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LITTLE HOUSE OF HORRORS: DISCRIMINATION AGAINST BOARDING HOME TENANTS – HUMAN RIGHTS LEGISLATION AND THE *CHARTER*

MEGHAN MCCREARY*

RÉSUMÉ

L'auteure étudie les conditions de vie des locataires des maisons de pension du centre-ville. Ces locataires sont toujours pauvres et souffrent souvent de maladie mentale ou d'invalidité. Ils vivent habituellement de l'assistance publique. L'auteure invoque l'argument que la déshospitalisation gouvernementale (passage de l'hôpital à la communauté), sans qu'il y ait un financement adéquat des services de soutien communautaires, force les personnes qui sont invalides et pauvres à vivre dans des maisons de pension. Elle soutient que cette situation est discriminatoire et qu'elle enfreint tant la Charte que les lois sur les droits de la personne. Elle illustre abondamment ces arguments en étudiant la façon dont la discrimination a été définie dans le contexte de la Charte et des lois provinciales sur les droits de la personne.

I. INTRODUCTION

*We are where we live; or in some cases, more accurately, we are where we want to live.*¹

I am always struck by the joy I feel when I walk through the door of my childhood home. The distinguished, white house on the prairies is a wonderful daydream, safe and warm like my childhood. It is a stark contrast from the homes of many of my clients, who, struggling against poverty and illness, are forced into boarding-home housing. For those of us who grew up in even relative comfort, these boarding homes are our adult nightmares, embodying what it is to be marginalised and powerless.

* Meghan McCreary is a member of the 1998 graduating class of Osgoode Hall Law School. The author wishes to thank Mary Truemner, Shelley Gavigan and Judith Keene for their suggestions in earlier drafts of this article. Also, thanks to the Civic Minded Five. The author is especially grateful for her participation in the Intensive Program in Poverty Law at Parkdale Community Legal Services which provided an extremely positive and constructive experience.

1. J. Jones, *The Dispossessed: America's Underclass From the Civil War to the Present*, (United States of America: Basic Books, 1992) at 290 (emphasis added).

As numerous poverty law scholars point out, living in poverty means living on the fringe of society.² Poor people are marginalised from health care, education, politics, and employment. For psychiatric survivors,³ this marginalisation is compounded by the stigma of mental illness. This is how many of my clients come to boarding homes. Estranged from family, unable to work consistently, and thus in receipt of public assistance, many boarding home tenants in Parkdale⁴ are discharged directly from Queen Street Mental Health Centre⁵ to a pre-arranged boarding home. The boarding home is operated by a service provider, usually privately, but sometimes with government funding, who provides meals and some basic assistance with day to day living.

The reality of many boarding homes is that of a huge power imbalance between the boarding home operator and his or her tenants. Boarding home accommodation is frequently substandard — houses are in serious states of disrepair, are infested with cockroaches, mice, and lice, and are equipped with shoddy linens and furniture. Many tenants suffer abuse at the hands of the operator — financially, physically, sexually and emotionally. Isolated and dependent, tenants are afraid to complain. Complaints are often met with retaliation and, for many, a boarding home is the last stop on a road to homelessness.

For many tenants living in a boarding home, the accommodation is poor.⁶ By and large however, not just any tenant lives in a boarding home. Boarding home tenants are largely psychiatric survivors in receipt of public assistance.⁷ It is my contention, that, due to a government policy of deinstitutionalisation⁸ without funding for proper community support, their disability, in conjunction with their poverty, force them into boarding home accommodation. This situation is discriminatory and breaches their basic human rights.

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2. *Ibid.*, at 10, 11, 95, 250. See also articles by M. Jackman [*infra*] note 11; N. Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity," (1995) 19 *Queens L.J.*, at 179–207.
 3. "Psychiatric survivor" is a term that describes anyone who is or has been a patient of a psychiatric institution. Some people prefer the term "psychiatric consumer," or "consumer-survivor."
 4. Parkdale is an inner-city neighbourhood in Toronto. Parkdale has a very heterogenous and multi-cultural population. Many of its residents are in receipt of public assistance.
 5. Queen Street Mental Health Centre is the largest psychiatric facility in Ontario and is located in the Parkdale neighbourhood.
 6. P. Mendes and M. Rowlinson, *Rooming Houses in Parkdale: A Study*. Unpublished paper for Parkdale Community Legal Services, April 1992. This study assessed fifteen rooming and boarding houses in Parkdale.
 7. E.S. Lightman, *A Community of Interests: The Report of the Commission of Inquiry into Unregulated Residential Accommodation* (Toronto: Government of Ontario Publications, 1992), at 27–30. Also, from a complete survey of all my boarding home clients, each is a psychiatric survivor who receives public assistance. However, over eight months, only thirteen of my approximately one hundred and twenty clients lived in boarding homes.
 8. Deinstitutionalisation was a "progressive" idea that has had very regressive effects. "Community based" care has supplanted hospital care, but without proper funding, resulting in significant neglect to people who require community support and care.

One great debate in poverty law focuses upon whether the interests of the poor can be advanced by lawyers and the law, or whether the law is merely a sight for abstract struggle.⁹ Working in poverty law during the current war on the poor by the Ontario government does not do much for one's idealism and belief in justice. However, the more time I spend in the Landlord and Tenant Division at Parkdale Community Legal Services,¹⁰ the more I think that the law must be used to provide protections for people and to provide answers — landlords and boarding home operators are simply not responsive to their tenants or the social agencies and workers who represent them. The long arm of the law, however, solicits a response, if only a defensive one.

The following discussion will explore how socially isolated, disabled and poor people have been forced into substandard boarding home care. I will argue that under the Ontario *Human Rights Code*, boarding home operators have a duty to accommodate their tenants who have disabilities, and further, that these tenants are discriminated against on the basis of their disabilities and their subsequent incomes when they are forced to live in substandard boarding homes. Furthermore, boarding homes are operated indirectly with government funding, and gain referrals through government agencies. Thus, the practices and conditions in these boarding homes breach the equality guarantees under section 15 of the *Canadian Charter of Rights and Freedoms*. I will illustrate my argument by considering how discrimination has been defined for purposes of the *Charter* and provincial human rights legislation, and will apply empirical evidence of boarding home abuse to Ontario human rights legislation and the *Charter*.

II. DEFINING DISCRIMINATION – THE ORIGINAL DISTINCTION

A. *Legislation*

The Canadian *Charter of Rights and Freedoms* and provincial human rights legislation exist to protect and ensure the basic human rights of Canadian citizens. The right to equality among all Canadians is set out under section 15 of the *Charter* in the following terms:

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

Section 15 identifies a number of groups which are automatically entitled to bring forward equity claims and, at the same time, leaves open the possibility that other analogous groups will be able to invoke the section as a barrier to discrimination against them. The groups that are enumerated are determined to be historically

9. This divide is articulated in various poverty law articles. See for example J. Keene, "Discrimination and the Charter: Equality Arguments in *Egan*, *Thibadeau*, and *Schacter*," (1995) 11 *J.L. & Social Pol'y* 134.

10. Parkdale Community Legal Services is a community legal clinic that is part of the Ontario Legal Aid Plan. It is the largest community clinic in Ontario.

disadvantaged and marginalised from the political process, thus making them more vulnerable to discrimination by government legislation or policy.¹¹

Section 15 mirrors equality protections set out in provincial and federal human rights legislation. Both *Charter* and human rights jurisprudence define discrimination as a distinction that creates a disadvantage for an individual. *Andrews v. Law Society of British Columbia*¹² was the first case to test a section 15 claim to equality. In this case, the Supreme Court of Canada considered both the meaning of discrimination and the criteria for determining whether a group, while not expressly enumerated under section 15, was nevertheless protected. In his judgment in the case, Justice McIntyre described the object of section 15 as “the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration.”¹³ Justice McIntyre then defined discrimination within the meaning of section 15 as:

... a distinction whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.¹⁴

According to McIntyre J., discrimination is a distinction based on personal characteristics that results in a burden or disadvantage that is not experienced by majority groups in society. A minority group is dislocated from the majority because of an identifiable characteristic. This characteristic further disassociates the group from the inherent power that belongs to the majority. In turn, the group is even more easily discriminated against, or divided from, the majority and without legislative protection, becomes further and further marginalised.

As the Supreme Court gained experience with section 15 claims, discrimination’s definition became more sophisticated. In *Egan v. A.G. Canada*,¹⁵ a case determining whether it was discriminatory to withhold pension benefits from a same-sex spouse, Madame Justice L’Heureux-Dubé redefined when a distinction is discriminatory:

A distinction is discriminatory within the meaning of s. 15 where it is capable of either promoting or perpetuating the view that the individual adversely affected by this distinction is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration.¹⁶

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11. M. Jackman, “Constitutional Contact with the Disparities of the World,” (1994) Vol. II. No. 1 Rev. Const. Studies 76 at 102.
 12. [1989] 1 S.C.R. 143 [hereinafter *Andrews*].
 13. *Ibid.*, at 171.
 14. *Ibid.*, at 174.
 15. [1995] 2 S.C.R. 513 [hereinafter *Egan*].
 16. *Ibid.*, at 552–553.

Just as with McIntyre J. in *Andrews*, L'Heureux-Dubé J. views section 15 as guaranteeing a very basic level of respect and recognition of worth to every member of Canadian society. However, L'Heureux-Dubé comes closer to recognizing the inherent power imbalance in discriminatory treatment. She defines discrimination in all its forms as a denial of one's "recognition or value as a human being." Such a distinction cuts to the very core of human dignity and exposes the hierarchal system that allows discrimination to occur: it is the powerful who discriminate against, tolerate, and/or encourage discrimination against the powerless. However, it is not always easily discernable who is powerful or powerless.

B. *How Discrimination Occurs*

A distinction, alone, does not result in discrimination. The effect of making a distinction, or of treating everyone the same, determines whether discrimination occurs. There are two types of discrimination that may give rise to a *Charter* or human rights claim. The first is different treatment resulting in disadvantage to those treated differently, I will refer to this as a *discriminatory distinction*; the second is same treatment that results in disadvantage, commonly referred to as *constructive discrimination*. When a psychiatric survivor is denied access to subsidized housing because of her psychiatric history, this is a discriminatory distinction. On the other hand, constructive discrimination occurs when a psychiatric survivor in receipt of public assistance is required, like all other applicants, to submit an extensive credit history together with housing references for an apartment in the private market. Being poor and having periods of instability disallow the individual from having a credit rating or long-time accommodation — thus because of disability and income, the individual cannot meet eligibility requirements.

To prove discrimination, a section 15 claim must establish a breach of equality, or a distinction from "the norm." In *Andrews*, a complainant had to show that:

he or she is not receiving equal treatment before or under the law or that the law has a differential impact on him or her in the protection or benefit accorded by law but, in addition, must show that the legislative impact of the law is discriminatory.¹⁷

Andrews articulates a two part test that asks if there is a distinction and whether that distinction causes a disadvantage or imposes a burden. A clearer, three-part test based on *Andrews*, was enunciated in *Rodriguez v. British Columbia (A. G.)*:¹⁸

The first step is to determine whether there is an infringement of one of the rights to equality mentioned in that provision. The question essentially is whether the statute makes distinctions between groups or classes of persons based on personal characteristics. If such inequality is found, the second step is to determine whether the inequality is discriminatory. Where there is discrimination, finally, justifications are to be considered in light of s.1 of the Charter.¹⁹

17. *Supra*, note 12 at 24.

18. (1993), 158 N.R. 1 (S.C.C) [hereinafter *Rodriguez*].

19. *Ibid.*, at para 145.

This test, in three parts, includes a section 1 analysis. It asks: (1) Is there a distinction?; (2) Does this distinction impose a burden or a disadvantage?; (3) Is the burden or disadvantage justifiable? Thus, discriminatory behaviour can be saved if it can be justified. As I will discuss later, this is a serious problem for boarding home tenants when a primary reason for their discriminatory living conditions is a poverty that results from insufficient funding for support services.

Ironically, the majority of boarding home tenants end up in boarding homes because they have experienced discrimination in housing elsewhere. During an economic boom in the 1980's, Toronto underwent a serious housing crisis. The supply of affordable housing dissipated as demand for housing grew steadily and tenants who once lived in self-contained apartments were forced to move into boarding homes.²⁰ Boarding home operators were able to charge higher rents from a higher-income tenant base and could be more selective in choosing tenants. Consequently, "hard to house" tenants were turned away from better housing and forced into increasingly substandard housing.²¹

C. *Connections: Human Rights Legislation and the Charter*

In *Andrews*, Justice McIntyre addressed the definition of discrimination under section 15 of the *Charter* with reference to the law developed under the Human Rights Acts of various Canadian jurisdictions. He stated that discrimination under section 15 would "be of the same nature and in descriptive terms will fit the concept of discrimination developed under the Human Rights Acts."²² The principles which had been applied under those Acts were "equally applicable in considering questions of discrimination under s. 15(1)."²³

Like the *Charter*, federal, provincial, and territorial human rights codes prohibit discrimination on the basis of race, colour, national or ethnic origin, religion, age, disability and sex, among other grounds. The prohibitions set out in the federal and provincial codes generally extend to discrimination in the provision of services, goods, and facilities; discrimination in accommodation and employment; and discriminatory publications. Unlike the *Charter*, the codes apply to non-governmental actors as well as to the actions of governments.

Because the majority of boarding homes are run by a private operator, human rights legislation has traditionally been used to challenge discrimination in these homes. If a boarding home operator, as a service provider, is found to be discriminating against a tenant, he or she has a duty to accommodate the tenant in order to achieve a level of equality for him or her.

20. *Supra*, note 6 at 17.

21. A. Murray, "Homelessness: The People," *Housing the Homeless and the Poor*, G. Fallis and A. Murray, eds. (University of Toronto Press, Toronto: 1990).

22. *Supra*, note 12 at 176.

23. *Ibid.*

However, in order to understand the duty to accommodate, one must also understand the meanings of "equality" and "discrimination" as they have developed in the context of human rights legislation and the *Charter*. As I have discussed, the Supreme Court of Canada has concluded that an equality guarantee protects equality of result, not just equality of form. Accommodation of difference can result in equality, but equality can also be achieved by applying the same rule to everyone, regardless of personal characteristic or circumstance. Nonetheless, equality of result requires that differences arising from the personal characteristics in section 1 of the Ontario *Human Rights Code* be accommodated in some form.²⁴

The annotated Ontario *Human Rights Code 1993* defines discrimination as "the act of making a distinction against, or in favour of, a person based upon the group, class or category to which that person belongs, rather than on individual merit."²⁵ Again, discrimination separates a minority from the majority and its power base. The pivotal discrimination case in Ontario, *Cameron v. Nel-Gor Castle Nursing Home*,²⁶ determined that in order to be discriminated against, a person must have been made worse off than someone else in a comparable position. Discriminatory treatment may effect an individual physically, mentally, economically, or emotionally. However, just as Madame Justice L'Heureux-Dubé found in *Egan*, human rights jurisprudence has determined that discrimination may also result from differential treatment which causes the victim to suffer adverse consequences or a serious affront to dignity.²⁷

The Ontario *Human Rights Code* guarantees equality with respect to accommodation and forbids harassment in accommodation. Section 2 of the *Code* reads:

2.— (1) Every person has a right to equal treatment with respect to occupancy of accommodation, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status, handicap or the receipt of public assistance.²⁸

Before a landlord or service provider can be forced to accommodate an individual, the individual must prove that non-accommodation results in discriminatory treatment. How and to what extent an individual must be accommodated is not finitely defined by human rights jurisprudence. The following principles, however, are well accepted:

If a rule, requirement or expectation creates difficulty for an individual because of factors related to personal characteristics noted in [section 1], the following obligations arise [for the landlord]:

24. Section 1 of the Ontario *Human Rights Code* reads:

1. Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or handicap. 1981, c.53, s.1; 1986, c.64, s.18(1).

25. A. Bowland, *Annotated Human Rights Code 1993*, (Toronto: Carswell, 1992) at 9.

26. (1984), 5 C.H.R.R. D/2170 (Ont. Bd. of Inquiry).

27. *Allan v. Riverside Lodge* (1987), 9 C.H.R.R. D/4516 (Ont. Div. Ct.).

28. 1981, c. 53, s.2(1); 1986 c. 64, s. 18(2).

- The rule, requirement, or expectation must be examined to determine whether it is “reasonable and *bona fide*.” If the rule, requirement or expectation is not imposed in good faith and is not strongly and logically connected to a[n operating] necessity, it cannot be maintained. There must be objectively verifiable evidence linking the rule, requirement or expectation with the [necessity].
- If the rule, requirement, or expectation is imposed in good faith and is strongly, logically connected to a [operational] necessity, the next step is to consider whether the individual who is disadvantaged by the rule can be accommodated.
- The duty to accommodate operates as both a positive obligation, and as a limit to obligation. Accommodation must be offered to the point of **undue hardship**. Some hardship must be tolerated to promote equality; however, if the hardship occasioned by the particular accommodation at issue is “undue”, that accommodation need not be made.²⁹

If discrimination is proved because the complainant can show that there was a distinction resulting in a disadvantage, then the essential issue is whether the landlord’s accommodating that disadvantage would cause him or her undue hardship. There is Supreme Court of Canada jurisprudence on the issue of undue hardship, but no definite rule about when hardship will be considered “undue.” In *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*,³⁰ Madam Justice Wilson provided a list of factors to be considered. These included financial cost, disruption of a collective agreement, size of employer’s operation, safety risks and who bears risk, and problems of morale of other employees. Wilson J. also stressed that the list was not a closed one.

Munsch v. York Condominium Corporation No. 60,³¹ illustrates discrimination through lack of accommodation. In this case, the tenant complained that the Corporation was not accommodating her disability to allow her to use the building’s swimming pool. In order to use the pool, the Corporation required that all patrons shower before entering the water. Ms. Munsch was not able to shower because the shower area of the pool was inaccessible to her, hence she was excluded from using the pool on two occasions.

The Board found that the Corporation did not intend to discriminate.³² However, the shower area of the pool was not reasonably accessible to the complainant until a special bench was installed. The Board found that the Corporation could have accommodated the tenant without undue hardship,³³ and that it could have been more flexible, allowing her to shower in her own unit before the bench was installed. The Board ruled that, even after a bench was installed to accommodate people with similar disabilities,

29. Judith Keene, “Employers’ Duty to Accommodate,” unpublished memo for the Ontario Clinic Resource Office, September, 1995.

30. [1990] 2 S.C.R. 489.

31. (1992), 18 CHRR D/339 (Ont. Bd. Inq.).

32. *Ibid.*, at D/343.

33. *Ibid.*, at D/344.

it is reasonable to expect that the rules be applied in a more flexible manner, allowing wheelchair residents and their guests to shower in their own units if they subjectively believe it is safer to do so and they are more comfortable doing so. *Munsch* illustrates two important points; first, one's intention while discriminating is irrelevant; secondly, even after a physical accommodation is made, other rules should be applied flexibly to specific, contextual situations.

III. APPLICATIONS

A. *A Discrete and Insular Minority – Who Are Boarding Home Tenants?*

Far from fighting for accommodation to use the pool, the majority of boarding homes in Parkdale fall considerable short of any normative standard of accommodation established by Ontario human rights legislation and jurisprudence. Certainly, boarding home tenants already belong to the most marginalised groups of society before they come to a boarding home. In their 1992 report on boarding homes for Parkdale Community Legal Services, Paul Mendes and Mark Rowlinson contend that the "provincial policy of de-institutionalization, which began over twenty years ago, has had a profound effect on the rooming and boarding house community. Rest homes and boarding homes have become the primary type of accommodation that caters to these single individuals who require ongoing care or support."³⁴ As health care services are being cut back, people who are poor, and do not have families to care for them, are finding care in boarding homes. In a 1988 report on boarding home housing, The Starr Group found that boarding houses provide a high percentage of special care housing for the poor.³⁵

Similarly, Ernie Lightman's 1992 report on unregulated residential accommodation³⁶ identified "vulnerable adults" as the group primarily living in boarding homes. The report contended that three conditions must be satisfied for an individual to be considered a "vulnerable adult:"

1. they must be poor (with incomes below \$15,000 in 1986);³⁷
2. they must have disabilities and not be living with family members; and
3. they are characterized by one or more of the following traits:
 - (a) because of their disability they require help from others in one or more areas of daily living, but are receiving less help than they need;
 - (b) in the event that they are refused housing or employment because of their disability, they do not know where to go to find information about their rights; and

34. *Supra*, note 6 at 4.

35. The Starr Group, *West End Rooming House Study* (City of Toronto, Toronto: August 1988) at 4.

36. *Supra*, note 7.

37. This definition was broadened slightly to include all persons residing in unregulated special-care homes who are presumed to be vulnerable adults. This would include some persons living in upper-income retirement homes.

- (c) they have learning or psychiatric disabilities, developmental disabilities, and/or physical conditions that have resulted in emotional or nervous problems.³⁸

Based on this definition, Lightman's commission estimated that in Ontario in 1991, there were some 196,000 non-institutionalized vulnerable adults living alone or with non-relatives. Of these, 150,000 live alone, two-thirds of them in rented premises. About 120,000 vulnerable adults are sixty-five years of age or older.³⁹ Of the total number of vulnerable adults living with non-relatives, 216, 237 people were "poor with a disability,"⁴⁰ 139, 039 were sixty-five years of age or older.⁴¹

Certainly there is an identifiable group living in boarding homes. The Lightman Commission identifies the group as "vulnerable adults" who are poor and disabled and, often, elderly. However, in attempting to define where the distinction is made for this groups, or how this group is discriminated against, we encounter problems. Poverty is a key factor in defining the characteristics of the group and, unfortunately, poverty is not a recognized ground of discrimination in either the Charter, or in federal or provincial human rights legislation.

B. *The Intersection of Poverty and Other – Recognizing the System*

In her concurring judgment in the *Andrews* case, Justice Wilson adopted Justice McIntyre's general interpretation and application of section 15, and expanded on his allusion to "discrete and insular minorities" as the ones section 15 was intended to protect.⁴² Martha Jackman explains that the concept of "discrete and insular minorities" springs from the notion that certain groups in society are particularly vulnerable to legislative and other forms of government sanctioned discrimination, because of invidious stereotypes, historic and continuing prejudice, and exclusion from the political process itself. The key to understanding whether a court should intervene to invalidate a law or government policy on equal protection grounds is the extent to which the group which is burdened by that policy has an equal opportunity to participate in the political process through which it was elaborated.⁴³ Jackman contends that "Because the poor have unequal, or no real, access to the political process through which the laws and policies affecting them are elaborated, ... the political exclusion of the poor ... is the central preoccupation of the discrete an insular minority based approach to equal protection review endorsed by the Supreme Court

38. *Supra*, note 7 at 18–19.

39. *Ibid.*, at 19.

40. *Ibid.*, at 21. People who were characterized as "poor and disabled" had incomes below \$15,000 in 1986.

41. *Ibid.*

42. *Supra*, note 12 at 174–175.

43. M. Jackman, "Constitutional Contact with the Disparities in the World" (1994) Vol II. No.1 Rev. Const. Studies 76 at 102. Jackman is commenting on J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980).

in the *Andrews* and *Turpin* cases.”⁴⁴ Hence, Jackman concludes that poverty should become an analogous ground of discrimination under section 15 of the *Charter*.

Jackman argues that the poor comprise a discrete and identifiable group that is subject to its own distinct forms of discrimination and disadvantage. However, she adds that there is a “frequent intersection of poverty and other forms of disadvantage explicitly recognized under section 15, including poverty and gender, poverty and disability, and poverty and race, among others. . . .”⁴⁵ It is not simply poverty that must be recognized as a prohibited ground of discrimination. The intersection of poverty with disability (or any other marginalising characteristic) must be recognized in legislation that guarantees equality because it is the *combination* of the characteristics that creates this system of discrimination. Courts and tribunals frequently struggle to find the single characteristic for which a complainant is discriminated against, but this approach misses the mark. As we see in boarding homes, it is not a single characteristic that leads a tenant into such substandard housing.

C. *The Disadvantaging Distinction*

Being either poor or disabled includes any tenant in a discrete and insular minority that is marginalised in society. However, for the poor and the disabled, housing situations in boarding homes are far below the standard of an average individual citizens, but also, their housing situations are below standard for an individual sharing only one of the characteristics of “vulnerable adults.” In her research for an affidavit concerning disrepair at a Parkdale boarding home, Lilith Finkler, community legal worker, found that tenants lived in grave conditions. Tenants experienced a serious lack of security, were not provided with adequate heat, furniture, linens, or food. As well, many tenants were subject to physical abuse from the boarding home operator and from other tenants. In addition, tenants were financially abused, paying up to \$600 per month to share a room and receive three meagre meals per day.⁴⁶

Mendes and Rowlinson also documented substandard conditions in the fifteen boarding homes they studied in their boarding home survey. They chronicled lice, mice and cockroach infestation, minimal security, serious invasions of privacy, substandard food where food was provided, extensive and close to uninhabitable disrepair. They also reported outrageous rents being charged. Two tenants sharing a room with a self-contained bath, paid \$540.00/month each.⁴⁷

Clearly, this is substandard treatment. However, to prove this is *discriminatory* treatment, we must show that there is a distinction from the norm. For boarding home tenants, it is very difficult to show a distinction. Because of the systemic nature of their discrimination, there is no similarly situated group for which to compare boarding

44. *Ibid.*, at 104.

45. *Ibid.*, at 103.

46. Affidavit of E.L. Finkler, In the Matter of X and Complaints of Disrepair, sworn April 14, 1994.

47. *Supra*, note 6 at 45.

home tenants. What other group is poor, socially isolated, and suffering from psychiatric and often physical disabilities? Higher income psychiatric patients do not end up in boarding homes because they can afford better; patients with families can return home for care; patients who are only physically disabled are cared for in rehabilitative hospitals; people who are only poor may apply for supportive housing. People who are poor, isolated *and* disabled — a particularly discrete and insular group — live in boarding homes. Actual treatment of individuals in boarding homes may demonstrate differential discrimination and this treatment may be addressed by human rights legislation which forces the landlord to make some accommodations. However, the situation and culture of boarding homes, themselves, are constructively discriminatory — a problem too big to attack on an individual by individual basis.

Nonetheless, if poverty is accepted as a discriminatory factor, a comparative group can be identified. The comparative group may be any group living in lower-cost or supportive housing that provides some care, such as a half-way house for probationary prisoners, or a group home for people who are developmentally disabled. The factor that distinguished boarding home tenants from these groups, who are provided with better care, is poverty — and it is poverty that excludes boarding home tenants from better housing.

D. *Shifting the Burden – Examining the System*

The Ontario *Human Rights Code* guarantees equality in accommodation for social assistance recipients.⁴⁸ Seemingly, this provision recognizes the difficulties poor people face in finding and keeping decent housing. However, this provision has not provided much protection for social assistance recipients. In a recent case, *Garbett v. Fisher*,⁴⁹ the Board of Inquiry found that landlords discriminated against social assistance recipients when they required a last month's rent deposit in a jurisdiction where a security deposit was not provided for in housing allowance.

I frequently tell my clients that it is discriminatory for landlords to require them to give a last month's rent deposit. However, although *Garbett v. Fisher* is a great test case, its ruling does not improve living conditions for the poor. A perspective tenant who tells her landlord that a deposit is discriminatory does not become a tenant, because someone more "suitable," with a higher income easily fills her place. Thus the tenant is forced into boarding home housing that does not require a deposit.

Discriminatory and abusive treatment of tenants in boarding homes is only the visible outcome of an entire system of discrimination against low-income and disabled people. All the boarding home clients I have encounter in my case work have been discharged directly from hospital to a Parkdale boarding home, with a referral from a housing worker.⁵⁰ Lightman's commission surveyed the location of discharge from

48. *Supra*, note 28.

49. (1996), 25 C.H.R.R. D/379 (Ont. Bd. of Inq.).

50. In an eight month period I carried thirteen boarding home files of a total case load of approximately 120 files. Each of these clients received family benefits due to their disability. These clients had also

psychiatric hospital beds in Ontario from March 15–April 15, 1991. From a sample size of 61 hospitals, 3,710 people were discharged. Of these, 2,922 people moved into private/independent housing; 122 went to supportive housing, such as a group home, and 124 individuals were discharged to boarding homes.⁵¹ Discharge to boarding homes was the third highest percentage of housing acquired with the assistance of hospital staff, although only 3.3% of all discharged patients went into boarding homes.

Each provincial psychiatric hospital is required to offer a discharge-planning service to oversee and implement appropriate services when patients are to be discharged.⁵² Primary among patients' needs is housing — unregulated rest-home accommodation, including boarding homes, compromises much of the housing available to this population group.⁵³ Boarding homes received the majority of "hard-to-serve clients," these people were psychiatric survivors without family and with little income.⁵⁴

Reflecting on my case work, each of my boarding house clients is in receipt of public assistance and has lived for some period in a psychiatric institution.⁵⁵ Further, upon visiting my clients at their homes, I observed that other tenants in the home required some form of care, and many had previously received care from a hospital.⁵⁶ Although it is not policy, tenant's benefit cheques frequently go directly to the boarding home operator, who subtracts rent payment and administers the remainder of the tenant's money, with the knowledge of the tenant's social assistance worker.⁵⁷

Operating a boarding house in Toronto has never been very profitable, but boarding home operators could always rely on the substantial increase in their property values, and hence use the untaxed capital gains to offset any operating loss. However, as property values are no longer rising,⁵⁸ boarding home operators are left with a costly

been patients at Queen Street Mental Health Centre. Such tenants make up a small percentage of Parkdale Community Legal Services' landlord and tenant case load. However, as we do not solicit clients, we only receive complaints from tenants who are able to contact us. Because boarding home tenants are so socially isolated, very few of them are able to access our services.

51. *Supra*, note 7 at 30. The Commission defined boarding homes as including boarding homes that are municipally licensed (second-level lodging homes); unlicensed; of unknown status; and supervised and domiciliary boarding homes included those regulated by Habitat Services in Toronto. Supportive/Regulated Housing included group homes, co-ops, foster homes, and correctional halfway houses.
52. *Supra*, note 7 at 279.
53. *Supra*, note 7.
54. *Supra*, note 7.
55. From a sample of thirteen boarding home clients in an eighth month period.
56. I spoke to approximately ten other tenants in boarding homes when I visited my clients.
57. From conversations with ten of my thirteen clients. These ten tenants do not have control of their social assistance cheque. The cheque goes directly to the operator who administers an allowance. My remaining three clients have their finances controlled by the Public Guardian and Trustee, and are given a living allowance through the trusteeship.
58. Task Force on Roomers, Boarders and Lodgers, *A Place to Call Home: Housing Solutions for Low-Income Singles in Ontario*, (Toronto: Government of Ontario Publications, December 1986) at 94–96. The Task Force reported that boarding home operators struggled to turn a profit in most of the

investment, high operating costs, and a capital loss. Mendes and Rowlinson disclosed that “many operators told us that they were losing money, or were barely covering their costs.”⁵⁹

Mendes and Rowlinson conclude that more than ever before, boarding home operators are:

dependent on government and social assistance agencies for their very survival. As the rental market has changed and vacancy rates have risen, single low income working people can now afford self-contained dwelling units. Therefore, rooming houses, as we saw, are now predominantly occupied by people on social assistance, and people who require some form of medical care. The result is that rooming house operators now rely overwhelmingly on referrals to get their tenants, and with vacancy rates skyrocketing, there is no doubt that many operators are desperately seeking tenants.⁶⁰

Thus, boarding homes indirectly rely on public money to operate, and are referred tenants through public policy decisions.

Lightman’s report contends that Toronto’s boarding home population is made up of poor and disabled tenants partly because of the province’s policy of deinstitutionalisation for psychiatric patients.⁶¹ Deinstitutionalisation has been severely criticized:

if by deinstitutionalisation we mean a clear cut policy directed toward reducing the population of provincial psychiatric hospitals and establishing community services to receive discharged patients, then no such policy ever existed in Ontario. However if by deinstitutionalisation we mean a deliberate policy of reducing the long-stay population of the large mental hospitals regardless of what happened to the patients afterward, then deinstitutionalisation began in 1960.⁶²

Lightman’s report contends that:

Deinstitutionalisation in favour of community-based care for persons with psychiatric histories has always been marked by fundamental ambivalence of purpose: the lure of saving money by shutting large and inhumane institutions has been omnipresent in government decision making; the commitment to develop true community care has been far weaker.⁶³

Because patients have been discharged without sufficient community-based programs to provide services, these “vulnerable adults” become tenants in boarding home care.

boarding homes in Ontario. Operators reported income loss through damage caused by tenants, non-payment of rent, and mortgage and insurance costs. Hence, boarding home operators cut down on services to tenants in an attempt to maintain income.

59. *Supra*, note 6 at 62.

60. *Supra*, note 6 at 52–53.

61. *Supra*, note 7 at 25.

62. H. G. Simmons, *Unbalanced: Mental Health Policy in Ontario, 1930–1989*, (Toronto: Wall and Thompson, 1990) at 160.

63. *Supra*, note 7 at 25.

The effects of deinstitutionalisation are discriminatory for this discrete and insular group, and as a government policy, is subject to a section 15 *Charter* challenge. Thus, the indirect funding of substandard boarding home accommodation springs from the direct effect of a government policy that forces poor and disabled people from hospital into substandard accommodation and care. Both the practice and the policy discriminate against the poor and the disabled.

However, boarding home operators argue that providing better services is financially impossible.⁶⁴ Even if the level of undue hardship was bankruptcy, as is sometimes suggested,⁶⁵ boarding home operators argue that they would be bankrupt if their costs increased.⁶⁶ Operators say they require help from government to provide better service. However, in a time where both operators and government are pleading their own form of poverty, can an operator, or the government be forced to pay?

IV. PRACTICALITIES – IS DISCRIMINATION ECONOMICALLY JUSTIFIED?

A. *Systemic Challenge*

The argument that poverty must be addressed as a human rights issue was endorsed by the United Nations Committee on Economic, Social and Cultural Rights⁶⁷ in its second periodic review of Canada's compliance with the *International Covenant on Economic, Social and Cultural Rights*.⁶⁸ The U.N. Committee began its review of Canada's performance under the *Economic Covenant* by commenting approvingly on the overall strengthening of the protection of human rights in Canada through the *Charter* and other human rights legislation.⁶⁹ The Committee went on, however, to question the lack of any real progress in combating poverty in Canada over the past ten years:

In view of the obligation arising out of article 2 of the Covenant to apply the maximum of available resources to the progressive realization of the rights recognized in the treaty, and considering Canada's enviable situation with regard to such resources, the Committee expressed concern about the persistence of poverty in Canada. There seems to have been no measurable progress in alleviating poverty over the

64. *Supra*, note 6 at 52. Also reported by G. Swainson, "Rooming Houses Often Horror Show," *Toronto Star*, July 22, 1993. The boarding home in question here, 17 Maynard, was shut down and the tenants moved to different boarding homes. This resulted from public outcry arising from significant media coverage. Previous lobbying of government had little effect until the media became involved.

65. *Supra*, note 29.

66. Swainson, *supra*, note 64.

67. United Nations Economic and Social Council, Committees on Economic, Social and Cultural Rights, "Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights (Canada)," Geneva, 10 June 1993, E/C. 12/1993/5, (1993) 20 C.H.R.R.

68. Annex to G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No.16) 49, U.N. Doc. A/6316 (1966).

69. *Supra*, note 67 at para.4.

last decade, nor in alleviating the severity of poverty among a number of particularly vulnerable groups.⁷⁰

The U.N. Committee specifically noted the prevalence of discrimination against the poor in housing;⁷¹ the problem of homelessness in Canada;⁷² the characterization of social and economic rights in Canadian constitutional discussions and court decisions as mere policy objectives;⁷³ and the failure of the courts to apply the Charter and provincial human rights legislation to provide for improved remedies against violations of social and economic rights.⁷⁴ In summary, the U.N. Committee argued that recognition of poverty under domestic human rights legislation is an essential step for Canada to meet its obligations under international human rights law, as well as under the Canadian *Charter*. However, this advice is not reflected in the majority decisions of recent equality jurisprudence.

In *Egan*, a discriminatory policy was justified under s. 1 of the Charter because Sopinka J., writing for the majority, contended that the court should not assume that a Parliament or a legislature has unlimited resources. Consequently, Sopinka J. ruled that the court should not interfere with the economic priorities of elected decision-makers;⁷⁵ hence discriminatory treatment was saved as justifiable for economic reasons under section 1. Clearly, fiscal conservatism was a major factor influencing his *Charter* analysis. However, the minority position took a much different approach. Writing for the minority, Iacobucci J. stated that regarding section 1 of the *Charter*:

The jurisprudence of this Court reveals, as a general matter, a reluctance to accord much weight to financial consideration under s. 1 analysis. In *Schacter*, supra, at p.709 [[1991] 2 S.C.R. 679], the Chief Justice noted that [t]his Court has held, and rightly so, that budgetary considerations cannot be used to justify a violation under s.1.⁷⁶

Iacobucci J. reveals that only in recent history have the courts placed so much emphasis on fiscal conservatism. Economic rights are not protected by the *Charter*, but in the vast majority of equality cases, the protection of equality rights came down to appropriate funding being provided.⁷⁷ If equality protections can be breached simply for economic convenience, then protections of all guaranteed rights are seriously minimized. The poor are merely the most marginalised, and least powerful group of minorities — thus, being a discrete and insular minority in the most traditional sense, they are the easiest for governments to exploit.

70. *Ibid.*, para. 12.

71. *Ibid.*, para. 18.

72. *Ibid.*, paras. 19–20.

73. *Ibid.*, para 21.

74. *Ibid.*, paras. 23, 24.

75. *Supra*, note 15 at 573.

76. *Supra*, note 15 at 609.

77. See *Egan*, *Schacter v. A.G. Canada*, *Thibadeau v. A.G. Canada*.

The big problem with respect to challenging systemic discrimination in boarding homes is that the funding of boarding homes with public money and the referral to these homes by government agencies are *practices*, but not *policies* of government. There is no legislation or written policy that dictates these practices, hence they are immune from *Charter* challenge. However, if the systemic problem of the poor and disabled being housed in boarding homes results from the government's deinstitutionalisation policy, then one may be able to show that the results of this policy are discriminatory for particular boarding home tenants. Deinstitutionalisation affects people differently and, in this sense, cause a discriminatory distinction. It is possible that the 79%⁷⁸ of patients discharged from hospital into private homes are not adversely affected by deinstitutionalisation, but a portion of the 3.3%⁷⁹ that are discharged to boarding homes clearly receive a substandard care and accommodation — the effect of deinstitutionalisation.

Government clearly has an international responsibility to protect against human rights violations, and the courts, arguably have a duty not to allow fiscal conservatism to interfere with the protection of human rights. However, if equality guarantees are reduced to whether non-discriminatory treatment is economically feasible, then what we are really challenging is government ideology. The system that creates discriminatory treatment for boarding home tenants must be challengeable at its source — government. Boarding home operators are always open to individual human rights challenges, but the systemic problem of discrimination against the poor and disabled must be tackled by challenging government policy.

B. Individual Challenge – Making Accommodations

While systemic discrimination might be tackled through *Charter* argument, individual complaints of boarding home tenants can be addressed by challenging the boarding home operator.

Bringing a human rights complaint in front of a human rights tribunal is a very slow process.⁸⁰ If, as poverty law advocates, we are looking for a result for our client, then the lengthy process of having to make a human rights complaint to the commission is a serious factor to consider when filing a complaint. By the time a complaint is heard, the client's situation probably will have changed.

Human rights complaints can be heard in more accessible courts, such as Landlord and Tenant Court. Section 47 of the Ontario *Human Rights Code* is the primacy section of the code. The *Code* is, therefore, paramount over all provincial legislation and, as such, is quasi-constitutional and can be heard in any court of the General Division level and above. In my case work, however, I have encountered some objections by judges to hear human rights complaints in Landlord and Tenant Court.⁸¹ Indeed, in *Re*

78. *Supra*, note 7 at 30.

79. *Supra*, note 7 at 30.

80. The Ontario Human Rights Commission states that a complaint may be heard within nine months of filing. However, most complaints are being heard approximately two years after filing.

81. In the Landlord and Tenant division of Parkdale Community Legal Services, Winter 1997, we made

Canadian Mental Health Association, Peterborough Branch and Warren,⁸² the court ruled that the reference to “court” in section 47 of the *Code* means the Divisional Court for the purposes of a complaint under Part IV of the *Code*. MacKinnon J. stated: “I am not persuaded that the *Code* supersedes or replaces the right of the parties under the *Landlord and Tenant Act*.” However, there is no provision of the *Landlord and Tenant Act* that exempts the statute from the primacy of the *Code*.⁸³

Nonetheless, in situations such as those previously documented at 17 Maynard, certainly there is no reasonable and *bona fide* reason for extensive disrepair, poor sanitary conditions, and insufficient food. Finkler also documented the instance of a tenant in a wheelchair being trapped in the boarding home because the home had no ramp.⁸⁴ Such lack of adequate access to the house is logically connected only to operating costs. The substantial problem in forcing the landlord to accommodate her tenants is, again, financial — it will cause hardship to the operator to accommodate her tenants. However, as the majority of boarding home tenants are disabled, then, as *Munsch* states, the boarding home must be operated to accommodate tenants’ special needs as they arise. It is relatively simple to prove that discrimination exists and that there is a need for accommodation in these homes, the difficulty is in ensuring that accommodation occurs.

V. CONCLUSION

Boarding home tenants do not experience substandard accommodation and care through blind fate. Rather, there is a direct link between government’s policy of deinstitutionalisation, and a poor and disabled, “vulnerable adult” ending up in a boarding home. Both the system that perpetuates substandard boarding home care, and the care itself, is discriminatory and breaches both the *Charter* and the Ontario *Human Rights Code*.

The biggest problem in challenging such discriminatory treatment is that discrimination is arguably justifiable under section 1 of the *Charter* and under the “undue hardship” jurisprudence of human rights legislation due to economic constraints. If discriminatory treatment is justified by economic conservatism, then what we are really challenging is a government ideology that discriminates against the poor and disabled. Such discrimination is reflected in the actions of Ontario’s current Conservative government.

two human rights complaints in Landlord and Tenant Court. The judges in both cases reluctantly heard these arguments upon considering our submissions regarding the paramountcy of the Ontario *Human Rights Code*.

82. (1993), unreported, MacKinnon, J. (OCJ).

83. This was confirmed in *Re Mercedes Homes Inc. and Grace* [1993] OJ No. 2610 (OCJ) [unreported] (Sutherland, J.). Nonetheless, Sutherland J. stated that in absence of other factors, the court preferred to stay the application to permit a specialized tribunal, like a Board of Inquiry, with powers of investigation, to deal with the complaint in its initial stages.

84. *Supra* note 46, para 18.

Indeed, with the abolition of rent control in Ontario,⁸⁵ the boarding home market may change again. Just as the housing crisis of the 1980's led to "under-housing," forcing those who used to live in self-contained apartments to move into boarding houses,⁸⁶ so will dramatically increased rents allow boarding home operators to obtain higher rents from a higher-income, employed clientele. Boarding home operators will become more selective in choosing tenants, and current tenants will be forced into the most substandard housing or onto the street.

Further with the Harris government's abolition of Part IV of the *Landlord and Tenant Act* and its replacement with the *Tenant Protection Act*,⁸⁷ tenant's rights which were previously secured as roomers and boarders under the *Landlord and Tenant Act* may vanish. Boarding home tenants will be doubly vulnerable: to the existent abuses described in this paper, and to new abuses caused by the removal of regular, tenant enforcement mechanisms, such as apartment inspections by the City of Toronto Department of Buildings and Inspections. Furthermore, under the *Tenant Protection Act*, which will implement an administrative law system, a landlord and tenant tribunal will not have the jurisdiction to hear individual human rights complaints. Complaints will be heard, then, only before a Human Rights Board of Inquiry, resulting in lengthy delay and no real relief for tenants.

In an age where cuts to social assistance are performed to support tax cuts for the upper and middle classes, equality challenges under the *Charter* serve two purposes. Firstly, a *Charter* challenge appeals to a supposedly objective, outside decision maker to determine whether government policy is discriminatory; secondly, and very importantly, it raises public awareness of abuses against the poor that are ignored by the status quo. Past Canadian jurisprudence has not taken an active role in challenging discrimination through economic conservatism, however, pressure on Canada from international agencies to address poverty may result in more progressive jurisprudence in the future. Possibly, only by combining community lobbying with legal challenges will poverty law advocates be able to effect the conservative ideology that perpetuates discrimination against the poor and disabled through public and private policy and practice.

85. The Ontario Harris government plans to abolish the agency that enforces rent control measures in 1998.

86. *Supra*, note 6 at 5.

87. The *Tenant Protection Act* should be in force sometime in 1998.