

New Brunswick Human Rights Commission

Guideline on Social Condition Adopted on January 27, 2005

Please Note

This policy statement embodies the New Brunswick Human Rights Commission's interpretation of the provisions of the New Brunswick *Human Rights Code* relating to social condition. It is subject to decisions by Boards of Inquiry and the courts, and should be read in conjunction with those decisions and with the specific language of the *Code*. If there is any conflict between these guidelines and the *Code*, the *Code* prevails. Any questions regarding this policy should be directed to the Commission's staff; additionally, this policy is not a substitute for legal advice.

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1. INTRODUCTION

The *New Brunswick Human Rights Code* (also called the *Human Rights Act*) states that all persons are equal in dignity and human rights. According to sections 11 and 12 of the *Code*, the role of the Human Rights Commission is to enforce the *Code* and the principles underlying it. In order to fulfill this objective, the Commission produces guidelines that reflect its interpretation of the *Code*.¹

This guideline sets out the Commission's position on discrimination based on social condition.

¹ The Commission would like to acknowledge and thank the human rights commissions from various jurisdictions across Canada for the opportunity to study and draw from their policies and documents on social condition.

Under the *Code*, employers, owners and service providers are prohibited from discriminating on the basis of social condition. This applies to any aspect of employment, as well as to housing, public services and membership in labour unions and professional associations.

Please note that this guideline does not apply to activities that fall under federal jurisdiction², such as:

- Inter-provincial and international services such as: railways; highway transport; telephone, telegraph, and cable systems; pipelines; canals; ferries, tunnels, and bridges; shipping and shipping services;
- Radio and television broadcasting, including cablevision;
- Air transport, aircraft operations, and aerodromes;
- Banks;
- Protection and preservation of fisheries as a natural resource;
- Grain elevators; flour and seed mills, feed warehouses and grain-seed cleaning plants;
- Uranium mining and processing.

2. INTERPRETATION PRINCIPLES

The Human Rights Commission will give this ground a broad and purposive interpretation consistent with its interpretation of the other prohibited grounds of discrimination and its obligations under international law, consistent also with the *Canadian Charter of Rights and Freedoms*³, and in keeping with the approach taken by tribunals in other Canadian jurisdictions where this kind of discrimination is expressly prohibited.

Courts have recognized that human rights statutes have a quasi-constitutional nature and that they take precedence over every other statute in case of conflict.⁴

However, the Commission must interpret the *Code* in light of the *Charter* and in particular in keeping with court decisions under section 15 of the *Charter*.

The Commission is also guided by international human rights case law and the treaty obligations agreed to by New Brunswick as a result of international human rights treaties that have been ratified by Canada. Article 2(2) of the *International Covenant on*

² For a fuller explanation, see http://www.hrsdc.gc.ca/en/lp/spila/elli/eslc/02Division_of_Legislative_Powers.shtml

³ *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.

⁴ *Newfoundland Association of Public Employees v. Newfoundland (Green Bay Health Care Centre)*, [1996] 2 S.C.R. 3, at para. 20.

Economic, Social and Cultural Rights,⁵ which Canada ratified in 1976, states that those who are participating in this covenant will guarantee that the rights enunciated in it will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status. Article 11 of the Covenant sets out the right to a decent standard of living and defines the progressive measures which governments have legally undertaken to adopt in order to combat poverty. These principles are also mentioned in articles 2, 22 and 25 of the *Universal Declaration of Human Rights*,⁶ which was adopted by Canada in 1948.

3. DISCRIMINATION ON THE BASIS OF SOCIAL CONDITION

Discrimination is differential treatment of, or failure to accommodate, an individual on the basis of the individual's actual or presumed membership in or association with some class or group of persons as set out the *Code*, rather than on the basis of personal merit.⁷

Employers, service providers, landlords and others subject to the *Code*'s prohibitions must avoid policies and practices that exclude people because of their social condition. They must also eliminate any discriminatory effect of policies and practices by accommodating each individual's particular social condition, provided they can do so without incurring undue hardship or sacrificing their objectives.

The Commission will investigate each complaint of social condition discrimination on its merits and meritorious cases that cannot be settled will be referred on to a public Board of Inquiry.

"Social condition" is defined as follows in section 2 of the *Human Rights Code* of New Brunswick:

...in respect of an individual, means the condition of inclusion of the individual in a socially identifiable group that suffers from social or economic disadvantage on the basis of his or her source of income, occupation or level of education;

This definition contains an objective element and a subjective element. The objective element is the occupation, source of income or level of education of a person. The subjective element is society's perception of these objective facts.⁸

⁵ *International Covenant on Economic, Social and Cultural Rights*, GA Res. 2200A (XXI), UN GAOR, 16 Dec 1966, U.N.T.S. entered into force 3 January 1976, U. N. Doc. HRI/GEN/1/Rev. 1, 5th Sess., 1990 (1994).

⁶ *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No 13, UN Doc. A/810 (1948) 71.

⁷ See also *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

⁸ *Québec (Commission des droits de la personne) c. Gauthier* (1993), 19 CHRR D/312

These are examples of occupations that under certain circumstances might constitute socially identifiable groups that suffer from social or economic disadvantage:

- students⁹;
- freelance workers¹⁰;
- seasonal workers;
- casual workers.

These are examples of sources of income that might be associated with socially identifiable groups that suffer from social or economic disadvantage:

- income assistance;
- employment insurance;
- retirement income;
- a rent subsidy from a public housing agency¹¹;
- a workers compensation pension.

According to court and tribunal decisions, only one of the above factors (source of income, occupation or level of education) need be present in order for discrimination on the basis of social condition to occur, but any combination of these factors is also sufficient.¹² A person's social condition may be the person's actual social status, or merely a perceived social condition upon which discrimination is based.¹³ Social condition may also be a temporary condition, such as unemployment.¹⁴

4. HOUSING

Section 4 of the *Code* prohibits discrimination based on social condition in the rental of housing accommodation.

Many of the complaints based on social condition in other jurisdictions involve the refusal to rent to families receiving income assistance.

⁹ *Lévesque c. Québec (Procureur général)* [1988] R.C.J. 223 (C.A.)

¹⁰ *Commission des droit de la personne et des droits de la jeunesse c. Sinatra*, (1999), C.H.R.R.D/218 (T.D.P. Que).

¹¹ *409205 Alberta Ltd. v. Alberta (Human Rights and Citizenship Commission)* (2002), 44 C.H.R.R. D/260 (Alta. Q.B.)

¹² *Commission des droits de la personne c. Ianiro*, (1997), 29 C.H.R.R. D/79 (T.D.P., Que.).

¹³ *Commission des droit de la personne et des droits de la jeunesse c. Sinatra*, supra note 10.

¹⁴ *Johnson c. Commission des affaires sociales*, [1984] C.A. 61 (Que.)

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

Similarly, rent/income ratios (or a minimum income for a given rent or apartment) should not be used to exclude potential tenants since they disproportionately exclude income assistance recipients, for example, and are not always reliable indicators of the likelihood of payment. Accordingly, such requirements may constitute indirect discrimination (also called adverse effect discrimination) based on social condition.¹⁵

Instead, a refusal to rent must be based on an individual assessment of the likelihood that the potential tenant would pay the rent as determined through credit checks, references from former landlords, etc.¹⁶

These are examples of cases that involve discrimination based on social condition:

- refusing to rent apartments to income assistance recipients without an individual assessment of their ability to pay or payment history;
- requiring a damage deposit only from students.

For information about exceptions and limits that may apply, see section 8 of this guideline. For information about various types of discrimination in housing, see the Commission's guideline on Discrimination in the Housing Sector.

5. EMPLOYMENT

Section 3 of the Code prohibits discrimination in all aspects and types of employment. For example, it applies to casual, part-time and term employment and to appointments to boards of directors and public offices. Specifically, it applies to:

- job ads, applications, interviews;
- selection and hiring;
- termination;
- terms and conditions of employment and
- membership in labour unions and employer's organizations.

¹⁵ *Whitton c. Québec (Comm. des droits de la personne)* (1997), 29 C.H.R.R. D/1 (C.A. Qué.): *Shelter Corporation v. Ontario (Human Rights Commission)* (2001), 39 C.H.R.R. D/111 (Ont. Div. Ct);

¹⁶ *Whitton, supra*

The *Code* prohibits discrimination against an employee or potential employee based on social condition. Conduct which may give rise to a complaint includes:

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

Not every difference in treatment constitutes discrimination. The Court's have been cautious not to view as discriminatory differences based on one's education or profession where they are based on bona fide occupational requirements. For information about exceptions and limits that may apply, see section 8 of this guideline.

6. SERVICE SECTOR

Section 5 of the *Human Rights Code* prohibits discrimination based on one's social condition in respect of accommodation, services or facilities available to the public. The courts have interpreted this provision broadly to apply to all services offered to the public, including:

- hospitality services and accommodations;
- private and public educational services;
- private and public health care services;
- insurance policies;
- nursing homes and residential care facilities and
- transportation and public transit services.

Service providers must not deny services or discriminate against clients or prospective clients based on their social condition. This can include discrimination in the manner in which services are offered or denied, advertising, or harassment of clients based on their social condition.

Not every difference in treatment constitutes discrimination. The Court's have been cautious not to view as discriminatory differences in treatment based on one's education or profession where the bona fide requirements of service providers require consideration of such. For information about exceptions and limits that may apply, see section 8 of this guideline.

7. OTHER

The prohibition of discrimination based on social condition also applies to publicity and to professional, business or trade associations, under sections 6 and 7 of the *Code* respectively. For example, the Commission may investigate complaints that:

- a sign discriminates against an individual because he or she receives income assistance; or
- a professional, business or trade association is refusing membership, excluding or harassing a given member because he or she receives income assistance.

8. DEFENCES

Employers, service providers, landlords and others subject to the *Code*'s prohibitions must avoid policies and practices that exclude people because of their social condition. They must also eliminate any discriminatory effect of policies and practices by accommodating each individual's particular social condition, provided they can do so without incurring undue hardship or sacrificing their objectives.

However, the *Code* does not prevent employers, landlords or service providers from:

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

While the standard defence allowed by the *Code*, that of a *bona fide* or good faith requirement is a flexible one, it was fairly well defined by the Supreme Court of Canada in 1999. In order for organizational policies or practices that have a discriminatory effect to be *bona fide*, they must pass the "Meiorin Test." This stringent three-part test requires that the standard be:

1. Adopted for a purpose or goal that is rationally connected to the function being performed;
2. Adopted in good faith and in the belief that it was necessary to fulfill that purpose or goal;
3. In fact reasonably necessary to accomplish that purpose or goal, in the sense that the employer, owner or service provider cannot accommodate affected individuals without incurring undue hardship.

For more information about this, please consult the Human Rights Commission's *Guideline for BFOQ's and BFQ's and the Duty to Accommodate*.

Example

A university requires students to have a high school diploma or a G.E.D. in order to be admitted into an undergraduate programme. This affects people who do not have a high school diploma or a G.E.D., a socially identifiable group that suffers from social or economic disadvantage on the basis on their level of education. The university's objective is to provide an undergraduate education and degree to students who are able to complete the required courses with a reasonable chance of success with a reasonable amount of assistance. It sincerely believes that a high school diploma or G.E.D. is required in order to meet this objective. It has statistics from its own experience or from objective research that support this requirement. Accordingly, this requirement would be justified under the Meiorin Test.

In addition, it should be noted that Section 7.01 of the *Human Rights Code* permits a limitation, specification, exclusion, denial or preference based on social condition when it is required or authorized by a provincial law.

9. FOR MORE INFORMATION

For further information about the *Code* or this policy, please contact the Commission at 1-888-471-2233 toll-free within New Brunswick, or at 506-453-2301. TTD users can reach the Commission at 506-453-2911. You can also visit the Commission's website at www.gnb.ca/hrc-cdp or e-mail hrc.cdp@gnb.ca.