

SECTION: Interpretation

Effective date: December 18, 2012

SUBJECT: SOCIAL DISADVANTAGE – s.9(2)(m)

Purpose:

This policy is intended to assist in the interpretation of social disadvantage, referred to in sections 1, 9 and 52 of *The Human Rights Code* (“*The Code*”). Where there is any conflict between this policy and *The Code*, *The Code* prevails.

Context:

A person alleging discrimination on the basis of social disadvantage has the burden of proof to establish that:

- a) They experience diminished social standing or social regard;
- b) Which diminished social standing or social regard arises from:
 - (i) Homelessness or inadequate housing;
 - (ii) Low levels of education;
 - (iii) Chronic low income; or
 - (iv) Chronic unemployment or underemployment; and
- c) The discrimination they experienced is based on a negative bias or stereotype related to any applicable circumstance(s) outlined in b) above.

See sections 1, 9(2), 9(2.1) and 52(2) of The Code.

The following interpretation principles will apply:

1. A determination of whether the discrimination is based on a negative bias or stereotype can be made by consideration of the evidence including the surrounding circumstances, prevailing attitudes, and/or social science research.
2. The Commission recognizes that socially disadvantaged persons may have difficulty providing evidence such as, for example, applicable social science research or statistics, to establish all components of the characteristic. Consistent with investigations regarding other grounds, the Manitoba Human Rights Commission (the “Commission”) investigation will include analysing and gathering evidence to determine if there is in fact a link between the complainant’s characteristic(s) and the

discriminatory treatment and/or to determine if all required components of this characteristic are present.

3. Once the complainant has established a prima facie case of discrimination on this ground, the burden of proof shifts to the respondent to establish that a failure to accommodate is bona fide and reasonable or that a bona fide and reasonable occupational (or analogous) requirement exists, in accordance with the analyses in *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)* (1999), 36 C.H.R.R. D/129 (“*Grismer*”) and *British Columbia (Public Service Employee Relations Comm.) v. B.C.G.E.U.* (1999), 35 C.H.R.R. D/257 (“*Meiorin*”).

4. The interpretation of social disadvantage includes an objective and a subjective element.

The objective element is that individual’s housing situation; level of education; level of income; and employment status. This element is generally quantifiable, i.e.: the person has x highest level of education, they have x income, etc.

The subjective element is derived from a qualitative assessment involving the values attributed to an individual based on the prevailing social perceptions or stereotypes associated with the objective factors.

The subjective element applies to several aspects of the definition of social disadvantage, namely: diminished social standing or social regard; whether the income or education is low or the person is underemployed; and whether the discrimination is based on a stereotype or negative bias. In certain cases, there may be a subjective element as to whether someone is homeless, has inadequate housing, and/or whether their unemployment, underemployment or low income is chronic.

In cases involving low income or low education, the Commission may consider social science or statistical research or data, such as the official poverty line and average educational attainment of Canadians. If the person is alleging underemployment, the Commission will assess evidence that they are “ready, willing, and reasonably able” to work additional hours, and/or at a higher paying and/or more highly skilled job.

In any case involving social disadvantage, the Commission will consider the context and surrounding circumstances. For example, an income considered low for a single parent of 4 children might not be considered low for a single childless person, or for someone who has a contributing partner and/or substantial savings.

The regard in which society holds an individual in that circumstance(s) is also subjective; however, this can be determined by reference to social science research or data in addition to evidence provided by the individual and any witnesses.

Whether a negative bias or stereotype is at play may be determined by the available evidence in the particular case as well as social science or other research where appropriate.

Whether individuals sharing the characteristic(s) of the complainant have been historically disadvantaged will also be considered.

5. For the subcategories of “low income”, “unemployment” or “underemployment”, *The Code* stipulates that the circumstances must be “chronic”. These conditions would require a pattern or lengthy period of low income or un/underemployment. Homelessness and education level could be more transient except that the temporary nature of the condition could affect the determination of whether the individual possesses the characteristic (i.e.: a person briefly in between apartments and staying with friends may not be considered homeless).

6. A socially disadvantaged person may also experience discrimination based on their source of income, another *Code* protected characteristic.

7. The concept of intersectionality can be important in assessing the impact of multiple circumstances of social disadvantage, or a situation where an individual is socially disadvantaged and possesses another protected characteristic. In particular, the intersectionality of various characteristics may give rise to stereotypes not present with one or different combinations of characteristics. Intersectionality can have a compound effect (i.e. individuals with more than one *Code* protected characteristic are more likely to face discrimination) and can even give rise to an entirely new basis for discrimination.

8. In all cases, the Commission utilizes common sense and considers if it is reasonably likely that the person possesses the characteristic and/or that discrimination occurred as defined by *The Code*.

Examples of conduct that may contravene *The Code* on the basis of social disadvantage include:

In rental

- If 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 and/or disability insurance or pension remuneration;
- Rent and income ratios should generally not be used to exclude potential tenants because they are not always reliable indicators of the likelihood of payment. A landlord must assess a potential tenant’s ability to pay the rent through individualised assessments, which could include, for example, use of credit checks and review of references from former landlords; or

- Imposition of different rental terms, financial or otherwise, on underemployed or undereducated individuals or on people who were perceived to be living in, or coming from, inadequate housing.

The Commission's Policy A-5 is also potentially applicable to socially disadvantaged persons (requiring direct payment of rent from social services or other benefit payor to the landlord, without reasonable cause, as a condition of the rental).

In employment

- Requiring a grade 12 education regardless of whether the job requirements reasonably necessitate same;
- Denying advancement opportunities to employees who do not possess a certain level of education although they are able to perform the job duties;
- Terminating an employee for reasons that stem from his or her socio-economic status (e.g. low level of education as opposed to legitimate performance related issues); or
- Placing unique conditions on an employee because of his or her socio-economic status (e.g. greater theft monitoring).

In services

- Denying insurance to people with low socio-economic status;
- Preventing people from staying in a hotel because of their socio-economic status;
- Refusing to deliver newspapers to low income neighbourhoods; or
- Taxi drivers refusing to pick up passengers whom they perceive to be homeless or low income.

The Commission will apply a purposive and contextual interpretation to the substantive protections set out in *The Code*, bearing in mind the broad purposes of *The Code* as reflected in its preamble, and in the interpretive approach to human rights reflected in Canadian jurisprudence generally.

APPROVED BY:

"Jerry Woods"
Chairperson

December 18, 2012
Date