WOMEN'S ECONOMIC INEQUALITY AND THE *CANADIAN HUMAN RIGHTS ACT*

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and

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[I]ncluding "social condition" in the Canadian Human Rights Act *is a small part of a much broader issue: how to make the link between the overall question of poverty and the effective enjoyment of human rights.*

Michelle Falardeau-Ramsay, Q.C.
Chief Commissioner of the Canadian Human Rights Commission
appearing before the Standing Committee on Legal and
Constitutional Affairs of the Senate of Canada
May 27, 1998

Legislation other than the Charter also protects, and provides remedies for violation of, economic, social and cultural rights, for instance human rights legislation....

Ambassador Mark. J. Moher
Head of the Delegation of Canada before the
UN Committee on Economic, Social and Cultural Rights
Geneva, November 26, 1998

ABSTRACT

The *Canadian Human Rights Act* (CHRA) needs to be modernized and reframed, if it is to be an effective tool for challenging rules and policies that maintain and reinforce women's economic inequality. One proposal under consideration during the current review of the CHRA is adding the ground social condition to the list of prohibited grounds of discrimination. The ground social condition will provide protection from discrimination that occurs because of the negative stereotyping of people with low incomes, in other words, discrimination that occurs because of one's *status* as a poor person or a person receiving social assistance. The ground social condition may be of assistance, for example, if a bank refuses to grant a loan because it assumes, without investigation, that a person on social assistance is a poor credit risk. However, the addition of the ground social condition will not improve the capacity of the CHRA to assist women to address the poverty and economic inequality that are manifestations of long-standing discrimination based on sex, race and disability. The CHRA needs to be reframed so it explicitly recognizes group disadvantage, including the persistent group disadvantage of women, and makes specific commitments to the elimination of women's social and economic disadvantage.

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EXECUTIVE SUMMARY

This report considers the most effective ways of ensuring that the *Canadian Human Rights Act* (CHRA) can assist women to challenge rules and policies that maintain and reinforce their economic inequality. One current proposal is to add the ground social condition to the CHRA. However, the addition of this ground, by itself, will not be sufficient to equip the CHRA to redress women's substantive inequality more effectively.

The CHRA has an important root in the recommendations of the Royal Commission on the Status of Women, made in 1970. The Commission recommended that human rights commissions be established in every jurisdiction that would have the power to enforce human rights laws prohibiting discrimination on a number of grounds, including sex and marital status, and to initiate action, whether or not formal complaints were made. The Royal Commission clearly anticipated that human rights protections would entitle women not just to formal equality, that is, equality in the form of, or on the face of, laws and policies, but to substantive equality, that is equality in actual conditions.

Twenty-five years later, the intransigence of patterns of women's poverty and economic inequality indicate that human rights legislation is a less effective tool than is needed. Women's poverty and economic inequality are manifestations of structural and systemic discrimination based on sex, compounded by race discrimination and discrimination based on disability. Any guarantee of non-discrimination or equality must be able to address the linkage between gender, race, disability and economic inequality, if it is to be successful as a tool for advancing women.

Though the intentions of Parliament may have been different, the CHRA was written as a formal equality document, individually focussed, neutrally worded and based on the assumption that refraining from different treatment of individuals based on their sex, race or other listed grounds would be sufficient to create equality. Over the last 25 years, different understandings have developed through the application of the law in real circumstances: that equality is not a matter of individual same treatment but, rather, a matter of addressing material disparities between groups. In other words, it is the effects of laws and practices, not the presence or absence of facial neutrality, which determines whether they are discriminatory, and affirmative structural responses by governments and others to women's substantive inequality are needed. In the year 2000, it is time for the CHRA to reflect these more sophisticated and current understandings.

Can adding the ground social condition to the CHRA help? The excitement in the language "social condition" is the possibility that it could connote equality of material conditions as distinct from mere formal equality. However, social condition has been a ground of discrimination in the Quebec Charter for 20 years, and it has come to have a very particular meaning. Social condition provides protection from being subjected to negative stereotyping because of being poor, or being on social assistance. Canadians should be protected from

discriminatory conduct based on stereotypes that people with low incomes are untrustworthy, a poor risk, poor tenants, sexually and socially irresponsible, poor parents and worse.

However, this is not all that human rights legislation can and should confer by way of assistance to groups that are socially and economically disadvantaged. The CHRA should also be able to provide an effective avenue for challenging laws and practices that cause, maintain or exacerbate the poverty and economic inequality that are manifestations of long-standing discrimination based on sex, race and disability.

To do this, the CHRA needs to be reframed and redesigned as a law that explicitly goes beyond formal equality. Now it should recognize group disadvantage, including the specific and persistent disadvantage of women, and make an open commitment to the elimination of that disadvantage, in all its forms.

1. INTRODUCTION

Enacted in 1977, the *Canadian Human Rights Act*[1] (CHRA) was intended to be an important tool to assist women to achieve social and economic equality in Canadian society. The Act has an important root in women's struggle to achieve justice.

In 1970, the Royal Commission on the Status of Women made 167 specific recommendations for improving the conditions of women in the areas of economic participation, education, the family, taxation, poverty, public life, immigration and citizenship, and criminal law. However, in addition to making these specific recommendations, the Royal Commission was concerned about ensuring that some new institutions would be created that, after the Commission had finished its work, would have a continuing mandate in order that "women's rights and freedoms are respected."[2] The Royal Commission recommended that human rights commissions be established in every jurisdiction that would be directly responsible to Parliament or the legislatures and have the powers to enforce human rights laws prohibiting discrimination on a number of grounds, including sex and marital status, and to initiate action, whether or not formal complaints were made.[3] Human rights commissions and human rights legislation were conceived by the Royal Commission as mechanisms for addressing, on a continuing basis, the many forms of discrimination against women that it had identified, as well as new forms that might arise. These mechanisms were intended to ensure that, in the future, discrimination against women would be prevented.[4]

It is quite clear from its recommendations, and from the range of concerns canvassed by the Royal Commission on the Status of Women, including women's poverty, that it anticipated human rights protections would entitle women not just to formal equality, that is, equality in the form of, or on the face of, laws and policies, but to substantive equality, that is, equality in actual conditions.

Twenty-five years later, it is important for women to assess whether the federal human rights system is fulfilling these expectations and meeting the needs of women for effective tools to assist them in overcoming their actual conditions of inequality.

It is clear that some advances have been made through human rights legislation. One key advance for women has been the recognition of sexual harassment as a form of discrimination against women.[5] Commissions, tribunals and courts have acknowledged that sexual harassment poisons women's working environments and violates their right to discrimination-free workplaces. Most employers and service providers are aware now that sexual harassment is an unlawful form of conduct, and that they have an obligation to take steps to prevent it and to remedy it when it occurs. Many have adopted policies prohibiting sexual harassment and have designed internal procedures for addressing it. Though sexual harassment has not disappeared, nor is it adequately remedied, it is no longer considered ordinary and acceptable behaviour in the workplace.

It is not so clear, however, that human rights legislation has been effective at addressing other barriers to women's equality in the workplace, or other policies and practices that have the effect of maintaining the status quo of women's economic inequality. In 1999, this is a key concern. As a new millennium begins, the world of work and trade is changing, but women's economic advancement appears stalled. Indeed, there are signs that women's economic conditions are worsening, as the size of government is diminished, and government interventions in the marketplace and family life to ameliorate women's inequality are reduced.[6]

Comparing a few basic indicators from a generation ago to current ones is not encouraging. Women, and particular groups of women, have not made the gains that could be expected during this period of prosperity.

In 1967, women's incomes were 43.2 percent of men's.[7] By 1995, there was some improvement: women's incomes were 58 percent of men's.[8] In 1967, almost half of women 65 and over were living below the poverty line;[9] by 1995, there was a little change— 43.4 percent of women 65 and over were living below the poverty line.[10] In 1967, one third of single mothers were living in poverty.[11] In 1995, poverty among single mothers was worse, with 57.2 percent of single mothers under 65 living below the poverty line.[12]

Overall patterns remain substantially unaltered. Occupational segregation by sex remains an important characteristic of the labour force, with work that is traditionally performed by women paid less than work that is traditionally performed by men. Women's full-year, full-time earnings are 72 percent of men's. Women are now performing more non-standard work than men, that is, more work that is part-time,[13] casual, seasonal and without benefits or union protection.[14] And, the high incidence of poverty among women, particularly among Aboriginal women, women of colour, immigrant women, women with disabilities, single mothers and elderly women, is not diminishing. With quasi-constitutional prohibitions against discrimination in employment and services in place for more than two decades, women could reasonably have expected to see more improvement.

The intransigence of these patterns reveals that poverty and economic inequality have a gendered character. There is a strong link between being female and being poor. Women's persistent poverty and general economic inequality are caused by a number of interlocking factors:

- the social assignment to women of the role of unpaid caregiver for children, men and old people;
- the fact that in the paid labour force women perform most of the work in the "caring" occupations and that this "women's work" is lower paid than "men's work";
- the lack of affordable, safe child care;

- the lack of adequate recognition and support for child care and parenting responsibilities that either constrain women's participation in the labour force or double the burden they carry;

- the fact that women are more likely than men to have non-standard jobs with no job security, union protection or benefits;

- the entrenched devaluation of the labour of women of colour, Aboriginal women and women with disabilities; and

- the economic penalties that women incur when they are unattached to men, or have children alone.[15]

To say this a different way, women's poverty and economic inequality are a manifestation of structural and systemic discrimination based on sex, race and disability. Any guarantee of non-discrimination or equality must be able to address the linkage between gender, race, disability and economic inequality if it is to be successful as a tool for advancing women.

This picture is further complicated by the fact that, despite long-standing commitments to women's equality and a recent commitment to analyzing the impact of laws, policies and practices on women,[16] the federal government has made drastic changes to social programs over the last five years that have had disproportionately negative effects on women and increased women's vulnerability to poverty. These changes include the repeal of the *Canada Assistance Plan Act*[17] and the introduction of the Canada Health and Social Transfer,[18] with concomitant cuts to social services, loss of entitlement to social assistance, increase in women's unpaid caregiving workload, loss of women's good jobs in the caregiving sector[19] and amendments to the employment insurance scheme, which have resulted in fewer women being eligible to receive benefits.[20]

The unchanging pattern of women's poverty and economic inequality cannot be squared with Canada's ample economic resources,[21] nor with Canada's multiple human rights commitments. Canada is a signatory to the *International Covenant on Civil and Political Rights* (ICCPR), the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).

The ICCPR obliges Canada not only to make broad guarantees of equality in law but also to provide effective protection against discrimination wherever it arises. CEDAW obliges Canada to take "all appropriate measures" to eliminate all forms of discrimination against women "in all fields, including the political, economic, social and cultural fields."[22] The ICESCR obliges Canada as a state party to "take steps...to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the ICESCR by all appropriate means, including...the adoption of legislative measures."[23] The ICESCR guarantees the right of everyone to gain a living by work that is freely chosen, to social security, including social insurance, to an adequate standard of living, including

food, clothing and housing, to the continuous improvement of living conditions, to the enjoyment of the highest attainable standard of physical and mental health, and to education. Also of central importance, under Article 3 of the ICESCR *s*tate parties undertake to ensure the equal right of men and women to the enjoyment of their economic, social and cultural rights, and under Article 2(2) to ensure there will be no discrimination of any kind with respect to those rights.

In its reports to United Nations oversight committees, Canada has consistently asserted that the enactment and enforcement of statutory human rights laws and Charter guarantees are a central means by which Canada fulfills these treaty obligations.[24]

However, over the last decade, Canadians who are members of disadvantaged groups have been concerned about Canada's failure to comply with its international human rights treaty obligations. In November 1998, 10 Canadian non-governmental organizations appeared before the United Nations Committee on Economic, Social and Cultural Rights on the occasion of the Committee's reviewing Canada's third report on its compliance with the ICESCR. These non-governmental organizations presented evidence to the Committee of:

- high and rising rates of poverty in Canada, particularly among vulnerable groups such as Aboriginal peoples, women, single mothers and people with disabilities;
- increasing homelessness and reliance on food banks; and
- retrogressive measures, such as cuts to welfare rates, loss of entitlement to welfare resulting from the repeal of the *Canada Assistance Plan Act* and reduced access to legal aid for family and civil matters.[25]

It was also pointed out that, although claimed by Canada as central mechanisms for protecting economic, social and cultural rights and for providing remedies for violations, the Charter and statutory human rights laws are not effectively performing this crucial function. The concluding observations of the United Nations Committee on Economic Social and Cultural Rights on Canada's Third Report highlighted the contradiction between Canada's wealth as a nation, and the poverty of many of its people. The Committee's criticism was stinging. It found that recent cuts to social programs harmed women. The report also expressed grave concern about the high rates of poverty among women, particularly single mothers. Stating grave concern about the ability of Canada's human rights system to address issues of social and economic inequality and noting, in particular, "the inadequate protection from gender discrimination afforded by human rights laws, and the inadequate enforcement of those laws," the Committee recommended to Canada that:

> 1) [F]ederal, provincial and territorial governments...expand protection in human rights legislation to include social and economic rights and to protect poor people in all jurisdictions from discrimination because of social or economic status; [26] and

2) adopt the necessary measures to ensure the realization of women's economic, social and cultural rights, including the right to equal remuneration for work of equal value.[27]

This squarely raises the question: What is the role of the Canadian Human Rights Commission and the CHRA with respect to persistent patterns of women's poverty and economic inequality? It is possible to come to differing conclusions. For example, some could conclude that the human rights system has nothing to do with these larger patterns of economic inequality; that it can and should deal only with individual instances of unfair treatment; that the larger patterns of inequality in conditions will have to be addressed through other means—through other legislation, economic policy or education, for example. Alternatively, others might conclude that the statutory human rights system should be able to deal effectively with the whole scope of this inequality by itself.

The first of these options renders the statutory human rights system essentially irrelevant to the central problem of inequality that large numbers of women face; the second would make the statutory human rights system the only means of dealing with women's social and economic inequality, subsuming every other form of social and political action that can alter unequal conditions.

Neither of these is a helpful or realistic approach. In our view, there is a middle ground that more accurately reflects the views of the ICESCR Committee and its recommendations. Women should expect that the federal human rights system:

- will be able to address larger patterns of women's inequality, including the economic dimensions of their inequality;

- will not be the only institution through which these patterns of inequality are addressed; and

- will interact with—sometimes complementing, sometimes counteracting—the workings of other institutions in order to move toward the goal of realizing Canada's human rights commitments to women.[28]

What can satisfy these expectations? At the time of this review, there are three related matters to be considered:

- prohibiting discrimination because of social condition or, to use the words of the ICESCR Committee, because of economic and social status;

- improving the capacity of the Act to address poverty and economic inequality that are manifestations of sex, race and disability discrimination; and

- incorporating ICESCR rights into human rights legislation in a more direct way. This paper deals with the first and second of these, and does not deal with the possibility of the more direct incorporation of economic and social rights into the CHRA.

The thesis here is that the proposal made recently in the form of Senate Bill S-11[29] to add "social condition" as a new prohibited ground of discrimination to the CHRA will be of limited usefulness to women seeking to vindicate their right to substantive equality. Social condition has been a ground of discrimination in the Quebec Charter[30] for about 20 years and has been given a restricted meaning, which is likely to be adopted by interpreters of the same language, if it is added to federal human rights legislation. We conclude that the more important and much more complex task, at this time, is to reframe human rights legislation in order to make it a modern and responsive tool to address the inequality of women. This will require incorporating into the Act language that reflects the advances over the last two decades in the understanding of discrimination and how it occurs and, simultaneously, designing ways of dealing with the still outstanding problems in interpretation that are obstacles to women's enjoyment of full equality.

In the year 2000, the CHRA should be able to provide women with an effective avenue to challenge laws, policies and practices that stereotype women because they are poor and cause, maintain or exacerbate women's poverty and economic inequality.

2. THE GROUND SOCIAL CONDITION

What would it mean to add the words "social condition" to the CHRA? How could this serve to advance the equality project for women? Are there limits on the work that such a new ground could be expected to accomplish?

The excitement in the language "social condition" is the possibility that it could connote equality of material conditions as distinct from mere formal equality. This is the sense in which its addition could be most helpful to women. If decision makers were to read "social condition" as an affirmation of the entitlement of women to equality in the actual conditions of their lives rather than the same treatment in the form of legislation, and as an obligation on governments to take affirmative steps to overcome women's de facto inequality, this would be a helpful antidote to the difficulties women face in trying to use equality and anti-discrimination provisions to address their conditions of material inequality.

However, in our opinion, the result of adding "social condition" is likely to be very different and much narrower than this. There are two places to look to discern what can be expected from this new ground: the Senate debates on Bill S-11[31] and the 20 years of experience in Quebec with interpreting and applying this ground.

The Senate Debates

For a number of years now, one option for addressing economic inequality in Canada, proposed by equality-seeking groups and some human rights commissions, has been to include social condition as a new ground of discrimination in the CHRA. Its inclusion was pressed for at the time of the 1997 amendments to the CHRA,[32] but the minister of justice at the time declined to consider it, deciding to focus on a package of other amendments to the CHRA that had been promised for 10 years that dealt principally with disability issues and with the establishment of a permanent tribunal.

In February 1997, Senator Erminie Cohen released a report on poverty in Canada, entitled *Sounding the Alarm.*[33] Having concluded that there is growing income inequality in Canada and that it is not in Canada's interest to ignore the needs of the 20 percent of Canada's population living below the poverty line, Senator Cohen made four recommendations. Two of these related to human rights guarantees. The first called on the federal government to honour the international agreements to which Canada is signatory and which pertain to improving the lives of poor people in Canada and, to that end, develop an action plan for the eradication of poverty within the decade.[34] The second urged "the Parliament of Canada [to] pass a bill to amend the CHRA in order to extend and give legal effect to the principle that everyone should have equal opportunity and to disallow discriminatory practices based on economic status."[35]

On December 10, 1997, Cohen introduced Bill S-11. It was debated in the Senate, with representatives from the National Anti-Poverty Organization (NAPO) and some human rights experts appearing to support it. The Bill was then passed by the Senate on June 9, 1998 and introduced in the House of Commons, where it was defeated in the spring of 1999, with the government stating that it would not support the Senate's Bill because it wished to address the issue of social condition during the overall review of the CHRA.

What did anti-poverty groups, human rights experts and senators hope for from the inclusion of social condition? Two issues were debated during the consideration of Bill S-11.

- What does "social condition" mean, specifically, would the addition of the words "social condition" address poverty per se or would it address the narrower, though important, problem of negative stereotyping of people because they are poor?

- Is social condition an essentially neutral ground, that is, does everyone, rich and poor alike, have a social condition, or does it refer to conditions of disadvantage?

In the limited debate that occurred, there seemed to be acceptance by the central advocates for inclusion of social condition that its effect would be to provide a remedy for discrimination that occurs because a person has a low income, is in receipt of public assistance, is unemployed or is in like circumstances. In other words, the effect would be to prevent a bank from refusing to open an account for a person simply because that individual was on social assistance. The effect would not be to ensure the CHRA provided an avenue for people to take issue with laws and policies that create extreme disparities in wealth and income among Canadians.

This distinction was reflected in the comments of Senator Erminie Cohen, who, when introducing Bill S-11, stated:

> It is with regret that I report to you that poverty continues to be one of the greatest barriers to equality in Canadian society. Poor Canadians live daily with social stigma and negative stereotypes. Financial institutions, landlords, utility companies, the legal system, public and private media and our governments continue to discriminate against our most vulnerable citizens.... *Bill S-11 does not confer any special privileges to Canada's poor. It deals solely with the proscription of discrimination, that is prohibiting a burden. To spell this out even further, I am not proposing that the government make poverty itself a violation of our domestic human rights legislation. Although our complacent attitude about poverty does contradict what we have signed in international fora, I am not suggesting that our domestic human rights legislation be empowered to take our government to task for not providing an adequate standard of living for all of its citizens* [Emphasis added].[36]

Michelle Falardeau-Ramsay, Chief Commissioner of the Canadian Human Rights Commission also indicated the circumscribed role she believed the ground social condition would play. She stated:

> In our view, the inclusion of “social condition” in the CHRA has both a practical and a symbolic impact.
>
> On the practical side, it would make clear to federal employers and service providers that they cannot discriminate against someone, because, for example, they are in receipt of social assistance.... While it is difficult to determine what kinds of complaints our...commission would receive if “social condition” was added to the federal law, I would expect that most would be related to denial of services in such areas as banking, transportation, and telecommunications. We recognize that the Canadian Bankers Association has made an effort to address the issue of banking services for low-income people...but anti-poverty groups continue to express concerns. Just this month, the Quebec media reported problems welfare recipients were having with access to both federally-chartered banks and provincially-regulated Caisses Populaires. There could also be complaints related to deposit requirements by telephone companies. ...
>
> [Also] the inclusion of “social condition” in the Act would have an important symbolic significance. It would give recognition to the idea that differences in economic status are as much a source of inequality in our society as race, gender or disability. ...[P]oor Canadians live daily with social stigma and negative stereotypes and face prejudice similar to those who are discriminated against on the other grounds enumerated in the Act. It is primarily for that reason that I would support this legislation. Adding “social condition” to the CHRA would send the message to Canadians that prejudice against people who are poor is as unacceptable in our society as prejudice against people who are black or aboriginal or disabled or female.

Falardeau-Ramsay added this.

> [I]ncluding “social condition” in the CHRA is a small part of a much broader issue: how to make the link between the overall question of poverty and the effective enjoyment of human rights. Regardless of whether Bill S-11 is adopted, I hope that the review of the CHRA...will explore ways of dealing with questions of economic and social rights in the context of human rights legislation.[37]

Even NAPO, while advocating for the inclusion of the ground social condition, conceded the limitations of the proposal. Fred Robertson, a board member of NAPO, stated:

> [T]he issue here is not poverty itself, but, rather the gratuitous discrimination against the poor. Housing and credit are two major areas in which this occurs. A poor individual may be a far better tenant or credit risk than one with a higher income, but landlords and lenders are free to ignore the individual's character and refuse service, either subtly or brutally, for reasons of insufficient income. Those of us on the receiving end of this treatment understand what a blatant affront to human dignity this treatment is.[38]

It is also clear from the submissions in support of Bill S-11 that Quebec's experience with the ground over the last 20 years would provide instruction as to what "social condition" means, were it included in the federal Act.[39] In short, "social condition" was understood in the Senate debates to refer to discrimination based on socio-economic status.

The other issue raised in the debates about Bill S-11 was whether the ground social condition should be understood to provide protection both to those whose social condition is one of disadvantage and to those whose social condition is one of privilege. Moreover, there seems to have been some disagreement about what the effect would be of leaving the ground undefined. On the one hand, human rights experts like Martha Jackman argued for leaving social condition undefined in order to permit disadvantaged groups to benefit from evolving interpretations. On the other hand, some senators agreed to leave social condition undefined in Bill S-11 to ensure that it would be neutrally applied, that is, that it would not only apply to conditions of relative disadvantage. Senator Grafstein, for example, stated, with apparent approval, that social condition can mean rich or poor, advantaged or disadvantaged. He indicated that he thought this meant that:

> We cannot then discriminate against multimillionaire Conrad Black because of his wealth. We will never be able to do that. I am not saying it jocularly. It is a neutral term and it does not mean a disadvantage. It indicates a condition, a status. It is a neutral statement.[40]

The Senate rejected a proposal to include a definition of social condition in its Bill that would link social condition to disadvantage. The proposed definition was: "'social condition' includes characteristics relating to social or economic disadvantage."

There may be ways, other than defining this particular ground, of clarifying that a ground such as social condition refers to social and economic disadvantage. What is certain, however, is that if it is included in the Act, it cannot be a ground that is understood to be

neutral. To fulfill its purpose, those who are disadvantaged because of their social and economic circumstances must be understood to be its intended beneficiaries.

The Quebec Experience

In the absence of a clear legislative definition interpreting the ground social condition as a reinforcement of the right of women to substantive equality, it is very probable that decision makers will look to existing case law, particularly that of Quebec, because Quebec is the sole jurisdiction that includes the ground social condition in its human rights legislation.

Article 10 of the Quebec Charter states:

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

The protection against discrimination based on social condition in the Quebec Charter is not explicitly limited to the status of being a social assistance recipient, and neither is it limited to tenancy, but rather applies throughout the Charter. Therefore, one would expect to see cases involving a wide range of circumstances. However, a review of the cases reveals that the pattern in Quebec is remarkably similar to other jurisdictions which prohibit discrimination on the ground of "receipt of social assistance" or "source of income." Although the Quebec cases leave open the possibility that someone other than a person on social assistance could claim social condition discrimination, so far every successful complainant has been a person on social assistance. And almost all the cases in which complainants have succeeded are about discrimination in rental accommodation. In most cases, the complainants are women with children. The discrimination they experience is frequently blatant, and explicitly based on the woman's status as a social assistance recipient.

For example, in the case of *Québec (Comm. des droits de la personne)* v. *Ianiro,*[41] a tribunal found that the respondent refused to rent an apartment to Francine Gilbert on the basis of her social condition, contrary to the Quebec Charter. At the time of the events in question, Ms. Gilbert had recently obtained a divorce and had custody of her three young children. The respondent refused to rent the apartment to Ms. Gilbert and did not take the time to check her references.

The respondent alleged that the only reason for the refusal to rent was that he did not wish to rent to a person who might break the lease after five or six months. The Tribunal found that

there were no objective reasons to support this apprehension. There was no evidence to show that Ms. Gilbert would not respect her obligations. Moreover, the respondent's son had said to Ms. Gilbert at the time of the refusal that "he did not want to have welfare recipients as tenants."[42]

Similarly, in the case of *Québec (Comm. des droits de la personne)* v. *Whittom*[43] the Tribunal held that Johanne Drouin had been discriminated against directly based on her social condition and indirectly based on her civil status as a single parent when she was refused accommodation because the landlord assumed she would not be able to pay the rent. The Tribunal found that it was contrary to the Quebec Charter to refuse to rent to poor people, and in particular those whose main source of income was welfare, on the basis of their low-income level, without first considering whether the individual was likely to be a reliable tenant.

The Tribunal reasoned that Ms. Drouin was discriminated against indirectly because of her status as a single mother because the landlord assumed that Ms. Drouin's income was not high enough, and this, while not directly related to the fact that her family was a single-parent family, "necessarily had the effect of affecting this type of family in particular, since this type of family, especially if it is headed by women, is the poorest in the society."[44]

The Tribunal said:

> Deciding not to rent to a person because his [or her] income is insufficient, without finding out anything else about the person...is taking a decision that contravenes the prescriptions of s. 10 of the Charter when the...refusal to rent affects a poor person whose income is derived mainly from social benefits. The decision not to rent presupposes that the poor person cannot in effect pay the rent and stigmatizes him [or her] by taking into account one of the main elements of "social condition", that is the financial categorization of a person and the place he [or she] holds in the society. This categorization of the financial situation of a person, one of the specific facets of "social condition", involves prejudice and contempt.[45]

The Quebec Court of Appeal confirmed the Tribunal decision in *Whittom*, holding that the respondents had discriminated against Johanne Drouin on the basis of her social condition when they refused to rent her an apartment.[46]

The Court found that the refusal to rent to Ms. Drouin was based on a superficial assessment of her ability to pay the rent. The Court noted that the evidence showed that, had the appellants taken the time to make some inquiries, they would have found that Ms. Drouin had never been in default of her monthly payments, even though her previous rent was similar to that requested by the appellants. By not renting the apartment to Ms. Drouin, the Court found, the landlord had discriminated by preventing her from fully exercising her right to execute a legal act, that is, to enter into a lease contract.[47]

There have been a number of cases that are factually similar to *Ianiro* and *Whittom,* mainly involving women with children who are receiving social assistance, in which Quebec tribunals have made consistent holdings.[48]

There have also been some cases alleging discrimination in employment. There is only one case in which the plaintiff was successful. In the case of *Lambert* v. *Québec (Ministère du tourisme) (No. 3)*[49] a Quebec tribunal held that Franck Lambert was discriminated against on the basis of social condition because, pursuant to a legislatively sanctioned workfare agreement, Mr. Lambert received only his social assistance payment while he worked full time at the Department of Tourism's photo library. He was denied minimum wage and other benefits required by labour standards legislation. At the time of writing, the *Lambert* decision was under appeal. This is a decision that has the potential to be important in other jurisdictions where participation in workfare programs is a condition of receiving social assistance.[50]

In the area of services, there has been one successful complaint of discrimination based on social condition. The Quebec Tribunal found that a refusal by a financial institution to consider a mortgage application from a welfare recipient constituted discrimination based on social condition.[51] The complainant, Francine D'Aoust, was a single mother receiving social assistance. The Tribunal found that Ms. D'Aoust had sufficient means to qualify for a mortgage loan. This is also an important decision because access to credit and the most basic of banking services, including cashing government cheques, is a widespread problem for people receiving social assistance. Moreover, banks are covered by the CHRA.[52]

As we have noted, most of the Quebec cases deal with tenancy, which is principally a matter within provincial rather than federal jurisdiction. For the purposes of our assessment, however, this is not what concerns us. We believe there are many instances of social condition discrimination that arise within federal jurisdiction, including, for example, women who are receiving social assistance being refused employment by federal sector employers because they are perceived to be poor, untrained and "not workforce material."[53]

Instead, our concern is that, although important, the Quebec cases in which complainants have been successful suggest a limited content for the ground itself. It is clear from the Quebec cases that the right to be free from discrimination based on one's social condition is not understood to give rise to a right to challenge policies and practices that cause, maintain or exacerbate a person's poverty, but rather as a right to have one's status as a social assistance recipient or a person with a low income disregarded by landlords, service providers and employers. Could the term "social condition" be pushed further? Without a new legislative definition, this is doubtful.

The meaning of the term "social condition" was extensively canvassed by the Tribunal in *Whittom*. The Tribunal explained that "social condition" was first defined by Tôth, J. who said:

> [I]n popular speech, "social condition" refers to the rank, place, position that a person holds in our society, through birth, income, level of education, occupation; all the circumstances and events that mean a person or group has a certain status or position in society. The Tribunal agrees with this statement.[54]

The Tribunal in *Whittom* noted that in *Gauthier*[55] "social condition" was defined as:

> ...the status of a person in a community, in particular, through his origins, level of schooling, occupation or profession and income, and through the perceptions and representations which, within the community are associated with those objective data.[56]

The Tribunal also said:

> The Courts have also several times affirmed that level of income was definitely one of the elements of "social condition", although it is not the income itself that is an element of "social condition" but the consequences resulting from the income, that is, the *place* the person holds in society because of his [or her] income[57] [emphasis in original].

The Tribunal in *Gauthier* found that welfare recipients represent a distinct and socially identifiable group in society and that membership in the group often leads to stereotypes and prejudice against individual members of the group.

In *Québec (Comm. de la personne)* v. *Briand,*[58] Sheehan, J. stated:

> A person's "social condition" can follow from several elements, such as level of education, employment, lack of all kinds of resources and even from family origins. It is not necessary that the prohibited distinction, exclusion or preference take into account each of these elements for it to create discrimination based on "social condition". It is enough that the distinction rests on one important aspect of a person's situation in society. It is also not necessary that the "social condition" is the "only" reason for the prohibited distinction, exclusion or preference. As well, it is not necessary that all welfare recipients are targeted by the exclusion.[59]

Conclusion

Cases, such as *Whittom, Gauthier* and *Guay*, indicate judicial concern about the treatment of people on income assistance, and insight concerning the poverty of women, but do not offer analyses that can be of assistance in addressing the interaction between the condition of being

female and the condition of being poor. Based on the judicial interpretations of social condition, it must be concluded that the assistance women would derive from an amendment adding the ground social condition to the CHRA is limited.

The Quebec cases show that, so far, the usefulness of the ground social condition is limited for the following reasons.

- The elements that have been identified as creating a person's inferior social condition do not include female sex, aboriginality, non-white race and disability.
- The ground has been restricted to addressing negative categorization and stereotyping based on social condition and specifically defined as *not* addressing the material conditions of poverty and economic inequality per se, including those that result from discrimination.

- The ground has been defined neutrally, so every person is understood to have a social condition. This neutrality has permitted a doctor and a judge, in different cases, to use the ground social condition to defend against claims of social condition discrimination made by others.[60]

Without question, poor Canadians should be protected from discriminatory conduct based on stereotypes that people with low incomes are untrustworthy, a poor risk, poor tenants, sexually and socially irresponsible, poor parents and worse. However, this is not, in our view, all that human rights legislation can or should confer by way of assistance to groups disadvantaged socially and economically.

As stated at the outset, we believe the test against which proposals for CHRA reform must be measured is: Will the amendments provide women with an effective avenue to challenge laws and practices that stereotype them because they are poor and/or cause, maintain or exacerbate their poverty and economic inequality? In our view, although adding the ground social condition could go some distance toward satisfying the first element of this test, it cannot, on its own, satisfy the second element.

Furthermore, if nothing else is done in the Act to signal that women's economic inequality is not consistent with guarantees of equality and non-discrimination, including the ground social condition could, in our view, be misleading and hazardous. We say this because constructing a ground that addresses only the discriminatory conduct poor people experience because of the *status* of being poor may make it more difficult to engage with the larger problem of the linkage between economic inequality and gender, ancestry, race and disability. It may send the message that the only thing human rights legislation is expected to address is the negative stereotyping of poor people because they are poor, and not the seemingly neutral distinctions that have the effect of relegating women and others to the ranks of the poor and the economically inferior. Second, it may imply to adjudicators that the other grounds—sex, ancestry, race and disability—are not intended to deal with the economic inequality that is experienced by women, Aboriginal people, people of colour and people with disabilities as a result of discrimination against them. Adjudicators may assume that any issue of economic

inequality belongs in the box marked “social condition” and that it is a small box that only concerns negative categorization because of the *status* of being poor.

3. SUBSTANTIVE EQUALITY FOR WOMEN: ADVANCES AND RETREATS IN THE JURISPRUDENCE

Since adding the ground social condition to the CHRA will not necessarily improve its capacity to advance the substantive equality project for women, the next question is: What will?

Though the expectation at the time the CHRA was introduced was that it would be a tool for addressing long-standing patterns of women's economic inequality, in effect, the statute was not designed to deal with those patterns, perhaps because group or structural inequality was not well understood at the time. The legislation was drafted in primarily formal equality terms. Over the last two decades, the concept of formal equality has been increasingly found inadequate when applied to the real cases of discrimination brought before adjudicators, and the meaning of the prohibitions in the statute have been, to some extent reshaped, as the law has been applied. In some key decisions during this period, tribunals and courts have gone well beyond consideration of the form of laws and policies and have designed new principles for analyzing inequality.

However, the idea that equality rights guarantees and human rights laws should address substantive disparities between groups is relatively new. The individualistic, formal idea of equality which has prevailed in our legal system for centuries is still more familiar, albeit outdated and inadequate. Because of this, interpretive problems continue to exist and the application of the concept of substantive equality is still uncertain, particularly in cases where the linkage between female gender and economic inequality is at issue.

We believe the statute should be rewritten now to incorporate the advances made through the application of the law over the last two decades and to correct identifiable interpretive problems.

Before describing the advances and the outstanding problems, however, it is important to state what we believe the differences are between the concepts of formal equality and substantive equality, since it is our view that substantive equality concepts should be clearly written into the statute now.

Formal and Substantive Equality

In formal equality theory, it is assumed that equality is achieved if a law, policy or practice treats likes alike. For example, if it is assumed that men and women are alike, an absence of different treatment in the form of the law, policy or practice, together with its universal application, are thought to make men and women equal.

Closer examination of formal equality reveals it is not just one concept but rather a package of interlocking puzzle pieces, which together, function to both conceal and legitimize the

oppression of marginalized groups in the society. The formal equality framework is characterized by:

- acceptance of the highly mechanical Aristotelian formulation that things that are alike should be treated alike, while things that are unalike should be treated as unalike in proportion to their unalikeness;
- a refusal to see that equality is actually a question of *in*equality, that is, of dominance and subordination between groups in the society;
- a refusal to see that relations of inequality between groups are sustained by government inaction as well as by government action;
- a propensity to place many forms of inequality in a realm, such as the family or the market, that is categorized as "private," beyond the reach and responsibility of government;
- a central normative commitment to a policy of blindness toward personal characteristics thought to be out of the control of the individual, such as genitalia and skin colour;
- resistance to dealing with discrimination relating to a category of stigmatization concerning which there may be a significant element of choice, such as being lesbian, or which, like poverty, is not readily reduced to personal characteristics analogous to skin colour;
- an incapacity to deal with the adverse effects of facially neutral laws or policies;
- an understanding of discrimination, not as systemic, but rather as consisting of explicit, differential treatment;
- a tendency to individualize everything so patterns of group-based oppression and subordination are rendered invisible; and
- a conception of government as always a threat to individual liberty and not as a significant actor in creating the conditions necessary for human flourishing.

In contrast, a substantive equality framework for human rights adjudication reflects the following insights.

- Equality is not a matter of superficial sameness and difference, but rather a matter of inequality, that is, dominance, subordination and material disparities between groups.
- It is the effects of laws, policies and practices, not the absence or presence of facial neutrality, which determine whether they are discriminatory.

- Addressing inequality between groups requires government action.

- The so-called "private" realms of the family and the marketplace cannot be set outside the boundaries of equality inquiry or obligation, because they are key sites of inequality.

- Neither liberty nor equality for individuals can be achieved unless equality is achieved for disadvantaged groups.

- It is essential to be conscious of patterns of advantage and disadvantage associated with group membership.

- The test of equality is not whether an individual is like the members of a group that is treated more favourably by a law, policy or practice, but whether the members of a group that has historically been disadvantaged enjoy equality in real conditions, including economic conditions.[61]

Some of these substantive equality insights are articulated in the jurisprudence of the last 20 years. We refer to both human rights and s. 15 Charter cases since the principles of interpretation are shared and mutually reinforcing.

Advances in the Jurisprudence

There are important jurisprudential developments over the last 25 years in both human rights and Charter interpretation which have given life to the minimalist language of the CHRA and provincial human rights laws. During this period, courts and tribunals established principles of interpretation intended to encourage adjudicators to deal in a sophisticated and socially sensitive way with the substantive inequality of women and other disadvantaged groups.

On key points, understandings have changed since the CHRA was first introduced. There is wide acknowledgement now that women's inequality has historic roots and structural dimensions. There is an understanding that discrimination is not simply a matter of the bigoted behaviour of individuals. Rather, it is principally the "normal" functioning of central institutions which perpetuates the inequality of women and other disadvantaged groups. Remedying the actual conditions of women's inequality will require changing how those institutions function.

Basic principles that have been recognized in the jurisprudence include:

- that women's inequality has group dimensions;

- that sex inequality is a problem experienced by women as a group, not men as a group;

- that grounds are not rigid, watertight compartments, but have softer boundaries and often intersect with each other;

- that affirmative structural responses by governments and others to women's substantive inequality are needed; and

- that adverse effect discrimination requires effective response.

Group Dimensions

In the jurisprudence, the group dimensions of women's inequality have been recognized. They were clearly recognized by the Supreme Court of Canada in *CN Rail*, in *Brooks* and in *Janzen*.[62] In *CN Rail*,[63] which concerned an entrenched pattern of discrimination against women applying for, and employed in, blue-collar jobs with the railway, the Supreme Court of Canada defined the issue before it as "whether a human rights tribunal...has the power under s. 41(2)(a) [of the *Canadian Human Rights Act*] to impose upon an employer a programme tailored specifically to address the problem of systemic discrimination in the hiring and promotion of a disadvantaged group, in this case women."[64] It noted further that the complaint was not "that of a single complainant or even a series of individual complainants; it was a complaint of systemic discrimination practiced against an identifiable group."[65]

The Court found that it was an uncontradicted fact that discrimination against women had deep roots at CN. Women were discriminated against at the time they applied for jobs. They were also required to take discriminatory tests, required to have unnecessary qualifications and harassed on the job if they were hired. Taken altogether, CN's practices amounted to a systemic denial of equal opportunities for women.[66] The Court concluded that a systemic remedy directed toward women as a group, including a specific requirement that CN hire one woman in every four new hires until the representation of women in blue-collar jobs in the St. Lawrence region reached 13 percent,[67] was necessary in the circumstances to prevent future discrimination. In this important case, the Court recognized that discrimination against women has group dimensions and requires a group-based remedy.

In *Janzen* v. *Platy Enterprises,*[68] the Supreme Court of Canada recognized that, though both perpetrators and victims of sexual harassment can be either male or female, "in the present sex-stratified labour market, those with the power to harass sexually will predominantly be male and those facing the greatest risk of harassment will tend to be female."[69] The Court held that when sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power.[70] Women are most vulnerable to it because they tend to occupy low-status jobs in the employment hierarchy, and because sexual harassment is used in a sexist society to remind women of their inferiority to the dominant male group.[71]

The Supreme Court also specifically rejected the reasoning of the Manitoba Court of Appeal in this case, which individualized and de-gendered the problem of sexual harassment. The Court of Appeal decided that the real cause of sexual harassment was the physical

attractiveness of the individual victim, rather than her membership in the group women. However, the Supreme Court rejected this. It found instead that sexual harassment does not occur solely because of the physical attractiveness of the victim, and that any female employee at the restaurant owned by Platy Enterprises was a potential victim of Grammas, the harasser, and as such was disadvantaged because of her sex.[72]

In *Brooks* v. *Canada Safeway*[73] the Supreme Court of Canada dealt with a disability plan that denied benefits to pregnant women. The Court, in finding that the plan discriminated on the basis of sex, recognized that women as a group are placed at an unfair disadvantage when they are made to bear the costs of pregnancy. The Court said:

> It cannot be disputed that everyone in society benefits from procreation. The Safeway plan, however, places one of the major costs of procreation entirely upon one group in society: pregnant women.… Removal of such unfair impositions upon women...is a key purpose of anti-discrimination legislation.[74]

These cases stand for the principle that women, as a group, experience discrimination and entrenched forms of disadvantage, and recognize that a key purpose of human rights legislation is the removal of barriers to women's equality.

Sex Inequality as a Problem of Women

Brooks recognized that women, as a group, are disadvantaged by policies which do not alleviate the social and economic burden of childbearing, but instead reinforce it. *CN Rail* recognized that women, as a group, experience sex inequality with respect to access to non-traditional jobs, and *Janzen* recognized that women, as a group, are more vulnerable to sexual harassment because of unequal power relations between men and women.

In Charter jurisprudence, the Supreme Court of Canada has recognized that women generally occupy a disadvantaged position in society relative to men. In the case of *Weatherall,*[75] the Court specifically repudiated a claim by men that, as a group, they were discriminated against because of their sex by a policy which permitted women guards in some circumstances to do frisk searches and cell checks of male prisoners, while men guards were not permitted to do frisk searches of women prisoners or to check cells when the women might be undressed. In this case, the Court said:

> Given the historical, biological, and sociological differences between men and women, equality does not demand that practices which are forbidden where male officers guard female inmates must also be banned where female officers guard male inmates. The reality of the relationship between the sexes is such that the historical trend of violence perpetrated by men against women is not matched by a comparable trend pursuant to which men are victims and women the aggressors. Biologically a frisk search or surveillance of a man's chest area conducted by a female guard does not implicate the same concerns as the same practice by a male guard in relation to a female inmate. Moreover,

> women generally occupy a disadvantaged position in society in relation to men. Viewed in this light, it becomes clear that the effect of cross-gender searching is different and more threatening for women than for men.[76]

Grounds Are Not Rigid, Watertight Compartments

In some cases, grounds have been interpreted as though they were rigid, watertight compartments.[77] In cases where more than one ground has been pled, adjudicators have applied grounds serially, deciding first whether there is sex discrimination, and then whether there is race discrimination.[78]

Nitya Iyer notes that the treatment of grounds in this way—as rigid, watertight compartments—distorts women's experiences, and in the case of women of colour, analogizes them to what would have happened to raceless women or genderless racial minorities.[79] Iyer explains that the treatment of grounds as watertight compartments makes discrimination against the most disadvantaged women disappear.[80] Only if the particularities of their experiences as Aboriginal women, or immigrant women, or women with disabilities are examined fully can they be understood and remedied appropriately. Iyer also notes that where a race claim is made along with another ground, because of judicial resistance to making findings of race discrimination, race is often treated as secondary or is not addressed at all if the other ground of discrimination is established. This forecloses the opportunity for developing jurisprudence about race discrimination[81] and for public examination of the realities of racism. The point here is that, unless grounds are treated as richly interactive, the disadvantages of the most disadvantaged women will be neither seen nor addressed.

In *Dartmouth/Halifax County Housing Authority* v. *Sparks,*[82] the Nova Scotia Court of Appeal handled the intersectionality of grounds deftly, recognizing the interaction of the grounds race, sex and income. It ruled that tenants of public housing, as a group, were discriminated against because they were not afforded the protections of the *Residential Tenancies Act*[83] if their tenancy was terminated. The Court, in that case, found that tenants in public housing were predominantly black single mothers receiving social assistance. The Court said: "The public housing tenants group as a whole is historically disadvantaged as a result of the combined effect of several personal characteristics listed in s. 15(1)."[84]

In its recent decision in *Law,*[85] the Supreme Court of Canada recognized that a discrimination claim can posit an intersection of grounds that are a synthesis of grounds listed in s. 15(1) or analogous to them. It immediately applied this in the case of *Corbière.*[86] At issue in this case was a provision of the *Indian Act*[87] which bars members of a band who live off-reserve from voting in band elections. The Court found that the group experiencing differential treatment was Aboriginal people who are band members but live away from their reserves. Though this combination of traits did not fall under one of the listed or already recognized analogous grounds, the Court held that the exclusion of off-reserve band members from voting was based on a new ground that is a combination of existing and analogous grounds, namely, "aboriginality-residence."[88] L'Heureux-Dubé, J. noted that Aboriginal women are particularly affected by the bar to voting by off-reserve band members because of the history of their

involuntary loss of Indian status. Many Aboriginal women who lost their status because of s. 12(1)(b) of the *Indian Act*[89] and who have regained that status through Bill C-31[90] live off-reserve, because they had no choice but to leave the reserve when they lost their status. This approach to grounds permitted the Court to consider specifically the characteristics of the group in question, and to examine fully the nature of their disadvantage.

Effective Responses to Adverse Effect Discrimination

The ability and willingness of investigators, tribunals and courts to analyze fully adverse effect discrimination and respond to it effectively may be the most important factor now that determines whether human rights guarantees will advance the substantive equality of women. Most facially obvious gender distinctions in the text of legislation and policies have been eliminated. However, this does not mean that discrimination has disappeared. On the contrary, it means that now we are getting to the hard part, to the discrimination that is embedded, ignored and accepted.

Early in the application of human rights legislation, tribunals and courts decided that same treatment was an inadequate definition of equality, and that discrimination must be recognized by the effect on the victim, not by the intent of the perpetrator. The Supreme Court of Canada first recognized adverse effect discrimination in 1985 in the case of *O'Malley.*[91] Theresa O' Malley alleged that she was discriminated against with respect to employment because of her creed. The impugned rule was a requirement that all employees work on Saturdays on a rotating basis. O'Malley was a Seventh Day Adventist and her religion required her to observe a Sabbath from sundown Friday to sundown Saturday. Her employment was terminated because of her refusal to work on Saturdays. The Court held that Simpsons-Sears discriminated against O'Malley on the basis of creed, distinguishing in its decision between direct discrimination and adverse effect discrimination. Direct discrimination, the Court said, refers to practices or rules which discriminate on their face, such as "No Catholics or no women or no blacks employed here."[92] By contrast, adverse effect discrimination arises where an employer, or service provider, adopts a rule or standard which is neutral on its face and applies equally to all, but which has a discriminatory effect on an individual or a group because it imposes on them obligations, penalties or restrictive conditions not imposed on others.[93] The Court found there was an obligation on the employer to "accommodate" Ms. O'Malley's religion because of the adverse effect on her of the attendance rule.

In its first decision interpreting s. 15 of the Charter,[94] *Andrews* v. *Law Society of British Columbia,*[95] the Supreme Court of Canada imported into s. 15 the human rights principles it had shaped over the previous decade. The Court endorsed a concept of discrimination focussed on adverse effects, and confirmed there is no requirement for proof of intent to discriminate.[96] In its recent decision in *Law*, the Court summarized its holdings of the first decade of s. 15 analysis and reiterated its earlier rulings that proof of legislative intent is not required to found a s. 15 claim.[97] A claimant's onus will be satisfied by showing that the effect of the law is discriminatory.[98]

That discrimination can occur through the adverse effects of neutral-seeming rules or policies is an accepted principle of law in Canada now. However, tribunals and courts are still struggling with the effective application of this principle in sex equality cases and, for women, achieving substantive equality hangs in the balance.

The Need for Affirmative Structural Responses

Can equality be achieved through refraining from discriminatory practices, or is positive action required by governments and private actors to achieve it? Increasingly, human rights decision makers do not accept that inaction is a sufficient response to a complaint of discrimination, even though counsel for respondents sometimes argues that it is. In the case of *Huck*,[99] for example, a movie theatre was found to have discriminated against Michael Huck based on his disability because of its failure to make it possible for him to enjoy the service provided. Mr. Huck, who had muscular dystrophy and used a motorized wheelchair, was refused service unless he agreed to sit in front of the front row of seats. The theatre argued that it provided him with the same service as others, and if he could not enjoy it in the same way that was the fault of his disability, not of the theatre. The Saskatchewan Court of Appeal rejected this reasoning, and the theatre was required to alter its seating arrangements in order to provide patrons with disabilities with some choices regarding where in the theatre they would sit.

The concept of accommodation, first recognized in *O'Malley*,[100] is not just an acknowledgement that identical treatment does not always produce equality; it is also a recognition that merely refraining from discriminatory conduct is not sufficient to fulfill the goals of human rights legislation. When members of disadvantaged groups are negatively affected by discriminatory rules, positive measures are required to eliminate the discrimination.[101]

In *Eldridge*,[102] the Supreme Court of Canada held that where sign language interpreters for deaf people are necessary for effective communication in the delivery of medical services, failure to provide them constitutes a violation of s. 15 and is not saved by s. 1. The Court specifically rejected the argument that s. 15 requires only that people be treated the same and does not obligate governments to ensure that disadvantaged members of society have the resources necessary to take advantage of public benefit programs. Writing for a unanimous Court, LaForest, J. said, "In my view, this bespeaks a thin and impoverished vision of s. 15(1)."[103]

In *Vriend,*[104] the Supreme Court of Canada held that the omission of the ground sexual orientation from the Alberta *Individual's Rights Protection Act*[105] violated s. 15 of the Charter because it had a disproportionate impact on gays and lesbians as opposed to heterosexuals, depriving them of both legal protections and recognition of their human dignity that, given the social reality of discrimination against them, they clearly need.

Thus, in these recent cases, the Supreme Court of Canada has taken the important step of recognizing that governments have a responsibility to act to overcome disadvantage. Inaction

and legislative silence cannot be assumed to be neutral or non-discriminatory. A court or tribunal can only determine whether inaction is non-discriminatory by considering the impact of inaction or silence on a particular disadvantaged group.[106]

Further, the message that governments and others do not have positive obligations does not conform with undertakings Canada has made as a signatory to international human rights treaties. For example, as a state party to CEDAW, Canada has undertaken to "take all appropriate measures" to eliminate discrimination against women "in all fields including the political, economic, social and cultural fields."[107] CEDAW contemplates that state parties will pass legislation and also take other measures to ensure the practical realization of the principle of equality for women.[108] Obligations are placed first on governments; but those obligations extend to ensuring that discrimination against women by "any person, organization or enterprise" is eliminated.[109]

In short, the idea that achieving equality is, in the main, a prohibitory endeavour does not square with emerging jurisprudence or the commitments that Canada has made pursuant to international human rights treaties.

Retreats in the Jurisprudence

Even though courts and tribunals have said repeatedly that determining whether a given policy or practice is discriminatory is primarily a question of assessing adverse effects, rather than a search for discriminatory intention or differential treatment, the usefulness of this theoretical development is uncertain because of the difficulties some courts and tribunals have had when faced with women's claims of adverse effect discrimination.

Although there is widespread acceptance of the principle that women are entitled to substantive equality, and not mere formal equality, decision makers remain locked into a mind set about discrimination that is rooted in formal equality thinking. The lack of clear language in the CHRA and other human rights statutes affirming an intention to assist women in overcoming conditions of actual inequality means that human rights legislation is not serving as a helpful corrective. As a result, efforts to use human rights legislation to address the economic inequality of women are being blocked.

In human rights case law, one significant manifestation of the persistence of formal equality thinking is an entrenched assumption that if a rule looks neutral it must also be neutral in its effects. This assumption is reflected in the decision of the British Columbia Court of Appeal in a case called *Meiorin*.[110] At issue in *Meiorin* was an employment requirement that forest fire fighters run 2.5 kilometres in less than 11 minutes. The group used to develop the test standard was predominately male forest fire fighters. The effect of the test standard was to exclude most women, including Tawney Meiorin whose time, although rated by experts as indicative of excellent fitness, was 49 seconds over the standard of 11 minutes.

A grievance arbitrator found the test standard was discriminatory, based on its adverse effects on women,[111] not justified by evidence of safety or efficiency risk, and ordered Tawney Meiorin reinstated. However, the British Columbia Court of Appeal disagreed. The Court stated, "if individual testing is carried out there is no discrimination."[112] The Court came to this conclusion based on the outdated notion that the exclusive paradigm of discrimination is wrongful stereotyping of "an individual solely on the basis of association with a group,"[113] and that "individual testing is inherently non-discriminatory" because it assesses an individual's "merits" and "capacities."[114] While the Court was correct in recognizing that discrimination can result from wrongful stereotyping of an individual woman based on assumptions about the abilities of women in general, this is an incomplete formulation. Sex discrimination may also result from the incorporation of male norms into neutral-seeming rules, notwithstanding that each candidate is tested individually. In the Supreme Court of Canada, an intervenor, the Women's Legal Education and Action Fund (LEAF), put it this way.

> The concept of "merit" and "ability" to do a job is not neutral. By definition, "merit" and "ability" to do a given job encompass the existing ways of working. In a formal equality approach the analysis stops at the point of "fitting" into the existing model. However, substantive equality requires that the norms underlying a specific definition of ability be challenged.[115]

Meiorin demonstrates the persistence of a highly individualistic model of discrimination that was never intended to deal with group disadvantage.

Another manifestation of the continuing influence of formal equality thinking on human rights adjudication is the insistence on narrow biological comparisons. To prove sex discrimination, it must be shown that women or men are differently affected by a rule or policy because of their different biological characteristics.

That is the paradigm of sex discrimination that underlies the decision of the Federal Court of Appeal in *Thibaudeau*[116] in which Hugessen, J.A., writing for the Court, reduced the human rights ground sex purely to a matter of biological difference, with the result that the sex discrimination claim was defeated. At issue in *Thibaudeau* was the provision of the *Income Tax Act* which required custodial parents, 98 percent of whom are women, to pay tax on child support payments they received, while another provision of the Act made such payments tax deductible for the payor non-custodial parents, most of whom are men. Although Hugessen, J.A. recognized that within the negatively affected group women were the overwhelming majority, he viewed this as insufficient to found a claim of sex discrimination because two percent of the negatively affected group were men.

It was not just that the presence of men in the group was seen by the Court as diluting the pool of affected individuals such that the burden of proving adverse effects on women was not discharged. Rather, the fact that some men could be affected was taken by the Court as fundamentally inconsistent with the allegation of sex discrimination. The Court saw it as breaking the necessary "causal connection"[117] between the ground sex and the distinction in

treatment resulting from the *Income Tax Act*. In the Court's analysis, the fact of custodial parents being overwhelmingly women assumed no importance, as though it was merely coincidental and not inextricably related to "'hidden power relations' which assign to women primary responsibility for childcare in Canadian society."[118]

Hugessen, J.A. reasoned that:

> A male is always the opposite of a female and *vice versa.* Women or any sub-group of women who claim that a law discriminates on the basis of sex necessarily do so because it draws a distinction based on their shared characteristic of femaleness which it does not draw for those who have the opposite characteristic of maleness.[119]

The examples of femaleness and maleness provided by Hugessen, J.A. were of "being pregnant or having prostate cancer."[120] The difficulty with this narrow biological approach is what it leaves out. Excluded from this understanding of sex discrimination is an appreciation of the socially subordinating consequences of femaleness, including economic inequality, which provide the necessary context for understanding how and why a facially neutral system such as the inclusion/deduction system of the *Income Tax Act* affects women as a group differently from men as a group.

In the view of Hugessen, J.A., to succeed on a claim of adverse effect sex discrimination women would have to show that the challenged provision had a *qualitatively* different effect on women than on men. He said:

> The focus, surely, is not on numbers but on the *nature* of the effect; on the quality rather than the quantity. If legislation which adversely affects women has the *same* adverse effect on men, even though their numbers may be smaller or the likelihood of their suffering may be less, it cannot logically be said that the ground of discrimination is sex.[121]

However, it is clear that the inclusion/deduction system did have particular adverse effects on women, because of the situation of single mothers but, without a socially contextualized conception of sex discrimination, those effects can be difficult to perceive. Lisa Philipps and Margot Young[122] explain it this way.

> Had Hugessen J.A. given appropriate contextualized consideration to the effect of s. 56 in *Thibaudeau*, what would he have found? A number of things seem obvious. Female custodial parents face a hostile world. They are disadvantaged in terms of labour force participation and access to education and training opportunities. Their skills and labour are less valued than those of male custodial parents. This is in large part because, as women, they are already embedded in society-wide patterns of disadvantagement and prejudice. Male custodial parents, while they may share some of the immediate disadvantages which are imposed on separated custodial parents, like section

> 56(1)(b), do not share this larger context of gender disadvantagement. Still attached to these men are those privileges and advantages granted to men and denied to women. Because of this, there will seldom be an absence of qualitative difference in something done to women, relative to the thing done to men. Only by ignoring this context can Hugessen J.A. conclude that men and women are equally burdened by section 56(1)(b)[123] [citations in original deleted].

Making it completely clear that the Court specifically excluded the poverty of women as a group from its conception of the ground sex, Hugessen, J.A. said further:

> [I]t is a shameful truth that far more women in Canada suffer from poverty than men. Legislation which discriminates against the poor would therefore adversely affect more women than men. It could not be said, however, to discriminate on the grounds of sex unless it also drew a distinction against poor men or unless it created a different effect on women than on men.[124]

Again, the Court missed the point that poverty is such a central element of gender that legislation which has the effect of exacerbating women's poverty should be understood as a form of sex discrimination. This does not mean that sex is necessarily the only implicated ground. There can be discrimination on more than one ground. In *Thibaudeau*, for example, the ground family status could also be said to have been implicated by the inclusion/deduction scheme, in that women (and some men) who were custodians of their children were negatively affected by the scheme. It should be possible for decision makers to recognize that a provision may discriminate based on more than one ground. A good example of this may be found in the mandatory retirement case of *Dickason*[125] wherein L'Heureux-Dubé, J., in dissent, recognized that mandatory retirement at age 65 is as much an issue of gender as of age because of socio-economic patterns affecting women.

However, it appears that in *Thibaudeau* nothing short of direct evidence of a biological manifestation of discrimination would have convinced the Federal Court of Appeal that the inclusion/deduction scheme constitutes sex discrimination. This is made evident by the example of physical testing supplied by the Court.[126] Hugessen, J.A. suggested as a counter example to poverty, which he indicated the Court did not recognize as an issue of sex discrimination, that legislation imposing a physical test that could more easily be met by most men would be vulnerable to attack as sex discrimination. Although Hugessen, J.A. suggested that such a test would be "qualitatively different" for women than for men, the only way in which this makes any sense, in the terms of the judgment as a whole, is if we understand that different capacities to succeed in physical tests are elements of sex, such as the capacity for pregnancy and the capacity for prostate cancer.

It is not that Hugessen, J.A. is entirely wrong in his characterization of men and women's biological differences, but rather that the Court was too narrowly focussed on the question of biological similarities and differences and not focussed enough on the societally constructed hierarchy of inequality between men and women.

Whether or not the ground sex works for women is not just an academic point. For adverse effects analysis to function effectively for women, it is critical that decision makers not place all legislation on an artificial gender-neutral footing, and obscure the adverse effects of facially neutral legislation on women by reducing the ground sex to a matter of biological difference alone. The legal ground sex must be understood to include the political, social and economic consequences of being female.

Women's sex equality claims that do not succeed as such are also vulnerable to failing on other grounds, even when, as under the Charter, there is an open-ended list of grounds. In *Thibaudeau,* a majority of the Federal Court of Appeal did find that the challenged provision of the *Income Tax Act* violated the equality rights of the "separated custodial parent" based on the ground family status.[127] However, this conclusion was overturned on appeal to the Supreme Court of Canada which found no discrimination.[128] It is also worthwhile to note that in the Federal Court of Appeal, Letourneau, J.A., the only judge who specifically addressed the question of whether the inclusion/deduction system discriminated based on the ground of social condition, found that it did not because in his view there was no evidence that the discrimination created by the *Income Tax Act* was "in any way dictated by the applicant's 'social condition'."[129] In other words, according to Letourneau, J.A., to prove discrimination based on social condition, Suzanne Thibaudeau would have had to show that her social condition, as a divorced single mother receiving child support payments, was the *cause* of the discrimination of which she complained. This adds to our scepticism about whether merely adding the ground social condition to the CHRA would make a difference to the outcome of a case such as this.

There is a pattern in the case law of decision makers requiring that the affected group include no members of any other group—which is another way of analyzing what the Federal Court of Appeal did in *Thibaudeau*—making it difficult, if not impossible, for women to get any assistance in using human rights legislation to address issues of economic inequality, whether those issues arise in the context of services, accommodation or employment.

The following examples related to women's access to employment benefits are illustrative. They also show that the logic on which *Thibaudeau* rests is not confined to Charter jurisprudence. The same logic has infected statutory human rights jurisprudence and, therefore, warrants serious attention in this review of the CHRA.

Saskatchewan Teachers' Superannuation Comm. v. *Anderson*[130] is a case about women and pensions. The complaint concerned a refusal by the Saskatchewan Teachers' Superannuation Commission (STSC) to allow the complainants Sharon Lee Anderson and Signe J. Mossman to buy back contributory service to replace lost entitlement because of pregnancy. Anderson and Mossman were teachers who became pregnant in the 1950s and 1960s. Before 1976, their school boards did not provide maternity leaves and required women to resign when they became pregnant.

Some years later, Anderson and Mossman applied to the STSC to purchase one year's contributory pension benefits. Both women were due to retire with just under 30 years of

service. Their failure to accumulate 30 years of service was due to lost seniority and benefits at the time of their pregnancies. The STSC refused the application because under the governing statute, members were only allowed to purchase contributory service to replace time taken for leaves approved by a school board. However, board-approved leaves did not come into being until 1976. Since neither woman took an approved leave, there being no approved leaves for maternity at the time, they were refused permission to purchase the extra service. They complained that the STSC policy constituted sex discrimination.

Ultimately, their case was heard by the Saskatchewan Court of Appeal. In dissent, Jackson, J.A. found that there was sex discrimination. Applying Supreme Court of Canada doctrine on adverse effect discrimination, Jackson, J.A. ruled that the effect of the policy was to say "no women who took maternity leaves prior to January 1, 1976, are entitled to buy back the leave period for pension purposes."[131] Jackson, J.A. reasoned that the complainants were denied a benefit because they were pregnant and needed to take time off work. This denial had a disproportionate effect on women because the very fact of pregnancy necessitates taking an absence from teaching. They were discriminated against vis-à-vis men who did not have the same physical need. The STSC policy then built on that discrimination by offering the buyback option only to those with approved leaves when the opportunity for women to obtain approval for maternity leave did not exist. Jackson, J.A. concluded that, "[t]heir disadvantage, at its essence, stems from being women."[132]

Although Jackson, J.A. made a finding of sex discrimination, the majority disagreed. The majority reconfigured the comparison that the complainants sought to make between those who needed maternity leave and those who did not, such that the situation was rendered gender neutral and therefore devoid of sex discrimination. In the view of Gerwing, J.A., writing for the majority, the legislation distinguished between parents who took time off to care for their new children before the inception of board-approved leaves in 1976 and all other teachers.[133] Gerwing, J.A. characterized the fact that only women can become pregnant as "beside the point,"[134] and reasoned that "[m]en who took parental leave before Board-approved leaves were instituted have also been denied the option to buy back lost pension benefits."[135] The majority concluded that the legislation really drew a distinction, not based on sex, "but on time; that is when the absence took place in relation to the enactment of the provision to permit pension benefits in situations where there had not been a Board-approved leave."[136]

In *Dumont-Ferlatte* v. *Canada (Employment and Immigration Comm.)*[137] a federal human rights tribunal reasoned similarly that it was not discriminatory to penalize women who were away from work on maternity leave provided that other non-pregnant employees were also subject to penalty for absence. In this case, a sex discrimination complaint was brought in respect of a collective agreement provision that prevented a woman absent from work on maternity leave from earning her annual leave, sick leave credits and other benefits. The rule at issue was that if an employee worked less than 10 days in a calendar month, entitlement to these benefits ceased. On its face, the rule was gender neutral.

It was argued on behalf of the complainant that, although the rule was facially neutral, it discriminated against women by penalizing them for taking maternity leave.[138] However, the Tribunal held that the provision was not discriminatory because it applied to all leaves without pay. Explicitly invoking the reasoning of Hugessen, J.A. in *Thibaudeau*,[139] the Tribunal said: "With all due respect for the opposite view, it is not sufficient here to compare the situation of a pregnant woman with that of a man who will never be pregnant."[140]

The Tribunal went on to say that, based on *Thibaudeau*: " It is therefore necessary also to examine the effects of the rule and ask oneself whether a pregnant woman...is treated any differently than others to whom the same rule applies when they take similar kinds of leave."[141]

The Tribunal concluded that all employees on unpaid leaves were treated the same and therefore there was no discrimination based on sex.

It is ironic that in pregnancy cases such as *Saskatchewan Teachers* and *Dumont-Ferlatte*, even on a strictly biological approach to the ground sex, the decision makers could have found sex discrimination. The fact that they did not, and instead placed pregnant women in a group with other non-pregnant persons, suggests that the message of the Supreme Court of Canada in *Brooks*, to the effect that women should not be penalized because of their childbearing capacity, has not taken hold in the jurisprudence. Moreover, it would be a mistake to think that the obstacle represented by these cases relates only to pregnancy. The underlying problem is a lack of recognition that protections against sex discrimination are intended to remove barriers disproportionately experienced by women as a group.

Notwithstanding extensive talk in the cases about the applicability of adverse effects analysis, too often decision makers are actually still only focussed on the question of whether there is direct discrimination, and they have great difficulty getting beyond that.

Meiorin in the British Columbia Court of Appeal, *Thibaudeau* in the Federal Court of Appeal, *Saskatchewan Teachers* and *Dumont-Ferlatte* are all examples of women's complaints of sex discrimination being individualized and neutralized to the point that the impact on women as a group becomes invisible. The logic underlying these cases is this: as long as there are some men in the group, and everyone in the group is treated as though they were male, it cannot be sex discrimination. Until this formal equality logic is displaced, women will not receive the full benefit and protection of human rights protections.

4. CONCLUSION AND RECOMMENDATIONS

Since its introduction 25 years ago, human rights law has evolved significantly. Among the central jurisprudential developments are the recognition of adverse effect discrimination and the movement away from highly mechanical, individualistic modes of legal reasoning such as that which resulted in the defeat of women's sex equality claims under the *Canadian Bill of Rights*.[142]

Notwithstanding these positive developments, cases show that the mind set some courts and tribunals bring to the task of applying human rights guarantees makes it unlikely they can be effective tools for dismantling entrenched patterns of social and economic disadvantage experienced by women. There is a disturbing tendency for adjudicators to discount discrimination complained of by women unless it is shown that a respondent is treating individual women differently from individual men. And there is resistance to inferring different treatment from evidence of adverse effects experienced by women. The result is that women are being blocked in their efforts to use human rights protections to address conditions of social and economic inequality. Simultaneously, the ability of human rights legislation to meet the needs of women is undermined.

A major objective of this review should be to forge the CHRA into a tool that can more effectively address the material inequality of women. We have considered as one policy option the idea of adding a new ground to the CHRA, a ground called "social condition." Based on the Quebec experience, our assessment is that social condition is likely to be interpreted narrowly, as providing a right to have one's status as a recipient of social assistance, or a person with low income, ignored by employers and service providers. In our view, the addition of social condition, by itself, is an unsatisfactory response to central difficulties women confront in cases where they challenge rules and policies that maintain or reinforce their economic inequality. What is needed is a reframing of the CHRA, a reframing that reflects the transition from formal equality to substantive equality thinking that is occurring in Canadian human rights jurisprudence, and a reframing that both incorporates into the CHRA the positive jurisprudential developments of the last 20 years and seeks to overcome known problems occurring in the application of substantive equality precepts.

In general, the current CHRA is a formal equality document. It is individually focussed and assumes that equality can be achieved if public and private actors refrain from negative conduct and treat individuals the same, with some specified exceptions. In 1999, this vision is both unpersuasive and out of date. It is time for the CHRA to reflect both current knowledge and Canada's international human rights commitments.

Thinking about reframing human rights legislation for a new century is a big project. In the time and space available here, we can only sketch quickly principal elements that need to be dealt with. We make suggestions for new language, in all modesty, not because we believe we have devised *the* way to reconfigure the language of the Act but in the hope that our

attempts will spark discussion among the many women in Canada who care about this most basic equality tool, the CHRA.

There are a number of areas in which constructive changes could be made.

The Right of Women to Substantive Equality

Nowhere is it recognized in the CHRA that the Act is intended to promote the substantive equality of women. Although the Supreme Court of Canada has explicitly recognized that women are a disadvantaged group in Canadian society and that a key purpose of human rights legislation is to eliminate this disadvantage, the current CHRA expresses no acknowledgement that women, as a group, are a central concern of the legislation, no recognition that women are disadvantaged and no normative commitment to women's substantive equality.

Instead, the Act gives an opposite message.

The purpose clause refers to equality of opportunity for individuals and fails to specify an intention to address patterns of inequality experienced by disadvantaged groups. Section 2 states:

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

Also, the grounds in the CHRA, such as sex, are worded neutrally. This gives no clue that sex inequality is a persistent problem for women as a group, and rarely a problem for men.

The central prohibitory sections of the CHRA dealing with employment, services, harassment, membership in trade unions and professional associations, reinforce the idea that discrimination is an experience of individuals, without group dimensions. A majority of the sections (ss. 5 through 14) which define discriminatory practices state that it is a discriminatory practice to deny an opportunity *to any individual* or to differentiate adversely in relation *to any individual.*[143]

Reference to a class of individuals appears in s. 10, which states that it is a discriminatory practice for an employer or a union to pursue a policy, or enter into an agreement, that deprives an individual *or class of individuals* of any opportunity because of a prohibited

ground of discrimination. The possibility of a group or class being affected by a discriminatory practice is acknowledged here, but only, we note, with respect to employment. No such provision deals with discrimination against a class of individuals with respect to harassment, a service or tenancy.

Further, there is a problem inherent in s. 10 being a separate section from the general employment section, because this implies that complaints made by individuals about incidents of discrimination under s. 7 have no group dimensions and that one can draw a bright line between individual and class complaints. This is a problematic message; many complaints can only be accurately analyzed when the status and conditions of the group to which the complainant belongs are taken into account. Many individual complaints have implications for a whole group. Every woman's complaint has group dimensions.

Unfortunately, s. 10 does not counteract the overwhelmingly individualistic focus of the Act. Indeed, it seems to reinforce the message that individual treatment is principally what the Act is about.

Judicial endorsement of the idea that anti-discrimination provisions and constitutional equality rights guarantees should address the actual disadvantages of historically disadvantaged groups, such as women, is relatively new, but central to women's advancement. Now the CHRA needs to reflect this fundamental principle. We note that in B.C.'s new *Human Rights Code*, one stated goal of the legislation is: "to identify and eliminate the persistent patterns of inequality associated with discrimination prohibited by this Code."[144]

It is essential that a revised CHRA:

- expressly state that a purpose of the Act is to identify and eliminate political, social and economic disadvantages experienced by historically disadvantaged groups;[145]
- specifically name women as a group that experiences persistent disadvantage; and
- specifically name Aboriginal people, people of colour and persons with disabilities in a non-exclusive list of groups that are historically disadvantaged.

Naming women, Aboriginal people, people of colour and persons with disabilities is crucial to giving the Act a substantive equality focus. It is also essential to include a list of disadvantaged groups to ensure the category "women" is understood to include Aboriginal women, women of colour, women with disabilities and other groups of women.

By recommending that women be named specifically in the CHRA, we should not be understood to be advocating that other disadvantaged groups, in particular, Aboriginal people, people of colour and persons with disabilities should not be named in a similar fashion and for similar reasons. Indeed, we believe they should be. A number of the following recommendations could easily be broadened to name and include other historically

disadvantaged groups. The focus in this paper, however, is on women and women's inequality problems.

In addition to specifically naming women, a revised CHRA should:

- eliminate the separation of individual and class complaints as they are currently separated in ss. 7 and 10;
- ensure that each section dealing with employment or services, etc. recognizes the group dimensions of complaints made by members of disadvantaged groups; and
- ensure that each section dealing with employment or services, etc. prohibits any practice which has the effect of maintaining, reinforcing or exacerbating the disadvantage of an historically disadvantaged group.

Overlapping and Multiple Forms of Discrimination Experienced by Women

In addition to the fact that the grounds are stated neutrally, which gives a distorted picture of the problem that human rights legislation is intended to address, grounds are listed as though each were neatly distinct.

Although the CHRA was amended recently to include a new s. 3.1, clarifying that a discriminatory practice can be based on the effect of a combination of prohibited grounds, it is not clear that this, by itself, will encourage investigators and adjudicators to perceive the particularities of discrimination experienced by, for example, Aboriginal women, black women, women with disabilities, lesbians and single mothers, and dissuade them from rejecting claims that do not fit neatly into just one ground.[146]

This is a hard problem to solve through statutory language. However, it is a fundamental issue because, as we noted earlier, if grounds are not read together, the claims of the most disadvantaged women disappear.

The statement about intersectionality in s. 3.1 is very abstract. A statement that can be readily understood by women who are potential complainants, by investigators and adjudicators is needed.

A revised CHRA should therefore, in our view, specifically state that a purpose of the Act is to address those forms of discrimination that all too easily disappear from view because of the compartmentalization of grounds, that is, the overlapping forms of discrimination experienced by Aboriginal women, women of colour, immigrant women, women with disabilities, lesbians, single mothers and older women.

Adverse Effect Discrimination

The CHRA is mainly silent on the question of adverse effect discrimination. Section 7 prohibits discriminating *directly or indirectly* with respect to employment. This is the only reference and it is not adequate. It is clear from the cases that the concept of adverse effect discrimination applies throughout the Act, and is not restricted to employment. The concept of adverse effect discrimination has developed, and is well established, in the case law.

Nonetheless, as we have noted, there are significant problems outstanding in the application of adverse effects analysis and it is, for women, a crucial matter to their advancement. In this review, we believe it is essential that the Act be amended to confirm the centrality of adverse effects analysis to human rights law and to ward off problems that are identifiable in the case law.

We recommend that the revised Act explicitly state that:

The discrimination which the CHRA is intended to prevent includes the adverse effects experienced by women through the operation of facially neutral rules, policies and practices, which maintain or exacerbate their pre-existing disadvantage.

And further:

It is not a defence to a claim of adverse effect discrimination brought by women to show that:

a) some men are affected negatively by the impugned rule of policy; or

b) the impugned rule or policy is not the sole cause of the inequality complained of.

Affirmative Responses to Discrimination

As we have noted, the general structure of the CHRA posits that compliance with the Act will be achieved if employers, service providers and others refrain from engaging in discriminatory practices. The notion that equality is created by not engaging in discriminatory conduct is a partial truth. Moving toward equality requires taking positive steps to identify and address the various forms of entrenched disadvantage experienced by women, and particular groups of women, in Canada. Refraining from discriminatory conduct that further worsens the situation of women and others is important, but that alone will not alter the status quo of women's inequality.

Section 16(1) of the CHRA does provide for special programs, stating that it is not a discriminatory practice for a person to carry out a special program designed to prevent, reduce or eliminate disadvantages experienced by a disadvantaged group with respect to employment, services or accommodation.

However, the fact that a s. 16(1) program is characterized as “special” reinforces the message that the main goal of the legislation is to ensure that public and private actors do not engage in discriminatory acts. The general rule is: refrain from discriminatory conduct. The exception to the rule is: take positive steps to reduce or eliminate disadvantage. A “special program” can be established voluntarily, in order to go further than the Act generally requires.

This structure, and the relationship of the prohibition sections and the special programs section, conveys the message that the general obligation is a negative one. It is an obligation not to depart from the norm of identical treatment without regard to sex, race or other listed grounds.

Instead, the revised CHRA should endorse the view that everyone to whom the Act applies has a responsibility to take positive steps to promote equality.

The Right of Women to Substantive Equality Includes Full Social and Economic Equality

The CHRA is silent on the question of the social and economic inequality of women. Perhaps the drafters believed that nothing specific need be said. However, the pull of formal equality is still so strong that the meaning of equality can be eviscerated, even after courts have repudiated direct and intentional discrimination as defining, and have embraced the notion that the major focus for human rights and equality rights law must be the elimination of the disadvantage of women and other historically disadvantaged groups. When the concept is eviscerated, it is the guts of the inequality problem that are cast aside, that is, the social and economic inequalities that are key manifestations of entrenched and long-standing discrimination based on sex, race and disability.

There is no question that the commitment of the conceivers of human rights legislation, of federal legislators in 1976 and now, and of Canada as a signatory to international human rights treaties is de facto, not merely de jure equality for women. There is controversy, reflected in the case law, about the relationship of tribunals and courts to governments as allocators of resources. We note, however, that the ICESCR Committee has stated, in its general comment on the domestic application of treaty rights, that the ICESCR’s guarantees of equality between women and men, and of non-discrimination with respect to economic, social and cultural rights are rights capable of immediate implementation and of judicial treatment.

Further, the ICESCR Committee has specifically repudiated an approach to human rights which presumes that social and economic rights are not enforceable and, specifically, that social and economic rights dimensions of equality are not enforceable. The Committee has stated:

> [I]n relation to civil and political rights, it is generally taken for granted that judicial remedies for violations are essential. Regrettably, the contrary presumption is too often made in relation to economic, social

> and cultural rights. This discrepancy is not warranted either by the nature of the rights or by the relevant Covenant provisions. The Committee has already made clear that it considers many of the provisions in the Covenant to be capable of immediate implementation.
>
> Thus in General Comment No. 3 [the Committee] cited, by way of example: articles 3 [equality between men and women], [and] 7(a)(i) [equal pay for work of equal value]…. [T]here is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justifiable dimensions.It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competences of the different branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights[147] are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.[148]

The Committee concluded General Comment No. 9 by saying: "Guarantees of equality and non-discrimination should be interpreted, to the greatest extent possible, in ways which facilitate the full protection of economic, social and cultural rights."[149]

The CHRA must be able to play a key role in ensuring that economic benefits and opportunities are distributed in the society in a way that redresses the long-standing social and economic disadvantage of women, Aboriginal peoples, people of colour and people with disabilities. It is essential for Parliament to make its intention in this connection explicit in the CHRA.

The Ground Social Condition

Were these recommendations to be implemented, it is our view that social condition could be added as a ground, without fear of it playing a negative role, by diminishing the understanding of the Act's intention and capacity to provide a forum for challenging policies and practices which maintain the poverty and economic inequality that result from entrenched and historical discrimination based on sex, race and disability.

It must be clear that those who are disadvantaged economically and socially are the intended beneficiaries of this ground.

Summary of Recommendations

A revised CHRA should:

- specifically name women;

- specifically name women as a group that experiences persistent disadvantage;

- expressly state that a purpose of the Act is to identify and eliminate political, legal, economic and social disadvantages experienced by women;

- eliminate the separation of individual and class complaints as they are currently separated in ss. 7 and 10;

- ensure that each section dealing with employment or services, etc. recognizes the group dimensions of complaints made by members of disadvantaged groups;

- ensure that each section dealing with employment or services prohibits any practice which has the effect of maintaining, reinforcing or exacerbating the disadvantage of an historically disadvantaged group;

- specifically state that a purpose of the Act is to address those forms of discrimination that all too easily disappear from view because of the compartmentalization of grounds, that is, the overlapping forms of discrimination experienced by groups such as Aboriginal women, women of colour, women with disabilities, lesbians, single mothers and older women;

- specifically state that:
  - the discrimination the CHRA is intended to prevent includes the adverse effects experienced by women through the operation of facially neutral rules, policies and practices which maintain or exacerbate their pre-existing disadvantage,
  - it is not a defence to a claim of adverse effect discrimination brought by women to show that:
    - some men are affected negatively by the impugned rule or policy, or
    - the impugned rule or policy is not the sole cause of the inequality complained of;

- endorse the view that everyone to whom the Act applies has a responsibility to take positive steps to promote equality;

- state explicitly that a purpose of the CHRA is to ensure that economic benefits and opportunities are distributed in the society in a way that redresses the long-standing social and economic disadvantage of women, Aboriginal peoples, people of colour and people with disabilities; and

- if the previous recommendations are implemented, add the ground social condition and ensure those who are economically and socially disadvantaged will be the beneficiaries of this protection.

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ENDNOTES

[1] *Canada Human Rights Act*, R.S.C. 1985, c. H-6.

[2] *Report of the Royal Commission on the Status of Women in Canada* (Ottawa: Information Canada, 1970) at 388.

[3] *Ibid.* at 389.

[4] *Ibid.* at 387. The Royal Commission said: "Moreover there is a need to keep a continuing watch to ensure that women's rights and freedoms are protected." The Commission proposed that human rights commissions and human rights laws be established to "ensure that no discrimination occurs in fact, or in the interpretation of the law."

[5] See *Janzen* v. *Platy Enterprises Ltd.* (1989), 10 C.H.R.R. D/6205 (S.C.C.).

[6] See Pat Armstrong. 1997. "Restructuring Public and Private: Women's Paid and Unpaid Work." In *Challenging the Public/Private Divide: Feminism, Law, and Public Policy.* Edited by Susan B. Boyd. Toronto: University of Toronto Press, 37.

[7] *Supra* note 2 at 312.

[8] *Women in Canada: A Statistical Report.* 3 ed. 1995. Ottawa: Industry Canada, at 84.

[9] *Supra* note 2 at 319.

[10] National Council of Welfare. 1997. *Poverty Profile 1995: A Report by the National Council of Welfare.* Ottawa: Supply and Services Canada, at 85.

[11] *Supra* note 2 at 319.

[12] *Supra* note 10 at 85.

[13] The assumption that women work part time because they want to bears re-examination. In 1994, 34 percent of all female part-time workers indicated they wanted full-time employment but could not find it. See *Women in Canada, supra* note 8 at 66.

[14] Monica Townson. 1996. "Non-Standard Work: The Implications for Pension Policy and Retirement Readiness." Unpublished paper prepared for Women's Bureau, Human Resources Development Canada.

[15] See Shelagh Day and Gwen Brodsky. 1998. *Women and the Equality Deficit: The Impact of Restructuring Social Programs in Canada.* Ottawa: Status of Women Canada, at 7.

[16] Status of Women Canada. 1995. *Setting the Stage for the Next Century: The Federal Plan for Gender Equality.* Ottawa: Status of Women Canada.

[17] R.S.C. 1985, c. C-1. The *Canada Assistance Plan Act* is repealed by the *Budget Implementation Act, 1995,* S.C. 1995, c. 17.

[18] The Canada Health and Social Transfer was established by means of an amendment to the *Federal-Provincial Fiscal Arrangements Act,* R.S.C. 1985, c. F-8.

[19] For a full discussion of the impact on women of the 1995 *Budget Implementation Act*, including the repeal of the Canada Assistance Plan and the establishment of the new Canada Health and Social Transfer, see Shelagh Day and Gwen Brodsky, *Women and the Equality Deficit,* *supra* note 15.

[20] See National Association of Women and the Law, *Supplement to: The Civil and Political Rights of Women, Submission to the United Nations Human Rights Committee on the Occasion of the Consideration of Canada's Fourth Report on the Implementation of the International Covenant on Civil and Political Rights, New York, March 26, 1999*. NAWL's submission to the Human Rights Committee noted that:

> [I]n January 1997, the federal government introduced new unemployment insurance legislation, the *Employment Insurance Act*. One of the most significant changes in the legislation was the switch from eligibility based on weeks worked to eligibility based on hours worked. Under the old scheme, an individual needed 12 - 20 weeks (depending upon where that individual lived) of insurable earnings within the qualifying period to qualify for full benefits (including maternity benefits). A week of insurable earnings was a week in which at least 15 hours were worked (or a week in which the claimant had earned at least 20 percent of the maximum weekly insurable earnings). A claimant now needs a minimum of 700 hours of insurable earnings within the qualifying period. This is equivalent to twenty 35-hour weeks or approximately 46.6 15-hour weeks. For most individuals who work less than 35 hours a week, eligibility requirements are significantly more stringent than before. Indeed, the more part-time an individual's work is, the longer it will take for that worker to meet eligibility requirements. Whereas, previously, individuals working between 15 and 34 hours per week qualified for benefits after twenty weeks, these same individuals must now work between 20.5 and 46.6 weeks in order to accumulate the required 700 hours. The only positive side to this change is that individuals working less than 15 hours a week are no longer formally disentitled from benefits, as there is now no formal part-time cut-off. However, anyone working less than 14 hours a week cannot accumulate the required number of hours because it must be done within the qualifying period of 52 weeks. The 1996 legislation has also erected obstacles for people who have been out of the labour force for a long stretch of time. The new rules stipulate that such individuals need 910 hours of paid employment (the equivalent of 26 weeks of full-time work or a much longer period of part-time work) to qualify for benefits. These changes in eligibility requirements have hit working women disproportionately hard. Women, more than men, work in those temporary, part-time, seasonal, and/or unstable work situations—the secondary labour sector—where meeting these eligibility requirements is most difficult. They are also those employees especially vulnerable to work reduction and lay-offs. Additionally, the

increased qualifying hours mandated for people returning to the labour force after a long absence from it disproportionately impact women. Women are excluded from benefits they would have had under the previous legislation because of time off to raise children. Women's child rearing and caregiving responsibilities often result in precisely the kind of workforce absences and working patterns penalized under these rules. Recent government statistics, released March 18, 1999 by the federal Department of Human Resources Development, document this discrimination, confirming the legislation's negative gender-specific impact on women. The Report shows that the number of women who successfully claim unemployment insurance benefits has gone down by 20 percent while the number of men has been reduced by only 16 percent. A Canadian Labour Congress study of Statistics Canada data shows that only 31 percent of unemployed women got unemployment insurance benefits in 1997. Only 11 percent of women under 25 are receiving unemployment insurance benefits compared to 18 percent of men. Part-time female workers continue to pay premiums but, the data show, are disproportionately not able to claim unemployment benefits.

Maternity benefits are administered under the Employment Insurance Act and thus are also subject to these same rule changes. The result is that 12,000 fewer women qualified for maternity benefits in 1997, the year these changes took effect, than in 1996, when the old legislation was still in place. While no data exists to relate such statistics about maternity benefit qualification to changes in the birthrate, a Canadian Labour Congress senior economist has stated that the numbers of women affected is, even after the birthrate is factored in, likely still to be substantial.

Aboriginal women, women of colour, immigrant women, and women with disabilities are overrepresented in the "marginal" labour force. Thus, changes to unemployment insurance—as they affect both unemployment insurance benefits and maternity benefits—have exacerbated inequities already present in these women's involvement in the paid labour force.

Meanwhile, it is forecast that the Employment Insurance Account will have an accumulated surplus of $20 billion by the end of 1998. These factors have placed a huge strain on provincial social assistance programs since individuals unable to collect unemployment insurance are forced to rely on provincial income assistance programs. These provincial programs are significantly less generous in benefit level and more stigmatizing of recipients than unemployment insurance.

[21] UN Committee on Economic, Social and Cultural Rights*, Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant (Concluding Observations - Canada)* 19th Sess., 57th Mtg., UN Doc. E/C.12/1/Add 31 (December 4, 1998) [hereinafter *Concluding Observations*] at para. 11.

[22] See *Convention on the Elimination of All Forms of Discrimination Against Women,* GA Res. 34/180, UN GAOR, 34th Sess., (Supp. No. 46), UN Doc. A/34/46 (1982), Can. T.S. 1982 No. 31 [hereinafter *CEDAW*], Article 3.

[23] See *International Covenant on Economic, Social and Cultural Rights*, GA Res. 2200A (XXI), 21 UN GAOR, (Supp. No. 16), UN Doc. A/6316 (1966), 993 U.N.T.S. 3, Can T.S. 1976 No. 46 [hereinafter *ICESCR*], Article 2(1).

[24] *Statement by Ambassador Mark. J. Moher, Head of the Delegation of Canada before the UN Committee on Economic, Social and Cultural Rights (26-27 November 1998).*

[25] See National Association of Women and the Law, *Canadian Women and the Social Deficit: A Presentation to the International Committee on Economic, Social and Cultural Rights, on the Occasion of the Consideration of Canada's Third Report on the Implementation of the International Covenant on Economic, Social and Cultural Rights, Geneva, November 16, 1998.* See also, *National Association of Women and the Law*, *supra* note 20.

[26] *Concluding Observations*, *supra* note 21 para. 51.

[27] *Concluding Observations, ibid.* para. 53.

[28] See Shelagh Day. Forthcoming. "Canada's Human Rights System: Thirty Years Later." In the proceedings of the Conference on Equal Opportunity Law in International and Comparative Perspective, Hong Kong, 1998.

[29] Bill S-11*, An Act to amend the Canadian Human Rights Act in order to add social condition as a prohibited ground of discrimination,* 1st Sess., 36th Parl., 1997-98.

[30] *Charter of Human Rights and Freedom*, R.S.Q. 1977, c. C-12.

[31] *Supra* note 29.

[32] Bill C-98, *An Act to amend the Canada Evidence Act and the Criminal Code in respect of persons with disabilities, to amend the Canadian Human Rights Act in respect of persons with disabilities and other matters and to make consequential amendments to other Acts*, 2nd Sess., 35th Parl., 1997.

[33] Erminie Cohen and Angela Petten. 1997. *Sounding the Alarm: Poverty in Canada.* Ottawa.

[34] *Ibid.* at xiii.

[35] *Ibid.*

[36] The Honourable Erminie J. Cohen, Canada. Debates of the Senate, Second Reading of Bill S-11, 1st Sess., 36th Parl., (February 17, 1998).

[37] Michelle Fardeau-Ramsay, Q.C., Chief Commissioner, Canadian Human Rights Commission, Canada. Senate. Standing Committee on Legal and Constitutional Affairs*, Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 1st Sess., 36th Parl., (May 27, 1998).

[38] Fred Robertson, Board Member, National Anti-Poverty Organization, Canada. Senate. Standing Committee on Legal and Constitutional Affairs*, Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 1st Sess., 36th Parl., (May 27, 1998).

[39] See Martha Jackman, Professor of Law, Canada. Senate. Standing Committee on Legal and Constitutional Affairs*, Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 1st Sess., 36th Parl., (May 7, 1998).

[40] Senator Grafstein, Canada. Senate. Standing Committee on Legal and Constitutional Affairs, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 1st Sess., 36th Parl., (June 4, 1998).

[41] (1996), 29 C.H.R.R. D/79 (Que. Trib.).

[42] See also *Veronneau* v. *Bessette*, C.P. 750-32-001640-78, 1979 (Que. Trib.). In this case it was held that a women who was divorcee and a welfare recipient had been refused accommodation, based on her civil status as a divorced woman and on her "social condition" as a welfare recipient, contrary to the Quebec Charter.

[43] (1993), 20 C.H.R.R. D/349 (Que. Trib.).

[44] *Ibid*. at D/356.

[45] *Ibid.* at D/355.

[46] *Whittom* v. *Québec (Comm. des droits de la personne*) (1997), 29 C.H.R.R. D/1 (Que. C.A.).

[47] *Supra* note 43 at D/355.

[48] A tribunal held that Patrick Larente had been discriminated against on the basis of "social condition" (*Québec (Comm. des droits de la personne)* v. *Gauthier* (1993), 19 C.H.R.R. D/312 (Que. Trib.)). At issue was the respondent's acknowledged policy of denying accommodation to all welfare recipients irrespective of their ability to pay monthly rent.

In the *Gauthier* decision the Tribunal notes that expert evidence showed that as a welfare recipient the complainant's annual income was well below the poverty level established by Statistics Canada; in a society where people are judged on the basis of their employment welfare recipients are frequently set apart because they are not employed; and as a group welfare recipients have less education than the general population.

The Tribunal held that Isabelle Leroux was discriminated against because of her social condition when she was refused the rental of a new suite *(Québec (Comm. des droits de la personne)* v. *J.M. Brouillette Inc.* (1994), 23 C.H.R.R. D/495 (Que. Trib.). The Tribunal found as fact that the respondent refused to rent the new suite to the complainant because she was receiving social assistance, and not for purely economic reasons as the owner argued. The complainant was a 19-year old woman, receiving social assistance, jobless and the head of a single-parent family.

Regard may also be had to *Québec (Comm. des droits de la personne)* v. *Briand* (May 6, 1997), Quebec 200-53-000003-967, (Que Trib.). In 1996, Ms. Guay was a welfare recipient and a single mother with two young children. The family lived in a rented apartment. She was not employed, but was planning to go back to school and wanted, therefore, to move into a bigger apartment. She found an affordable apartment and went to look at it. She told the owner, Mr. Briand, that she was interested in the apartment, but that she wanted to find out about the local school and Hydro-Québec fees.

She revisited the apartment with a friend. After the visit, she informed the owner that she wanted to rent the apartment. She gave the owner requested information and made it clear to him that she had children, that she was getting ready to return to school, that she was unemployed and that she was a welfare recipient. The owner wanted to talk with both the manager of her building and the owner, but was not given the name of the owner by the building office when he called.

The next day the owner called Ms. Guay and told her that he wouldn't rent her the apartment. He feared that she didn't have the means to pay the rent, which, according to his calculations was "more than 50% of her income." Ms. Guay argued that the rent was only $50 more than for her present apartment and suggested that he should call her building manager to confirm that she always paid her rent. When she checked with the manager, Mr. Briand had not been in contact.

Later the owner offered her another apartment, smaller and with lower rent, which she wasn't interested in. He then suggested that he may rent her the original apartment if she provided him with a co-signer. However, Ms. Guay was concerned that her social welfare could be jeopardized if it looked as if she was living with another person.

The owner contended that the refusal was solely based on financial considerations and that Ms. Guay was offered the apartment with a co-signer but had refused. The Tribunal found that the refusal by Mr. Briand to rent the apartment to Ms. Guay was based at least partly on her social condition, contrary to the Quebec Charter.

And another recent tenancy case involved an allegation of discrimination by landlord against a woman who was unemployed with her second child and her spouse who was in receipt of unemployment insurance *Québec (Comm. des droits de la personne)* v. *Tremblay* (13 April 1999), Québec 200-53-000014-998 (Que. Trib.). The complaint was unsuccessful only because the tribunal found that the allegations had not been proven.

[49] (1997), 29 C.H.R.R. D/246 (Que. Trib).

[50] Interestingly, this case was not taken forward by the Quebec Human Rights Commission, but rather the complainant decided to proceed with the case even though the Commission had decided not to do so. This information was received from Commission counsel Beatrice Vizkelety, telephone conversation August 4, 1999. The Commission intends to intervene in the appeal in support of Mr. Lambert.

[51] *D'Aoust* v. *Vallières* (1993), 19 C.H.R.R. D/322 (Que. Trib).

[52] There have also been a number of cases in which complainants have been unsuccessful in persuading decision makers that they have experienced social condition discrimination. Some cases have failed because the decision maker was not satisfied by the evidence adduced in support of the complainant's allegations. Others have failed because the decision maker was not satisfied that the allegations amounted to discrimination based on the ground social condition. Some examples will suffice.

Tribunals and courts have held that a refusal to hire a person because of his or her criminal record does not fall within the meaning of the ground social condition. (*Mercier* v. *Beauport (Ville)* (1982), 3 C.H.R.R. D/648 (Que. P.C.); *Québec (Comm. des droits de la personne)* v. *Montréal (Ville)* (1982), 4 C.H.R.R. D/1444 (Que. S.C.).

A tribunal dismissed a complaint of harassment brought by Joan Skelly, a nurse, against David O'Hashi, a doctor whom she assisted along with other doctors in a hospital (*Québec (Comm. des droits de la personne)* v. *O'Hashi* (1996), 31 C.H.R.R. D/474 (Que. Trib.)). The tribunal found that the complainant and the respondent, two professionals working in the health care field, had substantially the same social condition and, therefore, that it was not possible to conclude that the complainant suffered harassment as a result of her social condition.

In another case, Denyse Lévesque alleged social condition discrimination because she was denied welfare while she was enrolled in school. (*Lévesque* v. *Québec (A.G.),* [1988] R.J.Q. 223 (Que. C.A.)). Her appeal was rejected by the Superior Court and by the Court of Appeal. Ms. Lévesque was considered a single person under Article 7 of the Social Welfare Law which states that a single person, who attends an educational institution full time, is not eligible for welfare, unless she finds herself in a situation, which is dangerous to her health or there is a risk of complete destitution. The Court of Appeal reasoned that although being student may in certain circumstances be considered as a "social condition" under s. 10 of the Quebec Charter, in the context of s. 7 of the Social Welfare Law, being a full time student at college or university level is not a social condition.

In the case of *Québec (Comm. des droits de la personne)* v. *Clinique Dentaire Forcier* (October 27, 1998) Drummond 405-53-000001-983 (Que. Trib.), Jeannine Guittard complained that her dentist had discriminated against her when he refused her request for dental services, referring her to the hospital for dental services instead, and made prejudicial statements about welfare recipients having bad mouth hygiene and missing their appointments. The tribunal found that the refusal of service was based on the best interest of the patient and her health, not her social condition. The tribunal found further that the comments about welfare recipients, while offensive to Ms. Guittard, did not constitute discrimination based on social condition because they were not directed toward her, but rather concerned other of the dentist's patients. The analysis in this decision, if it were adopted more widely would restrict the use of the ground social condition to challenge poor-bashing, requiring as it does that the prejudicial statements about welfare recipients must be specifically directed to the individual complainant.

The Quebec Charter includes an express right to a fair hearing in legal matters in Article 23. However, family law matters are usually heard in camera and publication of the findings is not permitted, subject to the discretion of the court. In the family law case of *Vaillancourt* v. *Stromei* (June 18, 1991) Montréal 500-04-000378-910 (Que. S.C.), Marie-Josée Stromei, whose husband was a judge,

was concerned that her husband's colleagues would hear the case and without a public hearing she would not receive a fair hearing. Referring inter alia to Article 10 of the Quebec Charter, Ms. Stromei sought a declaration that where one of the parties is a Supreme Court judge, the process should be made public and publication should be allowed. The application was refused. The Court reasoned that acceding to the complainant's request based solely on the fact that her husband is a judge would amount to depriving a class of citizens of the benefit of in camera hearings and would completely go against the principles in Article 10 of the Charter including the right to be treated equally based on civil status and social condition. The analysis in this case gives one pause because the logic of it is that it is discriminatory to treat a person, in this case a judge, differently because of his privileged social position.

[53] This observation is based on information provided by a representative of Action Travail des Femmes, a Montreal women's organization, regarding the experiences of women they assist.

[54] In *Comm. des droits de la personne* v. *Le centre hospitalier St-Vincent de Paul de Sherbrooke,* (7 September 1978) C.S. St-François 450-05-000856-78 (Que. Trib.), cited in *Johnson* v. *Québec (Comm. des affaires sociales)*, [1984] C.A. 61 at 69; and cited by the Tribunal in *Whittom*, *supra* note 43 at D/353.

[55] *Supra* note 48.

[56] *Ibid.* at D/318 and cited by the Tribunal in *Whittom*, *supra* note 43 at D/353.

[57] Quotation and decisions cited by the Tribunal in *Whittom*, *ibid.* at D/354.

[58] *Supra* note 48.

[59] *Ibid*. at 8.

[60] See *Québec (Comm. des droits de la personne)* v. *O'Hashi* and *Vaillancourt* v. *Stromei, supra* note 52.

[61] This analysis of the elements of formal and substantive equality was developed by Gwen Brodsky in "The Transformation of Canadian Equality Rights Law." Unpublished doctoral dissertation, York University, May 1999 at 107-108 and 129-130.

[62] *Canadian National Railway Co.* v. *Canada (Human Rights Commission)* (1987), 8 C.H.R.R. D/4210 (S.C.C.); *Brooks* v. *Canada Safeway Ltd.* (1989), 10 C.H.R.R. D/6183 (S.C.C.) and *Janzen, supra* note 5. These cases do not all involve complaints filed under the CHRA. However, the principles we discuss here have been applied in the interpretation of all Canadian human rights laws.

[63] *Ibid.*

[64] *Ibid.* at D/4211.

[65] *Ibid*.
[66] *Ibid*. at D/4229, para. 33253.

[67] This was the percentage of women in the labour force in the St. Lawrence region who were working in blue-collar jobs at the time.

[68] *Supra* note 5.

[69] *Ibid*. at D/6227, para. 44452.

[70] *Ibid*. at D/6227, para. 44451.

[71] *Ibid*. at D/6228, para. 44452.

[72] *Ibid*. at D/6232, para. 44460.

[73] *Supra* note 62.

[74] *Ibid*. at D/6195-6.

[75] *Weatherall* v. *Canada (Attorney General),* [1993] 2 S.C.R. 872.

[76] *Ibid*. at 877.

[77] An example of this is *Canada (Attorney General)* v. *Mossop,* [1993] 1 S.C.R. 554. In this case, a majority of the Supreme Court of Canada dealt with the grounds sexual orientation and family status as though they were watertight compartments. The Court decided that Brian Mossop was not discriminated against on the ground of family status when he was denied the right to take bereavement leave to attend the funeral of his partner's father. As a gay man, Mr. Mossop was considered not to have a family status. The Court decided that he was discriminated against because of his sexual orientation, and since sexual orientation was not a prohibited ground in the CHRA at the time, Mr. Mossop lost.

[78] See for example, *Blake* v. *Ontario (Ministry of Correctional Services)* (1984), 5 C.H.R.R. D/2417 (Ont. Bd. Inq.). In this case, Rosetta Blake alleged that she was discriminated against when applying for a job as a correctional officer because she was a black, 50-year old woman. It is not clear from the adjudicator's decision that the particular combination of her race, sex and age, and the nature of the resistance to employing her that Ms. Blake might encounter, was fully canvassed by the adjudicator or the Ontario Human Rights Commission as Ms. Blake's representative.

[79] *Ibid.*

[80] Nitya Iyer. 1993. "Disappearing Women: Racial Minority Women in Human Rights Cases." *Canadian Journal of Women and the Law.* 6: 25.

[81] Nitya Iyer. 1996. "Charter Litigating for Race Equality."A paper prepared for the Court Challenges Program, February 1, at 12.
[82] (1993), 119 N.S.R. (2d) 91. (C.A.).

[83] *Residential Tenancies Act,* R.S.N.S. 1989, c. 401.

[84] *Supra* note 82 at 99.

[85] *Law* v. *Canada (Minister of Employment and Immigration),* [1999] S.C.R. 497 at para. 94 per L'Heureux-Dubé J.

[86] *Corbière* v. *Canada (Minister of Indian and Northern Affairs)* (1999), 173 D.L.R. (4th) 1 (S.C.C.).

[87] *Indian Act*, R.S.C. 1985, c. I-5, s. 77(1).

[88] *Supra,* note 86 para. 14-18.

[89] *Indian Act*, S.C. 1951, c. 29.

[90] Bill C-31, *An Act to amend the Indian Act,* S.C. 1985, c. 27.

[91] *Ontario (Human Rights Commission) and O'Malley* v. *Simpsons Sears*, [1985] 2 S.C.R. 536 [hereinafter *O'Malley*].

[92] *Ibid*. at 551.

[93] *Ibid.* at 555.

[94] *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

[95] [1989] 1 S.C.R. 143.

[96] *Ibid.* at 165 and 174.

[97] In *McKinney* v. *University of Guelph,* [1990] 3 S.C.R. 229 at 279, La Forest J., writing for the majority, acknowledged that s. 15 protects against adverse effect discrimination. He stated that, "not only does the Charter protect from direct or intentional discrimination, it also protects from adverse impact discrimination." The same acknowledgement was made in *Symes* v. *Canada,* [1993] 4 S.C.R. 695 at 755 by Iacobucci J. who stated that "it is clear that a law may be discriminatory even if it is not directly or expressly discriminatory. In other words, adverse effects discrimination is comprehended by s. 15(1)."

[98] *Supra* at note 85 para. 80.

[99] *Canadian Odeon Theatres* v. *Huck* (1986), 6 C.H.R.R. D/2682 (Sask. C.A.).

[100] *Supra* note 91.

[101] It must be noted, however, that the concept of accommodation places its own internal limitations on positive obligations because what is required is accommodation to the point of undue hardship. For commentary on this, see Shelagh Day and Gwen Brodsky. 1996. "The Duty to Accommodate: Who Will Benefit?" *Canadian Bar Review.* 75: 433.

[102] *Eldridge* v. *British Columbia (Attorney General),* [1997] 3 S.C.R. 624.

[103] *Ibid.* at 678.

[104] *Vriend* v. *Alberta (A.G.),* [1998] 1 S.C.R. 493.

[105] *Individual's Rights Protection Act,* R.S.A. 1980, c. I-2.

[106] For commentary on *Eldridge* and *Vriend* and the positive obligations of governments, see Bruce Porter. 1998. "Beyond *Andrews:* Substantive Equality and Positive Obligations After *Eldridge* and *Vriend.*" *Constitutional Forum Constitutionnel.* 9: 59.

[107] *CEDAW*, *supra* note 22.

[108] *Ibid.* Article 2(a).

[109] *Ibid.* Article 2(e).

[110] *British Columbia (Public Service Employee Relations Comm.)* v. *B.C.G.E.U* (1997), 30 C.H.R.R. D/83 (B.C.C.A.), leave to appeal to the Supreme Court of Canada granted [1997] S.C.C.A. 541 (QL), appeal heard February 22, 1999 (S.C.C. File No. 26274).

[111] *Re British Columbia (Public Service Employee Relations Commission) and B.C.G.E.U. (Meiorin)* (1996), 58 L.A.C. (4th) 159 (B.C.L.R.B.)

[112] *Supra* note 110 at D/86.

[113] *Ibid*. at D/85.

[114] *Ibid.* at D/85 and D/86.

[115] Factum of Women's Legal Education and Action Fund (LEAF) filed in the appeal to the Supreme Court of Canada in the case of *British Columbia (Public Service Employee Relations Comm.)* v. *B.C.G.E.U* (1997), 30 C.H.R.R. D/83 (B.C.C.A.) at 3-4, on file with the authors.

[116] *Thibaudeau* v. *Canada* (1994), 114 D.L.R. (4th) 261 (F.C.A.).

[117] *Supra* note 116 at 275.

[118] As well, the fact that the legislative scheme is premised on an assumption that custodial parents will be poorer than non-custodial parents, allowing the separated or divorced couple to reduce their tax liability through income splitting, was not critically examined for its gendered content. The reference

to “hidden power relations” can be found in Mary Jane Mossman. 1998. “Achieving Gender Equality.” *Kobe University Law Review*. 32: 21 at 40.

[119] *Supra* note 116 at 271.

[120] *Ibid*. at 269.

[121] *Ibid.* at 271.

[122] “Sex, Tax, and the *Charter*: A Review of *Thibaudeau* v. *Canada*.” 1995. *Review of Constitutional Studies.* 2: 221.

[123] *Ibid.* at 247.

[124] *Supra* note 116 at 272.

[125] *Dickason* v. *University of Alberta*, [1992] 2 S.C.R. 1103 at 1191-1192.

[126] *Supra* note 116 at 272.

[127] *Ibid.* at 276.

[128] *Thibaudeau* v. *Canada*, [1995] 2 S.C.R. 627.

[129] *Supra* note 116at 292.

[130] (1995), 24 C.H.R.R. D/177 (Sask. C.A.).

[131] *Ibid.* at D/184.

[132] *Ibid.*

[133] *Ibid*. at D/179.

[134] *Ibid.*

[135] *Ibid.*

[136] *Ibid.*

[137] (1997), 27 C.H.R.R. D/365 (Can. Trib.).

[138] *Ibid*. at D/371.

[139] *Supra* note 116.

[140] *Supra* note 137 at D/372.

[141] *Ibid.*

[142] See for example, *Bliss* v. *Canada (A.G.)*, [1979] 1 S.C.R. 183.

[143] Although s. 10 states that it is a discriminatory practice for an employer or a union to pursue a policy, or enter into an agreement, that deprives an individual or class of individuals of any opportunity because of a prohibited ground of discrimination, this provision is limited in that it applies only to employment policies and practices.

[144] *British Columbia Human Rights Code*, R.S.B.C. 1996, c. 210.

[145] See *CEDAW*, *supra* note 22, Article 3. See also B.C. *Human Rights Code*, s. 3(a), *supra* note 144.

[146] A primary example of being lost between grounds is *Mossop, supra* note 77.

[147] This refers to the two sets of rights set out separately in the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights.*

[148] UN Committee on Economic, Social and Cultural Rights*, General Comment No. 9, The Domestic Application of the Covenant*, E/C.12/1998/24 (December 3, 1998) at para. 10.

[149] *Ibid*. at para. 15.