Ontario Human Rights Board File No. 92-0213/4/6

IN THE MATTER OF the Human Rights Code
R.S.O. 1990 c. H-19, as amended

BETWEEN:

DAWN KEARNEY, J.L. AND CATARINA LUIS

Complainants

-and-

BRAMALEA LTD., THE SHELTER CORPORATION and
CRECCAL INVESTMENTS LTD.

Respondents

SUBMISSIONS OF THE CHARTER COMMITTEE ON POVERTY ISSUES,
THE NATIONAL ANTI-POVERTY ORGANIZATION
AND THE ONTARIO COALITION AGAINST POVERTY

PART I: ISSUES

1. The issues in this case are:

> i) Does a refusal to rent an apartment based in whole or in part on minimum income criteria constitute direct discrimination on the basis of receipt of public assistance, age (sixteen and seventeen), family status, marital status, sex, race, place of origin and citizenship?
>
> ii) In the alternative, does a policy of refusing to rent an apartment based in whole or in part on minimum income criteria constitute adverse effect discrimination on the above cited grounds; and if so, can such qualifications be justified as reasonable and *bona fide* in the circumstances, and can the needs of the groups be accommodated without undue hardship?

PART II. FACTS

2. The anti-poverty coalition relies on the facts as outlined in the complainants' submissions. In addition, we rely on the following facts as illustrating the serious nature of the interests at stake in the present case and the ways in which problems associated with poverty, and poverty itself, are exacerbated by discriminatory barriers to market rent apartments.

a) Catarina Luis: Coping on Social Assistance in Ontario

3. Catarina Luis is a single mother who has relied on social assistance since arriving in Canada as a refugee from Angola.

Evidence of Catarina Luis, Vol. 2 at 154 and Vol. 53 at 25.

4. For Ms. Luis, as for others living in poverty, finding adequate housing for herself and her family has been difficult, and sometimes impossible. Ms. Luis was homeless for 3 months after she arrived in Canada while she searched for an apartment. During that time she and her daughter Roseline, who was two years old, lived at the Salvation Army shelter in Brampton. Ms. Luis was eventually able to rent a room for $450/month and subsequently moved to an apartment at $525. Her tenancy was terminated after a few months, however, because the house was sold, and Ms. Luis was again unable to find an apartment. She and her daughter were again homeless for several months. They stayed at the Salvation Army and at Robertson House Family Shelter in Toronto. There were nine people in one room at the Shelter, with frequent thefts and fights.

Evidence of Catarina Luis, vol. 2 at 109 - 113.

5. The structure of social assistance in Ontario is such that a recipient is entitled to a shelter allowance based on the rent paid, up to a maximum. Many recipients pay more than the maximum shelter allowance and so receive less shelter allowance than they pay in rent. Even those whose rent is covered by the shelter allowance pay large percentages of their income toward rent. For example, in 1990, a single mother on General Welfare Assistance receiving the maximum shelter allowance would be paying at least $550 per month in rent out of a total benefit of $972, or 57% of income toward rent.

Evidence of Chandra Pala, Vol. 5 at 88-89.
Chandra Pala, "Report on Ontario's Social Assistance Rate Structure," Exhibit 14 at 13-14.

6. Typically, social assistance recipients are barred from the majority of apartments which are available for rent, so they are unlikely to be able to secure the more affordable apartments which become available. A survey of large property owners and managers in 1993 found that more than half of the affordable units in the survey were owned by landlords who admitted that they did not rent to social assistance recipients. Many more had requirements which prevented social assistance recipients from renting there.

David Hulchanski, "Discrimination in Ontario's Rental Housing Market," Exhibit 26, Appendix D.

7. After being told she was disqualified by the Crossways from bachelor apartments under $600, Ms. Luis continued to search for apartments and ended up paying $630 for an inferior bachelor apartment on Sherbourne Street. Ms. Luis was then paying $80 a month more for shelter than she was receiving under the maximum shelter allowance, paying 61% of the 1990 Family Benefits Assistance entitlement for rent and 51% of the maximum income allowable under the STEP program.

Evidence of Catarina Luis, vol 2 at 140, vol 53 at 32.
Chandra Pala, "Report on Ontario's Social Assistance Rate Structure", *supra* at 5, 13, 14.

8. In October, 1995 social assistance rates in Ontario were slashed by 21.6%. Ms. Luis now has three children. Her monthly benefit of $1,574 was cut by $340 a month to $1,234 in October, 1995. The maximum shelter allowance for a parent with three children was cut to $602. Ms. Luis was paying $725 a month for a one bedroom apartment on Sherbourne

Street and her rent was to rise again to $750 in September. She was thus having to take $123 per month from her basic needs allowance to cover her rent, even though her basic needs had been cut by $174 per month to $632. After September she will have an effective basic needs allowance of $484 per month to cover food, clothing and all other necessities for herself and her three children. She is unable to feed herself and her children with this amount of money, and must regularly go to food banks.

Evidence of Catarina Luis, vol. 53 at 25-29, 30-31.
Social Services Pay Slip dated July 1996, exhibit 150.

9. Ms. Luis has been searching for more affordable apartments to no avail. She has applied for subsidized units in non-profit housing, but has been told there is a lengthy waiting list in excess of five years. The provincial government has cut funding for new social housing.

Evidence of Catarina Luis, vol. 53 at 32-35.

10. Access to any housing for social assistance recipients relies on finding landlords who do not use a minimum income requirement. Social assistance recipients will invariably fail a minimum income requirement even for low rent apartments, and even if their income is supplemented by earned income. If all landlords used a 30% minimum income criterion in 1990, the lowest income 26% of tenants would be rendered homeless. At that time, 19% of private market tenants were on social assistance. Virtually all of these households would be rendered homeless if all landlords practiced income criteria.

Michael. Ornstein, "Income and Rent," *supra* at 63-67
Lenny Abramowicz, The Landlord and Tenant Relationship in Ontario, Exhibit 43 at 6.

Chandra Pala, '"Report on Ontario's Social Assistance Rate Structure" supra Table 4.

11. The situation is significantly worse today than in 1990, the year on which Dr. Ornstein's studies are based. Between 1990 and 1994 the number of private market tenant households relying on social assistance doubled to 497,304 . Over 40% of all private market tenants relied on social assistance by 1993. Virtually all of these households would be rendered homeless by the universal application of a 30% income criteria by private sector landlords.

John Stapleton "Report on Social Assistance Programs in Ontario" Exhibit 12 at 4-7
Chandra Pala, '"Report on Ontario's Social Assistance Rate Structure" supra Table 4.
Lenny Abramowicz, "The Landlord and Tenant Relationship in Ontario, Exhibit 43 at 6.

12. The board has heard extensive evidence that by dramatically restricting the choice of apartments available to low income households, the use of income criteria by landlords forces members of disadvantaged groups to rent more expensive, inadequate accommodation just to get access to any housing at all.

Evidence of Maureen Callaghan, vol. 9 at 113.
Gerard Kennedy, "The Circumstances and Coping Strategies of People Needing Food Banks" Exhibit 59 at 32.
Ann Fitzpatrick, "Effects of Minimum Income Qualifications on Families with Children and Youth Seeking Housing," Exhibit 38 at 44.
Evidence of David Hulchanski, Vol. 12 at 106-107.

13. Ms. Luis' experience typifies the systemic pattern. In 1990, after encountering widespread use of income criteria, Ms. Luis rented a badly maintained, rodent and roach infested bachelor apartment on Sherbourne Street for $630. At that time over 90% of bachelor apartments

in Toronto CMA rented for $600 or less. The average rent for a bachelor apartment was $453. If Ms. Luis had not been excluded from the majority of apartments, she could certainly have secured a nicer bachelor apartment at significantly less rent. Yet with continual searching, including checking advertisements in newspapers, looking for, and following up on any vacancy signs, inquiring with friends, and even paying $50 to a rental agency, Ms. Luis had been unable to find a decent, bachelor apartment in the median price range.

Michael Ornstein, "Income and Rent: Equality Seeking Groups and Access to Rental Accommodation Restricted by Income Criteria," Table 7. Percentage Distribution of Rents of Privately Initiated Apartments Six Units of Size and Over, in October 1990. Evidence of Catarina Luis, vol. 2 at 117-18, vol. 53 at 23.

14. In October, 1995 Ms. Luis was renting a one bedroom apartment on Sherbourne Street for $725. An average one bedroom apartment according to the CMHC October 1995 survey, was $661. Again, Ms. Luis could save a significant amount of money if she had access to the more affordable and desirable apartments on the market.

Exhibit 148. Rental Market Report, Toronto CMA, October 1995 from CMHC

15. Ms. Luis is currently working from 10:00 a.m. in the morning until 7:00 p.m. in the evening, six days per week as an apprenticing hair stylist. She receives no pay for this work and relies entirely on social assistance. She cares for three children on her own - getting them to a baby-sitter and school, dealing with children's illnesses and all of the other responsibilities of parenting. The cuts to social assistance, combined with rental criteria which deny her access to the most affordable apartments, are threatening the viability of Ms. Luis' family and

threaten to undermine her determined attempts at securing qualifications for employment.

Evidence of Catarina Luis, vol. 53 at 30-37.

16. Even if she secures paid employment, statistics do not suggest that with Ms. Luis's intersecting equality-seeking characteristics she is likely to escape poverty or the exclusionary effect of income criteria. 59% of single parents who are non-citizens are excluded from low rent accommodation by income criteria. 61% of Black single mothers are disqualified. 60% of single mothers born in Africa are disqualified.

Michael Ornstein, "Income and Rent", Tables 13, 14, 15.

ii) The Situation of Young Families Living in Poverty: Dawn and Michael Kearney

17. At the time they applied to Bramalea, Dawn and Michael Kearney were living with Michael's parents and his sister in a three bedroom apartment. They had an eight by ten room. Dawn Kearney was seventeen years old and Michael Kearney was eighteen. Dawn was pregnant.

Evidence of Dawn Kearney, vol. 2 at 71-75 (approx), 90 .

18. Michael was earning $7.24 per hour, working 37.5 hours per week and expecting a raise to $9.24. The Kearneys were thus expecting a household income of $1,176.50 to $1,501 per month. Their entitlement as a couple with one child on Family Benefits Assistance would have been $1,195 per month. Thus, in terms of qualifying under landlords' income criteria, they were in about the same position as a family on Family Benefits

Assistance. The Kearneys are an example of the growing class of what is referred to as the "working poor", particularly common among young families.[1]

Chandra Pala, "Report on Ontario's Social Assistance Rate Structure" supra at 18, Table 6.

19. Families in Metropolitan Toronto with heads under 25 years are more than 40 per cent more likely to be poor than families as a whole. In March 1994, such households comprised more than one half of the households on social assistance in Ontario, even though they make up about 25% of all households. In the mid-70s, families in Canada headed by a person under 25 years of age had a median income of about 80% of that enjoyed by all families. Since that time, their situation has deteriorated without respite, until by 1992 they had a median income of only 54% of the median income of all families.

[1] "Other working poor" is a more appropriate term, because, as Catarina Luis amply demonstrates, the notion that social assistance recipients do not work is largely fallacious.

Child Poverty Action Group, Family Service Association of Metropolitan Toronto, and the Social Planning Council of Metro Toronto. *The Outsiders, A Report on the Prospects for Young Families in Metro Toronto*. (Toronto: Social Planning Council, 1994) at 7 - 8, quoted in Ann Fitzpatrick, "Effects of Minimum Income Qualifications on Families with Children and Youth Seeking Housing," Exhibit 38 at 17

20. Young families have been hit particularly hard by the recession. The unemployment rate among 20 - 24 year old people increased from 5% in 1989 to 17% in Toronto in 1993. In Toronto, only one in five young family heads was employed continuously in the same job throughout the two year period 1988-89. Furthermore, 34% of young families experienced a major change in employment over the two year period and nearly 44% of younger family heads who changed jobs experienced a fall in wages.

***The Outsiders, A Report on the Prospects for Young Families in Metro Toronto*, *supra* at 10 - 12, cited in Ann Fitzpatrick, "Effects of Minimum Income Qualifications on Families with Children and Youth Seeking Housing," Exhibit 38 at 17.**

21. Dawn and Michael Kearney thus typify the situation facing many young families living in poverty. To qualify under a 25% rent to income ratio, the Kearneys would have to find an apartment renting for $294 per month. Less than 10% of two bedroom (4 room) apartments which came available in 1990 in the Toronto CMA were under $491. It would be impossible to find a non-subsidized apartment $200 cheaper than that. If all landlords adopted Bramalea's income criteria, young families such as the Kearneys would be rendered homeless.

Michael Ornstein, "Income and Rent: Equality Seeking Groups and Access to Rental Accommodation Restricted by Income Criteria," Table 9.

22. Unable to find appropriate accommodation, the Kearneys joined a growing class of the "hidden homeless" -those who are doubled up with family or friends because they cannot find a home. The first year of the Kearney's life with their new daughter Rebecca was spent living in an eight by ten room and sharing an apartment with three other adults in a tense atmosphere. Dawn Kearney's self-esteem as a mother was damaged by conflict with Michael's mother over parenting. Predictably, there were frequent arguments and many sources of tension because of the over-crowding. These are the types of stresses which can very often break up families in the early formative years.

Evidence of Dawn Kearney, vol. 2 at 81-82, 92-93.
Ann Fitzpatrick, "Effects of Minimum Income Qualifications on Families with Children and Youth Seeking Housing," Exhibit 38 at 22, 48.

iii) J.L.and MARTA READY: Young People Living in Poverty

23. J.L. was sixteen when she applied for an apartment at Shelter Corporation. Her friend Marta Ready, with whom she applied to share a two bedroom apartment, was eighteen.

24. There is no evidence as to why J.L. had left her parental home at sixteen. Marta Ready had left her parental home because her mother had agreed to rent to a male boarder who had sexually abused Ms. Ready in the past. Her mother would not accept the truth of Ms. Ready's disclosure of the abuse. Nancy Webb, Director of Touchstone Youth Shelter, testified that a survey of homeless youth at Touchstone showed that 85% had experienced physical or sexual abuse. A similar survey by Covenant House found 86% of homeless youth reported physical abuse at home. Ms.

Webb has found that in general, something has gone really wrong in the family home for the youth to end up leaving home with nowhere to go.

Evidence of Nancy Webb, Vol. 11 at 23-24.
Exhibit 37.
Evidence of Marta Dickinson, vol. 3 at 56, 99.

25. J.L. estimated her income at $10,000 per year. She was attending school full time and earning an income as a piano teacher. Marta Ready estimated her income at $16,000 on her application, but it subsequently turned out to be $19,860.

Evidence of Marta Dickinson, vol. 3, at 56, 99.

26. J.L. and Ms. Ready were actually better off than most unattached women their age. 69% of unattached women under twenty had incomes below $10,000 in 1990. Only 8% had incomes of $20,000 or more. As Dr. Ornstein noted: "It is no exaggeration to describe the position of young, unattached persons in terms of absolute poverty, rather than deprivation relative to the overall population."

Michael Ornstein, "Income and Rent: Equality Seeking Groups and Access to Rental Accommodation Restricted by Income Criteria," at 20.

27. 92% of women under twenty are disqualified by a 30% rent-to-income requirement from low rent one bedroom apartments at $607 per month. Where two applicants proposed to share accommodation, Shelter Corporation required each to satisfy the minimum income requirements on her own, thus requiring an income of $32,000 from each applicant. Virutally no women under 20 have an income over $30,000. Shelter's policies excluded 98% of such women.

Evidence of Marta Dickinson, vol.3 at 75-76.
Michael Ornstein, "Income and Rent: Equality Seeking Groups and Access to Rental Accommodation Restricted by Income Criteria," Tables 2, 9.

28. After being refused accommodation by Shelter, Ms. Ready continued to live at her mother's house, despite the presence of the male boarder. There is no evidence as to what happened to J.L.

PART III LAW AND ARGUMENT

A. PRINCIPLES OF INTERPRETATION

29. There are three important principles of interpretation of human rights legislation which the anti-poverty coalition submits ought to be of primary consideration in this case. These are:

i) A contextual and purposive interpretation consistent with the nature of human rights legislation and the broad policy considerations underlying the provisions;

ii) Interpretation consistent with the *Canadian Charter of Rights and Freedoms* ("the Charter"), in particular section 7, guaranteeing the right to security of the person and section 15, guaranteeing the equal benefit and protection of the law; and

iii) Interpretation consistent with international human rights instruments ratified by Canada and with the values and principles of universally recognized human rights;

i) Contextual and Purposive Interpretation to Advance the Broad Policy Considerations Behind the Protections in the Code.

30. Human rights legislation is of a special nature and is of quasi-constitutional status. Chief Justice Lamer of the Supreme Court of Canada recently reviewed the key elements of a purposive approach:

> Following Heerspink, this Court has had many occasions to comment on the privileged status of human rights legislation. In *Ontario Human Rights Commission v. Simpsons-Sears Ltd., supra*, McIntyre J. observed (at p.547) that "[l]egislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary - and it is for the courts to seek out its purpose and give it effect." This Court has repeatedly stressed that a broad, liberal and purposive approach is appropriate to human rights legislation, according to La Forest J. in *Robichaud*, at p. 89, "must be so interpreted as to advance the broad policy considerations underlying it."
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> ***Re: University of British Columbia* v. *Berg* (1993), 102 D.L.R. (4th) 665, at 677-678 (S.C.C.).**

31. This broad and purposive approach is required because of the nature of the groups protected by human rights legislation and the interests at stake. Human rights legislation is the final refuge of the disadvantaged and disenfranchised. For this reason, exceptions must be interpreted narrowly.

> In approaching the interpretation of a human rights statute, certain special principles must be respected. Human rights legislation is amongst the most pre-eminent category of legislation. ... One of the reasons it has been so described is that it is often the final refuge of the disadvantaged and the disenfranchised. As the last protection of the most vulnerable members of society, exceptions to such legislation should be narrowly construed: *Brossard (Ville) v. Quebec (Commission des Droits de la Personne)* (1988), 53 D.L.R. (4th) 609 at pp. 627-8, [1988] 2 S.C.R. 279, 10 C.H.R.R. D/5515; see also *Bhinder v. Canadian*

National Railway Co. (1985), 23 D.L.R. (4th) 481 at pp. 484-5 and 500, [1985] 2 S.C.R. 561, 9 C.C.E.L. 135.

Zurich Insurance Co. v. Ontario (Human Rights Commission) (1992), 93 D.L.R. (4th) 346 (S.C.C.) at 374.

32. The legislative record reveals that the primary policy considerations leading to the protections from discrimination in housing for social assistance recipients, families, sixteen and seventeen year olds and other groups was the exclusion from appropriate rental housing of the most vulnerable members of society, most of whom live in poverty.

33. "Receipt of public assistance" was added as a prohibited ground of discrimination in 1981. The Ressearch Officer of the Standing Committee on Resource Development prepared a memorandum for the Committee when this amendment was being considered. The memorandum stated that private sector landlords were reluctant to rent to social assistance recipients for "a number of reasons." The reason for including this ground in housing when it is not included in other areas, the memo suggests, is the severe housing crisis faced by social assistance recipients. Thus, the underlying policy consideration was the problem of access to housing for a group define by its economic status. The legislature recognized that housing is a basic necessity, that landlords are reluctant to rent to people on social assistance for a number of reasons, and that social assistance recipients therefore needed the protection of the Human Rights Code to ensure that they had access to appropriate housing.

M. Madisso, Research Officer of the Standing Committee on Resource Development, Possible Ambiguities in Bill 7, Exhibit 174 of the legislative record, August 1981 at 2-3, Complainants' Book of Authorities, Vol. IV., Tab 8.

34. Five years later, on introducing the amendment to protect families with children from discrimination in apartments because of family status, Ruth Grier, MPP referred to the high percentage of income which many families pay for rent and the importance of access to housing for low income women as a reason for providing protection to this group.

> The majority of low-income women with children spend over half of their income on rent. Several who appeared before the Justice Committee are spending 75% of their income on rent. Housing is quite clearly the most important area of equality rights for low income women.
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> **Motion before the Standing Committee on the Administration of Justice to Amend Bill 7 by repealing s.20(4) of the Human Rights Code, S.O. 1981 c.53. Proposed by Ruth Grier, MPP. Complainants' Book of Authorities, Vol. IV at 25.**

35. Terry O'Connor, the Conservative Justice Critic, in desribing the reason for supporting the amendment, stated that the issue being addressed was access to housing for lower-income members of equality seeking groups for whom rental accommodation was the only option. Adult only apartments were:

> severely restricting the amount of accommodation that was available, particularly to lower-income families, single-parent families and younger families, whose only option is apartment living, who have not accumulated sufficient capital to own their own premises.
> **Legislature of Ontario Debates, 2nd Sess., 33rd Parliament,, December 9, 1986, at 4065. Complainants' Book of Authorities, Vol. IV at Tab 24.**

36. In the debate in the Legislature on deleting section 20(4) to prohibit adult only apartments, Ms. Grier again emphasized the intent

to protect low income members of equality seeking groups, many of whom have multiple equality-seeking characteristics.

> It is worth pointing out that the disproportionate number of people affected by the ability to discriminate against children in the rental business are women. Most are poor women. The vast majority are sole support parents. Eleven per cent of all families in this province are single-parent families, and one child in 10 is in a single-parent family.
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> **Legislature of Ontario Debates, 2nd Sess., 33rd Parliament, December 9, 1986, *supra* at 4067.**

37. The respondents ask the board to ignore these statements of legislative intent with respect to the provisions of section 2, applying to housing. Quoting from the Attorney General speaking in the legislature about the amendment to the Code dealing with discrimination in **sports**, they argue that the Code is restricted to formal "equality of opportunity", according to the "liberal paradigm embedded in Canadian society". The respondents extend the sports analogy, defining the exclusive object of human rights legislation as preserving the rules of "fair play" in a competition in which "the spoils belong to the victors". On the basis of this model, they submit that any difference in treatment because of economic status must be ruled to be outside of the ambit of the Code because this is a "merit-based" barrier rather than an "arbitrary" barrier. The respondents characterize the complainants' demands as being "redistributional", asking for "fair share" rather than "fair play" and demanding that the board impose "on a small subset of the population the bulk of the costs of the redistributive social policies."

Respondents' Submissions, paras. 59-65 and f.n. 47.

38. This is a case in which the three complainants have asked for an equal opportunity to pay a certified cheque for first and last month's rent and an equal opportunity to pay rent in advance each month for a place to live. It is a measure of how pervasive are the prejudices and hostility to poor people that the idea that landlords could be required to give equal treatment to the poor by accepting their cash is seen as such a fundamental threat to "the liberal paradigm" and the free market.

39. However, the present intervenors have no difficulty in admitting that our goal, and, in our subission, that of most equality seekers, is "redistributional". The evidence in this case does not support the respondents' proposition that renting to poor people would mean even a marginal increase in the cost of default for landlords, but the case still has important redistributional consequences. Being denied access to the most affordable apartments cost Catarina Luis a minimum of $100 per month. Because of income criteria, disadvantaged households are forced to rent over-priced and undesirable apartments. If income criteria were ruled illegal by this board, and if landlords respected the decision, there would be an important change in the distribution of affordable apartments. No longer would the most affordable, rent controlled apartments be typically occupied by the higher income, childless couples. They would be occupied by those who searched hardest and who were the first to apply - perhaps the single mother who is most in need of something affordable, like Catarina Luis. All of this is to say that systemic discrimination in markets has very serious economic consequences for equality seeking groups, which equality seeking groups seek to remedy through human rights claims.

40. The respondents ask the board to assume that poverty is linked exclusively with "lack of merit" and is therefore outside the ambit of

human rights. According to this logic, the correlation between membership in equality seeking groups and the experience of poverty would suggest that single mothers, people with disabilities, women, people who must rely on social assistance and others are lacking in "merit". The respondents' concept of "merit" is discriminatory in its both its assumptions and its consequences. It conceals the fact that poverty is more of a measure of social and historical disadvantage than a measure of "merit".

Respondents' submissions, para. 62.

41. It is impossible to sustain the kind of distinction proposed by the respondents between "equality of opportunity" and "equality of result". The basic premise of the "equality of opportunity" model - a competition in which all the players are equal - is simply too fantastic, given the complex world of entrenched inequalities in which we live. If the premise were true, the correlation between poverty and membership in equality seeking groups so amply demonstrated in evidence in this case, would not be the case. Similarly, it would not have been the case in *Griggs v. Duke Power* that blacks would be less likely to have highschool diplomas. In *Weatherall* it would not have been the case that "the historical trend of violence perpetrated by men against women" means that women prisoners subjected to searches by male guards is different from male prisoners subjected to searches by women guards. In *Action Travail des Femmes*, it would not have been the case that social and economic disparities in the workforce meant that the effect of CN's hiring policies was to exclude women. If human rights tribunals were to rule out every discrimination claim based on characteristics emanating from the social and historical disparities of the real world they would make themselves largely redundant.

Griggs v. Duke Power Co. (1971), 401 U.S. 424 (U.S.S.C.)
Weatherall v. Canada (Attorney-General) 105 D.L.R.(4th) 210 (SCC) at 213.
Action Travail des Femmes v. Canadian National (1984), 5 C.H.R.R. D/2327 (Can. Hum. Rts. Trib.)

42. The courts have affirmed on a number of occasions that equality protections in both the Charter and in human rights legislation are protections of "substantive" as well as "formal" equality. The respondents argue that because equity or affirmative action programs are not mandated on a wide scale by the Human Rights Code, they are "fundamentally different from the Code's merit protection objective." This position is completely contrary to that of the Ontario Court of Appeal in *Roberts*, which established that while the two aspects of equality - formal and substantive equality - can be distinguished from each other, they are both, equally, part of the overall aim of the Code.

> In relation to daily living, affirmative action programs are aimed at assisting those with a disadvantage to attain the same level of enjoyment of life as those who do not have the disadvantage. The purpose of s.14(1) is not simply to exempt or protect affirmative action programs from challenge. It is also an interpretive aid that clarifies the full meaning of equal rights by promoting substantive equality.
>
> Both formal equality and substantive equality conform to the overall aim of the Code.

***Roberts v. Ontario* 117 D.L.R.(4th) 297 (O.C.A.) at 332.**
Respondents' Submissions, para. 47.

43. We are unaware of any case which addresses an exclusionary policy which so accurately targets the vulnerable and disadvantaged groups for whom the Human Rights Code is the final refuge. Poverty is perhaps the most accurate indicator of the very disadvantaged status that led the

legislature to include particular groups in the Human Rights Code. The respondents' approach reverses the objects of the Code by rendering its protections meaningless for those who need them most. As Madam Justice Wilson has said regarding section 15 of the Charter, equality guarantees are "designed to protect those groups who suffer social, political and legal disadvantage in our society." As such, the analysis of discrimination should not become a mechanical and sterile categorization process but should proceed within the broader context of the entire social, political and legal fabric of society. That social context must include a recognition of the poverty in which single mothers, social assistance recipients, young families and unattached women live.

R. v. Turpin [1989] 1 S.C.R. 1296, at 1331-33

ii) Interpretation consistent with the Charter of Rights and Freedoms,

44. Section 7 of the Charter provides that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Judicial interpretation of the rights to life, liberty and security of the person should be "generous" and reflective of the values embodied in the Charter. Section 7 should also be interpreted in light of the right to equality so that infringements of the rights of vulnerable groups will be subject to the strictest judicial scrutiny.

R. v. O'Connor 130 D.L.R.(4th) 235 (S.C.C.).
Andrews v. Law Society of British Columbia (1989) D.L.R. (4th) 1 (S.C.C.) at 26.

45. Access to housing engages fundamental security of the person interests, both in general and on the particular facts in this case.

Homelessness, doubling up or living in inappropriate accommodation has serious health implications, both physical and psychological. The health of Ms. Luis's children was at risk because of homelessness. Further, homelessness poses a serious risk to the viability of families. Youth such as Marta Ready or J.L. may be forced to return to situations of abuse within the family home if they are barred from access to private sector housing. Overcrowding such as experienced by the Kearneys is a breeding ground for familial violence and psychological stress.

Ann Fitzpatrick, "Effects of Minimum Income Qualifications on Families with Children and Youth Seeking Housing," supra, at 50 - 60.

46. Section 7 should be read to "guarantee to every individual a degree of personal autonomy over important decisions intimately affecting their private lives." Choice of appropriate housing and the decision as to where to live is such a decision. Further, section 7 may include rights such as the right to adequate food, clothing and housing contained in international covenants.

R. v. O'Connor 130 D.L.R.(4th) 235 (S.C.C.).
***Irwin Toy v. Quebec* (1989) 58 D.L.R. (4th) 577 (S.C.C.) at 632-33.**

47. The Charter provides an over-riding framework of values for all statutory interpretation. Where there is any ambiguity as to the meaning or application of legislation, the interpretation which promotes Charter values is to be preferred. In considering the rights at issue for low-income members of equality seeking groups in this case, it is appropriate for the board to consider that the interests at stake are constitutionally protected and to adopt an interpretation favourable to the protection of security of the person.

Slaight Communications Inc. v. Davidson, (1989) 59 D.L.R. (4th) 416 at 421, 444.
R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606 at p. 660.

48. Section 15 of the the Charter provides that "every individual is equal before and under the law and has the right to the equal protection and benefit of the law without discrimination, and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

49. Poverty has been accepted by a number of courts as an analogous ground of discrimination prohibited by s. 15 of the Charter. These courts have relied on evidence of stereotypes and prejudices against poor people and social assistance recipients such as have been demonstrated in the present case. Indeed, the evidence of John Stapleton in this case outlining prevalent myths about social assistance recipients and poor people was adopted in the dissenting judgment (not on this point) in *Falkiner* as a basis for finding poverty and receipt of public assistance to be analogous grounds of discrimination under s.15 of the Charter.

Dartmouth/Halifax County Regional Housing Authority v. Sparks (1993), 101 D.L.R. (4th) 224 (N.S.C.A.)
R. v. Rehberg (1994) 111 D.L.R. (4th) 336 (N.S.C.A.)
Federated Anti-Poverty Groups v. British Columbia, (1992) 70 B.C.L.R. (2d) 325, 344. (S.C.)
Falkiner v. Ontario (unreported, Ont. Div. Ct.) 810/95, October 29, 1996 (per Rosenburg, in dissent, but not on this point) at 49-64.

50. As a group protected under the Charter, poor people are entitled to the equal benefit of human rights legislation. Where there is any ambiguity in a statute, interpretation consistent with the Charter is to be preferred.

51. The respondents ask the board to find that a landlord is entitled to consider a variety of factors in reviewing applications for tenancy, and to reject low income applicants on the basis of income criteria. The effect of such a finding would be that landlords could rarely be challenged for refusing to rent to low income equality seekers on any of the prohibited grounds of the Code. It would render the protections in the *Code* virtually meaningless for anyone of low income.

52. The board has reviewed a number of application forms for tenancy used by landlords. They ask a limited amount of information - income, employment, bank account, family status, marital status, previous landlords and credit information. On the basis of such an application, a landlord would be unable to refuse to rent to a higher income family with children with good references and good credit without creating an inference of discrimination because of family status. On the other hand, if income discrimination is permitted, the landlord would be entitled to refuse to rent to a low income family with good credit and good references soley on the basis of its low income status. Even if the real motivation is to avoid renting to a family with children, a knowledgeable landlord is unlikely to provide an illegal reason for refusal when income criteria, should they be found to be legal, provide a legal basis for refusal for anyone who is lower income.

David Hulchanski, "Discrimination in Ontario's Rental Housing Market," supra at 61-62.

53. The prohibited ground "receipt of public assistance", of course, defines a group which is entirely low income. The prohibition of discrimination on this ground would become entirely meaningless if income criteria were permitted. It would be rare indeed to find a landlord refusing to rent to welfare recipients who would not be able to state

that the reason for excluding them is that their income is too low. Thus, the effect of a ruling in favour of the respondents would be to render inoperative fundamental human rights protections for social assistance recipients on the basis that the members of this protected group are poor.

54. This case is widely known among landlords. Whatever this board rules is "permissable" will become the new "rule" for the wording of refusals to rent to equality seekers. If, as the respondents suggest, the use of income criteria "in conjunction with other factors" should be determined by this board to be permitted, social assistance recipients and other disadvantage households will be told that they are being refused because of their income "in conjunction with other factors". The vague distinctions relied on by the respondents all amount to the same thing. Either landlords are permitted to refuse to rent to disadvantaged groups because of their low income or they are not. If they are, then the protections in the Code are rendered ineffective for low income people.

55. Thus, for low income people, what is at stake in the present case is the equal benefit of the protections of the Human Rights Code in housing. As counsel for the complainants said in the opening statement:

> Equality-seeking groups have intervened in this case to defend the human rights protections we thought or think they already have. If landlords are permitted to disqualify social assistance recipients, refugee claimants, single mothers, young people and other disadvantaged groups, simply because the members of these groups have lower incomes, then the protections in the Code for these groups are rendered meaningless.
>
> If, for example, a landlord is permitted to reject the application of every social assistance recipient and every 16 and 17 year old who does not make over $30,000 per year, then the Code protects virtually no members of these groups from being refused an apartment. To permit such a policy would make

> a mockery of the human rights protections on which these groups rely for access to shelter.
>
> **Complainants' Opening Statement, Vol. 2 at 19.**

56. The board has heard disturbing evidence that human rights protections applying to poor people are not adequately enforced. Despite the fact that receipt of public assistance has been included in the Code since 1981, there have been only a handful of cases reaching tribunals. In 1986, when the legislature reviewed issues of discrimination in housing, MPP's were were "absolutely flabergasted" at the "total pattern" of landlords' refusing to rent to social assistance recipients in blatant violation of the Code. Yet at that time, not a single case had proceeded to a board of inquiry - five years after the amendments to the Code. The Attorney General was asked in the legislature to ensure that the Ontario Human Rights Commission improved enforcement and showed more "sensitivity" to the problems of low income families. The same year the Canadian Human Rights Advocate identified bias against welfare recipients within human rights commissions as a systemic problem.

> **E. Gigantes, Debates, Ontario Legislative Assembly, 4 March 1986 J-5 quoted in David Hulchanski, "Discrimination in Ontario's Rental Housing Market: The Role of Minimum Income Criteria", Exhibit 26 at 43.**
> **Legislature of Ontario Debates, 2nd Sess., 33rd Parliament, December 9, 1986, *supra*, at 4068.**
> **"A Special Advocate Report: Bias Against People on Welfare - Commissions' Record Uneven, Survey Reveals" (October 1986) Canadian Human Rights Advocate 7.**

57. In 1987 the first case of discrimination against a person on welfare was heard by a board. In awarding damages, however, the board reiterated the prevailing notion that this ground of discrimination is not as serious as other prohibited grounds of discrimination.

> I have found no reported case involving refusal of accommodation on the ground of receipt of public assistance. That ground has been just as explicitly made a prohibited ground of discrimination as any of the others listed in section 2(1) of the *Code.* However, the fact of being in receipt of public assistance does not go to the core of a person's being in the same way as race, creed, sex, age or most of the other attributes which are prohibited grounds. Caution is called for in assessing a claim that discrimination on the basis of receipt of public assistance has caused deep or continuing mental anguish.
>
> **Willis v. David Anthony Phillips Properties, 8 C.H.R.R. D/3847 at D/3855.**

58. In 1988 the Social Assistance Review Committee heard extensive evidence of widespread discrimination in housing against social assistance recipients and recommended better enforcement of the provisions of the *Human Rights Code* to protect low income families. However, there is no evidence of anything being done to address the problem. A survey of corporate owers and managers by Professor Hulchanski in June of 1992 found that 56% of affordable apartments in the survey were operated by property managers or landlords who refused to rent to social assistance recipients. A 1992 study of refugee housing by the City of Toronto Housing Department and the Multicultural Access Program found widespread discrimination against refugees, welfare recipients and single mothers. One of the respondents' own witnesses in this case testified that he will not rent to social assistance recipients unless they provide a co-signor who is not on social assistance.

> **David Hulchanski, Discrimination in Ontario's Rental Housing Market: The Role of Minimum Income Criteria, Exhibit 26 at 44-45.**
> **Evidence of Nyaz Jethwani, vol. 53 at 107.**

59. All of this suggests, in our submission, that social assistance recipients have been denied the equal protections of the *Human Rights Code*, in large part because the group is defined by its poverty.

The respondents attempt to exploit the prevailing tolerance for this prohibited form of discrimination when they rely on evidence such as a study done by landlords in Quebec purporting to show that welfare recipients are inferior tenants and cost landlords, on average, $660 per year. The study was cited by Professor Hulchanski as an example of prevailing prejudices against social assistance recipients. 72% of those surveyed said they would not rent to social assistance recipients if it were not for high vacancy rates. The study recommended forcing welfare recipients to work and transferring their housing allowances directly into the hands of landlords.

David Hulchanski, "Discrimination in Ontario's Rental Market: the Role of Minimum Income Criteria", Exhibit 26 at 45-46.
Respondents' Submissions, para. 123.

60. The respondents would not, we submit, consider citing, before a human rights tribunal, a study by a racist organization purporting to show that Blacks are inferior tenants to try to justify a policy which excludes Black applicants. They rely on an implicit differentiation between a protected group that is defined by its poverty and other groups protected in the same unqualified manner.

61. The myths and stereotypes outlined in the evidence of John Stapleton and Gerard Kennedy include notions that social assistance recipients are lazy, transient, have too many children or are often trying to cheat the system. These myths are thoroughly degrading and humiliating, and have severe social consequences.

Evidence of John Stapleton, vol. 4 at 35-50

John Stapleton, "Report on Social Assistance Programs in Ontario:, Exhibity 12 at 8.
Evidence of Gerard Kennedy, Vol. 24 at 3-6.

62. There is growing evidence that discriminatory attitudes toward people on social assistance are on the increase and are reaching the extremes of the most invidious discrimination. The tolerance for imposing forced labour on welfare recipients, once a minority extreme, has grown in public favour. The idea that people on welfare do not have the right to procreate is disseminated in the *Canadian Lawyer*. A similar view was expressed by a constable in Nova Scotia on the basis that people on welfare constitute a "limited genetic pool." As a number of recent academic commentators have noted, the judicial process is not immune from the prevailing discriminatory attitudes toward social assistance recipients and low income members of other equality seeking groups. The prevalence of discrimination against a particular group, however, ought not to encourage judicial tolerance of it. On the contrary, it is in climates such as the present one that social assistance recipients most rely on an adjudicative process that is untainted by the prejudices from which the Code is meant to protect them.

K. Selick, "If the Poor Don't Care, Why Should We?" (September 1990) 14:6 Canadian Lawyer 60.
People on Welfare for Equal Rights (POWER) v. Constable Michael Spurr, Nova Scotia Police Review Board, October 15, 1991.
Evidence of Gerard Kennedy, Vol. 24 at 5.
Hélène Tessier, "Lutte conte la pauvreté: question de droits de la personne et mesure de prévention contre une violence systémique à l'égard des enfants", (1996) 37 *Les Cahiers de Droit* 475 at 501-502.
Martha Jackman, "Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination Under the Canadian Charter and Human Rights Law", Review of Constitutional Studies, Vol. II, No. 1, 76 at 93.

63. The anti-poverty coalition urges the board to disavow any notion that discrimination against social assistance recipients is any less serious or damaging than other forms of discrimination and to apply the provisions of the Code in a manner which respects the rights of people living in poverty to the equal benefit of human rights protections.

iii) Interpretation Consistent with International Human Rights Law Binding on Canada

64. The right to adequate housing is recognized in the *Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights* and in other international human rights treaties which have been ratified by Canada. The right to adequate housing is most clearly defined in the Comments of the Committee on Economic, Social and Cultural Rights which monitors States parties' compliance with the *Covenant*.

Report of Scott Leckie, Exhibit 42 at 14-17.

65. Under the *Covenant*, States parties have an obligation to provide for judicial review of allegations of discrimination in housing. Discrimination because of economic status is prohibited under article 2(2) of the Covenant and ratifying parties are therefore obliged to provide domestic remedies to such discrimination.

Committee on Economic, Social and Cultural Rights, *General Comment No. 4*, (1991) UN doc E/1992/23, paras 6-7.

66. While the provisions of the *Covenant* may not themselves be directly enforceable in Canadian courts, their guarantees have been given effect

in Canadian law and are therefore relevant and persuasive sources for the interpretation of Canadian law, particularly in the area of human rights.

Report of Scott Leckie, at 11.

67. Referring to the *Covenant*, the Supreme Court of Canada has adopted the over-riding interpretive principle that domestic law, in this case the *Charter of Rights*, must be assumed to be consistent with the provisions of treaties which Canada has ratified. In interpreting the Charter consistently with the recognition of the right to work in the *Covenant*, Chief Justice Dickson referred to his earlier statement in *Reference Re: Public Service Relations Act (Alta)*:

> The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of the "full benefit of the Charter's protection." I believe that the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.
>
> *Slaight Communications Inc.* v. *Davidson*, (1989) 59 D.L.R. (4th) 416 (S.C.C.) at 427.

68. Attention to international human rights law in interpreting human rights and Charter protections in Canada is required, not simply to avoid placing Canada in breach of its treaty obligations, but to ensure conformity with the basic values underlying human rights.

> It is clear, however, that the Canadian courts do not take cognisance of international standards merely on the basis of the presumption that Parliament intended to legislate in conformity with its international obligations. If that were the case, it would be difficult to explain why the Supreme Court has deemed it appropriate to refer to the ECHR [European

> Convention on Human Rights] which Canada has not, and can not, ratify. Rather, it appears that reference is made to international human rights standards in general because, in the words of Dickson C.J., they "reflect the values and principles of a free and democratic society, and thus those values and principles that underlie the Charter itself."
>
> Matthew C.R. Craven, "The Domestic Application of the International Covenant on Economic, Social and Cultural Rights" (1993) *Netherlands International Law Review* 367 at 390; quoted in Report of Scott Leckie, *supra*, at 12.

69. In its review of Canada in 1993 the Committee requested information on discrimination in housing on the basis of low income, receipt of public assistance and several other grounds.

> Report of Scott Leckie, *supra*, at 22.

70. In the Committee's official "concluding observations" the Committee noted that human rights legislation had been improved to provide better protection of certain social and economic rights:

> **93. The Committee notes with satisfaction the general strengthening of the protection of human rights in Canada through the Canadian Charter of Rights and Freedoms and through improvements of other human rights legislation. ... It notes with satisfaction that Canadian courts have applied these provisions to cover certain economic and social rights, and that the Supreme Court of Canada has, on occasion, turned to the International Covenant on Economic, Social and Cultural Rights for guidance as to the meaning of the provisions of the Charter.**[2]

However, the Committee noted a number of concerns with respect to the interpretation of human rights legislation and addressed, in particular, the issue of minimum income criteria in rental housing.

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[2] *Ibid*, para. 93

107. The Committee has learned from non-governmental organizations of widespread discrimination in housing against people with children, people on social assistance, people with low incomes and people who are indebted. Although prohibited by law in many of Canada's provinces, these forms of discrimination are apparently common. A more concerted effort to eliminate such practices would therefore seem to be in order.

110. The Committee is concerned that in some court decisions and in recent constitutional discussions, social and economic rights have been described as mere "policy objectives" of governments rather than as fundamental human rights.

113. The Committee is concerned that provincial human rights legislation has not always been applied in a manner which would provide improved remedies against violations of social and economic rights, particularly concerning the rights of families with children, and the right to an adequate standard of living, including food and housing.

119. The Committee encourages the Canadian courts to continue to adopt a broad and purposive approach to the interpretation of the Charter of Rights and Freedoms and of human rights legislation so as to provide appropriate remedies against violations of social and economic rights in Canada.

UN doc. E/C12/1993/19.

71. The interpretative principle affirmed by the Supreme Court of Canada, as well as the Preamble to the Code, recognize that the Charter and human rights legislation should not proceed in isolation from the international human rights movement. It is an important corrective to potential domestic human rights abuses that domestic courts and tribunals consider the views of international bodies and test Canadian attitudes against the views of international authorities. Where an international body with authority to monitor violations of fundamental human rights identifies a violation in a particular country, it is, in our submission, incumbant on domestic tribunals there to take proper notice of this.

72. It is relatively rare in Canada for a specific issue under domestic adjudication to have been the subject of critical commentary by an authoritative body monitoring Canadian compliance with international law. Such situations are more common in countries better known for violating human rights. Evidence in this case substantiates the general information provided to the U.N. Committee about the widespread discrimination against social assistance recipients and low income households. It is submitted that while the Committee's statement of concern or recommendations of a particular interpretive approach to the Code are not binding on the tribunal, it would be inappropriate for a domestic tribunal to ignore the comments of an international human rights body regarding an alleged human rights violation that is before it.

D. Direct Discrimination and the Code's So-Called "Causal Requirements"

73. The anti-poverty coalition adopts the complainants' submissions with respect to direct discrimination. In addition, we wish to address the respondents' argument that the legislature's failure to include "poverty" or "social condition" as a prohibited ground indicates an intention to continue to "permit differentiation based on economic status."

74. Refusing to rent to anyone on social assistance because of the "economic status" or "low income" of members of the group is direct discrimination. Crossways' rental agent admitted that the income criteria in place at the time Ms. Luis applied excluded all social assistance recipients. This admission can simply be restated as: "We

did not rent to social assistance recipients **because** their income was considered too low". In other words, the respondent's "rule" simply provided a reason for excluding a protected group.

Evidence of Mary Gravelle, vol. 25 at 55.

75. The *Code*, however, does not allow a respondent to justify direct discrimination by providing a reason -whether it is framed as a "rule" or not. After significant pressure to include a "bfoq" defence to direct discrimination against social assistance recipients, the legislature opted to include the ground with no defences or reasons permitted. The Supreme Court of Canada has made it clear that in instances where the legislature has declined to provide a statutory "bfoq" defence, a tribunal should not reinterpret the legislative scheme in order to provide one.

***Re: University of British Columbia* v. *Berg* (1993), 102 D.L.R. (4th) 665, at 694.**

76. It is not reasonable, particularly in light of the legislative history, to ask the board to interpret the ground "receipt of public assistance" as being devoid of any reference to economic status and restricting the application of the Code to cases of invidious discrimination based on "source of income".

Respondents Submissions, paras 26-27,

77. The legislative commmittee considering the addition of "receipt of public assistance" to the Code in 1981 heard evidence from the Parkdale Tenants' Associations about the desperate need for access to appropriate housing among social assistance recipients. There was no evidence from the deputants supporting the amendment that the primary reason for

refusing to rent to social assistance recipients was their source of income.

A brief Presented by the Parkdale Tenants' Association on Bill 7, Exhibit 92 of the legislative record, at 1. Complainants' Book of Authorities Vol. IV, Tab 9.

78. In fact, the Standing Committee heard extensive evidence from landlords themselves that they did not exclude social assistance recipients because of their source of income but rather because of assumptions about their credit-worthiness based on two considerations - their low level of income and their protection from garnishment at source. It was on this basis that a number of landlords' groups urged the legislature to delete this proposed ground of discrimination, or at least to limit the prohibited discrimination to invidious discrimination based on the source of income. In an obvious reference to income criteria, the London Property Management Association stated that: "A landlord may maintain stringent credit requirements which automatically exclude recipients of public assistance." In order to protect such practices from challenge under the Code, they asked that the legislature prohibit only discrimination because of "source of income" rather than "receipt of public assistance".

Submission of the London Property Management Association with respect to Bill 7, Exhibit 103 of the Legislative Record at 2. Complainants' Book of Authorities, Vol. IV Tab 10.

79. The legislature's decision **not** to frame the ground as "source of income" as proposed by the landlords is significant. Source of income was protected in Manitoba and in Nova Scotia. Receipt of public assistance, however, was at that time unique to Ontario. "Source of income" does not identify a particular low income group or economic status for protection but clearly "receipt of public assistance" does. It is difficult to understand how including such a ground could be consistent

with an intent to "permit differentiation resulting from economic status," as submitted by the respondents.

Human Rights Act, R.S.N.S. 1989, c.214 as amended by S.N.S. 1991, c.12, s.5(1)(f).
Human Rights Code, C.C.S.M., c. H175, s.9(2)(j)
Respondents Submissions, para. 28.

80. It is also misleading to suggest that because the legislature declined to include "social condition" as a prohibited ground, in light of the example of its inclusion in human rights legislation in a neighbouring province, the intent must have been to permit discrimination because of economic status. At the time the legislature was considering the proposal to include "receipt of public assistance" as a prohibited ground, "social condition" appeared to offer no protection from discrimination on the basis of economic status against social assistance recipients or any other group. In Quebec, "social condition" had been found to lack definition and not to prohibit landlords from refusing to rent to social assistance recipients. This was still the case when the Ontario legislature reviewed the provisions of the Code in 1986, considering the plight of low income families and youth. Subsequent decisions finding discrimination against social assistance recipients to be prohibited in Quebec under the rubric of "social condition" did not come out until considerably later - part of a growing recognition across Canada of the seriousness of discrimination against this group which led to extended protections in a number of human rights codes.

***Leclair c. Paquet et Paquet* (1981), 2 C.H.R.R. D/444 (C.P.)**
***Quebec (Comm. des droits de la personne) c. Gauthier* (1993), 19 C.H.R.R. D/312.**

81. The respondents argue that since evidence of widespread discrimination because of income was put to the Committee in 1986 and

the legislature did not add a ground of discrimination to deal with it, it must have intended to permit it. However, the legislature did not think that an additional ground was necessary. Rather, as Ms. Grier stated, the evidence of widespread discrimination against low income people suggested a need to improve enforcement of existing provisions.

> We also need better enforcement by the Ontario Human Rights Commission of the clauses in the code that apply to housing. We need sensitivity on the part of the members of the commission and its staff to the problems faced by low income families. ...
>
> We must have a review by the commission of the application forms now used in many apartment buildings for those seeking accommodation. Tenants are asked about their income, their marital status and a number of other things that can be used to discriminate between them when they seek accommodation. There has to be some action to look into that.
>
> **Legislature of Ontario Debates, 2nd Sess., 33rd Parliament, December 9, 1986, *supra*, at 4068. Complainants' Book of Authorities, Vol. IV at**
>
> **Respondents' Submissions, par. 28.**

82. With respect to J.L. and Dawn Kearney and the ground of age and sex, the exclusion is so close to 100% (at least 98% in the case of J.L.) that the respondents might just as well have said: We do not rent to sixteen and seventeen year old women because their income is too low. Given the legislative intent to protect low income youth, and the broader purposes of the Code, it would be inappropriate to incorporate a justification provision by categorizing such a complete exclusion as adverse effect discrimination. The Court in *Berg* did not require that the safety concerns which formed the basis of denying Ms. Berg a key would exclude **all** persons with mental disability nor did it require that Ms. Berg be denied access **because** of the disability. The court found that the discrimination was direct discrimination, with no bfoq defence available, on the basis that the safety concern related, in large part,

to her mental disability. It is submitted that the economically disadvantaged status of young people is closely enough related to the protected ground (age of sixteen and seventeen) that excluding the group because of this characteristic constitutes direct discrimination.

***Re: University of British Columbia* v. *Berg* (1993), 102 D.L.R. (4th) 665, at 677-678 (S.C.C.).**

83. The respondents rely on the decision of the Ontario Court (General Divisional) in *Clarke v. Peterborough Utilities Commission* in support of their position that without a prohibition of poverty or economic status in the Code, the claimants cannot base a claim of discrimination on low income as an identifying group characteristic. However, the issue in *Peterborough Utilities* was entirely different. As the section quoted by the respondents notes, Howden, J. found that "There is no evidence that this policy treats or affects single mothers, or social assistance recipients **or the poor** differently because of their status or personal characteristic." The issue there was not that poverty was not considered an essential characteristic of single mothers or social assistance recipients. It was that to sustain a claim of discrimination on the basis of poverty, the applicants, in J. Howden's view, were required to show that poor people were over-represented among those who had unsatisfactory payment histories and who were therefore required to provide a deposit. There is no question in the present case that the impugned policy treats poor people differently because of their status.

Clarke v. Peterborough Utilities Commission (1995), 24 OR (3d) 7 (Gen Div) at 31.

84. The question of whether a particular rule or policy ought to be considered as direct discrimination is essentially one of legislative intent and purpose. A board will properly ask whether it makes sense

to suggest that the legislature would have intended that a protected group could be excluded because of a particular characteristic. In *Wormsbecker v. Super Valu and Westfair Foods Ltd.*, a respondent had denied a promotion to a woman because of absences resulting from pregnancy. The reasons for the disqualification were argued by the respondent to derive from rational business concerns with cost and work performance rather than from any intention to discriminate. The board noted that to prove direct discrimination, it was not necessary to show that the respondent "had an inherent dislike of women who are pregnant." It then turned to the question of legislative intent:

> Surely the legislature intended that pregnancy be construed as to describe all aspects of that condition such as appearance, physical limitations, and the absence of an employee for purposes of giving birth, among many things.
>
> **Wormsbecker v. Super Valu and Westfair Foods Ltd. (1981), 2 C.H.R.R. D/348 at 349.**

85. The reasoning of the board in Wormsbecker applies, a fortiori, to the present case. Surely the legislature intended that receipt of public assistance be construed so as to include, at the minimum, the low income status which characterizes all members of the group.

Causal Requirements and Intersectionality

86. The respondents attack the complainant's prima facie case on two further grounds:

i) discrimination must identify characteristics that are "constitutive of the protected ground" rather than characteristics that are shared by many groups; and

ii) a discrimination claim may invoke only a single ground and ought not to "piggyback" a number of grounds one upon the other.

Respondents' Submissions, paras 21-23, 94-95.

87. The first argument, that the characteristic identified by the discrimination must be one which is unique to a single protected group is premised on using the *Brooks* case, in which discrimination because of pregnancy was found to be discrimination against women, as the paradigm for all discrimination claims. In that situation, pregnancy is a characteristic of women and only of women (ie. not of men). But to generalize this to all cases of discrimination is simply absurd. Virtually every adverse effect case involves a characteristic which is shared widely among persons outside of the group. In height and weight requirement cases, many other individuals and groups other than members of a particular ethnic minority are short. Similarly, many others than blacks lacked highschool diplomas in *Griggs v. Duke Power*. Indeed, as the Wormbecker case made clear, even direct discrimination because of pregnancy may be based on a characteristic (absenteeism, safety concerns, etc.) which are not unique to pregnant women.

***Griggs v. Duke Power*, *supra*.**
***Wormsbecker v. Super Valu and Westfair Foods Ltd.* (1981), 2 C.H.R.R. D/348 at 349.**

88. The respondents "causal" theory creates a world of isolated categories into which few equality seekers would be able to fit. It would disqualify any equality claims which reflect either the diversity of members of equality seeking groups, who may not be "constituted" by a single characteristic, or the shared characteristics of members of different equality seeking groups. According to the respondents' logic, if only single mothers were poor, Ms. Luis would have a human rights complaint, but because refugee claimants and women of colour are also poor, she has no complaint - this despite the fact that being a refugee claimant and a single mother and a woman of colour means that she is

additionally disadvantaged by the fact that poverty is linked with all three groups.

Respondents' Submissions, para. 24.

89. The identification of discrete grounds of discrimination in the *Code* should not be mistaken for a requirement that the real world of discrimination occur in discrete categories, with group characteristics isolated in watertight compartments, and discriminatory effects limited to single groups. Various forms of discrimination are inter-related, mutually reinforcing and can operate together. Even if only single mothers were poor, for example, it would be impossible and futile to determine whether the poverty was a characteristic linked to their sex, their marital status or their family status. Disqualifying equality claims emananting from the complex intersection of various forms of disadvantaged and discrimination would thwart the purposes of the Code - to provide a last refuge for the most vulnerable and disadvantaged in society. Similarly, fragmenting the experience of equality seekers distorts the nature of equality claims and would provide an inappropriate defence to serious forms of discrimination. As the Board of Inquiry explained in Leshner:

> An example might occur should a woman of colour claim that she has been discriminated against by a refusal to hire her. How should she frame her claim?
>
> Both "race" and "sex" are prohibited grounds of discrimination. Under a disjunctive approach, the claim would be analyzed as being <u>either</u> race discrimination or sex discrimination. This would not only fragment her experience and existence; it may also defeat her claim. If the employer could show that it hires men of colour, it might resist the claim of race discrimination; if it could show that it hires white women, it might resist the claim of gender discrimination.

Leshner v. The Queen **(1992) 16 C.H.R.R. D/184 per Dawson at D/213-14.**
Resondents' Submissions, para. 95.
N. Duclos, "Disappearing Women: Racial Minority Women in Human Rights Cases" (1993), 6 C.J.W.L. 25 at 40-51.
N. Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1993) 19 Queen's Law Journal 179 at 191-194.

E: POLICY RESPONSES TO ECONOMIC INEQUALITIES

90. The respondents argue that the board should dismiss the complaints on the grounds that they seek to turn markets into something which they cannot be - "the primary instrument for achieving society's distributive justice ends." Professor Trebilcock advances the argument with some credibility in his book that in certain cases, intervention in the market will be counter-productive and a more appropriate response is income redistribution or some other societal response. The question is whether that in fact is the case here.

Respondents' Submissions, paras.30, 57.
Evidence of Michael Trebilcock and Paul Halpern, Vol. 46 at 48.

91. It is first important to note that Trebilcock's entire analysis relies on a number of hypotheses and assumptions which, if untrue, would presumably change the analysis. First, and most important,is the hypothesis that there is a correlation between higher rent to income ratios and a higher probability of default. Trebilcock admitted that this is something which requires empirical testing, and he assumed that Marmer/Penner and Earwaker had done their testing of the hypothesis properly.

Evidence of Paul Halpern and Michael Trebilcock, Vol. 46 at 63-65.

92. That assumption turned out to be entirely incorrect. Earwaker's calculations of average rent to income ratios had failed to allow for the over-representation of longer term tenants in the sample of non-defaulters. Once Professor Ornstein corrected the calculations, the results were that the average rent to income ratios of defaulters was 2% **lower** in one year and 2% higher in another. There was no evidence at all that there is any difference between the two groups.

> Michael Ornstein, **"Report in Reply to the Evidence of Michael S. Penner, Stephen Earwaker and Greg Lampert", Exhibit 156 at 3-5.**

93. Further, Professor Ornstein's analysis showed that Bramalea's income criteria was excluding half of the qualified applicant pool - tenants in Metro Toronto who were paying a similar rent for the same sized unit. With a vacancy rate in the order of 3%, vacancy losses were twenty times default costs at Bramalea. The evidence showed that in fact, Bramalea would benefit by relinquishing income criteria by at least doubling the demand for apartments from qualified applicants. In that case, the "redistribution" which the respondents find so offensive when it goes in the other direction, would presumably meet with their approval.

> **Evidence of Michael Penner, vol. 39 at 148.**
> **Michael Ornstein, "Income and Rent", supra, at 75**

94. Even if, despite the evidence to the contrary, we accepted the respondents' contention that renting to lower income households would actually create additional default costs for a landlord like Bramalea, the magnitude of the cost seems insignificant compared to the "social welfare" solution which he advocates. Professor Trebilcock admitted that social assistance rates would have to double or triple to ensure that social assistance recipients can meet landlords' income criteria, costing billions of dollars. The evidence from Marmer/Penner's analysis

of default costs and legal costs at Bramalea suggests that even if default rates doubled, which is highly improbable, the costs would amount to between $1 and $2 per month per tenant.

Evidence of Michael Trebilcock and Paul Halpern, Vol. 46 at 48.
Complainants' Submissions, paras 292, 297.

95. It makes no sense from a public policy standpoint to have landlords' arbitrary income criteria establish social assistance rates in Ontario. Chandra Pala gave evidence that it would be completely unworkable to set social assistance rates on the basis of a rent to income ratio.

Evidence of Chandra Pala, Vol. 6 at 60-61.

96. Social welfare responses must be designed in conjuction with equality protections to ensure that the market is not arbitrarily or unreasonably denying disadvantaged groups access to basic necessities at significant public expense. It is unacceptable to permit landlords to decide arbitrarily that large segments of the tenant population are disqualified from appropriate housing, and to expect the government to solve the resulting inequities at great public expense. As Gerard Kennedy noted, addressing poverty requires action at a variety of levels, not simply at the governmental level. It is necessary to address the barriers to accessing affordable housing as well.

Evidence of Gerard Kennedy, Vol 24, 89-91.

97. The respondents argue that prohibiting income criteria would force landlords as a group to bear the cost for societal objectives. Even if the respondents were able to show some correlation of default with higher rent to income ratios, however, it is incorrect to suggest that

prohibiting income criteria would place an additional burden on landlords as a group. The respondents did not dispute the evidence that disadvantaged households are forced to pay higher rents when their access to appropriate accommodation is restricted by income criteria. The redistribution effected by a number of landlords relinquishing income criteria would simply provide disadvantaged groups with a wider choice. As a result they would pay lower rents. According to the respondents' hypothesis about rent to income ratios and default, such a result would **reduce** the over-all default rate among tenants. This is consistent with evidence from Quebec which showed no increase in default there after income criteria were prohibited. The "redistribution" at issue then, even if the respondents' were right about a higher default risk among lower income tenants, is not a gift or donation from landlords to tenants, but rather a redistribution of tenants among all landlords. Those tenants deemed to be high risk would be more evenly distributed among all landlords rather than being restricted to those landlords who do not employ income criteria.

David Hulchanski, "Discrimination in Ontario's Rental Market: the Role of Minimum Income Criteria", Evidence of Greg Lampert, Vol 52 at 147.

98. The respondents cite *Andrews* to suggest that the courts should not get involved in complex social and economic policy issues in adjudicating equality claims. It has subsequently been clarified by the Supreme Court in *Symes*, however, that social and economic inequalities very much a central concern of equality claims and are not outside of the ambit of s. 15.

Symes v. Canada [1993] 4 S.C.R. 695, at 753-756.

99. Further, rationale for avoiding complex social and economic issues in Charter jurisprudence has always been deference to the authority and expertise of elected representatives in the allocation of scarce resources. The Supreme Court of Canada made it clear in *Dickason* that such deference is **not** to be extended to landlords or others whose "policy-making" function is frequently motivated primarily by profit.

Dickason v. University of Alberta 95 D.L.R.(4th) 439 (S.C.C) at 492.

ADVERSE EFFECT DISCRIMINATION AND UNDUE HARDSHIP

100. The anti-poverty coalition adopts the complaints' submissions with respect to adverse effect discrimination and undue hardship. We would highlight the following evidence:

i) On the basis of Bramalea and Shelter data, there is no correlation between default and higher rent to income ratios;

ii) Income criteria exclude half of qualified applicants and increase vacancy costs significantly, at greater cost than any purported savings in default;

iii) There is no evidence that defaulting tenants move any sooner than non-defaulting tenants so it is incorrect to allocte any turnover costs to default; and

iv) Should default costs double in a particular building, the extra cost would be $1 - $2 per month per tenant.

101. It is submitted that the respondents have not met any part of their onus to prove that income criteria are reasonable and bona fide and that it would not impose undue hardship to relinquish income criteria.

REMEDY SOUGHT

102. The anti-poverty groups adopt the complainants' submissions with respect to remedy. This case has involved significant public expense. Thousands of households in receipt of public assistance, as well as many other low income households, are awaiting a ruling which will provide a clear indication as to the scope of their rights under the *Code*. We therefore urge the board to address the systemic issue which has been put before it by both sides.

103. The anti-poverty groups submit that whether or not the discrimination is found to be direct discrimination or adverse effect discrimination, the appropriate remedy is to strike down the policy.