2009 **S.C.C. File No.**

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE NOVA SCOTIA COURT OF APPEAL)

BETWEEN:

DENISE BOULTER

APPLICANT
(APPELLANT)

-and-

NOVA SCOTIA POWER INCORPORATED and
ATTORNEY GENERAL OF NOVA SCOTIA

RESPONDENTS
(RESPONDENTS)

APPLICATION FOR LEAVE TO APPEAL
(Denise Boulter, Applicant)
(Pursuant to Section 40 of the *Supreme Court of Canada Act*, R.S.C. 1985, c. S-26)

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Part I — Statement of Facts

A. Overview: Ensuring Substantive Equality

1. This is a case in which the Equality Rights Applicants mounted a systemic challenge to a provision in the Nova Scotia *Public Utilities Act*[1] (the "*PUA*") that requires all members of the same rate-class to pay identical rates for electricity. The provision is non-discretionary and applies despite the fact that, as was accepted by the tribunal below, low-income people have insufficient income to afford their basic needs, including the essential service of electricity.

2. Through the *PUA*, the Province has created a regulatory scheme for the benefit of all electricity consumers in Nova Scotia. This regime includes an obligation to provide access to service (i.e., a 'right of access to electrical service') as part of the 'regulatory compact'. Therefore, the government needs to ensure that the legislated pricing regime for access to this service is configured in a way that protects the right of the most vulnerable to substantive equality in their access. Shortly put, the Province's enactment of protective regulatory legislation, such as the *PUA*, must ensure that equality-seekers are accommodated so that they, too, enjoy equal access to the benefits of the *Act*.

3. The legislated pricing structure, while facially-neutral and applicable to all, contravenes the Applicants' Equality Rights under s. 15 of the *Charter* as a result of adverse effect discrimination. They have sought to establish this by showing that the legislation results in adverse effects discrimination on the analogous ground of 'poverty' and, alternatively, that it disproportionately impacts on the basis of six frequently intersecting grounds of discrimination.[2]

4. This approach to ensuring substantive equality in access to electricity is one that, as the evidence demonstrated, is taken in most states in the United States as well as being legislatively authorized in Ontario.[3] The point here is that an approach to ensuring equal access that was proposed to the UARB by the Applicants is eminently do-able and, while perhaps surprising, is widely practiced throughout the United States.

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[1] *Public Utilities Act*, R.S.N.S., 1989, c. 380, s. 67(1) (hereinafter "*PUA*").
[2] Court of Appeal Judgment: LTA, Tab 3C, *para*. 48.
[3] This was judicially confirmed to be the case in *Advocacy Centre for Tenants-Ontario* v. *Ontario* (*Energy Board*), [2008] O.J. No. 1970 (Ontario Sup. Ct. J. Div. Ct.) at para. 61, LTA, Tab 6A.

5. This case raises nationally important issues of whether the Equality Rights guarantee in the *Charter* protects people living in poverty against discrimination on the basis of 'poverty'. It also seeks guidance from this Honourable Court about the proper role and identification of comparator groups in s. 15 of the *Charter* and, lastly, how adverse effects discrimination is to be proven in the context of disproportionate impact claims.

B. Rigid Pricing Structure for Electricity Requiring Accommodation for the Poor

6. The Applicants ask this Court to vindicate their right to substantive equality in the setting of electricity rates by declaring that the single-rate rule (in s. 67 of the *PUA*) violates s. 15 of the *Charter* and, as well, they seek an Order directing the Nova Scotia Utility and Review Board ("UARB") to take into account and accommodate their circumstances of disadvantage in the design of an equality-compliant rate program.

C. The Evidence before the Nova Scotia Utility and Review Board[4]

Denise Boulter: Personal Background

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

8. 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 what has become ongoing therapy for the adjustment disorder and depression.

Threatened Loss of Electricity

9. As someone who has had to rely on social assistance, Ms. Boulter has been in arrears on many occasions with the electrical utility and has also had many disconnection notices sent to her. Within the past two years, she made payments on her power bill arrears by taking money

[4] In order to ensure that the s. 15 claims were adequately supported, the record before the UARB and the Appeal Book in the Court of Appeal ran to well over six thousand pages. It was, however, only filed electronically. A copy of the Table of Contents from the Appeal Book is found in the LTA, Tab 5A.

from her social assistance 'personal allowance' which is intended to be used for the purchase of food and clothing.

Sacrifices or Deprivations that She Suffered while Being in Receipt of Assistance

10. One example illustrates the way in which Denise has had to choose which essential need would go un-met was when she was no longer able to obtain food from the food bank **and** 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.

11. 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.

12. By the spring of 2007, and, with the prospect of another power rate increase, Denise foresaw that any rate increase would need to be paid for by having to cut back further on her personal food consumption.[5]

UARB Accepted the Applicants' Evidence

13. The UARB accepted the Applicants' evidence. This included evidence of the personal experience of people living in poverty who stated that they had inadequate income with which to pay for basic needs such as shelter and adequate food. This was supported, in turn, by the evidence of nine experts who established, *inter alia*, that poverty is similar to other grounds of discrimination prohibited by s. 15 in that it has served as an historic basis of disadvantage, it is accompanied by pervasive stereotyping;[6] that people living below the poverty line (including those in receipt of social assistance) cannot afford a nutritious diet while also paying for shelter

[5] Denise Boulter's evidence is contained in the LTA, Tab 5B.

[6] See the expert evidence filed by Bruce Porter which served as part of the evidentiary foundation for the contention that 'poverty' is an analogous ground of discrimination: LTA, Tab 5C.

and other basics.[7] Significantly, much of this latter evidence comes from the Province's own sources.

14. Two experts gave evidence on the U.S. experience of regulated pricing designed to accommodate low-income people. One was a U.S.-based consultant retained by the Board-appointed Consumer Advocate who gave evidence in the area of "regulatory policy, rate design and low-income rates." This witness established that accommodative, income-based rate regimes are commonplace in the United States where most states have rate structures designed to ensure substantive access to utilities by the poor.[8] The Applicants' own expert was personally involved in the design of many accommodative programs in the United States and spoke to the various ways in which the income-based rates can operate.[9]

15. Finally, an expert in social policy statistics provided evidence of the overrepresentation, dramatically so in some cases, of members of equality-seeking groups such as single-mothers, people with disabilities and visible minorities among the poor.

16. There was only a single sentence of rebuttal evidence adduced by the Respondent Province—to the effect that it was unaware of any income-based utility rates in Canada.[10]

D. The UARB Judgment

17. The UARB dismissed the claim. It held that the *PUA* did not provide a right to affordable electricity to anyone and, therefore, there was no *distinction* in the enjoyment of the benefits of the *Act* between the affluent and the poorest of the poor. They both received equal treatment.[11]

E. The Nova Scotia Court of Appeal Judgment

18. The Applicants argued that the rigid prohibition of any accommodation in the setting of electricity rates created a barrier in their statutory right to *access* electricity and, therefore,

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[7] See the expert evidence of Dr. Patricia Williams, LTA, Tab 5D.
[8] See the expert evidence of Nancy Brockway, LTA, Tab 5E.
[9] See the expert evidence of Roger Colton, LTA, Tab 5F, at pp. 51 *et seq*.
[10] Respondent's evidence of Scott McCoombs, LTA, Tab 5G.
[11] UARB Judgment, LTA, Tab 3A at paras. 157-161.

constituted adverse effect discrimination on the analogous ground of 'poverty' contrary to s. 15 of the *Charter*. The Court of Appeal refused to follow earlier rulings from Nova Scotian courts that discrimination on the analogous ground of 'income' or 'poverty' were included within s. 15. The Court held that 'poverty' in **not** an analogous ground of discrimination within the meaning of s. 15 of the *Charter*.[12]

19. The Court of Appeal then addressed the Applicants' alternative argument that, despite being facially-neutral, the impugned provision results in many Nova Scotians being unable to access electricity and that this barrier to access impacts disproportionately on members of groups possessing, in many cases, several intersecting personal characteristics protected by s. 15 of the *Charter*.

20. The Court of Appeal applied *Hodge* and rejected the comparator groups that had been accepted by all parties during the *Charter* hearing before the Nova Scotia UARB and in their pleadings to the Court of Appeal: 'residential consumers of electricity in Nova Scotia who are living in poverty compared with those who are not living in poverty'. The Court held that, in light of its rejection of 'poverty' as an analogous ground, the proper comparator group analysis ought to focus on comparing the experience of different groups of poor people with each other (rather than, for example, the population as a whole). Thus:

> [In the context of] the claimants' submission based on sex, one would compare a female claimant under LICO[13] to male consumers of residential power also under LICO. To consider the disability claim, one would compare a disabled claimant under LICO with non-disabled consumers of residential power under LICO. And so on, for the other claimant categories in this s. 15(1) claim.[14]

21. The Court then considered the statistical data concerning the distribution of poverty among a variety of vulnerable groups in Nova Scotia. Despite the dramatic overrepresentation among the poor of single mothers, people with disabilities and several other vulnerable groups, the Court of Appeal concluded that, because of the presence of "substantial numbers" of people

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[12] UARB Judgment, LTA, Tab 3A, at para. 42.
[13] The Court's reference to "LICO" is to the Statistics Canada "Low Income Cut-Offs", a statistical tool widely used by governments and others as a poverty line.
[14] Court of Appeal Judgment, LTA, Tab 3C, *para*. 67.

among the poor who were *not* members of the claimant groups, but who also faced sever barriers in their ability to access electricity, the claim must fail:

> Both the complainant and comparator groups have substantial numbers of persons whose power costs add to their unwieldy burden of living expenses, forcing prioritization among basic needs. The *PUA* does not treat the complainants differently than it treats the comparator groups, either directly or by adverse effect, based on sex, race, ethnic or national origin, age, disability or marital status.[15]

The disproportionality claim did not get squarely addressed because, the Court of Appeal noted, there happened to be "substantial numbers" of poor people outside the claimant group, which, in its view, was fatal to the disproportionality claim. It will be appreciated that this not only completely undermines the disproportionate impact claim but verges toward a test for 'direct discrimination'.

F. Legislative Background

22. Through the *PUA*, the Respondent Province, as is the case in all provinces, has created a regulatory scheme, so as to avoid a situation in which, the Respondent Nova Scotia Power Inc.: "would otherwise have an unacceptable degree of market power….[The *Act* provides] relief from the potential misuse of monopolistic market power."[16] In common with other regulatory regimes throughout Canada, the Nova Scotia *PUA* has created: "an economic and social arrangement dubbed the "regulatory compact", which ensures that all customers have access to the utility at a fair price—nothing more."[17] The *PUA* achieves this by legislatively requiring electricity accessibility for all Nova Scotians (i.e., the 'obligation to serve' in *PUA* s. 52).[18] In return for ensuring access to electricity for all, rates and terms of service are to be 'reasonable and just' (*PUA* s. 44).

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[15] Court of Appeal Judgment, LTA, Tab 3C, *para*. 83. (emphasis added)
[16] Court of Appeal Judgment, LTA, Tab 3C, *para.* 65.
[17] *ATCO Gas and Pipelines Ltd*. v. *Alberta*, 2006 SCC 4 at paras. 62-3, LTA, Tab 6C, and *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, LTA, Tab 6T.
[18] Section 52 of the *PUA* provides:

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

23. Whilst, on the one hand, electricity rates are to be 'reasonable and just', impugned s. 67 of the *PUA* stipulates, on the other hand, that all consumers must pay the same rate. The provision prohibits 'discrimination' in pricing; by that it means identical treatment:

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

Impugned s. 67(1) of 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.[19]

24. The Legislature (*via* s. 67 of the *PUA*) has opted for a pricing structure that works for most Nova Scotians in terms of their ability to *access* electricity but which, effectively, disproportionately excludes the poor/equality seekers from being able to enjoy their right to regulated *access* to electricity and/or forces unacceptable choices on them as to which of their family's essential food and housing needs will go un-met. The 'embedded norm' in s. 67(1) is one of either assumed affordability or indifference to it. As a result, the poor/equality seekers do not have equal benefit of the regulatory regime created by government and, specifically, the legal requirement that electricity will be 'available to all Nova Scotians.'[20]

25. In Equality Rights terms, the state has intervened to provide a benefit to Nova Scotians by way of regulated access to electricity but has built in a structural barrier (s. 67's equal-treatment pricing formula) which prevents the most disadvantaged Nova Scotians from enjoying equal benefit and protection of the law.

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[19] That this is the case was confirmed by the Nova Scotia Court of Appeal in: *Dalhousie Legal Aid Service* v. *Nova Scotia Power Inc.,* 2006 NSCA 74 at paras. 25 & 39, LTA, Tab 6G, (leave to appeal dismissed [2006] S.C.C.A. No. 376). See also the Court of Appeal Judgment, LTA, Tab 3C, *para*. 8.
[20] *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 para. 10. (emphasis added)

Part II — Statement of Issues

26. This test case raises the following issues of public importance that warrant the consideration of this Honourable Court:

- **Issue One**: Is 'poverty' an analogous ground of discrimination within s. 15 of the *Charter*?
- **Issue Two**: What is the test for a violation of s. 15 of the *Charter* in cases of adverse effect discrimination where it is sought to be established by the disproportionate impact of a facially-neutral provision? What is the proper role of comparator groups where there are distinctions arising from disproportionate impact rather than categorical exclusion such as in *Eldridge* and *Vriend*? How are the proper comparator groups to be identified?

Part III — Statement of Argument

Issue One: Is 'poverty' an analogous ground of discrimination within s. 15 of the *Charter?*

27. Some 24 years after section 15 of the *Charter* came into force, Canadians living in poverty still do not know whether a fundamental basis of their disadvantage is a prohibited ground of discrimination under s. 15 of the *Charter*. Former Supreme Court of Canada Justice Gérard LaForest, as Chair of the *Canadian Human Rights Act* Review Panel (2000) appointed by the Federal Justice Minister to conduct a comprehensive review of the *Act*, stated that during the Panel's consultations, "we heard more about poverty than about any other single issue."[21]

28. Even though poverty or social-economic related disadvantage is now a prohibited ground of discrimination in all provincial human rights codes, the poor in Canada are unclear whether the Equality Rights guarantee in the *Charter* protects them from discrimination at the hands of governments.

29. The Court of Appeal, it is submitted, erred when it rejected 'poverty' as an analogous ground because, in its view, poverty is not 'immutable'. Resolving the role of immutability and, more importantly, whether poverty is an analogous ground of discrimination is truly of national importance—not just for the poor, but for all Canadians.

Disparate Case Law across Canada

30. Over the past two decades, Canadian jurisprudence has been uneven on the question as to whether poverty and/or socio-economic disadvantage are analogous grounds of discrimination.

[21] Canadian Human Rights Act Review Panel, *Promoting Equality*: *A New Vision* (Ottawa: Department of Justice, 2000), LTA, Tab 5H, page 106.

In 1991, the British Columbia Supreme Court recognized 'receipt of social assistance' as an analogous ground.[22] In 1993, Rip J. of the Tax Court of Canada also held that "poverty is a personal characteristic that can form the basis of discrimination."[23] In the same year, the Nova Scotia Court of Appeal (*en banco*) considered a s. 15 challenge to residential tenancies legislation that excluded tenants of public housing from the legislative protections enjoyed by private-sector tenants. Hallett J.A., writing for the Court, stated: "I find that the impugned provisions amount to discrimination on the basis of race, sex and income".[24] The Court also went on to hold that the legislation was discriminatory on the basis of 'public housing tenancy', citing the fact that all the tenants had a low income "verging on or below poverty".[25] This decision (known as *Sparks*) was later applied by the Nova Scotia Supreme Court in *R.* v *Rehberg* where Kelly J. 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."[26] Finally, in 2002, the Ontario Court of Appeal drew upon both *Sparks* and *Rehberg* to conclude in *Falkiner* that "receipt of social assistance" is an analogous ground of discrimination.[27]

31. Conversely, the Ontario Court of Appeal stated in *obiter* in *R.* v. *Banks* (2007) that poverty is not an analogous ground of discrimination:

> While the "poor" undoubtedly suffer from disadvantage, without further categorization, the term signifies an amorphous group, which is not analogous to the grounds enumerated in s. 15. [28]

Indeed, while the Ontario Court of Appeal in *Banks* took care to distinguish its earlier ruling in *Falkiner*, the Nova Scotia Court of Appeal in the instant case even questioned the correctness of

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[22] *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, LTA, Tab 6L.
[23] *Schaff* v. *The Queen* (1993), 18 C.R.R. (2d) 143 (T.C.C.) at para. 56, LTA, Tab 6AA.
[24] *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, LTA, Tab 6H.
[25] *Sparks* (*supra*) at para. 31, LTA, Tab 6H.
[26] *R.* v. *Rehberg* (1993), 111 D.L.R. (4th) 336 (N.S.S.C.) at p. 361, para. 83, LTA, Tab 6Z.
[27] *Falkiner v. Ontario (Ministry of Community & Social Services)* (2002), 59 O.R. (3d) 481 (C.A.), at paras. 84-93, LTA, Tab 6K. It is to be noted that the Court in *Falkiner* refused to follow an earlier Ontario ruling: *Masse* v. *Ontario* (*Ministry of Community and Social Services*), [1996] O.J. No. 363 at *para*. 375, LTA, Tab 6Q.
[28] *R*. v. *Banks*, 2007 ONCA 19 at para. 104, LTA, Tab 6V, leave denied [2007] S.C.C.A. No. 139.

Falkiner.[29] The British Columbia Supreme Court rejected poverty as an analogous ground in *Federated Anti-Poverty Groups of B.C.* v. *Vancouver* (*City*) (2002) stating that it was "a proverbial handmaiden to those who seek protection under the enumerated grounds."[30] (No mention was made of the same Court's 1991 ruling to contrary effect.)

32. This survey reveals the equivocal state of the jurisprudence as to whether poverty and/or socio-economic disadvantage is an analogous ground of discrimination. The uneven case law makes this Court's resolution of the issue a matter of compelling national importance.

Immutability: Its Role as a Factor in Determining Analogous Grounds and its Application to 'Poverty'

33. The Nova Scotia Court of Appeal relied on the 'immutability' criterion from *Corbiere*[31] to reject 'poverty' as an analogous ground:

> Poverty is a clinging web, but….individuals may enter and leave poverty or gain and lose resources. Economic status is not an indelible trait like race, national or ethnic origin, color, gender or age.[32]

34. The 'immutability' factor referred to in *Corbiere* was said, in *Vriend* and *Miron*, to be just one of several factors including: "historical social, political and economic disadvantage", whether a proposed ground is a 'personal characteristic', whether it has served as 'the basis of stereotypical attributes' and a proposed ground's 'similarity to other prohibited grounds of discrimination in human rights codes':

> All of these may be valid indicators…that their presence may signal an analogous ground. But the converse proposition—that any or all of them must be present to find an analogous ground—is invalid.[33]

35. The Court of Appeal rejected 'poverty' because, in the Court's view, it failed the 'immutability' criterion. 'Immutability' has, in the case law, taken on a determinative significance in analogous grounds assessments that is not only out of keeping with precedent but which, more importantly, endangers the paramount goal of promoting substantive-equality.

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[29] Court of Appeal Judgment, LTA, Tab 3C, at *paras*. 38-39.
[30] *Federated Anti-Poverty Groups of B.C.* v. *Vancouver* (*City*), [2002] B.C.J. No. 493 at paras. 275-6, LTA, Tab 6M.
[31] *Corbiere* v. *Canada* (*Minister of Indian and Northern Affairs*), [1999] 2 S.C.R. 203 at para. 13, LTA, Tab 6F.
[32] Court of Appeal Judgment, LTA, Tab 3C, para. 42.
[33] *Miron* v. *Trudel*, [1995] 2 S.C.R. 418 at para. 149, LTA, Tab 6R.

36. In addition, many commentators have observed that the actual degree to which poverty is immutable is not meaningfully different than that of, say, marital status or religion. Thus, while the Court of Appeal made the theoretically correct statement that: individuals may enter and leave poverty, the actual evidence in the record from government sources states that, Canada-wide, the odds of leaving poverty drop from 53% for people living in poverty for only one-year one year to 27% after five years.[34] Inter-generational poverty is well recognized; three-quarters of young social-assistance clients come from families that had previously required social-assistance.[35] The gist of these findings is confirmed in data reported by the Canadian Council on Social Development: For roughly 60 per cent, poverty proves to be a temporary situation, while it is a recurrent problem for the remaining 40 per cent.[36]

37. In reviewing whether 'poverty'/'social condition' can properly be thought of as immutable, the *Canadian Human Rights Act* Review Panel, found:

> Research done for the Panel shows that poverty is immutable in 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.[37]

38. The evidence, from a wide range of sources, makes clear that the ability to change one's poverty status is very difficult. To maintain otherwise is, itself, part of the stereotyping which the poor endure.

39. When this evidence of the duration of poverty is compared to the immutability of the analogous ground of 'martial status', the result is striking. Thus, not only is it theoretically true that a person's marital status can change through the course of their lifetime, but it is notorious that intimate relationships—whether married or common law—are entered into and ended at a

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[34] Province of Nova Scotia: *Background Document* to "Poverty Reduction Strategy Consultations" (November 2007), LTA, Tab 5I, at page 7.
[35] Province of Nova Scotia: *The Family Mosaic: Social Exclusion and Social Assistance: A Longitudinal Study of Lone-parent and Two-parent Families*, LTA, Tab 5J, at page 39.
[36] See *Canadian Fact Book on Poverty*, Canadian Council on Social Development (2000), LTA, Tab 5K, at xxiii.
[37] Canadian Human Rights Act Review Panel, *Promoting Equality*: *A New Vision* (Ottawa: Department of Justice, 2000), LTA, Tab 5H, *para*. 8.

rate that is in the vicinity of 40%. A divorced person has actually experienced three different marital statuses.

40. Accordingly, not only should the immutability factor not assume determinative weight but, when applied to 'poverty', it appears that it is no less immutable than other grounds of discrimination which this Court has found to be analogous. As Prof. Hogg has noted; "neither citizenship nor marital status is immutable in a strong sense."[38]

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

41. 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. 15(1) is to combat discrimination and ameliorate the position of disadvantaged groups within society." [39] This Court has not considered the question of whether 'poverty' is an analogous ground of discrimination, however, some members of the Court have commented on poverty-based disadvantage. Thus, former Justice L'Heureux-Dubé recognized that the poor are "one of the most disadvantaged groups in society"[40] and, when it comes to poverty-related barriers to the equal enjoyment of *Charter* rights, the poor, in the words of the current Chief Justice, are not to be regarded as "constitutional castaways".[41]

Recognition of 'Poverty' as an Analogous Ground is Strongly Encouraged by International Human Rights Law

42. In 1998, on the occasion of the review of Canada's compliance with its obligations under the *International Covenant on Economic, Social and Cultural Rights*, a United Nations treaty body made the following recommendation for Canada to bring itself into compliance with its international human rights obligations:

> The Committee again urges federal, provincial and territorial governments to expand protection in human rights legislation…to protect poor people in all jurisdictions from discrimination because of social or economic status.[42]

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[38] P. W. Hogg, *Constitutional Law of Canada*, (5th ed.) at p. 55-23.
[39] *Auton* (*Guardian ad litem of*) v. *British Columbia* (*Attorney General*), [2004] 3 S.C.R. 657 at para. 27, LTA, Tab 6D.
[40] *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), LTA, Tab 6Y.
[41] *Prosper* (*supra*) at 302, para. 102 *per* McLachlin J. (as she then was), LTA, Tab 6Y.
[42] United Nations Committee on Economic, Social and Cultural Rights. *Concluding Observations of the Committee on Economic, Social and Cultural Rights* (*Canada*), E/C. 12/1/Add.31, 4 December 1998 at *para*. 51.

While this recommendation was made in the context of amending human rights statutes, it is submitted that the same rationale applies to Canada's human rights obligations in the *Charter* which is, after all, the 'primary vehicle through which international human rights achieve a domestic effect'.[43]

Recognition in Human Rights Legislation

43. In *Andrews*, and other cases, the Court stated that the interpretation of s. 15 would build on the body of legislation and jurisprudence from the human rights field. Thus, recognition of a ground as analogous will be informed by whether that ground, or a similar ground, has been included in human rights legislation.[44] Currently, all provinces and territories have provided protection from discrimination because of either, source of income, receipt of public assistance or social condition in their human rights legislation. It can fairly be stated, therefore, that a legislative consensus exists nationally[45] that discrimination against poor people is both endemic and has required legislative remediation through inclusion in fundamental human rights legislation.

Findings and Recommendations of the LaForest Report

44. In 1999, the *Canadian Human Rights Act* Review Panel chaired by former Supreme Court Justice Gérard LaForest released its report, *Promoting Equality*, in which it recommended the inclusion of "social condition" as a prohibited ground of discrimination in all areas covered by the *Act*.[46] 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….[47]

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[43] *R.* v. *Ewanchuk*, [1999] 1 S.C.R. 330 at para. 73 *per* L'Heureux-Dubé J. with McLachlin J. and Gonthier J. concurring, LTA, Tab 6W. See also: *Health Services and Support - Facilities Subsector Bargaining Assn*. v. *British Columbia*, [2007] 2 SCR 391wherein this Court affirmed the principle from *Slaight* that: "the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified" and "Canada's current international law commitments and the current state of international thought on human rights provide a persuasive source for interpreting the scope of the *Charter*." (at paras. 70 and 78), LTA, Tab 6O.

[44] *Andrews* at para. 38, LTA, Tab 6B, and *Egan* v. *Canada*, [1995] 2 S.C.R. 513 at para. 176, LTA, Tab 6I, and *Miron* at paras. 148-9, LTA, Tab 6R.

[45] Only the *Canadian Human Rights Act* lacks a poverty/social condition ground of discrimination.

[46] Canadian Human Rights Act Review Panel, *Promoting Equality*: *A New Vision* (Ottawa: Department of Justice, 2000), LTA, Tab 5H, page 110. Importantly, the Review Panel urged a definition of 'social condition' that would limit its scope to "disadvantaged groups".

[47] *Ibid.* LTA, Tab 5H, at page 107.

In its report, the Panel ultimately concluded that "it is essential to protect the most destitute in Canadian society against discrimination."[48]

Scholarly Commentary

45. There is widespread scholarly support for the recognition of 'poverty' and/or 'social condition' as analogous to the grounds already in s. 15. Justice Lynn Smith and Professor Bill Black applied the *Corbiere* framework before concluding that 'poverty' fits the requisite criteria for being an analogous ground:

> Poverty would seem to meet most of the criteria for determining analogous grounds, and the additional factors incorporated within the ground of social condition strengthen this argument. By definition, poverty is associated with economic disadvantage, which in turn leads to social disadvantage. People living in poverty are subject to prejudice and stereotypes. For most, poverty is beyond the unilateral control of the individual and is at least as difficult to change as religion, citizenship or marital status. It is related statistically to enumerated grounds such as race and sex. While it almost never represents a fundamental choice in a person's life, it certainly is an important part of a person's life. In terms of residential and employment segregation and lack of educational opportunity, it has similarities to the conditions that gave rise to the phrase "discrete and insular minority." It is "inherited" in the sense that one's economic status and education level are statistically related to those of one's parents. Persons living in poverty lack their fair share of political influence, and programs related to poverty may be undervalued in the political process as compared with universal programs such as health.[49]

Conclusion

46. Granting leave to appeal and, subsequently, recognizing 'poverty' as a ground of discrimination would further this Court's observation that equality rights protections, both statutory and constitutional, are "often the final refuge of the disadvantaged and the disenfranchised....the last protection of the most vulnerable members of society."[50] Indeed, s. 15 "enshrines the fondest dreams, the highest hopes and finest aspirations of Canadian society. It 'provides the foundation of a just society'…." This in turn should lead to a sense of dignity and

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[48] *Ibid.* LTA, Tab 5H, at page 110.

[49] William Black & Lynn Smith "The Equality Rights" in Gerald-A. Beaudoin & Errol Mendes ed., *Canadian Charter of Rights and Freedoms*, (4th ed.) (Toronto: Butterworth, 2005) at pp. 1010-1011. See also: M. Jackman, "Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination Under the *Canadian Charter* and Human Rights Law" (1994) 2 *Review of Constitutional Studies* 76 at 121. See also, S. Turkington, "A Proposal to Amend the Ontario Human Rights Code: Recognizing Povertyism", (1993) 9 J. L. & Soc Pol'y 134.

[50] *Zurich Insurance Co*. v. *Ontario* (*Human Rights Commission*), [1992] 2 S.C.R. 321, at p. 339, LTA, Tab 6CC.

worthiness for every Canadian and the greatest possible pride and appreciation in being a part of a great nation."[51]

Issue Two: What is the test for a violation of s. 15 of the *Charter* in cases of adverse effect discrimination where it is sought to be established by the disproportionate impact of a facially-neutral provision? What is the proper role of comparator groups where there are distinctions arising from disproportionate impact rather than categorical exclusion such as in *Eldridge* and *Vriend*? How are the proper comparator groups to be identified?

A. Adverse Effects Discrimination and s. 15 of the *Charter*

47. This case was argued as an adverse effects discrimination claim on the basis of 'poverty', but, it was also framed, alternatively, as a challenge to a facially neutral provision resulting, by disproportionate impact, in adverse effects discrimination. On this front, the case was richly evidenced with testimony, not only from the five claimants but also the evidence of nine experts which documented the adverse effects, for example, on women, people with disabilities, children, visible minorities, immigrants and divorced people. They are the ones who, the experts confirmed, are disproportionately living in poverty and, thus, unable to enjoy equal access to electricity because of the 'one-price/no accommodation rule' embedded in the challenged legislation.[52]

48. This Court has commented on the fact that, in the modern era, direct or intentional discrimination will be comparatively rare. In the future, the heavy lifting of equality rights work will come from adverse effects litigation.[53] Thus, the real work of the equality rights guarantee will take place, if it will happen at all, in situations where government's practices, programs or legislation fail to accommodate the real life circumstances of disadvantaged groups. In situations involving government oversight, neglect or where the legislature has embedded a norm that works for most, but not for equality seekers, s. 15 holds the promise that those suffering discrimination will be able to establish their case by demonstrating the adverse effects of facially

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[51] *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493 at paras. 67-8, LTA, Tab 6BB.

[52] While the evidence goes into the qualitative aspects of the denigration which marginalized groups face, the statistical disproportionality of many equality-seeking groups among the poor is set out at paras. 21 and 48 of the Court of Appeal Judgment: LTA, Tab 3C.

[53] *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. 29, LTA, Tab 6E.

neutral legislation. After all, as this Court stated in *Andrews* and confirmed in *Eldridge*, 'the accommodation of differences is the essence of true equality'.[54]

B. Disproportionate Impact and Comparator Groups: Untrodden Ground and Fresh Questions

49. In the context of what is a potentially very promising Equality Rights guarantee, it is striking, as Professor Hogg notes in his text, that in the 25 years since s. 15 came into effect:

> Despite the commitment of the Supreme Court to substantive equality, and despite the industry of women's groups and other equality-seeking groups in developing equality cases for litigation, only two claims of indirect discrimination [i.e., *Eldridge* and *Vriend*] have been successful.[55]

50. It is important to realize, however, that in both *Eldridge* and *Vriend* this Court had before it adverse affect cases under s. 15 of the *Charter* that dealt with categorical exclusions from benefits; all members of the class, because of their characteristics, were subject to disadvantage *per se*. There was no need to consider the disproportionate impact, statistically, on the claimant group. In *Meiorin*, a human rights case, this Court referred to the disproportionate impact of an employment rule for forest firefighters but conducted no analysis of the principles underlying the disproportionality issue nor of the identification of comparator groups. In fact, this Court has yet to take the opportunity to flesh out the analysis of disproportionate impact discrimination in a s. 15 case or, in fact, a human rights case.

Comparator Group Analysis post-Kapp

51. In light of this Honourable Court's recent judgment in *Kapp*, questions have arisen relating to the proper status of comparator groups, especially given the reaffirmation of the overarching goal of substantive equality. The many critiques of comparator group analysis which see it as having, possibly, led to formalistic, 'similarly situated' reasoning which, it is contended, occurred here, are acknowledged by this Court itself in *Kapp*.[56]

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[54] *Andrews* v. *Law Society of B.C.*, [1989] 1 S.C.R. 143 at p. 169, para. 31, LTA, Tab 6B, and *Eldridge* v. *British Columbia*, [1997] 3 S.C.R. 624 at para. 65, LTA, Tab 6 LTA, Tab 6J.
[55] P. W. Hogg, *Constitutional Law of Canada*, (5th ed.) at p. 55-48.
[56] See, e.g., Daphne Gilbert and Diana Majury, "Critical Comparisons: The Supreme Court of Canada Dooms Section 15" (2006), 24 *Windsor Y.B. Access Just*. 111.

Intersectionality

52. This case also presents the situation of equality-rights claimants who possess several intersecting grounds of discrimination. For example, the Applicant, Denise Boulter, is a woman who is divorced and living as a single mother. She also has a mental disability.

53. While acknowledging the legitimacy of s. 15 claims based on intersecting grounds of discrimination,[57] this Court has yet to have such a case come before it. As a result, equality-seekers remain unclear how comparator groups would be identified and/or how the disproportionate impact would be assessed in that setting.

54. Accordingly, equality-seekers, including the Applicants, continue to need direction from this Court on the following questions, all of which arise in this case:

- In a disproportionate impact case under s. 15, how are comparator groups to be identified so as to further the goal of substantive equality; what were the proper comparator groups in this case?
- How is a comparator group analysis to be applied in the context of claimants possessing several, intersecting grounds of discrimination?
- How much statistical overrepresentation among members of the claimant group must there be in order for it to be considered 'disproportionate'? Conversely, does the fact that there are 'substantial numbers' of people outside the claimant group, but who are also denied 'equal benefit', mean that a 'disproportionate impact' claim must fail?

C. Comparator Groups: *Hodge* Applied to Disproportionate Impact Situations

55. The Court of Appeal applied *Hodge*—a case which did not involve adverse effects discrimination—to conclude that the comparators that had been proposed and accepted to that point must be rejected. Despite the fact that the case deals with the economic inaccessibility of electricity, the Court of Appeal stated that the determination as to whether the impugned provision resulted in any distinctions in the accessibility of electricity ought to involve comparisons exclusively between different groups of poor people; for example, between poor people with disabilities and poor people without disabilities; women living in poverty and men in

[57] *Law* v. *Canada* (*Minister of Employment and Immigration*), [1999] 1 S.C.R. 497 at para. 37, LTA, Tab 6P.

poverty and visible minorities in poverty to non-visible minorities in poverty. In each case, the comparison chosen by the Court of Appeal was between two groups—both of which are living in poverty. Therefore, in terms of distinctions, they are equally disadvantaged in their attempt to access electricity.

56. At the initial stage of the s. 15 analysis which seeks to discover whether the impugned provision has created any *distinctions* in accessing electricity, the Court's application of *Hodge* ensured that the substantively disadvantaged would only be compared with each other. Given this frame of reference, the result was predictable: poor people with disabilities and poor people without disabilities share equal barriers in accessing electricity. The Court of Appeal stated the results of its comparison:

> The *PUA* does not treat the complainants differently than it treats the comparator groups, either directly or by adverse effect, based on sex, race, ethnic or national origin, age, disability or marital status.…the claimants have not established that s. 67(1) draws a distinction on a listed or analogous ground.[58]

57. The problematic choice of comparator groups becomes all the more clear if the Court of Appeal's reasoning is applied to some familiar cases. Thus, the female job applicants with a lower aerobic capacity for the firefighter positions in *Meiroin* would, under the Court of Appeal's comparator-group reasoning, have been compared with men with lower aerobic capacity. On this approach, both would have failed the firefighters' aerobic test and, therefore, there would have been no distinction shown between the two groups in their suitability for the job, thus, no discrimination. Similarly, in the landmark American case of *Griggs* v. *Duke Power*,[59] the approach of the Nova Scotia Court of Appeal would have required that Black job applicants without a high school education to be compared with white job applicants without a high school diploma. The result would have been the same as the case at Bar; no discrimination since both Blacks and whites would have been denied jobs. The Court of Appeal's reasoning effectively means that any disproportionate impact claim in Nova Scotia will be doomed because the comparator groups will result in disadvantaged groups being compared to each other—a formalistic but sure way to defeat a substantive equality claim.

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[58] Court of Appeal Judgment: LTA, Tab 3C, at *paras*. 83-4.
[59] *Griggs* v. *Duke Power Co*., 401 U.S. 424 (1971), LTA, Tab 6N.

58. Moreover, in its selection of comparator groups, the Court of Appeal gave no consideration whatsoever to the realities of those *Charter* equality-seekers, such as the claimants in the present case, who go through life experiencing a confluence of several intersecting grounds of disadvantage. Even though intersectional disadvantage serves to compound the difficulties which equality-seekers are made to endure, this reality nowhere appears in the Court of Appeal's comparator analysis.

59. The Court of Appeal's approach to the selection of comparator groups in disproportionate impact cases has, effectively, shut down such adverse effects claims from being advanced in Nova Scotia. By applying *Hodge* in a way that identifies comparators as those which possess the protected characteristic compared with their opposite, but in circumstances where both are effectively excluded from access to the benefit of the law, it makes it impossible to ever prove adverse effects discrimination by disproportionate impact because both comparator groups are equally disadvantaged.

D. Disproportionate Impact: Defeated by 'Substantial Numbers' Outside the Claimant Group?

60. The Court of Appeal's approach to disproportionate impact analysis makes it impossible to establish adverse effect discrimination where, for example, in the case of people with disabilities, the Court can point to "substantial numbers" of able-bodied people who are also disadvantaged. At two separate points in its reasoning on this question, the Court of Appeal cites the fact that there were "substantial numbers" of people outside the claimant group who were also disadvantaged as the reason for rejecting the claim of adverse effects by disproportionate impact.[60]

61. By adopting this view, the Court of Appeal effectively hollows out a core component of substantive equality. After its decision in this case, it can be stated that in Nova Scotia all that remains of substantive equality are either claims based on direct discrimination or, for adverse effect claims, only cases of categorical exclusions such as in *Eldridge* or *Vriend* where all members of the class, because of their characteristics, are subject to disadvantage *per se*.[61]

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[60] Court of Appeal Judgment, LTA, Tab 3C, *paras*. 68 and 83.
[61] See Dianne Pothier "BCGSEU: Turning a page in Canadian Human Rights Law", (1999) 11(1) *Constitutional Forum* 19 at page 22.

Disproportionate impact-based violations of s. 15 will be defeated if "substantial numbers" exist outside the claimant group.

E. Conclusion

62. The Court of Appeal's comparator group analysis clearly does not promote substantive equality even through it relies on authority from this Honourable Court in support of its reasoning on comparator group identification. The issue of comparator group selection in adverse effect cases warrants guidance by this Court in order to ensure that it furthers the purposes of s. 15.

63. The Court of Appeal's dismissal of the disproportionate impact claim is equally problematic insofar as it dismisses the claim because it was able to identify "substantial numbers" of non-claimant members of the comparator group who were also disadvantaged. This effectively strips the disproportionate impact doctrine—first enunciated in *Griggs* and adopted in *O'Malley* of content of s. 15.

Part IV — Submission on Costs

64. This application for leave to appeal is: a) brought by an Applicant who is completely reliant on social assistance and against whom a cost award would impose even greater hardship and b) is public interest litigation advanced on behalf of all low-income people in Nova Scotia. Finally, it raises issues of public importance within the meaning of subsection 40(1) of the *Supreme Court Act*. For these reasons, the Applicants request that costs be awarded to the Applicants, in any event of the cause.

Part V — Order Requested

65. That leave to appeal be granted with costs, in any event of the cause.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Halifax, Nova Scotia, this ____ day of April, 2009.

Vincent Calderhead
Counsel for the Applicant, Denise Boulter

PART VI: TABLE OF AUTHORITIES

Para

Treaties and Other International Instruments

Books and Articles

PART VII: STATUTORY PROVISIONS

***Public Utilities Act*, R.S.N.S., 1989, c. 380:**

Orders by Board respecting rates and charges of utility

44 The Board may make from time to time such orders as it deems just in respect to the tolls, rates and charges to be paid to any public utility for services rendered or facilities provided, and amend or rescind such orders or make new orders in substitution therefor. *R.S., c. 380, s. 44.*

Duty to furnish safe and adequate service

52 Every public utility is required to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable. *R.S., c. 380, s. 52.*

Equal rates and charges for similar services

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

(2) 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. *R.S., c. 380, s. 67.*