VINCE

1992

S.C.A. No. 02681

IN THE SUPREME COURT OF NOVA SCOTIA
APPEAL DIVISION

BETWEEN:

IRMA SPARKS

APPELLANT

- and -

DARTMOUTH/HALIFAX COUNTY REGIONAL HOUSING AUTHORITY

RESPONDENT

- and -

THE ATTORNEY GENERAL OF NOVA SCOTIA

INTERVENOR

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PART I
FACTS

Personal Circumstances of the Appellant, Irma Sparks

1. Irma Sparks is a 42 year old Black Nova Scotia single-parent. She has two children who live with her: Parker, aged 16 and Faith, aged 8.

2. Ms. Sparks moved into public housing at 10 Chebucto Lane, Dartmouth, Nova Scotia in December of 1980 and has lived there since. She has a year-to-year lease dated April 1, 1991. The lease provides for a rent of $173.00 per month which is based upon a percentage of the tenant's income. Ms. Sparks' sole source of income is Family Benefits (provincial social assistance) of $767.00 per month for herself and her two children.

3. On May 1, 1991, Ms. Sparks was served with a notice to quit by the Respondent, her landlord, the Dartmouth/Halifax County Regional Housing Authority. The notice to terminate the tenancy was to be effective May 31, 1991 - thirty days later, the length of which notice was stipulated in the lease.

4. When Ms. Sparks refused to vacate the premises, the Respondent applied through the court for a termination of the tenancy.

Facts Admitted by the Respondent and the Intervenor

(1) That women, Blacks and social assistance recipients form a disproportionately large number of tenants in public housing.

(2) That women, Blacks and social assistance recipients form a disproportionate number of the people on the waiting list for public housing.

(3) That the facts admitted by the landlord do not take into account senior citizens who are tenants of subsidized housing.

(4) That for the purposes of the argument of the tenant, it is admitted that

public housing tenants are treated differently than tenants in the private sector under the Residential Tenancies Act.

(5) That for the purposes of the tenant's argument, the landlord in this matter is to be considered a "government actor".

(6) It is understood that the percentage of women and recipients of social assistance who are subsidized tenants, or on the waiting list therefor, are determinable from studies and records of the Dartmouth/Halifax County Regional Housing Authority, however, the number of black persons who are either tenants or on the waiting list cannot be so determined, although it is agreed that the percentage is disproportionate.

(7) When the word "disproportionate" is used, it means disproportionate to private sector tenants in the area serviced by the Dartmouth/Halifax County Regional Housing Authority.

(8) The Respondent (Dartmouth/Halifax County Regional Housing Authority) further produced statistics as to the make-up of its tenants. Of 278 family units, 180 (65%) were female-led, single-parent households and 164 (59%) received either municipal or provincial assistance.

see letter from Dartmouth/Halifax County Regional Housing Authority dated February 5, 1992 (filed with trial exhibits)

Legislative Facts

5. The parties agree that the premises involved are "residential premises" within the meaning of S.2(h) of the Residential Tenancies Act, R.S.N.S. 1989, c.401 as amended (hereinafter "the Act") and as such the Act applies to the landlord and tenant relationship.

6. Section 25 of the Act states:

Application of Act

25 **(1)** This Act governs all landlords and tenants to whom this Act applies in respect of residential premises.

Conflict with provisions of certain leases

(2) Where any provision of this Act conflicts with the provision of a lease granted to a tenant of residential premises that are administered by or for the Government of Canada or the Province or a municipality, or any agency thereof, developed and financed under the National Housing Act, 1954 (Canada) or the National Housing Act (Canada), the provisions of the lease govern. 1970, c.13, s.12: 1981, c.48, s.2.

7. Shortly put, where the public housing lease conflicts with the Act, the lease governs.

8. Also relevant in the present case is section 10 of the Act.

NOTICE TO QUIT

Time for notice to quit

(10) **(1)** Notwithstanding any agreement between the landlord and tenant respecting a period of notice, notice to quit residential premises shall be given

(a) where the residential premises are let from year to year, by the landlord, or tenant at least three months before the expiration of any such year.

(b) where the residential premises are let from month to month,

(i) by the landlord, at least three months, and

(ii) by the tenant, at least one month,

before the expiration of any such month;

(c) where the residential premises are let from week to week,

(i) by the landlord, at least four weeks, and

(ii) by the tenant, at least one week,

before the expiration of any such week.

Security of tenure

(8) Notwithstanding the period of notice in subsection (1), (3) or (6), where a tenant, on the eighteenth day of May, 1984, or thereafter, has resided in the residential premises for a period of five consecutive years or more, notice to quit may not be given except where

(a) ...

(b) ...

(c) ...

(d) the residential premises are operated or administered by or for the Government of Nova Scotia, the Government of Canada or a municipality.

(e) A judge is satisfied that the tenant is in default of any of his obligations under this Act, the regulations or the lease.

9. Further, paragraph 11(a) of the public-housing lease permits the Respondent landlord to terminate the tenancy by serving a 30-day Notice to Quit.

see Appeal Book p. 63

SOCIAL FACTS

10. The Supreme Court of Canada has repeatedly stated that an equality rights issue must be determined in a way that is sensitive to context; that is, with an appreciation of the social situation of the group(s) who is/are asserting an equality claim. Accordingly, the Appellant will sketch something of the evidentiary background (as gleaned from the documentary exhibits filed at trial) to this matter in order that the legal issues and argument can be considered in a more informed light. All of the following information has been taken from the published sources which were filed at trial and which make up Schedules 'A' and 'B' to the trial decision. It is understood that the originally filed materials remain as documentary exhibits as part of the County Court file (C.H. No. 75171).

BARRIERS TO OBTAINING SUITABLE HOUSING

11. C.M.H.C. has developed an approach to measuring how many people in Canada are in inadequate housing. It is called 'core' need and it looks at family problems using three criteria: First, 'affordability' - does the family spend 30% or more of houshold monthly income on shelter; if it does, there is an affordability problem. Second, adequacy - does the family's current dwelling need major repair or does it have no bathroom. Third, crowding - does more than one person sleep in each room. Applying these criteria, C.M.H.C. concluded (in 1981) that 1.28 million or 15.5% of all households were in 'core need'.

Housing Accessibility - Corbett (1986) at 20-21

12. More specifically, a Canadian Council on Social Development study in 1976 concluded baldly that: Housing problems for low-income women became critical first and foremost because of lack of money. Similarly, a 1979 study by C.M.H.C. ("Housing Canada's Children") concluded that for the vast majority of children, the root of the problem was "mainly related to affordability in the rental sector".

cited in The Housing Needs of Single Parent Families in Canada, Klodawsky, Fran et al (1983) at p. 5 and 7.

13. A U.S. study conducted in 1979 of 72 white, working class mothers found the impact of their low-income was felt most keenly in their inability to find satisfactory accommodation.

Klodawsky (supra) at 15

14. Finally, a 1991 study by the Nova Scotia Department of Community Services of how a group of single parent, mother led families had managed over the previous ten years, concluded, not surprisingly, that the affordability of the shelter was the "foremost consideration" in assessing the availability of housing.

Mothers and Children: One Decade Later (Nova Scotia, Department of Community Services, 1991) pp. 51-70

15. To summarize, the main problem of families experiencing 'core need' is their low-income status.

GENDER

16. For several reasons, the most important of which by far is income, women generally but particularly single-mothers, have a very difficult time in obtaining housing. The reasons include, discrimination on the basis of gender, marital status and family size.

17. The obstacles women have and have had in obtaining housing become apparent in light of the following information:

18. Figures vary slightly, but about 13% of all Canadian families are led by one parent. A full 83% of these families are led by women. Of central importance in the case at bar is the fact that **65%** of all families housed by the Respondent are female led. Moreover, the likelihood that a female single-parent family lives in poverty far outstrips that of the Canadian average.

Thus, while the poverty rate in 1987 stood at 8% for two-parent households in Canada, the rate among mother-led families was 57%. This last figure rises to 81% for mothers between 18-24. The rate for never-married single mothers of all ages is 75%. Indeed, interestingly, the poverty rate among single parent fathers in 1976 was cited as 14.1%. The poverty rate among sole-support mothers is the highest of all family types in North America.

see Women and Poverty Revisited (National Council of Welfare, Summer, 1990) at pp. 7-9

> In Nova Scotia, half of all single mothers were living below the poverty line - much higher than the national average. This compares with a poverty rate for all persons and family types of 15 percent. In other words, there are more than three times as many poor single mothers and their children in Nova Scotia as there are poor people in general.
>
> Children of single mothers in Nova Scotia have an alarmingly high rate of poverty, according to the National Council of Welfare. Whereas the poverty rate for children in all families in the province was 19.8 percent, and for children of couples, 12.4 percent, the poverty rate for children of single mothers was 70.9 percent. This translates into 15,200 children of single mothers who were poor in 1986.

Women and Children Last, Blouin, at p.15

19. The economic status of women is explained by factors such as the fact that women only earn 65% of what men earn in the labour market and the fact that child-rearing interrupts both their education and job-advancement.

Women and Poverty Revisited
Chapters 4-6

20. The frequency with which women find themselves in poverty is stark in and of itself. However, poverty rates say nothing about the actual depth of the poverty experienced. Thus, someone who needs only a few dollars to reach the poverty line is in a very different position to a family which is thousands of dollars below the line. Studies done for the Canadian Government show that single-mothers had incomes that only reached 61% of the

poverty line.

> Poor women are found in all types of family situations, but that womens' risk of becoming poor greatly increases when they do not have a husband or a father to support them.
>
> Women and Poverty Revisited, p. 14

21. The obvious connection between womens' comparative poverty and their difficulty in obtaining housing is confirmed by housing analysts. Thus, a Statistics Canada study done in 1984 found that 63% of female single parents in Atlantic Canada, compared to only 18% of two parent families, were spending more than 30% of their total household income on housing related expenses (the 30% figure has been developed by C.M.H.C. as the maximum appropriate proportion of family income that should be spent on shelter) (Mothers and Children supra at 52). A literature review conducted for C.M.H.C. by Elizabeth Jordan ("The Housing Needs of Female Led One Parent Families") arrived at the following conclusion:

> Of all the concerns around housing for the female led family, financial problems or worries are the greatest. This conclusion was reached over and over again in every piece of literature reviewed.
>
> Jordan at 33

22. The economic status of single-mothers is reflected in the nature of their housing tenure: 1981 figures show that only 20% of single parent families, compared to 70% of two-parent families were home owners. Thus, single parent families were more likely to be renting apartments in large urban areas. In terms of all women (not just single-mothers) 36% owned homes compared to men who owned homes at the rate of 71%.

> Mothers and Children at 51-2
>
> Also see Women and Housing McClain and Doyle (1984) at 9-10

23. In addition to their lower income, as a barrier to obtaining mortgage financing for a home, some studies refer to outright discrimination against

women by lenders.

Klodawsky, P.14

24. For women with children having to rent premises, there is ample evidence that landlords discriminate against women and particularly single mothers. Thus, whether it is because of their gender, their marital status or their family status (i.e., they have dependent children) landlords disadvantage women both in terms of making housing available and the maintenance of apartments once rented.

Women and Children at 63

Klodawsky at 14 and 42

Women and Poverty Revisited at 67

"Open More Doors" (MUMS, 1986) at 9-13

"A Roof Over Our Heads" Bosma-Donovan and Blouin (1988) at 18-20

25. The material filed with the trial Judge also reveals that women on their own with dependent children are consistently the most frequent household type to express dissatisfaction with the adequacy of their housing. The dissatisfaction relates to the overcrowding, maintenance and neighbourhood environments in which to raise children.

Women and Children at 51, 52, 55

Jordan at 14

Women and Housing at 11

26. Lastly, the difficulty in finding suitable accommodation results in single mothers experiencing considerable transiency in their tenures.

27. The Nova Scotia Government study which followed single and married mothers over a ten year span identified mobility as a striking factor:

> ...low income, unsuitable living arrangements and changing relationships come together to promote a

> higher degree of mobility among unmarried mothers. 29% of the married mothers, compared to only 10% of the unmarried mothers, remained at the same location throughout the entire first 10 years of their child's life. Furthermore, 48% of the unmarried and only 15% of the married respondents moved more than three times.
>
> Women and Children at 65
>
> see also Bosma-Donovan at 20-4
>
> Jordan at 14
>
> Women and Poverty Revisited at 67

28. The emotional fall-out of this situation is well captured in Women and Children:

> Frequent changes in living arrangements can create stress and adjustment problems for both mothers and their children. Community bonds and friendship are often broken when families follow transitory patterns (p. 67)

29. The Women and Poverty Revisited report ultimately conludes: "The most disturbing finding of this report is the strong links between motherhood and poverty" (p. 130).

TRIAL JUDGE'S FINDINGS:

30. The Trial Judge accepted the findings of the National Council of Welfare respecting the significantly greater poverty rate of women, especially single mothers. He went on to say:

> I accept that single-parent mothers have a more difficult time economically. The same is true regarding housing for single-parent mothers. Material submitted on both applications convince me that single-parent mothers have a more difficult time securing appropriate housing. At p. 79 of the study **Women and Poverty Revisited**:
>
> > "Canada Mortgage and Housing Corporation reports that 40 per cent of female single

> parents under 65 have 'core' housing needs, meaning their housing is either too crowded, physically inadequate or costs more than 30 per cent of their total income. In the Atlantic Provinces, many single parents pay more than 50 per cent of their income for an apartment. Families on social assistance in New Brunswick spend more than 65 per cent of their income for rent". (p. 394 N.S.R. at para. 21).

RACE

31. The historical disadvantage experienced by Nova Scotia's Black Community is perhaps the most shameful treatment accorded to any racial minority in the Province.

32. Dalhousie University's Institute of Public Affairs conducted a study on "Employment Patterns in the Black Communities of Nova Scotia" in 1981 and identified many disparities experienced by Blacks in the province.

> see "A Report on Employment Patterns in the Black Communities of Nova Scotia" (1981), Fred Wien and Joan Browne

33. On the issue of unemployment rates among Blacks compared to what they describe as the "majority" [white] community, they conclude as follows:

> [T]he unemployed comprise a very significant percentage of the Black labour force. At the point when the information was collected the unemployment rate among the Black labour force ranged from 12 to 38 percent, depending on the region, with the total averaging out at 25 percent. By way of comparison, the unemployed comprised 6.9 percent of the majority group labour force in Southwest Nova Scotia, and 31.1 percent along the Eastern Shore. The official unemployment rate for the total Nova Scotia labour force ranged between 8 and 10 percent in 1976.
>
> Wien and Browne, p. 7

> ...Black unemployment rates are, by a conservative estimate, at least twice as high as for the Provincial labour force as a whole and in certain regions, much higher.
>
> Wien and Browne, p. 15

34. One consequence of Black unemployment which the authors consider is the reliance on welfare:

> ...in view of the high Black unemployment rate and other factors, it will not be surprising to learn from Tables 13 and 14 that Blacks need to rely substantially on various forms of social assistance to make ends meet...provincial and municipal welfare payments are much more significant for the Black then for the majority group populations.
>
> Wien and Browne, p.8

35. Disparities are seen, too, in job levels held by Blacks and members of the majority community (at 12):

> Whether employed in low or high-wage establishments, one of the main distinctive features of Black employment patterns in the province is their concentration at the lower occupational levels of the employing establishment. The occupation tables presented earlier provided a hint of this pattern, but additional evidence is provided by Tables 23 and 24. Here, the occupations of the labour force are assigned a score ranging from 1 to 500, with the lower numbers reflecting occupations that are deemed to provide relatively high income and prestige levels, as well as requiring a high leval of education. It can be seen from the tables that only a very few of the occupations held by Blacks in 1975 received the high status/income scores; the majority group proportions are two or three times higher if we look at the percentage of occupations in the first 250 ranks. Similar findings emerge from a number of other reports.

36. In the summer of 1989, a report was published on the educational and income status of the Black communities of East Preston, North Preston and Cherrybrook. The information from these communities was then compared to

the appropriate data from the Halifax County area as a whole.

"Education and Income in the Watershed Area" (Kerry Deagle, 1989)

37. Demographically, "households in the Watershed communities are 39% larger than households throughout Halifax County". Also, "average annual household incomes in the Watershed area ($29,572) trail those of Halifax County households ($42,572.00) by 31% (Deagle, p.1).

38. When we look at occupations performed by adults in the Watershed area, there are the following findings: "39% of Watershed residents and 61% of the County residents work in 'white-collar' occupations, while 61% of Watershed residents and 31% of County residents work in 'blue-collar' occupations" (Deagle at p.1).

39. In terms of attainment of education, "17% of Watershed area residents have some post-secondary education compared to 52% of Halifax County residents" (Deagle at p.2).

40. The authors of the survey conclude as follows:

> **The results of this survey make it inconsistent for a rational individual to claim that racial prejudice does not exist in the educational system or work places of this County** (emphasis added).
>
> Deagle, p.2
>
> - and -
>
> Residents of the three Watershed area communities of East Preston, North Preston and Cherrybrook are significantly disadvantaged economically compared with residents of Halifax County. Their educational achievements are lower than their peers throughout the County, lessening their abilities to improve their economic situations.
>
> Deagle, p.2

AFRICVILLE

41. It is appropriate to make reference to the situation of the former

residents of Africville inasmuch as many of them are Black Nova Scotians who went on to become tenants elsewhere in Halifax and especially into premises controlled by the Respondent, Halifax Housing Authority.

42. In Africville: The Life and Death of a Canadian Black Community (1987) authors Clarmont and Magill detail several of the obstacles which Blacks faced:

> Just prior to relocation, some residents of a nearby middle class neighbourhood protested angrily against a suggestion that the people be relocated there, stating: "We don't want Africville people here". Several instances of discrimination did occur. In one instance, a white person was fined for sending KKK-type threats to a relocatee who had moved into a white neighbourhood.
>
> Clairmont and Magill, p. 192

- and -

> Africville relocatees obtained better housing, but at a considerable cost; many experienced what they considered to be a loss of freedom and status as they had to become tenants instead of homeowners. Most relocated families owned their dwellings in Africville, whereas less than one third were homeowners after relocation. To people without adequate and regular income who are unused to paying rent, mortgage, and service and maintenance bills, the expense of improved housing brought new worries, family strains and indebtedness.
>
> Clairmont and Magill at 192-3

- and -

> For these people who had been homeowners in Africville, the change in housing status was a serious loss; one relocatee observed: "I will die and won't be able to leave my children anything".
>
> Clairmont and Magill at 196

43. Many relocatees were moved into rental premises which were neither sanitary nor adequate. The authors of the Africville study indicate that the pressure of time allocated to complete the relocation of Africville residents meant that unsuitable premises were all that could be obtained:

> Many Africville relocatees complained about this housing practice; one relocatee commented: Wherever they could squat you, that's where you landed". Of the relocatees rehoused in rental accommodations in these redevelopment areas, a signficiant number had moved as many as three times since leaving Africville.
>
> Clairmont and Magill at 197

44. In terms of dependence on social assistance, the study of former Africville residents found that "clearly the majority of relocatees became heavily dependent on welfare to maintain themselves".

Clairmont and Magill p. 204

TRIAL JUDGE'S FINDINGS:

45. > One can almost take judicial notice that the Black Community in Nova Scotia has always been at the low end of the economic scale. The material submitted corroborates this submission. Per capita, the income and education of Black Nova Scotians are considerably lower than the majority of other Nova Scotians. Employment opportunities and availability of suitable housing also are not equivalent (p. 394 N.S.R., para. 20).

SOCIAL ASSISTANCE RECIPIENTS

46. As a discrete group within society, recipients of social assistance face obstacles arising from both their economic status and prejudicial societal attitudes.

47. In Nova Scotia, welfare is provided by what is known as the 'two-tier system'; individuals with long term disabilities and single-parents receive assistance from the Provincial Government pursuant to the Family Benefits Act while all other persons in need must apply to their municipalities for help under the Social Assistance Act.

i) Affordability

48. Invariably, the rates set by regulation under the Family Benefits Act are higher than those set by Municipal Councils pursuant to the Social Assistance

Act.

49. A study done in 1986 ("How will The Poor Survive") showed that "welfare benefits in Nova Scotia varied from 45 to 67 percent of the Statistics Canada poverty line. In other words, people on welfare were living far below the poverty line".

Women and Children Last at 16

50. The National Council of Welfare study, Women and Poverty Revisited (Summer 1990) analysed the role which welfare plays in perpetuating women's poverty (at p. 71):

> The main consequence of extremely low benefits is that single-parent mothers (and all other welfare recipients) are forced to use their food money to pay the rent".

51. A September, 1988 study by researchers Elizabeth Bosma-Donovan and Barbara Blouin entitled "A Roof Over our Heads: Single Mothers in Housing Crisis in the Halifax Metro Area" considered the links between receipt of social assistance and ability to obtain affordable housing in Nova Scotia. The following are some of their findings:

> Most average rents (by area) for Halifax and Dartmouth were above the shelter maximums set by social assistance. The effect of the frequently wide discrepancy between shelter maximums and shelter costs is that single mothers receiving social assistance are forced to rent housing they cannot afford.
>
> Restrictive social assistance policies for damage deposits, utility deposits, and moving allowances make it difficult for single mothers to move to more affordable housing, if they should happen to find it.
>
> Ninety percent of the sample were paying between 31% and 112% of their incomes for shelter. According to C.M.H.C. standards, anyone who spends more than 30% of income for shelter is paying too much.
>
> Because low-income single mothers are renting housing they cannot afford, they do not have enough money left over to meet other basic needs. They rely heavily on churches, food banks, family and friends to help

> them out. Even with help from these sources, they are not able to meet their basic family needs adequately.
>
> Transiency was a way of life for many of the families in the sample. Seventy percent of the women moved at least once within a 12-month period, and 60 percent moved between 3 and 10 times within a 26-month period. For most of these families who moved frequently, children were uprooted from schools, daycares and friendships.
>
> Bosma-Donovan and Blouin at ii and iii

ii) Discrimination

52. Many of the reports filed at trial refer to pervasive discrimination faced by welfare recipients in seeking to obtain housing. "Landlord discrimination was universal for all renters in the sample (28 of 30). Landlords discriminated against children, social assistance recipients, single mothers and nonwhites".

Bosma-Donovan and Blouin at p.iii

53. A 1987 report by the "Housing for People Coalition" (Halifax, Nova Scotia) states:

> Discrimination against women on social assistance is also a major problem but much harder to prove. Landlords are refusing people if their income is below a certain amount, which is almost always above the social assistance rate" (at 16).

TRIAL JUDGE'S FINDINGS

54. It also goes without saying that social assistance recipients are also less advantaged, although some arguments could be made that there are certain advantages accruing to such recipients if they are able to obtain suitable public housing at a smaller percentage of their income than would be the case if they were a private sector tenant (para. 23, 395 N.S.R.)

Note: Under Nova Scotia welfare regulations, the Family Benefits Division and Municipal Social Assistance agencies only pay a recipient's **actual** rent up to a specified maximum.

see e.g., Family Benefits Regulations 36 and 41

PART II
LIST OF ISSUES

The sole issue being pursued is that listed as #2 in the Notice of Appeal:

> The Learned Trial Judge erred in his interpretation and application of S.15 of the Charter of Rights.

PART III
ARGUMENT

55. The issue in this appeal is whether the impugned provisions of the Residential Tenancies Act ("the Act") violate the Appellant's rights under S.15 by contributing to the disadvantage she faces as a member of three protected groups.

56. In order to answer the question raised here, the Appellant proposes to outline briefly the historial precedents to S.15 of the Charter; the purpose of the Equality Rights guarantee as an aid to its interpretation and the test which the Supreme Court has ennunciated for its application.

The Purpose of Equality Rights

57. The 'purposive approach' must guide the Court's interpretation and application of S.15. That is, the equality rights guarantee is to be understood in light of the interests it was meant to protect bearing in mind the historical origins of the concepts enshrined.

> Andrews v. Law Society of B.C. (1989), 56 D.L.R. (4th) 1 (S.C.C.) at 14

58. McIntyre J. (for the whole Court on this point) spoke in general terms of the purpose of S.15:

> It is clear that the purpose of S.15 is to ensure equality in the formulation and application of the law. The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration.
>
> Andrews at 15

59. The Court has also said that the purpose of S.15 is "remedying or preventing discrimination against **groups** suffering social, political and legal disadvantage in our society" (emphasis added) (R. v. Turpin (1989), 69 C.R. (3d) 97 (S.C.C.) at 127). These are clearly very broad although somewhat ambiguous statements.

60. Returning to Andrews, Justice McIntyre provided more substantive indications as to the purposes underlying S.15 when he referred to some of the sources from which it developed as well as to approaches to equality which were to be rejected.

THE HUMAN RIGHTS BACKGROUND

61. The Supreme Court indicated that the equality rights provisions in S.15 must be understood in the context of pre-Charter history and particularly "the expanded concept of discrimination being developed under the various Human Rights Codes" and "...discrimination under S.15(1) will be of the same nature and in descriptive terms will fit the concept of discrimination developed under the Human Rights Acts...".

(Andrews, pp. 14, 17 and 19)

62. In the period after World War II legislatures of all provinces and Parliament enacted anti-discrimination legislation. A more complex, modern Canada required that equal respect be accorded members of groups who were being subject to intolerance and bigotry.

63. In addition, one of the most dramatic developments in the area of human rights was the judicial innovation of interpreting anti-discrimination legislation as **not** requiring any animus or mens rea as an element in the proof of a discrimination claim. Much early case law had required that a human rights complainant establish that the disadvantage suffered was the result of actions inspired by prejudice. Proving 'intent' clearly posed a formidable evidentiary obstacle:

> This [intent] concept produced a series of almost insuperable difficulties, as individual cases became

> bogged down in the vagaries of fact-finding. The potential law enforcement thrust of the statute was lost in the search for circumstantial evidence that would reveal the employer's state of mind.
>
> Blumrosen, Alfred W., "Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination" (1972), 71 Mich. L. Rev. 59 at 68
>
> see also Vizkelety, Beatrice Proving Discrimination in Canada (Carswell, 1987) at 14-25
>
> Mr. Justice Walter Tarnopolsky, "The Evolution of Judicial Attitudes" in Equality and Judicial Neutrality (Carswell, 1987) at 387-389

64. The leading decision by the Supreme Court of Canada in Ontario Human Rights Commission and O'Malley v. Simpson-Sears Ltd. (1985), 23 D.L.R. (4th) 321 authoritatively held that establishing intent was not a requisite element in a human rights complaint:

> It would be extremely difficult in most circumstances to prove motive, and motive would be easy to cloak in the formation of rules which, though imposing equal standards, could create...injustice and discrimination by the equal treatment of those who are unequal.
>
> O'Malley at 331

65. Indeed, in any human rights claim, the Respondent's intent was, after O'Malley, irrelevant in applying legislation which was, afterall, "aimed at the elimination of discrimination" (O'Malley at 331). The paramount role now accorded to the "effect" of a Respondent's actions was expanded on in later cases. Thus, in Action Travail Des Femmes v. Canadian National Railway Co. (1987), 40 D.L.R. (4th) 193 (S.C.C.), the Supreme Court specified that it was the "[impugned] practice itself which is sought to be precluded. The purpose of the Act is not to punish wrongdoing but to prevent discrimination" (Action Travail at 206). Chief Justice Dickson, for the whole Court, then went on to more fully explain (p. 207) why the focus of the inquiry must be the effects or impact of allegedly discriminatory actions. His Lordship concluded by stating (at p.207):

> the imputation of a requirement of "intent", even if unrelated to moral fault, failed to respond adequately to the many instances where the effect of policies and practices is discriminatory even if that effect is unintended and unforeseen.

66. Shortly after Action Travail, the Court felt the need to, yet again, indicate that in considering human rights claims it must be remembered that:

> ...the Act is directed to redressing socially undesirable conditions quite apart from the reason for their existence (emphasis added). Robichaud v. The Queen (1987), 40 D.L.R. (4th) 57 (S.C.C.) at 581

- and -

> ...the central purpose of a human rights Act is remedial -- to eradicate anti-social conditions without regard to the motives or intention of those who cause them.

(Robichaud at 582)

67. Later in the decision (p. 584), Justice LaForest reiterated that the "Act is concerned with **effects** of discrimination rather than its **causes** (or motivations)" (emphasis in original).

THE BILL OF RIGHTS EXPERIENCE

68. In terms of the drafting history of S.15(1), experience under the Bill of Rights, under which the phrase "equality before the law" was given a restrictive meaning was clearly a shortcoming which "deliberality" led to an expanded list of 4 equalities in S.15(1). Professor Hogg refers to the reasons of McIntyre J. in stating that the reason for having four formulations of the idea of equality was to "reverse the restrictive interpretations placed by the Supreme Court of Canada on the phrase 'equality before the law' in the Bill of Rights. The phrase "and under" was inserted to ensure that reviewing Courts could reach the substance of the law; while "equal benefit of the law" was intended to ensure that legislated benefits would also be subject to equality standards.

Andrews at 14 and 15

Peter Hogg, Constitutional Law of Canada (Carswell, 1992) 1158-9

APPROACHES TO S.15(1) THAT WERE REJECTED IN ANDREWS

69. Speaking for the Court, McIntyre J. takes up and rejects two of three approaches to the interpretation of the equality provision. In doing so, further direction is provided, albeit indirect, as to what is the appropriate perspective to adopt.

70. (1) At the outset of his reasons, His Lordship considers and dismisses the "identical treatment" interpretation whereby a violation of 'equality' results whenever individuals are treated differently from each other:

> In simple terms, then, it may be said that a law which treats all identically and which provides equality of treatment between "A" and "B" might well cause inequality for "C", depending on differences in personal characteristics and situations.

Andrews at 10-11

71. The problem with the equation of equality with 'sameness of treatment' is that it is premised on a false and unfair assumption about social reality; one based on a view that we are all advantaged. Moreover, by not acknowledging situational differences in needs and abilities, the identical treatment approach actually accentuates inequalities.

see also Colleen Sheppard "Recognition of the Disadvantaging of Women" 35 McGill L. J. 207 at 212

72. On this same point, McIntyre J. later in his reasons added to the sentiments expressed above by remarking that it is "the accommodation of differences...[which] is the essence of true equality...".

Andrews at 13

73. Professor Colleen Sheppard, in her commentary on Andrews, provides the following considerations on this approach:

> A final impliction of the rejection of the equality as sameness approach is the necessary abandonment of a straightforward rule-based approach (i.e., equality as sameness of treatment) to constitutional equality. One cannot simply conclude that inequality exists where individuals from disadvantaged groups are being treated differently. It depends on the circumstances. It thus becomes clear that interpreting the constitutional mandate of equality is complicated. Differential treatment does not necessarily produce inequality. Sameness of treatment does not necessarily generate equality. When, then, is it permissible to treat people differently and when is it not? To resolve this dilemma, Justice McIntyre adopts the purposive approach, forcefully rejecting the "similarly situated" test.
>
> Sheppard at 217-8

74. (2) Prior to Andrews, many courts had applied S.15 using the "similarly situated" test; a restatement of the Aristolelian principle of formal equality whereby *'likes should be treated alike while unalikes should be treated unalike'*.

> Andrews at 11

75. The test was developed in the United States as an exception to the 'identical treatment' approach and under it racially segregated schools were still constitutionally justifiable under the now infamous "separate but equal" doctrine. Using the 'similarly situated' test, differences in treatment between classifications or groups were permissible so long as they were "reasonable" or "not unfair".

> Andrews at 12; Lepofsky and Schwartz "Case Note" (1988), 67 Can. Bar Rev. 115 at 119-20 (This article is referred to with approval by McIntyre J. in Andrews) see also Sheppard at 219

76. The B.C. Court of Appeal in Andrews had applied the similarly situated test (1986, 27 D.L.R. (4th) 600 at 605) in which distinctions in the law were

said to violate S.15 only if they could be said to be "unreasonable or unfair" (at 619).

77. McIntyre J. squarely rejected this test for several reasons (including the problem that adoption of the 'reasonable and fair' test within S.15 would leave 'virtually no role... for S.1') and said that it was inadequate to meet the goals of S.15. Subsequent attempts to have the test or its variants accepted by the Supreme Court of Canada have been explicitly dismissed.

Andrews 11-13, 23

R. v. Turpin (1989), 69 C.R. (3d) 97 (S.C.C.) at 123 and 126 per Wilson J. for the Court

McKinney v. Univ. of Guelph (1990), 76 D.L.R. (4th)545 (S.C.C.) at 647 per LaForest J. and at 608-9 per Wilson J.

R. v. Swain (1991), 5 C.R. (4th) 253 (S.C.C.) at 295 per Lamer C.J.C.

DISTINCTIONS WHICH DISADVANTAGE ENUMERATED OR ANALOGOUS GROUPS

78. (3) In dismissing 'the identical treatment' and 'similarly situated' approaches, McIntyre J. states and reiterates what is important in evaluating a S.15 claim:

79. Under the heading "The Concept of Equality", McIntyre J. states:

> Equality is a comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises.
>
> Andrews at 10
>
> - and -
>
> To approach the ideal of full equality before...**the main consideration must be the impact of the law on the individual or the group concerned.**
>
> Andrews at 11

80. Accordingly, laws of general application must not "because of irrelevant personal differences have a more burdensome or less beneficial **impact** on one than another" (p. 11). The Court articulated its understanding of S.15 by dismissing approaches (1) and (2) above while stating that the new approach would need to be applied along with the guidance of the traditional 'purpose and effect' principle of interpretation to Charter violation determination: either an unconstitutional purpose or an unconstitutional effect can invalidate legislation . Incorporating this approach into S.15, (first enunciated in R. v. Big M. Drug Mart Ltd. (1985), 18 D.L.R. (4th) 321 at 349-350), was not only consistent with Charter jurisprudence generally, but was frankly reliant on 'effect-based' principles in human rights adjudication.

Andrews 14, 17 and 19

see Brooks v. Canada Safeway Ltd. (1989), 59 D.L.R. (4th) 321 (S.C.C.) at 336

Also, McKinney (supra) per LaForest J. at 647

81. "What kinds of distinctions will be acceptable under S.15(1) and what kinds will violate its provisions?" (Andrews at 13).

82. The fact that the Charter (in ss.2(a), 25 and 27) protects religious freedom and our multicultural heritage is an indication that S.15 was not intended to blindly eliminate distinctions (p.15).

> Moreover, the fact that identical treatment may frequently produce serious inequality is recognized in s.15(2), which states that the equality rights in s.15(1) do "not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups..." (p.16).

83. Reference was then made to O'Malley and Action Travail (both supra) to illuminate the concept of "discrimination" as the second part in the two-pronged approach to S.15. Indeed, an extended quotation from Action Travail was reproduced (at pp. 17-18 of Andrews) wherein Justice Rosalie Abella's Royal Commission report (Equality in Employment, 1984) was relied

on for a definition of discrimination:

> Discrimination...means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics.
>
> . . . . .
>
> It is not a question of whether the discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. **If the barrier is affecting certain groups in a disproportionately negative way,** it is a signal that the practices that lead to this adverse impact may be discriminatory (emphasis added).

84. Immediately following this quotation Justice McIntyre observed: "There are many other statements which have aimed at a short definition of the term discrimination. In general, they are in accord with the statements referred to above" (p. 18). He then provided his own summary for what is now an oft-cited definition of discrimination:

> I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society (p. 18).

85. Rejection of the two common appellate approaches to S.15 was, thus, followed by the adoption of what McIntyre J. called the "enumerated and analogous grounds" approach. The principle operating here is to restrict the scope of S.15's application to "the enumerated grounds... [which] reflect the most common and probably the most socially destructive and historically practised bases of discrimination..." (p.18). Members of these groups

frequently 'suffer social, political and legal disadvantage or vulnerability to political and social prejudice' (Turpin at 127).

86. Indeed, in Turpin the Court stated that a claimant under S.15 would need to be a member of a group which suffered social disadvantage "apart from and independent of the particular legal distinction being challenged" (at pp. 125-6).

87. As a female single-parent and a Black Nova Scotian, the Appellant clearly possesses two of the personal characteristics which are 'enumerated' and, therefore, prohibited bases of discrimination in S.15(1) (i.e., sex and race). In addition, the Learned Trial Judge stated in his reasons (1992), 112 N.S.R. (2d) 389 at 394) that 'social assistance recipients' are also a discrete and insular minority' within the meaning of S.15(1). This is clearly because they experienced 'social, political and legal disadvantage and are vulnerable to political and social prejudice' (per Turpin supra). It is submitted that this Honourable Court should affirm that ruling inasmuch as this case is equally as much a poverty issue as an issue effecting women and Blacks in terms of the historical disadvantage experienced by 'social assistance recipients'.

see especially Blouin, Barbara Women and Children Last (1989) pp. i-iv.

88. To summarize, the 'enumerated or analogous grounds' approach was elaborated to mean that a violation of S.15 required more than identification of 'different treatment' between groups; the words 'without discrimination' "limit those distinctions which are forbidden by the section to those which involve prejudice or disadvantage" to a protected group (pp. 22-24). The three general components, therefore, are: (i) a legal distinction (ii) which disadvantages (iii) a protected (i.e., enumerated or analogous) group.

see also Swain (supra) at p.297

Adverse Effect Discrimination

89. This form of discrimination occurs when a rule or requirement

unintentionally disadvantages a member of a protected group. A common example is that of a police force imposing a height and weight requirement for new recruits. The fact that such a request may serve to disproportionately exclude more women than men, illustrates how adverse effect discrimination arises.

90. The concept of adverse effect discrimination (also referred to as adverse impact discrimination, unintentional discrimination, disparate impact and systemic discrimination) was explicitly accepted by the Supreme Court of Canada in O'Malley (supra) at p.332 of the decision. Further recognition came in Action Travail (supra) at 209-210. The concept was implicitly incorporated into the interpretation of the equality rights guarantee in Andrews (at pp. 14, 18 and 19) and then explicitly in McKinney (supra) at 647.

91. Further insight into the actual operation of adverse effect discrimination is gained from brief examination of the U.S. Supreme Court decision in Griggs v. Duke Power Co. (1970), 401 U.S. 424 inasmuch as the Supreme Court of Canada looked to Griggs for guidance in accepting the principle into Canadian law. The following is Justice McIntyre's rendition of Griggs as he discussed it in O'Malley at 331 thereof:

> The idea of treating as discriminatory regulations and rules not discriminatory on their face but which have a discriminatory effect, sometimes termed adverse effect discrimination, is of American origin and is usually said to have been introduced in the Duke Power case in the Supreme Court of the United States. In that case the employer required as a condition of employment or advancement in employment the production of a high school diploma or the passing of an intelligence test. The requirement applied equally to all employees but had the effect of excluding from employment a much higher proportion of black applicants than white. ...[T]he Supreme Court of the United States held them [the achievement tests] to be discriminatory because of their disproportionate effect upon the black population (emphasis added).

92. It is very significant to the case at Bar that even though the explanation for why Blacks failed to perform satisfactorily on the tests was entirely

extraneous to the employer and, indeed, social in origin (i.e., 'because of the inferior education received by Negroes': Griggs at 430), this was irrelevant to the principle that Blacks were unquestionably disadvantaged by the job requirements. This point calls to mind the statement by Justice LaForest in Robichaud (supra) that human rights Codes are "directed to redressing socially undesirable conditions quite apart from the reasons for their existence" (at p. 581).

93. (Lest it be suggested that adverse effect discrimination as discussed here would produce extraordinary disruption to any variety of legislative schemes, it needs to be immediately made clear that the present analysis only concerns alleged breaches of the equality rights provisions. The many possible responses, replies, justifications or defences to a disproportional adverse effect finding are addressed under S.1 of the Charter).

94. The requirement for 'disproportional impact', first accepted by the Supreme Court of Canada in O'Malley, was followed by the same Court in Action Travail (supra) by its approving reference to Judge Abella's definition of discrimination; thus, if the impugned provision or rule "...is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory...That is why it is important to look at the results of a system" (in Action Travail at 210). Indeed, it will be recalled that the same passage was quoted with approval by the Supreme Court in Andrews (at p. 18).

95. The frustrations for disadvantaged groups experienced under the older regime requiring proof of invidious intent are extremely well documented by Professor Alfred W. Blumrosen in "Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination" (1972), 71 Mich. L. Rev. 59. Commenting on Griggs, Blumrosen notes that the decision:

> ...shapes the statutory concept of "discrimination" in light of the social and economic facts of our society. The decision restricts employers from translating the social and economic subjugation of minorities into a denial of employment opportunity... (at p. 62).

see also Vizkelety (supra) pp. 13-25

96. Using the guidance provided by the 'effect-based' approach of the human rights cases and Andrews itself, what are the elements of proof in a claim of adverse effect discrimination:

97. The first statements come from the 1985 decision in O'Malley where Justice McIntyre was dealing with a Saturday-work rule which disadvantaged Seventh Day Adventists. Adverse effect discrimination:

> Arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force...
>
> - and -
>
> An employment rule honestly made for sound economic business reasons, equally applicable to all to whom it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply (at p. 332).

98. In Andrews, the general definition of discrimination was put in these terms: "... a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group" which imposes a disadvantage (p. 18).

99. In the recently published third edition of Constitutional Law of Canada (Carswell, 1992), Professor Peter Hogg analyses the concept of adverse effect or 'systemic' discrimination in light of Andrews and other cases and summarizes the elements of proof as follows (p. 1178):

> Systemic discrimination is caused by a law that does not expressly employ any of the categories prohibited by S.15, if the law nevertheless has a

> disproportionately adverse effect on persons defined by any of the prohibited categories. In other words, a law that is neutral (non-discriminatory) on its face may operate in a discriminatory fashion; if it does, the discrimination is systemic.

100. Beatrice Vizkelety, in her Proving Discrimination in Canada (Carswell, 1987) analysed O'Malley and Griggs, then stated the burden of proof succinctly: "a prima facie case of discrimination will be made out where a standard rule or requirement is shown to be more onerous for protected group members than for members of the majority" (at p. 131).

101. Finally, Judith Keene has closely studied the adjudication of human rights claims (in Human Rights in Ontario (Carswell, 1992). In her discussion of adverse effect discrimination, she lists the elements of a prima facie case thus (at p. 126):

- proof that a requirement, qualification or factor that in itself is not discrimination on a prohibited ground exists;
- proof that the existence of the requirement, qualification or factor results in the exclusion, restriction or preference of a group of persons identified by a prohibited ground of discrimination; and
- proof that a person who is a member of the group allegedly affected by the requirement, qualification or factor has been excluded, restricted or preferred as a result of the existence of the requirement, qualification or factor.

Application to the Case at Bar

102. What are the 'effects of the system' under the Residential Tenancies Act whereby the most important protections of the Act are denied to those who live in public housing.

103. The Act, in S.10(8)(d), excludes public housing tenancies from security of tenure. "Security of tenure" basically provides that after five years of

residence a landlord may only terminate the tenancy on showing good cause (see S.10(8) generally).

104. The Act, in S.25(2), further states that the provisions of public housing leases prevail where they conflict with provisions of the Act.

105. Preference being given to the powers of a landlord (even if the landlord is an agency of the government) is clearly anomalous in the context of residential tenancies legislation. In Reference Re Residential Tenancies Act (1981), 123 D.L.R. (3d) 554 (S.C.C.) at 558. Dickson J. held that modern day tenancies legislation had been brought in to "address what was perceived to be an imbalance in favour of landlords, in a landlord/tenant relationship". This Honourable Court itself described our Residential Tenancies Act as having "attempted to reform the law and to give tenants more **security of tenure** and more readily available relief from arbitrary action" (Doherty v. Dartmouth Housing Authority (1984), 64 N.S.R. (2d) 77 (N.S.C.A.) at 81-2).

106. Under the Act, a tenant on a year-to-year lease can only be served with a Notice to Quit three months prior to the expiry of the one year term. On the other hand, a year-to-year public housing lease can be terminated on thirty days notice (see appeal book p. 63).

107. When the Residential Tenancies Act was enacted in 1970, the protection for tenants respecting termination of tenancies by Notices to Quit contained the following introductory wording in s.7: "Except where the landlord and tenant agree in writing upon a period of notice..."In other words, the statutory notice periods intended to be remedial, could be negotiated away.

108. In the 1984 session of the legislature, the Nova Scotia Government acted on the "Report of the Commission of Inquiry on Rents" ("the Coffin Report"). It contained 19 recommendations which covered not only issues relating to rent control but also many substantive areas of residential tenancies law.

109. Bill No. 91 was introduced, which was the legislative reflection of 18 of

the 19 recommendations (see Hansard, May 24, 1984, p. 2939 included with the trial exhibits).

110. The Commission's views regarding the waiver of statutory notice periods had been expressed in the following terms:

> 3. **NO AGREEMENTS FOR EXEMPTION**
>
> We recommend that there be no provision in any statute for an agreement to exempt either party from landlord and tenant legislation. In certain situations such exemptions could destroy the protection that the statutes intend and would encourage undue influence.

111. It is submitted that the mischief sought to be remedied was that expressed earlier: redressing the power imbalance between landlords and tenants, which, in this case, allowed whatever notice period a landlord could obtain.

112. An important feature of the 1984 amendment to the Act was the addition of security of tenure for tenants who had resided in premises for five years.

113. This provision, too, had been contained in the Commission's report as a recommendation:

> 5. **SECURITY OF TENURE**
>
> "We recommend that a person who has been a good tenant for at least five (5) years should be entitled to security of tenure also on the terms set forth in the Ontario Residential Tenancies Act (portions of which are not proclaimed) (see appendix C-21)".

114. The Minister responsible for the Bill, Laird Stirling, mentioned this provision in the course of his speech on the Bill:

> In actual fact, one the tests there, I think, will be a reasonable test, a reasonable test on the basis if a person has been a good tenant for a period of time and keep in mind, in my way of thinking security of tenure really means that you give notice only with

cause. Really that's what it's defined as. (Hansard, May 24, 1984, p. 2940) (emphasis added).

115. The question then becomes, who are these public housing tenants whose rights are so attentuated and who, by virtue of the lease-override authority in S.25(2) of the Act, ultimately have a tenancy at the will of their government landlords who, afterall, draft the leases by which they are bound.

116. The families living in public housing in Halifax, Dartmouth and the County of Halifax are admitted as being disproportionately Black, disproportionately female-headed (65%) and disproportionately in receipt of social assistance (59%).

117. These groups make up the bulk of public housing tenants because, as the documents filed at trial make explicit, these groups are among the poorest of the poor in Nova Scotia. While there is documented evidence of direct discrimination against these groups by private landlords, thereby making it all the more difficult for them to obtain housing in the private market, the primary barrier to obtaining suitable private housing relates to their inadequate incomes. In a society where over 60% of single-mothers live below the poverty line, where Blacks have an unemployment rate that doubles or triples that of the white community and where social assistance rates reach only halfway to the poverty line, it becomes immediately clear why many members of these groups are unable to obtain suitable housing in the private market. There is overt racism and sexism directed toward Blacks and single-mothers by private landlords, but the main obstacle to securing housing is the simple fact that for historical and cultural reasons, the incomes of Blacks and women (not to mention social assistance recipients) are simply inadequate to pay for privately rented premises.

118. Indeed, in Bernard v. Dartmouth Housing Authority (1988), 88 N.S.R. (2d) 190 at 198, this Honourable Court stated that the manifest purpose of public housing was the "relief of poverty". It is not simply a matter of coincidence that Blacks, women and welfare recipients are disproportionately represented in public housing; their documented poverty vis-a-vis other groups

readily provides the social explanation for their: inability to afford private rentals / reliance on public housing / exlusion from the protections of the Residential Tenancies Act.

119. Therefore, when the Nova Scotia legislature accorded, for example, 'security tenure' to most tenants in the 1984 amendments to the Act while simultaneously exempting public housing tenants from security of tenure and the other statutory protections, it made a decision which disproportionately **effected** and **disadvantaged** Blacks, women and social assistance recipients. Stated differently, when one asks the simple question as to who loses out, who is "disadvantaged" by ss. 10(8)(d) and 25(2) of the Act, the answer is that it is disproportionately members of groups who already experience a pervasive disadvantage in our society. The fact that the legislation particularly burdened protected groups was obviously unintentional and the resulting disadvantage experienced by these groups might well have been unforeseen. That does not affect the question as the authorities make clear; as Professor Hogg puts it: "...a discriminatory effect constitutes a breach of S.15, even if the effect is an incidental by-product of a benign intention" (p. 1177).

120. To take a concrete example of the prejudice suffered, Irma Sparks, as a tenant for almost twelve years, would have the right under the security of tenure provisions of the Act to force her landlord to show cause why her tenancy should be terminated. In the present case, however, the public housing landlord only had to serve a thirty day notice to quit without having also to prove just cause for terminating the tenancy. There can be no question that this is a real detriment and disadvantage to public housing tenants, who **effectively** are mostly women, mostly social assistance recipients and at least disproportionately Blacks, in that they do not receive "equal benefit of the law" (per S.15(1)).

121. Moreover, public housing tenants who are members of the three groups referred to in this case are also at a disadvantage when compared to other tenants of public housing who are not members of disadvantaged groups. That is, should a tenant in the Appellant's circumstances receive a thirty-day Notice to Quit and a two-parent white family in public housing with two incomes also

receive a notice on the same day, the ability of the latter household to obtain alternate accommodation in the private sector is statistically far greater. This is the case for exactly the same reasons why families face disadvantage in the in the private market in the first place; inadequate incomes and racial and sexist prejudice.

122. It is submitted that the Appellant has met the test for a violation of S.15(1) in that she is a member of three protected groups whose pre-existing social disadvantage is added to by SS.10(8)9d) and 25(2) of the Act. If as McIntyre J. stated, 'the essence of equality is the accommodation of differences', then the impugned provisions only serve to accentuate the Appellant's situational differences and inequalities.

THE TRIAL DECISION (1992), 112 N.S.R. (2d) 389

123. The Appellant submits that the principle flaw in the Learned Trial Judges reasons was his understanding and application of the principles of adverse effect discrimination.

124. Prior to addressing this position, however, one point in the Trial Judge's understanding of our position ought to be clarified. In paragraphs 26 and 27 of his reasons (p. 395 N.S.R.), Judge Palmeter characterized the Appellant's position as saying that because of her social disadvantage, Irma Sparks is effectively worse off than other public housing tenants under ss. 10(8)(d) and 25(2).

125. In Paragraph 121 above, we have argued that public housing tenants who are members of the same three groups as she is, are, in fact, more vulnerable than public housing tenants without those group-based disadvantages.

126. However, our position is clearly far broader than simply this, because the Appellant is making the cliam that by creating, in simple terms, two classes of tenants' rights, and by according fewer rights to the class of public housing tenants, the government has effectively served to further disadvantage these

protected groups. That is, in looking at the social situation of these groups, the public housing exemption actually fosters further social disadvantage - as compared to the majority community in Nova Scotia. Simply put, the public housing exemption creates a double disadvantage; three vulnerable groups are 'overrepresented' among those who do not enjoy the statutory rights and, among public housing tenants themselves, these groups face greater obstacles than their 'neighbours' if their tenancies are terminated.

127. Having said that, the primary error in the Trial Judge's reasons lays in his requirement that the Appellant needed to show that the impugned provisions:

> somehow exempted blacks, women and recipients of social assistance from the protection of the statutes by singling out a characteristic of being a black, female, social assistance recipient, and exempting from the protection of the Act those with that characteristic. (Paragraph 58, 402 N.S.R.).

128. With respect, from these comments and those in Paragraphs 54, 56 and 57, the Trial Judge has erred by focussing unduly on the nature of the distinction drawn by the impugned provision. Rather, the authorities make clear that his concern ought to have been with the **effects** or results of ss. 10(8)(d) and 25(2) on protected groups. On this point and to the same effect, see the remarks of Richard Moon "A Discrete and Insular Right to Equality" (1989), 21 Ottawa Law Review, 563. This article was actually referred to by the Trial Judge at one point. However, note the author's remarks (at p. 568) on a narrow reading of the tests in O'Malley and Andrews.

> ...the emphasis in this paragraph on the distinction drawn...and the unfair attribution of characteristics to the members of a group does not seem to fit with what McIntyre J. says earlier in his judgement.

129. Thus, when Judge Palmeter stated that, to have been discriminatory, the distinction must be based on the personal characteristics of the individual or group, he was relying on principles that relate to direct or intentional discrimination. He was, with respect, leaving no room for adverse effect

discrimination which considers 'the unintended and unforeseen consequences' of facially neutral legal classifications and distinctions.

130. If we refer to the seminal case of Griggs v. Duke Power Company (supra), the 'distinction' between those who got jobs and those who didn't turned on their results on two achievement criteria. The crucial point in Griggs and here is that there was nothing inherent in those criteria which reflected or was 'based on' immutable personal characteristics of Blacks. The criteria effectively discriminated against Blacks because their pre-existing social disadvantage resulted in their not performing as well as whites on the tests. The tests clearly did not 'single out' (to use Judge Palmeter's phrase) personal characteristics of Blacks (such as skin colour) but this was irrelevant when measured against the impact of these screening tests on Blacks.

131. Here, the distinctions drawn by the legislation are equally neutral on their face. Also, just as in Griggs, when the public housing criteria is allowed to function as the determinant of who will gain and who will lose (re enjoying security of tenure and other statutory rights), we find that Blacks, women and welfare recipients are, once again, on the losing side.

132. So, for the Trial Judge to say (in para. 57) that "it is not characteristic of any of those three groups to reside in public housing" reveals that he had understood adverse effect discrimination as requiring a qualitative similarity between the nature of the legal distinction and personal attributes of the protected group. In short, the Trial Judge looked for evidence of direct discrimination and found none.

133. In paragraph 50 (p. 401 N.S.R.) of the decision, the Trial Judge appears to correctly set out the test for adverse effect discrimination. However, in para. 54, he narrows the scope of the concept by apparently understanding the test to mean that the distinction must describe some inherent characteristics of the group. With respect, the proper test ("...a distinction, whether intentional or not, but based on grounds relating to personal characteristics..." which disadvantages a protected group - Andrews at 18) is whether the operation of legislation works to the disproportionate disadvantage

of a protected group. It is this approach which is in keeping with all of the authorities and factual situations decided by the Supreme Court.

134. This critique of the trial decision is discussed by Stephen Coughlan in his case comment on the trial decision (15 Dalhousie Law Journal, No. 2, forthcoming) Coughlan states that Judge Palmeter's statement that "it is not a characteristic of being black that one resides in public housing etc..." implies that "he must have in mind that residing in public housing is not necessarily a characteristic of these groups" (manuscript, p. 4).

135. Coughlan highlights the subtleties in the test in adverse effect cases:

> By "special characteristic", McIntyre J. may have meant a characteristic that is necessarily possessed by the individual or group. Alternatively, he may only have meant a characteristic that is in fact possessed by the individual or group.

136. To support the latter interpretation of McIntyre J.'s test, Coughlan refers to the fact that in both Griggs and in Action Travail (both supra), there was no necessary connection between the criteria for employment and the group excluded by their application - only a factual (i.e., statistical) connection (p. 6)

137. By the same token, to have required a necessary connection between the distinction and the group effected would be to be testing for direct discrimination (Coughlan at 6).

138. Coughlan concludes this point by saying that although the Judge's reasons were:

> consistent with the precise quote from O'Malley, it is not consistent with other statements in that case, with a liberal interpretation of the Charter, or with other cases. The very nature of adverse effect discrimination requires a broader reading.

139. Coughlan goes on to make the point that even the narrow test employed by the Judge has been met on the facts as admitted by the Respondent. Specifically, to exclude 'public housing tenants' from important statutory rights

is to exclude the poor (which 'social assistance recipients' are by definition) and, accordingly, even the Trial Judge's approach would catch the group.

BERNARD v. DARTMOUTH HOUSING AUTHORITY, (1988), 88 N.S.R. (2d) 190

140. The Trial Judge gave very substantial weight to Bernard. Given this and the fact that that case bears some similarity to the present case, the Appellant will present several reasons why the outcome in Bernard need not be followed here:

141. (1) Because of the fact that Bernard was decided before the crucial Supreme Court decision in Andrews, this Honourable Court did not have the benefit of the direction provided by that Court in interpreting S.15. It will be remembered that two separate approaches to S.15 were dismissed in Andrews; the 'different treatment' approach wherein any distinction resulted in the violation of S.15 and the 'similarly situated' approach whereby legislatively classified groups could be treated differently so long as the difference was 'reasonable or fair'. The Appellant's first comment on Bernard is that this Court apparently applied the 'reasonable or fair' test to its assessment of the validity of the different treatment for public housing tenants.

142. Thus, in paras. 23 and 24 of Bernard, this Court spoke of the need (in S.25(2)) to allow the government landlord to retain "flexibility" in dealing with its tenants so that its priorities and its ability to carry out a public housing mandate could be met. The Court acknowledged an inequality was present (paras. 26 and 27), but the Court's failure to find a prima facie case under S.15 appeared to turn (in paras. 23 and 24) on the fact that a separate regime for public housing was somehow reasonable in all the circumstances. Given the manifest balancing of interests which took place in these two paragraphs, the Court appears to have offended (because these Supreme Court cases had not been decided) the rule later established in Andrews and Turpin that "any consideration of the reasonableness of the enactment, indeed, any consideration of factors which could justify the discrimination would take place under S.1" (Andrews at 24).

see also Turpin at 121 and 123

143. (2) With the benefit of Andrews, we now know that the two step test to S.15 requires a distinction which produces an inequality and "discrimination" which serves to limit breaches of S.15 to inequalities which disadvantage a protected group.

see also Turpin at 125

144. In Bernard (at para. 26 and 27), the Court averted to the accepted principle that not all distinctions or, indeed, inequalities amount to discriminaton so as to violate S.15. The next step, in light of Andrews however, would have been to consider whether the distinction in the law disadvantaged an enumerated or analogous group. Because the alleged ground of discrimination in Bernard was "public housing tenants", it can readily be seen that this group is not referred to in S.15. Nor, admittedly, was there any evidence adduced (as the Court stated in Turpin at pp. 125-6) to establish pre-existing social disadvantages in order to have a such a group found to be an 'analogous group'.

145. The conclusion on this point is that the Court in Bernard failed to ascertain whether an analogous group was effected thereby leaving the S.15 analysis open to to question.

146. (3) Bernard was a S.15 case based on direct discrimination; the attack was based on the contention that the legislation was facially violative of S.15. The case at Bar relies on adverse effect concepts which bring different considerations to bear and allegedly effect different parties. Simply put, Bernard addressed the status of 'public housing tenants'; this case raises the equality interests of Blacks, women and welfare recipients groups which unlike the case in Bernard are expressly recognized in S.15(1). On this basis alone, the interests of these groups cannot have been forever determined on the basis of a case where they were not represented.

147. (4) Both Judge Palmeter's decision and Bernard placed very heavy reliance on an earlier decision in Newfoundland and Labrador Housing

Corperation v. Williams et al. (1987), 62 Nfld. & P.E.I.R. 269. Insofar as Williams is of questionable correctness it casts a similar pall on Bernard and the trial decision herein.

148. Again, Williams was a very early equality rights case (decided March 31, 1987), well prior to many of the principles under S.15 had been addressed.

149. (i) Thus, the Court in Williams, held that S.15 was not meant to include adverse effect discrimination:

> The effects test that is used with respect to other sections of the Charter is inapplicable here (except perhaps with regard to the onus). The fact that there is an unequal effect does not of itself warrant a condemnation of the legislation and call for justification under S.1 of the Charter. There must be a discriminatory value to whatever created the unequal effect before it can be said to be a violation of S.15 (at para. 63, p. 276).

150. (ii) The Court applied a 'reasonable' or 'fair' test in deciding whether the classifications were violating S.15 (paras. 60 and 67). A related point, is the fact that the Court expressly said that any government purposes which could give legitimatcy to the Act should be considered before moving to S.1 (para. 80). This is clearly at odds with the Andrews and Turpin approach.

151. (iii) The Court appeared to take the view that the Charter, or at least the equality rights guarantee, did not even apply to regulatory social welfare schemes: "There is a range withing which the political regime may operate with impunity" (para. 74, but see also paras. 72 and 75). Not only is there not constitutional authority for this position, it is squarely at odds with the Supreme Court case of Tetreault - Gadoury v. Canada (1991), 81 D.L.R. (4gh) 358 where the Court ruled unconstitutional eligibility restrictions for Unemployment Insurance benefits related to age.

see also Reference Re Family Benefits Act (1986), 75 N.S.R. (2d) 338

152. To summarize, the Williams decision is, understandably, problematic in light of the principles enunciated in Andrews. And yet, the Learned Trial

Judge cited with approval passages from that case which held that (i) socio-economic regulation is exempt from scrutiny under S.15 and (ii) there must be a weighing of legitimate government interests within S.15 and an assessment of whether they are "acceptable (see esp. paras. 35 and 60 of the trial decision).

153. (5) Bernard purported to apply the 'purpose and effect' approach to Charter analysis (para. 22). As stated in para. 80 above, this analysis provides that either an unconstitutional legislative purpose or an unconstitutional effect produced by the legislation will violate the Charter. However, this method of scrutinizing legislation should not be confused with substantive tests developed to assess breaches of particular sections of the Charter. (e.g., the purposive approach). The one refers to the legislation while the other provides the substantive content to particular Charter provisions.

154. With respect, Judge Palmeter (at par. 39) collapsed the distinction between the two.

SECTION 1

155. Should the Court agree that the Appellant's equality rights have been violated, the analysis then shifts to s.1 of the Charter to determine whether the impugned provsions can be salvaged.

156. Once a prima facie case has been established, all justifications, explanations or reasons are to be considered exclusively under S.1 of the Charter: "any justification of an infringment which is found to have occurred must be made, if at all, under the broad provision of S.1" (Andrews at 21 and Turpin at 121).

THE OAKES TEST

157. The first step: Whether the **objectives** of s.10(8)(2) and 25(2) are of sufficient importance to warrant overriding the Charter guarantee to equality.

158. In Bernard, this Court held that s. 25(2) of the Act was intended to give the Housing Authority 'administrative flexibility' to manage the scheme.

159. The more specific question, in light of all the evidence, is what is it that differentiates public housing from that in the private sector. It is submitted that there are only **two** things which are different: (1) only "families" (i.e., not individuals or groups of people) or "seniors" are categorically eligible to apply. (2) once admitted to public housing, the rent payable is "geared to income".

160. Insofar as a public housing landlord requires flexibility, it arises only from either one of these two bases. Against this is the fact that s.25(2) provides the landlord the option of providing tenants absolutely none of the rights found in the Residential Tenancies Act.

161. The Act effectively grants the government-landlord total discretion to grant leases which contain all, most, few or none of the statutory rights enjoyed by tenants in the private sectory.

162. The fact that the Respondent has not adduced any evidence to substantiate why it needs total discretionary 'flexibility' is significant.

163. The Supreme Court of Canada has repeatedly stated that 'administrative convenience' will not be accepted as a pressing and substantial legislative objective which is sufficient to override Charter rights.

Singh v. Minister of Employment and Immigration (1985), 17 D.L.R. (4th) 422 (S.C.C.) at 469

R. v. Big M. Drug Mart Ltd. (1985), 18 D.L.R. (4th) 321 (S.C.C.) at 365

164. The second prong of the Oakes test looks at "proportionality".

Proportionality: (A) whether the measures chosen (s.10(8)(d) and s. 25(2)) are rationally connected to the objective.

(B) whether they impair the Charter rights as little as possible.

(C) whether the measures so severly infringe upon the right that this infringement outweighs the legislative objective.

for a recent and succinct summary of the Oakes tests, see Tetreault-Gadoury v. Canada E.I.C., (1991) 81 D.L.R. (4th) 358 (S.C.C.) at 370

MINIMAL IMPAIRMENT

165. The second of the three 'proportionality' tests has served as the ground upon which legislation has been most closely scrutinized by the Supreme Court of Canada.

166. In this case, it is submitted that the essential weakness of the 'public-housing override' scheme is that the provisions allow government to do whatever it wants with the Blacks, the women and welfare recipients who disproportionately make up the residents. In a word, the impugned legislation is 'overbroad'.

167. In order to successfully pass the 'minimal impairment' test, government has the burden of establishing that it impaired equality rights as little as reasonably possible.

168. In Tetreault-Gadoury the Supreme Court stressed that while a measure of deference will be paid to government legislation in light of policy options open to it, this "does not give them an unrestricted license to disregard an individual's Charter rights":

> Where the government cannot show that it had a reasonable basis for concluding that it has complied with the requirement of minimal impairment in seeking to attain its objectives, the legislation will be struck down (at p. 372).

169. More recently, the Oakes test has been aplied 'flexibly'. However, even under the more relaxed approach, the Supreme Court had no difficulty in

holding, in Tetreault-Gadoury, that legitimate legislative objectives were not carried out by legislation which was not:

> carefully designed to achieve this objective, or at the very least, does not impair the respondent's rights in a minimal way (p. 373 D.L.R.).

170. Also, Mr. Justice LaForest took the opportunity to point out that the government had failed to adduce any evidence showing that there were no alternative measures which better accommodated the equality rights guarantee (at p. 373). It is submitted that the legislative record regarding the impugned provisions here are entirely bereft of indications that the legislature was even responsive to the expressed concerns that the legislation simply went too far.

to similar effect see Rocket v. Royal College of Dental Surgeons (1990), 71 D.L.R. (4th) 68

171. What is the evidence that the Legislature had a reasonble basis for concluding that it minimally impaired equality rights?

1. The legislative debates show that the government did not even respond to this problem when it was raised in the Legislature.

   see Hansard May 24, 1984, p. 2936

2. The recommendations of the Coffin Report had been explicitly to the effect that no statute should permit agreements to exempt from statutory protections as this "would encourage undue influence".

3. The experience of other legislatures had shown exempting public housing tenants from residential tenancies legislation was far from the norm in Canada. Indeed, in Ontario, the Landlord and Tenant Act security of tenure provisions apply to Public Housing.

172. The Ontario legislation has only three exemptions: (i) a provision related to termination of tenancies for misrepresenting family income. This is clearly rationally connected to public housing, i.e., it is obvious why it is in

the Act. (ii) a second provision allows for termination where a tenant "has ceased to meet the qualifications for occupancy of such premises". This relates solely to a tenant's categorical eligibility for housing, i.e., are they still a "family" or have the children now moved out. It has never been suggested that this situation applied to the facts here. (iii) the third and final exception relates to the right to sublet. This, too, is rationally connected to the purpose of public housing, i.e., to restrict eligibility to low-income families and seniors.

173. The Nova Scotia scheme not only removes the right to sublet or assign but also security of tenure (which could appropriately be dealt with by a provision such as that in s. 110(3)(c) of the Ontario Act). Instead, it wipes out all rights and leaves it to the discretion of the landlord whether the tenant will have any rights (on this point, see the number of tenant's covenants in the lease compared to the landlord's obligations).

Appeal Book pp. 60-62

RENT SUPPLEMENT PROGRAM

174. A different form of low-cost or subsidized housing was introduced into Nova Scotia in 1986; the Rent Supplement Program. Simply put, approved tenants from public Housing Authority waiting lists are placed as tenants in designated and approved privately owned apartment buildings. The tenant's rent is exactly that which they would pay if they were residing in a public housing project (i.e., rent geared to income) with the Department of Housing paying the landlord the difference between the market rent and the amount paid by the tenant to the landlord. Thus, a subsidized tenant moving into a privately owned building has been selected according to the same Core Need criteria and, indeed, the same waiting list as a tenant who might be placed in a conventional public housing unit.

Public Housing Operation Manual
Chapter 8.1-8.6 (filed with trial exhibits)

175. What kind of legal rights are enjoyed by the subsidized tenant living in a private unit? "The tenants of designated rent supplement units sign a lease with the owner and that lease should the same as the one used for the other

tenants in the building" (emphasis added).

Operations Manual 8.10; see also Ch. 8, Appendix 8A

176. The point here, of course, is that the simple fact that an individual receives a benefit from government (i.e., subsidized rent) is not used to reduce the rights which a Rent Supplement tenant will be accorded.

177. In conclusion, it is submitted that the impugned provisions have not been carefully tailored to infringe the Appellant's equality rights as little as possible. Had the legislature made such an attempt there would be an indication that only areas such as sub-letting, rent increases, or termination of the tenancy where dependent children no longer live at home were to be treated differently under the Residential Tenancies Act. In the present case, the Legislature has abdicated this responsibility and left the matter entirely within the discretion of the Department of Housing.

178. Accordingly, the Appellant submits that the legislation cannot be upheld under S.1 of the Charter.

PART IV
REMEDY SOUGHT

179. Should the Court accept that the legislation violates the Appellant's equality rights and is not saved by S.1, the question then becomes what is the most appropriate remedy.

180. Clearly, the Appellant ought to be accorded 'equal benefit of the law' as guaranteed by S.15(1). Professor Colleen Sheppard provides some insight on the present remedial question in "Equality, Idealogoy and Oppression: Women and the Canadian Charter of Rights and Freedoms" in Charterwatch: Reflections on Equality (Carswell, 1986) at 218:

> Courts will be faced with two types of situations relating to the social inequality of women. First, they will be confronted with cases where differential treatment is currently afforded to men and women. This may result in inequality if women are treated less favourably than men. It may be, however, that the differential treatment benefits women (e.g. maternity leave). Second, courts will encounter situations where facially-neutral treatment has a disproportionately adverse impact on women.
>
> In both of these situations, a court's first task is to determine whether the impugned law, policy or practice is operating to the detriment of women. ...
>
> When differential treatment entails less favourable treatments of women, the remedy required will be equal treatment. Where differential treatment provides a genuine benefit to women, this benefit should be retained in some way.

181. Because the impugned provisions will continue to operate in a discriminatory way so long as Blacks, women and social assistance recipients continue to be socially disadvantaged, it is submitted that the most 'appropriate and just' remedy (per S. 24(1) of the Charter) would be to declare ss. 10(8)(d) and 25(2) to be of no force or effect.

COSTS

182. The Appellant, Irma Sparks, is a recipient of Family Benfits and, as such, she qualifies for legal aid under the Legal Aid Act. Because of this and the other circumstances of this case, it is submitted that Civil Procedure Rule 5.17 ought to be applied so as to exempt Ms. Sparks from the payment of costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Halifax, Nova Scotia, this 13th day of October, 1992.

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