SHOULD THE CHRA MIRROR THE CHARTER?

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ABSTRACT

This report concludes that the *Canadian Human Rights Act* (CHRA) should not contain an open-ended clause, one that would prohibit discrimination on grounds other than those specifically listed in the Act. One variant of an open-ended clause, an "unreasonable cause" provision, would reintroduce the discredited "distinction" approach to equality issues, with its attendant negative consequences for women's equality. Another version would amend the CHRA to mirror s. 15 of the *Canadian Charter of Rights and Freedoms,* thus likely incorporating into the CHRA the same analogous grounds that courts include in s. 15. It would not effectively address specific inequalities experienced by women, such as those resulting from poverty. Furthermore, it could reinforce several negative features of the current Canadian human rights system, such as valorizing the "prohibited ground" approach to redressing women's inequalities. The report concludes that an open-ended list would cause more problems than it solves. On balance, having an open-ended list will not produce sufficient gains for women's equality to justify the efforts in lobbying for it and litigating its application.

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EXECUTIVE SUMMARY

Since its inception, Canadian human rights legislation, with only several exceptions, has prohibited discrimination on a closed list of grounds. Claimants must show that they suffer discrimination on the basis of one or more of the prohibited grounds, such as sex or race. The *Canadian Human Rights Act* contains 11 prohibited grounds.

In contrast, s. 15 of the *Canadian Charter of Rights and Freedoms* which entrenches constitutional equality rights, prohibits discrimination generally, and then specifically enumerates seven prohibited grounds. A general prohibition is typically referred to as an "open-ended clause" because the impugned grounds of discrimination are not closed. It needs criteria for determining whether a particular exclusion or negative treatment comes within its prohibition. For s. 15, the Supreme Court has developed an "analogous ground" approach, which requires that a ground of discrimination be analogous to an enumerated one before it is included under the open-ended clause.

This project asks whether an open-ended list of grounds in the CHRA would advance women's equality more effectively than the existing approach of a closed list. First, it describes important features of the CHRA and the Charter, and examines the relationship between the human rights statute and the constitutional text. Then it describes and evaluates several versions of an open-ended clause that could be incorporated into the CHRA.

- The CHRA could prohibit discrimination "without reasonable cause," a broad provision which would prohibit any unreasonableness regardless of whether the differential treatment or exclusion was related to stereotypes or prejudice about group membership. From 1973 to 1984, the British Columbia human rights legislation contained a provision of this breadth. The report rejects this approach, in part because of its assumption that any distinction constitutes an equality violation, which would detract considerably from women's equality struggles.

- The CHRA could prohibit any form of discrimination based on stereotypes about group membership, regardless of whether the group meets the criteria for "analogous" established by the Supreme Court. The report examines current Manitoba legislation that contains a "group membership" provision to this effect, and concludes that this option would likely lead to an analogous ground approach.

- In line with the Supreme Court's s. 15 approach, the CHRA could mirror the Charter by prohibiting discrimination on the basis of both enumerated and analogous grounds. The report discusses this option at length, considering six arguments that support or oppose the change. While a mirror provision could ensure the CHRA responds to new developments under the Charter, it would also produce negative consequences. It would reinforce the prohibited grounds approach to resolving inequalities. It could divert resources from the political process, and would likely constitute an inefficient use of administrative resources. Furthermore, it could constrict statutory human rights law, of

which the CHRA is an important element, into the more narrow confines of constitutional equality rights.

The report concludes that an open-ended clause does not produce sufficient benefits to justify adding it to the CHRA. Specifically, it would not effectively address economic inequalities experienced by women.

1. THE CURRENT CONTEXT

The *Canadian Human Rights Act*

First enacted in 1978, the *Canadian Human Rights Act* (CHRA) is an important policy tool and symbolic statement of Canada's commitment to equality. It contains 11 prohibited grounds of discrimination: race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted. These grounds are listed in s. 3 of the Act. With application to women across the country, the CHRA establishes human rights standards for the federal government and for all federally regulated businesses. The latter includes major employers, such as banks, railways and telecommunications corporations. Moreover, the CHRA's content and interpretation influence provincial developments that pertain to women's equality.

The CHRA is a statute. It can be amended by ordinary legislative process, which means Parliament may amend it by a simple majority vote of its members. However, since its original enactment in 1978, the CHRA has been amended infrequently. Many proposed changes have been controversial, and governments have been unwilling to risk further controversy by introducing amendments. The government's reluctance during the 1980s to add sexual orientation to the list of prohibited grounds delayed passage of other pressing amendments, such as an explicit incorporation of the duty to accommodate.

The Supreme Court of Canada has called the CHRA and provincial human rights laws "quasi-constitutional" because they articulate fundamental values and incorporate basic societal goals. Beginning with *Heerspink* v. *I.C.B.C.* in 1982, the Court has given human rights laws a broad and generous interpretation, one consistent with their purpose: remedying discrimination and providing "the final refuge of the disadvantaged and disenfranchised" (*Zurich Insurance Co.* v. *Ontario* 1992: 339). However, the Court has not consistently applied this interpretative principle, rejecting purposive interpretations which commissions and tribunals had developed to remedy the systemic exclusion of gay and lesbians families from employment benefits (*Mossop* v. *A.-G. Canada* 1993) and the erasure of women's contributions to history (*Gould* v. *Yukon Order of Pioneers* 1996).

Women who wish to obtain redress under the CHRA for inequalities must meet two preliminary conditions.

- They must experience inequality in an area of activity covered by the CHRA, such as employment or services that are federally regulated.

- They must show that their inequality fits into the description of one of the prohibited grounds. For instance, they may show that the inequality arises because of their sex or race. This may be done by proving that a decision maker deliberately used a prohibited ground as a reason to deny equal treatment (intentional discrimination). Alternatively, claimants may prove that an ostensibly neutral policy has a disproportionate effect on a

> group defined by a prohibited ground, such as by sex or race (adverse effects discrimination). The concept of discrimination has developed in such a way that all claims under the CHRA require a causal connection between the inequality and at least one prohibited ground.

In many circumstances, the prohibited grounds offer several avenues for filing a complaint of discrimination. Consider the example of a community organization that wishes to challenge a landlord's policy of not renting apartments to lone parents. The policy could be challenged directly as discrimination on the basis of family status, since people with children are suffering a disadvantage. It could also be challenged as discrimination on the grounds of marital status because it denies accommodation to parents who are not in marital relationships, whether legal or common law. Both of these challenges are examples of intentional discrimination. Alternatively, because the majority of lone parents are women, the policy's disproportionate impact on women could be challenged as sex discrimination. Depending on the city's demography, the policy may also have a disproportionate effect on women of a particular ethnic origin or ancestry.

However, in many other circumstances of inequality, the prohibited grounds do not facilitate the filing of complaints as a method of redressing the inequality. In some cases, it may be impossible to correlate the systemic negative treatment with a prohibited ground. Even more problematic are inequalities involving numerous and systemic causes, such as the negative treatment of people without homes or the denial of employment benefits and job security to part-time workers.

Even if women meet the two preconditions for possible redress under the CHRA, many obstacles may come between women and a remedy. They must initiate a claim with the Canadian Human Rights Commission (CHRC). The claim, which is given the pejorative label of "complaint," enters the Commission's investigative process, although it may be settled informally by the CHRC's early resolution process. If not, it proceeds to investigation. When staff complete the investigation, the Commission decides whether to send the complaint to the Canadian Human Rights Tribunal for adjudication. The process is lengthy and often alienating. The Commission's resources have not kept pace with demand for its services, and investigations rarely begin immediately. Funding cuts have led to severe cutbacks of regional offices, which further distance the CHRC staff from regional and local women's organizations. Instead of a regional office that engages in investigation and public education, with linkages to community organizations, the regional office is now one or two people who cannot have an effective presence in the entire region. In addition, procedures have become increasingly formal as respondents have challenged the decision-making process in the federal courts. A combination of factors, from the flood of individual claims to legalistic procedures, has detracted from the CHRC's ability to deal efficiently with complaints (Witelson 1999: 160-175).

This project does not focus on the overall effectiveness of the current commission structure for promoting women's equality. However, it is safe to say that the CHRA has contributed to the general advancement of women's equality, but not as quickly or thoroughly as many

women, and their organizations would like. The individual complaint process does not lend itself well to promoting systemic change. While sometimes it may, as with the *Action Travail des Femmes* v. *C.N.R.* decision (1987), more often it deals only with the circumstances of one person, or a group of people, in one workplace. When the complaint process does deal with large numbers and general policies, the sheer size and importance of the issues quickly bog it down. The pay equity complaints, although not part of this review, are an excellent example of the inefficiencies of the complaint process (Handman and Jensen 1999: 73-81).

Section 15 of the Charter

Section 15 of the Charter is the primary equality provision in the Constitution. Two specific provisions of the *Constitution Act, 1982*, also guarantee sex equality—ss. 28 and 35(4). However, counsel and courts have ignored both guarantees. While s. 28's immunity from the s. 33 override and possibly s. 1's reasonable limits could have been used to assert that sex equality is the most important aspirational goal of the Charter, the courts have not given it this interpretation. Section 35(4), inserted as a result of the 1983 constitutional conference on Aboriginal issues, was designed to eliminate discrimination against Aboriginal women. It has been virtually ignored. For instance, the Supreme Court did not mention it in *Corbière* v. *Canada* (1999) even though the impugned law had a much greater impact on women because of sex discrimination in the old *Indian Act*. Thus, s. 15 remains the principal constitutional vehicle for promoting women's equality. Appendix A contains s. 15 and other constitutional provisions that are relevant to this report.

Section 15 declares that everyone has a right to equality without discrimination. It then lists seven grounds of prohibited discrimination: race, national or ethnic origin, colour, religion, sex, age and disability. Section 1 permits violations of s. 15 to be justified as reasonable limits on equality rights. In the Charter's early days, several commentators argued that because s. 15 did not limit discrimination to prohibited grounds, it was violated by any distinction in a law or governmental policy, with the distinction requiring s. 1 justification (Hogg 1985: 800). This approach attracted many critics, who were fearful of wholesale invalidation of laws.

Since almost every law or policy draws distinctions on some basis, interpreting discrimination to require nothing more than a distinction would open the courtroom door to challenges of every law as violating s. 15. This would place enormous power in the courts. Moreover, it is inconsistent with the understanding of human rights laws as involving remedies for prejudice, stereotypes and historical disadvantage.

In its first s. 15 case, *Andrews* v. *Law Society of B.C.* (1989), the Supreme Court rejected decisively the "distinction" approach. Concerned with the potentially far-reaching and negative impact of the approach, the Court restricted the open-ended clause to grounds of discrimination that are analogous to the enumerated grounds. Under this approach, a court examines the listed or enumerated grounds to determine their shared features, and then compares the examined grounds to the new ground to see if it possesses at least some of the commonalities. The enumerated or analogous grounds approach substantially reduces the

potential sweep of s. 15, but is more consistent with the historical purpose of human rights legislation.
Since *Andrews*, the Supreme Court has added several analogous grounds, including ones of benefit to specific groups of women. See the addition of marital status (*Miron* v. *Trudel*, 1995); sexual orientation (*Egan* v. *Canada*, 1995); and off-reserve band member status (*Corbière* v. *Canada*, 1999). In doing so, it has articulated with greater precision the factors to consider in determining whether a ground is analogous. The most recent decision, *Corbière*, is part of a 1999 trilogy of equality cases in which the Court reaffirms and refines its basic *Andrews* approach. A majority of the Court in *Corbière* stated that the central characteristic of an analogous ground is a personal characteristic that is either immutable or changeable only at unacceptable cost to personal identity. Factors such as historical discrimination against the group, or their discreteness and insularity, are seen to flow from this central concept of immutable characteristics (*Corbière* v. *Canada* 1999: ¶13).

The application of the analogous grounds approach has not assisted groups defined by their economic inequality. For instance, agricultural workers are not an analogous group because they are heterogeneous; occupational status alone is insufficient to constitute an analogous group (*Dunmore* v. *Ontario (A.-G.)* 1997). In the same manner, social assistance recipients are too disparate and heterogeneous to meet the criteria for an analogous group (*Masse* v. *Ontario* 1996*)*, although an early trial court decision held otherwise (*Federated Anti-Poverty Groups of B.C.* v. *B.C. (A.-G.*) 1991). Neither are poor prisoners, because "the economic situation of a group of people does not constitute a ground relating to a personal characteristic" (*Alcorn* v. *Canada* 1999: ¶ 85).

Comparison of the CHRA and the Charter

There are several important differences between the CHRA and s. 15 of the Charter. First, the Charter is an entrenched constitutional document, while the CHRA is a statute. This difference cannot be overemphasized, and has several important consequences. Because the Charter is entrenched, it is much more difficult to amend. Any change to s. 15 needs the approval not merely of Parliament, but of seven of 10 provinces representing over 50 percent of the population. Since the *Constitution Act, 1982*, took effect, there have been no changes to the Charter as a whole, let alone s. 15. The difficulty of amendment was one primary reason for including an open-ended provision in s. 15 because it would permit judicial modifications to the scope of equality rights. By comparison, amendments to the CHRA need only obtain the approval of a majority of voting members in Parliament.

Another consequence of the Charter's constitutional status is that, as part of the supreme law of the land, all other laws must be consistent with it. The CHRA, as an ordinary statute, cannot violate the Charter. Thus, Parliament would be acting unconstitutionally if it enacted a law that directly violates the Charter, such as one imposing a state religion on all citizens. With respect to the CHRA, Parliament cannot enact an amendment in violation of either s. 15 or any other right or freedom. For instance, a law that sets a different minimum wage for women and men would clearly violate the Charter's equality rights.

The Supreme Court has held that a human rights law may violate the Charter if it does not cover a ground that is within s. 15's enumerated or analogous list. In *Vriend* v. *Alberta* (1998), the Court added "sexual orientation," an analogous ground in s. 15, to the list of prohibited grounds in the Alberta human rights law. The Alberta Legislature did not change the Alberta human rights law to add sexual orientation as a prohibited ground, after most provinces had done so in their legislation, and the Court had already held in the earlier *Egan* decision that sexual orientation was an analogous ground. In that context, the Court held that excluding gay men and lesbians from the protection of the Alberta law violated s. 15, and it read "sexual orientation" into the statute's list of prohibited grounds.

Vriend shows that changes to human rights statutes will not be made only by Parliament. The courts can require revision of the CHRA to ensure conformity with constitutional dictates. Whether all anti-discrimination laws, including the CHRA, will need to mirror the analogous grounds in the Charter is discussed in Chapter 3 of this report.

Second, the Charter only covers governmental action, but not action in the private sector. How to distinguish public action from its private counterpart is often controversial, but courts draw the line and exclude from constitutional scrutiny discrimination engaged in by private actors, such as business corporations. In contrast, the CHRA, like its provincial counterparts, covers a broad range of activities engaged in by both governments and private actors. It can have whatever coverage Parliament decides to give it, subject to the limitations of federalism.

Third, the rights in s. 15 of the Charter are subject to the general limitation clause in s. 1, which permits reasonable limits that are prescribed by law. The CHRA does not have a general limitation clause available to justify every violation of the statutory rights. Rather, it contains a number of specific exemptions, exceptions and qualifications to the prohibitions on discrimination. However, there is nothing inherent in a statutory code that precludes adding a general limitation clause. For instance, s. 11.1 of the *Alberta Human Rights, Citizenship and Multiculturalism Act* contains a general justification for violations.

Fourth, courts are the primary enforcement agency for Charter rights. Sections 24 and 52 of the *Constitution Act, 1982*, contemplate courts as the remedial forum for Charter claims. While some administrative tribunals do have the power to enforce Charter rights, the courts jealously guard their authority over Charter rights and remedies, and adjudicate the vast majority of Charter issues. In contrast, the CHRA establishes the Canadian Human Rights Commission and Tribunal as the initial enforcement mechanism for violations of the Act. Indeed, since the Supreme Court decision in *Bhadauria* v. *Seneca College* (1981), individuals and groups cannot bring actions in court to enforce rights in the CHRA. The exclusive process for protection of these rights is the filing of a complaint with the Commission, which will be adjudicated at first instance by a specialized tribunal, the Canadian Human Rights Tribunal. The ordinary courts only become involved with human rights adjudication under the CHRA or provincial legislation if the laws themselves permit an appeal, or if the courts exercise the more limited power of judicial review.

However, the courts have the ultimate authority in the interpretation of the CHRA. When they hear appeals or review applications, they give authoritative interpretations of the provisions. Since their interpretation is final, they can change the scope and meaning of statutory provisions. For instance, they can disagree with a commission about whether gay and lesbian families are included within the ground of family status (*Mossop* v. *Canada* 1993). Or, they can endorse commission and tribunal interpretations, such as the decision affirming that sexual harassment is a form of sex discrimination (*Janzen* v. *Platy Enterprises Ltd*, 1989).

But the influence is not completely one-sided. The wording of human rights codes and the interpretative principles developed by commissions and tribunals have influenced the content and interpretation of s. 15 (*Andrews* 1989: 175). The CHRA and other codes have been a source of guidance and inspiration for giving meaning to s. 15. For instance, the Supreme Court looks at whether a ground is included in human rights statutes across the country as an indication of whether it ought to be an analogous ground (*Egan* v. *Canada* 1995: 675; *Miron* v. *Trudel* 1995: 748).

It is important to keep in mind that one impetus for creating commissions and specialized tribunals was the unsympathetic stance of the ordinary courts to claims of discrimination. Legislatures created commissions and tribunals to provide more effective redress for rights violations. Legislatures have taken the lead in amending and passing laws to promote equality, including adding new grounds of prohibited discrimination, such as sexual orientation, and, in many provinces, receipt of public assistance. It has been legislative creations—commissions led by community organizations, unions and women's groups—which have implemented some of the most progressive interpretations of human rights laws. Two examples include the acceptance of sexual harassment and pregnancy discrimination as impermissible forms of sex discrimination. The courts endorsed these developments; they did not initiate them.

This report assumes that in the foreseeable future the Charter will not be amended, nor will the Court's interpretation of s. 15 change dramatically. With respect to the CHRA, since its revision is the impetus of this research, one cannot assume that its scope and administrative structure will remain unchanged. However, one must keep in mind that any change to the substantive scope of the CHRA will impact the Commission and the Tribunal.

2. OPEN-ENDED CLAUSES IN HUMAN RIGHTS LEGISLATION

Options for the CHRA

In assessing the likely contribution of an open-ended list to women's equality, we asked the following specific questions.

- Would the proposal enhance the CHRA's capacity to ameliorate persistent patterns of inequality that it has addressed since its inception, such as sexual harassment in the workplace and pay inequities?

- Would the proposal ameliorate persistent patterns of inequality that have not been addressed by anti-discrimination legislation? We choose poverty as our example of a persistent pattern of inequality. Specifically, would an open-ended clause assist women in challenging policies and decisions that have a negative impact on poor women?

- Would the proposal provide more accessible avenues of redress for inequalities suffered by individual women or by particular groups of women?

There are several methods of adding an open-ended clause to the CHRA. Each would facilitate a greater number of possible claims under the CHRA. The first is an analogous grounds approach, which is the narrowest change. The second is a middle approach. The third is an unreasonable cause approach, which is the broadest, with the largest number of actions that can be potentially challenged as discrimination. Appendix B contains draft statutory language for each option.

Analogous Ground Approach
Change the wording of the CHRA in such a way that it mirrors the wording of s. 15 of the Charter. This result could be achieved by inserting the Charter's open-ended wording into relevant sections of a new CHRA. If the current structure of the CHRA was retained, the list of prohibited grounds in s. 3 could be redrafted to replicate the Charter wording. The substantive provisions, such as s. 7 that prohibits discrimination in employment, could be left unchanged. Alternatively, the entire CHRA could be recast in positive language that gives everyone a right to equality, which is the current Ontario model. The positive right could then be worded in the same way as s. 15. Both variations are contained in Appendix B.

Group Membership Approach
Include a definition of discrimination that makes no mention of prohibited grounds, but does restrict discrimination to an individual's actual or presumed membership in a group. The option would not permit any claim of individual unfairness, but would be broader than the analogous ground approach under s. 15. This is the approach currently contained in the *Manitoba Human Rights Code*.

Unreasonable Cause Approach

Define discrimination as any distinction or denial to a person or class of persons that cannot be supported on reasonable grounds, and then exclude a number of grounds as unreasonable, such as sex, race and religion. In essence, any distinction would constitute discrimination unless reasonable cause existed for the distinction. Membership in a group defined by a personal characteristic, or subjected to stereotyping or historical disadvantage, would not be an essential feature. This approach was in effect from 1973 to 1984 in British Columbia, and is akin to the any distinction approach rejected by the Supreme Court for s. 15 claims.

An Unreasonable Cause Provision: The B.C. Experience

From 1973 to 1984, human rights legislation in British Columbia prohibited discrimination "without reasonable cause." Appendix C contains a description of the British Columbia experience, most of which occurred before enactment of the Charter, and all of it before s. 15 took effect in 1985. Thus, the Commission's handling of the clause was not influenced by the analogous ground approach developed by the courts under s. 15.

Initially, the B.C. Commission interpreted the without reasonable cause provision very broadly, not restricting it to circumstances that were analogous to the enumerated grounds in the Code. However, the Commission, and boards of inquiry that heard the complaints, gradually developed an analogous ground approach.

The historical record clearly indicates that controversy about the Commission's application of the open-ended clause led to political backlash, and contributed to the demise of the Commission and the Code. The British Columbia Legislature abolished the Commission in 1984, and replaced the Code with a modest *Human Rights Act* (1984) which did not contain the without reasonable cause provision.

The B.C. experiment offers several insights for those considering the future shape of the list of grounds in the CHRA.

- The provision gave the commission and boards of inquiry a powerful tool to advance the development of human rights law. Long before appearing in the closed lists of other jurisdictions' human rights acts, grounds such as sexual orientation, criminal charge, pregnancy and disability were protected under the without reasonable cause provision.

- The provision caught incidents of discrimination that, even today, would still be outside the protection of closed-list provisions. For example, in spite of the fact that they were denied service because of stereotypes, the complainants in *Oram and MacLaren* (1975) would have difficulty today arguing that their appearance falls under any enumerated ground.

However, the B.C. experience also points out considerable weaknesses with an unreasonable cause approach.

- One problem that emerged early on was that the provision could easily turn into a catch-all for general unfairness, one that would catch a very large number of actions, many only marginally significant. For example, the *Lopetrone* case (1976), which concerned whether the employer had properly assessed individual merit, pushed the limits of what reasonably should be protected by anti-discrimination legislation, and bordered on plunging the Commission into adjudicating fairness in employer decision making. However, the Commission and boards recognized the undesirable potential of this approach, leading the board in *Jefferson* v. *Baldwin and B.C. Ferries* (1976) to adopt "categories" or analogous ground-type reasoning, which eliminated many claims. As well, the legislative creation, in 1979, of the provincial Office of the Ombudsman, with its mandate of addressing unfairness complaints against government, diverted some pressure on the Commission to respond to situations of unfairness.

- The without reasonable cause provision did little to address the problems of those who suffered discrimination on grounds subsumed by the phrase "social condition." Indeed, while the Commission received a few complaints on the grounds of source of income, family status, financial status and educational requirement, none of these ever made it to a board of inquiry. It is unclear why this is so. Perhaps the Commission was so swamped by the large number of claims on other grounds that social condition assumed low priority. It may also be that the Commission, in the spirit of the times, considered social condition to be a non-ground. But this is speculation; in this case anyway, an open-ended clause did not extend to social condition.

- Although one would think that the without reasonable cause provision would encourage boards and courts to consider multiple grounds and intersectionality in adjudicating complaints, there is no evidence that this, in fact, took place.

- While the without reasonable cause provision did promote progressive development of human rights law, some of this development was well ahead of the community consensus needed to sustain it. While it may be tempting to dismiss the repeal of the Code and abolition of the Commission as isolated acts of an especially hostile right-wing government, a significant proportion of B.C. society supported those actions. As a result, the clock was turned back, with some groups that suffer discrimination losing protection that would only be restored nearly 10 years later.

- Even though many of the grounds the B.C. Commission dealt with are now enumerated ones, one likely consequence of adding an unreasonable cause provision to the CHRA is that the CHRC would be swamped by complaints. A large number of aggrieved persons would file complaints with the Commission because there is no federal ombuds office to deal with instances of governmental unfairness in its dealings with individuals.

We conclude that adding such a ground to the CHRA is undesirable. It is akin to the "any distinction" approach to s. 15 of the Charter, and would produce a similar result of potentially requiring a reasonable justification for every action or decision in the public and private sectors. While, in the abstract, a requirement of reasonableness may seem harmless, in

practice it presents many difficulties. It would likely do nothing to address persistent patterns of inequalities, and would divert resources and attention from important issues. It would render the current system more inaccessible, merely because of the large number of complaints that could be expected. The option falls short on each of the criteria of assessing a proposal's effectiveness in addressing women's inequalities.

A Group Membership Approach: The Manitoba Experience

The *Manitoba Human Rights Code* contains an open-ended definition of discrimination. Appendix D reproduces the statutory provision, s. 9(1)(a), and describes in more detail the Manitoba experience. The number of claims has always been very small, and in the past few years, most have involved discrimination on the basis of criminal record. The Commission does not apparently engage in any publicity about the clause and its possible uses.

The Manitoba Commission has adopted a cautious approach to the unspecified grounds provision. In the words of one official, the Commission does not see itself as an "unfairness commission" that deals with any and all forms of injustice. It directs its resources toward dealing with discrimination based on the enumerated grounds. However, its policy is not quite as restrictive as the analogous grounds approach under the Charter. To come within an "unspecified ground," a person need only meet the condition of proving "differential treatment which is based on a stereotypical view of a group of persons" (Manitoba Human Rights Commission 1987). By contrast, the Supreme Court's approach to s. 15 includes stereotypes as merely one factor, and not the critical determinant, in assessing whether an unenumerated ground will become an analogous one (*Corbière* v. *Canada*, 1999: ¶ 59-62).

If a version of s. 9(1)(a) were added to the CHRA, the Manitoba experience would likely not be replicated at the federal level. For one thing, the CHRC would likely face enormous pressure, especially from large corporations, to use analogous grounds reasoning from the beginning. The Manitoba Commission issued its policy before the Supreme Court had developed criteria for analogous grounds under s. 15. Moreover, the CHRC would likely receive more complaints than its Manitoba counterpart, which does not publicize the availability of an unspecified ground. Merely adding an open-ended clause to the CHRA would, in itself, generate considerable publicity. Even if it did not, national organizations and unions would be aware of the unspecified ground and would test its content and limits by filing complaints. With the tendency of several federally regulated employers to seek judicial review of commission decisions, one can reasonably expect litigation. The combination of a large number of complaints, litigation and judicial review would likely produce criteria similar to the Court's analogous grounds approach, if only to provide some certainty for the private sector.

If this supposition is correct, and a Manitoba-style provision would become a non-constitutional version of analogous ground, then the arguments in Chapter 3 of this report would apply. If, on the other hand, it remains broader than the analogous grounds approach, then it may be used to advance women's equality in ways that extend beyond constitutional understandings of equality. For instance, the Commission and Tribunal could recognize

negative treatment of part-time workers as a prohibited form of group-based discrimination. Many problems would remain, however, such as employer uncertainty about the extent of their obligations, which cannot be easily addressed by policy statements.

3. ANALYSIS OF AN ANALOGOUS GROUND PROVISION IN THE CHRA

The preceding two sections have discussed two of the three options. The unreasonable cause approach has been rejected because of its limited utility in addressing women's inequality. The group membership approach may offer more possibilities, but may lead to an analogous ground approach. The remaining alternative is the analogous grounds approach itself, in which the CHRA would replicate the open-ended ground in the Charter. However, putting the s. 15 words into the CHRA would not, in itself, produce the same criteria that the Supreme Court has developed for constitutional cases. Unless the amendment also stated specifically that its clear intention was to incorporate the s. 15 jurisprudence, the Commission and Tribunal would have scope for extending protection beyond the boundaries of s. 15, merely because the differences between the Charter and the CHRA could justify different criteria. Departing from the s. 15 criteria could produce the same results as the group membership approach discussed above.

This section addresses merits and disadvantages of having an open-ended clause in the CHRA, either one that exactly replicates the constitutional criteria for an analogous ground or something a bit different. It assesses the likelihood that any interpretation of a mirror provision would depart from the Court's interpretation of s. 15.

Responding to New Developments

Open-ended provisions are frequently advocated because they accommodate future developments. In the constitutional negotiations leading up to the Charter's enactment, the primary argument in support of an open-ended clause in s. 15 was the need for equality guarantees to respond to changing circumstances. Constitutions endure for a long time, and are not easily changed. The open-ended clause would permit the constitutional guarantees of equality to respond to inequalities that could not be foreseen in 1982. A similar argument can be made with respect to the CHRA. An analogous ground provision would permit commissions and tribunals to incorporate new developments in human rights protection, without the necessity of seeking amendments to the Act. While amending the CHRA only requires the ordinary legislative process, busy legislative agendas and other factors have combined to make amendment of the CHRA an infrequent occurrence.

Adding an open-ended clause would remove the argument that Parliament does not intend commissions and tribunals to interpret the CHRA in an expansive manner that keeps pace with understandings of equality. Indeed, the argument would be the reverse. By including an open-ended clause, Parliament intends commissions and tribunals to address inequalities that arise in new ways—ones that were not contemplated by Parliament at the time of enactment.

With an analogous ground provision, the CHRC could return to its roots as an agent of social change. It could address new problems and, as the B.C. experience illustrates, act as a catalyst for social justice. However, the Manitoba experience shows that there is no guarantee this will happen. Much depends on the resources of the CHRC, and the political

backing it receives for its efforts. Moreover, if the Commission adopts the s. 15 criteria for analogous grounds, its ability to respond to new injustices would be restricted, at least in part or initially, by the Court's jurisprudence.

The extent to which an analogous ground provision in the CHRA would permit flexibility and innovation depends, in large part, on whether commissions and tribunals would use it to argue for analogous grounds that were *not* covered by the Charter. If they did, then the CHRA's analogous ground could prohibit different forms of discrimination. These new grounds could be slowly incorporated into the Charter, continuing the symbiotic relationship between statutory codes and s. 15. Otherwise, the CHRA simply becomes another s. 15, interpreted and controlled by the courts, but with application to the private sector.

Women also need to be concerned, however, with not only how well an analogous ground provision would respond to new developments, but also how well it will respond to old and persistent inequalities. An analogous ground provision in the CHRA does not appear to do very much for women who live in poverty, at least not immediately. If receipt of social assistance does not qualify as an analogous ground under the Charter, then it will be a long, expensive and risky battle to have poverty recognized as an analogous ground under the CHRA.

Avoiding an Unconstitutional Gap

One argument in support of a mirror provision in the CHRA is that the Charter itself compels this result. Because the CHRA cannot violate the Charter, any discrepancy in coverage between the Charter and the CHRA would be unconstitutional, and the courts would read into the CHRA the absent ground, as occurred with sexual orientation in *Vriend* v. *Alberta* (1998). Over time, the CHRA would come to mirror the Charter in any event, so it might as well be done now to avoid expensive litigation. Adding an open-ended provision will ensure that any new Charter analogous ground will be automatically included within the CHRA, without the need for expensive litigation.

This argument has been recently advanced in support of changing a provincial human rights law. In his 1994 report on human rights legislation in British Columbia, Professor Bill Black argues that a human rights code should incorporate analogous grounds in order to ensure conformity with s. 15 of the Charter (*Report on Human Rights in British Columbia*, 1994: 163). He points out that no one can identify with certainty the grounds the courts will include as analogous in s. 15 of the Charter. From this uncontestable fact he concludes:

> The surest way to avoid an unconstitutional gap in the Human Rights Code would be for the Code to be worded in a way that recognized analogous grounds. The Human Rights Tribunal, taking guidance from the courts, could then interpret the Code in a manner consistent with the equality guarantees in the Charter.

Black recommends identical wording in the statute in order to "signal to the courts an intent to adopt the approach taken in the Charter." Presumably, once the courts find an analogous ground, it would come within the CHRA as well, and would then apply to the private sector. For instance, a private actor could no longer use citizenship or off-reserve residency as a reason to differentiate between customers. Even if Parliament falls far behind in amending the CHRA to take account of new human rights developments, the analogous ground provision would ensure that statutory human rights protection would be at least consistent with Charter standards.

Assessing the merit of this argument requires close scrutiny of its underlying assumptions. First, it assumes that the omission of an analogous ground in a code, or in our case the CHRA, would be unconstitutional. That is not invariably, or even frequently, the case. In only one case has the Supreme Court ruled that the omission of an analogous ground—sexual orientation—from a human rights law violated s. 15 of the Charter (*Vriend* v. *Alberta,* 1998). The Court explicitly rejected the argument that human rights legislation would be forced to mirror the Charter in all cases. "Whether an omission [from a human rights code] is unconstitutional must be assessed in each case, taking into account the nature of the exclusion, the type of legislation, and the context in which it was enacted" (1998: ¶ 106). Unconstitutionality is not a mechanical determination that merely involves checking to see if a statute mirrors the Charter, but depends on many factors.

In their assessment of unconstitutionality, the courts will be sensitive to the fact that the Charter is addressed to government action, while human rights law covers both the public and the private sector. Adding a new analogous ground to human rights codes will have potentially far-reaching consequences in the private sector. Section 1 is available to the government, but there is, at the moment, no equivalent provision in the CHRA. One would think that if there was a mirror provision, a s. 1 would need to be added, perhaps something akin to the "reasonable and justifiable contravention" provision in s. 11.1 of the Alberta legislation.

One can reasonably surmise that the courts will be extremely cautious about requiring that every new analogous ground in s. 15 be added to the CHRA. If it did so, then the s. 15 guarantees of equality would no longer be restricted to the public sector, as the court has held generally with respect to the Charter. Rather, everything in s. 15 would apply, through the medium of the CHRA, to the private sector. It is permissible, of course, for Parliament to expand the obligations people owe each other in the private sector. But the court will not lightly apply constitutional standards to private actors. Indeed, a mirror provision in the CHRA might make the courts more cautious about finding analogous grounds in s. 15, for fear of their automatic transplantation to the private sector.

Reinforcing the Prohibited Ground Approach

An open-ended list may reinforce the belief that the prohibited ground approach is the best way of addressing inequality problems. The mere existence of an open-ended clause may lead to the framing of inequality problems in the language of prohibited grounds. For instance, one

could argue that part-time employment status is a prohibited ground, and file a complaint that the differential treatment of part-time workers by corporations violates the CHRA.

Reality is that the complaint system is almost certainly not the best method of redressing the inequalities suffered by part-time workers. Regulatory changes to labour standards legislation would do more good, over a much shorter period of time. Overall, a regulatory model has many advantages over a complaint system for the promotion of women's equality. The essence of a regulatory model is to place positive obligations on employers or service providers to take certain measures or engage in particular conduct. One successful example of a regulatory approach to equality is the uniform building accessibility standard. Builders only receive building permits if they comply with the accessibility standards. While the standard is not comprehensive, and has not been perfectly applied, it has had a much faster and more widespread impact on building accessibility than even the most efficient complaint system could ever muster. Other examples of regulatory models include the federal *Employment Equity Act*, which requires all large federally regulated employers to develop equity plans, and the Ontario *Pay Equity Act*, which requires all employers to implement pay equity.

An analogous ground provision, of course, would not preclude the creation of regulatory methods to combat systemic forms of inequalities. However, the concern is that an open-ended clause would further privilege this approach as a strategy for addressing inequalities, when it does not deserve to be so. Regulatory methods can deal with the problem of multiple causes of inequalities. One significant limitation on a prohibited grounds approach is that it requires an identifiable actor—a wrongdoer who engaged in the discriminatory conduct. Yet many inequalities result from the combined actions and omissions of many institutions and individuals.

Reinforcement of the prohibited grounds approach may only exacerbate the deep-rooted tendency of courts and commissions to downplay the phenomenon of intersecting grounds. Iyer has pointed out how a "listed grounds" approach tends to force women to categorize their experiences as being either race discrimination or sex discrimination or some other form of discrimination. It does not permit women who suffer discrimination on a number of grounds, simultaneously, to have their experience reflected in the case law or in analytical methods (Iyer 1993).

One would think that an open-ended clause would assist women who suffer inequality on a number of grounds. They would not need to slot their experiences into one category, but could simply argue discrimination. However, the mere existence of a list of prohibited grounds seems to pull commissions and courts into a mind set that focusses on a singular characteristic, rather than a number of them, or the results of combining a number of them. For instance, both the Manitoba Commission, and the old B.C. experience, failed to use the open-ended clause in this way, focussing instead on a group characteristic (singular) rather than characteristics (plural).

Diverting Resources from the Political Process

The potential availability of new grounds under an analogous ground provision may divert women's efforts to reform social and economic policy away from the political process, where success typically produces structural and more far-reaching changes. Using the complaint process, on the other hand, even if it is a bit more expansive because of an analogous grounds approach, typically produces ad hoc changes to isolated policies. Over time, the complaint process may have a systemic effect, but it always takes longer to generate widespread change. One need only look to the example of ending discrimination against women in hiring and promotion. Employment equity legislation achieves that goal much faster than even the most efficient complaint process.

Legislatures not only have the power to introduce regulatory systems for achieving equality. They also can ensure that the CHRA is kept up to date. Historically, the political process, on balance, has been more progressive than the courts. For instance, the first recognition of sexual orientation as a prohibited ground did not come from courts, but from the Quebec National Assembly, which added sexual orientation as a prohibited ground to its human rights law in 1977 (*Charter of Human Rights and Freedoms*). Commissions took complaints of sexual orientation, and brought the injustice of this form of discrimination to the public eye. However, this is not to say that legislatures have always been at the forefront of human rights development. One need only remember the Alberta government's dogged refusal to add sexual orientation to its human rights law. These highly publicized examples detract from the larger picture—changes to human rights have been led by legislatures, not by courts.

These concerns replicate the concerns that many women's groups had with passage of the Charter in 1982.

An open-ended clause may make Parliament even less willing to engage in changes to the CHRA. Legislators who do not wish to respond to demands from community groups may say that change can come through the tribunal and court process, by a group arguing discrimination under the open-ended ground. Parliament may be prepared to respond to negative court decisions (as it did with the multiple grounds provision, s. 3.1 of the CHRA, which responded to *Mossop*) but may be less inclined to take a proactive role in implementing new directions in human rights law. Politicians can wash their hands of the responsibility for change by pointing to the open-ended ground—"make your argument to the commission and courts" may be their response.

Even if Parliament has the desire to change the CHRA or introduce other legislation to correct inequalities, a mirror provision in the CHRA may lead it to believe it can only make changes consistent with the courts' approach to analogous grounds. For instance, perhaps one argument for not proceeding with protection for people who are homeless would be that they are not an analogous group. The argument would be that they are not one of the groups that human rights laws, including s. 15, traditionally protect. Overall, there is a risk that the more the CHRA looks like the Charter, the less amenable it will be to progressive interpretations and amendments. It will become a Holy Grail, untouchable and unchangeable.

Legislative changes are not easy. They require political will and a momentum for change that must be built by lengthy political campaigns involving education, media relations and negotiation. When an amendment is finally passed, often with strong and vocal opposition, the government and other key players may not be committed to its full implementation. And, legislation may become highly unpopular (as with the old B.C. unreasonable cause provision) and be reversed. Moreover, to emphasize the role of legislatures in protecting rights may seem antithetical to the core concept of human rights as protections of minorities from oppressive treatment by majorities. After all, rights are entrenched, and placed above the ordinary political fray, to lessen the impact of politics on fundamental values. And, court decisions can become widely accepted and assist in building a consensus. None of these facts, however, detracts from the two points we argued above. First, legislatures have done more to promote social justice and women's equality than courts. Second, adding an analogous ground provision will have consequences for the political process, which women must consider in deciding whether to advocate for it.

Inefficiently Using Commission Resources

Whether or not a mirror provision in the CHRA would have a serious impact on the allocation of CHRC resources depends very much on the Commission's policies regarding the types of complaints it will accept and argue before a tribunal. If it decides to interpret the provision broadly, and depart from the Court's narrow criteria for an analogous ground, it will need to direct resources toward a larger number of complaints. Not all of the complaints that will be received under an analogous ground provision will deal with women's equality concerns. The resources will be directed toward other grounds or injustices that do not affect women directly or that support more advantaged groups in society. As well, resources will almost certainly need to be directed toward litigation because, in significant issues, the question of a new open-ended ground will end up in the Supreme Court. At the end of the day, fewer resources will be devoted toward the existing inequalities that the CHRA has always addressed, such as sexual harassment in the workplace and pregnancy discrimination.

It is not a complete answer to this problem to say that the commission's budget should be increased. Its resources will always be limited, and the complaint process will always expand to take up available resources. Every commission makes priorities about how it will handle complaints. An analogous ground provision will consume a particular portion of commission resources, and the question for women is whether the returns justify the expense.

The problem of diverting resources, and opening the door to considerable litigation, is exacerbated greatly if the CHRC loses its exclusive power to send complaints to a tribunal. The Manitoba Commission is able to keep a tight lid on its open-ended clause because it acts as the gatekeeper for the enforcement of rights in the Manitoba Code. If this aspect of the CHRC's power is changed, then an open-ended clause presents a greater possibility of opening a Pandora's box of uncertainty and unwelcome consequences. An open-ended clause in the hands of a maverick tribunal or judge—from the left or the right of the political spectrum—could generate considerable political controversy and expensive litigation.

Women's groups may find they are in court opposing regressive interpretations of the CHRA's open-ended provision, just as they are in court now defending existing laws and policies from Charter challenges.
Even if the CHRC continued to control access to the complaint process, however, its decisions regarding the open-ended clause would be subject to judicial review.

An open-ended clause, when coupled with elimination of the CHRC's gate-keeping function, would produce considerable uncertainty with human rights law. It is hard to imagine that business and employers would appreciate such a degree of uncertainty. Moreover, the greater the uncertainty about the reach of the CHRA, the greater the likelihood of opposition to it.

One symbolic message of an open-ended ground is that the unenumerated grounds are as serious as the prohibited grounds. Both the CHRA and s. 15 already send the implicit message that the prohibited grounds produce equal amounts of harm, and of the same type. An open-ended clause would send the additional message that other unenumerated grounds are also of equal importance. While this may not be the case, it will be difficult for the Commission not to devote resources to them.

Statutory Law May Become Too Much Like the Constitution

If the CHRA mirrored the words of s. 15, it may cause commissions and tribunals, as well as Parliament, to define discrimination in the way courts have defined it under the Charter. We already see evidence of the Charter understanding of discrimination beginning to dominate tribunal interpretation of statutory codes. For instance, many tribunals routinely quote and apply the *Andrews* definition of discrimination. If the words of the CHRA mirror the Charter, this unfortunate tendency would be exacerbated.

Why would this tendency be unfortunate? Because commissions and Parliament are not constrained by theory or precedent in describing a problem or its remedy. They don't need to make their definition of discrimination or inequality fit a predetermined model of equality (the discrimination approach) or precedent. They can be bold. They can define inequalities, for instance, as not requiring a comparison; they can define it as oppression or abuse, or exclusion, even if the comparison group cannot be found (as with pregnancy discrimination). They can respond to systemic injustice as it appears in a complex, post-industrial society. Under the Charter, however, courts respond to allegations, not of injustice, but unconstitutionality, and they must make their responses fit into a line of precedent and tradition. The danger is that if the CHRA mirrors the Charter, tribunals and legislators may tend to believe they are dealing only with another type of Charter right, and be loathe to take the innovative steps necessary to achieve social justice.

Having the CHRA mirror the Charter may enhance the movement toward seeing the CHRA as a quasi-constitutional document, and thus more impervious to legislative change, and more subject to judicial control and interpretation. At the moment, the CHRA is quasi-constitutional because it announces fundamental values and binds the government in its legislative capacity, but it is only quasi because it can be amended in the ordinary manner.

However, if it is seen as more like the Charter, it becomes more subject to the control of judges, rather than commissions and politicians.
Whether it is a good thing to have the CHRA become more like the Charter depends on one's view about whether the Charter has benefited women's equality. The record here is spotty, to say the least. Day and Brodsky (1989) concluded that from 1985 to 1989, each step forward under the Charter was accompanied by two steps back. It is clear that defending beneficial laws and policies from Charter challenges, such as the rape-shield provisions of the *Criminal Code*, has absorbed a great deal of energy and has not always met with success (Razack 1991: 109-120).

From a larger perspective, having the CHRA replicate s. 15 further entrenches the Charter's particular vision into Canadian law. As Bakan (1997: 45-62) argues, s. 15 cannot adequately address social and economic inequality because of the very structure and ideology of liberal rights. For instance, rights have a negative orientation: they tell actors—whether governments or others—what they cannot do. As well, they have a dyadic structure. They focus on two actors—the complainant and the respondent—leaving out multi-party relationships and ongoing processes that involve many individuals and organizations. While the CHRA is primarily a liberal document, further reinforcement of its liberal aspects ought not to be undertaken without clear benefits.

Only the courts may add analogous grounds to the Charter. Having tribunals and commissions defer to the analogous grounds in the Charter means they will be deferring to the courts and to judicial understandings of equality. History has shown that, in general, judges are not progressive with respect to their understanding of rights and their sensitivity to equality problems. Indeed, as this report has already noted, it was judicial insensitivity that prompted the establishment of commissions and specialized tribunals. Although the enactment of the Charter in 1982 may have altered the judicial approach to human rights, there is still no evidence that judges are more sensitive to inequality problems. That judges see themselves as the guardians of rights is the message of the *Cooper* case and the strict review that judges have decided to exercise over tribunals and commissions (*Cooper* v. *Canada* 1996). But there is no evidence that judges have a *better* understanding of inequalities, which would cause women to put faith in judges rather than legislators or administrators.

4. CASE STUDY: THE INEQUALITY OF POVERTY

Let us apply these arguments to the inequalities experienced by poor women. Would an analogous ground provision assist poor women in combating discrimination? First, they would need to show that the inequality they experience falls into the federal sector and is at least prima facie within the CHRA. Here one needs to be specific about the particular problem the CHRA is to address. Is it the non-availability of banking services? Is it an inadequate minimum wage? Let us consider the latter, since a challenge would involve a federal law and therefore appears, at least prima facie, to avoid the vexing issues that arise in the private sector. Some poor women make minimum wage working in federally regulated businesses, and their wage is so low they must work at several jobs, rely on food banks and, if possible, engage in other strategies to feed and house themselves and their families. Could they use the new CHRA, with an analogous ground provision, to challenge the low minimum wage? Because the challenge is to a federal law, and not to the action of a private corporation, such as a bank, it could also be brought under s. 15 of the Charter. The advantage of the analogous ground provision in the CHRA is that by filing a complaint with the CHRC, women would not need to initiate their own expensive court action. Once the Commission accepts the complaint, it bears the cost of proceeding, a big advantage for poor women.

The women need to convince the CHRC that all people earning the federal minimum wage are an analogous group. Or, they could argue that poor people are an analogous group. If the Commission accepts either argument, it will need to convince a tribunal that the low minimum wage constituted discrimination on the basis of a ground that falls under the open-ended clause in the CHRA. If that clause has been interpreted as replicating the s. 15 criteria for analogous grounds, the Commission will have an uphill battle. If social assistance recipients are not sufficiently homogeneous to constitute an analogous group, neither will minimum wage earners.

One problem with treating poverty as an analogous ground is that it is then labelled as a personal characteristic, for that is the hallmark of an analogous ground. The label feeds into the myth that poverty is an intrinsic condition, one inherent to the person rather than the result of economic and structural circumstances.

If the hurdle of fitting within the criteria for the open-ended ground is overcome, then the tribunal must accept that the low minimum wage constitutes discrimination. There is no doubt that the wage does not give people sufficient income to live decently and with dignity. Is that sufficient to prove discrimination? Would there need to be an appropriate group for comparison? If so, which group is used for comparison purposes? People who earn the provincial minimum wage? Some other group?

If the women overcome these hurdles and prove discrimination, the remedy they seek would be a higher minimum wage. But under s. 15, the courts have not required positive obligations on governments to implement equality, with perhaps the exception of the *Eldridge* case, in

which the cost of equality was very small (*Eldridge* v. *B.C. (Attorney General)* 1997). Moreover, here there is an additional twist. The cost would not be borne solely by taxpayers, as in *Eldridge*, but also by federally regulated businesses, which would be required to pay a higher minimum wage. Given that courts are loathe to interfere with economic policy at the best of times (*Masse*), it is highly unlikely that it would order the federal government to increase the minimum wage when such an order would affect thousands of companies and businesses across the country. The viability of increasing the wage is an economic decision that courts will leave with legislators.

We see nothing in adding an analogous ground provision that would overcome the traditional deference courts pay to legislators on economic questions. Women may be able to file a complaint, but their chances of success would be minimal. And would the CHRC's time and energy have been well spent, when the chances of success are so low?

This brief analysis is incomplete and perhaps overly negative. It is designed to show that adding an open-ended ground to the CHRA is not a panacea for social problems. Any prohibited ground approach has limited utility in addressing systemic problems, and if the problem stems from economic inequalities, an open-ended clause will do little to change it.

5. CONCLUSION

This report concludes that, on balance, there is little advantage in adding an open-ended clause to the CHRA, and considerable risk associated with it, such as spreading resources and energy too thinly, and further solidifying the power of the courts and their perspective on equality. However, let us assume that we have grossly overstated the risks and dangers, and that the benefits would indeed outweigh the risks. We conclude that the benefits are not sufficient to justify women's groups lobbying for the addition of an open-ended clause. Other changes of much greater magnitude, such as adoption of a regulatory approach to some inequality problems and reform of the complaint process, would make more of a difference to women's lives.

The research question this report addresses may seem mundane and obvious. However, we choose this question because it illustrates how a relatively innocuous change—just adding a few words that are already in the Charter—could have considerable ramifications on human rights practice, not just law. The central focus of legislative revision ought to be on how a change will work in the daily practice of implementing the fundamental values that animate human rights, and its assistance in improving the lives of women on a daily basis. Otherwise, one runs the risk of repeating what the Charter means today for most women— high-sounding words that are, their promise notwithstanding, nothing but words.

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APPENDIX A: SELECTED CONSTITUTIONAL PROVISIONS

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

35. (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

APPENDIX B: OPTIONS FOR THE CHRA – POSSIBLE WORDING

Current Provision in the CHRA

3.(1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.

(2) Where the ground of discrimination is pregnancy or childbirth, the discrimination shall be deemed to be on the ground of sex.

Here is an example of one substantive provision.

5. 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.

An Unreasonable Cause Option

This option is modelled on the old British Columbia legislation.

5.(1) 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,

unless reasonable cause exists for such denial or differentiation.

(2) For the purposes of subsection (1), the 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 of any person or class of persons shall not constitute reasonable cause.

A Group Membership Option

This option is modelled on the existing Manitoba legislation.

3.(1) For all purposes of this Act, “discrimination” means

(a) differential treatment of an individual on the basis of the individual’s actual or presumed membership in or association with some class or group of persons, rather than on the basis of personal merit; or
(b) differential treatment of an individual or group on the basis of any characteristic referred to in subsection (2); or
(c) differential treatment of an individual or group on the basis of the individual’s or group’s actual or presumed association with another individual or group whose identity or membership is determined by any characteristic referred to in subsection (2); or
(d) failure to make reasonable accommodation for the special needs of any individual or group, if those special needs are based on any characteristic referred to in subsection (2).

3.(2) The applicable characteristics for the purposes of clauses (1)(b) to (d) are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability, and conviction for an offence for which a pardon has been granted.

5.(1) No person shall discriminate with respect to the provision of goods, services, facilities or accommodation customarily available to the general public, nor shall any person

(a) deny, or deny access to, any such good, service, facility or accommodation to any individual; or
(b) differentiate adversely in relation to any individual,

unless reasonable cause exists for the discrimination, denial or differentiation.

The Analogous Ground Approach

Proposal 1 – Retains the list of prohibited grounds in a separate provision, which would now include an open-ended clause, and modify the substantive provisions accordingly.

3. (1) For all purposes of this Act, the enumerated grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.

(2) Where the ground of discrimination is pregnancy or childbirth, the discrimination shall be deemed to be on the ground of sex.

5. It is a discriminatory practice to discriminate, and in particular to discriminate on a enumerated ground, in the provision of goods, services, facilities or accommodation customarily available to the general.

Proposal 2 – Repeats the enumerated and analogous grounds in each provision.

Delete s. 3.

5. Every individual has the right to equal treatment with respect to the provision of goods, services, facilities or accommodation customarily available to the general public without discrimination, and in particular, without discrimination on the basis of race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.

APPENDIX C: B.C. EXPERIENCE WITH AN UNREASONABLE CAUSE PROVISION

Statutory Provisions

The Human Rights Code of British Columbia (1973), which was proclaimed in 1974 and repealed in 1984, prohibited discrimination in the usual range of activities on a closed list of grounds. In addition, no person could discriminate without reasonable cause in three specific areas:

- public facilities, accommodations, and services (s. 3);
- employment (s. 8); and
- membership in a trade union or occupational association (s. 9).

The language of s. 3 is typical of the wording of all three sections.

3. (1) No person shall

    (a) deny to any person or class of person any accommodation, service or facility, customarily available to the public; or
    (b) discriminate against any person or class of persons with respect to any accommodation, service or facility customarily available to the public, unless reasonable cause exists for such denial or discrimination.

    (2) For the purposes of subsection (1),

    (a) the race, religion, colour, ancestry, or place of origin of any person or class of persons shall not constitute reasonable cause; and
    (b) the sex of any person shall not constitute reasonable cause unless it relates to the maintenance of public decency or to the determination of premiums or benefits under contracts of insurance.

Thus, persons could file complaints with the B.C. Human Rights Commission, arguing that they had been discriminated against without reasonable cause. They needed to prove only one of two branches of without reasonable cause. First, none of the prohibited grounds could constitute a reasonable cause. In this respect, the 1973 Code was identical to any other anti-discrimination statute of its time. Second, any factor that denied services, employment or membership would constitute discrimination unless it was reasonable to use the factor. An absence of a reasonable cause was sufficient for a finding of discrimination. In this respect, the 1973 Code was unique.

Complaints Under the Without Reasonable Cause Provisions

The Commission's annual reports for 1979 and 1980 give the following statistics

about the without reasonable cause complaints.

- Without reasonable cause was the third largest group of complaints, after sex, and race or colour.

- One-fifth of all complaints were brought under without reasonable cause: in 1979, 152 out of the 737 cases handled and in 1980, 185 of the 828 complaints handled. These totals include both new cases and cases held over from the previous year.

- In 1980, the 123 new complaints brought under without reasonable cause included almost 40 cases dealing with pregnancy discrimination, about 20 with disability, 15 with mandatory retirement, nine with other age-based discrimination and about 15 with medical condition. Another 20 complaints covered grounds such as size, source of income, family status, criminal charge or conviction, sexual orientation, residency, financial status and educational requirement.

  The relatively large number of complaints could have stemmed from the very short list of prohibited grounds in the 1973 Code which has been expanded significantly since 1973. Approximately 100 of the 123 new complaints filed in 1980 could now be filed under a prohibited ground.

The Commission sent a number of without reasonable cause complaints to boards of inquiry. Between 1975 and 1980, 18 boards of inquiry were appointed to deal with complaints arising on this general ground. The average number per year was three, with a high of six complaints referred in 1975, to none in 1977.

Under the open-ended ground from 1975 to 1980, boards of inquiry dealt with a number of different matters. Disability or physical condition accounted for four of the 18 inquiries, while marital status and sex were the subject of three inquiries each. The remaining eight inquiries concerned a variety of grounds, including age, criminal conviction, sexual orientation and citizenship.

The boards of inquiry dealt with complaints under each of the three available sections of the Code. Nine complaints concerned public services or facilities, 10 concerned employment, and two involved membership in an occupational association.

Interpretation of the Without Reasonable Cause Provision

During the decade in which the provision was in force, the interpretation of without reasonable cause changed from a very broad one to a narrower one. Early case law treated the provision as an invitation to consider the reasonableness of any type of distinction drawn by an employer or service provider. The clause was something akin to a “fairness” test. Consequently, early board decisions took an expansive view of the types of situations protected by the language of the statute. For example, in the 1975 *Oram and MacLaren* decision, the board held that personal appearance was not a reasonable cause for a bar to

refuse to serve a person. In the 1976 *Lopetrone* decision, the board found that a hospital society had acted without reasonable cause in failing to consider the applicants' work records when it refused to hire them.

However, this approach did not prevail for long. Beginning with *Jefferson* v. *Baldwin and B.C. Ferries* (1976), boards of inquiry adopted a "categories" approach by asking if the discrimination arose on a group characteristic of the complainant. In *Jefferson*, an employee claimed he suffered discrimination on the basis of his disability, and the board held that physical handicap was included within the without reasonable cause provision. As boards applied the "categories" approach, similarity of the claimant's characteristic to those of the listed grounds became important. Thus, as the approach developed, it resembled more and more the analogous ground approach the Supreme Court would eventually adopt in 1989 for s. 15 claims.

The changed approach gave a less expansive interpretation to without reasonable cause, with boards of inquiry upholding less unusual types of grounds. However, the scope of the without reasonable cause provision was still more expansive than anything found in closed-list human rights codes.

A significant number of board decisions were reviewed by the courts, with mixed results. Two decisions found their way to the Supreme Court of Canada. In the first, *Gay Alliance Toward Equality* v. *Vancouver Sun* (1979), the Court adopted an extremely narrow view of the Code's scope, holding that a newspaper could deny an advertisement solely on the basis of its "gay-friendly" content. Four years later, in *Heerspink* v. *I.C.B.C.* (1983), the Court upheld a board ruling of without reasonable cause in an insurer's denial of coverage to a person charged with a criminal offence. In so doing, the Court endorsed, for the first time, the fundamental importance of human rights legislation. The without reasonable cause provision, by generating a large number of complaints and litigation, did assist in giving prominence to human rights issues.

Contemporary Assessments of the Without Reasonable Cause Provision

After a number of years of experience, interested parties, including the Commission, began to assess the strengths and weaknesses of the without reasonable cause approach. In February 1981, Professor Bill Black prepared a background paper on the development of the reasonable cause provision for the B.C. Minister of Labour to use at a federal–provincial meeting on human rights. In the article, titled "Reasonable Cause in Human Rights Legislation," he outlined the advantages and disadvantages of this approach. The advantages included flexibility to expand protection to new grounds of discrimination, including grounds that would ensure compliance with international covenant. As well, new grounds would be considered in the context of the facts of real cases, making for better consideration of what grounds should be protected in practical situations, and better legislative amendments when they were made.

The disadvantages included the uncertainty about the future interpretation of the Code. On the one hand, the Code could be so broadly interpreted as to usurp much of the field covered by labour legislation, while on the other hand, it could be construed so narrowly as to render it almost useless as a means of attacking discrimination. Moreover, the words "without reasonable cause" did not give sufficient guidance to members of the public regarding their obligations under the Code. Black suggested that the disadvantages could be avoided or minimized by careful drafting and appropriate administrative action.

In 1980, the Commission undertook a thorough review of the Code. In June 1981, it released a report of the review's findings, outlining changes to extend the Code's coverage and give the Commission more effective powers *(Recommendations for Changes to the Human Rights Code of British Columbia).* Several recommendations pertained to the without reasonable cause provision.

First, it recommended the addition of two new grounds: sexual orientation, and mental and physical disability. While both grounds had been covered under the without reasonable cause provision, the Commission suggested that including them specifically in the Code's text would give better protection. It also recommended that without reasonable cause be added to the provisions concerning the rental or purchase of property.

Second, the Commission noted that the without reasonable cause provision, while useful, did not make employers or the public generally aware of their obligations. It recommended that it be given the power to make enforceable guidelines that would describe specifically the conduct prohibited by the Code, and bind boards of inquiry.

In its proposals, unfortunately, the report makes only a brief allusion to consideration of enforcement experiences, without any indication of the precise nature of the experience.

The Demise of the Without Reasonable Cause Provision

In other quarters, however, there was little support for the without reasonable cause provision. Consequently, in 1983, the B.C. government moved precipitously to fire the Commission and introduce new legislation to replace the existing open-ended provisions with a closed list. Bill 27 was shelved shortly after it was introduced, but was reintroduced as Bill 11 and enacted the following year.

The government gave a number of reasons for scraping the Code. The suggestion that cutting the Commission was part of the government's measures to save money was dismissed as a ruse by the Opposition. It noted that the overall government budget for 1983 actually increased spending by 16 percent, and the human rights commission spent $1.25 million on human rights programs out of a total $8.6 billion budget (*Hansard,* 2nd sess., 33rd Parliament, vol. 9, at pp. 4392-93).

More important for this report, the government stated that uncertainty about the law's scope and meaning justified the repeal of the Code with its without reasonable cause provision.

When he introduced Bill 11 on second reading, the Minister of Labour, the Honourable Robert McClelland, stated:

> [M]ore and more under our present rules, more impossible grounds of discrimination were defined. The meaning of discrimination became less and less clear. How can society deal with really harmful cases of discrimination in employment, tenancy or access to facilities and services when members of the public are so unclear about what discrimination means? The whole concept of human rights and discrimination became diluted, to the extent that it now encompasses just about everything from the most trivial complaints to the most serious violations of human dignity. Who can define discrimination under those circumstances? And if we don't know what it is, Mr. Speaker, how can we ever hope to make progress toward eliminating it through legislation or in other ways? (See *Hansard*, 2nd sess., 33rd Parliament, vol. 9, p. 4373, April 12, 1984.)

In the Legislature, the Opposition argued that the government had chosen to repeal the without reasonable cause provision because it had given rights to groups, especially people with mental and physical disabilities. (See Hansard, 2nd sess., 33rd Parliament, vol. 9, p. 4377-78, April 12, 1984.)

During the course of debate on Bill 11, an Opposition MLA suggested that the "Hunky Bill" case may have galvanized opposition to the Code. In that case, the complainant argued that Konyk, a restaurant owner, discriminated against people of Ukrainian descent by choosing a name for his business which used a term offensive to those of Ukrainian descent. The board of inquiry found that this section did not extend to the name of the business, a decision upheld by the B.C. Supreme Court. The Opposition noted that the case had stirred up a "storm of criticism of the human rights legislation. It was too long, too expensive and too silly in some of the things that went before lawyers, the expense and delay and the whole bit."

Commentary

The B.C. experiment offers several insights for those considering the future shape of the list of grounds in the CHRA.

First, the provision gave the Commission and boards of inquiry a powerful tool to advance the development of human rights law. Long before appearing in the closed lists of other jurisdictions' human rights acts, grounds such as sexual orientation, criminal charge, pregnancy and disability were protected under the without reasonable cause provision.

Second, for a time, the provision insulated the development of human rights law from the vagaries of political ideology. Even after the election of a politically and socially conservative Social Credit government, boards of inquiry continued their progressive approach to protecting the disadvantaged. Indeed, that government was forced to repeal the Code

altogether, a move undertaken with little notice and not much more debate, in order to regulate the boundaries of protected grounds.

Third, the provision caught incidents of discrimination that, even today, would still be outside the protection of closed-list provisions. For example, in spite of the fact that they were denied service because of stereotypes, the complainants in *Oram and MacLaren* would have difficulty today arguing that their appearance falls under any enumerated ground.

However, the B.C. experience also points out weaknesses in the without reasonable cause approach.

First, one problem that emerged early on was the possibility that the provision could easily turn into a general unfairness test, one that would catch a very large number of actions, many only marginally significant. The *Lopetrone* case, for example, pushed the limits of what reasonably should be protected by anti-discrimination legislation, and bordered on plunging the Commission into the role of adjudicating fairness in employer decision making. However, the Commission itself recognized this problem when the board in *Jefferson* adopted a "categories" or analogous ground-type reasoning, which tends to eliminate many claims.

Second, the without reasonable cause provision did little to address the problems of those who were discriminated against on grounds subsumed by the phrase "social condition." Indeed, while the Commission received a few complaints on the grounds of source of income, family status, financial status and educational requirement, none of these ever made it to a board of inquiry. It is unclear why this is so; perhaps the Commission was so swamped by the large number of claims on other grounds that social condition assumed low priority. It may also be that the Commission, in the spirit of the times, considered social condition to be a non-ground. But this is speculation; we are left simply to conclude that, in this case anyway, an open-ended type of protection did not extend to social condition.

Third, although one would think that the reasonable cause provisions would encourage boards and courts to consider multiple grounds and intersectionality in adjudicating complaints, there is no evidence that this in fact took place.

Fourth, while the without reasonable cause provisions did promote progressive development of human rights law, some of this development was well ahead of the community consensus needed to sustain it. While it may be tempting to dismiss the repeal of the Code and abolition of the Commission as isolated acts of an especially hostile right-wing government, a significant proportion of B.C. society supported its actions. As a result, the clock was turned back, with some groups losing protection that would only be restored nearly 10 years later.

APPENDIX D: THE MANITOBA EXPERIENCE

Statutory Provision

The first Manitoba *Human Rights Act* enacted in 1974 contained a closed list of prohibited grounds. However, the Act underwent a significant revision in 1976. As well as adding "family status" and "political belief" to the listed grounds in some cases of discrimination, it rephrased the sections that dealt with services and accommodation. The new clauses prohibited discrimination "unless reasonable cause exists for the denial of discrimination" and then provided a non-exhaustive list of grounds that could not constitute reasonable grounds. This language did not change until the Act's repeal in 1987, when it was replaced with the *Manitoba Human Rights Code.*

Section 9(1) of the Code defines discrimination in four subsections, the first of which does not link differential treatment to a prohibited ground. Unlike the old Act, the unenumerated ground is available with respect to all activities covered by the Code, not merely housing and services. The other three subsections require that the differential treatment and failure to make reasonable accommodation be based on one of the prohibited grounds contained in s. 9(2). Section 9 is reproduced below.

9(1) In this Code, "discrimination" means

> (a) differential treatment of an individual on the basis of the individual's actual or presumed membership in or association with some class or group of persons, rather than on the basis of personal merit; or
> (b) differential treatment of an individual or group on the basis of any characteristic referred to in subsection (2); or
> (c) differential treatment of an individual or group on the basis of the individual's or group's actual or presumed association with another individual or group whose identity or membership is determined by any characteristic referred to in subsection (2); or
> (d) failure to make reasonable accommodation for the special needs of any individual or group, if those special needs are based upon any characteristic referred to in subsection (2).

9(2) The applicable characteristics for the purposes of clauses (1)(b) to (d) are

> (a) ancestry, including colour and perceived race;
> (b) nationality or national origin;
> (c) ethnic background or origin;
> (d) religion or creed, or religious belief, religious association or religious activity;
> (e) age;
> (f) sex, including pregnancy, the possibility of pregnancy, or circumstances related to pregnancy;

(g) gender-determined characteristics or circumstances other than those included in clause (f);
(h) sexual orientation;
(i) marital or family status;
(j) source of income;
(k) political belief, political association or political activity;
(l) physical or mental disability or related characteristics or circumstances, including reliance on a dog guide or other animal assistant, a wheelchair, or any other remedial appliance or device.

9(3) In this Code, "discrimination" includes any act or omission that results in discrimination within the meaning of subsection (1), regardless of the form that the act or omission takes and regardless of whether the person responsible for the act or omission intended to discriminate.

Number of Unenumerated Grounds Complaints

Since passage of the Code in 1987, there have been very few complaints based on an unenumerated ground. The Commission's annual reports give statistics for 11 years, from 1987 to 1997.

- On average, the Commission received 10 "unenumerated" complaints each year. However, the Commission accepted an unusually high number in 1988 and 1989 (24 and 16, respectively). Since 1990, the average number for each year has been seven complaints.

- The average of 10 complaints each year since 1987 represents only 3.8 percent of the total number of complaints.

Before 1987, the number of complaints on an unenumerated ground was also very small. The Commission has never sent a complaint based on an unenumerated ground to adjudication, either before or after the 1987 changes.

The Substance of Complaints

In December 1987, shortly after enactment of the new Code, the Commission adopted a short policy, "Unspecified Grounds of Discrimination," to assist in the application of the provision. In its entirety, the policy states:

> Section 9(1)(a) will be deemed to include differential treatment which is based on a stereo-typed view of a group of persons rather than on the basis of personal merit regardless of whether the group characteristic is listed in 9(2).

The policy makes it clear that s. 9(1)(a) will only apply to differential treatment that can be linked to group membership. It excludes complaints from individuals who suffer negative treatment because of another person's animosity or personal dislike of them.

According to discussions with Commission staff, the vast majority of complaints based on an unenumerated ground involve criminal record. Typically, a person is denied employment because of a past conviction. The Commission has resolved many of these complaints in accordance with its policy on criminal record, which describes factors in assessing whether the absence of a criminal record is a bona fide occupational requirement. As noted in Part B, no complaint on an unenumerated ground has ever been sent to a tribunal. (In Manitoba, the human rights tribunal is called a board of adjudication.)

Before 1987, when the unenumerated ground only applied to housing and public services and facilities, the Commission accepted a broader range of complaints, including ones based on sexual orientation and disability. Neither of these grounds was enumerated in the old Act, but they were added to the list in 1978. As well, before 1987, the Commission also dealt with a number of complaints from individuals who were denied entry to restaurants or other facilities because of their dress. Typically, the individuals were wearing blue jeans and were refused entry to one of the many businesses that had implemented a "no jeans" dress code.

The Commission does not publicize the availability of the unspecified ground. Except for a category in the statistical tables called "other," the annual reports do not mention it, nor is its availability noted on the Commission's Web site.

Comments

The Manitoba Commission has adopted a cautious approach to the unspecified grounds provision. In the words of one official, the Commission does not see itself as an "unfairness commission" that deals with any and all forms of injustice. It directs its resources toward dealing with discrimination based on the enumerated grounds.

Its policy, "Unspecified Grounds of Discrimination," is not quite as restrictive as the analogous grounds approach under the Charter. To come within an unspecified ground, a person need only meet the condition of proving "differential treatment which is based on a stereotypical view of a group of persons." In contrast, the Supreme Court's approach to s. 15 includes stereotypes as merely one factor in assessing whether an unenumerated ground will become an analogous ground (*Corbière* v. *Canada*, 1999: ¶ 59-62).

If a version of s. 9(1)(a) were added to the CHRA, the Manitoba experience would likely not be replicated at the federal level. For one thing, the Canadian Human Rights Commission (CHRC) would likely face enormous pressure, especially from large corporations, to use "analogous grounds" reasoning from the beginning. The Manitoba Commission issued its policy before the Supreme Court had developed criteria for analogous grounds under s. 15. Moreover, the CHRC would likely receive more complaints than its Manitoba counterpart, which does not publicize the availability of an unspecified ground. Merely adding an open-ended clause to the CHRA would, in itself, generate considerable publicity. Even if it did not, national organizations and unions would be aware of the unspecified ground and would test its content and limits by filing complaints. With the tendency of several federally regulated

employers to seek judicial review of commission decisions, one can reasonably expect litigation.