2008 **C.A. No. 292954**

IN THE NOVA SCOTIA COURT OF APPEAL

BETWEEN:

DENISE BOULTER, YVONNE CARVERY, LAURA LANNON, WAYNE MACNAUGHTON, KARAN WHITEMAN

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

FACTUM OF THE APPELLANT DENISE BOULTER

Vincent Calderhead
Nova Scotia Legal Aid
2839 Agricola Street
Halifax, NS B3K 4E4
Telephone: 420-3461
Counsel for Denise Boulter

Claire I. McNeil
Dalhousie Legal Aid Service
2209 Gottingen Street
Halifax, NS B3K 3B5
Telephone: 423-8105
Counsel for Yvonne Carvery, *et al* and Affordable Energy Coalition

David Roberts
Pink Breen Larkin
Suite 400, 1583 Hollis Street
Halifax, NS B3J 2M4
Telephone: 423-7777
Counsel for Nova Scotia General Government and Employees Union

Glenn Anderson, Q.C.
Department of Justice (NS)
4th Floor, 5151 Terminal Road
Halifax, NS B3J 2L6
Telephone: 424-7979
Counsel for the Attorney General of Nova Scotia

Daniel Campbell, Q.C.
Cox Hanson O'Reilly Matheson
1100-1959 Upper Water Street
Halifax, NS B3J 3E5
Telephone: 491-4105
Counsel for Nova Scotia Power Inc.

I N D E X

Page

PART I: Overview 1

Part A: The Applicant Denise Boulter: Personal Background and Circumstances 1

Part B: Government Regulation of Electricity Accessibility for all Nova Scotians: An Essential Services 8

Monopoly Provision of Electricity 9
Universal Accessibility of Regulated Electrical Service 9
Electricity Rates will be 'Reasonable and Just' But also Identical 11
The Insistence on 'Non-Discriminatory' Rates in s. 67 of the PUA: History and Purpose 11

PART II: Issue 15

PART III: **Argument** 16

Standard of Review 16
The Charter Equality Claim: An Overview 16
A Note on Justiciability 17
Application of the *Charter* 20
Purpose of the Equality of Rights Guarantee: Substantive Equality 21
Adverse Effects Discrimination & Substantive Equality 25
The Impugned Decision 29
The Andrews/Knapp Two Part Test: 32
Step 1: Disadvantage Impacting Protected Groups 32
Step 2: Disadvantage on the Basis of Enumerated and Analogous Grounds 41
Poverty as an Analogous Ground of Discrimination 44
Conclusion on Poverty as an Analogous Ground 62
Conclusion on Section 15 63
Section One of the *Charter* 63

PART IV: Relief Requested 65

PART V: Costs 66

PART I

> "Under a substantive definition of equality, different treatment in the service of equity for disadvantaged groups is an expression of equality, not an exception to it": P. W. Hogg, *Constitutional Law of Canada*, passage quoted by the Supreme Court of Canada in *R.* v. *Kapp* (SCC 2008) at para. 37

Overview

1. This is a case about what happens when a single, fixed-rate for all residential electricity consumers, stipulated by the *Public Utilities Act*, comes up against the reality of desperate poverty in Nova Scotia. It is a case in which a sampling of the thousands of Nova Scotians who do not have enough to provide the basics for themselves and their children have come before the Court asking that their *Charter* Equality Rights be affirmed. They ask the Court to vindicate their right to substantive equality in the setting of electricity costs by directing the Utility and Review Board to take into account and accommodate their circumstances of disadvantage. This approach to ensuring universal access to electricity is one that is taken in most states in the United States and one which is legislatively authorized in Ontario.

Part A: The Appellant Denise Boulter: Personal Background and Circumstances

2. Denise Boulter graduated from high school in 1983 with academic honours. She attended Mount Saint Vincent University in September 1983 but, due to an adjustment disorder, was unable to continue her studies. Ms. Boulter recently completed the two-year Health and Human Services Program at the Nova Scotia Community College in Kentville. Her goal is to work in the non-profit sector, possibly in a transition home as a counsellor or advocate for women.[1]

3. Denise was married in 1985 and, subsequently divorced in 1990. After her divorce, she found herself, unfortunately, in relationships which were marked by domestic violence—the most recent of which ended in November 2003.

---

[1] Ms. Boulter's background and circumstances are to be found in her direct evidence and an update thereto: Appeal Book ("A.B.") at pp. 240-9 and 281-3; **[Condensed Appeal Book ("C.A.B.") at pp. 91-105]**. Page numbers in the C.A.B. are in bold italics and are located at the middle, top of each page.

4. She has two children; a son, Michael, born in 1990 and a daughter, Stacey, born in 1998.

5. In the Spring of 2005, she moved into private rental housing in Dartmouth where she paid approximately $600 in rent – including heat. She was in receipt of social assistance at that time and had an overpayment recovery underway for previous arrears to Nova Scotia Power Incorporated (hereinafter "NSPI") which she paid through loans made to her by the social assistance authorities.

6. Because of her desperate financial condition, she came to the view that she simply could not make it financially living in private sector housing and needed to try to obtain affordable housing. She applied for and, in July 2005, was accepted back into low-cost, subsidized housing in Dartmouth.

Ms. Boulter's Disabilities

7. She has suffered from clinical depression as well as an adjustment disorder periodically throughout her adult life. Until approximately four years ago, Denise's depression resulted in her not being able to leave home for three weeks to a month at a time. In January 2003, she started therapy, which has been ongoing, for the adjustment disorder and depression.

Receipt of Social Assistance

8. Denise has been in receipt of social assistance on and off since 1990. However, she was consistently in receipt of social assistance since leaving her abusive relationship with her former partner in November 2003.

9. Ms. Boulter is desperately trying to escape from poverty via her educational qualifications from the Community College. As with most post-secondary students, she needed a computer with an Internet connection to meet her educational needs. This made the maintenance of her electricity account all the more important.

Threatened Loss of Power

10. While Ms. Boulter has had an NSPI account in her name on and off since her divorce in 1990, when she wasn't, herself, a customer of NSPI, it was because her account was past due and she was unable to pay it. Therefore, out of necessity, her power was in someone else's name. Indeed, during her last relationship, she couldn't get the account in her name because of pre-existing arrears with Nova Scotia Power.

11. Ms. Boulter has been in arrears on many occasions with NSPI and has also had many disconnection notices sent to her. Within the past two years, she made payments by taking money from her social assistance 'personal allowance' which is intended to be used for the purchase of food and clothing. This practice of buying less food in order to pay rent and power bills is, interestingly, confirmed by the expert evidence of Prof. Patricia Williams,[2] Charlie MacDonald[3] and Nancy Brockway[4] among others.

Income and Expenses

12. Until August of 2007, Ms. Boulter lived as an unattached individual on social assistance. Her net income from social assistance amounted to $720.00 per month for her basic needs as well as additional, special needs funds, for telephone, bus pass and a special diet.

13. Her rent and power bills exceeded her allotted "shelter allowance" from her social assistance entitlement—meaning that she had that much less to buy food and other essentials.

14. Until August 2007, she paid between $30 and $35 per month for electricity on a total income for basic needs (not including telephone, bus pass or special diet) of approximately $741.00 per month. In other words, she spent just over 4% of her monthly

---

[2] A.B. p. 928;**[C.A.B. p. 118]**.
[3] A.B. p. 178, para. 75 and pp. 5337-8;**[C.A.B. p.38 and C.A.B. p.123-4]**.
[4] A.B. pp. 5307, 5309-10;**[C.A.B. pp.125-7]**.

basic income for electricity in a situation where she did not pay her own heating costs. Moreover, she was constantly in rental arrears.

Food Expenses and Personal Deprivations Arising from Her Poverty

15. Up until February 2007, Denise was approximately 90% dependent on the local charitable food bank for meeting her food needs.

16. The food bank nearest her home in Dartmouth was only open on Wednesday afternoons. There was, in addition, another one that was open on Tuesday mornings. However, during both of these times, she was in class and unable to attend at the food bank. Because of that situation, a volunteer from the food bank had been making deliveries of food to her.

17. However, in February of 2007, she was sexually assaulted by this 'volunteer' during the course of his making a delivery to her home. As a result, this person was charged with sexual assault and, in November 2007, found guilty. Subsequently, Denise was unable to obtain any food deliveries from food banks.

18. As a result, Denise found herself in very desperate circumstances in which she started spending her limited resources on the purchase of food instead of fully paying her power bill and rent. She also needed to start relying on personal gifts of $10.00 and $20.00 from time to time to purchase food.

19. Due to her lack of money and inability to access the food bank, she had not been buying nearly as much nutritious food as she should have and, instead, had been buying a lot of canned foods as well as skipping many meals including her evening meal. She would, for example, eat cereal without milk for breakfast.

20. Because of the importance of her studies and having her daughter returned to her, Denise often found herself forced to pay a portion of her power bill – to avoid disconnection – instead of buying enough food for herself. This choice was extremely

stressful to her and one that she wished she was not forced to make. She borrowed money from a family member but exhausted her options in that regard.

Other Sacrifices or Deprivations that She Suffered while Living in Dartmouth and Being in Receipt of Assistance

21. On one occasion, Denise had to borrow Tylenol from her neighbour because her daughter had a high fever and Denise had no money to purchase medication. She did not buy medication for herself except when it was absolutely medically necessary. Even the $5.00 Pharmacare co-pay for medication came out of her personal allowance.

22. Another, more recent, example of the type of situation described above was when Denise was no longer able to get food from the food bank after February 2007 **and** she was unable to pay the $5 co-pay for her Prozac prescription. Therefore, she had to immediately discontinue taking this prescribed drug when her re-fill ran out. As a result of going off the Prozac 'cold turkey', her emotions immediately began to fluctuate wildly. Within a couple of days her emotions were all over the place –she found herself crying and soon thereafter, she would be angry and by the third day, she simply could not leave home.

23. As a survival strategy, Denise deviated from her prescribed daily dosage of two pills. Instead, she would take two one day and one the next and follow this pattern consistently as a way of 'stretching out' the medication. This has had some effects on her mood but she saw no way around it given her financial circumstances. Out of embarrassment, she did not tell her physician about deviating from the prescription.

24. In the spring of 2007, Denise foresaw that any power rate increase would need to be paid for by having to cut back further on her personal food consumption.

November 2007 Update

25. In August 2007, Denise's daughter Stacey began living with her at an apartment in Kentville. At the time of the hearing, she was living as a single-mother with her daughter.

26. In Kentville—during the last-half of 2007—Denise lived in a rented two-bedroom apartment where she was responsible for paying her own electricity, (including that for heat and hot water), which are **not** included in the monthly rent of $450.00. With respect to her electricity account with Nova Scotia Power, Denise made arrangements for "budget billing" under which she paid $140.00 per month.

27. Thus, at the time of the hearing before the UARB, her monthly income from social assistance as well as GST and the Child Tax Benefit was:

Personal Allowance:	$204.00	
Shelter Allowance:	$570.00	
GST Credit [$149.75/3mos.)]	$49.92	
Child Tax Benefit (CTB)	$309.65	
Telephone:	$29.46	special needs items
Transportation:	$80.00	
Special Diet:	$20.00	
Child Care	$145.00	
Overpayment Recovery from Social Assistance Entitlement:	(-$15.00)	
Total	**$1,393.03**	

28. A *partial* list of her monthly expenses at the time of the hearing before the UARB included the following:[5]

[5] This budget did **not** take into account all of her expenses. For example, Denise purchased for her daughter a hot meal at school once per week. Nor did it include expenses for hair cuts, personal care supplies, household cleaning supplies, her children's birthdays, Christmas, Easter, and grading presents and school related expenses. In addition, Denise was relying on a food bank at school in Kentville (there was no food bank locally in the Kentville area) to get a $25 food voucher and some small gifts. In November 2007, Denise had **no** idea how she was going to be able to buy things for Christmas.

• Rent	$450.00
• Telephone and Internet	$107.00
• Electricity (incl. heat, lights & hot water)	$140.00
• Medication	$10.00
• Bus Pass	$80.00
• Taxis for groceries	$25.00
• Child Care	$145.00
• Clothing, footwear	$80.00
• Groceries	$300.00
• Stacey's allowance	$20.00
• Michael's allowance	$20.00
• Debt Payments (cable)	$25.00
Total	**$1,402.00/mo.**

29. When she moved to Kentville in the summer of 2007, the Department of Community Services covered the costs for the hiring of a moving truck to move *her belongings* from Dartmouth to Kentville. However, the Department refused to pay the costs for *her* personally to relocate from Dartmouth. Therefore, in the end, the movers agreed to let her ride in the moving truck along with her furniture. (She ended up sitting on a chair in the truck without a seatbelt).

30. While still a student, Denise encountered school-related expenses, for example, school pictures, book orders, and fundraisers relating to her daughter's education. While her daughter was very anxious to be on the basketball team at school, this would have meant paying a fee of $100.00 for team-related expenses. This was simply unaffordable, so Denise had to tell Stacey that she could not be on the team; she was broken-hearted.

31. Finally, in the last-half of 2007, Denise received two disconnection notices from Nova Scotia Power as a result of not being able to pay her monthly-billing payment of $140.00 (on her $1,393/mo. income) on time. Unlike in Dartmouth, there was no food bank in Kentville so low-income people, who are willing to endure the shame and indignity of using it, do not even have that option open to them.

32. [Since the summer of 2008, Denise's son Michael has also begun residing with her at an apartment in Dartmouth while she seeks employment].

Part B: Government Regulation of Electricity Accessibility for all Nova Scotians: An Essential Service

33. Stated simply, electricity is essential to the ability to meaningfully live and participate in contemporary civilization.

34. Whether it is used for light, heating, refrigeration, in the operation of assistive devices or medical equipment for people with disabilities or to run basic appliances, the fundamental importance of access to electricity almost defies adequate description.

35. It comes as no surprise, then, that electricity is seen as an essential service. The Respondent, NSPI, agrees that this is so,[6] and, indeed, the Utility and Review Board has held this to be the case with respect to electricity service on several occasions. In the decision under appeal, the Board repeatedly states that "electricity is an essential service."[7]

36. The ability of *all* Nova Scotians to meaningfully participate in and be members of society with dignity and respect is inconceivable without access to electricity.[8]

---

[6] See NSPI Response to Information Request, A.B. pp. 2129 and 2131; **[C.A.B. pp. 128-9]**.

[7] See A.B., p. 173 (para. 64), pp. 195 & 196 (para. 118); **[C.A.B. p. 33 and pp. 55-6]**. See also the comment of Iacobucci J. (dissenting though not on this point) in *Kenora Hydro Electric Commission* v. *Vacationland Dairy Co-operative Ltd*., [1994] 1 S.C.R. 80 supra, at 93:

> …public utilities are highly regulated monopolies operating for the equal benefit of all citizens such that essential services are furnished on reasonable terms.

[8] In *Gosselin*, a majority of the Supreme Court of Canada stated: "The aspect of human dignity targeted by s. 15(1) is the right of each person to participate fully in society…" *Gosselin* v. *Quebec* (*Attorney General*), [2002] 4 S.C.R. 429 at para. 20.

Monopoly Provision of Electricity

37. Nova Scotians have no choice from whom they will purchase electricity; there is no open market. NSPI enjoys a virtual monopoly in the delivery of electricity to residents of Nova Scotia. In the course of its rate and regulatory decisions, the Utility and Review Board routinely notes that NSPI is a "virtual monopoly". In the course of the decision under appeal, the Board observed:

> NSPI is vertically integrated, investor-owned, regulated public utility with a virtual monopoly on electricity service throughout the Province. It is the primary electricity supplier in Nova Scotia, providing over 95% of the electricity generation, transmission and distribution in the Province.[9]

38. Indeed, it is because of the tendency towards natural monopoly in electricity markets that the Province regulates electricity rates for the benefit and protection of all Nova Scotians. The Respondent NSPI freely admits that: "The purpose of the *Act* is to regulate in the public interest the prices and terms of service of a business that would otherwise have an unacceptable degree of market power."[10]

Universal Accessibility of Regulated Electrical Service

39. At common law, a public utility had an obligation to serve all who required its services "as a matter of duty and not as a result of a contract."[11]

40. Since 1909, public utility statutes in Nova Scotia have also recognized and enshrined the public interest in the universal accessibility of electricity.[12]

41. The common law obligation to furnish service to all is currently codified in s. 52 of the *PUA*:

---

[9] NSUARB Decision approving Settlement Agreement (General Rate Application) (February 5, 2007) A.B. p. 94, para. 8; See also this Court's decision in *DLAS* v. *NSPI*, 2006 74, at para. 32.
[10] See the NSPI submission cited by the Board: A.B. p. 209, para. 151; **[C.A.B. p. 69]**.
[11] See *St. Lawrence Rendering Co. Ltd.* v. *Cornwall* [1951] O.R. 669 at 683 (H.C.) *per* Spence J.
[12] See *An Act to Establish a Board of Public Utility Commissioners,* S. N.S. 1909, c. 1, s. 5.

> Every public utility is required to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable.

42. The result of s. 52 is that, because of the overriding public interest, a public utility such as NSPI is required to furnish service "to all members of the public."[13] The UARB interprets s. 52 as imposing an "obligation to serve" on a utility.[14]

43. This Court characterized the obligation to provide service to all members of the public as being one of 'two great objectives of the *PUA*':

> That all rates charged must be just, reasonable and sufficient and not discriminatory or preferential, and that the service must be adequately, efficiently and reasonably supplied to the public. Almost all provisions of the Act are directed toward securing these two objects – that a public utility give adequate service and charge only reasonable and just rates. The service requirement is expressed in s. [52].[15]

44. Interestingly, the public interest underlying the requirement to provide universal access to service is so overriding that it has been found to be paramount to any permitted restrictions on service availability which a utility my have in its act of incorporation.[16]

45. Electrical service must be safe, adequate and in all respects just and reasonable. Moreover, consumers cannot be asked to pay rates unless and until they have been approved by the Board. The Board's supervisory powers in the public interest are extensive and serve to protect consumers through its direct auditing and inspection powers as well as the requirements that utilities obtain approval prior to making capital expenditures on assets which must, in any case, be "used and useful".[17]

---

[13] *Montreal Trust* Co. *of Canada* v. *Nova Scotia Power Inc*., [1994] N.S.J. No. 382 (N.S.S.C.) *per* Palmeter A.C.J. at paras. 6 & 15 and *Chastain et a1*. v. *British Columbia Hydro and Power Authority* (1972), 32 D.L.R. (3d) 443 at 454 (paras. 23-4) (B.C.S.C.).
[14] UARB Decision, A.B. p. 198, para. 123; **[C.A.B. p. 98]**.
[15] *Nova Scotia* (*Public Utilities Board*) v. *Nova Scotia Power Corp*. (1976), 18 N.S.R. (2d) 692 (A.D.), at para. 17, *per* Chief Justice MacKeigan (emphasis added).
[16] *Re Air-Page Communications Limited et al.,* [1982] N.S.J. 421 at para. 3
[17] *Board of Commissioners of Public Utilities* v. *NSPC*, [1976] N.S.J. No. 505 at paras. 21 and 24.

46. In sum, the Province has acted to protect the public interest through the creation of a comprehensive statutory scheme within which electricity is:

- Recognized as an essential service,
- Provided by a virtual monopoly,
- Furnished to all,
- As a matter of legal duty.

These regulatory features are intended to provide significant *benefits* and *protections* to Nova Scotians.

Electricity Rates will be 'Reasonable and Just' But Also <u>Identical</u>

47. Within the *PUA*'s elaborate regulatory framework, electricity is made accessible to all Nova Scotians in return for reasonable compensation to the utility.[18] Moreover, the *Act* and accompanying case law authorizes the Board to set rates that are 'just and reasonable'.[19] Put simply, the Respondent Province has set the terms under which electricity will be furnished to consumers; whilst rates are to be 'reasonable and just', under impugned s. 67 of the *PUA*, all consumers must pay the same rate. The *PUA* permits no accommodation for those for whom identical treatment effectively creates a barrier in their access to electricity and/or imposes unacceptable choices as to which of their family's basic needs will be met/un-met.

The Insistence on 'Non-Discriminatory' Rates in s. 67 of the PUA: History and Purpose

48. Section 67 provides that all "tolls, rates and charges" will "be charged equally to all persons and at the same rate". The principle which is codified in s. 67 of the *PUA* has its origins in provincial legislation enacted as s. 19 of the *Public Utilities Act* of 1913.[20]

---

[18] *PUA* s. 45 and see the Board's decision under appeal at A.B. p. 198, para. 123; **[C.A.B. p. 98]**.

[19] See ss. 44, 45, 52 and 87 and, for example, *Nova Scotia (Public Utilities Board)* v. *Nova Scotia Power Corp.* (1976), 18 N.S.R. (2d) 692 (A.D.) at para. 17 and *DLAS* v. *NSPI* at para. 15.

[20] S.N.S. 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

49. The prohibition against charging similarly-situated consumers different rates, what the *Act* terms 'discrimination', is mirrored in the penalty-creating provisions of the *Act*. Thus, ss. 107–110 of the *PUA* create offences for charging customers different rates for the same service.[21]

50. Section 67 of the *Act*, its precursors and accompanying penalty sections were and are intended to prohibit what in regulatory law[22] is referred to, ironically, as *discrimination* in the setting of rates.[23] Price 'discrimination', in the regulatory sense occurs when a utility charges different rates for substantially the same service. In the present case, *discrimination* would mean charging different rates for electricity to members of the same rate class.

51. Regulation of utilities under the *PUA* is a proxy for market-place competition.[24] The economic assumption underlying the rule on price discrimination is that if two customers were to be charged different rates for the same service, the one receiving the cheaper rate could simply turn around and re-sell the service to anyone charged a higher rate. Therefore, because price discrimination cannot/would not occur in the theoretical state of perfect competition, it is, accordingly, prohibited under its proxy—a regulated regime. In his text, much-cited by the UARB for regulatory law principles, Professor Bonbright explains the concept in the following way:

> 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.

[21] These offences were also contained in the 1913 legislation at ss. 84 – 87 of the *Act*.

[22] It would appear that the concept, or something very similar to it, is also found in administrative law more generally; e.g., *Way* v. *Covert* (1997), 160 N.S.R. 128 (NSCA).

[23] The Supreme Court of Canada has drawn attention to the conceptual distinction between administrative law and human rights understandings of 'discrimination': *Shell Canada Products Ltd*. v. *Vancouve*r (*City*), [1994] 1 S.C.R. 231 at para. 58 and see also: *Greater Vancouver Sewerage and Drainage District* v. *Ecowaste Industries Ltd.*,[2006] B.C.J. No. 1232 at paras. 287-8.

[24] *DLAS* v. *NSPI* at para. 33.

> One of the most nearly universal obligations imposed by Federal and state laws alike on railroads and on other public utilities is the obligation to furnish service and to charge rates that will avoid "undue" or "unjust" discrimination among shippers or customers, actual or potential.
>
> - and -
>
> In the literature of economics, one of the cardinal attributes of prices under assumed conditions of "perfect competition" is that of a uniform price for any one product at any given time and place.…A purely competitive price is the same to the rich and the poor, to the powerful and the powerless, to the person who finds the product barely worth buying and to the person who would pay ten times the prevailing price rather than go without.
>
> - and -
>
> [The] monopolist has the power, if he so chooses, to maintain substantial price differentials among different consumers or consumer groups.[25]

52. As mentioned above, the insistence on treating all members of the same rate class alike with respect to rates is also reflected in the offence and penalty sections in 107-110 of the *PUA*. There, a utility which charges anything other than the approved rates **or** which charges different rates to customers receiving similar service "shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared unlawful" (s. 107 of the *PUA*). Prohibitions for related forms of price discrimination are also found in ss. 108-110 of the *Act*. This Court has previously noted the close relationship between the anti-discrimination prohibitions in s. 67 and the corresponding offence provisions.[26]

53. The Legislature, via s. 67, has effectively made a policy decision as to the terms of access to electricity. The legislature has decided not just what the price of access will be but—in effect—**who** will be permitted access to electricity/who will be forced into unacceptable choices as to whether to eat or heat. By enacting a rule that says: 'unless you can pay the same as everyone else, you will not be entitled to electricity in Nova

---

[25] James Bonbright, *Principles of Public Utility Rates*, Columbia University Press, 1961, pp. 369, 372 and 373.

[26] See: *Board of Commissioners* at para. 27-29 *per* MacKeigan C.J.N.S.; and *DLAS* v. *NSPI* (*supra*) at paras. 28-9 *per* Fichaud J.A.

Scotia', the legislature has embedded a norm that works for many but not for equality seekers who are living in poverty.

54. In concluding this part of the Appellant's submissions, it will be readily appreciated that this appeal presents a clash between two distinct conceptions of *discrimination*; the traditional, administrative-law notion crystallized in s. 67, on the one hand, and the constitutionally-entrenched substantive Equality Right, on the other. Shortly put, the Court is being asked to decide whether s. 67's insistence on identical treatment for members of the residential rate-class is in conflict with substantive equality.

PART II: ISSUES

It is submitted that the grounds of appeal listed in Denise Boulter's Notice of Appeal can be encapsulated as follows:

1. **The UARB erred by failing to find that s. 67 of the *PUA* violates the Appellant's right to substantive equality under s. 15 of the *Charter of Rights and Freedoms* and which violation is not saved by s. 1 of the *Charter*.**

PART III: ARGUMENT

Standard of Review

55. The Board's decision under appeal to this Court (pursuant to 30(1) of the *Utility and Review Board Act*) concerns whether a legislative provision violates the *Charter of Rights*. The Supreme Court of Canada has held that these issues are to be reviewed using s standard of correctness.[27]

The Charter Equality Claim: An Overview

56. The regulatory scheme in the *PUA* is an elaborate supervisory regime which ensures that electricity will be furnished to all Nova Scotians on 'reasonable and just' terms. When it comes to setting the cost of electricity, however, the impugned legislation creates a barrier to obtaining the intended *benefits* and *protections* of regulated access to electricity service.

57. Section 67 creates a rate-structure which requires that all residential consumers be treated identically which, thereby, disproportionately results in substantive inequality for equality-seekers in their access to electricity.

58. In addition to the unequal *benefits* and *protections*, a significant *burden* is experienced by equality-seekers, such as the Appellant, who either cannot afford to access electricity while trying to meet their other basic needs or who pay for electricity—in order to maintain their shelter—thereby precluding them from being able to afford a nutritious diet for themselves and their children.

59. This is a case of adverse effect discrimination in which the *PUA*'s requirement of identical treatment in the setting of electricity rates violates the Appellants' rights to equal *benefit* and *protection* of regulated accessibility to electricity while imposing an unequal *burden* on them in their access to regulated electricity.

---

[27] *Dunsmuir v. New Brunswick*, [2008] S.C.C. 9 at para. 58 and *Multani* v. *Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 at para. 20.

60. The rate-setting scheme stipulated by s. 67 of the *PUA* sends a message that if a family can't afford the averaged cost for residential electricity then that family doesn't really matter, they don't deserve access to this essential service. This is the embedded mainstream norm or 'headwind' that poor people in Nova Scotia are confronted with.[28] In the British Columbia firefighters case of *Meiroin*, a physical fitness test—designed based on the aerobic capacity of males—which was used to screen all job applicants but which had the adverse effect of disproportionately excluding women was found to be discriminatory. This was because it had served "to entrench the male norm as the "mainstream" into which women must integrate."[29] Here, s. 67 is a legislated a norm regarding pricing that works for many people, but not the poor.

A Note on Justiciability

61. At some point, it is anticipated that one or both of the Respondents will make arguments which, effectively, put into issue the justiciability of this claim. Before the Board, for example, the Respondent Province argued that 'social and public policy questions are for the Legislature.' By way of immediate reply, it will be recalled that, unlike the United States, the Supreme Court of Canada has held that there is, in Canada, no 'political questions doctrine' which puts some types of legal claims beyond judicial scrutiny.[30]

62. The Respondents may well seek to argue that because the pre-existing social and economic disadvantage which the Appellants suffer is not *caused by* the impugned legislation, this is not really a suitable equality rights claim.

---

[28] The 'headwind' imagery is that of Sopinka J. in *Eaton* (*supra*) para. 67.

[29] *British Columbia* (*Public Service Employee Relations Commission*) v. *British Columbia Government and Service Employees' Union* (*B.C.G.S.E.U.*) (*Meiorin Grievance*), [1999] 3 S.C.R. 3 at para. 36.

[30] See e.g., *Newfoundland* (*Treasury Board*) v. *Newfoundland and Labrador Assn. of Public and Private Employees* (*N.A.P.E.*), [2004] 3 S.C.R. 381 at para. 80.

63. There are two points in reply. First, for those people, like Ms. Boulter, who have already been found to be 'persons in need' and are reliant on the Respondent Province for social assistance, the demonstrated and admitted inadequacy of the assistance provided to meet their basic needs makes clear that the government, quite literally, **is** responsible for the level of poverty at which they subsist and which level makes basic needs such as food and rent—including heat and lights unaffordable. Thus, the Respondent Province has chosen to both provide a level of assistance, knowing it be to be inadequate,[31] while maintaining in place legislation which prohibits any accommodation of the Appellants' social and economic disadvantage in the setting of electricity rates. **None** of this evidence was challenged at the UARB hearing.

64. Second, at the level of principle, similar arguments at the Supreme Court of Canada have been summarily dismissed. Thus, in *Eldridge*, a Crown argument that limitations in a province's Medicare regime could not be held responsible for the Appellants' deafness and their resulting inability to benefit fully from the health care regime was summarily rejected by the Court. In reaction to the contention "that governments should be entitled to provide benefits to the general population without ensuring that disadvantaged members of society have the resources to take full advantage of those benefits", the Court was clearly impatient: "[T]his position bespeaks a thin and impoverished vision of s. 15(1). It is belied, more importantly, by the thrust of this Court's equality jurisprudence….once the state does provide a benefit, it is obligated to so do in a non-discriminatory manner."[32] For well over two decades, the Supreme Court of

---

[31] For an admission of the inadequacy of social assistance rates by the Premier in December 2005, see A.B. pp. 1406 and 1635; **[C.A.B. pp. 131 and 132]**. See also the expert evidence of Professor Patricia Williams at A.B. p. 931, **[C.A.B. p. 121]** as well as a major publication by the Province's Department of Health Promotion and Protection (*Healthy Eating Nova Scotia*) which was adopted as and formed the Province's 'Healthy Eating Strategy') which repeatedly states that social assistance rates are inadequate for recipients to afford a nutritious diet: and of A.B. p. 1160 at pp. 1184, 1187, 1189; **[C.A.B. p. 145 at pp. 147-149]**.

[32] *Eldridge* at paras. 72-73. the lower courts in B.C. had also embraced this approach—see para. 66 of *Eldridge*. See also *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493 at paras. 75-6 where the Court similarly rebuffed a Crown argument that if the failure to include protection for gays and lesbians in Alberta's human rights legislation resulted in a

Canada has been clear in stating that effects-oriented[33] equality rights protections are "directed to redressing socially undesirable conditions quite apart from the reasons for their existence".[34]

65. Finally, should the Respondents urge the Court to avoid close scrutiny of the 'policy' decisions embedded in the *PUA*, it is submitted that the Supreme Court has consistently ruled (e.g., in *Operation Dismantle*,[35] *Symes*, *Vriend*, and *N.A.P.E.*) that the notion that there are inherently "political" questions which are immunized from the Courts' jurisdiction has been emphatically rejected.[36] One has only to recall how the Supreme Court waded into the area of health and social policy in *Chaoulli* to realize the aridity of such arguments. The *Chaoulli* decision is, perhaps, the most striking so far from the Court for the way that it not just entered the supposed "policy" fray of health care and found a violation but also went through the 'reasonable limit' defence erected by government and ended up striking down a cornerstone of Medicare policy in Quebec.

---

disadvantage to them; 'that distinction exists because it is present in society and not because of the [impugned *Act*].'

[33] This Court's own view on how 'adverse effects' are to be understood is found in *Sparks* v. *Dartmouth/Halifax County Regional Housing Authority*, [1993] 119 N.S.R. (2d) 91 at para. 28.

[34] *Robichaud* v. *The Queen*, [1987] 2 S.C.R. 84 at para. 10.

[35] It will be recalled that, in *Operation Dismantle*, the whole Court agreed with Wilson J.'s formulation of the matter:

> "The question before us is not whether the government's defence policy is sound but whether or not it violates the appellants' rights under s. 7 of the *Charter of Rights* and Freedoms. This is a totally different question. I do not think there can be any doubt that this is a question for the courts…..I would conclude, therefore, that if we are to look at the Constitution for the answer to the question whether it is appropriate for the courts to "second guess" the executive on matters of defence, we would conclude that it is not appropriate. However, if what we are being asked to do is to decide whether any particular act of the executive violates the rights of the citizens, then it is not only appropriate that we answer the question; it is our obligation under the *Charter* to do so."

Operation Dismantle v. *The Queen*, [1985] 1 S.C.R. 441 at para. 64.

[36] *Newfoundland* (*Treasury Board*) v. *Newfoundland and Labrador Assn. of Public and Private Employees* (*N.A.P.E.*), [2004] 3 S.C.R. 381 at para. 80.

66. The *Charter* challenge here is to the effects of a legislative provision which demands identical treatment in rate-setting and thereby operates to, disproportionately, work a real disadvantage on members of equality-seeking groups.

Application of the Charter

67. The *PUA* declares that Nova Scotia Power Incorporated is a public utility[37] and, thus, makes its provision of electricity "service"[38] subject to the comprehensive regulatory supervision of the *Act* and the statutory delegate, the Utility and Review Board.[39] As the Board itself put it: "the terms of service under which NSPI provides electricity are dictated by legislation - the *Act*."[40]

68. From there, the *Act* provides the Board with broad power in s. 44 to set 'just' rates for each rate class.

69. Central to this appeal, and the focus of the Equality Rights challenge, is the fact that government embedded a legislative decision (in s. 67 of the *PUA*) that all residential consumers will pay identical rates in order to access the benefits and protections of regulated electricity. Thus, there is no claim against any actions by NSPI in its billing practices.

70. The Appellant submits that, pursuant to s. 32 of the *Charter*, the elaborate legislative regime in the *PUA* and, more particularly, the identical treatment requirements in s. 67 of the *PUA*, attract the application and scrutiny of the *Charter of Rights.*[41]

---

[37] Section 117(2) of the *PUA* declares that NSPI is a "public utility".

[38] Section 2(f) of the *PUA* defines "service" as including:
(iii) the production, transmission, delivery or furnishing to or for the public by a public utility for compensation of electrical energy for purposes of heat, light and power.

[39] Section 17 of the *Act* provides that the Board has general supervision over all "public utilities".

[40] A.B. p. 210, para. 152; **[C.A.B. p. 70]**.

[41] The Supreme Court noted in *Vriend* that there is nothing in the wording of s. 32 "to suggest that a positive act encroaching on rights is required." Rather, s. 32 is "worded broadly enough to cover positive obligations on a legislature such that the *Charter* will be engaged even if the legislature refuses to exercise its authority." (*Vriend* at para. 60).

Purpose of the Equality of Rights Guarantee: Substantive Equality

71. In *Kapp*, the Supreme Court recently reiterated its position that the Equality Rights guarantee has a dual purpose which realizes the provision's underlying commitment to substantive equality and the 'remedying of prejudice and disadvantage'[42]:

i. to combat discrimination; and

ii. to ameliorate the position of those who suffer social and political disadvantage within society.[43]

72. The purpose of s. 15—indeed, of all *Charter* rights is dynamic: 'The promotion of equality and dignity.'[44] "Substantive equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration."[45]

73. In *Kapp*, the Court refers to *Andrews* on several occasions for the principle that equality does not necessarily mean identical treatment and that the formal "like treatment" model of discrimination may in fact produce inequality". The Court referred to McIntyre J.'s warning in *Andrews* against a sterile similarly-situated test focused on treating "likes" alike.[46]

74. Simply put, s. 15 "is aimed at preventing discriminatory distinctions that impact adversely on members of groups identified by the grounds in s. 15 and analogous grounds."[47]

75. In *Andrews* and later in *Eldridge* this vision was elaborated as:

> In the case of s. 15(1), this Court has stressed that it serves two distinct but related purposes. First, it expresses a commitment—deeply ingrained in

---

[42] *Law* v. *Canada* at para. 28.
[43] *R.* v. *Kapp* (SCC 2008) at paras. 16 and 25. See also e.g., *Auton* v. *B.C.* at para. 27.
[44] *Kapp* at paras. 15 & 21.
[45] *Kapp* at para.15.
[46] *Kapp* at para. 15.
[47] *Kapp* at para. 16.

> our social, political and legal culture—to the equal worth and human dignity of all persons.…Secondly, it instantiates a desire to rectify and prevent discrimination against particular groups "suffering social, political and legal disadvantage in our society".[48]

76. The Supreme Court has repeatedly stated that s. 15 in particular has a 'strong remedial character.'[49]This reflects the dynamic, ameliorative purpose of the Equality Rights guarantee.

77. In the *Eaton* case, involving the rights of a child with disabilities, the Supreme Court stated that when courts are addressing an Equality Rights claim from members of a disadvantaged group, they must "take into account the true characteristics of this group which act as headwinds to the enjoyment of society's benefits and to accommodate them. Exclusion from the mainstream of society results from the construction of a society based solely on "mainstream" attributes to which disabled persons will never be able to gain access".[50] The resonance of the statement for the present case, and s. 67 in particular, is readily apparent.

78. With particular relevance to impugned provisions which, as here, insist on the identical treatment of all, the Supreme Court in *Eaton* stated that these may be seen as "reverse stereotyping":

> …which, by not allowing for the condition of a disabled individual, ignores his or her disability and forces the individual to sink or swim within the mainstream environment. It is recognition of the actual characteristics, and reasonable accommodation of these characteristics which is the central purpose of s. 15(1) in relation to disability."[51]

79. While the above passage was written in the context of disability (one of the grounds of discrimination at play in the present appeal), it also has clear application for

---

[48] *Eldridge* at para. 54.
[49] *Andrews* at p. 171, para. 34 and *Law* at para. 23.
[50] *Eaton* at para. 67
[51] *Eaton* at para. 67

members of the other equality-seeking groups who are before the Court seeking substantive equality.[52]

***Kapp* and the Supreme Court's Renewed Commitment to Substantive Equality**

80. The Supreme Court of Canada recent 'restatement' in *Kapp* of its approach to s. 15 of the *Charter* appears to have accepted many of the scholarly critiques of the *Law* test, distancing itself from that decision while re-embracing the commitment to substantive equality initially set out in its seminal decision in *Andrews*. It is *Andrews*, the Court says, which sets the 'template' for the proper understanding of s. 15.

81. *Kapp* sends a clear signal to Courts to avoid what the Supreme Court refers to as "the formalism of some of the Court's post-*Andrews* jurisprudence which re-surfaced in the form of an artificial comparator analysis focussed on treating likes alike."[53]

82. Indeed, this is precisely the flaw in the Board's reasoning in the present appeal. The Board had before it a rate-setting regime [s. 67(1) of the *PUA*] which required 'treating likes alike' and saw no equality problem.[54] The Supreme Court has stated and re-affirmed that, 'the accommodation of differences is the essence of true equality'[55] but, in its insistence on non-accommodative, identical treatment, s. 67 statutorily *prohibits* disadvantage from being taken into account/accommodated in the setting of rates.

83. In its decision, the Board stated that the Appellants had incorrectly *assumed* that the *PUA* holds out that electricity rates will be affordable. Because there is no affordability mechanism or provision for rates based on ability to pay in the *PUA*, the Board reasoned, it could not be said that low-income people were missing out on some

---

[52] In his thematic discussion of 'substantive equality' at pp. 55-46 to 55-48 of his text, Professor Hogg links it closely with adverse effect analysis.
[53] *Kapp* at paragraph 22.
[54] See the UARB Decision at A.B. pp. 197-8, para. 122; **[C.A.B. pp. 57-8]**.
[55] *Andrews* v. *Law Society of B.C.*, [1989] 1 S.C.R. 143 at p. 169, para. 31 and *Eldridge* at para. 65.

benefit in the *Act* that others were being given.[56] Therefore, the Board concluded, there was no unequal 'benefit of the law' afforded to the Appellant within the meaning of s. 15 of the *Charter*.

84. With respect, the Appellants' had at no point *assumed* that the *Act* provides that electricity rates will be set based on ability to pay. Had there been any doubt on this point, the matter was made clear after this Court's earlier decision in *DLAS* v. *N.S.P.I.* (2006). Indeed, had affordability in accessing service been a feature of the *PUA*, there would obviously have been no need to file an elaborate *Charter* challenge to the rate-setting regime in the *Act*. The Appellants could simply have asked the Board to set affordable rates.

85. Both Respondents argued before the Board that the Appellants had assumed that the *PUA* contemplates rate affordability. The Board embraced these manifestly inapt contentions; the Board set up a 'straw-man' argument relating to the Appellants' purported position and then knocked it down. This effort appears to have prevented the Board from being able to grapple with the Appellants' actual positions.

86. In short, the Board considered the formal equality found on the face of the *PUA* and, in particular, s. 67's 'non-discrimination' provision—with its rigid prohibition of accommodation—as posing no problem under s. 15 of the *Charter*, indeed as being in perfect compliance with the *Charter*.

87. Lastly, and crucially, in the Board's decision, it cited authorities regarding s. 15 which referred to violations **also** arising from an 'unequal *burden*' imposed by an impugned law. The Board entirely failed to conduct any analysis to determine whether s. 67 violated s. 15 by imposing an unequal *burden* on the Appellants. It is submitted that

---

[56] The Board states: "affordable electricity or electricity based on ability to pay is not a benefit given to, or a burden imposed by the *Act* on any ratepayer of NSPI…. The position of the Claimants seems to assume that either or both of these benefits is a benefit of law", A.B. p. 211, paras. 157-8; **[C.A.B. p. 71]**.

had the Board conducted an 'unequal burden' analysis, the outcome would have been very different.

88. Ultimately, the Board's error lies in its failure to drill down past the equal treatment required by s. 67 in order to assess whether the impugned provision's formal equality was the source of substantive inequality. The Board entirely failed to conduct and adverse effects analysis as to whether s. 67 effectively resulted in unequal *benefit*, *protection* and *burden* in the Appellants' ability to access regulated electricity. In *Meiroin*, Mclachlin J. for the Court stated, in the context of a statutory human rights case but which is no less apt here, that:

> 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.[57]

Adverse Effects Discrimination & Substantive Equality

89. Far from 'identical treatment'—such as stipulated by s. 67 of the *PUA*—ensuring equality within the meaning of s. 15 of the *Charter*, the Supreme Court has frequently stated that it could well be the opposite: "identical treatment may frequently produce serious inequality".[58]

90. Section 15 of the *Charter* prohibits and protects equality-seekers against adverse effect discrimination.[59] In *Andrews*, the Supreme Court of Canada discussed adverse effects analysis[60] in the following passage which, because of its centrality, is quoted *in extensio*:

---

[57] *British Columbia* (*Public Service Employee Relations Commission*) v. *British Columbia Government and Service Employees' Union* (*B.C.G.S.E.U.*) (Meiorin Grievance), [1999] 3 S.C.R. 3 at para. 41.

[58] *Kapp* (*supra*) at para. 27 and *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143 at p. 171, para. 26.

[59] *Eldridge* at paras. 61 & 63.

[60] Indeed, it will be appreciated that alleged violations regarding **all** *Charter* rights are addressed by considering both the purpose and effect of allegedly unconstitutional actions/inactions; see P. W. Hogg, *Constitutional Law of Canada*, (5th ed.) at Section 36.7(b), pp. 36-23 and 36-24.

> This proposition has found frequent expression in the literature on the subject but, as I have noted on a previous occasion, nowhere more aptly than in the well-known words of Frankfurter J. in *Dennis* v. *United States*, 339 U.S. 162 (1950), at p. 184:
>
> > It was a wise man who said that there is no greater inequality than the equal treatment of unequals.
>
> The same thought has been expressed in this Court in the context of s. 2(b) of the *Charter* in *R.* v. *Big M Drug Mart Ltd*…..:
>
> > The equality necessary to support religious freedom does not require identical treatment of all religions. In fact, the interests of true equality may well require differentiation in treatment.
>
> In simple terms, then, it may be said that a law which treats all identically and which provides equality of treatment between "A" and "B" might well cause inequality for "C", depending on differences in personal characteristics and situations.[61]

91. The reason for arriving at this result lays in the contextual nature of the determination of rights violations. In order to ascertain the *effect* which legislation has on people in different circumstances, it is essential to look at the effects in the social and political setting in which the question arises."[62] This is because the social and economic circumstances of equality-seekers may result in vulnerability, for example, to facially neutral legislation. Thus, the Supreme Court has stated, there are many situations where "substantive equality requires that distinctions be made in order to take into account the actual circumstances of individuals as they are located in varying social, political, and economic situations."[63]

92. Substantive discrimination/inequality occurs when the impact or burden of a provision such as s. 67 of the *PUA*—which is applicable to and requires equal treatment of all—falls more heavily on groups protected by s. 15 of the *Charter*:

> It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because

---

[61] *Andrews* at para. 26.
[62] *Andrews* at para. 26.
[63] *Lovelace* v. *Ontario*, [2000] 1 S.C.R. 950 at para. 60.

> of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force.[64]

93. In circumstances where the *effects*[65] of a law of general application disproportionately impact or burden members of equality-seeking groups, the impugned statute may well violate s. 15 of the *Charter*. As was stated in the leading *Andrews* case: "a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another."[66]

94. This is precisely the situation before the Court. Section 67 of the *PUA* is a facially neutral provision of general application which this Court has interpreted as requiring identical rates for all Nova Scotians.[67] The *effect* of s. 67 was clearly shown before the UARB to have a disproportionate impact on people living in poverty, on single mothers, on children and seniors, on people with disabilities, on visible minorities. These effects range from the most immediate, most obvious fact that the burden imposed by electricity rates is borne more heavily by the poor. The effects extend, for some people, to electricity simply being unaffordable and, thus, effectively inaccessible, or only being affordable at an unacceptable cost such as having to choose between heating and allowing one's children to eat a nutritious diet.

95. On its terms, s. 67 stipulates that when the Utility and Review Board makes decisions on electricity rates, its decisions will provide that all people will be treated identically in the setting of those rates. The *Act* has, therefore, left the Board with no remedial discretion in the setting of 'just' rates under s. 44; rates which could, but for the

---

[64] *Eldridge* at para 63.
[65] "A legal distinction need not be motivated by a desire to disadvantage an individual or group in order to violate s. 15(1). It is sufficient if the *effect* of the legislation is to deny someone the equal protection or benefit of the law. As McIntyre J. stated in *Andrews*, at p. 165, "[t]o approach the ideal of full equality before and under the law . . . the main consideration must be the impact of the law on the individual or the group concerned"; *Eldridge* v. *British Columbia*, [1997] 3 S.C.R. 624 at para. 62.
[66] *Andrews* (*supra*) at p. 165.
[67] *DLAS* v *NSPI* (2006) at paras. 25 & 39.

strictures of s. 67, accommodate the unique needs and circumstances of members of equality-seeking groups.[68]

96. To be clear, this *Charter* challenge does not claim that the statute intends to disproportionately exclude equality-seekers from the benefits and protections of the *Act*, nor do we allege that, through the *PUA*, the Province intended 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.

97. Therefore, for purposes of the equality-rights guarantee, the fact that equality-seekers are adversely affected by s. 67 has the same legal import as would be the case if s. 67 had, for example, expressly stated that a fixed proportion of single-mothers, of persons with disabilities, of children or Black Nova Scotians would be ineligible to receive electricity.

98. The Supreme Court of Canada has consistently held that taking into account the adverse effects of legislation on members of disadvantaged groups is precisely what **is** required by legislators in enacting legislation and by courts when applying the *Charter*:

> Not only does s. 15(1) require the government to exercise greater caution in making express or direct distinctions based on personal characteristics, but legislation equally applicable to everyone is also capable of infringing the right to equality enshrined in that provision, and so of having to be justified in terms of s. 1. Even in imposing generally applicable provisions, the government must take into account differences which in fact exist between individuals and so far as possible ensure that the provisions adopted will not have a greater impact on certain classes of persons due to irrelevant personal characteristics than on the public as a whole. In other words, to promote the objective of the more equal society, s. 15(1) acts as a bar to the executive enacting provisions without taking into account their possible impact on already disadvantaged classes of persons.[69]

---

[68] *DLAS* v *NSPI*, (2006) NSCA 74 at para. 25.
[69] *Eldridge* (*supra*) at para 64 (emphasis added).

99. In *Eldridge*, the Court found a s. 15 violation because the Province, in its medicare program, had failed to take into account/accommodate those whose disadvantage prevented them from fully accessing its benefits. The fact that medicare had not exacerbated—let alone caused—their deafness was entirely irrelevant. The s. 15 violation lay in the fact that the legislated program did not **accommodate** the pre-existing disadvantage.

100. In the recent *Kapp* decision, the Supreme Court's majority judgment links the purpose of a s. 15 with substantive equality in nine separate passages. *Kapp* makes clear that it is primarily the "effect" or the "impact" of impugned legislation which will result in violations of s. 15. Shortly put, whether challenged legislation violates substantive equality will be determined by whether the law 'impacts adversely on members of groups protected by s. 15.'[70]

101. Professor Hogg summarizes, in a characteristically pithy way, the link between adverse effects discrimination and substantive equality:

> Substantive equality allows a court to drill beneath the surface of the facially neutral law and identify adverse effects on a class of persons distinguished by a listed or analogous personal characteristic. It is not necessary to show that the law was passed with the intention of discriminating; the mere fact that the law does have the disproportionately adverse effect is enough."[71]

The Impugned Decision

102. As stated above, the Board was of the view that the *Act* treated everyone the same/identically and that the claimants were receiving all the benefits that all other consumers received. Conversely, because there was no provision in the *Act* to ensure affordability of electricity rates, the claimants had not experienced unequal benefit of the law.[72]

---

[70] *Kapp* at para. 16
[71] Hogg (*supra*) at p. 55-48
[72] UARB Decision, A.B. pp. 211-212, paras 158 & 161; **[C.A.B. pp. 71-72]**.

103. As noted above, and despite receiving argument and citing jurisprudence that raised the issue of 'unequal burden' the Board entirely failed to consider whether s. 67 imposed an unequal *burden* on the claimants.

104. Lastly, it is interesting and, in our submission, significant that in its reasoning, the Board stated[73] that it would consider the first step of the *Law* test ('distinction') simultaneously with the third step ('discrimination'); thereby, effectively equating the two. The Board justified its conflation of *distinction* with *discrimination* stating: "since they both relate to whether there has been discrimination or disadvantage." In other words, in the Board's view, had there been a distinction in the *PUA*, this may have given rise to discrimination; conversely, so long as there was no different treatment, then here could, in the Board's understanding, be no 'discrimination'.

105. This understanding of the Boards' reasoning appears to find confirmation in para. 182 of its reasons wherein the Board, after conducting an extended grounds of discrimination analysis, proceeds to *Law* Step Three ('discrimination') where it immediately refers to its finding on Step One ('distinction') in order to conclude that, because there had, in fact, been identical treatment (i.e., "not been a denial of an equal benefit of the law") of the *Charter* claimants and, there was no need to consider whether there existed discrimination.

106. It will be appreciated that this is precisely the similarly situated, formal equality approach which was recently disparaged by the Supreme Court in *Kapp*. As McIntyre J. stated in *Andrews* (in a passage revived in *Kapp)*; far from 'identical treatment' ensuring "equality" within the meaning of s. 15 of the *Charter*, it is likely the opposite: "identical treatment may frequently produce serious inequality".[74] In *Kapp,* the Supreme Court

---

[73] UARB Decision, A.B. pp. 207-8, para. 146; **[C.A.B. pp. 67-8]**.
[74] *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143 at p. 171.

referred to Professor Hogg for the principle that "different treatment in the service of equity for disadvantaged groups is an expression of equality, not an exception to it."[75]

107. The ultimate flaw in the Board's reasoning was that, despite being aware that the claim before it was one of adverse effects discrimination,[76] the Board restricted itself to asking whether the claimants had been accorded formal equality i.e., equal treatment. In its preoccupation with whether s. 67 was *discriminatory* in the regulatory sense, the Board failed to appreciate the far more profound substantive discrimination that had occurred as a result of the prohibition on accommodation of equality-seekers living in poverty. Instead, the Board ought to have applied the scrutiny called for in *Eldridge*:

> Not only does s. 15(1) require the government to exercise greater caution in making express or direct distinctions based on personal characteristics, but legislation equally applicable to everyone is also capable of infringing the right to equality enshrined in that provision, and so of having to be justified in terms of s. 1.… Even in imposing generally applicable provisions, the government must take into account differences which in fact exist between individuals and so far as possible ensure that the provisions adopted will not have a greater impact on certain classes of persons due to irrelevant personal characteristics than on the public as a whole.[77]

108. It is respectfully submitted that by failing to "drill beneath the surface of the facially neutral law and identify adverse effects on a class of persons distinguished by a listed or analogous personal characteristic",[78] the Board erred.

109. The Board failed to ask itself the crucial but simple questions; by embedding a policy that everyone pays the same for electricity, does s. 67 effectively create a barrier for the poor in accessing regulated electricity? By insisting that the rich pay the same for

---

[75] *Kapp* at para. 37.
[76] UARB Decision, A.B. pp. 193 & 203-4, paras. 114 & 136-7; **[C.A.B. pp. 53 & 63-4, paras. 114 & 136-7]**.
[77] *Eldridge* v. *British Columbia*, [1997] 3 S.C.R. 624 at para. 64.
[78] This is the formulation of Professor Hogg in *Constitutional Law of Canada* (5th ed. 2007), vol. 2, at p. 55-48.

electricity as those who do not have adequate income to obtain their basic needs, does s. 67 'have a more burdensome impact on one than another'[79] in terms of accessing/inability to access electricity.

110. [The Board also considered, in *obiter*, the issue of whether poverty is an analogous ground of discrimination. Its obiter ruling held that poverty was not analogous to those in s. 15.[80] It is submitted that the Board erred by misapplying the law and by ignoring controlling authority to the contrary.]

The Andrews/Kapp Two Part Test:

Step 1: Disadvantage Impacting Protected Groups

111. Under the re-stated *Andrews* test for violations of s. 15, a successful claimant needs to show two things:

> 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? [81]

The second point is explained in *Kapp* by reference to McIntyre J.'s statement in *Andrews* in which he "emphasized that a finding of discrimination might be grounded in the fact that the impact of a particular law or program was to perpetuate the disadvantage of a group defined by enumerated or analogous s. 15 grounds."[82]

112. Whether challenged legislation results in a disadvantage can only be determined by examining "the condition of others in the social and political setting in which the question arises."[83] Substantive equality demands attention to the real-world effects of laws on members of disadvantaged groups.

---

[79] *Andrews* at para. 26.
[80] UARB Decision A.B. p. 221, para. 181; **[C.A.B. p. 81, para. 181]**.
[81] *Kapp* at para. 17.
[82] *Kapp* at para. 18.
[83] *Andrews* at para.26.

Disadvantage #1: Unequal Benefit/Protection of the Law

113. As stated earlier, the *benefits* and *protection* of the *PUA* hold out that because electricity is an essential service, government has regulated it so that electricity can be made universally accessible to all.

114. Electricity is to be made accessible to all in Nova Scotia on terms that are 'reasonable and just'. Moreover, the "comprehensive over-all control of the operations and rates of a public utility"[84] are exercised for the benefit and protection of all members of the public.

115. The uncontradicted and largely unchallenged evidence before the Board establishes that the Appellant and members of several equality-seeking groups disproportionately make up the group of Nova Scotians who either cannot access electricity or, if they can, they are forced into unacceptable choices of which basic needs they or their family members will forego.

116. For members of equality-seeking groups who are living in poverty, their incomes are inadequate to be able to afford their basic needs—including the electricity needed for heat and lights and refrigeration. Accordingly, the impact of the rule in s. 67 of the *PUA* (i.e., treating all residential consumers alike) is such that many members of equality seeking groups—a clearly disproportionate number—are unable to enjoy equal access to electricity service and/or can only do so by making unacceptable choices regarding their rent or family's nutrition.

People Living in Poverty and Their Access to Electricity

117. The evidence at trial, which was neither seriously challenged nor rebutted in any way, established two significant points:

---

[84] *Board of Commissioners of Public Utilities* v. *NSPC*, [1976] N.S.J. No. 505 at para. 45.

- Nova Scotians (such as the Appellant), who are living in poverty,[85]do not have sufficient incomes to obtain adequate food, clothing and housing. This is something which has been well-known by those in the field for a long time. The evidence, almost all of it from experts so-qualified by the Board, was adduced at the hearing and is available in the record before this Court.

  For example, evidence based on the research of nationally acclaimed nutritionist Dr. Patricia Williams established that for people who are reliant on social assistance (**all** of whom live in poverty), their income is insufficient to meet their basic needs[86]. Professor Williams writes in her report:

  > 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.[87]

- In the case of single parents, especially single-mothers, the gap between their social assistance income and a basic needs budget is well over a hundred dollars per month; in the case of two-parent families on assistance, the adequacy gap is

---

[85] Using the generally accepted (including by the Respondent Province) Statistics Canada Low Income Cut-Off ("LICO") criteria for measuring poverty. A very recent (November 2007) Provincial government background study on poverty reduction calls the LICOs the "yardstick" in the measurement of poverty, see A.B. p. 3432; **[C.A.B. p. 137]**.

[86] Dr. Williams' report regarding the cost of a nutritious diet and the manifest inadequacy of the income which recipients of social assistance must rely is found at: A.B. pp. 916-932; **[C.A.B. pp. 106-122]**.

[87] A.B. p. 930; **[C.A.B. p. 120]**.

close to four hundred dollars per month. This research has been sponsored by and, indeed, adopted by the Respondent Province.[88]

- The poor in Nova Scotia are disproportionately made of up of members of equality-seeking groups. Expert statistical evidence from Dr. Richard Shillington showed that women, single parents, especially single-mothers, people with disabilities, Black Nova Scotians, children and the aged are overrepresented among the poor in Nova Scotia.

118. Over and above the discrete groups referred to above is the phenomenon of intersectionality. This is the multiplier or compounding effect when equality-seekers experience the confluence of several characteristics of disadvantage. The significance here is that when a *Charter* claimant possesses more than one of the characteristics, the adverse effects are compounded as they affect the one person/family.

119. In its review of the evidence, the Board set out a useful summary of Dr. Shillington's explanation of the statistical evidence regarding the disproportionate make–up of the poor by members of historically disadvantaged groups.[89] In his direct evidence, the disproportionate impact of poverty is shown graphically in two charts in Dr. Shillington's evidence.[90]

120. Dr. Shillington's evidence provides the following example of dramatic overrepresentation among the poor based on intersecting grounds of discrimination of *sex*, *martial status* and *age* (i.e. young children):

---

[88] A.B. p. 1160 at pp. 1166, 1184, 1187; **[C.A.B. p. 145-149]**.
For an admission of the inadequacy of social assistance rates by the former Premier in December 2005, see A.B. pp. 1406 and 1635; **[C.A.B. pp. 131-2]**.
[89] See especially A.B. pp. 181-4, paras. 85-90; **[C.A.B. pp. 41-4]**.
[90] See: "Figure 7" and "Table 5" in Shillington's report: A.B. pp. 400-401; **[C.A.B. pp. 152-3**]. An even more updated version of this data (albeit based on a smaller sample size) was filed by Dr. Shillington prior to the UARB hearing and is set out—and explained—at A.B. 3363-3367; [**C.A.B. pp. 156-160]**.

> For example, there is extreme overrepresentation[91] in the 2001 census of lone-parents with children under 18 among the poor; a spread of 27 percentage points between the actual proportion of this family type in the total population and their proportion among poor families (9% vs. 36%). Stated differently, they are 4 times more likely to be poor than one would expect given their proportion in the population.
>
> The overrepresentation seen in the 2001 census among lone-parent families is continued in the 2005 SLID survey...where there is a spread of 25 percentage points between the actual proportion of this family type in the total population and their proportion among poor families (7% vs. 32%). This is about 4.5 times more likely to be poor than one would expect given their proportion in the population. (The figures for female led lone parent families are actually higher in Exhibit IR-20(S) with a 23 percentage point disparity (i.e., about 3.5 to 4 times more likely to be poor than one would expect given their proportion in the population).[92]

121. Moreover, all of the Appellants live in poverty and all are members of equality-seeking groups. Denise Boulter is a single mother, in receipt of social assistance, who lives with a mental disability and, as such, faces a plethora of social and economic disadvantages.

122. The evidence is clear that people living in poverty face many obstacles in their access to electricity. Many are in arrears to NSPI and either cannot obtain electrical service or cannot get an account in their own name. Many NSPI customers who are living in poverty experience disconnections or threatened disconnections as a result of not being able to pay power bills and rent and food for their families. In such circumstances, re-establishing service incurs re-connection charges thereby further setting back a

---

[91] Shillington explains 'overrepresentation' in the following terms:

> By over/under-representation, I am referring to the disparity between the proportion which a group represents in the overall population and the proportion of the same group in the poor population. If a group represents 10% of the population but 20% of the poor population, we can say that they are overrepresented/disproportionately represented among the poor. If poverty affected all groups evenly or randomly, one would expect to find the two proportions to be the same. (A.B. 3365; **[C.A.B. p. 158.]**)

[92] See Updated Response to Information Request filed by Richard Shillington, A.B. p. 3363 at 3365; **[C.A.B. p. 158]**.

person/family which is already desperately poor. For those poor nova Scotians who choose to maintain electrical service, the unchallenged evidence—from the Appellants and the systemic, social science evidence—is that they will face severe food shortages or rental arrears.

123. In short, the *benefits* and *protections* of universal accessibility of electricity contemplated by the *PUA* are not equally available to people in poverty because the approach to pricing embedded in s. 67 results in electricity rates that are not affordable to the poor. Section 67 admittedly assures formal equality but prevents substantive equality in access by equality-seekers to the benefits and protections of the *PUA.*

Disadvantage #2: Unequal Burden of the Law

124. An otherwise neutral law can violate a claimant's Equality Rights when it has a 'more burdensome impact' on equality-seekers than on persons who are not disadvantaged.[93] This approach to the understanding of disadvantage created by law, the Supreme Court states in *Kapp*, is what underlies substantive equality.[94]

125. Section 67's similarly-situated rule, with its insistence that all consumers must pay the identical rate ("like rates for like service" as the Board put it[95]) regardless of their circumstances, creates a situation which adversely impacts people living in poverty including many members of equality-seeking groups. The pricing regime for electricity chosen by government and embedded in Section 67 of the *PUA* disproportionately 'saddles'[96] those living in poverty with burdens which either preclude their access to electricity or mean that s. 67's pricing regime for power creates a barrier to their being able to pay the rent or buy nutritious food. The poor experience threatened access to electricity and/or actual inability to have electrical service—with all that entails— or are forced to make unacceptable expenditure choices.

---

[93] *Andrews* at para. 26; *Kapp* at paras. 15 & 18.
[94] *Kapp* at paras. 15-18.
[95] UARB Decision A.B. page 197 at para. 122; **[C.A.B. p. 57 at para. 122]**.
[96] The term is that of McLachlin C.J.C. in *Auton* at para. 27.

126. An example of the burden experienced by the appellant Denise Boulter is found in her own experiences. While Denise was living on her own as a single woman and coping with a mental disability living in poverty, she struggled to escape by pursuing a community college program. Having inadequate income to meet her basic needs, Denise sought help from a food bank. When her class schedule prevented her from accessing the food bank during its limited hours of being open, she accepted an offer from a food bank 'volunteer' to bring deliveries to her home. Being without options, Denise accepted this offer and, was victimized when the 'volunteer' sexually assaulted her. Denise's arrears on her power bills and threatened access to electricity meant that Denise skipped meals, and 'stretched' her medication by taking less than the prescribed dosage because she could not afford the co-pay amount for prescription renewals. This, too, resulted in adverse side effects. Inability to afford a proper diet resulted in Denise skipping meals and buying food with poor nutritional value.

127. After she regained custody of her daughter in 2007, Denise again fell into arrears on her power bill and maintained electricity only by going further into debt with the Department of Community Services which recovered these loans by reducing her monthly social assistance entitlement to a level which was even further below the level required for an adequate income.

128. It is important to bear in mind that the Board expressly accepted the evidence of Denise Boulter and the other Appellants 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.[97]

Pre-existing Disadvantage

129. The *burden* which s. 67 imposes on people in poverty clearly exacerbates their pre-existing disadvantage. Respectfully, the record is chocked full of documentation which documents the historical disadvantage of: person's with *disabilities* (especially the documentation accompanying the evidence of expert witness Charlie MacDonald);

[97] UARB Decision, A.B. p. 212, para. 160; **[C.A.B. p. 72, para. 160]**.

single-mothers (especially the documentation accompanying the evidence of expert witnesses Charlie MacDonald, Dr. Patricia Williams, Bruce Porter and Paul O'Hara) and contains considerable evidence regarding racialized people and their historical disadvantage.

130. Moreover, this Court and the Supreme Court of Canada have already, in the context of equality-rights challenges, commented on the well-known record which documents the disadvantage which, for example, single-mothers and persons with disabilities face in our society.[98]

131. The legislature's insistence, via s. 67, that all consumers pay the same for electricity, when many consumers reliant on the same legislature's inadequate social assistance and who, thus, don't have the resources to do so, is an example of formal equality undermining substantive equality. This is precisely what was referred to by Sopinka J. in the context of disability in *Eaton* (and repeated in *Eldridge*) as 'reverse stereotyping'; the way in which formal equality's refusal to take into account "the condition of others in the social and political setting in which the question arises"[99] serves to actually exacerbate disadvantage:

> …by not allowing for the condition of a disabled individual, ignores his or her disability and forces the individual to sink or swim within the mainstream environment. It is recognition of the actual characteristics,

---

[98] In *Sparks*, a five-member panel of the Court stated: "Single mothers are now known to be the group in society most likely to experience poverty in the extreme." (Sparks at para. 32). In *Cameron*, Justice Bateman's concurring opinion referred to Supreme Court of Canada decisions before concluding that: "Disabled persons have historically been denied access to education, employment, shelter, and other basic amenities of life through the inappropriate attribution of stereotypes and generalizations of inability. Similarly, they have been denied such access through the construction of a society which requires that disabled, in order to fully participate, be free of their limitations. This results in a marginalization of the disabled unwarranted by their personal characteristics. As recognized in the passage above, not allowing for the condition of a disabled individual forces that person to "sink or swim within the mainstream environment." (emphasis added): *Cameron* v. *Nova Scotia (Attorney General)*, (1999), 177 D.L.R. (4th) 611 (N.S.C.A.) at p. 675, para. 263.

[99] *Andrews* at para. 26.

> and reasonable accommodation of these characteristics which is the central purpose of s. 15(1) in relation to disability."[100]

132. The *burdens* imposed by s. 67 and experienced by Denise Boulter are replicated by the other Appellants and those of the equality-seekers described in the evidence of Dr. Patricia Williams, Carol Horne, Paul O'Hara and Bruce Porter.

133. It is extremely important for this Court to appreciate that Denise Boulter's story is not an aberration; not the story of an unfortunate individual who is down on her 'luck'. Rather, the evidence before the Board, and now this Court—ranging from that filed by the Board's own Consumer Advocate through to experts on: public attitudes and perceptions of the poor, energy affordability, social policy statistics, food-costing of nutritious diets in the context of the inadequacy of social assistance rates to meet the basic needs of the poor—makes crystal clear that Denise Boulter's experience is shared by thousands upon thousands of Nova Scotians. While their personal stories will, of course, vary, the main features will be the same: inadequate income to meet their basic needs – food, clothing and shelter.

134. Nor is this a story, for example, of the collective experience of people who fail to manage their money properly. Despite the stereotypes and stigma to which the poor have been subject (e.g., regarding the 'poor choices' *they* have made[101]), the un-rebutted evidence – much of it from government sources – is that social assistance and minimum wage rates provide an inadequate income for families whose need is beyond dispute—having been verified, in the case of people in receipt of assistance, by government officials.

135. Stated simply, the Respondent Province knows and acknowledges that the social assistance rates, which, after all, are set by it, are inadequate to meet the basic needs of

---

[100] *Eaton* at para. 67

[101] On this point, see the evidence of Bruce Porter, A.B. pp. 296-308, paras. 24-45, **[C.A.B. pp. 171-183]**.

those reliant on them.[102] Being poor in Nova Scotia means not just 'having less' than others, it means not receiving enough income to meet your basic needs. It means experiencing the incessant humiliation and degradation of soup kitchens and food banks.

136. Despite this, s. 67 of the *PUA* demands that those who live in poverty will pay the same electricity rates as everyone else and prohibits their circumstances and limitations from being taken into account.

137. This means that in order for equality-seekers who live in poverty to have access to electricity enabling them to participate in society[103] – by having access to electricity – they must give up something else. Usually, that means the ability to eat an adequate diet; sometimes it means not being able to pay the rent; sometimes it means going without necessary clothing.

Conclusion on 'Disadvantage'

138. The impugned provision of the *Act* adversely affects the Appellant and other equality-seekers. Members of equality-seeking groups are disproportionately disadvantaged by the impugned legislation. It imposes disadvantages, both by creating a barrier to the equal enjoyment of the *benefits* and *protections* accorded by the *Act* and by being more *burdensome* compared to those who are not living in poverty.

Step 2: Disadvantage on the Basis of Enumerated and Analogous Grounds

139. Should the court accept that the Board erred, the Court must then consider whether the disadvantages identified by the Appellant are based on grounds listed in s. 15

---

[102] See the statement of the former Premier in the expert evidence of Paul O'Hara, A.B. page 1390 at 1406 and 1635; **[C.A.B. pp. 131-132]** or, generally, *Healthy Eating Nova Scotia* forming part of the evidence of Prof. Patricia Williams esp. A.B. pp. 1184, 1187, 1189; **[C.A.B. pp. 147-9]**.

[103] The Supreme Court of Canada has held that a core aspect of the purpose of the Equality Rights guarantee in s. 15 of the *Charter* is to protect "equal membership and full participation in Canadian society [which] runs like a leitmotif through our s. 15 jurisprudence." *Gosselin* v. *Quebec* (*Attorney General*), [2002] 4 S.C.R. 429 at para. 23.

of the *Charter* or analogous thereto. As stated by Professor Hogg: "The mere fact that a law has a disproportionately adverse effect on persons defined by a prohibited category (along with an impairment of human dignity) is enough to establish the breached of s. 15".[104]

140. Given that this is a claim of adverse effects discrimination, there is no contention that the neutrally-worded s. 67 of the *PUA* refers to prohibited grounds of discrimination. Thus, the fact that the disadvantaged is claimed to be 'based on' prohibited grounds of discrimination "does not mean that the personal characteristics must be explicit on the face of the legislation, nor that the legislation must be manifestly directed at such characteristics."[105]

141. Rather, it is a claim that the impugned provision disproportionately imposes burdens and withholds benefits afforded to those living in poverty. The Appellant is a member of several disadvantaged groups which are expressly protected by s. 15 or accepted by the Supreme court as analogous thereto:

- *Sex* [Denise Boulter is a woman],
- *Disability* [Denise Boulter suffers from clinical depression as well as an adjustment disorder],
- *Marital Status* [Denise Boulter had been living as a single/divorced person and, at the time of the hearing, was a single-parent],
- *Poverty* [Denise Boulter is a recipient of social assistance who is living in poverty.]
- *Age* [Denise Boulter has two children living with her in poverty and who are immersed in the same disadvantages as is she.]

---

[104] Hogg, *Constitutional Law of Canada* (5th ed. 2007), vol. 2, at p. 55-49.
[105] This Court's statement in dismissing one such argument in: *Sparks* v. *Dartmouth/Halifax County Regional Housing Authority*, [1993] 119 N.S.R. (2d) 91 at para. 28.

Intersectionality

142. As stated earlier, the Supreme Court of Canada and scholarly writing have drawn attention to the importance of courts seeing the whole person when assessing discrimination and *not* teasing out discrete grounds of discrimination. Thus, Denise Boulter is a single-mother with young children with a mental disability living in poverty and experiences the world/faces the struggles of a person who possesses **all** those characteristics.

143. The multiplier or compounding effect of 'intersectionality' in equality rights jurisprudence has been well-recognized.[106] As Denise Reaume explains, the treating of grounds as both "isolated" and "homogenous" gives rise to two main problems, the first of which is illustrated as follows:

> The first problem involves situations in which adjudicators fail to notice how the combination of factors actually compounds the injury to the complainant. The case of *Alexander* v. *British Columbia* illustrates the problem very well. The respondent liquor store manager refused to serve Alexander because he thought she was drunk. In fact, she had a motor impairment that affected her gait and speech, and she was partially blind. Alexander was also a First Nations woman. The tribunal found for the complainant, but characterized the discrimination as being solely on the basis of disability. Here, the worry is that the adjudicator's tendency to focus on a single (perhaps the strongest) ground for the complaint means that the full flavour of the injury is overlooked. Perhaps the adjudicator read these facts correctly -- perhaps the respondent would have treated anyone with this disability in the same way, regardless of her race. But it would scarcely stretch credulity to imagine that the respondent was influenced by the fact that the complainant was Aboriginal, perhaps assuming too quickly that she must be drunk because she was Aboriginal. In focusing exclusively on the disability basis of the complaint, the tribunal missed an opportunity to examine how much more insulting it is likely to be to a First Nations person than to others to be treated this way. In other words, using the enumerated grounds as pigeonholes -- as mutually exclusive logical categories into only one of which a single

---

[106] *Law* (*supra*) para. 94; see N. Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1994) 19 Q.L.J. 194, and Denise G. Reaume, Of Pigeonholes and Principles: A Reconsideration of Discrimination Law" (2002) 40 Osgoode Hall L.J. 113 – 144. Professor Dianne Pothier has also addressed this phenomenon in: "Connecting Grounds of Discrimination to Real Peoples' Real Experiences", (2001) 13(1) Canadian Journal of Women and the Law 37.

> individual can fit -- obscures a central issue in the case: what harm was done to the complainant by the respondent's behaviour?[107]

144. It is submitted that the disproportionate impact of s. 67 on historically disadvantaged groups protected by s.15 has been amply established and this evidence was accepted by the Board.[108]

Poverty as an Analogous Ground of Discrimination

145. It is submitted that while the discrimination in this case has been clearly established vis-à-vis members of the equality-seeking groups discussed above, the discrimination against poor people in this case is even *more* direct.

146. For the same reasons discussed above in relations to the other ground/groups, it is submitted that the formal equality provisions of s. 67 of the *PUA* prevent those living in poverty from receiving equal benefit of the *PUA* while also being 'more burdensome' for the poor than for the non-poor consumers of electricity in Nova Scotia.

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.[109] The following discussion reviews criteria which ought to be taken into account when this Court considers whether *poverty* is analogous to those listed in s. 15 of the *Charter*.

Recognition of 'Poverty' as Furthering the Purpose of Section 15

148. Most fundamentally, recognition of 'poverty' as an analogous ground falls squarely within the ameliorative purposes of s. 15: "The primary and oft-stated goal of s.

---

[107] Réaume (*supra*) at page 132.
[108] See also the Board's own finding in the UARB Decision, A.B. p. 215 at para.168; **[C.A.B. p. 75, para. 168]**.
[109] While the Supreme Court has avoided rigid criteria for identification of analogous grounds, see *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 13.

15(1) is to combat discrimination and ameliorate the position of disadvantaged groups within society."[110]

149. This is all the more the case when the interpretive principle is applied that the Constitution, generally, is to be interpreted in a 'broad and purposive manner'. Human rights protections, both statutory and constitutional, are "often the final refuge of the disadvantaged and the disenfranchised."[111]

150. A court's decision as to whether to recognize a ground as analogous should itself be informed by an overarching vision of generosity:

> Both the enumerated grounds themselves and other possible grounds of discrimination recognized under s. 15(1) must be interpreted in a broad and generous manner, reflecting the fact that they are constitutional provisions not easily repealed or amended but intended to provide a "continuing framework for the legitimate exercise of governmental power" and, at the same time, for "the unremitting protection" of equality rights.[112]

Judicial recognition of Poverty as an Analogous Ground of Discrimination

151. The Nova Scotia Court of Appeal and the Nova Scotia Supreme Court have found that "low income" or "poverty" to be personal characteristics/analogous grounds of discrimination within the meaning of s. 15 of the *Charter*.

152. Thus, in 1993, the Nova Scotia Court of Appeal, *en banco*, concluded that a provision of the *Residential Tenancies Act* discriminated against Black Nova Scotians, women and those living in low-income when it excluded public housing tenants from its protections. Hallett J.A, writing for a five member panel of the Court, stated: "I find that the impugned provisions amount to discrimination on the basis of race, sex and income".[113] Moreover, Hallett J.A. continued:

---

[110] See e.g., *Auton v. B.C.* at para. 27.
[111] *Zurich Insurance Co.* v. *Ontario* (*Human Rights Commission*), [1992] 2 S.C.R. 321, at p. 339.
[112] *Andrews* at para. 38; *Robichaud* (*supra*) at para. 8; *Action Travail* at paras. 28-32.
[113] *Dartmouth/Halifax County Regional Housing Authority* v. *Sparks* (1993), 101 D.L.R. (4th) 224 (N.S.C.A. *en banco*) at pp. 232-34, paras. 26 & 27.

> Low income, in most cases verging on or below poverty, is undeniably a characteristic shared by all residents of public housing; the principal criteria of eligibility for public housing are to have a low income and have a need for better housing. Poverty is, in addition, a condition more frequently experienced by members of the three groups identified by the appellant. The evidence before us supports this.
>
> Single mothers are now known to be the group in society most likely to experience poverty in the extreme. It is by virtue of being a single mother that this poverty is likely to affect the members of this group. This is no less a personal characteristic of such individuals than non- citizenship was in *Andrews*. To find otherwise would strain the interpretation of "personal characteristic" unduly.[114]

153. Applying *Sparks* to the s. 15 claim before him in *R.* v. *Rehberg*, Justice Kelly, of the Nova Scotia Supreme Court considered the equality-rights claim and stated: "I find in these circumstances, as was found in *Sparks*, that poverty is likely a personal characteristic of this group, and in this instance poverty is analogous to the listed grounds in s. 15."[115]

154. These Nova Scotia rulings were recently considered by Justice Moir of the Nova Scotia Supreme Court who also considered contrary authorities from other jurisdictions before returning to the above-noted cases of *Sparks* and *Rehberg* for the principle that poverty is an analogous ground of discrimination.[116]

---

[114] *Sparks* (supra) at paras. 31-2.

[115] *R.* v. *Rehberg* (1993), 111 D.L.R. (4th) 336 (N.S.S.C.) at p. 361, para. 83.

[116] *Tupper* v. *Nova Scotia* (*Attorney General*), [2007] N.S.J. 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)*, [2002] O.J. No. 1771 (C.A.) at para. 73 and in Justice Kelly's decision in *R.* v. *Rehberg*, [1994] N.S.J. No. 35 (S.C.). In *Sparks* v. *Dartmouth/Halifax County Regional Housing Authority*, [1993] N.S.J. No. 97 (C.A.) 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.

155. In 2002, the Ontario Court of Appeal drew upon both *Sparks* and *Rehberg* before concluding that "receipt of social assistance" is an analogous ground of discrimination.[117]

156. It is acknowledged that this Court's decision in *Sparks* can be interpreted in more than one way on the question of 'income' or' public housing tenancy' as the ground of discrimination. Clearly, the Board understood the latter to be the case.[118] While the Court's reasons for decision stand on their own, it is submitted that, either way, this Court has held that income-based or income-related distinctions are prohibited grounds of discrimination within the meaning of s. 15.

157. Moreover, should there have been ambiguity in *Sparks*, such uncertainty is entirely absent from Justice Kelly's decision in *Rehberg* wherein the Court stated that "poverty is analogous to the listed grounds in s. 15."[119]

Recognition in Human Rights Legislation

158. In *Andrews*, and other cases, the Court stated that the interpretation of s. 15 would build on the jurisprudence from the human rights field. This extends to the recognition of analogous grounds of discrimination as being informed by what have been identified by legislatures as bases of discrimination that need to be prohibited. Thus, recognition of a ground as analogous will be informed by whether that ground has been included in human rights legislation.[120]

---

[117] *Falkiner v. Ontario (Ministry of Community & Social Services)* (2002), 59 O.R. (3d) 481 (C.A.), at paras. 84-93. See also e.g., *Federated Anti-Poverty Groups of British Columbia* v. *British Columbia* (*AG*) (1991), 70 B.C.L.R. (2d) 325 (B.C.S.C.) at p.354 finding that "persons receiving income assistance" constitute a group protected by s.15; M. 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 *Review of Constitutional Studies* 76 at 77-101.

[118] UARB Reasons for Decision, A.B. p. 217, para. 172; **[C.A.B. p. 77, para. 172]**.

[119] *R.* v. *Rehberg* (1993), 111 D.L.R. (4th) 336 (N.S.S.C.) at p. 361, para.83.

[120] *Andrews* at para. 38 and *Egan* v. *Canada*, [1995] 2 S.C.R. 513at para. 176.

159. The evidence before the Court, as the survey of human rights protections contained in the expert evidence of Bruce Porter makes clear, is that "all provinces and territories have now provided protection from discrimination because of poverty or receipt of public assistance in human rights legislation. Nova Scotia's *Human Rights Act* prohibits discrimination on the basis of 'source of income'.[121] The significance of this is that a legislative consensus exists nationally that discrimination against poor people is both endemic and warrants legislative remediation through inclusion in fundamental human rights legislation.

160. This is consistent with the findings of the Canadian Human Rights Review Panel chaired by former Supreme Court Justice Gérard LaForest.[122] In 1999, the Federal Minister of Justice requested the Panel to consider, among other things, whether the ground "social condition" should be added to the *Canadian Human Rights Act*. During the consultations, the Panel "heard more about poverty than about any other single issue."[123]

161. After national hearings, the Panel released a report entitled *Promoting Equality*, in which it recommended the inclusion of social condition as a prohibited ground of discrimination in all areas covered by the *Act.*[124] The Panel stated:

> Our research papers and the submissions we received provided us with ample evidence of widespread discrimination based on characteristics related to social conditions, such as poverty, low education, homelessness and illiteracy….[125]

In its report, the Panel expressed the view that "it is essential to protect the most destitute in Canadian society against discrimination."[126]

---

[121] Evidence of Bruce Porter, A.B. page 310; **[C.A.B. p. 185]**.
[122] See: Canadian Human Rights Act Review Panel, *Promoting Equality*: *A New Vision* (Ottawa: Department of Justice, 2000), A.B. pp. 2694-2702; **[C.A.B. pp. 194-202]**.
[123] *Ibid.* at A.B. p. 2695; **[C.A.B. p. 195]**.
[124] *Ibid.* at A.B. pp. 2694-2702; **[C.A.B. pp. 194-202]**.
[125] *Ibid.* at A.B. p. 2696; **[C.A.B. p. 196]**.
[126] *Ibid.* at A.B. p. 2699; **[C.A.B. p. 199]**.

162. It is submitted that the conclusions of this relevant and authoritative study can fairly be regarded as a consensus position by respected jurists that poverty ought to be recognized as a ground of discrimination analogous to those referred to in s. 15.

History of Stereotyping and Social Exclusion

163. A ground of discrimination will be recognized as analogous to those listed in s. 15 when the group possessing it has been subject to stereotyping and social exclusion:

> …. the determination of whether a group falls into an analogous category to those specifically enumerated in s. 15 is "not to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of our society".[127]

164. While the Supreme Court of Canada has not yet considered whether poverty or receipt of public assistance is an analogous ground of discrimination, it has certainly recognized that the poor are "one of the most disadvantaged groups in society"[128] and that when it comes to poverty-related barriers to the equal enjoyment of *Charter* rights, the poor, in the words of the current Chief Justice, ought not to be treated as "constitutional castaways".[129]

165. The evidence—emerging from **both** the *Charter* claimants and from the Provincial government—is that current thinking equates poverty with the inability to participate in society with dignity, resulting in social exclusion. Deprivation is closely related to this concept, describing the inability to gain access to the resources needed to meet social conventions, participate in social activities, maintain self-respect, and lead a life one has reason to value.[130]

---

[127] *R.* v. *Turpin*, [1989] 1 S.C.R. 1296 at para. 46.

[128] *R. v. Prosper*, [1994] 3 S.C.R. 236 at p. 288, para. 71, *per* L'Heureux Dubé, J. (Dissenting but not on this point).

[129] *Ibid*., at 302, para. 102 *per* McLachlin CJ.

[130] On this understanding of 'poverty' see the evidence of Richard Shillington, A.B. p. 415; **[C.A.B. p. 154]**.

166. In a Background Document prepared for its recent Poverty Reduction Consultations, the Respondent Province of Nova Scotia expressed a strikingly similar view regarding an exclusion-based understanding of poverty to that of the Appellants' expert witness Dr. Richard Shillington (outlined in the paragraph immediately above):

> Although it is often defined in relation to income, being poor extends beyond income, and includes dimensions of 'social exclusion', such as access to adequate housing, essential goods and services, health and well-being, and community participation. The definition from the United Nations Office of the High Commissioner for Human Rights captures the complexities of what it means to be poor: **"**A human condition characterized by the sustained or chronic deprivation of the resources, capabilities, choices, security and power necessity for the enjoyment of an adequate standard of living and other civil, cultural economic, political and social rights."[131]

167. In his expert evidence Bruce Porter described the prevalent patterns of negative stereotyping and prejudice as well as the extent of discrimination against the poor. The very existence of such patterns indicates that the broader society imagines and treats this group in a particular way, based on an attributed "understanding" of the group, itself a personal characteristic.

168. A review of the Appellants' evidence illustrates the deprivation and exclusion that they experience as a result of their poverty. Each of the claimants experiences and describes indignities and survival strategies that place them at the margin of their society.

Immutable characteristics

169. Frequently, those opposed to the recognition of poverty as an analogous ground of discrimination claim that it is different than the other grounds because whether someone is living in poverty is something that can change over time.

170. There are two main responses to this. First, the evidence is that whether one is in poverty, in fact, is **not** something that changes as much as one might imagine. Second,

---

[131] *Background Document* prepared for NS Government Poverty Reduction Strategy Consultations (November 2007) A.B. page 3428 at p. 3431; **[C.A.B. p. 136]**.

poverty is at least as difficult to change as religion, citizenship or marital status. That is, these recognized ground are comparatively more fluid than some of the other grounds listed in s. 15.

ii) *People Living in Poverty – Similarity to other Grounds in s. 15*

171. Mr. Porter also provided evidence regarding the fact that poverty is similar to other grounds of discrimination listed in section 15 of the *Charter*. In response to a question by the Board asking if "low income groups, poverty, disadvantaged, poor people" had a common thread, Mr. Porter described the group "people living in poverty" as akin to people characterized by the prohibited ground of 'disability':

> A. …. in the sense that there are going to be fuzzy areas around the edge. People can argue about what's the best definition of poverty, whether it's the low income cut-offs under the Statistics Canada and I think there are going to be some people who fall under the low income cut-offs who wouldn't necessarily have all of the hardships that would be associated with poverty. There may be some you know, students or something. But in general, it -- so you know, I would -- I think it's a qualitative rather than strictly quantitatively defined group. But you can use quantitative indicators and the low income cut-offs are about the best around in terms of saying these are people who are what Statistics Canada calls living in straightened circumstances because of the fact that their income is going to be lower than what would be needed for basic requirements of a dignified life. And so I think it is important when we're looking at the stereotypes and the attitudes and so on that we focus on the kind of qualitative indicators of what it's like to be living in poverty. It's not just a question of how much money you have. It's also a question of how you fit into society, what you're excluded from, what the kinds of attitudes are that you encounter.[132]

172. Richard Shillington also testified about the fact that while, for very specific purposes, there may be race or disability-related definitions used in particular statutes, there is, of course, no formal or 'official' definition of race or disability and yet that omission did not prevent their inclusion in s. 15 of the *Charter* as recognized grounds of discrimination. Neither disability nor race (nor many of the grounds such as religion etc.) have *official* definitions; they are "fuzzy areas around the edge," yet they are well-

[132] Hearing Transcript, A.B. pp. 5229-5231; **[C.A.B. pp. 203-205]**.

recognized and enumerated grounds of discrimination and are bases upon which we see discrimination in Canada.[133]

ii) *People Living in Poverty – A Group that Remains in Poverty*

173. "People living in poverty" is also identifiable as a group because poor people do not move easily out of poverty. It is a misperception, evidently shared by the Respondent Province, that there are innumerable variables when determining if a person's income is sufficient, and that these incomes and expenses change "daily, weekly, monthly and yearly."[134] In fact, there is no evidence before us that this is the case; however, there is ample evidence before the Board that poverty is inter-generational, and that people living in poverty face great difficulty in leaving poverty.

Duration of Poverty

174. The "Family Mosaic Study," commissioned by the Provincial Government of Nova Scotia is a 20 year longitudinal study of lone-parent and two-parent families in Nova Scotia. The study found considerable evidence of inter-generational social assistance reliance in Nova Scotia, and used findings of other researchers on inter-generational patterns of unemployment, poverty and social assistance usage.[135]

175. The Family Mosaic Study also concluded that because the sons/daughters of social-assistance recipients often do not have the network of their parents' income to fall back on, they themselves are more likely to require assistance. They found that **three-quarters** of young social-assistance clients were drawn from families that had previously required social-assistance.[136]

---

[133] Hearing Transcript, A.B. pp. 5461-2, **[C.A.B. pp. 206-7]**.
[134] The relevant extract from the Respondent AG's Pre-Hearing Memorandum is found in the UARB Decision at A.B. p. 206, paras. 142; **[C.A.B. p. 66].**
[135] A.B. pp 4428-29; **[C.A.B. pp. 210-211]**.
[136] A.B. pp 4428-9; **[C.A.B. pp. 210-211]**.

176. Family Mosaic also found that it can be difficult for social assistance recipients to move off assistance and into the work force. They found that while many social-assistance recipients may be motivated to seek employment, in the past, some social-assistance regulations have tended to create rather than remove barriers. The loss of medical coverage, the existing tax structure, low minimum wages, and additional childcare expenses all can be significant obstacles when mothers attempt to support their families through their own earnings.[137]

177. Indeed, the Province's own recently released Poverty Reduction Background Document takes up the topic of the 'duration of poverty' and notes that the odds of leaving low-income dropped from 53% after one year to 27% after five years. It states that:

> Duration, or the length of time an individual lives in low-income, is a key factor in poverty-related outcomes. Some individuals, such as students, experience low incomes for short periods of time, whereas for others it is a persistent state. Lone-parent families, especially those headed by women, and individuals with work-limiting disabilities, are prone to persistent poverty.[138]

178. The gist of these findings is confirmed in data reported by the Canadian Council on Social Development in their standard reference tool: the *Canadian Fact Book on Poverty* ("For roughly 60 per cent, poverty proves to be a temporary situation, while it is a recurrent problem for the remaining 40 per cent….. Certain groups are more vulnerable to lengthy spells of poverty. These groups include lone parents, persons with disabilities, members of visible minority groups, recent immigrants, individuals with low levels of education and unattached individuals. The longer one remains in poverty, the more difficult it is to escape").[139]

179. The Province's own *Background Document* to its Poverty Reduction Strategy notes that "people in low-income situations often have little discretion to…take

---

[137] A.B. p. 4442; **[C.A.B. p. 212]**.
[138] A.B. p. 3434 (emphasis added); [**C.A.B. p. 139]**.
[139] A.B. p. 2759; **[C.A.B. p. 219]**.

advantage of opportunities to improve their economic and social status." The paper goes on to state that "(t)he result is social exclusion – the inability to access resources and opportunities – and the beginning of a cycle of poverty."[140]

Defining the group affected – Quantitative aspects

180. The evidence filed in this matter establishes that the existence and extent of poverty is subject to a consensus measurement tool; the Statistics Canada Low-Income Cut Offs. The LICOs allow researchers to measure poverty rates; the relative depth of poverty i.e., the gap between their incomes and the poverty line. These are the quantitative aspects of poverty. The poverty lines derived from the LICOs take into account both family size and location/size of community in which a person/family reside.

181. The Low Income Cut-Offs are the most commonly used measure of poverty, and have been the leading measure in this country for almost 40 years. As Richard Shillington stated in his direct testimony, the LICO is "the most-commonly accepted poverty line in Canada." This statement is based on Mr. Shillington's extensive research on poverty, including his authorship of several books, reports and articles on poverty and its measurement.[141]

182. While the Government of Canada does not *sanction* the LICOs as official poverty lines, the evidence shows that Canada nonetheless invariably *uses* the LICOs as *the* measure of poverty in formal submissions made to the United Nations. Thus, in its Fifth Periodic Report (2005) to the United Nations Committee on Economic, Social and Cultural Rights the Government of Canada stated that: "(i)n terms of the Low Income Cut-Offs (LICO), Canada has no official measure of poverty, but typically uses Statistic Canada's LICO as a proxy."[142]

---

[140] A.B. pp. 3429 & 3431; **[C.A.B. pp. 134 & 136]**.
[141] Hearing Transcript, A.B. pp. 5445-6; **[C.A.B. pp. 222-223]**.
Direct Evidence of Richard Shillington (**Revised**), A.B. p. 395; **[C.A.B. p. 395]**.
[142] A.B. p. 3253; **[C.A.B. p. 225]**.

183. The Respondent Provincial Government itself used the LICOs in the recently released "Background Document" for Poverty Reduction Strategy Consultations held in November 2007. The document states that:

> One measure that is currently being reported in Canada with a regularity and reliability that allows for trending and provincial comparisons is Statistics Canada's Low Income Cutoff (LICO)…While Statistics Canada is careful to point out that low-income data are quite different from measures of poverty, the LICO remains the yardstick. As such, and owing to its wide use in the literature, the LICO will be used in the discussion that follows in this document.[143]

184. Use of the LICOs as a poverty-measurement tool was the subject of much and questioning by the Attorney General in his Information Requests during the UARB proceeding. Interestingly, no evidence of alternative measures of poverty was filed by the Province. However, the Responses to the Information Requests posed *to* the Province revealed that when Departments and agencies of the Respondent Provincial government publish data on poverty, they invariably rely on the LICOs. This was the subject of comment by the Board ("…it was noted that the Province of Nova Scotia uses the LICO widely in its various publications when describing poverty."[144] Board also noted this These include:

- the Department of Finance *Annual Statistical Review*;
- the *Minimum Wage Review Committee Report & Recommendation*: (Environment and Labour);
- *Nova Scotia Demographic Trends into the Twenty First Century* (Department of Finance, 1997);
- *Nova Scotia's Business Climate Index* (2005) for "Low Income": (Economic Development);
- *Women and Economic Autonomy in Nova Scotia: Facts and figures* (2004) Nova Scotia Advisory Council on the Status of Women;
- Nova Scotia Senior Citizens' Secretariat *Business Plan 2006-2007*;
- Department of Community Services *Annual Accountability Report Fiscal Year: April 2003 to March 2004*;
- The Treasury Board (N.S.) *Annual Accountability Report 2001-02*;
- Department of Community Services *Business Plan Fiscal Year 2006-07*;

---

[143] A.B. p. 3432 (emphasis added); **[C.A.B. p. 137]**.
[144] UARB Decision, A.B. p. 219, para. 176; **[C.A.B. p. 79]**.

- Department of Community Services *Business Plan Fiscal Year 2007-08*.[145]

185. The almost universal use of the LICO is remarkable. That it is invariably and authoritatively used to quantitatively measure poverty is demonstrated throughout the evidence. What is also remarkable is the range of bodies using the LICOs, from community organizations to research analysts to Provincial and federal governments to the United Nations.[146]

186. Richard Shillington, based on his expertise in the area of poverty measures, informed the Board that there are other measures of poverty nationally and internationally, for example, the Low Income Measure, the Market Basket Measure, and the Human Development Index. Despite the existence of alternatives, Mr. Shillington supports the LICO as an appropriate measure of poverty in Canada, and, importantly, points out that the conclusions in his report regarding both poverty rates and over representation profiles of equality-seeking groups would not change if he had used the Market Basket Measure, and that the Low Income Measure "doesn't tell a picture that is much different than (the LICO) picture."[147]

187. Shortly put, the measurement of poverty in Canada—using the LICOs—is a matter of consensus by government, non-governmental and international bodies.

---

[145] See: Responses to IRs 1 & 3-4, A.B. pp. 3723-6; 4219-4223; **[C.A.B. pp. 226-229**; **230-234]**.

[146] For ease of reference, a sampling of the range of uses of the LICOs can be found in the Direct Evidence of Paul O'Hara, Exhibits D, E, I and J; Direct Evidence of Charlie MacDonald, Exhibits B, C, D, E, F, G and Exhibit D at p. 37; Bruce Porter Responses to IR's issued by the Attorney General, Exhibit IR 20-L at p. xix, Exhibit IR 20-M, Exhibit IR 25-Q, and Exhibit IR 26-S; 2006 Hearing Exhibit N-30, CA IR's to AG, IR-15; 2006 Hearing Exhibit N-30, CA IR's to AG, Attached GPI Atlantic Report, at p. 35. And the Family Mosaic Study, produced for the provincial government, and before the Board as a response to an information request to the AG, Exhibit N-29, AG IR-14 to Boulter et al., Family Mosaic Study, p. 53 at tab 3.

[147] Transcript at A.B. p. 5444; **[C.A.B. p. 221]** and Shillington Direct Evidence (**Revised**), A.B. p. 417; **[C.A.B. p. 155]**.

Evidence that poverty is a personal characteristic

188. Poverty is a personal characteristic as it shapes the way society interacts with and treats people living in poverty, inasmuch as there are *perceived* characteristics of people living in poverty.

189. One of the tasks of the *Canadian Human Rights Act* Review Panel (chaired by former Supreme Court Justice Gérard LaForest) which authored *Promoting Equality: A New Vision* was to consider whether the ground of "social condition" should be added to the *Canadian Human Rights Act* as a ground of discrimination. In coming to its ultimate conclusion, the report stated that:

> Some might say that poverty and illiteracy are less likely to form a part of an individual's identity than sex or religion. On the other hand, our research shows that the persistence of such factors and the way they shape social and economic relationships suggest they are a part of one's identity or perceived identity.[148]

190. Mr. Porter's direct testimony explains how, as with discrimination against other groups, discrimination against poor people encourages false generalizations about members of the group to accentuate imputed negative characteristics. He describes how poor people are imagined as idle, able-bodied men who are "idle at the taxpayers' expense," when, in fact, the majority of those on social assistance or who are homeless are women, children and persons with disabilities.[149]

191. Mr. Porter goes on to describe how poor people are often characterized as being irresponsible with money, when, in fact, they must be extremely conscientious and careful in budgeting in order to survive.[150] Thus, Wayne MacNaughton testified how he would have $62.00 left each month after rent, which he would use to buy a bus pass. Mr. MacNaughton found that a bus pass was the most resourceful use of his money as it allowed him to access soup kitchens around the city. He testified that he had a routine, almost like a roster, of where he would go to eat and when. He also testified that he

---

[148] A.B. p. 2699; **[C.A.B. p. 199]**.
[149] A.B. p. 294; **[C.A.B. p. 169]**.
[150] A.B. p. 294; **[C.A.B. p. 169]**.

would see a lot of the same people at each place, people employing the same strategies as him.[151]

192. This is similar to the findings of the Family Mosaic Study which pointed out the difference between perceptions of mothers on social assistance to their reality. This study found that contrary to the common public perception that social-assistance recipients do little to help themselves, 77% of mothers who had received social assistance at some time, as compared to 58% of mothers who never received social assistance, took some type of training after their first child was born. This finding is consistent with…research in Ontario that demonstrated single parents on social assistance frequently pursued additional education and training.[152]

193. In his testimony, Mr. Porter describes, and refutes, other stereotypes about poor people. He describes attitudes characterizing single mothers as selfish, and that parents living in poverty are unable to properly parent. He testifies that low income tenants are widely believed by landlords to pose a greater risk of default on rent; that homelessness among young people is seen as a "lifestyle choice;" and that low income parents are widely assumed to lack parenting skills.[153]

Evidence that poverty is an immutable personal characteristic

194. As noted earlier in our analysis of a qualitative definition of poverty, there was ample evidence before the Board that poverty is both inter-generational and that it is difficult to leave poverty. While poverty may not be strictly immutable for some people in that it is not a characteristic that is unchangeable in individual cases, it is constructively immutable in that it is a personal characteristic that is difficult, if not sometimes impossible, to change for many people.

---

[151] A.B. pp. 1239-40; **[C.A.B. pp. 237-8]**.
[152] A.B. p. 4411; **[C.A.B. p. 209]**.
[153] A.B. pp. 294-7; **[C.A.B. pp. 169-172]**.

195. In reviewing whether "poverty"/'social condition' should be included in a reformed *Canadian Human Rights Act*, the Review Panel (chaired by former Supreme Court Justice Gérard LaForest) found that poverty can properly be thought of as immutable;

> [I]n the sense that it is beyond the control of most poor, at least over considerable periods of their lives. There is evidence that poverty is inherited because individuals whose parents were poor are more likely to live in poverty….Our research also shows that while people may move from social assistance to a low-paying job to employment insurance, few actually move into income levels high enough to escape their condition of poverty.[154]

196. As shown by the evidence adduced before the Board, people living in poverty often lack the supports and, therefore, the power to leave poverty. This lack of control was aptly described by the World Bank: "poverty means powerlessness and voicelessness, and vulnerability to fear."[155] This calls to mind the words of the Supreme Court in *Andrews*, when the Supreme Court was considering whether 'citizenship' should be accepted as an analogous ground of discrimination. The Court referred to the phenomenon of political and legislative powerlessness:

> Relative to citizens, non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated. They are among "those groups in society to whose needs and wishes elected officials have no apparent interest in attending".[156]

Evidence that people living in poverty are a discrete and insular minority

197. Although it has been shown by the evidence that people living in poverty are disproportionately made up of people from other protected groups, such as people with disabilities, single mothers, and visible minorities, Bruce Porter testified that <u>discrimination because of poverty is a distinct form of prejudice and discrimination</u>. People living in poverty are a discrete group that encounters prejudice and discrimination that is different from other forms of prejudice and discrimination.

---

[154] A.B. p. 2698; **[C.A.B. p. 198]**.
[155] A.B. p. 4467; **[C.A.B. p. 213]**.
[156] Cited in *Andrews* at para. 5.

198. While discrimination because of poverty is similar in nature to other forms of discrimination, such as discrimination because of race, citizenship, sex or disability, it is its own ground of discrimination. For example, Mr. Porter reported that discrimination on the ground of poverty is the most common form of discrimination in housing.[157]

199. Again, considering the findings of the *Canadian Human Rights Act* Review Panel, there is clear evidence of the poor being a distinct group.

> … the very existence of stereotypes about the poor shows they are often seen and treated as a distinct group. Existing grounds such as age and disability are also relative, and there is considerable debate about how to define disability and race.[158]

200. The Panel also considered the use of existing enumerated grounds to address discrimination based on poverty and found this approach to be lacking:

> Some barriers related to poverty could be challenged on one or more of the existing grounds. However, these cases have rarely been successful. They are difficult to prove because they do not challenge the discrimination directly. Such a case may require complex testimony about the economic status of the group affected, since it may be necessary to show a disproportionate effect on a particular group. Evidence can be even more difficult to obtain if the case involves the interaction of multiple grounds. Perhaps more fundamentally, if a policy or practice adversely affects all poor people or all people with a low level of education, a ground-by-ground consideration of the issue can be seen as a piecemeal solution that fails to take into account the cumulative effect of the problem.[159]

201. Similarly, in his direct testimony regarding the intersection of discrimination based on poverty with other grounds of discrimination, Bruce Porter notes that discriminatory attitudes and stereotypes about the poor frequently provide a more acceptable gloss on invidious discriminatory attitudes toward racialized minorities, youth, Aboriginal people, people with disabilities and women with children. Mr. Porter describes how, without effective protection from discrimination on the basis of their poverty and disadvantage, members of these groups are likely to find protections from

---

[157] A.B. p. 293; **[C.A.B. p. 168]**.
[158] A.B. p. 2699, (emphasis added); **[C.A.B. p. 199]**.
[159] A.B. p. 2697 (emphasis added); **[C.A.B. p. 197]**.

discrimination on other grounds largely ineffective at addressing systemic patterns of exclusion and disadvantage.[160]

Evidence that people living in poverty have been historically discriminated against and stereotyped

202. The evidence of Bruce Porter illustrates how, historically and presently, poor people have been the subject of discrimination. He describes prevalent patterns of stereotyping and the nature and extent of discrimination against the poor, and the ways in which these discriminatory patterns have undermined measures to address their needs by blaming systemic poverty on affected individuals and imputing moral failures to poor people.

203. Porter cites disturbing examples of discrimination against poor people, including local evidence wherein theories of genetic inferiority were applied to this group – discrimination reminiscent of the most destructive forms of racial discrimination.[161]

204. Porter also describes the stigmatization that low-income individuals and households experience, and describes this stigmatization as a common feature of discrimination. He states that poor people report that they are subject to stigma when they live in public housing projects, a point that was also raised in the Family Mosaic Study when one participant said "it's public housing – you're stereotyped."[162]

205. Porter explained that stigmatization and discrimination against the poor relies on imputing inadequacies or moral failures to poor people as an explanation of their poverty rather than recognizing poverty as a failure of larger economic and political systems beyond the control of affected individuals. In a memorandum prepared for the federal government on public reaction to a proposed child poverty measure, government officials were warned:

---

[160] A.B. p. 305; **[C.A.B. p. 180]**.
[161] A.B. pp. 293-4; **[C.A.B. pp. 168-9]**.
[162] A.B. p.298; **[C.A.B. p. 173]**; Family Mosaic Study, A.B. p. 4310; **[C.A.B. p. 240]**.

> Welfare recipients are seen in unremittingly negative terms by the economically secure. Vivid stereotypes (bingo, booze, etc.) reveal a range of images of SARs [social assistance recipients] from indolent and feeble to instrumental abusers of the system. Few seem to reconcile these hostile images of SARs as authors of their own misfortune with a parallel consensus that endemic structural unemployment will be a fixed feature of the new economy.[163]

206. This attitude toward the poor had great influence on government and decision makers about poverty issues, as is well documented by Mr. Porter. The "get tough" attitude toward welfare "cheats" was key for the campaigns of many elected officials, which included the elimination of a $37 monthly pregnancy benefit for expectant mothers on income assistance in Ontario, the reason for which Premier Mike Harris explained "what we're doing is making sure that those dollars don't go to beer."[164]

207. On the core question before it as whether the ground of "social condition" should be added to the *Canadian Human Rights Act* as a ground of discrimination, the LaForest Review Panel which authored *Promoting Equality: A New Vision* (2000) referred to its findings about stereotyping and discrimination based on poverty before concluding that:

> We believe it is essential to protect the most destitute in Canadian society against discrimination. At the very least, the addition of this ground would ensure there is a means to challenge stereotypes about the poor in the policies of private and public institutions. We feel that this ground would perform an important educational function. It sends out a signal about assumptions and stereotypes to be taken into account by policymakers.[165]

Conclusion on 'Poverty' as an Analogous Ground

208. It is submitted that the Court can comfortably rely on the evidence adduced to re-affirm the earlier holdings by the Courts of Nova Scotia that 'poverty' is, indeed, an analogous ground of discrimination within the meaning of s. 15 of the *Charter*.

---

[163] A.B. p. 299; **[C.A.B. p. 174]**.
[164] A.B. p. 300; **[C.A.B. p. 175]**.
[165] A.B. p. 2699; **[C.A.B. p. 199]**.

209. Finally, it is worthwhile recalling the reminder of Dickson J., writing in *Action Travail des Femmes* when he cautioned against unduly narrow interpretations of human rights protections:

> We should not search for ways and means to minimize those rights and to enfeeble their proper impact.[166]

210. The demands of substantive equality, which seek to ameliorate disadvantage, militate towards the recognition of poverty as an analogous ground of discrimination.

Conclusion on Section 15

211. It is submitted that the Appellants have met their burden of showing that the Board committed an error of law in its interpretation and application of s. 15 of the *Charter*. Moreover, the Appellants have established a violation of s. 15 by having shown that the otherwise neutrally-worded s. 67 of the *PUA* has an adverse, disproportionate impact on members of groups protected by section 15 of the *Charter*; that this impact adds to the pre-exiting disadvantage that members of these groups face.

212. Not only has there been no effort to accommodate the adverse effect (remembering that 'the accommodation of differences is the essence of true equality'[167]), but s. 67 expressly prohibits any accommodation. The evidence clearly establishes that notwithstanding any of the existing programs for people living in poverty that are designed to address basic needs or, even, the costs of energy, equality-seekers are left with inadequate income with which to pay the rent and buy a nutritious diet. Those reliant on government are forced by it to either to eat or eat. This is inconsistent with substantive equality.

Section One of the *Charter*

213. The Respondent failed to advance a substantive s. 1 case before the UARB. The Board was clearly troubled by this decision, noting: "The AG chose not to introduce any

---

[166] *Action Travail des Femmes* v. *CNR*, [1987] 1 S.C.R. 1114 at p. 1134.
[167] *Andrews* v. *Law Society of B.C.*, [1989] 1 S.C.R. 143 at p. 169, para. 31 and *Eldridge* at para. 65.

evidence or indeed to pursue a s.1 argument."[168] The Supreme Court has consistently held that the burden on governments seeking to uphold a s. 15 violation will be "onerous".[169]

214. Moreover, with respect to the Respondent having adduced no s. 1 evidence, the Supreme Court has stated that:

> …the state must show that the violative law is "demonstrably justified". The choice of the word "demonstrably" is critical. The process is not one of mere intuition, nor is it one of deference to Parliament's choice. It is a process of demonstration.[170]

215. In the absence of any evidence, the Respondent Province baldly stated that the violation should be upheld because to find that s. 67 is unconstitutional would:

- "..result in discord"
- "..impose considerable administrative expense, etc."

216. In response, it will readily be apparent that: 1) the Province has ignored the Supreme Court principle that there must be a "reasoned demonstration"[171] based on evidence if a violative provision is to be upheld under s. 1. The Respondent's claim was not simply made on the basis of an evidentiary vacuum, it was made in an evidentiary context which shows that most of the states in the United States have and have had income based utility rates for years;

2) In any event; 'administrative convenience' has been explicitly rejected by, among other Courts, the NSCA as a reason to uphold a violation under s. 1 of the *Charter*.[172]

217. The Respondent stated, in the absence of evidence, that 'considerable administrative expense' would be incurred. There was no mention of who would incur

---

[168] UARB Decision at A.B. p. 222, para. 183; **[C.A.B. p. 82 at para. 183]**.
[169] See, for example, *Lavoie* v. *Canada*, [2002] 1 S.C.R. 769 at paras. 6 & 86.
[170] *R.J.R. MacDonald* v. *Canada*, [1995] 3 S.C.R. 199 at para. 128 per McLachlin J. (as she then was).
[171] *RJR MacDonald* (*supra*) at para 129.
[172] See, for example, *Sparks*, (*supra*), at p. 372 DLR.

the expense nor its size. These are vague, afterthoughts that are patently insufficient to justify saving legislation which has been found to be violative of the right to equality.

218. Finally, the fact that there is, yet, no income-based rate regime in Canada tells us little about whether the absence of such schemes is discriminatory. Indeed, all will agree that both Canada and Nova Scotia have long histories of discrimination that were only changed through both legal and political challenges.

219. The fact that most of the states in the United States make explicit provision for income-based services–within "cost of service" regulatory environments in the United States is testament that such accommodative systems can be consistent with that model of regulation.[173]

220. Most recently, the courts in Ontario have confirmed that that province's utilities legislation authorizes utility rates based on affordability for low-income people. This is further indication that the discrimination that has been found cannot be justified as reasonable.[174]

221. The Respondent Province simply has not met the 'onerous' burden on it.

PART IV: RELIEF REQUESTED

222. It is submitted that the most appropriate remedy, one that fully vindicates the rights violation while minimally infringing on the legislative domain is one which leaves s. 67 of the *PUA* intact for almost all purposes but which *reads in* a remedy for people living in poverty.

---

[173] See the evidence of the expert witness Nancy Brockway proffered by the Board's Consumer Advocate at A.B. pp. 1956-7; **[C.A.B. pp. 242-3]**. See also her *viva voce* evidence on this point at: A.B. pp. 5291-5292; **[C.A.B. pp. 244-5]**.

[174] *Advocacy Centre for Tenants-Ontario* v. *Ontario* (*Energy Board*), [2008] O.J. No. 1970 (Ontario Sup. Court of Justice-Divisional Court) at para. 61.

223. In *Schachter* and in *Sharpe*, the Supreme Court read wording into legislation which had the effect of making unconstitutional legislation *Charter* compliant.

224. In this case, the reasonable legislative role played by s. 67 would be continued. Legislative intrusion would be minimal. Moreover, it can be readily agreed that the legislature would prefer to maintain s. 67 rather in most applications than for it to be unavailable at all.

225. Accordingly, it is submitted that the remedy which best addresses the rights violation while respecting the role of the legislature would be to read-in wording to s. 67 which directs the UARB to accommodate the needs of people living in poverty.

Part V: COSTS

226. The Appellant's counsel has incurred very substantial costs to pursue this litigation which is clearly public interest litigation. Bearing in mind that the *Legal Aid Act* (s.22), it is submitted that the Appellant should be awarded its costs.

All of which is Respectfully Submitted.

Dated at Halifax, Nova Scotia, this 24th day of September, 2008.

Vincent Calderhead
NOVA SCOTIA LEGAL AID
2830 Agricola Street
Halifax, NS B3K 4E4

Tel: (902) 420-3461
Fax: (902) 420-2873

Counsel for Denise Boulter

Appendix A - List of Citations Referred to in Part III

1. *Kenora Hydro Electric Commission* v. *Vacationland Dairy Co-operative Ltd*., [1994] 1 S.C.R. 80

2. *Gosselin* v. *Quebec* (*Attorney General*), [2002] 4 S.C.R. 429

3. *St. Lawrence Rendering Co. Ltd.* v. *Cornwall* [1951] O.R. 669 at 683 (H.C.)

4. *Montreal Trust* Co. *of Canada* v. *Nova Scotia Power Inc*., [1994] N.S.J. No. 382 (N.S.S.C.)

5. *Chastain et a1*. v. *British Columbia Hydro and Power Authority* (1972), 32 D.L.R. (3d) 443

6. *Nova Scotia* (*Public Utilities Board*) v. *Nova Scotia Power Corp*. (1976), 18 N.S.R. (2d) 692 (A.D.)

7. *Re Air-Page Communications Limited et al.,* [1982] N.S.J. 421

8. *Board of Commissioners of Public Utilities* v. *NSPC*, [1976] N.S.J. No. 505

9. *Nova Scotia (Public Utilities Board)* v. *Nova Scotia Power Corp.* (1976), 18 N.S.R. (2d) 692 (A.D.)

10. *DLAS* v *NSPI*, (2006) NSCA 74

11. *Way* v. *Covert* (1997), 160 N.S.R. 128 (NSCA)

12. *Shell Canada Products Ltd*. v. *Vancouve*r (*City*), [1994] 1 S.C.R. 231

13. *Greater Vancouver Sewerage and Drainage District* v. *Ecowaste Industries Ltd*.,[2006] B.C.J. No. 1232

14. James Bonbright, *Principles of Public Utility Rates*, Columbia University Press, 1961

15. *Dunsmuir v. New Brunswick*, [2008] S.C.C. 9

16. *Multani* v. *Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6

17. *British Columbia* (*Public Service Employee Relations Commission*) v. *British Columbia Government and Service Employees' Union* (*B.C.G.S.E.U.*) (*Meiorin Grievance*), [1999] 3 S.C.R. 3

18. *Newfoundland* (*Treasury Board*) v. *Newfoundland and Labrador Assn. of Public and Private Employees* (*N.A.P.E.*), [2004] 3 S.C.R. 381

19. *Eldridge* v. *British Columbia*, [1997] 3 S.C.R. 624

20. *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493

21. *Sparks* v. *Dartmouth/Halifax County Regional Housing Authority*, [1993] 119 N.S.R. (2d) 91

22. *Robichaud* v. *The Queen*, [1987] 2 S.C.R. 84

23. *Operation Dismantle* v. *The Queen*, [1985] 1 S.C.R. 441

24. *Law* v. *Canada* (*Minister of Employment and Immigration*), [1999] 1 S.C.R. 497

25. *R.* v. *Kapp* (SCC 2008)

26. *Andrews* v. *Law Society of B.C.*, [1989] 1 S.C.R. 143

27. P. W. Hogg, *Constitutional Law of Canada*, (5th ed.)

28. *Lovelace* v. *Ontario*, [2000] 1 S.C.R. 950

29. *Cameron* v. *Nova Scotia (Attorney General)*, (1999), 177 D.L.R. (4th) 611 (N.S.C.A.)

30. *Eaton* v. *Brant County Board of Education*, [1997] 1 S.C.R. 241

31. N. Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1994) 19 Q.L.J. 194

32. Denise G. Reaume, Of Pigeonholes and Principles: A Reconsideration of Discrimination Law" (2002) 40 Osgoode Hall L.J. 113 – 144

33. Dianne Pothier, "Connecting Grounds of Discrimination to Real Peoples' Real Experiences", (2001) 13(1) Canadian Journal of Women and the Law 37

34. *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203

35. *Auton* (*Guardian ad litem of*) v. *British Columbia* (*Attorney General*), [2004] 3 S.C.R. 657

36. *Action Travail des Femmes* v. *CNR*, [1987] 1 S.C.R. 1114

37. *R.* v. *Rehberg* (1993), 111 D.L.R. (4th) 336 (N.S.S.C.)

38. *Tupper* v. *Nova Scotia* (*Attorney General*), [2007] N.S.J. No. 341

39. *Falkiner v. Ontario (Ministry of Community & Social Services)* (2002), 59 O.R. (3d) 481 (C.A.)

40. *Federated Anti-Poverty Groups of British Columbia* v. *British Columbia* (*AG*) (1991), 70 B.C.L.R. (2d) 325 (B.C.S.C.)

41. M. 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 *Review of Constitutional Studies* 76

42. *Egan* v. *Canada*, [1995] 2 S.C.R. 513

43. *R.* v. *Turpin*, [1989] 1 S.C.R. 1296

44. *R. v. Prosper*, [1994] 3 S.C.R. 236

45. *R.J.R. MacDonald* v. *Canada*, [1995] 3 S.C.R. 199

46. *Advocacy Centre for Tenants-Ontario* v. *Ontario* (*Energy Board*), [2008] O.J. No. 1970

47. *Schachter* v. *Canada*, [1992] 2 S.C.R. 679

48. *R. v. Sharpe*, 2001 SCC 2

Appendix B - Statutes and Regulations

1. *Public Utilities Act*, R.S.N.S., c. 380
2. *Public Utilities Act*, S.N.S. 1913, c. 1
3. *An Act to Establish a Board of Public Utility Commissioners*, S. N.S. 1909, c. 1