NOVA SCOTIA COURT OF APPEAL

Citation: Boulter v. Nova Scotia Power Incorporated, 2009 NSCA 17

Date: 200900213
Docket: CA 292954
Registry: Halifax

Between:

Denise Boulter, Yvonne Carvery, Laura Lannon,
Wayne MacNaughton, Karan Whitman

Appellants

-and-

Affordable Energy Coalition

Appellant

-and-

Nova Scotia General Government and Employees Union

Appellants

-and-

Nova Scotia Power Incorporated
and Attorney General of Nova Scotia

Respondents

2009 NSCA 17 (CanLII)

Judge: The Honourable Justice Fichaud

Appeal Heard: December 2, 2008

Subject: Section 15(1) of *Charter of Rights*

Summary: Appellants claimed that s. 67(1) of *Public Utilities Act* violated s. 15(1) of *Charter of Rights*. Section 67(1) required the Utility and Review Board to set the same power rates for all consumers of power. This precluded a rate affordability program for low income consumers. The Board held that s. 67(1) did not violate s. 15(1) of the *Charter*. The appellants appealed to the Court of Appeal.

Issue: Does s. 67(1) violate s. 15(1) of the *Charter*?

Result: Poverty is not an analogous ground under s. 15(1). Section 67(1) did not treat protected classes of sex, race, national or ethnic origin, age, disability or marital status differently than their respective comparator groups. Section 67(1) did not breach s. 15(1) of the *Charter* either directly or by adverse effect.

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This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 35 pages.

NOVA SCOTIA COURT OF APPEAL

Citation: Boulter v. Nova Scotia Power Incorporation, 2009 NSCA 17

Date: 20090213
Docket: CA 292954
Registry: Halifax

Between:

Denise Boulter, Yvonne Carvery, Laura Lannon,
Wayne MacNaughton, Karan Whitman

Appellants

-and-

Affordable Energy Coalition

Appellant

-and-

Nova Scotia General Government and Employees Union

Appellant

-and-

Nova Scotia Power Incorporated
and Attorney General of Nova Scotia

Respondents

Judge(s): Saunders, Hamilton and Fichaud, JJ.A.

Appeal Heard: December 1, 2008, in Halifax, Nova Scotia

Held: Appeal is dismissed without costs per reasons for judgment of Fichaud, J.A.; Saunders and Hamilton concurring.

Counsel: Vincent Calderhead, for the appellant Boulter
Claire McNeil, for the appellants Carvery, Lannon, MacNaughton, Whitman and Affordable Energy Coalition
David Roberts for the appellant, NSGEU
Daniel M. Campbell, Q.C., for the respondent NSPI
Glenn R. Anderson, Q.C., Louise Walsh Poirier and Duane C. Eddy for the AGNS

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Reasons for judgment:

[1] Nova Scotia Power Inc. is a virtual monopolist in the supply of electricity in Nova Scotia. The Nova Scotia Utility and Review Board sets the electricity rates to be charged by Nova Scotia Power. The Board acts under ss. 44 and 67(1) of the *Public Utilities Act*. Section 67(1) does not permit the Board to set a rate for low income consumers different than the rate chargeable to other consumers for the same circumstances and conditions respecting electrical service. The appellants applied to the Board for an order that s. 67(1) violates s. 15(1) of the *Charter of Rights*. The Board ruled that there was no violation of s. 15(1). The appellants appeal. They submit that s. 67(1) discriminates based on poverty, which the appellants say is an analogous ground under s. 15(1). Alternatively, they cite evidence that women, racial minorities, recent immigrants, the aged, the disabled, single mothers and their children are disproportionately represented among the poor, and contend that ss. 67(1) discriminates by adverse effect based on the listed categories of sex, race, national or ethnic origin, age and disability in s. 15(1) and the recognized analogous category of marital status.

Public Utility
Regulation of NSPI

[2] Section 2(e)(iv) of the *Public Utilities Act*, RSNS 1989 c. 380 ("*PUA*") defines "public utility" to include the owner of a plant for the production or delivery of electrical power. That is the business of Nova Scotia Power Incorporated ("NSPI"). Though its shares are privately owned, NSPI is a public utility under the *PUA*. NSPI is vertically integrated, provides electrical service throughout Nova Scotia, and supplies over 95% of the electricity generation,

transmission and distribution in the province. No potential competitor can supply electricity without approval of the regulator. NSPI is a virtual monopolist.

[3] The regulator is the Nova Scotia Utility and Review Board ("Board"). The Board is constituted by the *Utility and Review Board Act*, SNS 1992 c. 11 ("*UARB Act*"), and regulates NSPI under the *PUA*.

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[4] Sections 18 and 35 of the *PUA* give the Board "general supervision of all public utilities" and approval authority for capital expenditures exceeding $25,000. Section 52 requires every public utility to "furnish service and facilities reasonably safe and adequate and in all respects just and reasonable". Sections 107 to 109 prohibit the utility from engaging in "unjust discrimination" by either giving an unreasonable preference to a person or subjecting a person to an unreasonable disadvantage. Section 110 prohibits a consumer from receiving a discriminatory preference. Section 64(1) prohibits a public utility from receiving payment for service unless the Board has approved the utility's rates for the service. Section 45 says that the public utility may earn the annual return that "the Board deems just and reasonable" under the prescribed statutory conditions. Section 44 authorizes the Board by order to set the utility's rates for services.

[5] As NSPI's factum acknowledges, "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." An unregulated monopolist may have the market power to restrict supply below what would be the competitive level, charge prices above what would be the competitive level, and discriminate arbitrarily among consumers in price or supply. In the decision under appeal [2008 NSUARB 11], the Board described its rate-making role for NSPI:

> [117] The reasons for the Board's role in the regulation of public utilities are explained in its March 31, 2005 rate case decision as follows:
>
> > ... NSPI is not like an unregulated retailer. It is a virtual monopoly which operates its business on a cost-of-service basis. Providing electricity to all communities in the Province was not (and likely still is not) financially feasible for private, competitive companies. For that reason, the Province's electric service supplier is a cost-of-service monopoly. In return for undertaking and continuing the costs of electrification of the Province, the Utility is permitted, under the *Act*, to recover the reasonable and prudent costs of providing this service. Because it is a monopoly, regulation operates as a

> surrogate for competition. One of the regulator's tasks is to balance the need for the Utility to recover its reasonable and prudent costs with the need to ensure that ratepayers are charged fair and reasonable rates.
>
> [18] It is in the interests of all Nova Scotians to ensure that NSPI continues to be a stable and financially sound company. This is a reality which the Board must consider when determining what, if any, rate increase is warranted.
>
> [19] In short, rates charged to customers are based on costs incurred by the Utility in providing service. If the Board finds certain costs to be imprudent or unreasonable, it can (and has) disallowed such expenditures and reduced proposed rate increases accordingly ...
>
> [Board Decision, March 31, 2005, 2005 NSUARB 27, p. 7]

[118] Electricity is an essential service. The cost of providing electricity to all areas of the province is in excess of $1 billion per year. These costs are passed on to each category of ratepayer (e.g., residential, small commercial, industrial, etc.). In order to protect the public interest, the Board must ensure that NSPI, a monopoly providing an essential service to the public, does not abuse its monopoly status by overcharging its customers as a whole or any customer class in particular. The Board meets this responsibility in two ways. During a general rate application, the Board reviews the revenue required by NSPI to comply with the sections of the *Act* noted above (as well as others), and satisfies itself that the costs NSPI proposes to recover from ratepayers reflect only those expenditures NSPI must or should incur, and that the costs of same are reasonable, justifiable and reflect a price which is as low as reasonably possible. The rates include an appropriate return to NSPI. Between rate hearings, the Board applies a similar test when considering capital expenditures proposed by NSPI which exceed $25,000.

[6] Section 67(1) of the *PUA* constrains the Board's rate-making discretion:

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.

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[7] The Board's decision under appeal (¶ 120) stated the Board's view of s. 67(1), "to ensure fairness between customer classes when rates are set", and elaborated:

> [121] Electricity rates are set on the basis that the costs incurred by the utility to serve its customers, together with a reasonable rate of return, are recovered from its customers. Customers are divided into customer classes. These classes reflect variations in the services required by different customers (e.g., domestic customers and industrial customers) which are received from the utility. Since the services required by each customer class differ, the utility's cost to serve each customer class also differs. For example, in order to serve domestic customers, the utility must have an extensive distribution system. Large industrial customers do not require this infrastructure and, therefore, the costs to serve these two classes of customers are quite different. As a result, the total revenue requirements of the utility must be fairly divided by customer class and allocated accordingly. The requirement for fair allocation of costs ensures that all customers pay for the cost of the service they receive and their rates do not subsidize the rates of other customers.
>
> [122] The focus of this proceeding is s. 67(1) of the *Act* which requires that the Board order like rates for like service. As noted by the Court of Appeal in *Dalhousie Legal Aid v. Nova Scotia Power Inc.* (2007), 245 N.S.R. (2d) 206, s. 67(1) is mandatory. The rates and charges "shall always ... be charged equally" to persons of similar circumstances and conditions in respect of service. The purpose of the section includes protection, in particular of people such as the Claimants, from NSPI abusing its monopoly power (but, of course, the section pre-dates the *Charter*). For example, it prevents NSPI from providing favourable rates, which are not based on cost, to, for example, its shareholders, its employees or their families, or to anyone (including the advantaged in society) based on non-cost related principles.
>
> [123] This is particularly important when analyzing s. 67(1) within the context of the *Act* as a whole. In exchange for its obligation to serve (s. 52), NSPI is given the opportunity to recover its costs of service and a reasonable return (s. 45). To the extent rates may not recover their cost of service (because they are based on ability to pay rather than cost) those costs will be assigned to other customers thereby raising their rates.

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> [124] The concept of fairness is central to the regulation of public utilities in this province. An important consideration for the Board (applying public utility principles) would be, if rates for certain customers are based on ability to pay, should rates for other customers (e.g., struggling businesses) also be based on ability to pay? These would be difficult questions indeed.

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Legal Proceedings

[8] In May and June 2004 NSPI applied to the Board for approval of a rate increase. Dalhousie Legal Aid Service intervened to propose a Rate Assistance Program for low income consumers of power. The Board's decision (2005 NSUARB 27) accepted that "all customers, regardless of income, receive 'substantially similar' service from NSP". This meant that section 67(1) of the *Act* required the Board to charge the "same rate" to residential customers, regardless of income. This court dismissed the appeal [*Dalhousie Legal Aid Service v. Nova Scotia Power Inc.*, 2006 NSCA 74 ("*DLAS*")] and concluded:

> [39] Section 67(1) is not ambiguous: "rates . . . shall always . . . be charged equally to all persons and at the same rate" in substantially similar "circumstances and conditions in respect of service of the same description". The Board cannot reduce the rate to a low income customer who receives the same service as a high income customer.

In *DLAS*, this court said (¶ 33) that the Act prescribed the Board's rate making function as "a proxy for competition, not an instrument of social policy", and (¶ 25): "It is for the Legislature to decide whether to expand the Board's purview" to authorize different residential rates based on income. The Supreme Court of Canada denied leave to appeal: [2006] SCCA No. 376.

[9] In *DLAS* the issue turned on statutory interpretation. There was no challenge to s. 67(1)'s constitutional validity.

[10] In *Boulter*, the Appellants challenge the validity of s. 67(1). They submit that poverty is an analogous ground under s. 15(1) of the *Charter*, and that s. 67(1)'s exclusion of the option for an ameliorative program to assist the poor discriminates contrary to s. 15(1). Alternatively, they cite evidence that women, racial minorities, seniors and children, recent immigrants, the disabled and single mothers demographically are over-represented among the poor, and submit that s. 67(1) discriminates based on the enumerated categories of sex, race, national or ethnic origin, age and disability, and the established analogous category of marital status in s. 15(1).

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Evidence

[11] In October 2006 NSPI applied to the Board for approval of another rate increase. On October 31, 2006 Ms. Boulter on the one hand, and the Affordable Energy Coalition, Ms. Brown, Ms. Lannon, Mr. McNaughton and Ms. Whiteman on the other, as intervenors, filed with the Board Statements of Issue and Notices Pursuant to the *Constitutional Questions Act*, RSNS 1989, c.89. The Notices said that "sections 44 and 67(1) of the *Public Utilities Act* infringe the rights of low income consumers under section 15 of the *Charter*". I will describe these intervenors collectively as the "claimants". The claimants also alleged a violation of the *Human Rights Act*, RSNS 1989, c 214. The *Human Rights Act* was not argued in the Court of Appeal, and I will not discuss it further.

[12] The claimants filed evidence as to their circumstances and called nine other witnesses. Subject to a few restrictions, the Board accepted these other witnesses as experts.

[13] I repeat the Board's description of the individual claimants' circumstances:

> **<u>Yvonne Carvery</u>**
>
> [18] Yvonne Carvery is an African Nova Scotia senior and lives in Halifax. She receives income from the Canada Pension Plan and, after living in Uniacke Square for a number of years, now resides in a senior citizens complex. She is a diabetic and requires medication for that disease. She stated that her total annual income in 2006 was $12,797 and that her electricity costs are approximately $750. She indicated that she uses NSPI's budget plan to pay her electricity bills, which comprise approximately 6% of her annual income.
>
> [19] Ms. Carvery stated that she has difficulty meeting the costs of such basic needs as rent, food, telephone, etc., and, that when trying to make ends meet, she gives priority to rent and electricity.
>
> **<u>Laura Lannon</u>**
>
> [20] Laura Lannon grew up in Westville, is disabled and has a number of chronic illnesses. She moved to Halifax in 1993 and has worked sporadically since she was 19 years old. She receives a total monthly income of $824 from the Nova Scotia

Department of Community Services ("DCS"). She is currently enrolled in a training program while on income assistance and receives a training allowance of $200 per month, but is only allowed to keep $150 per month under current DCS rules with the rest deducted from her monthly allowance. In addition, she receives a quarterly GST rebate of $19. Her total current annual income is approximately $11,916.

[21] Ms. Lannon stated that she has difficulty meeting her electricity expenses, and the costs of other basic needs, due to her limited income, despite using food banks and receiving assistance from private organizations. Her power has been disconnected a number of times and she is required to make a deposit with NSPI before power service is reconnected to her residence and has often paid late payment charges. She recently moved to a residence where her rent includes electricity costs but indicated that the building is not safe or properly maintained.

Wayne MacNaughton

[22] Wayne MacNaughton has lived in Halifax since 2001. He moved to Halifax from Ontario where he had steady employment until 1996, when he suffered retinal detachment in both of his eyes. As a result, he now has seriously reduced vision, particularly at night, which has made it difficult for him to find employment. Due to his illness, he is only able to do volunteer work and is paid an honorarium for these duties. He receives social assistance from DCS and his total monthly allowance is $541.50.

[23] Mr. MacNaughton has experienced homelessness and has lived in shelters and transient housing, but now lives in housing provided by the Metro Non-Profit Housing Association ("MNPHA").

[24] As a result of Mr. MacNaughton's financial circumstances, the cost of electricity was a significant burden. In January, 2002, Mr. MacNaughton moved into a new MNPHA building and pays a flat charge of $25 per month for electricity. In his pre-filed evidence, Mr. MacNaughton stated that life has changed for him since he moved to his current location. He has fewer worries about electricity bills since his costs are fixed.

Karan Whiteman

[25] Karan Whiteman moved to Canada from Trinidad in 1989 when she was 16 years old. She has a son and is currently

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> separated from her husband. She receives income assistance from the DCS, receiving a total monthly income, including child care benefits and GST rebate, of $1,130. Ms. Whiteman, in her pre-filed evidence, provided details of her expenses. Currently, her shelter expenses (rent and electricity) exceed the shelter allowance by $173.00. She frequently has to pay late charges and disconnection charges from NSPI. She indicated that on average she pays almost 14% of her income for electricity.
>
> **Denise Boulter**
>
> [26] Denise Boulter is a single parent who struggles to make ends meet. Although she has a medical history which affects her ability to be employed or attend school, she is now in the second year of a two year program at the Nova Scotia Community College in Kentville. She has been on social assistance sporadically since 2003. Ms. Boulter is currently a customer of NSPI and stated that she has had electricity bills in the past which resulted in a number of disconnection notices and had difficulty obtaining an account in her own name.
>
> [27] Ms. Boulter filed an update to her pre-filed evidence and responses to AG's IR's on November 23, 2007. Her current monthly income is $1,393.03 including GST rebate and child tax benefit. Her total expenses are $1,402.00 per month. She lives in a two bedroom apartment and is responsible for her electricity bill, which includes heat and hot water. She is on a budget billing plan with NSPI and pays $140.00 per month for electricity.
>
> [28] Ms. Boulter uses food banks whenever she can to supplement her dietary needs. She stated that any increase in power rates will further erode her ability to buy food and other necessities of life, including medical supplies.

[14] The evidence of the claimants' experts included the following points.

[15] Mr. Brendan Haley is a policy analyst with the Ecology Action Centre. He said that existing energy sufficiency programs are unaffordable to the poor. NSPI contributes $250,000 to the Salvation Army's program to assist low income Nova Scotians with their power bills. Mr. Haley said that this program does not adequately address the needs of those living in poverty.

[16] Ms. Carol Horne is a field worker with the Society of St. Vincent de Paul of Halifax. She acts as an intermediary and negotiator between persons in need and various agencies, including NSPI respecting electricity bills. She

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explained the consequences of power disconnection, the loss of light, heat and use of appliances. She noted the family consequences such as the concern that the child protection services may remove the children. She described how she tries to help her clients:

> First of all, I talk to Nova Scotia Power and get a payment history, look about what's happening with the account. Then I go to their home and we sit down and we look at what their income is, what's coming in and what's going out, and try to work out something so that we pay and then they can carry on from there. Like we'll make a payment to keep power on. Sometimes it makes two visits but we try to work out some way that they can put shelter first and that isn't always easy. But we try to work -- I try to work out something like that. I -- most of the people that I work with they -- we look at budgeting. And I say the term "budgeting" but I'm not sure it's budgeting that I do because when I'm going out, if you're not in housing and you're in regular apartments when we look at what their shelter costs are and what's coming in, we -- it could be up to 80 percent of the income coming in is going out in shelter. So I don't know how you ever budget that. Because it's a real -- when they're paying their rent and their power and whatever else they're paying and that goes first they have almost nothing left for food. So sometimes people decide to feed their children before they pay their power. So it's a real difficult time but those are the kind of things we look at.

[17] Mr. Charles MacDonald is the current chair of the Tetra Society of Metro Halifax and former executive director of the Nova Scotia Disabled Persons Commission. He spoke of the needs of persons with disabilities. He said that the disabled are more likely to be poor and to need government programs than are the able bodied. His written evidence referred to a 2001 federal government survey indicating that 27.9% of working age adults with disabilities lived below the Low Income Cut Offs, compared to 12.7% of the able bodied population. He said that the reasons for this social disadvantage included barriers to employment, a social and systemic failure to accommodate persons with disabilities and inadequate social supports. He explained the impact of electricity costs:

> The affordability of electricity is a factor in the ability of persons with disabilities to maintain their need for shelter. Electricity is a necessity and without it, persons with disability run the risk of losing their homes. In addition, electricity costs may result in persons with disabilities having to choose between equally

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> important needs such as their need for shelter and their need for food. Food shortages are a reflection that incomes are inadequate to meet basic needs. Persons with disabilities are at risk for homelessness and unaffordable electricity costs contribute to this vulnerability.

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[18] Paul O'Hara discussed the inadequacy of welfare and housing and energy assistance programs. He said that basic necessities, food, shelter, utilities including power, are not affordable under current government levels of support. Respecting power bills, he said:

> From my personal experience in advocating on behalf of clients, I can support my clients accounts of being told by CSR's "if you don't have the money then you will be cut off". The customer service representatives frequently do not offer alternatives such as a settlement agreements [*sic*], or waiver of deposits to clients who are experiencing financial difficulties and are behind on their bills.
>
> In the past I have negotiated settlement agreements on behalf of clients, sometimes in circumstances where settlement agreements have already been signed, but where the terms are so onerous and unrealistic given the client's income, that they have been breached. My experience is that my clients are so desperate to keep the lights on or get the lights back on, that they will agree to almost any terms.

[19] Nancy Brockway was qualified as an expert in low income rates, regulatory policy and rate design. She said that 26 American jurisdictions have adopted a form of low income affordability program for utility costs.

[20] Dr. Patricia Williams is an Associate Professor at Mount Saint Vincent University's Department of Applied Human Nutrition. She spoke to the affordability of a nutritious diet, in the broader context of food security. She examined affordability scenarios for a two parent family of four, a single mother with two children and a single adult male. I quote the findings from her report:

> **Major Findings**
>
> **Family of Four**
>
> Our data show that a basic nutritious diet for a family of four would cost at least $572.90 and $617.42/month in 2002 and

2004/05, respectively. When monthly costs for food, shelter, and other expenses considered essential for a basic standard of living were compared with average monthly incomes for a family of four with one adult working full time and the other part time, both earning minimum wage, the findings suggest this family would face a **deficit of $342.10** in 2002. Even when the 2006 increase in minimum wage to $7.15/hr was factored in, with the increasing cost of goods and services, findings indicate **an additional $427.93 is needed** each month to afford a basic nutritious food basket costing $617.42.

The same family of four relying on Income Assistance would face a potential **deficit of at least $277.00** in 2002 and **$380.53** in 2006.

Lone Parent Family

A basic nutritious diet for a lone female parent working full time with two children would cost at least $351.68 and $386.18/month in 2002 and 2006, respectively. The results show that whether earning $6.00/hr in 2002 or $7.15/hr in 2006, this household cannot even afford basic expenses before purchasing food; in fact this family would face a **deficit of at least $463.42** and**$373.84**, respectively after the cost of the NNFB was factored in.

The same lone parent family relying on Income Assistance would face a potential **deficit of $53.26** in 2002 and **$129.84** in 2006.

Single Adult Male

The monthly cost of the NNFB in 2002 for a 30-year-old male was $198.73/month; in 2006 this same basket cost $213.66/month. After the cost of a basic nutritious diet was factored in, the single male earning minimum wage and living in a boarding room was left with just $16.94 in 2002 and $108.45/month in 2006 to cover all other potential expenses. Again, even this minimal surplus assumes that he was able to rent a place for just over $300.00 per month and purchased **no** personal hygiene products, household and laundry cleaners, dental and prescriptions, costs associated with physical activity, education or savings for unexpected expenses.

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If this single adult male relied exclusively on income assistance he would face a **deficit of at least $160.73** in 2002 and **$300.30** in 2006. Both of these scenarios assume that the single adult male pays only approximately $300/month for shelter and $62.50 and $80.97 for power, heat and water in 2002 and 2006, respectively.

Female lone parent (attending university) with 2 children

Even with Canada and Nova Scotia Student loans, a Canada Study Grant, the Child Tax Benefit and GST credit, a lone mother of two children who is attending university full-time in 2005 would potentially be in **debt** each month by almost **$500.00** if she were to purchase a nutritious diet for herself and her children.

[Dr. Williams' emphasis]

Dr. Williams concluded:

Together this evidence shows that food insecurity is a significant problem in our province; low-income citizens cannot access enough healthy, safe food that they like and enjoy in a manner that is socially acceptable, or they worry that they will not be able to do so. Research has shown that those who are food insecure self-report their health as poorer and are at greater risk for chronic disease. Food insecurity is closely linked to poor nutritional intake.

Food insecurity may have negative and interrelated impacts on healthy eating, chronic disease prevention and management, healthy child development, educational achievement and social inclusion. It is clearly a barrier to the social, cultural, and economic development of families and communities in Nova Scotia.

. . .

This body of research shows that almost all people in the studied households relying on minimum wage earnings and **all** people in receipt of income assistance, or Student Assistance in Nova Scotia are unable to meet their basic needs, experience food insecurity and are likely to compromise their dietary intake in order to afford essential expenses, placing their health at risk.

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[Dr. Williams' emphasis]

[21] Dr. Richard Shillington was qualified as an expert in statistical analysis and social policy, particularly as it relates to poverty. He used the Low Income Cut Off, a Statistics Canada term that has been taken by researchers to determine the poverty line. He said that recent immigrants comprise about 1% of Nova Scotia's population but 2% of the poor and visible minorities comprise about 4% of the population but 8% of the poor. He said that women, single parents, seniors, aboriginals and the disabled are over-represented among the poor. He testified:

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> Q. I just -- before you go on, could you just explain what the relationship is between Figure 7 that we've been talking about, and the table that's on the next page, which is headed Table 5?
>
> A. Sure. The next page is Table 5. And the data in -- that's reflected in Figure 7 is the -- is a graphic which is the poverty rates in 2001, which is the second last column to the right. And you're just selecting various categories. And so what you'll see in that, if you -- if you look at the bottom, in the various -- the bottom four rows, for recent immigrants, visible minorities, aboriginal identity, populations with disabilities, why does -- why are these data in here? This data, I actually brought out of Statistics Canada's publications. Why are these there? Because people who've done research in the area know that these are populations that regularly are over represented in poor populations. These are populations that are -- have a higher risk of living in poverty. Recent immigrants, visible minorities, persons who report an aboriginal identity, people with disabilities. And you look at the bottom four numbers, the overall poverty rate is 17 percent. Again, I'm looking at the second last column. The poverty rate for recent immigrants is 46 percent, which means that they're about 2-1/2 times more likely to be poor than general population. For the population with visibility minorities, the poverty rate is -- I need my glasses, excuse me -- 35 percent. So, they're more than twice as likely. For aboriginal identity, twice as likely. The 34 percent, compared to 17 percent. For people with -- population with disabilities, 23 percent poverty rate, about 1-1/2 times as likely. And if you go up to the line, it's about a third of the way down the page. For lone parents, that same chart, they're about four times as likely to be low income. And the reason is -- why would a lone parent family

> be -- have a much higher poverty rate? You have a family with children. The presence of children increases all of the economic demands for the family. So, the family need more income to have the same standard of living, but there's only one adult. So, they can only have one income. You have much higher demands.

Later (¶ 48-49, 68, 83) I will discuss the Table 5 to which Dr. Shillington referred.

[22] Mr. Bruce Porter, a human rights consultant, described the negative societal stigma of poverty, and the connection between the poverty stereotype and the discrimination suffered by racial minorities, single mothers and the disabled. His report said:

> 16. Though it intersects with other grounds of discrimination, as will be described below, discrimination because of poverty is a distinct form or prejudice and discrimination, similar in nature to other forms of discrimination such as discrimination because of race, citizenship, sex or disability.
>
> . . .
>
> 20. As with discrimination against other groups, discrimination against poor people encourages false generalizations about members of the group to accentuate imputed negative characteristics. Social assistance recipients, the homeless and other poor people, for example, are often characterized as able-bodied men who are idle at the tax-payers' expense. In fact, the majority of those relying on social assistance or who are homeless are women, children and persons with disabilities.
>
> . . .
>
> 67. From the standpoint of discrimination against poor people, lower utilities rates for low income households are the equivalent of a wheelchair ramp into housing for a wheelchair user. Accommodation of unique needs can make the difference between being housed and being homeless. The interest at stake is immense.
>
> 68. A regulation prohibiting the accommodation of the needs of low income households through lower rates is, in my view, an unreasonable refusal to give equal consideration and respect to

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> the needs of poor people. The notion that poor people must "pay their way" without any assistance or accommodation of their needs, even at the cost of losing housing or access to a basic service, is a discriminatory notion based on stereotypes and prejudices about the poor and denying poor people equal dignity and respect.

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[23] Mr. Roger Colton testified respecting low income utility issues and the affordable energy burden. In his view the rates set by the Board under the *PUA* are unfair to the poor:

> While the Company is attentive to imposing collection fees and charges on payment-troubled low-income customers purportedly on the basis of ensuring cost-based rates and the lack of cross-subsidies, it fails completely to prevent the reverse cross-subsidies that can be traced to attributes that are disproportionately displayed by low-income customers. Indeed, when it comes to fundamental ratemaking principles, the Company not merely routinely, but nearly universally, engages in rate averaging that causes low-income customers to pay system costs that non-low-income customers cause the Company to incur. This process of rate averaging imposes higher costs, and thus higher rates, on low-income customers, which, in turn, both creates and exacerbates the payment-troubled status of these low-income customers ...

Mr. Colton proposed a rate assistance program with a credit based on income level.

[24] In response, the Attorney General of Nova Scotia submitted evidence of a manager with the provincial Department of Energy. He was unaware of any Canadian income based assistance program that has been approved by regulators of electricity rates. No witness testified for NSPI.

Board's Ruling

[25] The Board's written decision of February 4, 2008 (2008 NSUARB 11) held that the claimants' *Charter* claim failed the tests from *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, ¶ 88. The Board (¶144) accepted the claimants' proposed comparator groups - persons in poverty versus persons who are not in poverty – but determined that the *PUA* did not give anyone, in either comparator group, "affordable energy". The rates are based on NSPI's cost plus reasonable return, not the consumer's ability to pay. The *PUA*

relieves consumers in both comparator groups from the effects on price and supply of unchecked monopolistic market power. (¶155-59) Accordingly, in the Board's view, the claimants had not proven that the *PUA* imposed differential treatment between those living in poverty and those who do not live in poverty. The Board dismissed the *Charter* challenge.

[26] The claimants appeal to this court. Section 30(1) of the *UARB Act* permits an appeal to the Court of Appeal on issues of law or jurisdiction.

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Issues and Standard of Review

[27] The issues are whether the Board erred by ruling that s 67(1) does not infringe s. 15(1) of the *Charter* and, if there is an infringement, whether there is justification under s.1 of the *Charter*. Because of the s. 96 court's role to interpret the *Constitution*, the Board's decision on a constitutional challenge to the validity of legislation is reviewed for correctness: *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, at ¶ 58.

Section 15(1)

[28] Section 15(1) of the *Charter* says:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[29] In *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, at ¶ 88, the Supreme Court stated:

> (3) Accordingly, a court that is called upon to determine a discrimination claim under s. 15(1) should make the following three broad inquiries:
>
> (A) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?
>
> (B) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?

and

(C) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

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[30] In *R v. Kapp*, 2008 SCC 41 at ¶ 17, the Court restated *Law's* three inquiries as two tests:

> [17] The template in *Andrews*, as further developed in a series of cases culminating in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, established in essence a two-part test for showing discrimination under s. 15(1): (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? These were divided, in *Law*, into three steps, but in our view the test is, in substance, the same.

[31] Under *Kapp*'s first test, does s. 67(1) create a distinction based on an listed or analogous ground? I will address this question from the perspectives of the appellants' two submissions, first based on poverty as an analogous ground, then second based on sex, race, national or ethnic origin, age, disability and marital status. In my view the answer is No. So it is unnecessary to address *Kapp*'s second test.

Poverty as an Analogous Ground

[32] The claimants first contend that poverty is an analogous ground under s. 15(1) and that, by excluding the option of an income based rate assistance program, s. 67(1) creates a distinction based on poverty. Ms. Boulter's factum says:

> 147 It is submitted that 'poverty' meets the criteria to be considered an analogous ground of discrimination within s. 15 of the *Charter* and that this Court ought to affirm, or re-affirm, that principle.

The factum of the other claimants says:

> 94. The Appellants argue that:
>
> . . .
>
> - . . . poverty is an analogous ground, and those living in poverty are disproportionately impacted and burdened by being treated in an identical manner to other consumers of electricity.

[33] I respectfully disagree that poverty is an analogous ground under s. 15(1).

[34] In *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, Justices McLachlin and Bastarache for the majority stated the criteria to identify an analogous ground:

> 13 What then are the criteria by which we identify a ground of distinction as analogous? The obvious answer is that we look for grounds of distinction that are analogous or like the grounds enumerated in s. 15 -- race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. It seems to us that what these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity. This suggests that the thrust of identification of analogous grounds at the second stage of the *Law* analysis is to reveal grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law. To put it another way, s. 15 targets the denial of equal treatment on grounds that are actually immutable, like race, or constructively immutable, like religion. Other factors identified in the cases as

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> associated with the enumerated and analogous grounds, like the fact that the decision adversely impacts on a discrete and insular minority or a group that has been historically discriminated against, may be seen to flow from the central concept of immutable or constructively immutable personal characteristics, which too often have served as illegitimate and demeaning proxies for merit-based decision making.

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Later authorities have taken these principles to govern the definition of analogous grounds. *Delisle v. Canada (Deputy Attorney General*, [1999] 2 SCR 989 at ¶ 43, per Bastarache, J. for majority. *Baier v. Alberta*, [2007] 2 SCR 673 at ¶ 64-65 per Rothstein, J. for majority. *Clyke v. Nova Scotia (Minister of Community Services)*, 2005 NSCA 3 at ¶ 52. *Brebric v. Niksic*, [2002] O.J. No. 2974 (O.C.A.) at ¶ 19. *R. v. Banks*, 2007 ONCA 19 at ¶ 100, leave to appeal denied [2007] SCCA No. 139. *Forrest v. Canada (Attorney General)*, [2006] F.C.J. No. 1850 (FCA) at ¶ 16.

[35] In short, under *Corbiere* the test is whether poverty is a personal characteristic that either (1) is actually immutable or (2) is constructively immutable because it is changeable only at unacceptable cost to personal identity or, put differently, the government has no legitimate interest in expecting the individual to change. I will return to this test shortly.

[36] The Supreme Court has identified citizenship, marital status, sexual orientation and possibly language as analogous grounds. *Law Society of British Columbia v. Andrews*, [1989] 1 SCR 143. *Lavoie v. Canada*, [2002] 1 SCR 769 at ¶ 39, 41. *Miron v. Trudel*, [1995] 2 SCR 418. *Nova Scotia v. Walsh*, [2002] 4 SCR 325. *Egan v. Canada*, [1995] 2 SCR 513. *Vriend v. Alberta*, [1998] 1 SCR 493. *M. v. H.*, [1999] 2 SCR 3. *Little Sisters Book and Art Emporium v. Canada*, [2000] 2 SCR 1120. *Gosselin v. Quebec*, [2005] 1 SCR 238, ¶ 12. See Hogg, *Constitutional Law of Canada* (5th ed. Supp) ¶ 55.8(b).

[37] In *Gosselin v. Quebec (Attorney General)*, [2002] 4 SCR 429 a regulation under *Quebec's Social Aid Act* set the base amount of welfare for recipients aged under 30 at roughly one third the amount for recipients aged 30 and above. Welfare recipients under 30 could increase their welfare payments by taking education and work experience programs. Ms. Gosselin brought a class action on behalf of the affected welfare recipients aged under 30. She challenged the regulation under s. 15(1) of the *Charter*, among other arguments. The challenge was based on age, an enumerated ground, not poverty. Chief Justice McLachlin for the majority held that the law did not discriminate within the meaning of *Law*'s

contextual factors, and the Court dismissed the s. 15(1) claim. The Chief Justice did not address poverty as an analogous ground. But the result of the discrimination analysis was that social assistance recipients with financial circumstances at least as dire as the claimants' circumstances here failed in their s. 15(1) challenge to a law that targeted persons in poverty. The majority also dismissed Ms. Gosselin's claim under s. 7 of the *Charter*, that the welfare restrictions violated her security of the person contrary to principles of fundamental justice.

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[38] In *Kapp* Chief Justice MacLachlin and Justice Abella said:

> 41 We would therefore formulate the test under s. 15(2) as follows. A program does not violate the s. 15 equality guarantee if the government can demonstrate that: (1) the program has an ameliorative or remedial purpose; and (2) the program targets a **disadvantaged group** identified by the enumerated or **analogous grounds**.
>
> . . .
>
> 55 . . . Section 15(2)'s purpose is to protect government programs targeting the conditions of a **specific and identifiable disadvantaged group, as contrasted with broad societal legislation, such as social assistance programs**.
>
> . . .
>
> 57 We have earlier suggested that a distinction based on the enumerated or analogous grounds in a government program will not constitute discrimination under s. 15 if, under s. 15(2), (1) the program has an ameliorative or remedial purpose; and (2) the program targets a **disadvantaged group** identified by the enumerated or **analogous grounds**.
>
> [emphasis added]

One may deduce from these passages, though the point was *obiter*, that the receipt of social assistance *per se* does not define a specific and identifiable disadvantaged group as an analogous ground.

[39] The Ontario Court of Appeal has twice discussed economic status as an analogous ground. In *Falkiner v. Ontario (Ministry of Community and Social Services)* (2002), 59 O.R. (3d) 481 (C.A.) Justice Laskin for the Court held that receipt of social assistance was a protected ground under s. 15 (¶ 84-93), but (¶88) "economic disadvantage ... alone does not justify protection under s. 15". Five years later, in *Banks*, Justice Juriansz for the Court held that anti-panhandling legislation did not violate s. 15(1), and continued:

> **104** It is worth noting that the appellants took care not to argue that "poverty" in and of itself is a ground of discrimination. While the "poor" undoubtedly suffer from disadvantage, without further categorization, the term signifies an amorphous group, which is not analogous to the grounds enumerated in s. 15. The "poor" are not a discrete and insular group defined by a common personal characteristic. While it is common to speak of the "poor" collectively, the group is, in actuality, the statistical aggregation of all individuals who are economically disadvantaged at the time for any reason. Within this unstructured collection, there may well be groups of persons defined by a shared personal characteristic that constitute an analogous ground of discrimination under s. 15.
>
> **105** *Falkiner v. Ontario (Ministry of Community and Social Services)* (2002), 59 O.R. (3d) 481 (C.A.), on which the appellants rely, is distinguishable from the present case. The differential treatment in that case was based on three grounds: sex, marital status and "receipt of social assistance". *Falkiner* did not recognize poverty as a ground of discrimination.

[40] In *Dartmouth/Halifax (County) Regional Housing Authority v. Sparks* (1993), 119 N.S.R. (2d) 91 (CA) this court held that public housing tenancy was an analogous ground under s. 15(1). In *R. v. Rehberg* (1994), 127 NSR (2d) 331 (SC) Justice Kelly, citing *Sparks*, said that poverty may be an analogous ground. These decisions predated *Corbiere*. The principles underlying the earlier Nova Scotia decisions have been overtaken by the Supreme Court of Canada's more recent expression of the governing principles.

[41] Returning to the *Boulter* case, the claimants' presentation poignantly depicts the burden of poverty. But that burden and the sympathy it evokes are not the defining criteria for an analogous ground under s. 15(1).

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[42] In my view, poverty is not a personal characteristic, under *Corbiere*, that is (1) “actually immutable” or (2) "constructively immutable" in that either the government “has no legitimate interest in expecting us to change” or it "is changeable only at unacceptable cost to personal identity". 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. Ms. Boulter's factum says (¶ 9) "Ms. Boulter is desperately trying to escape from poverty via her educational qualifications from the Community College", and the claimants’ experts propose transformational governmental assistance. 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.

[43] That poverty’s plight appeals for relief does not mean the redress is constitutional. Pure wealth redistribution, that is legally directed but unconnected to *Charter* criteria, in my view occupies what *Hogg* (¶ 55.8) describes as “the daily fare of politics, and is best [done] not by judges but by elected and accountable legislative bodies”. The elected officials may assess, for instance, whether Dr. Williams’ compelling findings (above ¶ 20) warrant action or whether to add “social conditions” to the grounds of prohibited discrimination in the *Human Rights Act*, as recommended by The Canadian Human Rights Review Board Panel: *Promoting Equality: A New Vision* (Ottawa, Dept. of Justice, 2000) pp. 106-113. I emphasize at this point that I am *not* denying poverty as an analogous ground *because* it is “political”. Political issues are constitutionally reviewable: *Newfoundland (Treasury Board) v. Newfoundland and Labrador Association of Public and Private Employees (NAPE)*, [2004] 3 SCR 381 at ¶ 80. Rather, the claimants’ poverty claim does not on its merits satisfy *Corbiere*’s legal criteria for analogous grounds under s. 15(1), and therefore the issue moves to the legislative arena.

[44] Insofar as the appellants rely on poverty as an analogous ground, I would dismiss the appeal and affirm the Board’s dismissal of the s. 15(1) challenge.

Listed and Recognized Analogous Grounds

[45] The individual claimants have traits that are protected by s. 15(1). Ms. Carvery is African Nova Scotian, a senior and diabetic. Ms. Lannon is disabled. Mr. MacNaughton has seriously reduced vision. Ms. Whiteman is a single mother, an immigrant and a member of a racial minority. Ms. Boulter is a single mother who suffers clinical depression and adjustment disorder.

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[46] The individual claimants have incomes below the Low Income Cut-Offs ("LICO") defined by Statistics Canada. Ms. Carvery receives Old Age Security and the Guaranteed Income Supplement. The other claimants receive income assistance from Nova Scotia's Department of Community Services. Their poverty requires them to ration their needs, including power, food, clothing, gifts for children, and social interaction. Individuals with more fortunate economic circumstances do not have to priorize among basic needs.

[47] The claimants do not say that the *PUA* or s. 67(1) advertently discriminates on the basis of sex, age, race, national or ethnic origin, disability or marital status. To the contrary, s. 67(1), bolstered by ss. 107-110 of the *PUA* (above ¶ 4), prescribe equal rates for the same electrical service. Rather the claimants submit that s. 67(1) fosters adverse effect discrimination. Ms. Boutler's factum says:

> 96. To be clear, this *Charter* challenge does <u>not</u> claim that the statute <u>intends</u> to disproportionately exclude equality-seekers from the benefits and protections of the *Act*, nor do we allege that, through the *PUA*, the Province <u>intended</u> to disproportionately *burden* equality seekers. These are, however, the undenied and undeniable effects of s. 67 of the *Act*. In directing that all consumers will be treated identically, the legislature, through the statute, violates the substantive equality rights of the members of disadvantaged groups by prohibiting accommodation of their circumstances. [emphasis in original]

[48] The claimants rely principally on demographic evidence from Dr. Shillington of over-representation among the poor of the disabled, women, single mothers, racial minorities, recent immigrants, children and the aged. I reproduce

Table 5 from Statistics Canada's 2001 Census, that was Dr. Shillington's key source and was a significant basis of the claimants' submissions on this issue:

Table 5

Selected Statistics on Poverty, Nova Scotia, 2001 and 1996

	Total	**Poor**	**Distribution**		**Poverty Rate**	
			Total	**Poor**	**2001**	**1996**
Unattached Individuals	**116,370**	**44,760**	**100%**	**100%**	**38%**	**41%**
Working-age women	37,290	16,320	32%	36%	44%	46%
Working-age men	41,215	15,090	35%	34%	37%	40%
Senior women	27,795	10,805	24%	24%	39%	38%
Senior men	10,070	2,540	9%	6%	25%	31%
Economic Families	**261,325**	**34,845**	**100%**	**100%**	**13%**	**16%**
Couples with no children under age 18	131,445	10,050	50%	29%	8%	8%
Couples with children under age 18	86,130	8,290	33%	24%	10%	12%
Lone-parent families with children under 18	24,230	12,650	9%	36%	52%	64%
Other families	19,520	3,850	7%	11%	20%	22%
All persons*	**886,885**	**147,015**	**100%**	**100%**	**17%**	**19%**
Children 0-17	198,850	39,420	100%	100%	20%	23%
Aged 0-5	57,025	12,925	29%	33%	23%	27%
Aged 6-17	141,820	26,495	71%	67%	19%	21%
Aged 65+	118,490	16,800	13%	11%	14%	15%
Females	457,175	83,815	52%	57%	18%	21%
Males	429,710	63,205	48%	43%	15%	17%
Population	**886,885**	**147,015**	**100%**	**100%**	**17%**	**19%**
Recent immigrants	5,705	2,640	1%	2%	46%	45%
Visible Minorities	34,245	12,085	4%	8%	35%	38%
Aboriginal identity	9,545	3,275	1%	2%	34%	32%

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With disabilities	185,260	43,050	21%	29%	23%	29%

Source: Statistics Canada: 2001 Census

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[49] Table 5 shows that the 2001 poverty rate for the entire population was 17%, or 147,015 persons from a Nova Scotia total of 886,885. But the poverty rate was: among the disabled - 23%; among visible minorities - 35%; among recent immigrants - 46%; among single parent families with children under 18 years of age - 52%; among unattached senior women- 39%. Some later statistics, showing reduced poverty rates, also were in evidence, but the proportional disparities among these groups generally remained.

[50] From the demographic data, the claimants submit that individuals in the protected categories under s. 15(1) are more likely to be poor, and therefore more likely than those not in poverty to have to priorize power costs against other basic needs. By requiring equal power rates for equal electrical service, s. 67(1) excludes the option of a rate reduction for those in poverty. The exclusion of the ameliorative option, the claimants say, perpetuates an existing disadvantage based on sex, race, national or ethnic origin, age, disability and marital status, and constitutes adverse effect discrimination under s. 15(1).

[51] I will move to the legal principles under s. 15(1). In *Kapp* the Supreme Court said the first question under s. 15(1) is "Does the law create a distinction based on an enumerated or analogous ground?" That distinction may be on the law's face or an adverse effect that violates substantive equality. But, if no distinction based on a listed or analogous ground emanates from the law, the answer to *Kapp*'s first question is No.

[52] This requirement of a distinction means that the s. 15(1) analysis involves comparison.

[53] *Hodge v. Canada (Minister of Human Resources Development)*, [2004] 3 SCR 357 underlined the significance and the principles of comparator analysis under s. 15(1), and illustrated the application of those principles. Justice Binnie for the Court began:

> (1) A person asking for equal treatment necessarily does so by reference to other people with whom he or she can legitimately invite comparison. Claims of discrimination under s. 15(1) of the *Canadian Charter of Rights and Freedoms*

> can only be evaluated "by comparison with the condition of others in the social and political setting in which the question arises": *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 164. A s. 15(1) claim will likely fail unless it can be demonstrated that the comparison, thus invited, is to a "comparator group" with whom the claimant shares the characteristics relevant to qualification for the benefit or burden in question apart from the personal characteristic that is said to be the ground of the wrongful discrimination.
> [S.C.C.'s underlining]

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Justice Binnie noted the pervasive effect of comparison analysis throughout s. 15(1):

> 17. . . . It is worth repeating that the selection of the comparator group is not a threshold issue that, once decided, can be put aside. On the contrary, each step in the s. 15(1) analysis proceeds "on the basis of a comparison". Indeed in many of the decided cases, the characteristics of the "comparator group" are only developed as the analysis proceeds, especially when considering the "contextual factors" relevant at the third stage, i.e., whether discrimination, as opposed to just a "distinction", has been established.

[54] Justice Binnie explained the steps of comparator analysis.

[55] First the claimant and the comparator group must share the "characteristics relevant to qualification for the benefit or burden in question". The relevance is determined initially from an analysis of the legislation, to determine the legislature's objective, and to identify the "universe of people potentially entitled to equal treatment". (¶ 24-25) Justice Binnie said:

> 26 Nevertheless, in a government benefits case, the initial focus is on what the legislature is attempting to accomplish. It is not open to the court to rewrite the terms of the legislative program except to the extent the benefit is being made available or the burden is being imposed on a discriminatory basis.

[56] Second, the claimant and the comparator group must share all those relevant characteristics to qualify for the benefit or burden, "apart from the personal characteristic that is said to be the ground of the wrongful discrimination". Justice Binnie explained:

> 23 The appropriate comparator group is the one which mirrors the characteristics of the claimant (or claimant group) relevant to the benefit or advantage sought except that the statutory definition includes a personal characteristic that is offensive to the *Charter* or omits a personal characteristic in

> a way that is offensive to the *Charter*. An example of the former is the requirement that spouses be of the opposite sex; *M. v. H.*, *supra*. An example of the latter is the omission of sexual orientation from the Alberta *Individual's Rights Protection Act*; *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

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[57] The characteristic that is backed out of the comparison must be a prohibited ground under s. 15(1). Justice Binnie said:

> 33 If the claim to equality is to succeed, the ground has to be a personal characteristic enumerated or analogous to those listed in s. 15(1). This too is occasionally lost sight of. In *Martin*, the excluded chronic pain sufferers at one point attempted to compare themselves to another group of chronic pain sufferers who had suffered workplace injuries at an earlier date. The earlier group had obtained greater benefits under the *Workers' Compensation Act* than the later group of sufferers, but in the interim the benefit the earlier group had received had been terminated and the group grandfathered. Gonthier J. rejected the group of earlier sufferers as a relevant comparator group because what differentiated them from the claimants was not the type of disability but simply the *date* of their respective workplace accidents, which was not a prohibited ground of discrimination. [emphasis in original]

[58] To explain this point, Justice Binnie referred to *Gosselin*, that I discussed earlier (¶ 37):

> 36 In *Gosselin*, *supra*, McLachlin C.J. for the majority noted, at para. 28:
>
>> The Regulation at issue made a distinction on the basis of an enumerated ground, age. People under 30 were subject to a different welfare regime than people 30 and over.
>
> 37 Much of the claimant's argument in *Gosselin* was rejected because it put the focus on the disadvantages attaching to welfare recipients as a class rather than differentiating *within* that general class between the two age groups. The evidence of discrimination was therefore not properly aligned with the alleged ground of discrimination. [emphasis in original]

In short, to support a s. 15(1) claim based on age, there must be a distinction based on age, not merely a disadvantage attaching to welfare recipients of all ages. (See *Gosselin* ¶ 35). I will return to this when applying the principles to the *Boulter* case. (below ¶ 67)

[59] In *Hodge*, the s. 15(1) claim of discrimination based on marital status, failed this last point. The differential treatment did not turn on marital status. Justice Binnie explained:

> 40 Section 44(1)(d) of the CPP targets the benefit (survivor's pension) at surviving "spouses". The statutory definition includes common law spouses as well as married spouses. This presents a problem for the respondent. She was not in any sort of relationship at all with the deceased at the date of his death. The survivor's pension was denied on the basis that the respondent was not, at the relevant time, a spouse. It was not denied, as it was in *Miron*, because at the relevant time she was a *common law* spouse rather than a *married* spouse.

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[60] Ms. Hodge then advanced an effect-based argument that separated spouses suffer economic dependency after separation, and that Statistics Canada reports a 50% poverty rate among elderly unattached women. Justice Binnie commented:

> 44. . . . The respondent points out that the "particular vulnerability" of these women "is due to the near impossibility of entering or re-entering the work force and the inadequacy of our pension systems in general". The legislature may, of course, extend the responsibility of common law spouses beyond the point where at common law the relationship would end, to deal with matters such as economic dependence, but Parliament has not done so in the CPP. On the contrary, s. 2(1) defines the requisite common law relationship in terms of cohabitation. In the absence of any demonstration that this definition itself runs afoul of s. 15(1), we are not at liberty to ignore it.

[61] In *Auton (Guardian ad litem of) v. British Columbia* , [2004] 3 SCR 657, Chief Justice Mclachlin for the Court adopted *Hodge*'s comparator analysis:

> 50 The law pertaining to the choice of comparators is extensively discussed in *Hodge*, *supra*, and need not be repeated here. That discussion establishes the following propositions.
>
> 51 First, the choice of the correct comparator is crucial, since the comparison between the claimants and this group permeates every stage of the analysis. "[M]isidentification of the proper comparator group at the outset can doom the outcome of the whole s. 15(1) analysis": *Hodge*, *supra*, at para. 18.
>
> 52 Second, while the starting point is the comparator chosen by the claimants, the Court must ensure that the comparator is appropriate and should substitute an appropriate comparator if the one chosen by the claimants is not appropriate: *Hodge*, *supra*, at para. 20.

> 53 Third, 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 raised as the basis for the discrimination: *Hodge*, *supra*, at para. 23. The comparator must align with both the benefit and the "universe of people potentially entitled" to it and the alleged ground of discrimination: *Hodge*, at paras. 25 and 31.

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[62] The authorities have applied the comparator principles from *Hodge*: *(Canada (Attorney General) v. Hislop*, [2007] 1 SCR 429, ¶ 37-38; *Clyke* (NSCA) at ¶ 40; *Downey v. Nova Scotia (WCAT)*, 2008 NSJ No. 314 (C.A.) at ¶ 46, 59, 62, 67; *Wynberg v. Ontario*, [2006] O.J. No. 2732 (C.A.) at ¶ 18-20, 107-8; *Howe v. Canada (Attorney General)*, 2007 BCJ No. 1207 (C.A.). Though in *Kapp* (¶ 22) the Chief Justice and Justice Abella cautioned against formalistic and artificial comparator analysis, I do not read *Kapp* as altering the *Hodge* principles.

[63] Applying the *Hodge* principles to the *Boulter* case, the court should first analyze the legislative purpose of any benefit or burden under the *PUA*.

[64] I refer to the provisions of the *PUA* and the Board's commentary extracted earlier (¶ 4-6). The *PUA* does not deliver electrical service. NSPI, a private company, produces and sells electricity. Neither does the *PUA* provide the consumer with insurance against power costs as, for instance, medical or hospital insurance legislation does for health care. The power rates set by the Board are not calculated based on a benchmark of consumer "affordability". The rates are set to approximate what NSPI could charge in a competitive market, and include cost recovery to NSPI plus a reasonable rate of return.

[65] The benefit of the *PUA*'s electrical rating provisions is the relief from the potential misuse of monopolistic market power. The unrestricted monopolist may raise its price above what would be the competitive market level, and reduce its supply below what would be a competitive market level, and discriminate arbitrarily, in price or supply, among consumers. The Board's rate powers under the *PUA* protect power consumers from these vicissitudes. That is a "benefit of the law" under s. 15(1) of the *Charte*r.

[66] The "universe of people potentially entitled to equal treatment" under *Hodge* comprises consumers of residential power in Nova Scotia. It is consumers to whom the *PUA*'s benefit is directed. The claimants are consumers of residential power.

[67] Next, as stated in *Hodge* and *Auton*, 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." Counsel for Ms. Boulter urged the court to back out poverty from the comparator group. This would compare the complainants to a group with more substantial income. I disagree. I have already expressed my view that poverty is not an analogous ground under s. 15(1). The grounds at issue here, according to the claimants, are sex, race, national or ethnic origin, age and disability. It is each of those traits, in turn, that must be backed out for the comparator analysis. To back out poverty would misalign the evidence with the alleged ground of discrimination, as noted in *Gosselin* and by Justice Binnie in *Hodge* (above ¶ 58). To consider the claimants' submission based on sex, one would compare a female claimant under LICO 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.

[68] I refer to Dr Shillington's Table 5 from Statistics Canada (above ¶ 48). If the 83,815 females in poverty are backed out, there remain 63,205 males who are beneath the LICO threshold and must priorize their expenses for basic needs. If one backs out the 12,085 individuals who are visible minorities and 3,275 persons of aboriginal identity who are below LICO, there remain 131,655 individuals who are not visible minorities or of aboriginal identity and who have income below LICO. If one backs out 2,640 recent immigrants under LICO, there remain 144,375 persons under LICO who are not recent immigrants. If one backs out 39,420 children up to age 17 plus 16,800 seniors aged 65 and over, there remain 90,795 individuals between 18 and 64 with incomes below LICO. If one backs out 43,050 persons with disabilities, there remain 103,965 persons without disability under LICO. There are 12,650 lone parent families with children under age 18, but there are 22,195 other Economic Families including 8,290 couples with children under 18, all under the LICO threshold and who must priorize their expenses for basic needs as do the claimants. In each case, the claimant group and the comparator group both have substantial numbers living in poverty, who must priorize power costs against costs of other basic needs.

[69] I quoted Dr. Williams' report earlier (¶ 20). Dr. Williams found that each category, family of four, single parent, single adult male and single adult female, suffered significant monthly deficits. Dr. Williams concluded:

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> This body of research shows that almost all people in the studied households relying on minimum wage earnings and **all** people in receipt of income assistance, or Student assistance in Nova Scotia are unable to meet their basic needs, experience food insecurity and are likely to compromise their dietary intake in order to afford essential expenses, placing their health at risk." [Dr. Williams' emphasis]

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[70] I return to the purpose of the power rating process under the *PUA*. The *PUA*, unlike medical and hospital insurance legislation, is not intended to deliver insured power rates or even affordable power rates. It is intended to relieve consumers from the potential arbitrary price hikes or supply restrictions that may result from a monopolist's market power. Without the *PUA*, the claimants and others in poverty, inside and outside the protected groups under s. 15(1), would pay higher monopolistic power prices for more restricted monopolistic power supply than they do under the *PUA*.

[71] Subject to the claimants' adverse effects submission that I will address next, in my view the comparator analysis does not establish that the *PUA* creates a distinction based on sex, race, national or ethnic origin, age, disability or marital status.

[72] The claimants attempt to circumvent the *Hodge* comparator analysis. They suggest that comparator analysis, though relevant to direct discrimination, is supplanted for adverse effect discrimination by a need to show only that the *PUA* fails to ameliorate the over-representation of s. 15(1) protected groups among the poor. The *PUA*'s omission would perpetuate an existing disadvantage, which the complainants submit suffices to prove an adverse effect distinction. They urge that the error in the decision under appeal was the Board's failure to apply this alternative approach to the s. 15(1) claim.

[73] With respect, I disagree. The comparator analysis applies generally to s. 15(1) claims for either direct or adverse effect discrimination. Otherwise s. 15(1) would afford simply a freestanding duty of affirmative action instead of what the *Charter* intends, a remedy for differential treatment (on protected grounds) that is discriminatory. This point is supported by the leading decisions of the Supreme Court of Canada.

[74] In *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 SCR 3 ("*Meorin*"), Justice MacLachlin, as she then was, for the Court held that the traditional separate tests for direct and adverse effect discrimination under human rights legislation should be synthesized into one approach. She said that under s. 15(1) of the *Charter* there is only one approach for both direct and adverse effect discrimination:

> [47] The conventional analysis differs in substance from the approach this Court has taken to s. 15(1) of the *Canadian Charter of Rights and Freedoms*. In the *Charter* context, the distinction between direct and adverse effect discrimination may have some analytical significance but, because the principal concern is the effect of the impugned law, it has little legal importance. As Iacobucci J. noted at para. 80 of *Law*, *supra*:
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>> While it is well established that it is open to a s. 15(1) claimant to establish discrimination by demonstrating a discriminatory legislative purpose, proof of legislative intent is not required in order to found a s. 15(1) claim: *Andrews*, *supra*, at p. 174. What is required is that the claimant establish that either the purpose or the effect of the legislation infringes s. 15(1), such that the onus may be satisfied by showing only a discriminatory effect. [Emphasis in original.]

[75] *Law*'s three-step test and *Kapp*'s two-step test (above ¶ 29-30) apply whether the distinction is direct or by adverse effect. Justice Iacobucci's statement in *Law* (¶ 80) is quoted in the passage from *Meorin* above. In *Kapp* ¶ 18, Chief Justice McLachlin and Justice Abella quoted Justice McIntyre's seminal ruling in *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143, at 174:

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

[76] The test searches for a distinction by comparing the claimant to a comparator. The claimant's characteristics may be selected to accommodate the uneven territory of adverse effect discrimination. So discrimination against a definable claimant subgroup of a protected class will suffice: *Brooks v. Canada Safeway Ltd.*, [1989] 1 SCR 1219, at 1247 (pregnant women); *Janzen v. Platy Enterprises Ltd.*, [1989] 1 SCR 1252, at 1288-89 (women subject to sexual

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harassment); *Symes v. Canada*, [1993] 4 SCR 695, at pages 769-771; *Nova Scotia (Workers' Compensation Board) v. Martin*; *Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 SCR 504, at ¶ 76-77, 81 (types of disability). In *Kapp*, ¶ 55, Chief Justice McLachlin and Justice Abella said:

> "Not all members of the group need to be disadvantaged, as long as the group as a whole has experienced discrimination."

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[77] But it remains necessary, even for adverse effect discrimination, that the claimants' group or subgroup be treated differently than the comparator group, whose members do not have the protected characteristic but are otherwise similar to those in the claimant group or subgroup. In *Symes* pages 770-71, Justice Iacobucci said:

> Following upon this acknowledgment, however, the important thing to realize is that there is a difference between being able to point to individuals negatively affected by a provision, and being able to prove that a group or subgroup is suffering an adverse effect in law by virtue of an impugned provision. As already noted, proof of inequality is a comparative process: *Andrews, supra*. If a group or subgroup of women could prove the adverse effect required, the proof would come in a comparison with the relevant body of men. Accordingly, although individual men might be negatively affected by an impugned provision, those men would not belong to a group or subgroup of men able to prove the required adverse effect. In other words, only women could make the adverse effects claim, and this is entirely consistent with statements such as that found in *Brooks, supra* to the effect that "only women have the capacity to become pregnant" (at p. 1242).
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> Looking at this point a different way, if s. 63 creates an adverse effect upon women (or a subgroup) in comparison with men (or a subgroup), the initial s. 15(1) inquiry would be satisfied: a distinction would have been found based upon the personal characteristic of sex. [Justice Iacobucci's emphasis]

[78] The leading decisions to rule that adverse effect discrimination violated s. 15(1) are *Eldridge v. British Columbia*, [1997] 3 SCR 624 and *Vriend v. Alberta*, [1998] 1 SCR 493. Though these rulings predated *Law* and *Hodge*, their reasons support the need for comparator analysis.

[79] In *Eldridge* the absence of deaf translation meant the deaf could not communicate with medical personnel while persons with hearing could. The legislation and policies were silent respecting deafness, so the distinction was by adverse effect. But there was a distinction based on disability. Justice LaForest's

reasons (¶ 58-60, 71, 76, 80) recognize the need for differential treatment based on disability. He stated the point succinctly:

> [80] In my view, therefore, the failure of the Medical Services Commission and hospitals to provide sign language interpretation where it is necessary for effective communication constitutes a *prima facie* violation of the s. 15(1) rights of deaf persons. This failure denies them the equal benefit of the law and discriminates against them in comparison with hearing persons.

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[80] In *Vriend*, Alberta's human rights legislation omitted sexual orientation as a prohibited ground. Justices Cory and Iacobucci for the majority ruled that the omission violated s. 15(1), sexual orientation being an analogous ground. As the law said nothing about sexual orientation, the distinction was by adverse effect. Justices Cory and Iacobucci (¶ 81-82) stated that the omission created distinctions with two comparator groups:

> [81] It is clear that the *IRPA*, by reason of its underinclusiveness, does create a distinction. The distinction is simultaneously drawn along two different lines. The first is the distinction between homosexuals, on one hand, and other disadvantaged groups which are protected under the Act, on the other. Gays and lesbians do not even have formal equality with reference to other protected groups, since those other groups are explicitly included and they are not.
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> [82] The second distinction, and, I think, the more fundamental one, is between homosexuals and heterosexuals. ... This was well expressed by W. N. Renke, "Case Comment: *Vriend v. Alberta*: Discrimination, Burdens of Proof, and Judicial Notice" (1996), 34 *Alta. L. Rev.* 925, at pp. 942-43:
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>> If both heterosexuals and homosexuals equally suffered discrimination on the basis of sexual orientation, neither might complain of unfairness if the *IRPA* extended no remedies for discrimination on the basis of sexual orientation. A person belonging to one group would be treated like a person belonging to the other. Where, though, discrimination is visited virtually exclusively against persons with one type of sexual orientation, an absence of legislative remedies for discrimination based on sexual orientation has a differential impact. The absence of remedies has no real impact on heterosexuals, since they have no complaints to make concerning sexual orientation discrimination. The absence of remedies has a real impact on homosexuals, since they are the persons discriminated against on the basis of sexual orientation.

[81] *Eldridge* and *Vriend* do not, as the claimants suggest, stand for the principle that an adverse effect claim escapes comparator analysis. In *Eldridge* the deaf had

no translation and those with hearing did not need translation. In *Vriend* homosexuals had no human rights protection and heterosexuals did not need protection. These were adverse effect distinctions, on protected grounds, between the claimants and comparator groups of persons without the protected trait but otherwise similar to the claimants. Essentially this is the *Hodge* approach.

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[82] The results in *Eldridge* and *Vriend* may be compared to the outcome in *Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia*, [2007] 2 SCR 391. Chief Justice McLachlin and Justice LeBel for the majority dismissed a s. 15(1) challenge to legislation that adversely affected employment positions known as "women's jobs", and that were occupied disproportionately by women (see ¶ 16). The ruling said (¶ 165):

> "The differential and adverse effects of the legislation on some groups of workers relate essentially to the type of work they do, not to the persons they are."

[83] In *Boulter*, Dr. Shillington's Table 5 establishes that each claimant group and its respective comparator group contain substantial numbers of persons in poverty. 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.

Conclusion

[84] Despite their impressive presentation to the Board and to this court, the claimants have not established that s. 67(1) draws a distinction on a listed or analogous ground under *Kapp*'s first test. I would dismiss the appeal without costs.

Fichaud, J.A.

Concurred in:

Saunders, J.A.

Hamilton, J.A.