation) and to some extent perhaps the jurisprudential precedents available in Quebec, New Brunswick and the Northwest Territories. These considerations are taken into account in our recommendations section.

B. Problems Concerning Definition

1. Potential Unintended Effects

Absent a proper definition, or perhaps guidelines to implement the new ground of social condition, it is possible that the current framework contained in the CHRA would yield unintended results. Lynne Iding argues:

If social condition analysis was undertaken within the existing discrimination analysis, social condition protection would be substantive and far reaching, and would even recognize as indirect discrimination a refusal to sell, rent or provide based on a person's true inability to pay. While this might be a noble goal in addressing poverty, it is unlikely and impractical to expect that human rights legislation will be a tool through

⁴⁵² *2006 Annual Report*, *supra* note 435.

which the private marketplace moved from profit motive to accommodation motive.⁴⁵³

For example, if a landlord were charging \$500/month for rent (a facially neutral standard), which has an adverse effect on someone on welfare whose housing allowance is only \$300/month, theoretically the claimant could ask the landlord to accommodate her up to the point of undue hardship, which in this case would be lowering the profit margin, possibly to zero. A similar argument could be made for all purveyors of the necessities of life (perhaps even more persuasively in the context of food). This example is illustrative of the point that the implementation of social condition as a prohibited ground could have significantly redistributive potential in the marketplace, which is unlikely to be the intended consequences of its addition in the human rights regime; as a corollary, it could result in protracted litigation to test the limits of the ground.

The problem of unintended effects was also addressed by the La Forest Panel Report⁴⁵⁴ and by the Commission in its 2006 submissions to the United Nations in the context of governmental programs. It stated: “In defining social condition in a federal context, it will be important to carefully consider the complexity of social programs, such as how the social benefit features of the income tax system could be shielded from undue interference as a result of human rights claims.”⁴⁵⁵

While the experience at the provincial level in Quebec and in the *Charter* context would weigh against the likelihood of social condition protection being taken to institute a reordering of the marketplace or of social programs, this argument does weigh in favour of a definition, guidelines, and/or a carefully crafted limitation that could assist in the implementation of the ground if it were to be adopted.

2. *Trade-offs in Definition and Vagueness*

Even if a definition similar to that developed in Quebec, New Brunswick and the Northwest Territories is employed when adding social condition as a prohibited ground of discrimination, the charge could still be levelled that it would be too vague since criteria like income and education are relative. Unlike concrete terms such as “sex” and “colour”, this vagueness could lead to an uneven application of the new ground, compensating claimants in some circumstances, while denying protection in others. This raises the classic balancing problem in applying laws: predictability versus flexibility. Fairness demands that claimants and defendants know in advance what would constitute discrimination on the basis of social condition. However, the ground must not be applied so mechanically as to leave worthy complainants remediless.

This concern relates to the other trade-off involved in defining social condition. In order to satisfy the requirement of predictability, the ground must be defined in fairly concrete terms. If the ground is defined too broadly, it raises concerns about opening the

⁴⁵³ Iding, *supra* note 43 at para 23.

⁴⁵⁴ *La Forest Report*, *supra* note 3 at 112.

⁴⁵⁵ Canada. *Submission by the Canadian Human Rights Commission to the United Nations Committee on Economic, Social and Cultural Rights on the Fourth and Fifth Periodic Reports of Canada under the International Covenant on Economic, Social and Cultural Rights*, April 2006. online: < http://www.chrc-ccdp.ca/legislation_policies/un_submission_nu-en.asp > (last accessed March 3, 2008).

floodgates, as well as frivolous claims and abuse of the ground. Conversely, if defined too narrowly, many of the benefits yielded by the dynamic and flexible nature of social condition as a ground would be lost, and the protection provided by the CHRA would become fragmented.

This raises the possibility of alternative approaches, but, while another term such as “poverty” may have a more common understanding, there still exists little consensus on its definition or method of measurement.⁴⁵⁶ However, an even more narrowly-defined ground, such as “receipt of public assistance” used in some jurisdictions, would not have the remedial potential of social condition. For example, it may result in a claimant only being protected temporarily while actually in receipt of welfare and then losing that protection when their source of income changed, even though the disadvantages they suffer might remain the same.

It seems that, to achieve the purposes of the inclusion of social condition protection, it will inescapably involve a certain flexibility and a recognition that it is a relative concept incorporating objective and subjective elements. Like other enumerated grounds that share this trait, such as disability, debate will be ongoing about how to adequately define it. This issue must be addressed at the definition stage in order to avoid confusion and protracted litigation, as well as a substantial influx of claims.

3. *Potential Abuse of the Broad Concept*

If social condition were included as a prohibited ground of discrimination in the *Canadian Human Rights Act* there is also the potential that it could be used by individuals for whom it was not intended. For instance, the early generation of cases under the Quebec case-law provided protection for judges,⁴⁵⁷ doctors’ levels of incomes⁴⁵⁸ and profit-oriented hospitals.⁴⁵⁹ The early definition of social condition in Quebec did not include recipients of social assistance,⁴⁶⁰ heads of a lone parent family,⁴⁶¹ or people with prior criminal convictions.⁴⁶² This approach was heavily criticized by Collard, Senay and Brun and Binette.⁴⁶³

However, courts and tribunals in Quebec have since adopted the principles used to interpret human rights codes and section 15 of the *Charter* to prevent the abuse of social condition. Especially in *Gauthier*, which has been followed by all cases dealing

⁴⁵⁶ *La Forest Report*, *supra* note 3, c. 17. See also *e.g.* D.P. Ross, K.J. Scott and P.J. Smith, *The Canadian Factbook on Poverty 2000* (Ottawa: Canadian Council on Social Development, 2000) at 13, which describes at least eight different working definitions for measuring “poverty”.

⁴⁵⁷ *Droit de la famille*, *supra* note 87.

⁴⁵⁸ *Guimond*, *supra* note 86. See also *Rh aume c. Association professionnelle des optom tristes du Qu bec*, (1986) D.L.Q. 57 (C.S.).

⁴⁵⁹ *Centre hospitalier*, *supra* note 77.

⁴⁶⁰ *Paquet*, *supra* note 88.

⁴⁶¹ *Fournier*, *supra* note 493.

⁴⁶² *Commission des droits de la personne du Qu bec c. Cie Price Lt e* (1982), J.E. 81-866 (C.S.); *Mercier v. Beauport (Ville)* (1981), 3 C.H.R.R. D/648 (Que. C.P.).

⁴⁶³ R. Senay, “Condition sociale, motif prohib  de discrimination selon la Charte des droits et libert s de la personne” (1979) 39 R. du B. 1030, A. Collard, “La condition sociale: est-ce vraiment un motif de discrimination?” (1987) 47 R. du B. 188, H. Brun and A. Binette, “L’interpr tation judiciaire de la condition sociale, motif de discrimination prohib  par la *Charte des droits* du Qu bec” (1981) 22 C. de D. 681 at 693.

with social condition, the court agreed with the Supreme Court of Canada that [TRANSLATION] “a broad and liberal interpretation most likely to ensure the attainment of the objects [of human rights legislation]”⁴⁶⁴ should be applied to quasi-constitutional documents. The court cites McIntyre’s decisions from *O’Malley*:

It is not, in my view, a sound approach to say that according to established rules of construction no broader meaning can be given to the Code than the narrowest interpretation of the words employed. The accepted rules of construction are flexible enough to enable the Court to recognize in the construction of a human rights code the special nature and purpose of the enactment, and give to it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature... and it is for the courts to seek out its purpose and give it effect.⁴⁶⁵

A purposive and contextual approach to the interpretation of social condition has also been encouraged.⁴⁶⁶ Therefore, the risk of social condition being abused is limited given the clear directives from the Supreme Court of Canada, which inform the interpretation of all human rights statutes. Moreover, if a statutory definition were adopted to expressly define the ground as relating to social and economic disadvantage, as has been done in New Brunswick and the Northwest Territories, this would also address the issue.

C. Institutional Competence

There are several arguments against the addition of social condition as a prohibited ground of discrimination that centre on the institutional competence of the statutory human rights regime to deal with the underlying problem of socio-economic disadvantage.

1. Human Rights Legislation is the Wrong Venue to Address the Problem

It has been argued in academic discourse surrounding social condition that the Human Rights Commission is not the best place to address the problem of socio-economic disadvantage. Lynn Iding argues persuasively that the *Canadian Charter of Rights and Freedoms*, in combination with government legislation is the preferable way to address this issue. “Anti-discrimination legislation in itself might result in only the limited effect of addressing stereotypes about low income individuals, while doing little to alleviate poverty itself and its barriers to accessing the necessities of life.”⁴⁶⁷ Under this analysis, the more pressing problem is not discrimination based on stereotypes, but rather positive rights to the necessities of life, such as food and shelter and, thus, a *Charter* right to life’s basic necessities – perhaps included in the section 7 right to security of the person, or by including social condition or economic disadvantage as an analogous ground under section 15 – would be the preferable way to attack the problem.

⁴⁶⁴ *Gauthier*, *supra* note 6 at D/317.

⁴⁶⁵ *O’Malley*, *supra* note 64 at para. 12.

⁴⁶⁶ *Gauthier*, *supra* note 6; *Senay*, *supra* note 463.

⁴⁶⁷ *Iding*, *supra* note 43.

A related argument against the use of human rights legislation is that socio-economic disadvantage can be much more effectively addressed by utilizing the very same resources on public policy programs designed to improve the situation of socially and economically marginalized groups in society. Not only is adding social condition to federal legislation a piecemeal solution, it risks the implication that it is a panacea or silver bullet for the problem of socio-economic disadvantage. This may resonate particularly strongly for complainants on social assistance who, after pursuing their claim successfully, are likely to have their damages award clawed-back from their social assistance benefits.

Implicit in these arguments is the concern that human rights legislation does not do enough to address the problem of socio-economic equality in general and discrimination on social condition in particular. This is borne out to some extent by the experience in Quebec with social condition where the vast majority of successful claims have been based on receipt of social assistance in the context of housing. In general, as in the case of the Charter, adjudicative bodies have taken an unambitious approach in applying the ground of social condition except to the clearest of cases. On this view, the addition of social condition to the CHRA would do little more than the addition of source of income as a prohibited ground.⁴⁶⁸ Therefore, this approach would do little to realize the potential of social condition as a vehicle for addressing discrimination claims due to the generally deferential approach of tribunals and courts in matters with a socio-economic dimension.

However, neither of these arguments necessarily negates the potential benefits of including social condition in the *Canadian Human Rights Act*, but rather advocate more comprehensive measures for dealing with socio-economic equality. Another way to view the addition of social condition would be as one piece in a more complex solution.⁴⁶⁹ Indeed, as the La Forest Panel expressed, it could be the first step in generating greater momentum towards other ameliorative activities:

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.⁴⁷⁰

2. *Broad Administrative Discretion*

Another institutional argument raised against adding social condition to the *Canadian Human Rights Act* is that it would give too much discretionary power to the Canadian Human Rights Commission and Tribunal. In some respects this argument is a

⁴⁶⁸ The Commission itself has recently advocated the addition of source of income as a prohibited ground instead of social condition, see *supra* note 455.

⁴⁶⁹ Turkington, *supra* note 53.

⁴⁷⁰ *La Forest Report*, *supra* note 3 at c. 17.

combination of arguments regarding the drain on limited resources and the difficulties inherent in interpreting and applying a concept as broad and open-ended as social condition. It also raises the complex issues of comparative institutional competence in respect of the proper roles for the legislative, executive and judicial branches in formulating and implementing policy.

Like many of the other arguments that we have examined in this section, we feel that fears about granting too much discretionary power to the Commission and the Tribunal have been overstated. The problem of defining and applying the broad concept of social condition has been explored in the preceding arguments, and in any event, is not a novel task for the Commission and Tribunal. For instance, contrary to the view of some commentators, the problems of defining and implementing the rights of the disabled have not turned either human rights commissions or tribunals into “politically correct predators”, who are trying to use their powers to remake the world in their own image.⁴⁷¹

Administrative agencies have been increasingly recognized as appropriate bodies for the definition and implementation of social and economic policy in Canada⁴⁷² and the Commission and Tribunal have experience and expertise in the area,⁴⁷³ as will be discussed in the next section. All administrative agencies, including the Commission and the Tribunal, must operate within their legislative mandates and in accordance with the rules of jurisdiction and fair procedure. The discretion that can be exercised by the Commission and the Tribunal is far from unfettered as both are subject to judicial review and the constraints of their enabling statute. That said, we do recognize a challenge to the capacity, expertise and preparedness of essentially adjudicative administrative agencies to address issues of complex socio-economic policy. As the options examined in the recommendations section reveal, we believe that limits may be placed in the form of both statutory and regulatory definitions and guidelines, which could address these concerns.

V. What are the Arguments For Including Social Condition as a Prohibited Ground of Discrimination in the *Canadian Human Rights Act*?

A. *The purpose of the Act and the Educational and Symbolic Significance of Inclusion*

The principle upon which the *Canadian Human Rights Act* is based is,

... that all individuals should have an *opportunity equal with other individuals* to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual

⁴⁷¹ M. Crawford, “Human Rights Commissions: Politically Correct Predators?” (1991) 15 *Canadian Lawyer* 16 would suggest this is a real problem. Such a view was rejected by the Supreme Court of Canada in *Meiorin*, *supra* note 66.

⁴⁷² Evans, et al., *Administrative Law Casebook: Cases, Texts and Materials*, 3rd ed. (Toronto: Emond Montgomery, 1989).

⁴⁷³ *Gould*, *supra* note 130.

orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.⁴⁷⁴

Further, as stated in the *La Forest Report*, “The Act embodies *fundamental values of Canadians*.”⁴⁷⁵ The inclusion of social condition as a protected ground of discrimination would adhere to the principle behind the CHRA and signify to the international community that Canada recognizes the need for equality protection for those suffering social and economic disadvantage. As detailed above, those suffering from social and economic disadvantage are one of the most vulnerable groups in Canadian society, subject to negative stereotyping, adverse living conditions, and discrimination. Protecting the ground of social condition in a “quasi-constitutional”⁴⁷⁶ document such as the CHRA will symbolize Canada’s sincere commitment, ensuring that these rights are not downgraded to mere principles and government objectives.⁴⁷⁷ Including social condition in the CHRA would symbolize that Canada has not forgotten about this oft-marginalized societal group, and affirm the protection of the poor and socially disadvantaged as one of Canada’s fundamental values.

The inclusion of social condition will also encourage provincial human rights commissions and tribunals to more effectively address social and economic equality in their existing human rights legislation. As noted above, only two provinces and one territory currently include social condition as a prohibited ground of discrimination in their provincial human rights acts. The lack of federal legislation on social and economic equality has led to the “consequent lack of awareness, in the provinces and territories, of the State party’s legal obligations under the [ICESCR],”⁴⁷⁸ one of which is the implementation of social and economic rights protection in both federal and provincial legislation. As stated by Martha Jackman and Bruce Porter, “[p]roviding a clear mandate under the CHRA with respect to social and economic rights would promote ... a collective effort” by the provinces to develop comprehensive policies with respect to the protection against social and economic discrimination.⁴⁷⁹

B. The Canadian Human Rights Commission and Tribunal are the Best Venues for Protecting Discrimination on the Basis of Social Condition

Contrary to some of the arguments against the inclusion of social condition canvassed above, we believe that, on balance, the Commission and Tribunal are the best venues for the protection of social condition for a number of reasons. First, they possess the judicial and administrative experience and expertise needed to effectively handle the protection of those discriminated against under social condition. Second, adding social condition to the jurisdiction of these established governmental bodies is an economically efficient means to protect the ground compared to, for example, the creation of a new administrative apparatus for this purpose. Finally, the addition of social condition as a

⁴⁷⁴ CHRA, *supra* note 1, s.2. [Emphasis added.]

⁴⁷⁵ *La Forest Report*, *supra* note 3 at 23

⁴⁷⁶ *Zurich*, *supra* note 261 at 339.

⁴⁷⁷ Jackman and Porter, “Women’s Substantive Equality”, *supra* note 47 at 23.

⁴⁷⁸ CESCR, *Concluding Observations*, *supra* note 370 at 11.

⁴⁷⁹ Jackman and Porter, “Women’s Substantive Equality”, *supra* note 47 at 23.

protected ground under the CHRA will enhance the intersectional and holistic approach of dealing with human rights discrimination.

1. Expertise and Experience of the Canadian Human Rights Tribunal and Commission

Adding the ground of social condition to the CHRA will couple the legal remedies of the Tribunal with the institutional mechanisms for supporting and promoting these rights available to the Commission.⁴⁸⁰ First, due to the relative economic accessibility for complainants (who by definition will be predominantly without resources to fund a court challenge) and the broad powers available to cease, prevent and redress discriminatory practices,⁴⁸¹ the human rights Tribunal is an ideal forum to create the legal remedies needed to properly protect the ground of social condition. In fact, human rights tribunals are often a better forum than courts for devising effective and creative solutions to discrimination which would be unavailable through the expensive court process, because they have a more immediate effect for a greater number of people.⁴⁸² Indeed, it was the flexibility and adaptability of administrative agencies that attracted human rights advocates to the Commission and Tribunal structure as an improvement over pursuing human rights by way of court prosecutions for breach of statutes.⁴⁸³

Second, complementing the remedial and judicial powers of the Tribunal is the monitoring, investigation and educational functions of the Commission. Part of the Commission's mandate is to develop and conduct information and discrimination prevention programs,⁴⁸⁴ and as such the Commission provides a "degree of institutional support which does not exist in the case of social and economic rights under federal/provincial/territorial agreements or in relation to the *Charter*."⁴⁸⁵ This institutional support is particularly important at the early stages of integrating the protected ground of social condition into Canadian law. This educational role of the Commission is in line with the systemic focus on discrimination advocated in the *La Forest Report*. Discrimination based on social and economic grounds is a systemic problem, and is "inherently connected to discriminatory attitudes toward poor people."⁴⁸⁶ As stated in the *La Forest Report*:

(h)uman rights education and promotion is perhaps one of the most powerful tools for addressing equality issues, particularly in the area of systemic discrimination which is based on attitudes and assumptions that are held and acted on, often unknowingly. Giving people this knowledge

⁴⁸⁰ *Ibid.* at 23.

⁴⁸¹ CHRA, *supra* note 1, s.53(2).

⁴⁸² Turkington, *supra* note 53.

⁴⁸³ Tarnopolsky, *supra* note 61. The limits of courts in respect to matters of human rights has also been emphasized in *Bhadauria*, *supra* note 62, *Christie*, *supra* note 60 and B. Vitzkeley, "Discrimination, the Right to Seek Redress and the Common Law: A Century-Old Debate" (1992) 15 Dal. L.J. 304.

⁴⁸⁴ See Canada, Canadian Human Rights Commission, *About*, online: CHRC <<http://www.chrc-ccdp.ca/about/default-en.asp>>.

⁴⁸⁵ Jackman and Porter, "Women's Substantive Equality", *supra* note 47 at 23.

⁴⁸⁶ *Ibid.*

should be the first step towards eliminating the problem.⁴⁸⁷

The Commission is ideally suited to fulfill this educational role since, as was noted by one commentator, the promotion of public attitudes which respect to the dignity and equality of discriminated parties is a traditional role of human rights commissions.⁴⁸⁸

Lastly, the expertise of human rights agencies has been recognized.⁴⁸⁹ In dealing with a multitude of complaints of discrimination on a daily basis, the Commission and Tribunal are well-placed to address the inclusion of a new ground of discrimination in a manner that fulfills the purpose of their enabling statute.

2. *Adding Social Condition is Economical*

Adding the ground of social condition to the CHRA, and thereby assigning the duties of its promotion and protection to the Commission is economical. It is more cost effective to assign duties to an existing agency, such as the Commission, than to create a new agency to deal with issues of social condition discrimination. With its existing infrastructure, funding, and in-house expertise, the Commission has most, if not all, of the variables needed to administer the protection of the ground of social condition under the CHRA. This is presumably the same logic that was used in 1995 when the administration of the *Employment Equity Act* was assigned to the Commission, and is even more compelling in this case, as administering the inclusion of social condition under the CHRA is more in line with the Commission and Tribunal's present functions and mandate than was administering the *Employment Equity Act* in 1995.

3. *The Inclusion of Social Condition will Enhance Intersectionality*

As noted above, the theory of intersectionality is that various socially and culturally constructed categories interact on multiple levels to manifest themselves as inequality in society. This theory holds that the classic grounds of discrimination do not act independently of each other, but interrelate to create a system of oppression that reflects the "intersection" of multiple forms of discrimination.⁴⁹⁰ This was recognized when the CHRA was amended in 1998 to affirm with greater certainty that, "a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or the *effect of a combination of prohibited grounds*."⁴⁹¹ The benefit of this amendment is the possibility of an increased holistic approach to complaints, which would also be advanced by the inclusion of social condition. As stated in the *La Forest Report*, "[t]here is an interrelationship between the ground of social condition and other grounds listed in the CHRA such as race, sex and disability. The severely disabled and single women are among the poorest in Canada."⁴⁹² The inclusion of social condition will

⁴⁸⁷ *La Forest Report*, *supra* note 3 at 45.

⁴⁸⁸ Jackman and Porter, "Women's Substantive Equality", *supra* note 47 at 23.

⁴⁸⁹ See e.g. *Bell Canada v. Canadian Telephone Employees Assn.*, [2003] S.C.J. No. 36.

⁴⁹⁰ S. Knudsen, *Intersectionality-A Theoretical Inspiration in the Analysis of Minority Cultures and Identities in Textbooks*, online: Caught in the Web or Lost in the Textbook.

<http://www.caen.iufm.fr/colloque_iartem/pdf/knudsen.pdf> (date accessed February 29, 2008).

⁴⁹¹ CHRA, *supra* note 1, s.3(1). [Emphasis added.]

⁴⁹² *La Forest Report*, *supra* note 3 at 113.

encourage an intersectionality analysis under the CHRA and further facilitate a holistic approach to complaints.

As a result, including social condition may actually consolidate complaints that have been presented under other grounds or under multiple grounds. This assertion is supported through the literature and case law⁴⁹³ and could be found empirically. The following is a table of the number of complainants filing complaints with the Commission, the number of grounds cited in those complaints and the approximate percentage of complainants filing complaints under multiple grounds:

Year	Total Number of Complainants	Grounds of Discrimination Cited	Approximate Percentage of Complainants Filing Under Multiple Grounds⁴⁹⁴
2004	828	989	13%
2005	752	866	10%
2006	717	839	11%

More than one-tenth of all complaints are brought under multiple grounds of discrimination. Hence, the ground of social condition may aid in naming those complaints more precisely without increasing the total number of complaints. More significantly, complaints framed in an intersectional way are likely to better reflect the realities and experiences of complainants suffering from discrimination. As observed by the La Forest Panel, the recognition of social condition under the human rights regime would be particularly useful in dealing with complaints of multiple discrimination because it can do so in a more comprehensive way and in a manner more accessible to and respectful of the realities of complainants:

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.⁴⁹⁵

⁴⁹³ Turkington, *supra* note 53 at 180: “Adding poverty to the *Ontario Human Rights Code* is not an attempt to protect a large group of people currently unprotected by the Code. Adding poverty would provide a different kind of protection to subgroups of people who are currently only partially protected by the *Ontario Human Rights Code*.” See also *Fournier*, *supra* note 447 at D/15: First, “social condition” concerns many areas, including those specifically listed in article 10, including race, sex, sexual orientation, civil status, religion, political convictions, language, ethnic or national origin.”

⁴⁹⁴ Calculated by subtracting the number of grounds filed under from the number of complainants, dividing that number by 1.5 (conservatively assuming that half of all multiple grounds complaints are filed under 2 grounds, and half are filed under 3 grounds), and dividing that by the total number of complaints.

⁴⁹⁵ *La Forest Report*, *supra* note 3 at 109-10.

C. The Limited Charter Role to Date and the Role of Human Rights Statutes in Influencing the Recognition of Analogous Grounds under the Charter

As discussed above, there has thus far been limited success in recognizing social condition or related characteristics such as poverty as an analogous ground of discrimination under the *Charter*. Should the ground of social condition be added as a protected ground of discrimination under the CHRA, the legislative recognition of the ground could inform jurisprudential developments in the *Charter* field, both in the application of equality rights under section 15 of the *Charter* and in consideration of broader socio-economic claims. As stated by Martha Jackman and Bruce Porter,

One of the difficulties in advancing social rights claims under the Charter has been the lack of human rights jurisprudence to guide the courts on applying equality rights in a manner that is consistent with social and economic rights. Including social and economic rights in the CHRA will promote the development of an equality jurisprudence that can be carried over to *Charter* claims within the social and economic sphere.⁴⁹⁶

The inclusion of social condition under the CHRA will further develop the living tree that is Canadian equality and human rights legislation, not only expanding the equality guarantees of the CHRA, but in turn informing and enhancing the guarantees enshrined in the *Charter*.

Furthermore, if the ground of social condition is not added to the CHRA, yet is found to be an analogous ground of discrimination under the *Charter*, it is possible that the courts will instruct the legislature to add it, as omitting to do so could be seen as the CHRA itself violating section 15 of the *Charter*.⁴⁹⁷ Obviously, this is the least desirable method of amending the CHRA, and in the interest of preempting its forced inclusion by the courts, the legislature would be wise to voluntarily amend the CHRA to include the ground of social condition.

D. Practical Benefits to the Lives of Individuals Living in Poverty and the Benefits of Statutory Human Rights Regimes

Poverty continues to be one of Canada's foremost problems. In a country as prosperous as ours, the fact that over one-tenth of the population lives in poverty, is alarming. Compound this with the consistent evidence that those living in poverty are subject to widespread discrimination⁴⁹⁸ and it is clear that those living in poverty are in desperate need of an adjudicative body to which they can seek redress. Adding the ground of social condition in the CHRA will not only provide an economical system of remedy for those in need of its protection, it will also make a symbolic statement that Canada does not tolerate discrimination against one of the most vulnerable of its citizen groups.

The practical benefits of adding social condition to the CHRA are numerous. First and foremost, this addition will ensure that there is a means to challenge stereotypes and discrimination of the poor. Second, the addition will serve as an important educational tool both to private and public actors. As stated in the *La Forest Report*, it will "send out

⁴⁹⁶ Jackman and Porter, "Women's Substantive Equality", *supra* note 47 at 23.

⁴⁹⁷ *Vriend*, *supra* note 44.

⁴⁹⁸ *La Forest Report*, *supra* note 3 at 107.

a signal about assumptions and stereotypes to be taken into account by policymakers.”⁴⁹⁹ Third, as stated above, the CHRA is meant to embody Canada’s core values. The exclusion of social condition in the current version of the CHRA implicitly endorses the idea that there is nothing wrong with discriminating against Canada’s poor by either perpetuating negative stereotypes or failing to account for their particular circumstances. Fourth, the inclusion of social condition will not only aid in remedying individual cases of discrimination, but will help allay the devastating psychological impact of widespread stereotyping and discrimination that has been attested to by complainants at the provincial level. Lastly, the knowledge that the government acknowledges the plight of the economically and socially disadvantaged and is willing to help alleviate it is of important symbolic value to those burdened by poverty.

E. International Obligations

As described above, Canada is party to a number of international human rights obligations, including the ICESCR and ICCPR, which it has not fulfilled. By not fulfilling its international obligations, Canada is damaging its reputation as a leader in human development, and opening itself up to challenges at the international and domestic levels. The inclusion of social condition in the CHRA would go toward fulfilling the recommendations of international human rights bodies that have gone unimplemented for years. A legislative inclusion would be consistent with Canada’s undertaking under article 2 of the ICESCR to “guarantee that the rights enunciated in the present Covenant will be exercised *without discrimination of any kind* as to...social origin... or other status” “with a view to achieving *progressively* the full realization of...rights”⁵⁰⁰ and its obligations of article 2(3)(a) of the ICCPR to provide an *effective* legal remedy to all individuals who feel their rights under the Covenant have been infringed.⁵⁰¹ Currently, there is no such avenue at the federal level for people who have experienced discrimination on the basis of social condition.

The addition of social condition to the CHRA, while not enough to wholly fulfill Canada’s international social and economic obligations, will send a message to the international community that Canada is serious about making a long-term commitment to addressing poverty. Conversely, by keeping the status quo and electing not to add social condition, Canada is sending the message that social and economic disadvantage is not worthy of being afforded even “negative right” protection.

F. Proposed Reform and Support by Government and Related Agencies

As canvassed in Part I, various Canadian bodies, including the La Forest Panel, have now advocated including social condition in the CHRA. These recommendations are highly persuasive given the practical experience, research, expertise, and authority of the issuing bodies. In particular, the Senate and the Canadian Human Rights Commission have both advocated the inclusion of social condition. Other human rights commissions have supported the same change provincially and territorially, with both New Brunswick and Northwest Territories now including the ground under their human rights acts. The

⁴⁹⁹ *Ibid.* at 110.

⁵⁰⁰ ICESCR, *supra* note 31, art.2.

⁵⁰¹ ICCPR, *supra* note 360, art.2.

voices of academics, organizations and interest groups have also been raised in support of expanding human rights protections.

VI. What is the Best and Most Feasible Option for Adding Social Condition to the *Canadian Human Rights Act*?

Nearly a decade ago, the La Forest Review Panel made the critical recommendation that social condition be added as a prohibited ground under the *Canadian Human Rights Act*. In our 1999 Report to the La Forest Review Panel, we explored a range of options for how this could be achieved on a somewhat equal footing, although we did ultimately make our preferences clear.⁵⁰² We now have the benefit of the Report from the Review Panel,⁵⁰³ more cases from Quebec and the provincial additions of social condition to the human rights codes in New Brunswick and the Northwest Territories. On the basis of this additional information and evolution in our own thinking, we address the important question of options with a renewed perspective and a new recommendation. In this section, we will address the options that we do not believe are appropriate or feasible at this time, and then turn to a discussion of our recommended approach.

A. Rejected Options

1. Not Include Social Condition (*Status Quo*)

One option would be to do nothing. While there are reasons that could support such a conclusion (many of which are reviewed in Part IV), such a recommendation would be a reaffirmation of the *status quo*. Such a course of action would not respond to the arguments in favour of including social condition such as those outlined in Part V of this study. In particular, it would not be responsive to the recommendation of the United Nations Committee on Economic, Social and Cultural Rights that Canada expand its human rights legislation to include protection against discrimination on the basis of “social and economic status”.⁵⁰⁴

The *Canadian Charter of Rights and Freedoms* could be an alternative venue in the Canadian legal landscape for redressing discrimination on the basis of social and economic condition. However, social condition is not one of the enumerated grounds under section 15 of the *Charter* and would have to be added by way of an analogous grounds analysis. While those suffering from social and economic disadvantage may well be the kind of discrete and insular minority who lack meaningful access to the majoritarian political process and thus need protection against discrimination, the courts have been reluctant to extend their *Charter* mandate to embrace the shaping of social and economic policy in Canada.

The limits of the *Charter* in respect to social and economic rights are explored in Parts II.D and III.B. of this study, concluding that the potential breadth of sections 7 and 15 of the *Charter* will not in most cases overcome the reluctance of the courts to become

⁵⁰² MacKay, Piper and Kim, *supra* note 4.

⁵⁰³ *La Forest Report*, *supra* note 3.

⁵⁰⁴ *Supra* note 370. The International Labour Organization’s Committee of Experts has also recommended Canada expand its human rights protection, *supra* note 22.

engaged in matters of social and economic policy. When this analysis is combined with the high cost of pursuing *Charter* litigation, it is our conclusion that sections 7 and 15 protections are not realistic alternatives to express statutory protection in the human rights codes. There are also issues of comparative institutional competence, which make flexible administrative structures more appropriate for dealing with these kinds of issues than the courts.⁵⁰⁵

As discussed in Part III.C of this study, the prospects of a *Socio-Economic Charter*⁵⁰⁶ by way of a constitutional amendment are also remote. The failure of the *Charlottetown Accord* has dampened any enthusiasm for wide-based constitutional reform. Furthermore, the proposals in the *Charlottetown Accord* were very modest in nature and would have added little real protection for people who are disadvantaged because of their social condition in society. The more recently adopted *Framework to Improve the Social Union*⁵⁰⁷ is even more general and uninformative. Therefore, the process of constitutional reform offers little potential for changing the *status quo* in respect to social and economic rights in the foreseeable future.

2. Rewrite the CHRA to include Analogous Grounds

A potentially far-reaching option would be to rewrite the prohibited grounds section of the *Canadian Human Rights Act* in the same form as section 15 of the *Charter of Rights*. This would mean that there would be an open-ended section on prohibited grounds that contains a list of grounds but leaves open the possibility for the addition of analogous grounds through adjudication. The enumerated part of the section could be either the existing list of grounds under the *Act*; the enumerated grounds under the *Charter* or an extended list of grounds that could expressly include social condition, source of income, poverty or some other formulation.

Donna Greschner and Mark Prescott in a report completed for Status of Women Canada (and submitted to the La Forest Review Panel) analyze variations on the analogous grounds option.⁵⁰⁸ These variations include both a non-discrimination and positive guarantee of equality formulation of the *Charter* analogous grounds approach, the open-ended group membership approach contained in the *Manitoba Human Rights Code*⁵⁰⁹ and the unreasonable cause approach adopted in British Columbia between 1972-1984.⁵¹⁰ What all of these formulations share is an open-ended wording that would allow social condition to be added to the prohibited grounds by way of interpretation.

Greschner and Prescott reject this option for reform for many reasons. Among the reasons were: a concern about tying human rights codes too closely to the *Charter*; a loss of focus by commissions which may act to obscure general acts of unfairness; the dangers

⁵⁰⁵ As discussed in Part III.D. of this study on economic and social rights in the Quebec Charter, even when economic and social rights are recognized statutorily, there is very little openness on the part of adjudicators to read much substantive content into these rights.

⁵⁰⁶ MacKay, Piper and Kim, *supra* note 4, Appendix II.

⁵⁰⁷ *Ibid.*, Appendix III.

⁵⁰⁸ D. Greschner and M. Prescott, "Should the CHRA Mirror the *Charter*?" in Status of Women Canada, *Women and the Canadian Human Rights Act: a collection of policy research reports*. (Ottawa: Status of Women Canada, 1999) 1.

⁵⁰⁹ *Supra* note 144.

⁵¹⁰ *Human Rights Code*, S.B.C. 1973 (2nd session), c. 119.

of being flooded with complaints; and the negative consequences of commissions getting too far ahead of public opinion and producing a backlash. As support for their skepticism about this option, the authors include summaries of the negative experiences of Manitoba and British Columbia with their versions of the open-ended provisions in Appendices C and D of their report. The proposed text of the analogous grounds amendments is included in Appendix B of the Greshner and Prescott report.

We share many of the concerns expressed by Greshner and Prescott about this option. The experiences in Manitoba and British Columbia suggest that social condition is not likely to be found as an analogous ground, despite open-ended wording. This is particularly true where the interpretation of the *Charter of Rights* has not to date included social and economic condition as an analogous ground of discrimination. There are also some dangers in having the *Canadian Human Rights Act* mirror the *Charter*, as the effect is to apply the *Charter* to the private as well as the public sector. This leads Greshner and Prescott to conclude that the effect of adopting this option might be to stifle the evolution of both human rights codes and the *Charter*. On balance, the disadvantages to the analogous grounds option appear to outweigh any advantages.

3. *Include Social Condition without a Statutory Definition*

Another possible option is to follow the lead of the Quebec legislators, and include social condition as a prohibited ground in the *Canadian Human Rights Act* with no statutory definition. This option has the virtue of flexibility and leaves room for the concept of social condition to grow and evolve. Such evolution could occur as a result of interpretation by human rights tribunals and the courts or the elaboration of the term at the administrative level through guidelines or policy directives. The absence of a statutory definition does not mean that there will be no definition at all.

Critics of this option suggest that it is a form of legislative “cop-out”, which merely passes the onerous task of defining the contested concept to the executive and judicial branches of government. In addition, this option creates uncertainty about what Parliament has really added to the CHRA; the intent of the legislature is left in doubt. Would it not be better for Parliament to clarify its own intent, than to have administrators, Tribunal members and judges speculate about the true legislative intent? We think that it is better for Parliament to define, and our preference for some form of statutory definition (even if minimal in form) is supported by the Quebec experience of adding social condition with no statutory definition. The experiences of the courts in Quebec can be used to determine the appropriate manner to introduce social condition into the *Canadian Human Rights Act*. In particular, Quebec case law demonstrates some of the advantages and disadvantages of including social condition in a statute without a legislative definition.

Commentators attributed much of the earlier failure of the courts to give social condition a definition that would serve the population for which it was intended to a lack of a statutory definition. In 1981, Brun and Binette diplomatically evaluated three reasons (only two of which are relevant here) why the courts were failing to use “social condition” to protect complainants in discrimination actions. These were:

[TRANSLATION]

- A) The novelty and ambiguity of an expression that the legislature has not defined ..., and
- B) To put it bluntly, a particular ideology on the part of the judiciary, which sometimes unceremoniously manifests itself.⁵¹¹

Similar concerns were reflected six years later by André Collard when he stated:

[TRANSLATION]

It should also be acknowledged that the limiting character of the list in article 10 prevented the judiciary from indirectly doing what it could not do directly by considering social condition to be a catch-all that could have made it possible to punish all forms of discrimination.

It is therefore up to the Quebec legislature to realize this and to express itself in the way that it can: through legislative change.⁵¹²

The Quebec experience suggests that the lack of a statutory definition has, in some cases, frustrated the implementation of the prohibition against social condition discrimination on the front lines of human rights. Even attempts to clarify and codify prior interpretations of social condition at the policy level have not filled the void left by the statutory omission. Considerable time and expense has been directed to the definition of social condition in Quebec and it has not always been applied in a manner that protects the individuals meant to be served by human rights codes. In this regard, including social condition without a statutory definition has some of the same problems as the analogous grounds approach discussed above.

4. *Include Positive Economic and Social Rights in the CHRA*

The addition of social and economic rights as positive rights would be a significant and far reaching way to protect social condition under the *Canadian Human Rights Act*. While provisions allowing for affirmative action or equity programs are a form of positive rights, they are often presented as a defence to conduct that what would otherwise be discriminatory. In general, the *Canadian Human Rights Act*, similar to the legislation at provincial and territorial levels, has been structured around negative prohibitions of discrimination. The imposition of affirmative duties have occurred in exceptional cases such as the *Action Travail de Femmes Case*⁵¹³ and pay equity cases or monitoring under the *Employment Equity Act*,⁵¹⁴ but such situations are not the norm.

This positive rights option, which would move the *Act* beyond its normal structure, is persuasively argued by Martha Jackman and Bruce Porter in their report to

⁵¹¹ Brun & Binette, *supra* note 463 at 687.

⁵¹² A. Collard, *supra* note 463 at 192.

⁵¹³ *Action Travail des Femmes v. Canadian National Railway Co.*, [1987] 1 S.C.R. 1114.

⁵¹⁴ *Employment Equity Act*, S.C. 1995, c. 44.

Status of Women Canada (which was submitted to the La Forest Review Panel).⁵¹⁵ Jackman and Porter advocate the addition of social condition to the prohibited grounds of discrimination, as well as the inclusion of positive guarantees to specific social and economic rights. The relevant section of their “Model Social and Economic Rights Amendment” reads as follows:

1. (1) Everyone has a right to adequate food, clothing, housing, health care, social security, education, work which is freely chosen, child care, support services and other fundamental requirements for security and dignity of the person.
- (2) These rights shall be interpreted and applied in a manner consistent with Canada’s human rights treaty obligations and the fundamental value of promoting equality and alleviating social and economic disadvantage.

As expressly stated in section 1(2) quoted above, the domestic social and economic rights are to be interpreted so as to be consistent with Canada's international obligations. In this respect, the option outlined by Jackman and Porter would be the one that is most responsive to the criticisms of Canada made by the United Nations Committee on Economic, Social and Cultural Rights. This broad remedial option is also the one that would best address the systemic components of social condition discrimination by defining rights in a positive way and putting obligations on the federal government to respond to the problem. There is also recognition in the authors’ proposed amendments of possible justifications open to the government when defending claims of discrimination.

What Jackman and Porter are proposing is a combination of a complaint-driven model based upon prohibited grounds, including social condition, and a regulatory model concerned with the delivery of positive social and economic rights. These rights would be administered by a Social Rights Sub-Committee of the Canadian Human Rights Commission and a Social Rights Sub-Panel of the Human Rights Tribunal, each having special expertise in dealing with matters of social and economic rights.

While this is an extension of the traditional roles played by the Commission and the Tribunal, it is not without precedent. The role of the Canadian Human Rights Commission in administering the *Employment Equity Act*, as a separate statute, or in implementing pay equity and accessibility standards for the disabled under the *Canadian Human Rights Act*, provides some foundation upon which to build.

It is a progressive proposal that addresses not only the gap between international commitments and domestic realities but also the need to respond in an affirmative manner to the systemic problems of discrimination based on poverty. There are some clear resource implications in adopting this option but there are also many negative resource implications in continuing the cycle of poverty - which takes both an economic and human toll.

We reject this option not because it lacks merit, but rather because it would involve a regulatory redesign of the Commission and Tribunal structures that goes well beyond the mandate of our study. There are also some unanswered questions about the institutional competence of even a redesigned Commission structure to rise to the

⁵¹⁵ Jackman and Porter, “Women's Substantive Equality”, *supra* note 47 at 43. Relevant sections of their proposal are included in Appendix VII to our 1999 Report.

challenge of enforcing positive economic and social rights. There is considerable merit to this more holistic approach to attacking poverty that has the potential to get to the root causes of the problem. What poor people need more than freedom from negative stereotypes and prejudicial attitudes and actions is more resources to escape the cycle of poverty. However, these protections are clearly not mutually exclusive. Thus, we recommend the inclusion of protection from discrimination on the basis of social condition as a feasible measure that can be implemented in the short-term and also that the incorporation of positive economic and social rights into the CHRA be the topic of a future research study by the Commission.

Even the La Forest Panel, with a far more expansive mandate than ours and much more experience and expertise, recommended against the inclusion of economic and social rights in the CHRA and made the following observations on the matter:

The Panel is of the view that the direct enforcement of social and economic rights in Canada through Tribunal orders would require a substantial extension that we do not think is feasible at this time. However, we think that the Commission could play a useful role by monitoring and reporting on these rights.

...

We are concerned about the breadth of the issues — legal, constitutional and political — that would be raised by the addition of social and economic rights to the Act that were enforceable by Tribunal order.⁵¹⁶

The La Forest Panel did nonetheless make a recommendation in respect to an educational and monitoring role for the Canadian Human Rights Commission in respect to Canada's international human rights commitments.

Recommendation:

130. We recommend that the Commission should have the duty to monitor and report to Parliament and the United Nations Human Rights Committee on the federal government's compliance with international human rights treaties, included in its legislation. Provincial and territorial human rights commissions, in consultation with the Commission, may wish to comment on matters within their respective jurisdictions.⁵¹⁷

This seems like a small but positive step in the right direction as the Canadian Commission in conjunction with the provincial commissions would be well suited to this educational task, which is a logical extension of its current statutory mandate in section 27 of the *Canadian Human Rights Act*. Furthermore, the Continuing Committee of Human Rights Officials, which was set up in 1988 to monitor Canada's international human rights commitment, seems to have more of a reporting than educational role. There may be an important role for the Commission in respect to positive economic and social rights and living up to Canada's international human rights obligations. While the

⁵¹⁶ *La Forest Report*, *supra* note 3 at 115-16.

⁵¹⁷ *Ibid.* at 116.

likely role would be educational and symbolic at this stage, it could evolve into a reference to monitoring Canada's international commitments in section 2 of the CHRA and ultimately a non-justiciable package of positive economic and social rights, in line with the approach taken in Quebec.

While we do not recommend the inclusion of such rights at this time, it is an important option worthy of future study by the Commission. It may be timely to embark on such a study as the Canadian Human Rights Commission is cautiously reclaiming a more significant role at the international level and has reasserted its partnership with provincial human rights commissions by rejoining the Canadian Association of Statutory Human Rights Agencies (CASHRA) in Yellowknife in June 2007. The links between social condition as a ground of discrimination and economic and social rights in more positive terms was also recognized by the La Forest Panel. It is time to act on social condition and embark upon more study of the Commission's role (if any) in respect to positive economic and social rights.

B. Recommended Option for Including Social Condition as a Prohibited Ground of Discrimination under the Canadian Human Rights Act

As indicated above, we recommend that social condition should be added as a prohibited ground of discrimination under the *Canadian Human Rights Act*. This would be an important step in advancing human rights protection at the federal level, where there currently exists a gap for protecting individuals from discrimination based on social and economic disadvantage.

Notably, in recommending that social condition be added to the CHRA, the Review Panel also noted the intersection between social condition and the enumerated grounds of discrimination in the CHRA:

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.*⁵¹⁸

As we observed earlier in this study, not only do many groups protected by the CHRA also experience discrimination based on social condition, but the grounds intersect in a way that produces multi-dimensional discrimination. This in itself is a good reason to add social condition to the CHRA and the La Forest Panel also appears to reinforce that conclusion.

While recognizing that social condition is not the same as poverty, the La Forest Panel recognizes that both concern classes of individuals in disadvantaged social and economic situations.⁵¹⁹ The Panel also recognized that the existing grounds of discrimination are often inadequate to respond to the economic dimensions of the adverse treatment experienced by these groups.

⁵¹⁸ *Ibid.* [Emphasis added.]

⁵¹⁹ *Ibid.* at 107.

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.⁵²⁰

The La Forest Panel also concludes that matters such as poverty, education and illiteracy can be as much an element of a person's identity as sex or religion.

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.⁵²¹

The La Forest Panel concluded with the following six recommendations on social condition:

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 Quebec 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.⁵²²

⁵²⁰ *Ibid.* at 108.

⁵²¹ *Ibid.* at 110.

⁵²² *Ibid.* at 113.

We are in general agreement with these recommendations, as we are also of the opinion that the addition of social condition, due to its intersectional nature and purposive content, would provide important equality protections, which are not adequately addressed in the CHRA currently. However, for the same reason, it is important that social condition protection be implemented in a practical and measured manner to ensure sufficient certainty and broad acceptance of this new ground. Thus, we do have some different ideas about how to define social condition in the statute and how to handle defences, justifications, exemptions and delayed applications to certain areas, as will be explored in the following sections.

1. Include Social Condition with a Statutory Definition

Because social condition is perceived as a broad and somewhat ambiguous term, we conclude that including social condition as a prohibited ground of discrimination should be accompanied by some form of statutory definition of the term. Social condition is a contested concept more akin to the prohibited ground of disability (which is defined in section 25 of the CHRA) than it is to the more delineated grounds of discrimination such as race, gender, ethnic origin or colour. It is also more open to conflicting interpretations than some of the newer grounds, such as conviction for which a pardon has been granted or sexual orientation.

The experiences of Quebec in litigating the proper definition of social condition support the need to have some form of statutory definition. This has been explored in detail in Part II and will not be repeated here. There is some danger in a statutory definition in that it can freeze the evolution of the concept and make it less responsive to changing societal conditions. This leads us to conclude that a minimal statutory definition is desirable but that too much detail at the statutory level might be counterproductive.

In the Senate debates on Bill S-11, a definition was proposed although the bill was defeated. The proposed definition reads as follows: “social condition includes characteristics relating to social or economic disadvantage”.⁵²³ This economical definition serves many valuable purposes. It emphasizes that the term social condition has an economic as well as a social component and, in that respect, is broader than a term such as social origin. By referring to the term disadvantage, it also focuses on groups who have not fared well in the current structure and fits with the purposive approach to the interpretation of human rights statutes.

Another message that is sent by even a minimal statutory definition is that the matter is important enough to be defined in the statute itself rather than being left to the more flexible, but less entrenched form of regulations, guidelines or policy directives. It also allows for the elaboration of the statutory definition by subordinate legislation but anchors this process in the statute itself. Having this official recognition in the statute is a matter of symbolic significance to the people who suffer from social and economic disadvantage and are likely to need the protection of the provision.

The difference between a statutory definition and a policy directive on definition is not just a symbolic one. Policy directives or even guidelines under section 27 of the *Canadian Human Rights Act* have no binding effect on courts and are not determinative

⁵²³ Bill S-11, *supra* note 19.

for tribunals. The useful elaboration of what is meant by social condition in the 1994 policy directive from the Quebec Human Rights Commission has had little practical impact or guidance, but has rather merely served to codify past judicial interpretations. Thus, while a policy elaboration of a statutory definition may be useful it is not a real substitute for including at least a skeletal definition in the statute itself.

Since the proposed statutory definition is minimal in nature, there may be a need for further elaboration by way of subordinate legislation. This could serve the purpose of giving greater clarity to the concept of social condition, while still allowing flexibility and room to adapt to changing conditions. One form that such clarification could take is the identification of factors that the Commission and the Tribunal could take into account in determining whether a particular fact situation raises an issue of social condition.

We will not precisely define the elaboration of the statutory definition at the executive level but will make some suggestions by drawing upon the New Brunswick and Northwest Territories models that were discussed earlier. The definition in the *New Brunswick Human Rights Act* reads as follows:

“social condition”, in respect of 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;⁵²⁴

Along with the inclusion of “social condition” as a ground of discrimination, section 1(1) of the *Northwest Territories Human Rights Act* includes a definition of the term:

“social condition”, in respect of an individual, means the condition of inclusion of the individual, 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;⁵²⁵

The Northwest Territories definition is the broader and more inclusive one because it refers specifically to poverty and illiteracy and leaves room for further expansion by the term “or any other similar circumstance.” It thus holds the best potential for advancing the conditions of the poor and coming closer to meeting Canada’s international human rights obligations. However, this section does not include occupation as the New Brunswick one does and, for clarity and consistency with both the New Brunswick and Quebec experiences, we would suggest that it be added to the Northwest Territories definition for this executive level elaboration at the federal level.

The reference in the Northwest Territories definition to not covering a temporary status is consistent with the position advocated by the La Forest Panel.

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.⁵²⁶

⁵²⁴ NBHRA, *supra* note 108.

⁵²⁵ NWTTHRA, *supra* note 124.

⁵²⁶ *La Forest Report*, *supra* note 3 at 111.

While we have some concern with the exclusion of all “temporary” situations at this definitional level, it would still be up to the Commission and Tribunal to determine where to draw the line between a temporary or on-going status, on complex matters such as poverty. For instance, we would endorse the approach taken by the Northwest Territories Adjudication Panel to the concept of “other than on a temporary basis” in the *Mercer* case, discussed above; a literal reading of the concept could have led the Panel to find that periods of unemployment due to the nature of seasonal work was “temporary”, but the Panel instead looked at the socio-economic context of seasonal work in finding that it was “other than on a temporary basis.”⁵²⁷ Furthermore, because this definition is not in statutory form it can be more easily changed than the minimal definition in the statute itself.

An important remaining question is what body should be charged with the elaboration of the definition. One option is to follow the approach adopted in respect to the definition of “undue hardship” for purposes of accommodation under section 15 of the *Canadian Human Rights Act*. In accordance with section 15(3) of the CHRA, it is the Governor in Council (Cabinet) who is authorized to prescribe standards for assessing undue hardship in the form of regulations. The later subsections emphasize the need to devise these regulations in a broad public process that involves extensive consultation. A variation on this model would be to designate the relevant Minister, rather than the whole Cabinet, as the person to make the regulations. A further variation is that the regulation maker – be it Cabinet or the relevant Minister – should only make the regulations on the recommendation of the Canadian Human Rights Commission. There are precedents within the current CHRA for all of these variations.

Giving the power of elaboration to the Cabinet or the relevant Minister ensures a high level of political accountability but also runs the danger of interfering with the perceived status of the Commission or the Tribunal as agencies that are independent and at arms length from government. By virtue of being regulations, they would also be binding on the Commission, the Tribunal and even the courts - if they were so formulated. Elaboration in the form of regulations would also be less flexible than that in the form of guidelines or policies developed by the Commission. Another option would be to have the Commission elaborate the definition either in the form of non-binding policy or guidelines enacted pursuant to section 27 of the CHRA. However, our preference is for regulations rather than guidelines.

The question of where the definition of social condition is fleshed out in detail raises important political issues of control and accountability. On the question of whether the control should rest with the Cabinet or the Commission itself or somewhere in between, our personal compromise preference is for regulations to be initiated at the recommendation of the Commission. However, we do urge that the process be anchored in a minimal statutory definition as the proper foundation for the process.

The New Brunswick experience also offers guidance on how Commission guidelines might be used to give further interpretive guidance to the meaning and application of social condition. The *New Brunswick Guideline on Social Condition* explicitly states that the grounds of discrimination are to be interpreted consistently with Canada’s and New Brunswick’s obligations under the *Charter of Rights* and the

⁵²⁷ Notably, the New Brunswick Guidelines cite “unemployment” as an example of a temporary status that could be recognized as a social condition: *NBHC Guidelines*, *supra* note 113.

International Covenant on Economic, Social and Cultural Rights.⁵²⁸ We applaud this and recommend it at the federal level.

The *NBHRC Guideline* further states that the interpretation of the ground of social condition should follow the Quebec case law on this ground. Like the La Forest Panel, the *NBHRC Guideline* advocates that judicial bodies interpret the ground in accordance with the Quebec case of *Gauthier*⁵²⁹, stating that the NBHRA definition of “social condition”,

...contains an objective element and a subjective element. The objective element is the occupation, source of income or level of education of a person. The subjective element is society’s perception of these objective facts.⁵³⁰

Furthermore, the *NBHRC Guideline* follows a number of Quebec cases in its issuance of the following directive:

According to court and tribunal decisions, only one of the above factors (source of income, occupation or level of education) need be present in order for discrimination on the basis of social condition to occur, but any combination of these factors is also sufficient. A person’s social condition may be the person’s actual social status, or merely a perceived social condition upon which discrimination is based. Social condition may also be a temporary condition, such as unemployment.⁵³¹

These kinds of matters concern the application of the definitions at both the statutory and regulation levels and are in our view, appropriate for Commission guidelines under section 27 of the CHRA. We thus recommend that guidelines in line with the ones discussed (albeit not necessarily in precisely the same terms), be adopted by the Canadian Human Rights Commission. Social condition is thus defined and elaborated in descending levels of detail at the statute, regulations and guidelines levels. This should give comfort to those who are concerned about what social condition means and how it will be applied.

⁵²⁸ *NBHRC Guideline*, *supra* note 113.

⁵²⁹ *Gauthier*, *supra* note 6.

⁵³⁰ *NBHRC Guideline*, *supra* note 113 at 3.

⁵³¹ *Ibid.* at 4. The reference to temporary condition would have to be squared with the exclusion of temporary status in the regulation definition in the Northwest Territories model.

2. *Do Not Include Additional Defences or Justifications*

Under the current *Canadian Human Rights Act*, the major justifications for claims of discrimination are set out in section 15. In common parlance, these are often referred to as defences but they are more accurately justifications in that once a respondent has established one of the justifications listed in section 15 then there is deemed to be no discriminatory practice – thus there is nothing to defend. Section 15 contains broad justifications, such as bona fide occupational qualifications and bona fide justifications, which can apply to most cases and also contains more specific justifications applying to particular situations, such as age or pensions. In addition, section 16 of the CHRA provides a justification for programs or practices that promote affirmative action. Social condition should be added as a ground here as well.

The question is whether the existing justifications are adequate to deal with social condition or whether there needs to be new ones to respond to the potentially broad application of the proposed additional ground of discrimination. Before turning to this question, it is important to note that as a result of the 1998 amendments to the *Canadian Human Rights Act*, section 15(2) requires that a respondent establish accommodation up to the point of undue hardship in order to establish a bona fide occupational requirement or a bona fide justification. Other than the statutory factors of health, safety and cost, section 15(3) designates the Governor in Council (Cabinet) as the body responsible for defining undue hardship in the form of regulations.

As Martha Jackman and Bruce Porter indicate in their report for Status of Women in Canada (submitted to the Review Panel) these broad general justifications can be applied to social and economic rights with only small modifications.⁵³² The critical passage from their report reads as follows:

The permissible defences to a complaint that a social or economic right has been denied on a prohibited ground of discrimination should be stated explicitly under the CHRA. Section 15(1) of the Act now provides that a practice will not be found discriminatory if there is a reasonable and bona fide justification for it. For a practice to be deemed to have a reasonable and bona fide justification under s. 15(2), “it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.”

In the case of private respondents, the “reasonable and bona fide” standard applied to discriminatory practices in other areas would also apply to discrimination in relation to social and economic rights. In the example mentioned above, of a challenge to lending restrictions that disproportionately deny mortgages to women, the banks may be required to alter their credit restrictions or to develop housing loan programs for low-income women, where

⁵³² Jackman and Porter, “Women’s Substantive Equality”, *supra* note 47 at 75-76. They were discussing the even more expansive positive social and economic rights as well as social condition.

such measures would not impose an “undue hardship.” The standard for undue hardship with respect to private respondents is an evolving one. It is significant, however, that in its decision in *Central Okanagan School District No. 23 v. Renault*, the Supreme Court of Canada explicitly rejected the *de minimus* economic test applied by the United States Supreme Court in *Trans World Airlines Inc. v. Hardison*. The Court stated that “the use of the term “undue” infers that some hardship is acceptable; it is only “undue” hardship that satisfies this test.” Boards of inquiry have taken this to mean that, in order to remedy discrimination, substantial expenses may be imposed on private respondents, relative to the resources available to them.

In the case of government respondents, however, the issue of cost as a defence to discrimination is more complex, not only because government resources are virtually unlimited, but because governments are generally balancing competing demands in making any social or economic policy choice. Neither the Canadian Human Rights Tribunal nor the courts have squarely addressed the cost justification under s. 15(2) of the CHRA with respect to governments’ obligations under the Act. As an employer, the government will likely be held to the same standards as the private sector. It is more difficult to assess the notion of “undue hardship” with respect to broader obligations of governments to address disadvantage through social programs and other measures.⁵³³

For present purposes, we are using the excerpt to make the point that the current justifications under the CHRA can be applied to discrimination based upon social condition. While some modifications in analysis may be needed, the general justifications and concepts – such as *bona fide* justifications, accommodation, and undue hardship – can be applied in respect to the proposed additional ground.

Another existing justification which could be useful in the social condition context is section 15(1)(e) of the *Canadian Human Rights Act* which allows the Commission to create justifications in addition to those set out in the statute. Such justifications would, of course, have to be consistent with those in the statute and would have the limited binding effect discussed earlier. Nonetheless, such guidelines could provide an effective means of tailoring justifications to the unique situations that may arise from the addition of social condition. It seems appropriate that the Commission, as the front line agency, be the one to devise specific justifications in response to special circumstances around the inclusion of social condition, rather than to speculate presently about potential problems which may or may not arise.

Our view is that the existing justifications can anticipate potential difficulties with the inclusion of social condition. This position is fortified by the Quebec and Northwest

⁵³³ *Ibid.* at 75 [footnotes omitted]. Of course, we are only recommending the addition of social condition and not positive economic and social rights at this time.

Territories experience. Under these human rights statutes, defences considered in claims of discrimination on social condition are no different from defences used for discrimination based on other grounds.

In our 1999 Report to the La Forest Panel, we recommended adding an additional justification in the form of a *Charter* style reasonable limits clause. There are precedents for this in Alberta⁵³⁴ and Nova Scotia⁵³⁵. However, this position was not adopted by the La Forest Panel nor the legislators in New Brunswick and the Northwest Territories. The effect of adopting such a justification would weaken the protection of human rights generally and does not appear to be necessary. With the advantage of the wisdom of others and sober second thought, we now recommend against including a reasonable limits kind of justification in favour of considering delayed implementation in limited cases as explored next.

3. *Include Time Delays for Public Programs or Legislative Acts*

Because Canada has many complex statutory and administrative programs that make economic distinctions, there is an understandable concern about the litigation that might be triggered by adding social condition as a ground of discrimination. This was a point clearly recognized by the La Forest Panel as follows:

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.⁵³⁶

With this problem in mind the Panel recommended that Cabinet review all programs with a view to reducing social condition discrimination and the creation of programs to respond to the inequalities created by poverty.⁵³⁷ More particularly, the Panel advocated exemptions from the ground of social condition discrimination for certain complex governmental programs, as identified by the government.⁵³⁸ The *La Forest Report* does identify income tax and immigration as two likely candidates for exclusion from review on the basis of social condition because of the complex economic structures implicit in these regimes. The immigration example as a target for an exemption was supported by Citizenship and Immigration Canada when the Department took part in the Panel's hearings, as the following quote indicates.

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

⁵³⁴ *Alberta Human Rights Citizenship and Multiculturalism Act*, *supra* note 72.

⁵³⁵ *Nova Scotia Human Rights Act*, *supra* note 72, s. 6(f)(ii).

⁵³⁶ *La Forest Report*, *supra* note 3 at 112.

⁵³⁷ *Ibid.* at 113 (Recommendation 126).

⁵³⁸ *Ibid.* at 113 (Recommendation 127).

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).⁵³⁹

We agree that the problem identified by the La Forest Review Panel is a real one that must be addressed and the internal examination of programs and the creation of new ones is an excellent idea, which we fully endorse. In respect to the exemption of government sectors subject to a periodic review as recommended by the Panel, we suggest a modified solution that calls for a delayed application similar to how section 15 of the *Charter of Rights* was brought into effect.

It does make sense to have federal government agencies determine which programs, legislative schemes, benefit structures and services are likely to be most significantly affected by the addition of social condition to the CHRA. Under the *La Forest Report* recommendation, these areas (such as the *Income Tax Act* and the *Immigration and Citizenship Act*) are then to be exempted subject to a periodic review, during which the agency must make a case to continue the exemption. This is consistent with deference to the legislative branch on matters of economic and social policy but does require them to justify the continuance of the exemption.

We recommend that as part of the agencies’ reviews suggested by the La Forest Panel, agencies under the direction of the Cabinet make their cases not for an exemption from the social condition regime, but rather for a delay in its application to the particular agencies. The agencies can also make their case for a delay covering a period of time between one and five years. During this time the agencies are to put their houses in order and any extension to the delay would require proof of exceptional circumstances. These delay periods for particular agencies would be granted by Cabinet in the form of regulations.

In New Brunswick, the scope for the exemption of particular programs and legislative schemes is even broader than the one outlined in the *La Forest Report*. In section 7.01 of the *New Brunswick Human Rights Act*⁵⁴⁰ it states:

Despite any provision of this Act, a limitation, specification, exclusion, denial or preference on the basis of social condition shall be permitted if it is required or authorized by an Act of the Legislature.

This New Brunswick approach is simply too broad in providing a blanket exclusion, and a delay in the coming into force of the new human rights provision offers a compromise position between this legislative exemption and the executive level exemption advocated by the *La Forest Report*. It also re-establishes the principle that the provisions of the CHRA apply to everyone under federal jurisdiction in both the public and private sectors. The only question is when it comes into effect. The Commission by way of guidelines and working with the government agencies should assist the relevant bodies in putting their houses in order.

⁵³⁹ *Ibid.* at 106.

⁵⁴⁰ NBHRA, *supra* note 108.

The private sector covered by the CHRA may feel unfairly treated if there is no delay option for them and we recommend that once the provision is added to the CHRA it will only come into effect in the private sector after one year. Furthermore, the Commission should issue some detailed guidelines to assuage the concerns of the private sector (such as banks) that emphasize the position taken in the case law requiring service providers to undertake objective individualized assessments, rather than adhering to blanket policies that may be based on assumptions and stereotypes. The more comfortable people are with the shape and parameters of social condition, the more comfortable they will be in having it apply to them. The Commission needs to play a supportive role in this transition period, similar to their role on other matters such as pay equity and employment equity.

One source of comfort for those concerned about the impact of adding social condition is that the experience to date (mainly Quebec) has been quite careful and cautious and has not strayed far from protecting on the basis of source of income. Furthermore, attacks upon benefit schemes and complex social services based on social condition have not met with much success to date. These limits are explored in more detail in Part II of this study. Thus, we advocate only delay provisions by way of regulations rather than renewable or permanent exemptions.

VII. Concluding Thoughts

There continues to exist a significant problem of poverty in Canada and one of its manifestations is in the form of social condition discrimination. The response of the legislative, executive and judicial branches of the Canadian state has not been adequate, in our view, and the addition of the ground of social condition to the CHRA in a controlled and defined way will be one more tool in advancing the rights and interests of those on the margins of Canadian society. Poverty and social condition discrimination require a multi-pronged approach and a human rights code that includes social condition, is only one prong, but an important one. Parliament can position the Commission to take a lead in this important area and we hope and urge that Parliament has the courage to do so.

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