IN THE MATTER OF the complaints filed by [redacted] alleging discrimination in accommodation on the basis of receipt of social assistance, sex, marital status and family status.

SUBMISSIONS OF THE COMPLAINANTS

Re: The Application Of Section 34

Background

The above-referenced fifteen human rights complaints were filed on February 11, 2003 with a request that the complaints be dealt with jointly and on a priority basis. By letter dated April 2, 2003, our office confirmed our request that the Commission combine the fifteen complaints and deal with them together under section 32(3) of the *Code*, as having questions of law and fact in common.

The fifteen complaints name as respondents the Ontario Ministry of Community, Family and Children's Services (the "Ministry") and local Administrators under the *Ontario Works Act (*the "*Act*"). The complaints allege that the level of the shelter allowance component of the *Ontario Works* social assistance cheque is discriminatory under sections 2 , 9 and 11 of the *Human Rights Code* (the "*Code").* The level of the shelter allowance is set by regulations[1] passed under the *Act*; the regulations are administered and implemented by the Ministry and the local Administrators.

Amendment of Complaints

In order to simplify the issues in dispute in these complaints, we have obtained instructions from our clients to abandon all grounds of discrimination other than receipt of public assistance. Two of the complaints herein rely only on the ground of receipt of public assistance. These two complaints, filed by [redacted], remain unamended, as filed.

In respect of the remaining thireen complaints, the grounds of family status, gender and marital status are no longer claimed as a basis for the allegation of discrimination with respect to the occupancy of accommodation. [2]

[1] O. Reg. 134/98, s. 42(2). See *Ontario Works* Directive 29.0-7.

[2] Finally, please also note that, in the case of the complaint of Shelagh Gould, the ground of ethnic origin was incorrectly noted by the Commission due to an error in completing the complaint form. This ground should also be removed as a ground of discrimination.

Inadequacy of Case Analysis Report

It is our submission that the Case Analysis[3] fails entirely to address the legal basis for these complaints. The staff report does not consider or analyze the constructive discrimination issues raised by the complaints. In fact, we have found it difficult to respond to the Case Analysis, as we could find no clear articulation of the reasons for the recommendation to dismiss the complaints.[4] Moreover, it is our submission that the Case Analysis is based on an interpretation of the *Human Rights Code* that undercuts the very purpose of the legislation and is inconsistent with equality rights jurisprudence.

In reviewing our submissions, we urge the Commissioners to consider particularly the judgment of the Supreme Court of Canada in *Eldridge v. British Columnbia*[5]*.* The Court in that case considered an equality challenge against the B.C. Government for failing to fund interpreter services for deaf persons. The Court found that Government funding for such interpretor services is an indispensable measure to facilitate access to medical services. This is similar to our argument that an adequately-funded shelter allowance is an indispensable measure to support access to housing for persons on public assistance. The Court rejected the Government's argument that it had no responsibility to ensure equality of access for disadvantaged members of society, and found instead that the failure to fund sign language interpretation was a denial of equality rights protection in the *Charter of Rights.*[6] In criticizing the Government for failing to fund the service, the Court characterized the Government's position as one that "bespeaks a thin and impoverished vision" of equality rights protection. The Court went on to state that the position of the B.C. Government is "belied, more importantly, by the thrust of this Court's equality jurisprudence".

It is our submission that the approach urged upon you by the Case Analysis also bespeaks a "thin and impoverished vision" of the equality protection in the *Human Rights Code.* Further, as will be discussed below, the analysis urged by Commission staff is belied by the thrust of equality jurisprudence at the Supreme Court of Canada and the Ontario Court of Appeal.

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[3] We file the submissions herein in respect of each of the above-noted complaints and in response to the Commission's Case Analysis in respect of each complaint as against each of the two respondents, all of which are herein referred to as "the Case Analysis".

[4] For example, in para. 19, Ministry Case Analysis (para. 20 Municipal Case Analysis), the report states that the complaints have no reasonable basis "based on the following rationale". No rationale follows in 3 paragraphs remaining before the next heading, all of which merely summarize the evidence. We are left to ponder what is at best a hint in the last sentence that the complaints are to be dismissed because all the complainants are treated the same way as married recipients. It appears that the staff is applying a similarly situated analysis as the rationale for dismissal. Assuming that we are correct in inferring that this is the rationale, we then wonder why there is no discussion of the extensive and binding Supreme Court of Canada jurisprudence rejecting a similarly situated analysis.

[5] [1997] 3 S.C.R. 624in

[6] *Eldridge,* para.94

Factual Basis for the Complaints

Section 42(1) of the *Ontario Works* Regulations provides that "shelter" means "the cost of a dwelling place used as a principal residence with respect to any "of a list of enumerated costs including rent.

Subsection (2) sets out rules for calculating the cost of shelter. It provides that provides in paragraphs 1, 2 and 3 that the cost will be the lesser of "the actual cost payable for shelter "and "the maximum amount payable for shelter" as set out in the following table:

TABLE

Benefit unit size	Maximum Monthly Shelter Allowance
1	$325
2	511
3	554
4	602
5	649
6 or more	673

The shelter allowance maximums in the prescribed table fall significantly below the actual costs of rental accommodation in communities across Ontario. The average cost of a one-bedroom in Ontario according to the October 2003 CMHC Rental Market Survey[7] is $767. The average cost of a two-bedroom apartment in Ontario, as of October 2002 is $886.

Community-specific average rents are published by CMHC Rental Market Survey reports. For example, in the Toronto area, where the majority of our complainants live, the cost of an apartment as of October 2003, was $884 for a one-bedroom apartment and $1040 for a two-bedroom apartment.[8]

[7] Canada Mortgage and Housing publishes data on the average rent of "privately initiated apartment structures containing at least three rental units". See CMHC Rental Market Report Ontario, November 26, 2003 "FASTFAX".
[8] CMHC Rental Market Report Toronto CMA, November 26, 2003. "FASTFAX"

Across Ontario, 96% of all *Ontario Works* (*"OW"*) recipients are tenants; 83% of tenants on *OW* rent their housing in the private rental market.[9] These tenants have been significantly disadvantaged as rents have increased. Average rents across Ontario increased by 26% between 1995 to 2003.[10]

The problem of rising rents for tenants on *Ontario Works,* like our complainants, has been significantly affected by cuts in social assistance. In 1995, public assistance rates under *Ontario Works* were decreased by 21.6%. The effective drop in social assistance levels under *Ontario Works* is 39.8% as between 1995 and 2003 when the 18.2% increase in cost of living[11] is included in the calculation.

The result is a growing and punishing gap between the shelter allowance and average rents in communities across Ontario. The gap is most significant in Toronto and Ottawa, but it is significant and increasing in every community. In fact, CMHC data published recently demonstrates that rent levels are increasing in every census metropolitan area survey by CMHC outside Toronto notwithstanding a recent overall improvement in vacancy rates. [12]

This increasing income shortfall for welfare recipients is reflected in the increase in food bank use across Ontario. In Toronto, 55,000 children used the food banks in 2001.[13]

The shortfall in the shelter allowance is part of the lived experience of our complainants, who make use of food banks and used clothing stores to feed and clothe their children. All of our complainants are forced to use the "basic needs" portion of their *OW* cheque, in other words their food money, to pay for their rent.

Almost all of our complainants are single parents of young children, and as such are representative of a significant portion of the *Ontario Works* population across the province. Of the 403,283 beneficiaries receiving *Ontario Works* in Ontario, 175,000, or roughly 43%, were children. [14]

The relationship between the shelter allowance and rents in Toronto, where most of our complainants live, is graphically illustrated below.

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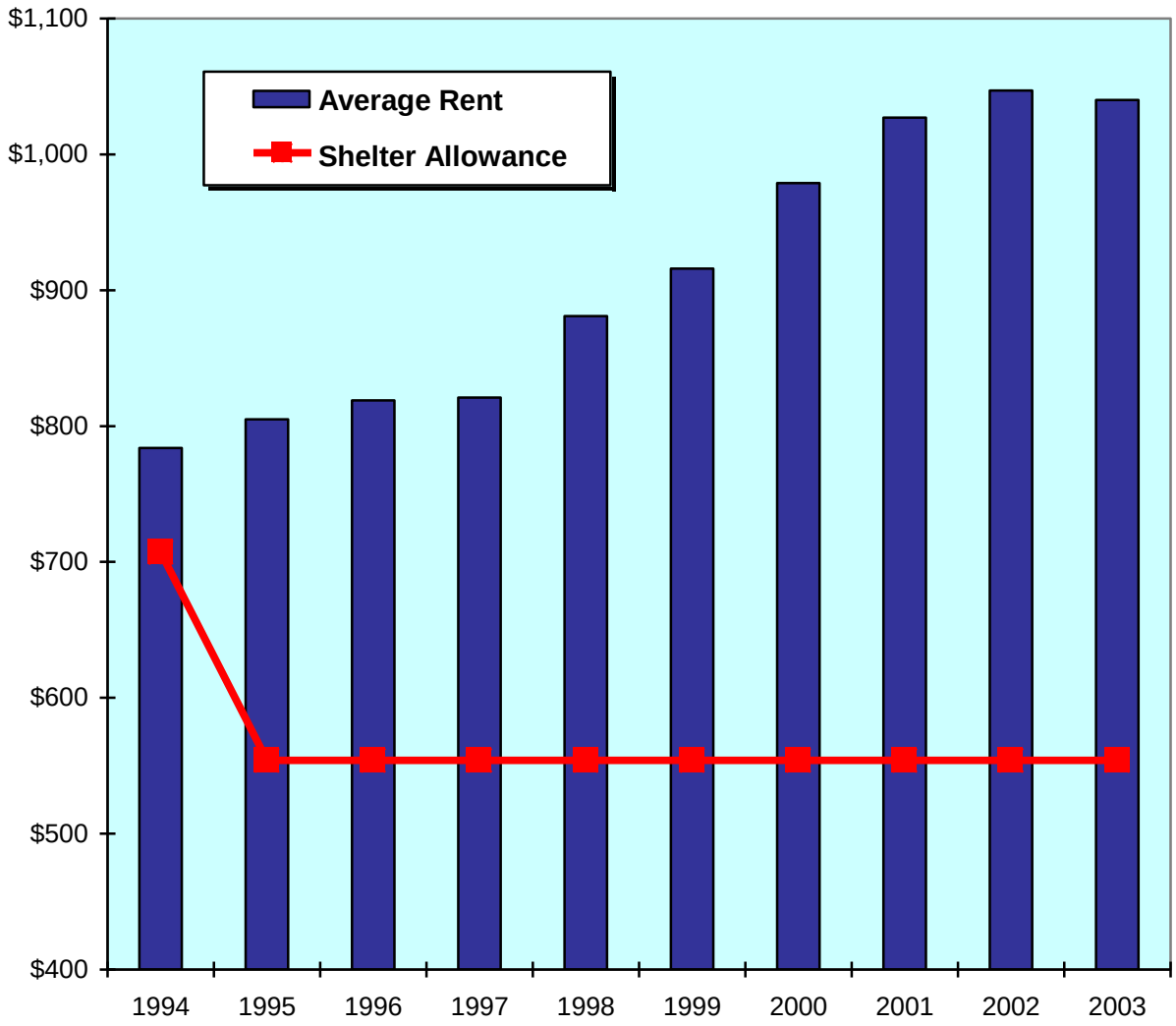
[9] Quarterly Report, OW/ODSP Cases and Beneficiaries by Accommodation Types, Statistics and Analysis Unit, Social Assistance and Employment Opportunities Division, Ministry of Community, Family and Children's Services, June 2003.
[10] Canada Mortgage and Housing Rental Market Survey Reports, 1995 to 2003.
[11] Statistics Canada: Ontario Consumer Price Index, all items (Index, 1992=100), 2001 basket content (CANSIM v738313 - from Table 326-0002)
[12] Canada Mortgage and Housing Annual Rental Market Survey Report, 2003-2003
[13] Daily Bread Food Bank Fact Sheet – *Turning our Backs on Our Children,* October 2002.
[14] Statistics and Analysis Unit, Ministry of Community, Family and Children's Services.

Comparison of Rent to Shelter Allowance
Toronto CMA, 1994-2003

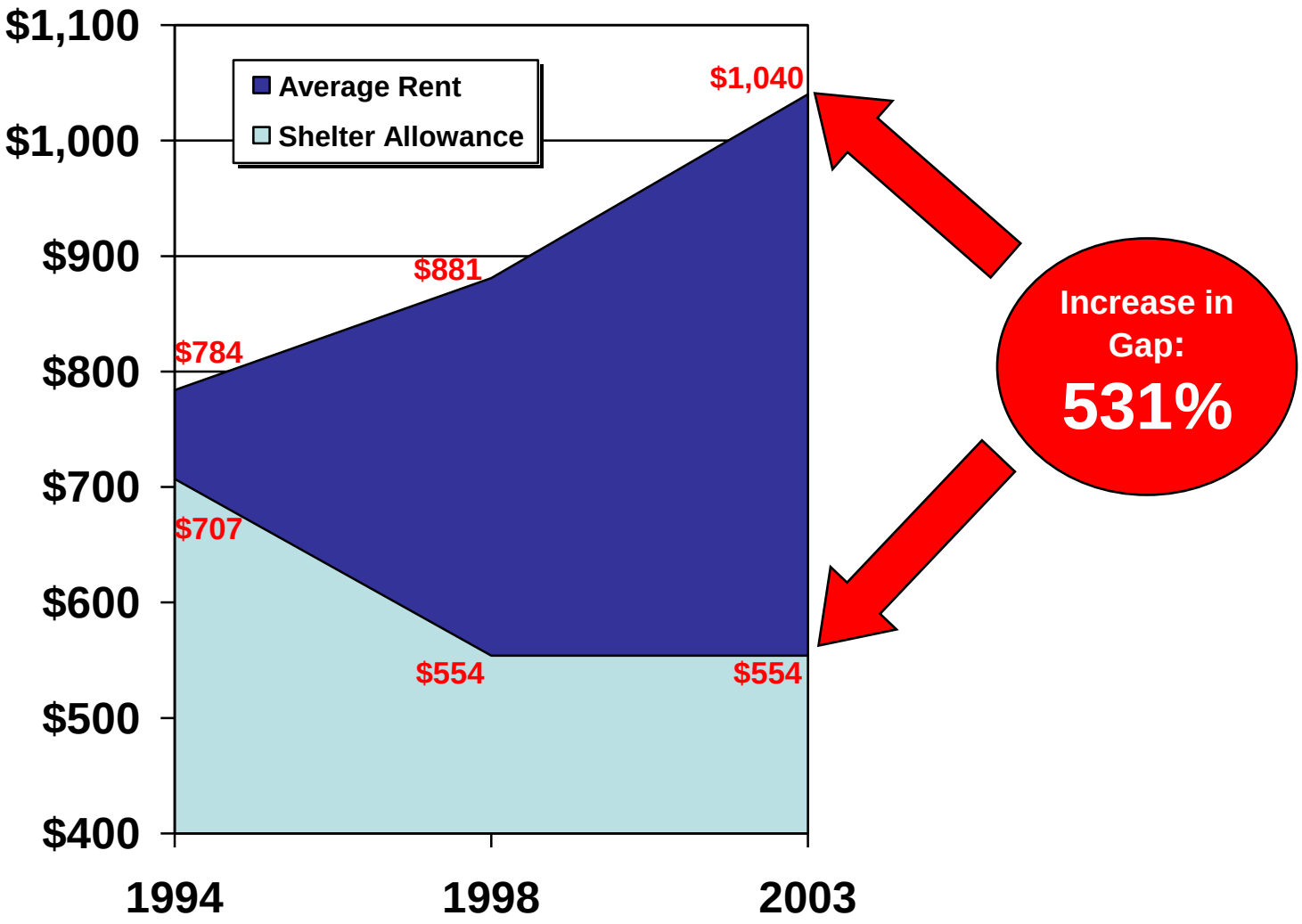
Single + 2 Children, 2 Bedroom Apartment



The chart below illustrates the relationship between the shelter allowance and average rents in Toronto since 1995. In Toronto, the gap between the allowance and rents has grown by 531% between 1995 and 2003.

Shelter Gap
Toronto CMA: 1994, 1998, 2003

Single + 2 Children, 2 Bedroom Apartment



Sources:
Canada Mortgage and Housing Corporation, Rental Market Survey Reports
Ontario Ministry of Community, Family and Children's Services

The Legal Framework for the Complaints

The Government of Ontario, and local *Ontario Works* Administrators, infringe the right of each of the complainants, under section 2 of the *Code,* to equal treatment with respect to the occupancy of accommodation, by implementing a ceiling on the *Ontario Works* shelter allowance that maintains the level of assistance significantly below the actual cost of rental accommodation in each of the complainant's communities.

More specifically, the complainants submit that the ceiling on the shelter allowance, as currently set, constitutes a factor with a disparate negative impact on public assistance recipients, and as such constitutes an infringement of their rights under s. 11 of the *Code.*

Constructive Discrimination

The complainants have previously argued, in submissions to the Commission in this matter, that the policy of setting a maximum shelter allowance (at a level completely unrelated to the actual cost of rental housing) constitutes, under s. 11, constructive or "adverse impact" discrimination. It is on this basis that the complainants allege an infringement of their s.2 rights under Part I of the *Code.*

Notwithstanding our prior submissions, the Case Analysis does not in any way acknowledge or address the claim of constructive or "adverse impact" discrimination. This is the core legal issue in these complaints, and the Commission cannot simply dismiss the complaints as vexatious or groundless without addressing the legal basis on which they are brought.

In the following passage, we discuss the application of s.11 to the circumstances alleged in these complaints. For ease of reference, we have set out s. 11(1) below.

> **11.** (1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is **not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground** of discrimination and of whom the person is a member, except where,
>
> (a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or
>
> (b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right. [emphasis added]

The language of s.11 expressly provides that the section is to be applied in situations in which a complaint challenges a requirement or factor that is *not otherwise discrimination* on a prohibited ground. That is the situation in our complaints: the shelter allowance ceiling does not itself fall within a prohibited ground of discrimination.

The opening language of s.11 states that a right under Part I (including the s.2 right to equal treatment in accommodation) will be infringed *even in a situation which is not otherwise discrimination*, if the challenged factor has the effect of excluding or restricting a group of persons who are identified by a prohibited ground of discrimination.

As stipulated in the Commission s.34 guidelines, a complaint can only be dismissed as vexatious if it lacks any basis in fact[15] or is groundless.[16] In other words, a complaint should only be dismissed under s.34 if it is apparent, on the face of the complaint, that the evidence, if proven, would not disclose an infringement of the *Code.*

The basic factual evidence in this case – the level of the shelter allowance and the level of rents – will be straightforward to prove. Based on these largely undisputed facts, it will be our submission before the Tribunal that the current ceiling on the shelter allowance constitutes a factor that results in the restriction of the ability of the complainants to find and maintain rental housing in the private rental market. Relying on s.11 and s.2, we will argue that, by setting the ceiling at a level that bears no relation to actual rental costs, the *OW* regulations impose a qualification on the shelter allowance that has a negative impact on public assistance recipients in respect of their ability to find and maintain private rental accommodation.

The level of the ceiling is not a trifling matter in the lives of the complainants. The most stark circumstances are demonstrated by the situation of those complainants who live in Toronto. The shelter allowance for a mother with one children is less than half the amount of the average rent for a two-bedroom apartment in Toronto. All of our complainants must use their *OW* food money to pay for rent.

Neither do the complainants have the option of obtaining publicly subsidized housing. There are waiting lists for rent-geared-to-income housing in every community across Ontario. In Toronto, there are now more than 71,000 households on the waiting list for City's 75,000 units of subsidized housing.[17]

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[15] *Procedures Manual,* September 1996, p.17
[16] *Procedures Manual,* July 1977, p.11

[17] The Toronto Report Card on Housing and Homelessness, 2003, (published by the City of Toronto), page 11.

More than half of our complainants are young mothers under the age of 20 years who, at the time the complaints were filed, had babies two years of age. The City of Toronto acknowledges that it now takes "many years" to get a subsidized apartment in this city, meaning that these young mothers cannot hope to reach the top of the list until long after their children are in school and they themselves hope to be in paid employment. These complainants are stuck in the private rental market trying to find and maintain housing on the basis of a shelter allowance which puts them at a severe financial disadvantage.

These factual circumstances provide firm support for a legal argument that the structure of the shelter allowance, and particularly the unrealistic ceiling, has an adverse and discriminatory impact on persons in receipt of public assistance. The shelter allowance ceiling, as currently set, restricts the ability of *OW* recipients persons to exercise their s.2 rights with respect to the occupancy of housing.

In our submission, the facts and arguments in respect of these complaints are entirely in keeping with the scope of the complainants' rights when properly considered under both s.11 and s.2.

Broad and Purposive Interpretation

In considering the staff recommendation for dismissal of these complaints, it is incumbent on the Commissioners to apply an interpretation of the legislation that is consistent with the stated purpose of the legislation. The preamble provides that:

> ……. it is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province;

The Supreme Court of Canada has stated that it is a fundamental principle of human rights jurisprudence that human rights statutes are to be given a broad interpretation that will advance the "broad purposes" and special quasi-constitutional nature of the legislation.[18]. The Commission, in considering the present complaints, should afford a broad and purposive interpretation to the language of s. 2 and s.11.

[18] *O'Malley v. Simpson-Sears* [1985] 2 S.C.R.536at para.12; *Insurance Corp. of B.C. v. Heerspink,* [1982] 2 S.C.R. 145 at 157-58.

In our submission, the language of s.11 matches the circumstances relied on in these complaints. When s.11 and s.2 are read together, as they must be, it is clear that the language is sufficiently broad to allow a complainant to challenge a a benefits program to assist financially disadvantaged persons in accessing or maintaining housing if that program is qualified or structured in a way that would restrict the ability of a *Code*-protected group to obtain or maintain housing.

Reasons for Dismissal in Case Analysis Report

In our submission, a broad and purposive interpretation of s.11 and s.2 will answer two key justifications for dismissal that appear to be relied upon in the Case Analysis. Both of these justifications appear to be put forward in support of a finding that the complaints are vexatious, without legal basis and outside the jurisdiction of the Commission.

The first justification for dismissal is that the facts alleged do not "amount to discrimination under the *Code"* because they are not "with respect to the occupancy of accommodation"[19]. The justification seems to rely on the fact that receipt of assistance cannot be a ground of discrimination unless the complaints are with respect to the occupancy of housing.

The second related justification that is suggested by the Case Analysis is that the complaints are "illogical" [20] and outside the Commission's jurisdiction because they allege social assistance discrimination against a social assistance provider in the social area of housing.

Each of these two justifications for dismissal is discussed below.

"With respect to the occupancy of accommodation"

Section 2(1) states:

> Every person has a right to equal treatment **with respect to the occupancy of accommodation**, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, same-sex partnership status, family status, disability or the receipt of public assistance. [emphasis added]

[19] See para. 26 and 27 in Ministry Case Analysis; para. 27 and 28 in Toronto Case Analysis.
[20] See para. 43 and 44 in Ministry Case Analysis; para. 40 and 41 in Toronto Case Analysis.

The Case Analysis states, in paragraphs 26 and 27[21], that the complaints are vexatious, do not establish a reasonable basis, and, even if proven, would not "amount to discrimination" because they "could not be said to be "with respect to occupancy of accommodation" within the meaning of s.2.

There is no analysis provided by staff that would assist the Commissioners in interpreting the meaning of the words "with respect to" in the context of the s.2 "occupancy of accommodation" right. The report contains no discussion of how the Commissioners could apply a purposive interpretation of those words as you are required to do in applying human rights legislation.

There is jurisprudence that should inform the Commission's consideration of the language of s.2 and particularly the words "with respect to". The Supreme Court of Canada has considered the proper interpretation of phrases like "with respect to", "in connection with" and "in respect of". In *Noregijick v. The Queen*[22], the Court stated:

> The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to", or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject -matters.

This view was recently restated in ***CanadianOxy Chemicals Ltd. v. Canada (Attorney General)***, [1999] 1 S.C.R. 743, at para. 16, interpreting s. 487(1) of the Criminal Code, and in ***Sarvanis v. Canada*** [2002] 1 S.C.R. 921. In ***Sarvannis***, which dealt with liability under the Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, the Court also reiterated the importance of statutory context, which of course is important in this case as well.

Accordingly, the words "with respect to" should be interpreted by the Commission as supporting "the widest possible" connection between social area of housing and the factor or qualification that is challenged by these complaints under s.11 and s.2. If anything, the words "with respect to" convey an even wider connection between the two related subject-matters than the words "in respect of" which were specifically considered by the Court and found to require only "some connection" between the two subject-matters at issue.

In other words, at this stage in the process, the Commission should not dismiss the complaints on the basis that they are not "with respect to" housing unless satisfied that the challenged factor – namely the shelter allowance ceiling – has no connection or possible impact on the ability of the complainants to exercise their right to occupy housing. The Ministry of Community and Social Services in

[21] Ministry Case Analysis; also at para.27 and 28 of Toronto Case Analysis and in all other Case Analysis Reports.
[22] [1983] 1 S.C.R. 29 at p. 39.

fact does not dispute that the shelter allowance component of *OW* is provided to recipients to allow them to find and maintain housing for themselves and their families.

The Commissioners must reject the staff recommendation if satisfied that the facts, if proven, could establish that the shelter allowance ceiling has a connection with, and a potential impact on, the ability of the complainant to find and maintain housing. Any legal issues concerning the scope of the s.2 right to occupancy of accommodation should not be decided in a s.34 application but must be referred to the Human Rights Tribunal for a determination.

Accordingly, the complaints establish the basis for a *prima facie* case of adverse impact discrimination, under s.11 and s.2 , by alleging that the provision of a *OW* shelter allowance is structured such that a "requirement, qualification or factor" has a negative impact **with respect to** the ability of recipients to occupy housing.

As such, the complaints should be allowed to proceed to the investigation and mediation stage, and should ultimately be referred to the Tribunal for a hearing on the legal issues.

Alleging Social Assistance Discrimination by Assistance Provider in the Areas of Housing

The Case Analysis concludes that the Commission lacks jurisdiction in respect of these complaints because they allege discrimination on "the receipt of social assistance ground against the provider of social assistance in the social area of housing".[23]

In responding to this second justification for dismissal, we ask the Commission to to consider two equality rights decisions that dealt with similar issues: *Ontario (Human Rights Commission) v. Ontario (Ministry of Health)* ("*Roberts*")[24] and *Falkiner v. Director of Income Maintenance Branch, Ministry of Community and Social Services* ("*Falkiner*"). [25] In both these cases, the Courts found that a requirement or factor in a government benefits scheme was discriminatory.

In our complaints, as in *Roberts* and *Falkiner*, we challenge one "requirement, qualification or factor" (to use the language of s.11) in an ameliorative program offered by government, but not the program as a whole. As in *Roberts* and *Falkiner,* we challenge a feature of the benefits program that has a specific negative impact on a group of recipients claiming equality rights. Contrary to what is suggested in the Case Analysis[26], it is not significant, from a legal

[23] See para. 43 and 44, Ministry Case Analysis; para. 40 and 41 Toronto Case Analysis,
[24] (1994), 21 C.H.R.R. D/259
[25] 2002] O.J. No. 1771
[26] See Ministry Case Analysis, para. 31

perspective that in *Roberts,* unlike in our complaints, the rule at issue resulted in the claimant being completely ineligible for the program. In our complaints, as in *Falkiner,* the persons claiming equality rights remain eligible for benefits but at a reduced level.

The *Falkiner* decision is particularly relevant. In that case, several social assistance recipients used the equality rights protection in the *Charter* to challenge a requirement under the previous welfare legislation that limited their level of benefits. The requirement at issue concerned living arrangement with a person who might be considered to be a partner. The Ontario Court of Appeal found that the so-called "spouse in the house" rule was discriminatory even though it applied only to persons on welfare and treated everyone in the same situation the same way.

The *Falkiner* case is similar to our complaints in that we are also challenging a requirement or factor in the welfare scheme that applies only to persons on welfare and that treats everyone "similarly situated" under the scheme in the same way. In *Falkiner,* the requirement or factor was struck down by the Court because of its impact on welfare recipients as compared to persons not on welfare. This is the same as the basis on which our complaints are brought: we challenge the impact of the shelter allowance ceiling on persons on social assistance *as compared to persons not on social assistance*.

Finally, it is also significant that in *Falkiner*, as in our complainants, the requirement at issue is challenged because of its impact on the claimants in other area of their lives. The Court in *Falkiner* strikes down the rule, not simply because of its impact on the recipients' level of benefits. The Court relies specifically on the rule's negative impact on:

- their ability to enter into intimate, live-in relationships;
- their right to privacy in respect of their personal relationships;
- their sense of financial independence; and on
- their sense of personal dignity. [27]

Similarly, we are challenging an aspect of the welfare scheme because of its secondary or constructive adverse impact on the complainants, specifically its impact on their ability to find and maintain housing.

Accordingly, we ask the Commissioners to not accept the staff recommendation for dismissal on the basis of the second justification, namely that it is "illogical" to claim social assistance discrimination against an assistance provider in the area of housing. Our complaints fall within the equality rights jurisprudence of the Ontario Court of Appeal and accordingly fall within the jurisdiction of the Commission.

[27] *Falkiner,* para. 100 to 105.

Other Issues Raised by the Case Analysis

Respondents as Non-Housing Providers

Contrary to the submissions of the respondents, the rights in section 2(1) of the *Code* are not restricted by an identified and limited class of respondents. The subsection does not limit the class of potential respondents to housing providers.

In this regard, it is instructive to compare the language of subsection (1) with that of subsection (2). Subsection (2) limits the group of potential respondents to the "landlord or agent of the landlord" or "an occupant of the same building". Under subsection (1), the class of potential respondent is not limited to landlords, landlord agents or other occupants.

In a previous decision, the Board of Inquiry has added a government agency, acting as a funder and not a landlord, as a respondent to a section 2 complaint: *Iness v. Carolina Co-operative Homes Inc. and Canada Mortgage and Housing Corporation*[28]; reversed *Canada Mortgage and Housing Corp. v. Iness*[29] (Div. Ct); leave to appeal granted ("*Iness*")[30]

In *Iness*, as in the present complaints, the agency that was added as a party, CMHC, was an agency of government with a policy that allegedly infringed a right with respect to the occupancy of accommodation offered for rent by another entity. At issue in that case was a funding policy of CMHC which purportedly required the housing co-operative landlord to set rent at the level of the complainant's social assistance shelter allowance. The result of this policy was that the tenant was required to pay for other non-rent shelter costs (hydro and apartment insurance) out of the basic needs (food and clothing) portion of her welfare cheque.

The Board of Inquiry decision to add CMHC as a party in *Iness* is consistent and supportive of the present complaints in which we challenge a policy of a non-landlord respondent that has a negative impact in respect of the right to occupancy of accommodation. The facts are very similar in that the issue is the impact of the policy of a non-landlord on the disposable income of a tenant who is dependent on an *OW* shelter allowance.

In light of the *Iness* decision, we urge the Commissioners not to adopt the unsatisfactory reasoning on this point in the Case Analysis. It would be illogical to dismiss these complaints as vexatious and lacking a basis in law when a similarly-based complaint has been considered by a Board and the Divisional

[28] (2001), 40 C.H.R.R. D/182
[29] [2002] O.J. No. 2761
[30] [2002] O.J. No. 4334.

Court without either decision-making body adopting the analysis urged by the staff report.

The decision to add CMHC is under appeal to the Court of Appeal, but **not** on the point on which we rely in these complaints. The issue in the appeal is the jurisdiction of the Board to add a *federal* agency, not the status of CMHC as non-housing provider.

Identification of the Comparator Group

The Case Analysis appears to adopt the position of the Ministry of Community and Social Services that there is no basis for the complaints because the complainants receive the same level of assistance as other similarly situated recipients. Unfortunately the Case Analysis fails to deal explicitly with the comparator issue, making it difficult for the complainants to know the case that they are up against in responding to the staff recommendation for dismissal.

However, it is clear that the implication of the analysis set out in the staff report is that the correct comparator for these complaints is other persons in receipt of *OW.* The Case Analysis states:

> However, the evidence indicates that the respondent calculates the amount of the shelter allowance by applying a formula as set out in the *OWA* and that the amount of the allowance is based solely on the number of persons in a benefit unit. The evidence indicates that in the application of the formula delineated in the *OWA,* the respondent does not treat the complainant differentially (sic) from other married recipient (sic) found eligible for financial assistance pursuant to the *OWA.*

In this passage, the Case Analysis adopts a similarly situate analysis that has been rejected by the Supreme Court of Canada on numerous occasions. In the first and leading case, *Andrews v. Law Society of British Columbia*[31], the Court discusses the deficiencies of the test at some length. Excerpts from that discussion are set out below:

> The similarly situated test is a restatement of the Aristotelian principle of formal equality – that "things that are alike should be treated alike, while things that are unalike should be treated unalike in proposition to their unlikeness. … [page 13]
>
> The test as stated, however, is seriously deficient in that it excludes any consideration of the nature of the law. If it were to be applied literally, it could be used to justify the Nuremberg laws of Adolf Hitler. … [page 13]

[31] (1989), 56 D.l.R. (4th) 1 at page 12 to 15, per McIntyre dissenting, but whose analysis on s.15 was adopted in its entirety by the majority.

> Thus, mere equality of application to similarly situated groups or individuals does not afford a realistic test for violation of equality rights…. [page 14].
>
> I would also agree with the following criticism of the similarly situated test made by Kerans J.A. in *Mahe v. The Queen in the Right of Alberta:*
>
> > …. The test accepts an idea of equality which is almost mechanical, with no scope for considering the reason for the distinction. In consequence, subtleties are found to justify a finding fo dissimilarity which reduce the test to a categorization game. Moreover, the test is not helpful. After all, most laws are enacted for the specific purpose of offering a benefit or imposing a burden on some persons and not on others. The test catches every conceivable difference in legal treatment.
>
> For the reasons outlined above, the test cannot be accepted as a fixed rule or formula for the resolution of equality questions arising under the Charter. Consideration must be given to the content of the law, to its purpose, and its impact upon those to whom it applies, and also upon those whom it excludes from its application. The issues which will arise from case to case are such that is would be wrong to attempt to confine these consideration s within such a fixed and limited formula.

As the foregoing passage makes clear, the Commission cannot appropriately dismiss these complaints merely because the complainants are treated in the same way, and receive the same shelter allowance, as other *OW* recipients. Other *OW* recipients are not the appropriate comparator group for these complainants.

In fact, as the Supreme Court has clarified in *Law v. Canada (Minster of Employment and Immigration)*[32], it is generally the person claiming equality rights who is entitled to identify the appropriate comparator for assessing the validity of the claim. This is consistent with the decision of the Ontario Court of Appeal in *Falkiner et al. v. Director, Income Maintenance Branch, Ministry of Community and Social Services* [33] As stated by Laskin J.A. in the following passage:

> … the s. 15(1) analysis must be considered from the perspective of the claimant and must take into account the effect of the legislation in question.

The *Falkiner* decision should be of particular assistance to the Commission in considering the comparator issue in our case. Admittedly, *Falkiner* is

[32] [1999] 1 S.C.R. 497 at para.88
[33] [2002] O.J. No. 1771 at para.69

complicated by the fact that it considered discrimination on several enumerated and analogous grounds, including sex, marital status and receipt of social assistance. However, the Court's analysis of 'receipt of social assistance' with respect to the comparator issue is instructive in this case.

In *Falkiner,* the Court of Appeal found that the legislation being challenged (the definition of spouse under social assistance legislation) resulted in differential treatment of the claimants on all three grounds. The Court found that the correct comparator group in respect of this ground was persons not in receipt of social assistance.

> First, the respondents allege that they have been treated unequally on the basis of the personal characteristic of being a social assistance recipient. As I stated above, the respondents urge a comparison between themselves and persons who are not on social assistance. In my view, the respondents' claim of differential treatment on the basis of being a social assistance recipient can best be assessed by comparing their treatment to the treatment of single persons not on social assistance. Framing the comparison in that way shows that the respondents have been treated unequally. [pg. 24 at para. 73]

Similarly, the appropriate comparator group for the purpose of identifying the discrimination at issue in these complaints is composed of the other renter households not on public assistance against which the complainants compete in finding and keeping their housing in the private rental market. To apply the language of s.11 and s.2, the ceiling on the shelter allowance results in the restriction of the ability of public assistance recipients to compete for housing with other renter households who are not dependent on the shelter allowance to cover their housing costs.

We submit that the Commission must apply the analysis of the Ontario Court of Appeal as summarized above. Accordingly these complaints are appropriately found to disclose a reasonable basis for a finding of adverse impact or constructive discrimination and should proceed to investigation, mediation and a hearing before the Tribunal.

Issues Raised by the Respondents

Special Program under Section 14

Several respondents have raised as an issue the application of section 14 of the *Code* to these complaints. Section 14 has no application to the complaints. It appears that the Case Analysis accepts our position in this regard.

Section 14 must be interpreted purposively based on the overall role and purpose of human rights legislation. Section 14 is intended to protect ameliorative programs from challenge by members of advantaged groups. Section 14 cannot be used to shelter an ameliorative program from challenge by a person within the disadvantaged group entitled to or claiming the protection of the program where that person bases the challenge on an allegedly discriminatory factor affecting eligibility or delivery of the program: *Ontario (Human Rights Commission) v. Ontario (Ministry of Health)* (1994), 21 C.H.R.R. D/259 ("*Roberts*")/

Moreover, pursuant to section 14(5) of the *Code,* where a special program is implemented by the Crown, as in the case in these complaints, the Commission may not inquire into the application of the exemption. The appropriate procedure in respect of Crown programs is to refer the issue to the Human Rights Tribunal of Ontario to consider the application of section 14: *Roberts* at para. 40.

Liability of Local Administrators

The Commission has received submissions with respect to the liability of local Administrators named as respondents in the complaints. The complainants acknowledge that the local *Ontario Works* Administrators named in each of the complaints are responsible under the legislation and regulations for delivery of assistance in accordance with rules and benefit levels set by the Province of Ontario. It is acknowledged that the local Administrators are the delivery agents for the program and that this will affect the nature and extent of their liability and the scope of any remedy that the complainants would seek as against the local Administrators.

We also acknowledge that two or more municipal councils acting as local delivery agents for *Ontario Works*, including the City of Toronto, have supported an increase in the rate of assistance, and have called upon the Province of Ontario to increase the shelter allowance levels that are the subject of these complaints.

More Appropriately Dealt with under the Charter

One of the respondents has suggested that the issue raised by these complaints would be more appropriately dealt with under the Charter of Rights.

While a challenge to the level of the welfare shelter allowance might well be possible under section 15 of the Charter, there is no basis for finding that the *Charter* route is more appropriate. The Ontario *Human Rights Code* offers the complainants an accessible enforcement process for challenging unequal treatment in a government program. The process under the *Code* includes an mediation and investigation process at the Commission which would be unavailable to the parties in a court action.

Complaints Should be Dismissed "as a disguised attempt to bring attention to a social and/or political issue"

The County of Lanark raises this argument in its submissions. It states, among other things, that the complaint against it should be dismissed because it was filed "for the purpose of protesting policy and/or political decisions with respect to the deployment of public resources …. and with intent to bring about an increase in the amount of social assistance … not to redress discrimination or alleged violations of the *Code* … "

We acknowledge that the complaints are brought for the purpose of seeking a remedy in respect of the level of the shelter allowance. The complaints raise issues that are appropriately within the jurisdiction If the Human Rights Tribunal of Ontario. If the Tribunal finds that the shelter allowance ceiling constitutes a rights infringement under s. 11 and s.2, as we will argue it must, it has the authority under s.41(1) of the *Code* to order, among other things, that the Government of Ontario take steps to achieve compliance in respect of its future practice in setting the shelter allowance. Contrary to the submissions of the County of Lanark, the complaints are an undisguised attempt to obtain that result.

Conclusion: The Role of the Commission Is To Take Forward Cases That Forward the Policy To Recognize the Dignity and Worth of Every Person

It is the express function of the Ontario Human Rights Commission, under s. 29 of the *Code*, to "forward the policy that the dignity and worth of every person be recognized and that equal rights and opportunities be provided without discrimination that is contrary to the law". The Commission must do this through its public education role, but also through its enforcement role.

It is the role of human rights commissions, in all Canadian jurisdictions, to take forward, in appropriate circumstances, cases that might require a novel or untested interpretation of human rights law. There are many instances in which the provincial human rights commissions have demonstrated this importance role.

In our submission, the fifteen complaints at issue are important cases for the Commission to take forward to the Human Rights Tribunal of Ontario. The Ontario Commission has signaled its intention to expand the current understanding of its human rights mandate to include economic and social rights, as expressed in international law. The Commission has acknowledged that test cases before the Tribunal are an important legal strategy to explore and address possible infringements of the economic and social rights of vulnerable and marginalized members of our society. [34]

These fifteen complaints raise issues of economic and social disadvantage. The complainants are recipients of public assistance who claim that their economic and social disadvantage is reinforced and augmented by an a government policy that is alleged to result in constructive discrimination against them as public assistance recipients.

It is acknowledged that the complaints raise legal issues as to the appropriate interpretation of the scope of protection under sections 2 and 11 of the *Code*. Similar issues have been considered by the Courts in deciding equality rights cases under the *Charter of Rights*. We urge the Commission to consider the relevant *Charter* jurisprudence in making its determination in respect of our complaints, and particularly the decisions of the Supreme Court of Canada in *Eldridge* and the Ontario Court of Appeal in *Falkiner.* The legal issues raised by these complaints must be decided in the context of, and consistently with, the relevant *Charter* jurisprudence. Ultimately, the appropriate forum for this consideration is the Human Rights Tribunal of Ontario, and not the Commission's summary dismissal process under section 34.

We urge the Commission to proceed with these complaints in a priority fashion. Given the on-going hardship suffered by our clients, it would be inappropriate to allow these complaints to be delayed at the Commission. We hope that a mediation conference can be scheduled shortly. The key facts – the level of the shelter allowance and average rents – cannot be in dispute between the parties; there should be no need for an extensive investigation. Accordingly, failing settlement, we are asking that the complaints be referred to the Human Rights Tribunal forthwith.

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[34] See Norton, Keith, Q.C., *Bringing the Universal Declaration Home: The Ontario Human Rights Commission's Perspective*, Presentation, Proceedings of Conference on "Advancing Economic, Social and Cultural Rights: Implementing International Human Rights Standards into the Legal Work of Canadian Human Rights Agencies:, December 1-2, 2000, Toronto.