

SECTION: Interpretation

Effective date: June 14, 2002

SUBJECT: UNSPECIFIED GROUNDS OF DISCRIMINATION - s.9(1)(a)

Purpose:

This policy is intended to assist in the understanding and application of *The Human Rights Code* (“*The Code*”). Where there is any conflict between this policy and *The Code*, *The Code* prevails.

Context:

As The Supreme Court of Canada noted in its “*Meiorin*” decision, the equality provisions set out in the Charter and in human rights legislation inform the interpretation of each other.

Section 9(1)(a) provides for an open-ended definition of discrimination, protecting classes or groups of people on the basis of personal characteristics not found within s. 9(2). As such, it is broadly similar in effect to the ‘analogous grounds’ found within s. 15(1) of the *Charter*. As the Supreme Court noted in that context, in *Corbiere*:

- We look for grounds of distinction that are analogous or like the grounds enumerated in s. 15 - race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. It seems to us that what these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity. This suggests that the thrust of identification of analogous grounds at the second stage of Law analysis is to reveal grounds based on characteristics that we cannot change or that the Government has no legitimate interest in expecting us to change to receive equal treatment under the law. To put it another way, s. 15 targets the denial of equal treatment on grounds that are actually immutable, like race, or constructively immutable, like religion. Other factors identified in the cases as associated with the enumerated and analogous grounds, like the fact that the decision adversely impacts on a discrete and insular minority or a group that has been historically discriminated against, may be seen to flow from the central concept of immutable or constructively immutable personal characteristics, which too often have served as illegitimate and demeaning proxies for merit-based decision making.

Section 9(1)(a) must be interpreted in a manner to advance the broad purpose of human rights legislation, namely to remedy or prevent discrimination against groups suffering social, economic, political or legal disadvantage in our society. Not all of those groups are described in s. 9(2). But for s. 9(1)(a) to apply, the group in question must be analogous to the groups protected by s. 9(2). Some of the relevant characteristics may be:

- The group is a 'discrete and insular minority', and its membership is not 'highly fluid'. That is, the group must be such that its membership is capable of being readily defined, and is of some permanence. For example, 'real estate agents' could hardly be described as a discrete and insular group. 'New residents in Manitoba' may be a group but it is highly fluid, and is not in itself considered to be a discrete and insular minority: see *Haig v. Canada: Haig v. Canada (Chief Electoral Officer)*, [1993] 2 SCR 995. Thus, a residency requirement for voting would not fall within 9(1)(a). Care must be taken, however, in applying these rules because seemingly neutral requirements targeting new residents may have discriminatory effects based on national origin.
- A group falling within s. 9(1)(a) would normally have 'historically suffered (significant) discrimination and disadvantage'. Lottery winners may be a group, but have not been subject to historical stereotype, prejudice, and discrimination. On the other hand, there is evidence that persons in possession of or perceived to be in possession of a criminal record have been the victims of stereotype and have suffered differential treatment in consequence. As such, they may be eligible for consideration under this subsection.
- Generally, the characteristic in question will not be within the control of the individual and will not be alterable by conscious action, or at least either not alterable except on the basis of unacceptable personal cost. See, for example, 'citizenship' in the context of membership in the legal profession: *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143 or is something the state has no legitimate interest in changing.
- Should it turn out that gender identity is not included in the existing protections set out in s. 9(2), it would likely form the basis for a protected group under s. 9(1)(a), given the considerations set out above.

Note: It is important that any categorization process with respect to s. 9(1)(a) not be made in any mechanical fashion, but rather in a purposive manner mindful of the broad social policy principles set out in the Code.

APPROVED BY:

"Janet Baldwin"
Chairperson

July 10, 2002
Date