Access to Energy: How Form Overtook Substance and *Disempowered* the Poor in Nova Scotia

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A. Introduction

Just and equal access to energy has many dimensions – from an underlying regulatory principle to a fundamental component of the right to housing under international human rights law.[1] There is widespread consensus that access to energy is an essential need in today's society. Yet, in the real world, disadvantaged communities are disproportionately denied such access.

Unfortunately, rather than recognising and addressing this reality, the Canadian judiciary, when given the opportunity, has simply legitimated it. More specifically, through the triumph of formal over substantive equality, the case of *Affordable Energy Coalition* (*Re*) (*Boulter*)[2] has reinforced and perpetuated this version of systemic discrimination against the poor in Nova Scotia.

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1 The UN Committee on Economic, Social and Cultural Rights has stated that the right to adequate housing under Article 11 of the *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 includes "energy for cooking, heating and lighting". See *General Comment 4: The right to adequate housing (Art 11(1) of the Covenant)*, UNCESCROR E/1992/23 (1991) at para 8(b).

2 Litigation to defend the equality interests of the poor in accessing electricity in Nova Scotia initially took the form of a conventional statutory interpretation challenge before the Nova Scotia Utilities and Review Board ("NSUARB") and ultimately the Nova Scotia Court of Appeal. When that proved futile, low income electricity consumers looked to the *Canadian Charter of Rights and Freedoms* (see below note 3) to vindicate their claim to equal access to regulated electricity. For clarity, the statutory interpretation cases are: *Dalhousie Legal Aid Service, Re*, 2005 NSUARB 27 [*DLAS* (NSUARB)] and, on appeal, *Dalhousie Legal Aid Service v Nova Scotia Power Inc*. 2006 NSCA 74 [*DLAS* (NSCA)]. The subsequent *Charter* litigation produced the following cases: *Affordable Energy Coalition* (*Re*), 2008 NSUARB 11 (the name which the case bore at the tribunal level) [*Boulter* (NSUARB)] and, as upheld by the Nova Scotia Court of Appeal: *Boulter v Nova Scotia Power Incorporation*, 2009 NSCA 17 [*Boulter* (NSCA)]. Unless the context specifies otherwise, references to *Boulter* refer to the *Charter* litigation carried out before the NSUARB *and*, on appeal, the NSCA.

Anti-poverty litigation under section 15 of the *Canadian Charter of Rights and Freedoms*[3] has sought to ensure that governments do not discriminate against protected groups by denying them equal access to programs and benefits provided to others. Legal advocacy around this important principle has been built on the foundation put in place by the Supreme Court of Canada over twenty years ago, when the Court rejected the view that "where a government confers a benefit it is entitled to attach whatever conditions it pleases to the receipt of the benefit."[4] Social justice-based equality rights litigation has focussed primarily on direct benefits conferred by governments, through transfer payments or social programs, and has mainly targeted the income side of the household account book, seeking to ensure that government income and benefit programs are distributed without discrimination against disadvantaged groups.[5] As we outline in this chapter, litigation in the *Boulter*[6] case took a new approach, shifting focus from household income levels to the household expenditure side of the ledger.

Under examination in *Boulter* was how the provincial government had, or had not, acted to protect low income households in their purchase of electricity from monopolistic utilities. Rather than applying concepts of substantive equality to government's obligations to provide direct income benefits through social programs, the concept of substantive equality was applied to the government's duty to ensure that disadvantaged groups had equal financial access to utilities through appropriate regulation of private actors.[7] The focus in *Boulter* shifted from income, to expenses, and from benefit provision to government regulation of private utility

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3 S 15, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Charter*].

4 *Professional Public Service of Canada v Northwest Territories* (*Commissioner*), [1990] 2 SCR 367, Sopinka J at para 90.

5 See Claire Mummé, "At the Crossroads in Discrimination Law: How the Human Rights Codes Overtook the Charter in Canadian Government Services Cases" (2012) 9 JL & Equality 103.

6 See above note 2.

7 See the discussion in Part C, below.

companies providing essential household services. Such a reorientation of perspective was essential in order to capture the full unjust and unequal impact of poverty on low income families as energy consumers.

During the 1980s in Nova Scotia, as elsewhere, anti-poverty advocates regularly appeared before provincial regulatory tribunals charged with reviewing electricity rate increase applications, to seek relief from the credit and collections policies of large monopoly providers against poor customers. Successes were seen in the area of securing due process and in mitigation of collection practices. However, while regulations approved by Nova Scotia's Public Utilities Board, pursuant to the province's *Public Utilities Act (PUA)*,[8] exhorted providers to take into account "ability to pay" in resolving payment disputes or negotiating arrears settlement agreements, the reality was that there was no relief in sight for low-income customers for whom the cost of power was simply unaffordable.

The affordability problem became critical over the past decade because of a perfect storm of inadequate income assistance rates and fuel cost increases passed onto electricity customers through rate increases. In Nova Scotia, increases in the price of electricity far surpassed the cost of living increases for social assistance recipients. Compounding this problem, social assistance shelter rates in the province had lagged far behind the actual costs of housing for years, even excluding increases in the cost of electricity. The result was that low-income households in Nova Scotia were facing "unsustainable electricity burdens" in terms of the proportion of their income required to purchase electricity. Low income customers were paying upwards of 20-30% of their net income towards heating electricity costs alone in the winter months. This left little for other essential needs, in particular access to adequate housing.

[8] *Public Utilities Act*, RSNS 1989, c 380 [*PUA*].

In the United States, similar crises with respect to unsustainable energy burdens resulted in a range of innovative low-income programs and other multifaceted "universal service programs" that provided rate assistance, crisis relief, and access to energy efficiency measures to poor households, all approved and funded by regulation rather than by tax dollars.[9] Such programs were paid for by utility customers, using a sliding scale, through mechanisms such as "systems benefit charges." These programs were thus "revenue/cost neutral" to the utilities and government. And, importantly, these programmes ensured at least some equality in access to energy, independent of income.

The objective of the *Boulter* litigation was to challenge the Nova Scotia government's approaches to energy regulation that further marginalized the poor and their ability to access energy. In the *Boulter* case,[10] we attempted to force government implementation of rate-funded, low-income electricity programs, approved and adopted through the Nova Scotia Utility and Review Board ("UARB"), using the application of constitutional equality rights protections to the provincial regulatory price-setting mechanism. In order to achieve this objective, we targeted a provision in the provincial *PUA* that required the same price be charged for all residential electricity customers and that simultaneously prohibited any accommodative pricing regime.[11] The premise of the approach taken in *Boulter* was that when governments intervene in the market to regulate corporate actors – in this case private sector utilities – they must do so in a

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[9] For an overview of low income utility funded programs in the U.S. see the overview of "rate assistance" programs included in http://liheap.ncat.org/Supplements/2012/supplement12.htm; for background on the development of utility funded low income programs in the U.S. see Chapter 7 (*Utility Affordability Programs Description and Implementation*) in Charles Harak et al., *Access to Utility Service*, 5th ed (Washington: National Consumer Law Centre, 2011) 159, including *Low-Income Rate Discount Programs* (Ch. 7.2.2), *Percentage of Income Payment Plans* (Ch. 7.2.3), *Arrearage Forgiveness* (Ch. 7.2.5); and *Systems Benefits Charges in Rstructured States* (Ch. 7.2.7).

[10] See above note 2.

[11] *PUA*, above note 8, section 67(1). See the discussion, below, at note 21 and following.

way that takes into account the needs and economic circumstances of the most vulnerable consumers.

The *Boulter* case raised the question of whether public utility legislation that fails this test adequately protects the socially marginalized in their dealings with private sector actors, given government obligations to substantive equality under section 15(1) of the *Charter*. The litigation sought to ensure that, in discharging its duty to protect Nova Scotians in their access to basic services, governing legislation must actually accommodate the needs of the most vulnerable. While the Nova Scotia courts ultimately dismissed the *Boulter* challenge, our work has raised important questions about the nature and scope of the duty imposed on government, as a regulator, in situations where its legislation and practices result in barriers (in this instance, pricing barriers) affecting the poor in their access to energy.

B. The Context of the *Boulter* Challenge

1) Electricity Regulation – An Overview

At the turn of the 19th and early 20th centuries, public utility regulation of electricity in the United States and Canada followed a similar pattern based on comparable market forces. Both were regulated at the state or provincial level through the introduction of legislation to protect the consumer, to promote economic efficiency, and to support the expansion of what was a new form of energy and a unique industry. Public utilities were, and continue to be, regarded as a business that is a natural monopoly (typically due to large demands for capital and other barriers

to entry) and one which has public interest implications for public health, welfare, or the economy.[12]

The rapid early growth in the electricity industry was marked by instability, as small producers and suppliers of electricity found it difficult to compete and were swallowed up by large corporations. Regulation of the transmission, supply, and distribution of the electricity industry in Nova Scotia, as in most jurisdictions, resulted in a single, multi-tasking, publicly owned and regulated body. In the absence of meaningful market-based competition, public utility regulation was also intended to mitigate the potential for unfair and predatory practices against consumers, who found themselves at the mercy of large corporate monopolies. Regulation in this area further recognized the failure of market-driven competition to achieve affordable prices through 'the magic' of supply and demand, creating an exception to the *laissez-faire* economic principles of the industrial revolution.

In addition to furthering economic development, the push towards universal electrification was also associated with social benefits. One commentator wrote in 1936 that: "It is now generally recognized through the civilized world that no other single factor is so conducive to the material and social welfare of any community as to have at its disposal a cheap supply of electrical power." [13] From the beginning, the concern for consumer protection and for encouraging economic growth extended beyond procedural safeguards to price regulation and affordability. The drive for "cheap" power came to be expressed in legislation as the duty to regulate prices to ensure that they remained "just and reasonable."[14]

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[12] Charles Harak et al., *Access to Utility Service*, 3d ed (Washington: National Consumer Law Centre, 2004) Appendix B.1.3.1 at 2.

[13] Donald F MacDonald, *Light in the East: Rural Electrification*, (1936) (unpublished, archived at St Francis Xavier University, Department of Extension Department), online: St Francis Xavier University Digital Collections http://collections.stfx.ca/cdm/compoundobject/collection/stfx_coady/id/1073/rec/2.

[14] See *PUA*, above note 8, ss. 19, 44, 45, 83 & 87.

The development of economic principles of utility regulation included a "cost of service" approach, which restricted profit margins and demanded that electricity utilities be publicly accountable and capable of justifying rate increase demands by demonstrating economic efficiency, prudence, and sound management of costs. Interpreting a provision in the *PUA* dating from the original statute passed in 1909, the Nova Scotia Supreme Court elaborated on the basis for the reasonableness standard:

> Customers expect a utility to supply good services at a reasonable rate. The concept of a reasonable rate is a heritage from the common law when it was called a 'reasonable price' (*pro mercede rationabili*) or 'whatever is deserving' (*quantum meruit*). The statutory element of 'just' complements the 'reasonable' test of the common law, so it can now be said that the Board must determine rates that are 'just and reasonable.' In determining a just and reasonable rate, the objective of the Board is to protect both the customer and utility, and to safeguard the overall public interest.[15]

Public utility regulation also contained principles such as "non-discrimination" in the administrative law sense. In exchange for a monopoly over production, transmission, and distribution of electricity, the regulated utility was not permitted to simply cherry pick the low-cost, easy to serve customer, but was required to establish access to service for all customers—that is, by offering similar terms to customers in similar circumstances.[16]

In Nova Scotia, the courts interpreted the powers of the public utility regulatory authority broadly. In a 1976 case the Nova Scotia Supreme Court stated:

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[15] *Re: City of Dartmouth*, [1976] NSJ No 457, NSSCAD at paras 10-11 [*City of Dartmouth*].

[16] See *PUA*, above note 8, ss 52 & 67(1) discussed at length below.

> The Nova Scotia Act, somewhat broader in scope and more intensive in its controls than the Acts of most other provinces, was the first Canadian statute of its type. It was closely similar to those of some American states, such as New Jersey, which have been described as giving an "extensive measure of control ... amounting to a complete system for the full control of all public utilities as far as it can be given by legislation". [17]

This expansive approach to the regulatory authority, reaffirmed in Nova Scotia in the 1970s based on legislation dating from the turn of the century, has continued largely uninterrupted to the present day.

2) The Failure of the Statutory Interpretation Approach to Rate Affordability

In the wake of the 1970s oil crisis, public utility regulation in the United States took a new turn. Increasing demands by vulnerable consumer groups for added protection in the form of affordability led to new initiatives, including regulated lifeline rate programs, low-income energy efficiency measures, and modified credit and collections policies.[18] Deregulation in the 1990s led to a further push for greater protection of low income consumers through the regulatory process, as a kind of safety net to the new world of competition in the arena of utility pricing in the United States. New legislative reforms were introduced to bolster low-income affordability programs in many states. As a result, over thirty-five states currently boast regulated low-income programs providing rate assistance, crisis relief, and/or energy efficiency measures.[19]

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[17] *City of Dartmouth*, above note 15 at para 8.

[18] Lifeline rates provide minimum basic service, often for vulnerable groups or for those living in poverty.

[19] LIHEAPClearinghouse, "2010 State-by-State Supplements to Energy Assistance and Energy Efficiency" online: LIHEAPClearinghouse http://liheap.ncat.org.

Two interrelated principles underlay the pressure for rate accommodation for low-income consumers. The first is the inelasticity of the demand. Because a certain amount of electricity is a basic need, it is not susceptible to price signals: i.e., even if the cost is unaffordable, consumers cannot reduce their expenditures below a minimum amount because electricity is essential to cooking, lighting, refrigeration, and, in some cases, heating. The second is energy burden, calculated as the proportion of net income required to meet electricity costs. Sustainable electricity burdens have been calculated at 3-4% of net household income for non-heating households or 6% of income for heating customers.[20]

In contrast to the United States, the field of public utility regulation in Canada saw fewer innovations and changes. While deregulation was tried in Alberta and Ontario for relatively short time periods, in the 1990s and 2000s, it was not embraced as it had been in California and other American jurisdictions. Credit and collections policies in Canada were modified in response to consumer protection concerns, but largely in order to ensure procedural fairness in the delivery of disconnection notices and in providing a process for resolution of billing disputes, without substantive write-offs or reduction in arrears. In the mid-2000s, energy efficiency programs also began to inform regulatory measures, as a means of averting the additional investment costs of expanding production.

Thus, energy rate affordability was an area that had been largely untouched and unchallenged in Canada, until a group of Nova Scotia low-income advocates and consumers, represented by Dalhousie Legal Aid Service (DLAS), intervened in a 2004 application by Nova

[20] See, for example, the expert evidence of Roger Colton referred to by the NSUARB at para. 102 of the Charter decision (*Boulter* (NSUARB), above note 2) and also Roger Colton, "Home Energy Affordability in Manitoba: A Low-Income Affordability Program for Manitoba Hydro" online: Fisher Sheehan & Colton www.fsconline.com; Impact Evaluation and Concurrent Process Evaluation of the New Jersey Universal Service Fund (April 2006), online: APPRISE Inc www.appriseinc.org.

Scotia Power Inc. for a rate increase.[21] A first approach in advancing affordability claims on behalf of low-income consumers – the one adopted by DLAS in that case – was to ask that utility regulators interpret their role in imposing "just and reasonable" rates[22] as requiring the accommodation of low-income consumers in order to ensure that rates for these customers were in fact manageable and 'just.' Interpretive reference was made to the equality-rights provision of the *Charter* as mandating the public value of substantive equality central to statutory interpretation. It was argued that such an approach was necessary in order to ensure an 'equality-consistent' interpretation and application of the statute. As DLAS formulated this submission before the Nova Scotia Utility and Review Board ("NSUARB"):

> Accordingly, it is incumbent on the Board, when exercising its discretion under s. 44 of the *PUA* to make an order that is "just", to do so in a manner which is consistent with the value of Equality. It is now well settled in law that when determining the interpretive scope of inherently open-ended terms in an *Act* (such as "just"), especially in a context where access to an essential "service" is being considered, a tribunal or court should construe the term in a way which best promotes *Charter* values. Similarly, the Board's discretion in s. 44 of the PUA to make remedial orders must be informed by and consistent with *Charter* values. The open-ended discretion in that section is to be exercised in a manner which is compliant with *Charter* values.[23]

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[21] *Re Nova Scotia Power Inc*, 2005 NSUARB 27 [*Nova Scotia Power*]. Since then in Nova Scotia, Ontario, and Manitoba, boards and courts have been asked to interpret the scope of the existing regulatory framework to set utility prices or rates based on affordability for low-income consumers; see *Advocacy Centre for Tenants-Ontario v Ontario Energy Board*, (2008) 293 DLR (4th) 684; *Re Affordable Energy Coalition*, [2009] 275 NSR (2d) 214.

[22] The NSUARB's remedial authority under the *PUA*, above note 8, is broad. Under "Orders by Board respecting rates and charges of utility," s 44 states: "The Board may make from time to time such orders as it deems just in respect to the tolls, rates and charges to be paid to any public utility for services rendered or facilities provided, and amend or rescind such orders or make new orders in substitution therefor". A similar statutory provision does not exist in the public utility legislation of Ontario or Manitoba, where jurisdictional impediments to the consideration of low income programs have not been a factor.

[23] *Nova Scotia Power*, above note 21 at 251.

This statutory interpretation claim was rebuffed by both the NSUARB[24] and the Court,[25] as requiring powers outside the scope of the Board's statutory jurisdiction. Relying on section 67 of the *PUA*[26], the NSUARB and, ultimately, the Nova Scotia Court of Appeal, concluded that the Board lacked the jurisdiction to consider either accommodation of the poor, or rate affordability, as a factor in the rate-making exercise. In the Court of Appeal's view:

> The statute does not endow the Board with discretion to consider the social justice of reduced rates for low income customers. It is not for the Board or this court to read into s. 67(1) the words: "... similar circumstances and conditions in respect of *the income level of customers and* service of the same description." It is for the Legislature to decide whether to expand the Board's purview with the italicized words.[27]

This initial foray to establish equality in energy affordability was thus unsuccessful.

C. The Constitutional Approach to Rate Affordability: Framing the *Charter* Claim in *Boulter*

1) The Equality Claim in *Boulter*

With the door to an equality-consistent application of the statute closed to low-income electricity consumers in Nova Scotia, one legal option remained: a full section 15 *Charter*

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24 *Ibid.*
25 *DLAS* (NSCA), above note 2 at paras 25, 33 & 39 [*DLAS*].
26 *PUA*, above note 8, s 67(1).
27 *DLAS* (NSCA), above note 2 at para 25.

challenge to a regime which stipulated a single price for all consumers of electrical energy, with no accommodation for the poor. There seemed little doubt as to the application of the *Charter* to a regulated price-setting regime (even where the entity being regulated was a private corporation) in light of the Supreme Court of Canada's conclusion in *Vriend v. Alberta* that: "The respondents' submission has failed to distinguish between 'private activity' and 'laws that regulate private activity'. The former is not subject to the *Charter*, while the latter obviously is."[28]

In framing the substantive claim in *Boulter*, we first had to consider what the focal point of the section 15 challenge should be. Given that the NSUARB and the Court had interpreted the legislative provision at issue to require that all residential customers pay identical rates for electricity, the question about how to frame the discrimination argument was critical. The applicable provision of the Nova Scotia *PUA* read as follows:

> 67 (1) All tolls, rates and charges shall always, under substantially similar circumstances and conditions in respect of service of the same description, be charged equally to all persons and at the same rate, and the Board may by regulation declare what shall constitute substantially similar circumstances and conditions.[29]

Was the appropriate equality claim that the 'one-price/no accommodation' rule, embedded in section 67 of the *PUA*, resulted in the poor having to spend a larger percentage of their income on electricity than others? Was it that section 67 increased their poverty? Or was it

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[28] *Vriend v Alberta*, [1998] 1 SCR 493 at para 65, Cory and Iacobucci JJ.

[29] *PUA*, above note 8.

a claim that section 67 imposed a disproportionate burden on the poor, on women and children, and on people with disabilities?

In the end, the focus of our equality argument was informed by advice from a colleague in the United States: 'Remember, the hook has got to be about equal *access* to electricity'. What our. colleague was referring to was the fact that, in most utility regimes in North America, there is a provision that assures everyone *access* to the utility service. In Nova Scotia, the provision in question, section 52 of the *PUA*, states that: "[e]very public utility is required to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable."[30] In common with other regulatory regimes throughout Canada, the Nova Scotia *PUA* has created "an economic and social arrangement dubbed the 'regulatory compact', which ensures that all customers have access to the utility at a fair price—nothing more."[31] A focus on "access" would provide the foothold for the equality argument.

The promise of regulated utilities access is that a monopoly utility such as Nova Scotia Power Inc. has a legal obligation to furnish service 'to all members of the public in Nova Scotia.'[32] This is not a trivial benefit of the *PUA*. The Nova Scotia Court of Appeal characterized the 'duty to serve all members of the public as one of the 'two great objects' of the *Act*.[33] This takes on added importance in the context of an essential service that is solely available from a monopoly provider. The protective features of public utilities law, acting

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30 *Ibid*, s 52.

31 *ATCO Gas and Pipelines Ltd v Alberta (Energy and Utilities Board)*, 2006 SCC 4 at paras 62-63 [*ATCO*]; *Nova Scotia* (*Public Utilities Board) v Nova Scotia Power Corp*, (1976) 18 NSR (2d) 692 (AD) at para 17, MacKeigan CJ [*Nova Scotia (Public Utilities Board)*].

32 Section 52 of the *PUA*, above note 8, and *Montreal Trust Co of Canada v Nova Scotia Power Inc*, [1994] NSJ No 382 (NSSC) at para 10, Palmeter ACJ [*Montreal Trust Co*].

33 *Board of Commissioners of Public Utilities v Nova Scotia Power Corporation*, (1976), 18 NSR(2d) 692 MacKeigan CJNS at para 17. See also *ATCO* above note 31, "Rate regulation serves several aims -- sustainability, equity and efficiency […] In return for this right of exclusivity, utilities assume a duty to adequately and reliably serve all customers" at paras 62-63 (emphasis added).

sometimes as a proxy for market competition and other times as a protection from the adverse consequences of profit-based provisions of essential services, are well understood within that field, but have not been examined from the perspective of the equality rights guarantees enshrined in the *Charter*.

With this as a departure point, the section 15 argument became relatively simple. The requirement of section 67 of the *PUA* that everyone pay the same for electrical energy effectively deprives protected groups of the right to equal access to electricity. By requiring everyone (including the poorest of the poor) to pay identical rates for electricity, section 67 has the effect of preventing the poor—including, disproportionately, members of other equality-seeking groups—from enjoying equal access to electricity. All others, excepting the poor, realize the section 52 guarantee of access. Therein lies the *Charter* breach. Put simply, the government had partially discharged its duty to protect consumers in their interactions with a powerful utility but, in doing so, had failed to adequately accommodate the unique needs of the poor in accessing electricity. As a consequence, the poor were effectively deprived of the legislation's promise of access to service by all members of the public in Nova Scotia..

Thus, the objective of the *Boulter* claim was to challenge the Nova Scotia government's failure to comply with its statutorily recognized duty to regulate essential utility services—especially when a utility is provided by a monopoly.[34] In *Boulter*, we affirmed that, while the existing regulatory regime worked fairly for most, it let down the poor inasmuch as the 'one-price/no accommodation' rule in section 67 created a barrier to the equal enjoyment of the access rights created by section 52 of the *PUA*. We argued that the systemic effects of section 67, and

[34] In its judgment, *Boulter* (NSCA) above note 2 at para 5, the NSCA articulated a commonly-held understanding of the underlying rationale for regulatory schemes: "the policy reason for regulation of prices and terms is that the utility as a virtual monopoly, would otherwise have an unacceptable degree of market power."

the failure to address them, constituted adverse effects or indirect discrimination on the analogous ground of 'poverty', contrary to section 15 of the *Charter*.

The *Boulter* claim crystallized the experience of our clients. Living in poverty, they faced substandard housing, were unable to meet their nutritional needs, and often experienced the dilemma to "heat or eat." Evidence presented in earlier phases of the electricity litigation had demonstrated that the effect of unaffordable electricity rates is to curtail access to electricity for those living in poverty, or subject them to unacceptable choices. Accessing electricity, meant—and means—many other compromises, but especially compromised nutritional health.[35] Low-income mothers are known, for example, to compromise their own nutritional intake in an attempt to feed their children.[36]

In this respect, public utilities law is analogous to consumer protection, human rights, or residential tenancies legislation, all of which seek to redress critical power imbalances. By stipulating many of the terms of the relationship between two private entities, in this case, the monopoly private electrical utility and the residential consumer, these forms of government intervention in the market protect the vulnerable and advance equality. Further, when government imposes such protective controls on the activities of either state or non-state actors (including private corporations) in their dealings with the vulnerable public, such legislation must not effectively burden and, thus, indirectly discriminate against members of disadvantaged

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[35] See Nova Scotia Food Security Network, *Can Nova Scotians Afford to Eat Healthy: Report on 2010 Participatory Food Costing*, (May 2011) at 23-26, online: Nova Scotia Department of Health and Wellness www.foodsecurityresearchcentre.ca.

[36] See Lynn McIntyre et al, *Hungry mothers of barely fed children: A study of the diets and food experiences of low-income lone mothers in Atlantic Canada* (Nova Scotia: Public Health Services, Capital District Health Authority, 2001).

groups. To emphasize, whether such burdening or discrimination is intentional or simply an effect is immaterial to the legally recognized harm.[37]

However, as described below, it was precisely the interface of constitutional equality rights with market pricing that appears to have been at the heart of the extraordinary judicial resistance we confronted in the *Boulter* case. While statutory human rights protections have been successfully used for decades to intervene in the labour market or in the area of consumer services, in order to ensure non-discrimination in the provision of employment or accommodation, the strictures of equality rights protections had, to this point, not been engaged against the archetype of regulated market pricing.

2) The International Lens: the Duty to Protect

There is an interesting and intriguing link between the undoubted applicability of the *Charter*'s equality guarantees to public utilities law— in particular the 'right to equal protection' (referred to by Bertha Wilson J as one of the 'four equalities' in section 15), and the 'duty to protect' in international human rights law.[38] This connection brings into clearer focus the principle underlying our litigation in the *Boulter* case: that within the protective context of public utilities regulation

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[37] An important statement from the Supreme Court of Canada concerning the significance of carrying out an effects-based assessment is found in *CN v Canada* (*Human Rights Commission*), [1987] 1 SCR 1114 [*Action Travail*] in which the Court affirmed that: "…the imputation of a requirement of "intent", even if unrelated to moral fault, failed to respond adequately to the many instances where the effect of policies and practices is discriminatory even if that effect is unintended and unforeseen" at para 27 [*Action Travail*]. Shortly after *Action Travail*, in its decision in in *Robichaud v The Queen*, [1987] 2 SCR 84 at paras 10-1, the Court felt the need to, yet again, indicate that in the consideration of human rights claims it must be remembered that: "...the Act is directed to redressing socially undesirable conditions quite apart from the reason for their existence...(and)... the central purpose of a human rights Act is remedial -- to eradicate anti-social conditions without regard to the motives or intention of those who cause them."

[38] *R v Turpin*, [1989] 1 SCR 1296 at para 43.

governments in Canada have a particular duty to protect vulnerable groups when government regulates in areas impacting social and economic interests, and that this duty has constitutional status located within section 15 of the *Charter*.

The prevailing paradigm[39] in international human rights law is that all human rights impose a three-fold obligation on state parties: the duties to respect, protect, and fulfill, referred to colloquially as 'the typology of obligations.' As one commentator explains:

> The obligation to respect requires the State, and thereby all its organs and agents, to abstain from doing anything that violates the integrity of the individual or infringes on her or his freedom, including the freedom to use the material resources available to that individual in the way she or he finds to satisfy basic need. The obligation to protect requires from the State and its agents the measures necessary to prevent other individuals or groups from violating the integrity, freedom of action or other human rights of the individual including the prevention of infringements of his or her material resources. The obligation to fulfil requires the State to take the measures necessary to ensure for each person within its jurisdiction opportunities to obtain satisfaction of those needs, recognized in the human rights instruments, which cannot be secured by personal efforts.[40]

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[39] This approach, while still dominant, is undergoing erosion at the margins, as well as internal elaboration. See for example, Ida Elisabeth Koch, "Dichotomies, Trichotomies or Waves of Duties?" (2005) 5:1 Human Rights Law Review 81. The UN Committee on Economic, Social and Cultural Rights has explained that the third element of the 'respect, protect, fulfill' typology should actually be understood as incorporating "both an obligation to facilitate and an obligation to provide," Office of the High Commissioner for Human Rights, *General Comment No. 12: The Right to Adequate Food (Art 11 of the Covenant)*, UNCESCOR, UN Doc E/C.12/1999/5, (1999) at 15 [*General Comment No. 12*].

[40] Asbjørn Eide, "Realization of Social and Economic Rights and the Minimum Threshold Approach" (1989) 10 HRLJ 35 at 37; Henry Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy*, 2nd ed (Princeton: Princeton University Press, 1996) at 160; *General Comment No. 12*, above note 39.

Thus, if we look at the right to health under international human rights law, the UN Committee on Economic, Social and Cultural Rights (CESCR) has stated that the state's duties to protect are extensive. For example, in the area of health policy the CESCR has affirmed that:

> Obligations to protect include, *inter alia*, the duties of States to adopt legislation or to take other measures ensuring equal access to health care and health-related services provided by third parties; to ensure that privatization of the health sector does not constitute a threat to the availability, accessibility and quality of health facilities, goods and services; to control the marketing of medical equipment and medicines by third parties; and to ensure that medical practitioners and other health professionals meet appropriate standards of education, skill and ethical codes of conduct.[41]

The UN Human Rights Committee has also commented on the duty to protect arising under the *International Covenant on Civil and Political Rights*[42] and, in particular, the *ICCPR*'s own equality-rights provision:

> [T]he positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities....The Covenant itself envisages in some articles certain areas where there are positive obligations on States Parties to address the

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[41] Committee on Economic, Social and Cultural Rights, UNCESCR, *General Comment 14: The right to the highest attainable standard of health (Art 12 of the Covenant)*, UNCESCROR, 22nd Sess, UN Doc E/C.12/2000/4 (2000) at para 35 [*General Comment 14*].

[42] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47.

> activities of private persons or entities....In fields affecting basic aspects of ordinary life such as work or housing, individuals are to be protected from discrimination within the meaning of article 26.[43]

The equality rights argument we adopted in *Boulter* reflected this key international principle. We argued, in challenging s 67 of the *PUA*, that the concept of substantive equality in Canadian equality rights jurisprudence provides guarantees analogous to the 'duty to protect' underinternational human rights law.[44] We argued that the century-old provision of the *PUA*, which had been enacted to ensure equality of treatment, failed to adequately protect the equality of enumerated and analogous groups under section 15. This was indirect discrimination on the basis of poverty in the enjoyment of access to electricity as guaranteed under section 52 of the *PUA*. By enacting a rule that essentially says 'unless you can pay the same as everyone else, you will not be entitled to electricity in Nova Scotia', the legislature granted access to all except those living in poverty.[45] The Legislature discriminatorily permitted income-sorted access to electricity, forcing low income households into unacceptable choices as to whether to eat or heat. And the right to access set out in the legislation is in effect discriminatorily granted to some and denied to others.

One of the ironies of this case is that, from a historical perspective, section 67 of the *PUA* was always understood as a standard anti-discrimination provision—a principle contained in all public utilities statutes. It provides that all "tolls, rates and charges" will "be charged equally to all persons and at the same rate".[46] The principle codified in section 67 of the *PUA* has

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[43] Human Rights Comittee, *General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UNHRCOR, 2004, CCPR/C/21/Rev.1/Add.13, at para 8.

[44] *PUA*, above note 8.

[45] *Ibid.*

[46] *Ibid*, s 67(1).

its origins in provincial legislation dating from 1913.[47] Seen in this way, the *Boulter* litigation presented a clash between two distinct conceptions of *discrimination*: the traditional, administrative-law notion of identical treatment crystallized in section 67 of the *PUA*, on the one hand, and the substantive conception of equality enshrined in section 15 of the *Charter*, on the other.[48] Thus, the Court was being asked to decide whether section 67's insistence on identical treatment for members of the residential rate-class was in conflict with and, if so, would be trumped by requirement of substantive equality under section 15.

3) 'Poverty' and alternative grounds of discrimination in *Boulter*

An important hurdle had to be crossed in this litigation. Continuing uncertainty around judicial recognition of 'poverty' as an analogous, stand-alone, ground of discrimination meant that our pleadings in *Boulter* claimed, first, that poverty qualifies as an analogous ground of discrimination. But we also included an alternative adverse effect discrimination claim, arguing that, despite being facially-neutral, the impugned provision of the *PUA* resulted, and results, in many vulnerable Nova Scotians being unable to access electricity. Section 67 thus disproportionately affects members of groups possessing, in many cases, several intersecting personal characteristics expressly protected by section 15 of the *Charter*. To support these claims, considerable evidence was introduced before the regulatory tribunal.

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[47] *Public Utilities Act*, SNS 1913, c 1, s 19: "All tolls, rates and charges shall always, under substantially similar circumstances and conditions in respect to service of the same description, be charged equally to all persons and at the same rate, and the Board may by regulation declare what shall constitute substantially similar circumstances and conditions. The taking of tolls, rates and charges contrary to the provisions of this section and the regulations made pursuant thereto is prohibited and declared unlawful."

[48] The Supreme Court of Canada has drawn attention to the conceptual distinction between administrative law and human rights understandings of 'discrimination.' See *Shell Canada Products Ltd v Vancouve*r (*City*), [1994] 1 SCR 231 at para 58; see also *Greater Vancouver Sewerage and Drainage District v Ecowaste Industries Ltd*, 2006 BCSC 859 at paras 287-88.

All of the claimants told their stories: their lives in poverty, the struggles they faced in trying to obtain electricity, the desperation they felt in their attempts to make ends meet, and the systemic indifference they encountered. They identified themselves as women with disabilities, single parents, racialized women, and seniors.[49] The claimants' personal testimony was supplemented by the evidence of nine experts who established, *inter alia*, that poverty is similar to other grounds of discrimination prohibited by section 15 as poverty has served as an historical basis of disadvantage, is accompanied by pervasive stereotyping,[50] and that people living below the poverty line (including those in receipt of social assistance) cannot afford a nutritious diet while also paying for shelter and other basics.[51] Significantly, much of this latter evidence came from the provincial government's own sources. In addition, an expert in social policy statistics provided evidence of the overrepresentation -- dramatically in some cases -- of members of equality-seeking groups, such as single-mothers, people with disabilities, and visible minorities among the poor.

Finally, two experts gave evidence on the experience in the United States of regulated utilities pricing designed to accommodate low-income people. A United States-based consultant (retained by the Nova Scotia Utilities and Review Board-appointed 'Consumer Advocate') gave evidence in the area of "regulatory policy, rate design and low-income rates."[52] This witness established that accommodative, income-based rate regimes are commonplace in the United

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[49] The evidence of one of the claimants (Carvery) and many of the experts is on the NSUARB web page. Go to the NSUARB's web page for its "Cases & Evidence": http://uarb.novascotia.ca/fmi/iwp/cgi?-db=UARBv12&-loadframes and enter the case number "M05474" into the "Find Cases by Case Number" field. A link to the case appears which will lead you to the pleadings, decisions, Orders and the evidence which are available for download.

[50] See the expert evidence by Bruce Porter filed with the UARB in *Boulter* (NSUARB), above note 2, which served as an important part of the evidentiary foundation for the contention that 'poverty' is an analogous ground of discrimination. Porter's evidence can be found at: Social Rights CURA www.socialrightscura.ca.

[51] The expert evidence of Dr. Patricia Williams relied on her published work for these conclusions; see: *Working together to build food security in Nova Scotia* (2007), online: Nova Scotia Canada www.gov.ns.ca and *Healthy Eating Nova Scotia* (2005), online: Nova Scotia Canada www.gov.ns.ca.

[52] See the expert evidence of Nancy Brockway in *Boulter* (NSUARB), above note 2 referred to at paras 79-80.

States, where most states have rate structures designed to ensure substantive access to utilities by the poor.[53] The *Charter* claimants' own expert was personally involved in the design of many accommodative programs in the United States and spoke to the various ways in which the income-based rates can operate.[54]

This evidence, which was neither seriously challenged nor rebutted in any way, established two significant points. First, Nova Scotians who are living in poverty[55]simply do not have sufficient incomes to obtain minimally adequate food, clothing, and housing (including utilities). Second, the poor in Nova Scotia are disproportionately made up of members of groups protected under section 15 of the *Charter*. Expert statistical evidence from Dr. Richard Shillington showed that women, single parents and especially single-mothers, people with disabilities, Black Nova Scotians, children, and the elderly are overrepresented among the poor in Nova Scotia.

In contrast to the claimants' extensive record, there was only a single sentence of evidence[56] adduced by the Province of Nova Scotia—to the effect that the Province was unaware of any income-based utility rates in Canada.[57] As indicated earlier, the claimants' experiences of either going without electricity for lights or heating, or of having to make unacceptable choices to either heat or eat, was not rebutted. This claimant evidence, along with that of the experts,

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[53] *Ibid*.

[54] See the expert evidence of Roger Colton in *Boulter* (NSUARB) above note 2 at paras 57 et seq.

[55] Using the generally accepted (including by the Respondent Province of Nova Scotia) Statistics Canada Low Income Cut-Off ("LICO") criteria for measuring poverty. A 2007 provincial government background study on poverty reduction calls the LICOs the "yardstick" in the measurement of poverty.

[56] As with all regulatory hearings in Nova Scotia, stakeholders and members of the public received standing to make submissions. Although all electricity customers opposed Nova Scotia Power Inc.'s application for a rate increase, none opposed our cross application for a *Charter* remedy, a universal service program to assist the poor. However the role of opposition was taken not by the power utility, but by the Province of Nova Scotia, also an intervener, which took the sole lead in opposing our application.

[57] Respondent's evidence of Scott McCoombs referred to by the NSUARB in *Boulter* (NSUARB), above note 2 at para 109.

was in fact accepted by the tribunal.[58] Indeed, the claimants' evidence of the inadequacy of social assistance rates, founded on government supported research, was buttressed by statements from a former Premier admitting that social assistance rates were inadequate.[59] Consequently, it seemed that the evidentiary basis, as well as the legal argument, for a finding of unconstitutional discrimination, were strongly established.

D. The outcome of the constitutional challenge in *Boulter*

1) The Nova Scotia Utility and Review Board decision

In its decision in *Boulter*, the Nova Scotia UARB expressly accepted the evidence of the *Charter* claimants with respect to their inadequate incomes and the struggles they face in attempting to obtain and maintain electricity and/or having to choose between heating and eating.[60] However, the NSUARB dismissed the claim that section 67 (1) of the *PUA* violated the equality rights provisions in section 15 of the *Charter*. The Board held that, on its face, section 52 of the *PUA*, which mandated access to service for all, did not provide a "right to affordable electricity" to anyone and, therefore, there was no distinction in the enjoyment of the accessibility protections in section 52 of the *Act* between the affluent and the poorest of the poor. In the view of the NSUARB, both enjoyed equal treatment.[61] As the Board put it:

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[58] *Ibid*, at para 160.

[59] See "Welfare rates likely to get boost in next budget" , *Chronicle Herald* (Halifax, Nova Scotia), December 29, 2005, p. B4, attached as Exhibit "H" to the expert evidence of Paul O'Hara in *Boulter* (NSUARB), above note 2 [Exhibit "H"].

[60] *Boulter* (NSUARB), above note 2 at para 160.

[61] *Ibid*, at paras 157-58. Of course, the *Charter* claimants had at no point assumed or claimed that the *PUA* provides that electricity rates would be set based on ability to pay. Had there been any doubt on this point, the matter was made clear after the Court of Appeal's earlier decision in *DLAS* (NSCA), above note 2. Indeed, had affordability in accessing service been a feature of the existing *PUA*, there would obviously have been no need to

> [Section] 67(1) does not confer affordable electricity rates or rates based on ability to pay on any group, including the comparator group. It cannot be said that affordable electric service or service in accordance with ability to pay is provided to either comparator group. The position of the Claimants seems to assume that either or both of these benefits is a benefit of law, that one comparator group receives and that the benefit has been denied the Claimants based on their personal characteristics. The Board does not accept this argument.[62]

In short, the NSUARB considered that the facial neutrality of the *PUA* and, in particular, section 67's 'non-discrimination' provision —with its rigid prohibition of accommodation—was not problematic under section 15 of the *Charter*. The Board found section 67 to be in perfect compliance with the *Charter*.

The Board's error lay in its failure to drill down past the textual identical treatment required by section 67 of the *PUA* in order to assess whether despite such a guarantee substantive inequality resulted. The NSUARB failed to conduct any adverse effects analysis in order to ascertain whether governmental regulatory intervention effectively resulted in unequal access to regulated electricity. As McLachlin J underscored in *Meiroin*, in the context of a statutory human rights case (but no less apt here): "Interpreting human rights legislation primarily in terms of formal equality undermines its promise of substantive equality and prevents consideration of the effects of systemic discrimination."[63] As the Supreme Court also underscored in *Andrews v Law Society of British Columbia*: "It must be recognized at once … that every difference in

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file an elaborate *Charter* challenge to the rate-setting regime in the *Act*; the claimants could simply have asked the Board to set affordable rates, above note 32.

62 *Boulter* (NSUARB), above note 2 at para 158.

63 *British Columbia* (*Public Service Employee Relations Commission*) *v British Columbia Government and Service Employees' Union* (*BCGSEU*) (*Meiorin Grievance*), [1999] 3 SCR 3 at para 41 [*Meiorin*].

treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality."[64]

2) The Nova Scotia Court of Appeal Judgment in *Boulter*

On appeal before the Nova Scotia Court of Appeal, we again argued that the insistence in section 67 of the *PUA* that everyone must pay the same rate, along with the rigid prohibition of any accommodation in the setting of electricity rates, created effective unequal access to electricity. This, we argued, constituted adverse effect discrimination on the analogous ground of 'poverty,' contrary to section15 of the *Charter*. In the alternative, the Appellants claimed that the 'one price-no accommodation rule' disproportionately affected members of equality-seeking groups with multiple identification under enumerated and analogous grounds under s. 15(1) in their access to electricity in Nova Scotia.

The Court of Appeal decision[65] began by refusing to follow earlier rulings from Nova Scotia courts that discrimination on the analogous ground of 'income' or 'poverty' fell within the scope of section 15.[66] Precedents from elsewhere in Canada were equally rejected.[67] Instead, the

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64 [1989] 1 SCR 143 at 164 [*Andrews*].

65 *Boulter* (NSCA), above note 2.

66 See *Dartmouth/Halifax County Regional Housing Authority v Sparks*, (1993) 101 DLR (4th) 224 at 232-34; *R v Rehberg* (1993), 111 DLR (4th) 336 at para 83 (NSSC); *Tupper v Nova Scotia* (*AG*), [2007] NSJ No 341 at para 27: "In cases of well-defined and serious poverty, some courts have found an analogous ground and substantive discrimination. Social assistance recipients were recognized as an analogous class in *Falkiner v Ontario (Minister of Community and Social Services)*, 159 OAC 135 at para 73 [*Falkiner*] and in Kelly J's decision in *R* v *Rehberg*, [1994] NSJ No 35 (SC). In *Sparks v Dartmouth/Halifax County Regional Housing Authority*, [1993] NSJ No 97 (CA) our Court of Appeal, constituted by a panel of five, overturned a previous holding and, in doing so, found the legislation in question discriminated "on the basis of race, sex and income" (para 21). On the third ground, the court found that eligibility for public housing was a sufficient indication of poverty."

Court relied on the Supreme Court of Canada's reasoning in *Corbiere v Canada*[68] as a basis for deciding that 'poverty' is not an analogous ground of discrimination within the meaning of section 15 of the *Charter*.[69] In the Court's analysis:

> Poverty is a clinging web, but financial circumstances may change, and individuals may enter and leave poverty or gain and lose resources. Economic status is not an indelible trait like race, national or ethnic origin, color, gender or age. As to the second test, the government has a legitimate interest, not just to promote affirmative action that would ameliorate the circumstances attending an immutable characteristic, but to eradicate that mutable characteristic of poverty itself. That objective is shared by those living in poverty.... Economic status, poverty or wealth, is not an adopted emblem of identity like religion, citizenship or marital status, that the individual observes peacefully free of government meddling. Poverty *per se* does not suit the legal pattern for an analogous ground under *Corbiere*'s formulation.[70]

Having dismissed 'poverty' as an analogous ground of discrimination, the Court of Appeal went on to address the alternative equality claim in *Boulter*, which focussed on the adverse impact of section 67 of the *PUA* on groups identified by either analogous or enumerated grounds of discrimination in section 15. The Court started by examining the question of 'comparator groups.' In the process, it rejected the comparator groups proposed by the claimants, notwithstanding they had been accepted by all parties during the *Charter* hearing

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67 *Falkiner*, above note 66 at paras 84-93. See also *Federated Anti-Poverty Groups of British Columbia v British Columbia* (*AG*) (1991), 70 BCLR (2d) 325 (BCSC) at 354 finding that "persons receiving income assistance" constitute a group protected by s 15; Martha Jackman, "Constitutional Contact with the Disparities of the World: Poverty as a Prohibited Ground of Discrimination Under the Canadian *Charter* and Human Rights Law" (1994) 2:1 Rev Const Stud 76 at 77-101 [Jackman].

68 *Corbiere v Canada* (*Minister of Indian and Northern Affairs*), [1999] 2 SCR 203.

69 *Boulter* (NSCA), above note 2 at paras 32-34.

70 *Ibid*, at para 42.

before the NSUARB, by the Board itself in its decision and, once again, by all parties in their written submissions to the Court of Appeal. Throughout the earlier proceedings, the accepted axis of comparison in terms of access to electricity had been 'residential consumers of electricity in Nova Scotia who are living in poverty compared with those who are not living in poverty.' This comparator group flowed intuitively from a claim by poor people that, while the requirement in section 67 of the *PUA* that everyone pay the same rate worked for many Nova Scotians, it had the effect of excluding the poor in accessing electricity.

Based on its rejection of 'poverty' as an analogous ground of discrimination, the Court of Appeal went on to insist that the proper axis of comparison in *Boulter* could not be defined on a basis that it had rejected. Instead the Court held that the comparator group analysis ought properly to focus on comparing the financial difficulties in accessing electricity of different groups of poor people *with each other*.[71] The Court repeatedly[72] stated that it was required to apply the 'mirror comparator group' analysis adopted by the Supreme Court of Canada in *Hodge v Canada.*[73] Under that approach, the comparator group should "mirror the characteristics of the claimant or claimant group relevant to the benefit or advantage sought, except for the personal characteristic related to the enumerated or analogous ground listed as the basis of the discrimination."[74] Thus the Court of Appeal affirmed that:

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[71] The Court of Appeal applied *Hodge* to require that the comparator group must itself be based on an enumerated or analogous ground of discrimination in section 15; see *Hodge v Canada (Minister of Human Resources Development)*, 2004 SCC 65 [*Hodge*]; *Boulter* (NSCA), above note 2 at paras 57-67.

[72] *Boulter* (NSCA), above note 2 at paras 56, 61 & 67.

[73] *Hodge*, above note 71.

[74] *Ibid* at para 67.

> [In the context of] the claimants' submission based on sex, one would compare a female claimant under LICO[75] to male consumers of residential power also under LICO. To consider the disability claim, one would compare a disabled claimant under LICO with non-disabled consumers of residential power under LICO. And so on, for the other claimant categories in this s. 15(1) claim.[76]

It is readily apparent that this kind of *intra-poverty* comparison would lead to the predictable result that all poor people, whether men or women, able-bodied or disabled, face similar obstacles in paying for electricity. In short, *all* people in poverty must decide whether to heat or eat. Such circular reasoning, illustrated by the following quote, doomed the claim:

> Both the complainant and comparator groups have substantial numbers of persons whose power costs add to their unwieldy burden of living expenses, forcing prioritization among basic needs. The *PUA* does not treat the complainants differently than it treats the comparator groups, either directly or by adverse effect, based on sex, race, ethnic or national origin, age, disability or marital status.[77]

Because of the presence of "substantial numbers" of people *among the poor* who were not members of the disadvantaged groups identified by the claimants, but who also faced severe barriers in their ability to access electricity, the adverse impact claim in *Boulter* was rejected by the Court[78] However, the observation that substantial numbers of poor people outside the

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[75] The Court's reference to "LICO" is to the Statistics Canada "Low Income Cut-Offs", a statistical tool widely used by governments and others in Canada as a poverty line. As used here, "under LICO" would refer to living on an income below the poverty line; *ibid* at para 46.

[76] *Boulter* (NSCA), above note 2 at para 67.

[77] *Ibid* at para 83.

[78] *Ibid* at paras 68 & 83.

claimant group were similarly disadvantaged is irrelevant in the determination of an adverse effects claim. The Court not only avoided addressing the systemic discrimination claim entirely, it also failed to recognize that indirect discrimination can occur even though not all members of the claimant group are disadvantaged within the meaning of section 15.

The Court's reasoning in *Boulter* erased the stark realities of income inequality and income inadequacy from view in three ways. First, its rejection of 'poverty' as a ground of discrimination permitted the Court to strip aching income inadequacy from the 6,000 pages of evidence before it. Second, the Court conducted a de-contextualized and pointless comparison of, for example, the position of men and women living in poverty vis-à-vis each other's difficulties in accessing electricity. Finally, the Court's reasoning failed entirely to come to grips with adverse effect discrimination.[79] Insofar as the Court even referred to the statistical evidence showing that poverty is not experienced randomly in our society, it dismissed this with its observation that a "substantial number" of poor men or able-bodied people in poverty face similar obstacles to accessing electricity. The Court failed to appreciate that the relevant question was whether members of equality seeking groups are disproportionately represented among the poor struggling with 'heat or eat' problems. It is irrelevant whether or not some able-bodied men also live in poverty in Nova Scotia.

Dianne Pothier has pointed out that, if the presence of 'significant numbers' of members from the comparison group is sufficient to defeat an adverse effects claim, then section 15 violations will turn solely on whether direct, rather than systemic, discrimination has occurred. Pothier helpfully distinguishes between two kinds of adverse effect claims:

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[79] This test was first enunciated by the Supreme Court of Canada in *Ontario* (*Human Rights Commission*) *v Simpsons Sears Ltd*, [1985] 2 SCR 536 [*O'Malley*]. In *O'Malley*, the Court cited the seminal US case of *Griggs v Duke Power Co*, (1971) 401 US 424, involving a screening test for job applicants that served to eliminate a disproportionate number of Black job applicants, while also eliminating some white job applicants.

> Although they are both instances of adverse effects discrimination, there is a difference between *O'Malley* as a *categorical exclusion* case (all observant Seventh Day Adventists were unable to work on Saturdays) and *Meiorin* as a *disproportionate impact* case (although women disproportionately failed the test compared to men, some women passed the test). In the disproportionate impact cases, it cannot be that the comparison is with those who face the same consequences as the claimant(s)—in *Meiorin* men who failed the aerobic fitness test—because that would preclude ever finding discrimination in disproportionate impact cases.[80]

Pothier then points to the flaw in the Court of Appeal's reasoning in *Boulter* more specifically:

> On [the NSCA's *Boulter*] analysis, only in adverse effects cases of categorical exclusion (where *only* the claimants faced the consequences) could a comparator be identified so as to successfully claim discrimination ... However, in a disproportionate impact case, there are, by definition, some outside the claimants' category who face the same consequences as the claimants. If, in *Boulter*, there is no discrimination because both disabled and non-disabled persons face inability to pay because of poverty, then *Meiorin* was wrongly decided; both men and women who failed the aerobic fitness test were subject to termination of employment, meaning no discrimination.[81]

[80] Dianne Pothier, "Tackling Disability Discrimination at Work: Towards a Systemic Approach" (2010) 4 MJLH 17 at 35 (emphasis added).
[81] *Ibid* at 36.

Having stripped 'poverty' from the primary section 15 claim in *Boulter*, the Court of Appeal's 'see no evil, hear no evil' approach to issues of poverty means that barriers to accessing electricity disproportionately experienced by women, by people with disabilities, by newcomers to Canada, and by Black Nova Scotians remain untouchable. Instead of seeing the fact that single mothers are almost four times more likely to live in poverty than one would expect if poverty occurred randomly, the Court's comparisons led it to the innocuous conclusion that everyone who is poor experiences similar barriers accessing electricity, including men who are poor.

An application for leave to appeal the Court of Appeal's decision was denied by the Supreme Court of Canada, thus ending the *Boulter* claim.[82] It is important to note, however, that since the Court of Appeal's ruling in *Boulter*, the Supreme Court of Canada has rethought the doctrinal elements so critical to the unfortunate findings of the Court of Appeal. The *Withler*[83] decision critiques "mirror" comparator group analysis from *Hodge*. This is an important development as that analysis has frequently been used by government lawyers and lower courts to defeat substantive equality claims of the kind advanced in *Boulter*.[84] In *Withler*, the Supreme Court states bluntly that: "use of mirror comparator groups as an analytical tool may mean that the definition of the comparator group determines the analysis and the outcome."[85] The Court warned that short-circuiting section 15 claims at a preliminary stage had the effect of marginalizing or eliminating full consideration of the discrimination issues raised.[86] This seems highly appropriate as a criticism of *Boulter*.

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82 *Denise Boulter v Nova Scotia Power Incorporated and Attorney General of Nova Scotia; Yvonne Carvery, Wayne MacNaughton and Affordable Energy Coalition v Nova Scotia Power Incorporated and Attorney General of Nova Scotia*, leave to appeal to SCC refused, 33124 (10 September 2009).

83 *Withler v Canada* (*AG*), 2011 SCC 12 [*Withler*].

84 See the cases discussed in: Daphne Gilbert & Diana Majury, "Critical Comparisons: The Supreme Court of Canada Dooms Section 15" (2006) 24 Windsor YB Access Just 111.

85 *Withler*, above note 83 para 56.

86 *Ibid*, at para 56.

The Supreme Court of Canada accepted the criticisms of numerous scholars in the course of addressing and explaining, at length, why the now-discredited mirror comparator group approach undermined substantive equality and ought not to be applied. The Court summarized the flaws in the *Hodge* 'mirror comparator' groups approach in the following terms:

> … a mirror comparator group analysis may fail to capture substantive inequality, may become a search for sameness, may shortcut the second stage of the substantive equality analysis, and may be difficult to apply. In all these ways, such an approach may fail to identify — and, indeed, thwart the identification of—the discrimination at which s. 15 is aimed.[87]

While comparison remains an element of a section 15 claim, the Supreme Court of Canada has rejected the formality and rigidity of the mirror comparator approach.[88] It has refreshed the principles that are to guide a court's comparison analysis in the determination of equality claims. As the Court explained in *Withler*:

> It is unnecessary to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground the discrimination. Provided that the claimant establishes a distinction based on one or more enumerated or analogous grounds, the claim should proceed to the second step of the analysis. This provides the flexibility required to accommodate claims based on

[87] *Ibid*, at paras 55-60.

[88] For a critical assessment of *Withler*, see Jennifer Koshan & Jonnette Watson Hamilton, "Meaningless Mantra: Substantive Equality after Withler" (2011) 16:1 Review of Constitutional Studies 31.

intersecting grounds of discrimination. It also avoids the problem of eliminating claims at the outset because no precisely corresponding group can be posited.[89]

E. Conclusion

In the wake of the Nova Scotia Court of Appeal's judgment in *Boulter*, one is left to ponder: what went so wrong in this claim and how could things have turned out differently? Clearly, a key factor in the *Boulter* case was the Court's negative view of 'poverty' as an analogous ground of discrimination. The Court's approach to this issue foreshadowed its resistance to the broader equality rights claim, based on the recognized grounds of discrimination under section 15. There is support from Nova Scotian and other Canadian courts, law reform bodies and scholars[90] for the recognition of 'poverty' as a prohibited ground of discrimination under the *Charter*. All provinces and territories in Canada have provided protection, under their human rights legislation, from discrimination because of either 'source of income', 'receipt of public assistance', or 'social condition'.[91] At a statutory level, this then is a national consensus that discrimination against poor people is endemic and requires remediation through fundamental

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89 *Withler*, above note 83 at para 63.

90 Jackman, above note 67; Canadian Human Rights Act Review Panel, *Promoting Equality: A New Vision* (Ottawa: Department of Justice, 2000) at 106 [CHRA Review Panel]. Cf *R v Banks*, 2007 ONCA 19; *Federated Anti-Poverty Groups of BC v Vancouver* (*City*), 2002 BCSC 105; *Dunmore v Ontario* (*AG*) (1997), 155 DLR (4th) 193 at para 217, affd (1999), 182 DLR (4th) 471 (Ont CA), rev'd [2001] SCJ No 87 (on s 2(b) grounds, not on s 15(1)); *Masse v Ontario* (*Ministry of Community and Social Services*) (1996), 134 DLR (4th) 20 at 45 (Ont Div Ct); *Polewsky v Home Hardware Stores*, [2003] OJ No 2908 at para 24. Since *Boulter*, additional courts have cited it for the principle that poverty is not an analogous ground of discrimination: *Sahyoun v Ho*, 2011 BCSC 567 at para 56; *Mackie v Toronto* (*City*), 2010 ONSC 3801 at para 69; *PD v British Columbia*, 2010 BCSC 290 at para 155, and *Toussaint v Canada* (*Minister of Citizenship and Immigration*), 2009 FC 873 at para 76.

91 In *Andrews*, above note 64 at para 38, *Egan v Canada*, [1995] 2 SCR 513 at para 176, and *Miron v Trudel*, [1995] 2 SCR 418 at paras 148-49, the Supreme Court of Canada has stated that the interpretation of section15 builds on the body of legislation and jurisprudence from the human rights field. Thus, recognition of a ground as analogous will be informed by whether that ground, or a similar ground, has been included in human rights legislation.

human rights legislation.[92] In addition, United Nations bodies have explicitly recognized 'poverty' as a basis of discrimination under international human rights law[93] which, as the Supreme Court of Canada has repeatedly affirmed, bears directly on the interpretation of the Canadian *Charter*.[94] The Nova Scotia Court of Appeal's complete failure to address these domestic and international sources, all of which support acceptance of 'poverty' as a prohibited ground of discrimination, is a further problematic aspect of the *Boulter* decision.

From the experience in *Boulter*, it would also appear that courts involved in determining poverty-focused claims are still reluctant to embrace adverse effects discrimination—especially the sort proven by disproportionate impact. The Court of Appeal's section15 analysis in *Boulter* certainly marks what can be seen as a historic low point in the use of comparator-group analysis to trump substantive equality claims. On the other hand, it is tempting to speculate, in light of the Supreme Court of Canada's abandonment of formalistic comparator group analysis in *Withler*, whether a similar claim would be decided differently now.

It is worth noting that it was the provincial government, rather than Nova Scotia Power, which opposed the equality rights claim in *Boulter*: vigorously resisting the application of adverse effects analysis generally and the analogous ground of poverty in particular. Yet the proposal for a rate-funded electricity program imposed no additional financial burdens on government or taxpayers, so the motive for the government's position must be found elsewhere.

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92 Only the *Canadian Human Rights Act*, RSC 1985, c. H-6, lacks a poverty/social condition ground of discrimination; see CHRA Review Panel, supra note 90 at 106.

93 See the *General Comment* issued by the UN Committee on Economic, Social and Cultural Rights regarding discrimination, especially as it relates to discrimination on the basis of 'social and economic situation': "Individuals and groups of individuals must not be arbitrarily treated on account of belonging to a certain economic or social group or strata within society. A person's social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatization and negative stereotyping which can lead to the refusal of, or unequal access to, the same quality of education and health care as others, as well as the denial of or unequal access to public places," UNCESCR, *General Comment 20: Non-discrimination in economic, social and cultural rights (Art 2 of the Covenant)*, UN Doc E/C12/GC/20 (2 July 2009) at para 35.

94 See, for example, *Divito v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 at paras 22-23 and also Bruce Porter, Chapter 1.

Indeed, to the extent that a rate-funded program would have decreased the pressure to improve government social assistance rates, one could argue that it was actually against government's immediate pecuniary interests to oppose such a program.

This leaves the substantive equality rights claim and, in particular the inclusion of 'poverty' as an analogous ground under section 15 of the *Charter*, as the most likely target of the Nova Scotia government's opposition in *Boulter*.[95] Despite the fact that a universal service program would have cost the government nothing, and actually provided a non tax-funded approach to "poverty reduction", the ideological and jurisprudential opposition to such an expansion in the field of equality rights proved more powerful than the achievement of fiscal and social policy goals. As to the provincial government's role in opposing the right claim, as Sujit Choudhry commented in relation to the Supreme Court of Canada's decision in *Chaoulli v. Quebec (Attorney General)*: "It is impossible to say whether a class bias, unconscious or otherwise is at work. But, as they say in politics, the optics are bad."[96] In the end, governments' duty to effectively protect those within its borders, especially the most vulnerable, must comply with the requirements of substantive equality. Contrary to the problematic reasoning and the disappointing outcome in *Boulter*, equality must trump ideology if Canada is to meet its domestic and international human rights obligations towards people living in poverty, and, most especially, towards low income electricity consumers in Nova Scotia.

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[95] See the comments of counsel for the utility cited in the *Lawyers Weekly* coverage of the NSCA's *Boulter* decision: "...the point that is of national significance is that the court has firmly rejected the argument that poverty itself is a characteristic that has constitutional protection from discrimination, analogous to the characteristics which are named in the *Charter of Rights*," *Lawyers Weekly* (6 March 2009) at 5.

[96] Sujit Choudhry, "Worse than Lochner ?" in Colleen M. Flood, Kent Roach & Lorne Sossin, eds, *Access to Care, Access to Justice: The Legal Debate Over Private Health Insurance in Canada* (Toronto: University of Toronto Press, 2005) 75 at 95.