IN THE MATTER OF the complaints filed by [redacted] alleging discrimination in accommodation on the basis of receipt of social assistance

SUBMISSIONS OF THE COMPLAINANTS IN RESPONSE TO THE RECONSIDERATION REPORT

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Factual Basis for the Complaints

The complainants are all persons in receipt of social assistance under the *Ontario Works* ("*OW*") program of the Ontario Government. The complaints challenge the formula for setting a ceiling on the shelter allowance portion of their *OW* benefits, alleging that, by failing to take into account current average rents, the formula places a severe and discriminatory disadvantage on their ability to find and maintain rental housing. All of the complainants rent accommodation for their families that costs considerably more than the amount covered by the shelter allowance, and they have been unable to find less expensive rental housing. All of our complainants are forced to use the food portion of their social assistance benefits to cover their monthly rent.

The *OW* shelter allowance is provided specifically to address the shelter costs of recipients. Section 42[1] of the *OW* Regulations provides in subsection (1) 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) defines what will be accepted as the cost of shelter and provides 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

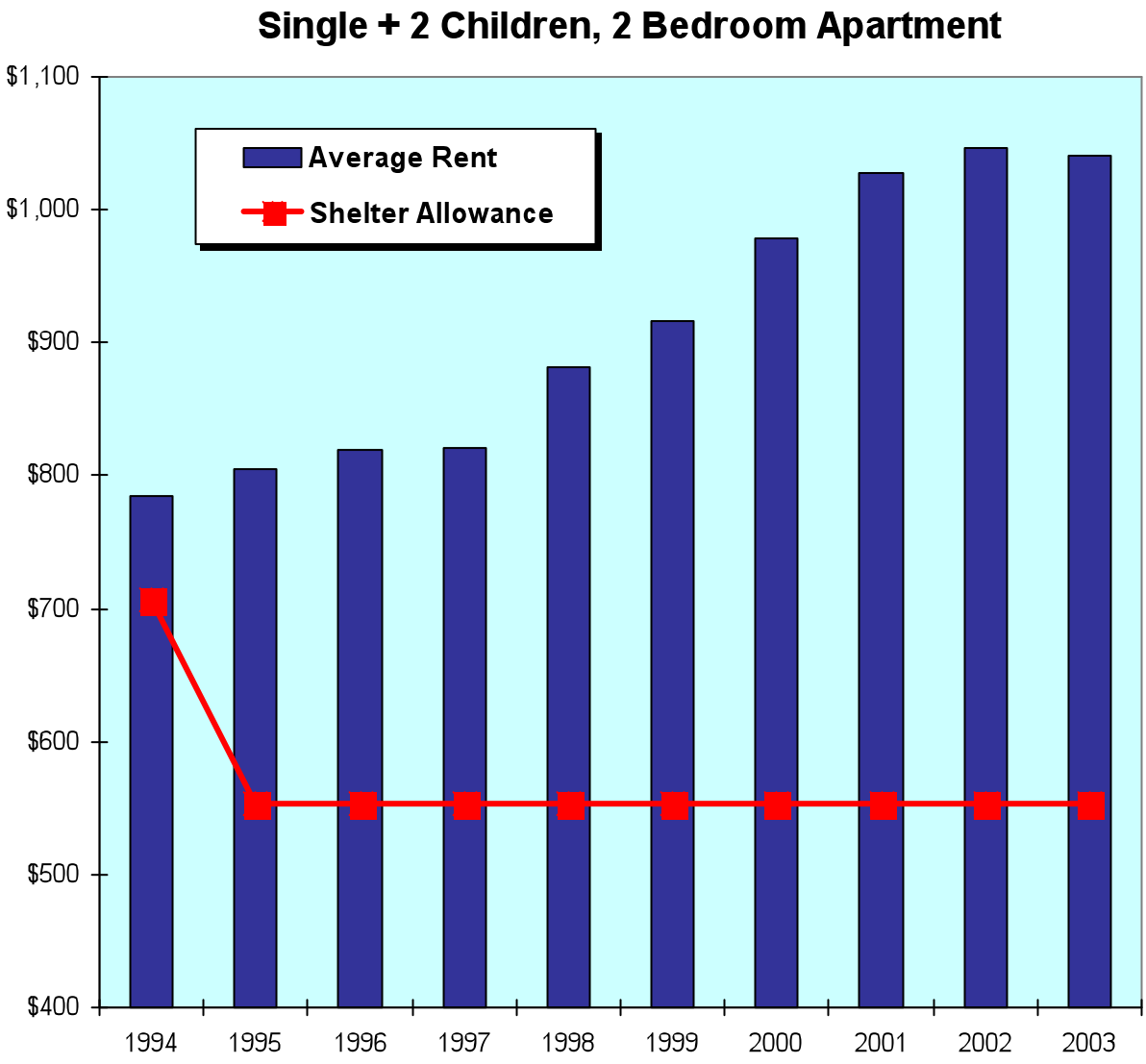
Benefit unit size	Maximum Monthly Shelter Allowance
1	$325
2	511
3	554
4	602
5	649
6 or more	673

The shelter allowance maximums in the prescribed table fall significantly below the actual cost of rental accommodation in communities across Ontario. The average cost of a one-bedroom in Ontario, according to the October 2004 Canada Mortgage and Housing Corporation ("CMHC") Rental Market Report,[2] is $774. The average cost of a two-bedroom apartment in Ontario, as of October 2004, is $898.

[1] O. Reg. 134/9. See *Ontario Works* Directive 29.0-7.
[2] 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 Highlights, October 2004.

Community-specific average rents are published by CMHC in its Rental Market Survey reports. The chart below uses CMHC data to illustrate the discrepancy between the shelter allowance and rents in Toronto from 1994 to 2003.

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



In 1994, the shelter allowance almost matched the average rents, even in expensive urban markets. For example, in 1994, a mother with two children would receive a shelter allowance of $707, but the average cost of a two-bedroom apartment in Toronto was only $784. By 2004, the average rent for a two-bedroom apartment had risen to $1052, but the same family would receive a shelter allowance of only $554 [3]

Most of the complainants have applied for rent-geared-to-income (RGI) housing but there are lengthy waiting lists for subsidized rental units in every community across Ontario. There were 124,785 households on active social housing waiting lists province-wide at year-end 2004[4] and more than 65,748 households on the Toronto waiting list as of May 31, 2005. [5]

Most *OW* recipients are tenants who rent in the private rental market: 96% of all *OW* recipients are tenants; 83% of tenants on *OW* rent their housing in the private rental market.[6] The *OW* tenants who are not in subsidized housing have suffered increasing financial hardship as rents climbed throughout the past decade. Average rents across Ontario increased by 27% between 1995 to 2004,[7] and have continued to rise despite higher vacancies rates. [8] Welfare rates, on the other hand, were decreased by 21.6% under the 1995 *OW* legislation. Between 1995 and 2003, the effective drop in *OW* levels was 39.8%, once the 18.2% increase in cost of living[9] is included in the calculation.[10]

There is a growing and punishing gap between the *OW* shelter allowance and average market rents in communities across Ontario. The Ontario Human Rights Commission has recognized the hardship caused by this gap in its recently published

[3] CMHC Rental Market Report, October 2004.
[4] Ontario Non-Profit Housing Association, *2005 Assessment of Waiting List Statistics,* July 2005, p.4
[5] City of Toronto, *Housing Connections,* Monthly Report, June 2005.
[6] 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.
[7] Canada Mortgage and Housing Rental Market Survey Reports, 1995 to 2004.
[8] CMHC Rental Market Report, October 2004, Ontario Highlights
[9] Statistics Canada: Ontario Consumer Price Index, all items (Index, 1992=100), 2001 basket content (CANSIM v738313 - from Table 326-0002)

discussion paper on ***Human Rights and the Family in Ontario.*** The discussion paper notes that a single parent with two children on *OW* would have only about $31 left, after paying the average monthly rent for a two-bedroom apartment in Toronto, to cover all other needs for the month.[11]

In ***Human Rights and the Family in Ontario,*** the Commission discusses the fact that the United Nations Committee on Economic, Social and Cultural Rights has expressed grave concern about the impact of decreased welfare rates, including Ontario rates, on the ability of recipients to find affordable housing.[12] The paper states unequivocally that the Commission shares this concern and views the resulting lack of access to housing for social assistance recipients as "a serious human rights issue".[13] Given the Commission's public recognition that the unrealistic shelter allowance is a human rights issue, it appears hypocritical of the Commission to prevent the complainants from challenging the shelter allowance formula as discriminatory before the Human Rights Tribunal of Ontario.

Legal Basis for the Complaints

The complaints challenge as discriminatory the *OW* formula for calculating the shelter allowance. **What is challenged is <u>not</u> the level of the shelter allowance *per se,* but the rather the failure of the shelter allowance regulation to include a formula that takes into account actual rent levels.** If permitted to make their case before the Human Rights Tribunal of Ontario, the complainants will seek an order requiring the respondent Ministry to develop a new formula that takes into account actual rent levels in communities across Ontario.

The complainant's position is that the shelter allowance formula results in constructive or adverse impact discrimination in respect of their s.2 right of equal access to housing. The complainants do not allege that the formula is directly

[10] A rate increase of approximately 3% was introduced in the 2004 budget.
[11] OHRC, *Human Rights and the Family Discussion Paper,* March 2005, p.44
[12] ibid., at 12
[13] ibid., at 44

discriminatory under s.2, or that it imposes unequal treatment in services. The Commission's Section 34 Case Analysis and the Reconsideration Report both analyze the complaints applying a direct discrimination model and focusing on the identification of the respondent as a service provider, and the identification of the shelter allowance formula as a service policy. With respect, this analysis misses the point.

The shelter allowance formula is a service policy that is specifically designed to address housing needs. These complaints allege that the policy has an adverse impact in respect of the right to equal access to housing, not equal treatment in services. The complaints can only properly be assessed with reference to the definition and parameters of constructive or adverse impact discrimination as set out in s. 11 of the *Code*.

Section 11(1) provides:

> A right of a person under Part 1 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,
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> (a) the requirement, qualification or factor is reasonable and bona fide in the circumstances; or
> (b) it is declared in this Act, other than section 17, that to discriminate because of such ground is not an infringement of a right.

The components of section 11 can be broken down as follows:

A right under Part 1

is infringed

where a requirement or factor that is not discrimination on a prohibited ground

results in the exclusion or restriction of a group of persons identified by a prohibited ground.

The components of s.11 can be applied to the complaints as follows:

The complainants' rights in s. 2

are infringed

if the challenged shelter allowance regulation (although not constituting discrimination in service on a prohibited ground)

results in a disadvantage or restriction that affects the complainants, as public assistance recipients, with respect to their occupancy of accommodation.

Section 11 was enacted precisely in order to capture the secondary adverse impacts of policies or rules that would not otherwise be vulnerable to an equality-rights claim. As discussed in greater detail below, in our submission, the language of s.11 readily captures the issue raised by these complaints.

Overview of Response to Reconsideration Report

The Reconsideration Report focuses its analysis in support of dismissal on one key issue: do the complaints establish a social area. The Report concludes, in paragraphs 20 and 31, that the complainants have failed to establish a "proper social area". The Report suggests that the complaints should have been filed as s.1 complaints alleging unequal treatment in the social area of services, but that the complainants were unable to do so because receipt of social assistance is not a prohibited ground in relation to services.

To be clear, the complaints were not filed under s.1 simply because there is no unequal treatment with respect to services. All *OW* recipients receive the same shelter allowance. The complaints raise a different issue entirely – the adverse impact of the shelter allowance policy in the social area of housing. The complaints do not allege that the shelter allowance formula has a discriminatory impact on all recipients but only on the subgroup of recipients who rent housing in the private rental market.

Given the recommendation that the complaints be dismissed for failure to establish a "proper social area", the key question that must be determined in this reconsideration application is: Can the policy of a service provider be challenged as discriminatory on the basis of its negative impact *in another social area* on the rights of a designated group member? More specifically, can a welfare policy be challenged if it has a negative impact on the *Code*-protected right of welfare recipients to have equal access to housing?

Our submission is that a negative response to this question by the Commission would have the effect of enfeebling Ontario human rights legislation, and would run afoul of Supreme Court of Canada jurisprudence,[14] by imposing a narrow and restrictive interpretation that is inconsistent with the actual language of the *Code*. The general result would be a weakening of the constructive discrimination protection in the legislation. The specific result would be to allow social assistance programs to impose policies on recipients that restrict their rights in other social areas, as long as the program treated all recipients in the same way, with the same potential negative consequences.

Moreover, the interpretation urged by the Report is contrary to the approach adopted by the Ontario Court of Appeal in *Falkiner v. Director of Income Maintenance Branch, Ministry of Community and Social Services ("Falkiner").*[15] In that decision, the Court of Appeal found that a welfare policy was discriminatory because, although it applied equally to all recipients, it had a negative secondary impact on a group of recipients (as compared to non-recipients) in other areas of their lives, including personal relationships, personal privacy and financial independence. In *Falkiner,* the Court of Appeal dismissed the defense raised by the Ministry of Community, Family and Children's Services in the present complaints, specifically that the welfare policy was not discriminatory because it applied to all recipients.

[14] *Canadian National Railway Co. v. Canada* [1987] 1 S.C.R. 1114 at 1134
[15] (2002), 59 O.R. (3d) 481 (C.A.).

Falkiner was a constructive discrimination case decided under the Canadian *Charter of Rights.* Even before constructive discrimination was specifically added to the Ontario *Code*, Boards of Inquiry had developed a constructive discrimination analysis that has since informed *Charter* jurisprudence.[16] Section 11 was enacted to codify this developing jurisprudence and to specifically capture and prohibit conduct that is not directly discriminatory but has secondary discriminatory impacts. There is nothing in the language of s.11 that provides that the secondary discriminatory impacts must be experienced in the same social area that is associated with the conduct complained of, or with the alleged discriminator. In fact, such a requirement would not make sense, given that the purpose of prohibiting constructive discrimination is precisely to capture the secondary impact of treatment that would not otherwise be discriminatory.

Put another way, it is not surprising that a welfare (service) policy which ties assistance levels to spousal relationships would potentially have a adverse impact on the ability of recipients to enter into personal relationship. This is the *Falkiner* situation and the Court of Appeal found that the policy at issue constituted constructive discrimination.

Similarly, it is not surprising that a welfare (service) policy that sets an allowance to pay for housing needs would, potentially, have an adverse impact on the ability of recipients to find and maintain housing. The shelter allowance formula is a service policy that is designed to have an impact in the social area of housing, by addressing the need of recipients to occupy housing. The language of s. 11 appears to anticipate and support complaints that allege a secondary adverse impact that would not otherwise be discriminatory.

[16] See the discussion of human rights jurisprudence on constructive discrimination in *Ontario Human Rights Commission v. Simpson-Sears* [1985] 2 S.C.R. 536 at p.550.

Key Questions Raised by the Reconsideration Report

The Report breaks down and discusses the primary issue of social area with reference to following five inter-related questions. References to the relevant paragraph of the Report are included in brackets.

1. Can the complaints be said to be "with respect to the occupancy of accommodation"? (¶17 to 19)

2. Is there concordance between the ground relied upon and the social area into which the allegations fall? (¶20)

3. Does the Ministry's policy as a service provider engage the complainants' right to access housing? (¶21)

4. Is there a sufficient relationship between the challenged policy and the negative impact on the complainant's ability to access housing? (¶24)

5. What is the correct comparator group for assessing whether these complaints raise a *prima facie* case of discrimination. (¶31)

Each of these questions is addressed below.

1. Can the complaints be said to be "with respect to the occupancy of accommodation"?

The shelter allowance is a benefit specifically designed to address the housing costs of recipients, and as such, is captured by the s.2 language as "treatment with respect to the occupancy of accommodation". It is disingenuous for the Ministry to argue that the shelter allowance is not "treatment with respect to the occupancy of accommodation", when it is provided precisely in order to address the complainants' need to find and maintain housing. In other words, the challenged regulatory

provision is a service policy that affects the complainants in the social area of housing. It is not surprising that a challenge to the policy might allege a discriminatory impact in the very social area – occupancy of accommodation – that the policy is designed to address.

The Reconsideration Report, in paragraph 20, sets out this issue a slightly different way, relying on the fact that the Ministry's "actions" fall within the social area of services. This is only partially correct. There is no doubt that the shelter allowance is provided specifically to cover housing costs. Moreover, in an adverse or constructive discrimination claim, the identification of the respondent as a service provider cannot limit the right of the equality-seeker to allege that he or she has suffered a discriminatory impact in another social area as a result of the service policies, particularly where those policies are designed to affect the claimant in that other social area.

Put another way, the respondent's identification as a service provider cannot shield them from a claim that one of their policies has a discriminatory impact on protected rights in another social area – particularly where the challenged policy was designed to have application in that other social area.

The correct analysis in an adverse or constructive discrimination case must identify the social area on the basis of where the equality-seeker alleges that the discriminatory impact was experienced. In other words, the first question must be to ask where the complainants are alleging that discriminatory impact was experienced. This is consistent with the direction of the Supreme Court of Canada that equality rights analysis must always take as its starting point the perspective of the claimant.[17]

[17] See for example the discussion in *Law v. Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497 at para. 57 to 61.

Finally, with reference to the interpretation and application of the words "with respect to the occupancy of accommodation", the complainants rely on the jurisprudence discussed in their application for reconsideration. In response to the comments in paragraph 17 of the Reconsideration Report, we note that, although the jurisprudence relied upon does not deal with s.2 of the *Code,* it is nonetheless particularly applicable to the present complaints, given the need for a broad and generous interpretation of human rights statutes[18].

2. Is there Concordance between Ground Relied Upon and Social Area?

The ground relied upon in these complaints is 'receipt of public assistance'. The social area in which we are alleging discrimination is housing. Receipt of social assistance is a prohibited ground of discrimination in respect of the right under s.2 to equal treatment in housing. There is concordance between the ground relied upon and the social area.

3. Does the Ministry's policy as a service provider engage the complainants' right to access housing?

This is another useful way to approach the same issue. The Report concedes that s.2(1) does not provide that only landlords can be named as respondents to housing discrimination cases, but notes that it "does not follow that the Ministry's actions in this complaint engage the complainant's right to occupancy of accommodation". The Report then notes that the Ministry is providing a service and not accommodation.

We agree that the Ministry is providing a service but the service is an allowance to help the complainants find housing. The complaints do not allege that the formula for the allowance imposes unequal treatment in the provision of welfare services. The complaints instead allege that the formula has an adverse effect on the complainants' housing rights, putting them at a disadvantage as compared to non-recipients also

[18] *Canadian National Railway Co. v. Canada* [1987] 1 S.C.R. 1114 at 1134; *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.

renting in the private market. We note that the negative impact of the shelter allowance formula is not felt equally by all recipients. Households that have rent-geared-to-income apartments will carry rental costs that are matched to their *OW* shelter allowance ceiling. Households that rent in the private market, on the other hand, are adversely affected by the formula because it fails to take into account actual market rents.

It is an evidentiary question as to whether the complainants can demonstrate that the Ministry's service policy has an actual negative impact on the complainants' right to access housing. However, as a question of law, there is nothing in the legislation, and in s.11 in particular, that would support early dismissal of these complainants simply because the Ministry is a service provider and the challenged policy is a service policy.

4. Is there a sufficient relationship between the challenged policy and the negative impact on the complainant's ability to access housing?

The Report states that the relationship between the alleged discriminatory policy and the complainants' right to access housing is more remote than in the case of *Canada Mortgage and Housing Corp. v. Iness,* [19] relied upon in our earlier submissions.

On the contrary, we note that in our complaints, as in *Iness*, what is challenged is a policy of a government agency that has a secondary discriminatory impact on the financial resources available to social assistance recipients to pay their rent and buy their food. In fact, the shelter allowance policy challenged in these complaints has a far greater negative financial impact on the complainants than the Canada Mortgage and Housing Corporation (CMHC) policy challenged in *Iness.* In *Iness,* a new policy of the agency caused the landlord to take the claimant's entire shelter allowance as rent, with the result that the claimant was forced to use the non-shelter part of her social assistance to pay other shelter-related costs such as utilities. In both instances,

[19] (2001), 40 C.H.R.R. D/182; rev'd (2002) 215 D.L.R. (4th) 705 (Ont. Div. Ct.); aff'd (2004) 236 D.L.R. (4th) 241 (Ont. C.A.).

the challenged policy of a non-landlord government body forced a social assistance recipient to use the food portion of their welfare assistance to pay housing costs.

If the Human Rights Tribunal of Ontario had no difficulty adding CMHC as a respondent to a housing discrimination case based on the impact of their policies, the Commission cannot fairly take the position that the complainants should be barred from making a similar claim against the Ministry.

5. What is the correct comparator group for assessing whether these complaints raise a *prima facie* case of discrimination?

The Report appears to concede, at paragraph 31, that based on the Court of Appeal decision in *Falkiner* (appeal to the Supreme Court of Canada withdrawn), the Commission may have used an incorrect comparator, specifically other persons on social assistance, in its initial report recommending early dismissal of these complaints. This is a point that needs emphasis because, if the correct comparator group is other recipients, the discrimination 'disappears': all *OW* recipients are subject to the challenged policy. The respondent has relied on this argument and it is reflected in the Reconsideration Report. See paragraph 27, where the Report notes that the Ministry applies the shelter allowance formula to all persons in receipt of public assistance.

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 comparator group identified by the complainants and are not an appropriate comparator group for these complainants. As the Supreme Court has clarified in *Law v. Canada (Minster of Employment and Immigration)*[20], 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.*

[20] [1999] 1 S.C.R. 497 at para.88

The *Falkiner* decision is of particular assistance to the Commission in considering the comparator issue in our case. *Falkiner* is complicated by the fact that it considered discrimination on several enumerated and analogous grounds, including sex, marital status and receipt of public assistance. However, the Court's analysis of 'receipt of public assistance', in its consideration of the comparator issue, is instructive in these complaints.

In *Falkiner,* the Court of Appeal found that the correct comparator group in respect of the ground of receipt of social assistance 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.
>
> [para. 73]

Similarly, the appropriate comparator group for the purpose of identifying the discrimination at issue in these complaints is composed of other renter households not on public assistance with whom the complainants compete in finding housing in the private rental market. To apply the language of s.11 and s.2 of the *Code,* the unrealistic 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.

These factual circumstances provide firm support for a legal argument that the shelter allowance formula, 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 without reference to actual market rents, 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.

Need for a Broad and Purposive Interpretation of the *Code*

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 to the *Code* 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 …

The Supreme Court has stated that it is a fundamental principle of human rights jurisprudence that human rights statutes are to be given a generous interpretation that will advance their "broad purposes" and special quasi-constitutional nature. In particular, the Court has instructed that, in interpreting human rights statutes, it is important not "to minimize those rights" or "to enfeeble their proper impact". [21] The Commission, in considering these complaints, should afford an interpretation of the language of s. 11 and s. 2 that is consistent with the overall purpose of the *Code* and that does not minimize or enfeeble the scope of the legislation.

In our submission, the language of s.11 and 2, read together, easily supports the right of these complainants to challenge a service policy that is specifically designed to

[21] *Canadian National Railway Co. v. Canada* [1987] 1 S.C.R. 1114 at 1134; *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.

assist with access to housing, but that is structured in a way that restricts the ability of a group of recipients to gain and maintain occupancy of housing.

Conclusion: The Mandate of the Commission

It is the express function of the Commission 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 public education, but also through its enforcement role.

In all Canadian jurisdictions, it is the role of human rights commissions to refer for adjudication, in appropriate circumstances, cases that might require a novel or untested interpretation of human rights law and that would expand the protection afforded by the legislation.

These complaints represent such a challenge for the Commission. The Reconsideration Report notes that the submissions of the complainants, if accepted by the Human Rights Tribunal of Ontario, would "broaden the reach of the *Code* and thereby address an issue which traditionally would be viewed as outside the Code's purview". The complaints identify an issue that the Commission itself has recognized as a human rights issue in its recently released report on ***Human Rights and the Family in Ontario***. Moreover, the Commission has previously signaled an intention to expand the current understanding of its human rights mandate to include economic and social rights, such as are claimed in these complaints.

In making this commitment at its 2000 conference, "Advancing Economic, Social and Cultural Rights: Implementing International Human Rights Standards into the Legal Work of Canadian Human Rights Agencies", the Chief Commissioner 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. [22]

These complaints raise issues of economic and social disadvantage. The complainants are all on public assistance and are predominately young sole support parents of very young children. They are among the most marginalized members of society and they claim that their economic and social disadvantage is reinforced and augmented by an a government policy that purports to assist them to gain housing.

It is acknowledged that the complaints raise legal issues as to the appropriate interpretation of the scope of protection under sections 11 and 2 of the *Code*. Ultimately, the appropriate forum for the consideration of these legal issues is the Human Rights Tribunal of Ontario, at a hearing into the merits of the complaints, and not the Commission's summary dismissal process under section 34.

[22] 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.