1992 S.C.A. No. 02681

IN THE SUPREME COURT OF NOVA SCOTIA
APPEAL DIVISION

BETWEEN:

IRMA SPARKS

APPELLANT

- and -

DARTMOUTH/HALIFAX COUNTY REGIONAL AUTHORITY

RESPONDENT

- and -

ATTORNEY GENERAL OF NOVA SCOTIA

INTERVENOR

FACTUM OF THE INTERVENOR ATTORNEY GENERAL OF NOVA SCOTIA

Vincent Calderhead
Metro Community Law Clinic
2830 Agricola Street
Halifax, Nova Scotia
B3K 4E4

Solicitor for the Appellant

Jamie S. Campbell
Cox Downie
1100 - 1959 Upper Water Street
Halifax, Nova Scotia
B3J 3E5

Solicitor for the Respondent

Timothy J. Lemay
Department of Attorney General
400 - 5151 Terminal Road
Halifax, Nova Scotia
B3J 2T8

Solicitor for the Intervenor

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PART I

STATEMENT OF FACTS

1. The Attorney General accepts the statement of facts as set out in the Respondent's factum.

PART II

ISSUE

1. Whether the Learned Trial Judge erred in his interpretation and application of s.15 of the Charter of Rights and Freedoms.

PART III

ARGUMENT

2. The Appellant's claim at trial was that the effect of ss.10(8)(d) and 25(2) of the *Residential Tenancies Act*, R.S.N.S. 1989, c.401 and s.11 of the lease dated April 3, 1991 between the respondent and the applicant is to discriminate against her based on race, sex and source of income.

3. Section 15 of the Canadian Charter of Rights and Freedoms provides:

> (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program, or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

4. Section 10(8)(d) excludes public housing tenants from security of tenure and s.25(2) allows the provisions of the lease to govern where they conflict with the Act:

> 10(8) Notwithstanding the periods 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
>
> (d) the residential premises are operated or administered by or for the Government of Nova Scotia, the Government of Canada or a municipality.
>
> 25(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.

5. It is submitted that ss.10(8), 25(2) above and 11 of the lease allow Housing Authorities to, where applicable, move people out of public housing so that needy people on the waiting list can move in. While this may create difficulty for people moving out, it creates a benefit for people on the waiting list that have an established need for public housing.

6. The judicial approach of the application of s.15(1) was refined and clarified in what is referred to as the "trilogy" of decisions of the Supreme Court of Canada: Andrews v. Law Society of British Columbia (1989), 56 D.L.R. (4th) 1; Reference re Workers' Compensation Act, 1983 (Nfld) (1989), 56 D.L.R. (4th) 765; and R. v. Turpin (1989), 48 C.C.C. (3d) 8.

7. As the Learned Trial Judge herein held, at p.22 of his decision (Appeal Book, p.36):

> According to Andrews, a s.15 challenge requires a two step approach:
>
> 1. The complainant under s.15(1) must establish that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection or benefit accorded by law; and
>
> 2. The complainant must establish that the legislative impact of the law is discriminatory. (See Andrews, McIntyre, J. at pp.23-24).

8. In Andrews, Mr. Justice McIntyre considered the concept of equality as it is protected by the Charter at pp.9-10:

> The concept of equality
>
> Section 15(1) of the Charter provides for every individual a guarantee of equality before and under the law, as well as the equal protection and equal benefit of the law without discrimination. This is not a general guarantee of equality; it does not provide for equality between individuals or groups within society in a general or abstract sense, nor does it impose on individuals or groups an obligation to accord equal treatment to others. It is concerned with the application of the law.
>
> * * *
>
> It 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. It must be recognized at once, however, that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality. This proposition has found frequent expression in the literature on the subject but, as I have noted on a previous occasion, nowhere more aptly than in the well-known words of Frankfurter, J. in Dennis v. United States, 339 U.S. 162, at p.184, 94 L.Ed. 736 (1950):
>
> "It was a wise man who said that there is no greater inequality than the equal treatment of unequals."

In short, "the accommodation of differences ... is the essence of true equality" and "identical treatment may frequently produce serious inequality" (Andrews).

9. Further in his analysis of s.15, Mr. Justice McIntyre provides the following definition of discrimination [at p.18]:

> 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.

This definition was relied upon by this Honourable Court in P.A.M. v. Criminal Injuries Compensation Board (unreported, 15 May 1992).

In the context of Andrews, "personal characteristics" is limited to those enumerated in s.15(1), or grounds analogous thereto. They identify "discrete and insular minorities", that is, traditionally disadvantaged groups who suffer social, political or legal disadvantage of vulnerability through political and social prejudice. (Mr. Justice Henry in Re Haddock et al. and Attorney General of Ontario; Federation of Metropolitan Toronto Tenants Association, Intervenor (1990), 70 D.L.R. (4th) 644 (Ont. H.C.J.) applying Andrews, Turpin, and Reference re: Workers' Compensation Act, 1983 (Nfld). In Andrews, Madame Justice Wilson concluded that the question of whether or not a group is "discrete and insular" and the focus of review for disparate impact under s.15(1) should be [at p.323]:

> ... a determination which is not to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of our society. While legislatures must inevitably draw distinctions

> among the governed, such distinctions should not bring about or reinforce the disadvantage of certain groups and individuals by denying them the rights freely accorded to others.

10. Palmeter, C.J.C.C. agreed "that what we are dealing with in this case is an individual's merits and capacities and not an individual's personal characteristics" (Appeal Book, pp.39-40).

11. The Attorney General agrees that subsidized tenants are treated differently than non-subsidized tenants and furthermore that there is a disproportionate number of black single mothers on social assistance who are tenants of subsidized housing or who are on a waiting list for subsidized housing. However, not only must the appellant show that the Act creates a distinction which is in violation of one of the equality rights, she must also show that the "distinction is discriminatory" (Turpin, per Wilson, J. at p.36) in the context of the legislation considered as a whole and other special benefits to which the respondent is entitled.

12. The Learned Trial Judge rightly held that "Bernard is the law in Nova Scotia as it relates to distinctions created in the Residential Tenancies Act affecting tenants of public housing" (Appeal Book, p.46). In Bernard v. Dartmouth Housing Authority (1988), 88 N.S.R. (2d) 190 (N.S.S.C.A.D.), this Honourable Court upheld the decision of the trial judge that s.15 of the Charter was not violated by s.12(2) [s.25(2)] of the *Residential Tenancies Act*. In his decision, Pace, J.A. considered the difference in treatment of subsidized tenants:

> [25] The effect of s.12(2) [s.25(2)] of the Act is as stated by Goodridge, C.J.N., in the case of Newfoundland & Labrador Housing Corp., supra [(1987), 38 D.L.R. (4th) 355], at p.361:
>
> "As a non-subsidized tenant, a person would have the benefits of the lease, if any, the Act and the common law. As a subsidized tenant a person would have the benefit of the lease and the common law."
>
> [26] There is no doubt there is a difference or inequality between the protection afforded a non-subsidized tenant and a subsidized tenant. However, not every difference or inequality gives rise to discrimination such as would necessitate the invocation of the protection afforded under the provision of s.15(1) of the Charter. As this court has stated in Reference re Family Benefits Act, supra, the burden of proof of discrimination is cast upon the challenger to establish a prima facie violation of s.15(1) of the Charter.

13. The appellant alleges that the legislation imposes a burden on her as a result of her race, sex and source of income. This ignores the context of the legislation which confers upon individuals on the waiting list for public housing, who are of an identical racial, sexual and economic status, a benefit by allowing, in appropriate circumstances, speedy access to public housing. It must be remembered that subsidized public housing is a limited resource, for which demand always outstrips supply.

14. "The government has conferred a benefit on those in need of affordable housing by virtue of subsidized rent, in order to relieve the burden of poverty to which they are subject as a result of their financial status. To protect this benefit, tenants of public housing are excluded from the provisions of s.11 of the Act relating to rental increases" (Trial decision, Appeal Book, p.28). On the other hand, ss.10(8)(d) and 25(2) treat subsidized tenants differently from non-

subsidized tenants by not affording them the protection of security of tenure and by subjecting them to potentially different notice to quit provisions. While this may pose difficulties for those exiting public housing, it provides a benefit to people on the waiting list who are disproportionately black, female, single mothers and poor. Considered as a whole, it is submitted that the operation of the *Residential Tenancies Act* and the *Public Housing Act* cannot be regarded as discriminatory.

15. The Supreme Court of Canada has shown increasing deference to social and economic choices of the Legislature. According to Madam Justice Wilson in Andrews (at D.L.R. p.34):

> If every distinction between individuals and groups gave rise to a violation of s.15, then this standard might well be too stringent for application in all cases and might deny the community at large the benefit associated with sound and desirable social and economic legislation.

16. Similarly, in Andrews (at D.L.R. p.38), La Forest, J. stated:

> Much economic and social policy-making is simply beyond the institutional competence of the Courts: their role is to protect against incursions on fundamental values, not to second guess policy decisions. (emphasis added)

17. Richard Moon discussed the concept of disparate impact in his review of Andrews entitled A Discrete and Insular Right to Equality: Comment on Andrews v. Law Society of British Columbia, (1989) Ottawa Law Review 21: 563-583:

> A law is not wrongful (it does not violate the right to equality) simply because it has a disparate impact on a particular group. Not everyone will benefit from programmes of higher education, health care or road construction, but that is not a reason to prohibit such programmes and deny their benefits to others. Disparate impact is not itself objectionable because equality does not demand a levelling of social provision to a common denominator. The right to equality simply requires that the interests of some members of the community not be completely ignored or sacrificed in the general distribution of benefits and burdens.

18. In R. v. Hess (1991), 119 N.R. 353 (S.C.C.), the court was asked to determine whether s.146(1) of the *Criminal Code* (now repealed), which made it an offence for a male person to have sexual intercourse with a female person under the age of 14 whether or not he believed she was under age 14, was contrary to s.15 of the Charter, because the section subjected only males to prosecution. In considering the correct application of s.15, Madam Justice Wilson reviewed Andrews and Turpin and concluded the following, at p.375:

> In other words, we must not assume that simply because a provision addresses a group that is defined by reference to a characteristic that is enumerated in s.15(1) of the **Charter** we are automatically faced with an infringement of s.15(1). There must be a denial of an equality right that results in discrimination.

And further, in disposing of the s.15 argument, she states at p.376:

> Nevertheless, there are certain biological realities that one cannot ignore and that may legitimately shape the definition of particular offences. In my view, the fact that the legislature has defined an offence in relation to these realities will not necessarily trigger s.15(1) of the Charter.

19. Mr. Justice McIntyre, in Andrews, had this to say with respect to an analysis under s.15(1), at p.313:

> The words "without discrimination" require more than a mere finding of distinction between the treatment of groups and individuals. Those words are a form of qualifier built into s.15 itself and limit those distinctions which are forbidden by the section to those which involve prejudice or disadvantage.

20. There are certainly no "biological realities" to consider in this case as there was in Hess, but there are socio-economic realities. In fact, the disproportionate number of black single women on social assistance is the result of the socio-economic state of the community. Public housing is a government scheme aimed at providing to people who are subject to these socio-economic realities, including black single women on social assistance, a means of alleviating some of the hardships which they face. The group who is allegedly being discriminated against makes up a disproportionate number of the people for which the benefit is provided and it is only because they are receiving this benefit that they are subject to ss.10(8)(d) and 25(2) of the Act.

21. When the provisions of the Act apply and a subsidized tenant ceases to obtain the benefit of public housing, a person on the waiting list, who is also a member of the group allegedly being discriminated against, receives a benefit. Therefore, even though the subsidized tenant who must vacate suffers a burden, the impact of the legislation does not create a burden on the group as a whole.

22. As Mr. Justice McIntyre noted in Andrews, at p.13:

> It is not every distinction or differentiation in treatment at law which will transgress the equality guarantees of s.15 of the Charter. It is, of course, obvious that legislatures may - and to govern effectively - must treat different individuals and groups in different ways. Indeed, such distinctions are one of the main preoccupations of legislatures. The classifying of individuals and groups, the making of different provisions respecting such groups, the application of different rules, regulations, requirements and qualifications to different persons is necessary for the governance of modern society.

23. In his decision at trial, the Learned Judge quoted with approval, *inter alia*, this passage from Newfoundland and Labrador Housing Corp. v. Williams et al. (1987), 62 Nfld. & P.E.I.R. 269 (Nfld. C.A.):

> It is a legitimate end for the government to establish a separate regime for subsidized tenants. They are subsidized and on that basis can legitimately have their own classification if only, for no other reason, because their rent is paid in part out of public coffers and the provisions with regard to rent increases and termination may have to vary because entitlement to subsidization may vary with respect to a tenant as time passes. (p.278)

24. Counsel for Ms. Sparks, at para.123 of his brief, argues that the Learned Trial Judge's understanding and application of the principles of adverse effect discrimination were flawed. As an aside, he argues (at paras.124-126) that the group with whom the appellant should be compared, for purposes of a discrimination analysis, is not "other public housing tenants", but tenants as a whole in the majority community in Nova Scotia.

25. However, this is contrary to the reasoning in Re Ontario Human Rights Commission et al. v. Simpsons-Sears Ltd. (1985), 23 D.L.R. (4th) 321 ("O'Malley"), the case which he says brought adverse effect discrimination into Canadian law. At D.L.R. p.332 of O'Malley, McIntyre, J. states:

> An employment rule honestly made for sound economic or 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. (emphasis added)

26. The impugned provisions here apply to tenants of public housing, all of whom are impacted equally by them. That public housing tenants may be treated in a manner which is different from private sector tenants has already been determined by this Court in Bernard. But to the extent that no greater burden is suffered by the groups here in issue than by other public housing tenants, there is no adverse effect discrimination referrable to their status as Blacks, women or single mothers. That is to say, there is no evidence that they are affected "differently from others to whom [the provisions] may apply", to borrow the words of McIntyre, J.

27. It is respectfully submitted that although subsidized tenants, including members of the groups allegedly being discriminated against, are treated differently under the Act, the distinction is not discriminatory considering the aim of public housing and the fact that the impact of the legislation does not create a burden on the groups as a whole.

28. Furthermore, as found by Palmeter CJCC, it is submitted that this court is bound by the decision in Bernard, which upheld the equivalent provision to s.25(2) of the *Residential Tenancies Act* by virtue of the principle of *stare decisis*.

SECTION 1 OF THE CHARTER

29. His Honour Chief Judge Palmeter found that the impugned sections herein do not violate s.15 of the Charter and therefore there was no necessity to consider s.1 of the Charter (Appeal Book, p.46). However, should this Honourable Court consider that ss.10(8)(d) and 25(2) infringe s.15, it is submitted that these sections are justifiable under s.1 of the Charter. Section 1 of the Charter states:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out and it is subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

30. The approach to be followed in weighing whether a law constitutes a reasonable limit to a Charter right has been stated on many occasions beginning with R. v. Oakes (1986), 26 D.L.R. (4th) 200, and more recently in McKinney v. University of Guelph (1991), 76 D.L.R. (4th) 545 (S.C.C.) and Stoffman v. Vancouver General Hospital (1991), 76 D.L.R. (4th) 700 (S.C.C.). In his judgment in McKinney, Mr. Justice La Forest summarized the approach used in Oakes, at pp.647-648:

> The onus of justifying a limitation to a Charter rests on the parties seeking to uphold the limitation. The starting point of the inquiry is an assessment of the objectives of the law to determine whether they are

> sufficiently important to warrant the limitation of the constitutional right. The challenged law is then subjected to a proportionality test in which the objective of the impugned law is balanced against the nature of the right, the extent of its infringement and the degree to which the limitation furthers other rights or policies of importance in a free and democratic society.
>
> This balancing task, as the court recently stated in United States of America v. Cotroni (1989), 48 C.C.C. (3d) 193, at pp.218-9, should not be approached in a mechanistic fashion. For, as was there said: "While the rights guaranteed by the Charter must be given priority in the equation, the underlying values must be sensitively weighed in a particular context against other values of a free and democratic society sought to be promoted by the legislature." Indeed, early in the development of the balancing test, Dickson, C.J.C. underlined that: "Both in articulating the standard of proof and in describing the criteria comprising the proportionality requirement the court has been careful to avoid rigid and inflexible standards": see R. v. Edwards Books & Art Ltd., [1986] 2 S.C.R. 713. Speaking specifically on s.15 in Andrews v. Law Society of British Columbia, at p.41, I thus ventured to articulate the considerations to be borne in mind:
>
> > The degree to which a free and democratic society such as Canada should tolerate differentiation based on personal characteristics cannot be ascertained by an easy calculus. There will rarely, if ever, be a perfect congruence between means and ends, save where legislation has discriminatory purposes. The matter must, as earlier cases have held, involve a test of proportionality. In cases of this kind, the test must be approached in a flexible manner. The analysis should be functional, focusing on the character of the classification in question, the constitutional and societal importance of the interests adversely affected, the relative importance to the individuals affected of the benefit of which they are deprived, and the importance of the state interest.

Objective

31. Thus the first hurdle to overcome in order to override a right guaranteed by the Charter is that the objective sought to be achieved by the impugned law must relate to "concerns which are pressing and substantial in a

free and democratic society" (Oakes, p.227). In Bernard, at p.198, Mr. Justice Pace discussed the purpose of the *Residential Tenancies Act* in relation to subsidized housing:

> [23] The appellant concedes that the "purpose" of s.12(2) [s.25(2)] of the *Residential Tenancies Act* is to provide the landlord in the public housing setting with the administrative flexibility to administer the scheme. Counsel for the appellant also agreed that parties to public housing tenancies are accorded a special status because of the special nature of the tenancy and, therefore, conventional rights and obligations should be treated in a way that is sensitive to that context.
>
> [24] The object of the public housing scheme is clearly designed for the relief of poverty. The purpose of the impugned legislation is to provide the landlord the administrative flexibility to administer the scheme and adopt it to the various changes in circumstances peculiar to subsidized housing. Changes in eligibility and personal and family circumstances such as income, number of occupants, and a variety of other changes may affect the rental charges as well as the duration of the tenancy.

The government, by implementing a scheme of public housing, recognizes that many members of society find themselves in situations of economic distress which make it difficult for them to find adequate shelter. Public housing is an attempt to deal with the "pressing and substantial" problem of poverty and therefore it is submitted that the "objective test" is met.

Proportionality

32. Once a sufficiently significant objective is recognized, the next step in the analysis is to show that the means chosen are "reasonable and demonstrably justified". This involves a "proportionality test" for which Chief Justice Dickson identified three components (Oakes, at p.227):

1. The measures adopted must be rationally connected to the objective.
2. The means should impair as little as possible the right or freedom in question.
3. There must be a proportionality between the effects of the measures which are responsible for limiting the right or freedom, and the objective to be achieved.

(a) *Rationality*

33. The lengthy waiting list for public housing makes it clear that this government scheme addresses a serious problem. It is submitted that the means adopted by the Legislature, that is, the exclusion of subsidized tenants and their government landlords from the operation of the Act and the acceptance of the lease, are rationally connected to the implementation of a public housing scheme which attempts to address a great demand for subsidized housing. In fact, other jurisdictions have implemented similar legislation in the administration of their public housing schemes (see *Residential Tenancies Act*, S.N. 1988, c.44; *Landlord and Tenant Act*, R.S.N.B. 1973, c.L-1; and *Residential Tenancies Act*, S.N.B. 1975, c.R-10.2).

34. As Mr. Justice Pace pointed out in Bernard, the means chosen by the government allow for greater administrative flexibility such as the ability to end the benefit quickly where there is no longer a need. Mr. Justice Goldridge in Newfoundland and Labrador Housing Corporation v. Williams et al. (1987), 62 Nfld. & P.E.I.R. 269, dealing with the similar legislation, concluded that the

means adopted by the government made a distinction that had a "regulatory and nondiscriminatory tone" and further at p.278:

> [83] It is a legitimate end for the government to establish a separate regime for subsidized tenants. They are subsidized and on that basis can legitimately have their own classification if only, for no other reason, because their rent is paid in part out of public coffers and the provisions with regard to rent increases and termination may have to vary because entitlement to subsidization may vary with respect to a tenant as time passes.
>
> [86] The period of notice is three months under the Act, one month under the lease. The legislation which brings this about is within the range of acceptable legislative conduct. This is all the more so when one considers the fact that a tenant's right to subsidization may from time to time vary or cease.

35. The ability of the Housing Authority to determine a notice to quit period potentially different from what may apply to non-subsidized tenants is reasonable in light of the demand for public housing and the need to deal with a variety of situations and changing circumstances. In addition, security of tenure for public housing residents would seriously interfere with the implementation of this scheme again in light of the demand that exists. As Richard Moon, in his case commentary of Andrews, supra, at p.581, notes:

> The legislature is not forbidden to enact laws which have a disparate impact on a discrete and insular group; it is simply forbidden to enact such laws for no reason.

And at p.582:

> It may be too much for the courts to demand that every time a law appears to contribute in some small way to

> systemic inequality, the legislature must put forward a compelling reason to support the law. Such an approach might tie the legislature's hands too much, preventing it from pursuing important goals.

(b) *Minimal Impairment*

36. The next step in the proportionality test requires the assessment of whether there has been a minimal impairment to a constitutionally protected right; in this case, the equality rights under s.15(1). The government is conferring a benefit - access to affordable housing - on members of society who would otherwise have financial difficulty obtaining adequate shelter. In conferring such a benefit, the legislature has chosen to limit the benefit by means of ss.10(8)(d) and 25(2). As Dickson, C.J.C. said in R. v. Edwards Books & Art Ltd. (1987), 35 D.L.R. (4th) 1, at p.51:

> A "reasonable limit" is one which having regard to the principles enunciated in Oakes, it was reasonable for the Legislature to impose. The courts are not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line.

37. As noted in the rationality analysis, the limitations placed on this benefit are aimed at furthering the goal of public housing - the relief of poverty. For every tenant moved out of public housing, another from the group allegedly discriminated against (blacks, single mothers, and recipients of social assistance) moves in and gains a benefit. The impairment to the group as a whole is minimal.

38. The notion of legislative freedom has been clearly recognized and supported by the Supreme Court of Canada in a number of decisions: Edwards Books & Art Ltd., supra; Irwin Toy Ltd. v. Quebec (A.G.) (1989), 58 D.L.R. (4th) 577; and McKinney, supra.

39. In Edwards Books & Art Ltd., Mr. Justice La Forest commented on the need for legislative freedom at p.67:

> Given that the objective is of pressing and substantial concern, the Legislature must be allowed adequate scope to achieve that objective. It must be remembered that the business of government is a practical one. The Constitution must be applied on a realistic basis having regard to the nature of the particular area sought to be regulated and not on an abstract theoretical plane.
>
> By the foregoing, I do not mean to suggest that this court should, as a general rule, defer to legislative judgments when those judgments trench upon rights considered fundamental in a free and democratic society. Quite the contrary, I would have thought the Charter established the opposite regime. On the other hand, having accepted the importance of the legislative objective one must in the present context recognize that if the legislative goal is to be achieved, it will inevitably be achieved to the detriment of some. Moreover, attempts to protect the rights of one group will also inevitably impose burdens on the right of other groups. There is no perfect scenario in which the rights of all can be equally protected.
>
> In seeking to achieve a goal that is demonstrably justified in a free and democratic society, therefore, a Legislature must be given reasonable room to manoeuvre to meet these conflicting pressures.

40. In Irwin Toy, the majority of the court noted that "as courts review the results of the Legislature's deliberations, particularly with respect to the

protection of vulnerable groups, they must be mindful of the Legislature's representative function." (at p.625).

41. In determining whether university mandatory retirement policies are reasonable and justifiable, Madam Justice Wilson reviewed the decisions in Edwards Books and Irwin Toy and reached the following conclusion with respect to legislative freedom (McKinney at p.615):

> It seems to me that the central message to be drawn from the foregoing cases is that, if there is to be deference [of the judiciary] toward the legislative initiative in cases where different means might impinge less severely upon a guaranteed right or freedom, the exercise of such deference is particularly apposite in those cases where something less than a straightforward denial of a right is involved. Where the legislature is forced to strike a balance between the claims of competing groups for instance, and particularly where the legislature has sought to promote the interests of the less advantaged, the court should approach the application of the minimal impairment test with a healthy measure of restraint...
>
> In such a context, the requirement of minimal impairment will be met where alternative ways of dealing with the stated objective meant to be served by the provision in question are not clearly better than the one which has been adopted by government. It is not a question of the court refusing to entertain other viable options.

42. A Legislature, responding to a social problem such as poverty, cannot be expected to solve the entire problem in "one fell swoop". It is submitted that this could not be the intended objective of the equality guarantee under the Charter. The government has chosen to address the problem of poverty by providing the benefit of subsidized housing to those in financial need. However,

because of the seriousness and breadth of this problem, the Legislature has felt the need to limit the benefit by allowing the government room to deal flexibly with the variety of considerations that arise under the public housing scheme, not the least of which is the lengthy waiting list.

(c) *Effects*

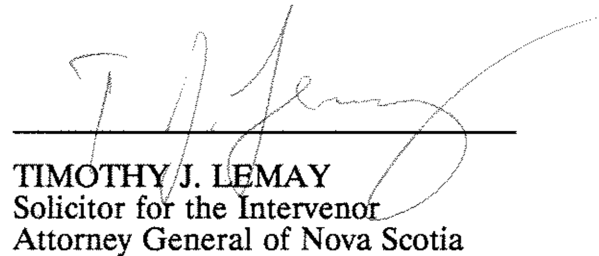
43. The final question to be addressed in the s.1 analysis is whether the effects of the measures are proportional to the objectives of the impugned legislation. It is submitted that the effects of the limitations on the public housing scheme on subsidized tenants are not so severe as to outweigh the government's pressing and substantial objective. The Legislature has instituted a public housing scheme to address the pressing problem of poverty and, in pursuit of this goal, has felt it necessary to limit the benefits under this scheme in order to more effectively implement the scheme. The government confers the benefit when needed and terminates it as soon as possible when circumstances indicate that it should be so terminated.

PART IV

REMEDY SOUGHT

44. It is respectfully submitted that the decision of the Learned Trial Judge should be affirmed and the appeal herein dismissed. However, should this Honourable Court find that s.15 of the Charter has been infringed, the Attorney General submits that the impugned provisions should be held to the justified under s.1 of the Charter, for the reasons set out above.

All of which is respectfully submitted.



TIMOTHY J. LEMAY
Solicitor for the Intervenor
Attorney General of Nova Scotia

HALIFAX, NOVA SCOTIA
November 9, 1992

LIST OF AUTHORITIES

1. Andrews v. Law Society of British Columbia (1989), 56 D.L.R. (4th) 1;
2. Reference re Workers' Compensation Act, 1983 (Nfld) (1989), 56 D.L.R. (4th) 765;
3. R. v. Turpin (1989), 48 C.C.C. (3d) 8;
4. P.A.M. v. Criminal Injuries Compensation Board (unreported, May 15, 1992)
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15. Irwin Toy Ltd. v. Quebec (A.G.) (1989), 58 D.L.R. (4th) 577