PROVINCE OF NOVA SCOTIA
COUNTY OF HALIFAX

C.H. No.: 75171

I N T H E C O U N T Y C O U R T
OF DISTRICT NUMBER ONE

BETWEEN:

DARTMOUTH/HALIFAX COUNTY REGIONAL HOUSING AUTHORITY

Applicant

- and -

IRMA SPARKS

Respondent

- and -

THE ATTORNEY GENERAL OF NOVA SCOTIA

Intervenor

Jamie Campbell, Esq., and Colin Clarke, Articled Clerk; counsel for the Applicant/Landlord.
Vincent P. Calderhead, Esq.; counsel for the Respondent/Tenant.
Allison Scott and Ms. Lyse Gareau, Articled Clerk; counsel for the Attorney General.

1992, April 13th , Palmeter, C.J.C.C.:- This matter comes before the Court as an objection to a report of the Dartmouth and County East Residential Tenancies Board dated September 10th, 1991, pursuant to Section 15(4) of the **Residential Tenancies Act**, Chapter 401 R.S.N.S. 1989.

The Applicant/Landlord originally made an application to this Court seeking an Order that the tenancy agreement with the Respondent/Tenant be terminated, that the Applicant be put into possession of the residential premises at 10 Chebucto Lane, Dartmouth, Nova Scotia and that monies be paid to the Landlord by the Tenant. The

matter was directed to the appropriate Residential Tenancies Board for hearing and for a report and recommendation.

The parties appeared before the Residential Tenancies Board on July 25th, 1991 and the hearing was adjourned for further argument to September 5th, 1991. The Tenant argued that the Board should refer constitutional issues to the County Court for determination or, in the alternative, stay the proceedings until a Human Rights complaint, made by the Tenant against the Landlord, was determined.

In its report the Board found that it had no jurisdiction to stay the proceedings or determine questions of a constitutional nature under the **Charter of Rights and Freedoms.** The Board recommended termination of the tenancy as of September 30th, 1991 and ordered the Tenant to pay to the Landlord $692.00 in unpaid rent. The issues raised in the Notice of Objection filed by the Tenant were basically as follows:

> 1. Should the Residential Tenancies Board have stayed its proceedings pending the Human Rights Commission hearing

or pending the determination of the constitutional validity of portions of the **Residential Tenancies Act**, and;

2. Do Section 10(8)(d) and 25(2) of the **Residential Tenancies Act** contravene s. 15(1) of the **Canadian Charter of Rights and Freedoms.**

At the hearing of this objection counsel for the Tenant did not pursue the issue of the stay of proceedings.

It should be noted that the same issues were raised in **Halifax Housing Authority** v. **Yolanda Carvery**, C.H. No. 75945, a Notice of Objection heard by me on February 7th, 1992. In that matter the Landlord, Halifax Housing Authority, was represented by Mr. Jamie Campbell, solicitor for the Landlord herein, and Ms. Carvery was represented by Ms. Claire McNeil of Dalhousie Legal Aid Service. I refused to consolidate these two actions and with the agreement of the solicitors postponed decision on either matter until I heard submissions in both.

The facts here are not in dispute. They are stated in the Tenant's Memorandum of Law. Irma Sparks is a 42 year old Black Nova Scotian single parent. She has two children who live with her: Parker, aged 16, and Faith, aged 8.

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

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

When Ms. Sparks refused to vacate the premises, the Landlord applied through this Court for a termination of the tenancy.

I determined that I would not hear evidence on the objection but would allow counsel to refer in argument to any relevant documentation, including extra judicial material. As a result, I have been provided with a substantial number of studies, texts, articles and statistics, particularly by counsel for the Tenant. I have considered the material provided where appropriate.

The references used by counsel for the Tenant in his argument are listed in Appendix "A" to this decision. A large number of references were also submitted by counsel for the Tenant in the **Yolanda Carvery** case. These references are listed in Appendix "B" to this decision. I have also considered that material where applicable. All solicitors involved in both applications were aware of this procedure.

For the purposes of this hearing, counsel for the Landlord and the Attorney General agree to the admission of the following facts, namely:

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

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

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

4. That for the purposes of the argument of the Tenant, it is admitted that public housing tenants are treated differently than tenants in the private sector under the **Residential Tenancies Act.**

5. That for the purposes of the Tenant's argument, the Landlord in this matter is to be considered a "government actor".

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

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

The Tenant submits that Sections 10(8)(d) and 25(2) of the **Residential Tenancies Act** contravene Section 15 of the **Canadian Charter of Rights and Freedoms.**

Section 10(8)(d) of the **Residential Tenancies Act** reads:

> "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;"

In other words, the tenure provisions of the **Act** do not apply to tenants of public housing. The Tenant, in this case, moved into public housing in 1980 and had been a tenant for over ten years when the notice was given.

Section 25(2) of the **Act** reads as follows:

> "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."

In the case before me Ms. Sparks was given 30 days notice to quit under the provisions of her lease. Had the provisions of the **Act** been applicable, Ms. Sparks would have been entitled to three months' notice to quit at the end of each lease term, except for cause.

It is agreed that Ms. Sparks is a member of two groups which are enumerated in s. 15 of the **Charter**, namely, race and sex. Counsel also argues that Ms. Sparks, as a "social assistance recipient" is within an unenumerated or "analogous group" also protected by s. 15 of the **Charter**. Reference has been made to the cases of **R. v. Turpin** (1989) 69 C.R. (3d) 97 (S.C.C.) and **F.A.P.G. (B.C.) et al v. A.G. of British Columbia et al**, (unreported Vancouver Registry A 893060, May 31, 1991), (B.C.S.C.). I hold that "social assistance recipients" are an "analogous group" protected by s. 15 of the **Charter**. They are a discrete and insular minority as defined by the Supreme Court of Canada in the case of **Andrews v. Law Society of British Columbia** (1987), 56 D.L.R. (4th) 193 S.C.C. (hereinafter referred to as "**Andrews**").

Counsel for the Tenant refers to a study published by the National Council of Welfare during the summer of 1990 entitled **Women and Poverty Revisited**. Chapter II of that study enumerates many disturbing findings which are set forth in the factum of the Tenant. On p. 14 the following paragraph summarizes the Chapter:

> "Overall, this chapter confirms our 1979 finding that poor women are found

> in all types of family situations, but that women's risk of becoming poor greatly increases when they do not have a husband or a father to support them. Our new data on the depth of poverty shows that low-income single-parent mothers and unattached women under 65 have a much harder time than other low-income women because their incomes are so far below the poverty line."

With these findings I do not take issue. They are supported by the other reference material submitted in both this and the **Carvery** case. I accept that single-parent mothers have a more difficult time economically. The same is true regarding housing for single-parent mothers. Material submitted on both applications convince me that single-parent mothers have a more difficult time securing appropriate housing. At p. 79 of the study **Women and Poverty Revisited**:

> "Canada Mortgage and Housing Corporation reports that 40 per cent of female single parents under 65 have 'core' housing needs, meaning their housing is either too crowded, physically inadequate or costs more than 30 per cent of their total income. In the Atlantic Provinces, many single parents pay more than 50 per cent of their income for an apartment. Families on social assistances in New Brunswick spend more than 65 per cent of their income for rent."

One can almost take judicial notice that the Black Community in Nova Scotia has always been at the low end

of the economic scale. The material submitted corroborates this submission. Per capita, the income and education of Black Nova Scotians are considerably lower than the majority of other Nova Scotians. Employment opportunities and availability of suitable housing also are not equivalent.

I accept the submissions by the Tenant that single parent mothers, and blacks, are less advantaged than the majority of other members of our society. It also goes without saying that social assistance recipients are also less advantaged, although some arguments could be made that there are certain advantages accruing to such recipients if they are able to obtain suitable public housing at a smaller percentage of their income than would be the case if they were a private sector tenant.

Counsel for the Tenant argues that she is being discriminated against under s. 15(1) of the **Charter** because she is black, is a single-parent mother, and is a recipient of social assistance. Accordingly, it is argued that s. 10(8)(d) and s. 25(2) are discriminatory and therefore unconstitutional. The Tenant cites the concept of adverse effect discrimination.

The Supreme Court of Canada defined the concept of "adverse effect discrimination" in **Ontario Human Rights**

Commission v. Simpson-Sears Ltd. (1985), 23 D.L.R. (4th) 321. At p. 332 McIntyre, J. states:

> "A distinction must be made between what I would describe as direct discrimination and the concept already referred to as adverse effect discrimination in connection with employment. Direct discrimination occurs in this connection where an employer adopts a practice or rule which on its face discriminates on a prohibited ground. For example, 'No Catholics or no women or no blacks employed here.' There is, of course, no disagreement in the case at bar that direct discrimination of that nature would contravene the Act. **On the other hand, there is a concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force.** For essentially the same reason that led to the element of discrimination contravening the Code, I am of the opinion that this court may consider adverse effect discrimination as described in these reasons a contradiction of the terms of the Code. 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 mine)

Simply put, in the case before me, in my opinion the Tenant is arguing that the sections questioned in the

Residential Tenancies Act affect the Tenant in a disproportionately negative way because she is a black, single-parent mother, and a recipient of social assistance. In other words, disproportionate to the effect on other tenants of public housing who are not black, single-parent mothers or on social assistance.

It is not being suggested that tenants who are black, single-parent mothers or recipients of social assistance are treated any differently than other tenants of public housing, however, it is being submitted that the treatment has a disproportionate adverse effect on blacks, single-parent mothers or recipients of social assistance because they are discrete and insular minorities in the context of the **Andrews** case, that is, traditionally disadvantaged groups who suffer social, political or legal disadvantage of vulnerability through political and social prejudice.

It is clear, and agreed by counsel, that tenants of public housing as a whole are treated differently than tenants in the private sector. 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. Rent is specifically related to a percentage of the public housing tenants' income. On the other hand, public housing tenants do not have the benefit of security of tenure and may be subject to different notice to quit provisions than those afforded tenants in the public sector.

It is suggested that the fact that public housing tenants do not have security of tenure and shorter notice periods could be a benefit for those on the waiting list for public housing, who are disproportionately black, single-parent mothers or recipients of social assistance. The onus is on the Tenant to establish a **prima facie** case of discrimination.

In **Reference Re: Family Benefits Act** (1986), 75 N.S.R. (2d) 338, the Supreme Court of Nova Scotia, Appeal Division considered s. 15(1) of the **Charter** and at p. 351 stated as follows:

> "It will be necessary under S. 15(1) of the **Charter** to establish that a

> challenged law not only treats a class unequally but also in a discriminatory manner. The burden of proof in the first instance of establishing that a law prima facie violates S. 15(1) will be on the person challenging the statute. We see no reason to distinguish in this regard between laws which fall within the listed classifications and those which discriminate on other grounds. No doubt it will be easier to establish a case under the listed classifications as laws classifying on some of those grounds will be inherently suspect. On the other hand, it may not be apparent that a law is discriminatory until the purpose and effect of the law is carefully examined."

This case is cited only to show the burden which must fall on a person alleging discrimination.

Counsel for the Landlord and the Department of Attorney General submit that the issue is simply whether public housing tenants may be treated in a manner which is different from private sector tenants. Their submission is in the affirmative and they cite the case of **Bernard v. The Dartmouth Housing Authority** (1988) 88 N.S.R. (2d), 190 (N.S.S.C.A.D.) (hereinafter called "**Bernard**") as authority that the question has already been determined by our Court of Appeal.

In **Bernard** the tenant was given six weeks notice to quit, pursuant to the terms of her lease with the Dartmouth Housing Authority, less than the notice to quit provisions

in the **Residential Tenancies Act**. The then s. 12(2) of the **Act**, which is identical to the present s. 22(2) of the **Act**, allowed the terms of the lease to govern. The tenant claimed that the provisions of s. 12(2) of the **Act** were in contravention of her rights under s. 7 (security of the person) and s. 15 (equality rights) of the **Charter**.

The Appeal Division held that because the right asserted was a proprietory one, which bestowed a direct benefit on the tenant, it had no constitutional protection under s. 7 of the **Charter**. The Court held that the ability of the Dartmouth Housing Authority to terminate the tenancy on thirty days notice was not discrimination and not in contravention of s. 15 of the **Charter**.

At p. 198 of **Bernard**, Pace J.A. states as follows:

> "The appellant concedes that the 'purpose' of s. 12(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.
>
> 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 adapt 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 effect of s. 12(2) of the **Act** is as stated by Goodridge, C.J.N., in the case of **Newfoundland and Labrador Housing Corp.**, supra, 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.'
>
> 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 provisions of s. 15(1) of the **Charter**." (emphasis mine)

In **Newfoundland and Labrador Housing Corp. v. Williams et al** (1987) 62 Nfld. & P.E.I. E.I.R. 269 (Nfld. C.A.), it was held that the provisions of the **Landlord and Tenant Act**, S.N. 1973, c. 54, which provided that the **Act** did not apply to residents of public housing, did not violate s. 15(1) of the **Charter**. At pp. 277-278, Goodridge, C.J.N. states as follows:

"The Charter should not be seen as a cornucopia from which all good things flow. Legislative and administrative bodies must function; individuals must accept some form of regulation and discipline in society. It is not a perfect world. Full equality will never be accomplished. It is not possible and probably not desirable.

The goals of s. 15 is to eliminate discrimination. Distinction is not discrimination.

Not every distinction should be seen as a Charter case. There must be an area where government is free to act without having to justify every legislative or administrative act and without being subjected to adverse review. There are legitimate regulatory measures that society must be prepared to accept. The function of running the nation or a province must continue and with it may arise some distinctions and inequalities. Even if one for whatever reason gives the term discrimination a non-pejorative meaning, one must accept that such distinctions and inequalities to some degree are the natural and acceptable outcome of legislative and administrative action and should not be seen as a denial of the equal protection and benefit of the law. There is a range within which the political regime may operate with impunity.

That range, however narrow it may be, is certainly broad enough to permit the bland inequalities said to exist in these cases.

These views while directed mainly to the ends may apply equally to the means.

The ends involve creating a special regime or classification for subsidized tenants.

> The means involve the exclusion of the subsidized tenants and their government landlords from the operation of the Act and the acceptance of a lease. The lease is not part of the legislation but it cannot be disregarded for it is this and this alone that makes the tenant a subsidized tenant...
>
> 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.
>
> The means adopted are legitimate. One does not pick at the legislation and say it might have been done differently or that a better method might have been adopted. (see **Gerol v. The Attorney General of Canada,** 85 D.T.C. 5561).
>
> One merely looks to see that the methods are within that acceptable range mentioned above and are free of discrimination. If the distinction has a regulatory and non-discriminatory tone, one need consider no more.
>
> 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."

Counsel for the Landlord submits that **Bernard** is the law in Nova Scotia and that the Court therein made

three determinations, as follows:

> 1. That public housing tenants are treated differently than private sector tenants;
>
> 2. That not every difference is discrimination; and,
>
> 3. That a system which has been set up to deal with public housing as a social welfare program is acceptable even though it is different and even through those public housing tenants are indeed treated differently.

I agree with his interpretation of **Bernard**.

In **Newfoundland and Labrador Housing Corporation v. Williams et al**, Goodridge C.J.N. stated at p. 277:

> "The challenger must not only show difficult treatment. He must present a prima facie case of discrimination. Proof of different treatment is not proof of discrimination. It may be that where the different treatment is shown to be related to one of the matters enumerated in s. 15(1) of the Charter race, origin, religion, sex, age or disability, a prima facie case is made out." (emphasis mine)

This was the reasoning followed in **Bernard** where the Court held that a **prima facie** case of discrimination was not made out as it relates to public housing tenants. I accept this reasoning.

Counsel for the Landlord submits that **Bernard** is the law in Nova Scotia as it relates to public housing tenants and agree. In order to get around **Bernard** the Tenant must try to distinguish the case in some manner. In attempting to do this, counsel for the Tenant relies heavily on the Supreme Court of Canada decision in **Andrews**. He suggests that **Bernard** is somehow criticized by the Supreme Court of Canada in **Andrews** because the case of **Reference re: Family Benefits Act**, supra, mentioned in **Bernard** is discredited.

Reference re: Family Benefits Act is discredited because of the acceptance of the "similarly situate" test only. It is clear in reading **Bernard** that the similarly situate test was not used in that case. In my opinion, the Court in **Bernard** used the "purpose and effect" approach as followed in **Southam Inc. v. Hunter** (1984) 25 C.R. 145 and **R. v. Big M. Drug Mart Limited** (1985) 1 S.C.R. 295, an approach cited with approval in **Andrews**. At p. 13 of **Andrews**, MacIntyre J. states as follows:

> "Consideration must be given to the content of the law, to its purpose, and its impact upon those to whom it applies, and also upon those whom it excludes from its application. The issues which will arise from case to case are such that it would be wrong to attempt to confine these considerations within such a fixed and limited formula."

The Tenant further suggests that **Bernard** decided a different issue on different facts. It is submitted that **Bernard** cannot saddle all disadvantaged groups with the outcome in that case in which the interests were not represented nor was the issue of discrimination against them ever addressed. The Tenant submits that **Bernard** is distinct from the present application on the basis that the Tenant is claiming discrimination based on one of the enumerated grounds in s. 15.

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).

All parties agree that both section 10(8)(d) and Section 24(2) of the **Act** create a differential impact on the tenants of public housing which of course includes the Ms. Sparks. The question, accordingly, is whether the impact of these sections is discriminatory against her.

As previously stated, distinctions and differentiations do not necessarily constitute discrimination under s. 15(1) of the **Charter**. In **Andrews**, McIntyre J. states at p. 12:

> "For, as has been said, a bad law will not be saved merely because it operates equally upon those to whom it has application. Nor will a law necessarily be bad because it makes distinction."

and again at p. 13:

> "It is not every distinction or differentiation in treatment at law which will transgress the equality guarantees of section 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 in 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. As notes above, for the accommodations of differences, which is the essence of true equality, it will frequently be necessary to make distinctions."

In **A Discrete and Insular Right to Equality:** Comments on Andrews v. Law Society of British Columbia (1989) Ottawa Law Review, a review on **Andrews**, Richard Moon discussed the concept of disparate impact at pp. 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 burden.

The wording in s. 15(1) must be considered in reference to this application. In particular, the phrase "without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".

The words "without discrimination" were considered by McIntyre J. in **Andrews**. At p. 22 he states as follows:

> "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."

I agree with counsel for the Landlord that the words "based on" are there for a reason and that legislation which purports to or has the effect of treating individuals differently, based on one of the groups mentioned in s. 15(1) or any analogous group, is subject to challenge. In **Andrews**, McIntyre J. states at p. 18:

> "Distinctions based on personal characteristic attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination while those based on individuals' merits and capacities will rarely be so classified."

McIntyre J. differentiates between personal characteristics and an individual's merits and capacities.

Counsel for the Landlord submits that what we are dealing with in this case is an individual's merits

and capacities and not an individual's personal characteristics. With that submission I am in agreement.

The restrictions imposed by virtue of the sections in the **Act** are not imposed as a result of any characteristic of race or sex or source of income, but rather by virtue of having individually applied and individually been accepted for public housing. It is not a characteristic of being black that one resides in public housing. Similarly, it is not a characteristic of being a single mother or a female that one resides in public housing. In my opinion it is not a characteristic of having a low income that one resides in public housing. The fact that there is a disproportionately large number of blacks, women, and recipients of social assistance in public housing does not, in my opinion, make it characteristic of any of the three groups individually or the three groups considered as one group.

There has to be a connection between the characteristic of the sex, or the race, or the source of income, and the different treatment for a charge of discrimination to be even considered. In her reliance on the concept of adverse effect discrimination the Tenant must establish that a requirement which is otherwise neutral

is imposed and applies to everyone upon whom it is imposed, imposes special obligations on some because of some special characteristic of the group.

I have already discussed the concept of adverse effect discrimination and referred and quoted from **Re: Ontario Human Rights Commission and Simpson-Sears Ltd.** I refer to part of the same prior quote where McIntyre J. states at p. 332:

> "It arises where an employer for genuine business reasons adopts a rule or a standard which is on its face neutral and which will apply equally to all employees, but which has a discriminatory effect upon the prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other numbers of the work force." (emphasis mine)

In his memorandum counsel for the Tenant at pp. 29-30 submits that there are three central elements on a s. 15 claim, namely:

> 1. There must be a distinction drawn by the impugned law or government activity;

2. The distinction must impose a disadvantage on the individual or group; and,

3. The resulting inequality must either directly or disproportionately affect an enumerated or analogous group.

At p. 34 of his Memorandum counsel submits that the three elements necessary for a **prima facie** case have been met because the admission by the Landlord that blacks, women, and social assistance recipients are disproportionately represented in public housing, compared to the overall population, establishes the third element.

I have no difficulty finding that the first two elements have been established but I do have difficulty with the third, based on which must be established. I agree that a proponent of discrimination must prove disproportionality but must also prove that the distinction is based on the personal characteristics of the individual or group.

In support for what he considers makes up the third element, counsel for the Tenant refers to the cases

of **Andrews**, at p. 18, **R v. Turpin** (1989)m 69 C.R. (3d) 97 9S.C.C.), at p. 125, **R. v. Swain** (1991), 5 C.R. (4th) 253 (S.C.C.) at p. 297 and **McKinney v. University of Guelph** (1990) 76 D.L.R. (4th) 545 (S.C.C.) at p. 647. **Andrews** very definitely sets forth that the distinction must be based on personal characteristics. This must be established. In **R v. Turpin** the Court refers to **Andrews** with approval. In **R. v. Swain**, the Court refers to both **Andrews** and **Turpin,** and at p. 297 states as follows:

> "This enquiry will focus largely on whether the law has drawn a distinction (intentionally or otherwise) between a claimant and others, based on personal characteristics."

The **McKinney** case at p. 647 doesn't suggest that a disproportional impact is sufficient and refers to **Andrews**.

I have already determined that in the case before me, the distinction is not based on the Tenannt's personal characteristics but rather on her merits and capacities. I find that the third element, as suggested by the Tenant, must also establish that the distinction is based on personal characteristics and that this has not been established.

The tenant in this case is treated differently because and solely arising from having applied and met the

criteria for public housing. I agree with the submission by counsel for the Landlord that the fact that public housing tenants are disproportionately black, females on social assistance tells us something about public housing but doesn't tell us anything about being black, about being female or upon being on social assistance. I agree that it is not a characteristic of any of those three groups to reside in public housing.

I accept the submission that the legislature is not discriminating against black, female, social assistance recipients by treating public housing tenants differently. In order to establish this the Tenant would have to show that the legislation somehow exempted blacks, women, and recipients of social assistance from the protection of the statute by singling out a characteristic of being a black, female, social assistance recipient, and exempting from the protection of the **Act** those with that characteristic. With respect, the Tenant has not done so.

Counsel for the Tenant has argued that there are certain limitations which would be appropriate to be included in the legislation referring to public housing tenants, but that the Nova Scotia Legislature went too far in the **Act.** Submissions made would indicate that every common

law province in Canada with the exception of Newfoundland, New Brunswick and Nova Scotia, either provides equal protection to public housing and other tenants, or in the case of Ontario, Saskatchewan, Manitoba and N.W.T. there is a legislative regime that is equal except in controlling financial eligibility, in particular, in the area of subletting or rental income protection and requirements to disclose information concerning the tenant's income.

The fact that legislation is not uniform across Canada does not establish discrimination. What might be appropriate in Ontario may not be appropriate for Newfoundland or Nova Scotia. **Bernard** has established that it is acceptable to have a separate system. The Nova Scotia system is the one put in place by the legislature to ensure the necessary flexibility. The Courts have held it to be appropriate. In my opinion it is not now reasonable to second guess the legislature and the decision of the Court in **Bernard**. As Chief Justice Goodridge said in **Newfoundland and Labrador Housing Corporation v. Williams et al** one does not pick at legislation to say that it might have been done differently. At p. 278 of **Newfoundland** he states as follows:

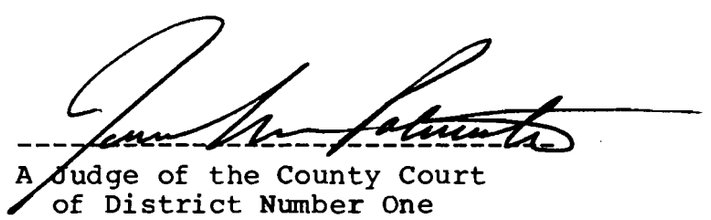
> "One merely looks to see that the methods are within that acceptable range mentioned

> above and are free of discrimination. If the distinction has a regulatory and non discriminatory tone, one need consider no more."

To summarize, **Bernard** is the law in Nova Scotia as it relates to distinctions created in the **Residential Tenancies Act** affecting tenants of public housing. Distinctions, differences or inequality do not necessarily give rise to discrimination. As in **Bernard,** the Tenant here has not established a **prima facie** case of discrimination as it affects public housing tenants as a whole.

With regard to the Tenant's submission that she is suffering adverse affect discrimination by virtue of being black, a woman, and a recipient of social assistance, I find that she has not established a **prima facie** case thereof. I accordingly find that sections 10(8)(d) and 25(2) of the **Residential Tenancies Act** do not contravene the provisions of s. 15(1) of the **Charter.** Because of this finding there is no necessity to consider s. 1 of the **Charter.**

I will dismiss the Notice of Objection and confirm the report of the Residential Tenancies Board dated September 10th, 1991.



A Judge of the County Court
of District Number One

SCHEDULE "A"

HALIFAX HOUSING AUTHORITY v. SPARKS
C.H. No.: 75171

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MATERIALS SUBMITTED:

1. Public Housing Operations Manual.

2. Copy of Lease between Dartmouth Housing Authority and Irma Sparks, dated April 1, 1991.

3. Article - **Education and Income in the Watershed Area** - Kerry L. W. Deagle, July 5th, 1989.,

4. Report on Employment Patterns in the Black Communities of Nova Scotia, April 1981 - Fred Wien and Joan Browne.

5. **Mothers and Children - One Decade Later,** Published by the Nova Scotia Department of Community Services.

6. Information on Non-Senior Family Housing tenants and Applicants, February 5th, 1992, Dartmouth/Halifax County Regional Housing Authority.

7. Article - **The Recent Evolution of Social Housing in Canada,** by Steve Pomeroy.

8. Canada Mortgage and Housing Corporation information bulletin on **Lands Management.**

9. **Women and Children Last** - Single Mothers on Welfare in Nova Scotia, by Barbara Blouin.

10. Report - **Women and Poverty Revisited** - report by National Council of Welfare, Summer 1990.

11. **Housing Assessibility - Present and Future** Issued in Atlantic Canada - proceedings of Atlantic Regional Housing Workshops, Oct. 29 -30, 1986.

12. Report of Nova Scotia Commission of Inquiry on Rents - September 1983.

13. **Housing for People Coalition Report** 1987.

14. Article - **The Housing Needs of Single Parent Families in Canada** -Klodawspy, Spector and Hendrin.

15. CMHC Bulletin - **Information Rent Supplement Program.**

16. Study - **Innovative and Alternative Financing of Social Housing** - February 1991, by David Bruce.

17. Hassard - Minutes - Nova Scotia House of Assembly April 20, 1970. Remarks of Members, Donohoe, Nicholson, Regan, Vaughan and Brown.

18. Hassard - Assembly Debates, Nova Scotia House of Assembly, May 24th, 1984.

SCHEDULE "B"

HALIFAX HOUSING AUTHORITY v. YOLANDA CARVERY
C.H. NO.: 75945

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MATERIALS SUBMITTED:

1. A Report on Employment Patterns In The Black Communities of Nova Scotia, Fred Wien and Joan Browne, April 1981.

2. A study of Women's emergency housing needs in the Halifax/Dartmouth area - **At The End of the Rope** - Canada Mortgage and Housing Corporation.

3. A study - **The Housing Needs of Female Led One Parent Families** - Canada Mortgage and Housing Corporation.

4. Article - **Africville - The Life and Death of a Canadian Black Community** - Canadian Scholars' Press, Toronto 1987.

5. Report - **Education and Income in the Watershed Area,** by Kerry L. W. Deagle, July 5th, 1989.

6. Working Paper Number One - **Housing and Nova Scotia's Welfare Safety Net,** by Prof. J.G. Wanzel and Jane Wrathall - June 6th, 1991.

7. Case Histories - International Women's Week Shelter Committee - **OPEN MORE DOORS.**

8. Manual - The Housing Authority.

9. **A Roof Over Our Heads** - Single Mothers in Housing Crisis in the Halifax Metro Area, by Elizabeth Bosma-Donovan and Barbara Blouin.

10. **Multifaceted Environmental Assessment of Public Housing for Mulgrave Park.** Prepared for the Halifax Housing Authority, April 1988.

11. **Women and Housing: Changing Needs And The Failure Policy,** by Janet McClain with Cassie Doyle.

12. A Report by the National Council of Welfare - - - **WOMEN AND POVERTY REVISITED,** Summer 1990.

13. Manual - **Department of Housing Administration Manual - Chapters 1 - 8.**