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In *Dartmouth/Halifax County Regional Housing Authority* v. *Sparks*,[1] courts in Nova Scotia are once again called upon to consider whether tenants in public housing are entitled to the same protection as private tenants. The Supreme Court Appeal Division decided in *Bernard* v. *Dartmouth Housing Authority*[2] that shorter notice periods for public housing tenants were not objectionable, under either s. 7 or s. 15 of the *Charter*. The issue will now return to the Court of Appeal, but in the meantime the County Court has held that *Bernard* still sets the standard in Nova Scotia.

Under the *Residential Tenancies Act*,[3] tenants not in public housing are guaranteed three months notice to quit, and those who have resided in a rental property for more than five years have security of tenure. However, tenants in public housing do not enjoy these protections: they are entitled only to the notice period in their lease, and do not enjoy security of tenure - see s. 10(8)(d) and s. 25(2) of the Act. It is these latter sections that were challenged in *Sparks*, as violating the equality provisions of the *Charter*.

At issue is whether those in public housing are a group protected by s. 15, and whether the different treatment is of the sort that attracts *Charter* protection. In particular, the court is required to deal with the difficult question of "adverse effect discrimination", rather than more straightforward direct discrimination. The approach to be taken to these two issues under s. 15 is not identical: unfortunately, that difference has created some problems in the County Court decision.

There are positive features to the County Court decision. Judge Palmeter accepted that the tenant - a black single mother receiving social assistance - was covered by s. 15, not only on the enumerated grounds of race and sex, but also on the ground that " 'social assistance recipients' are an 'analogous group' protected by s. 15 of the *Charter*".[4] He also accepted

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1. (1992), 112 N.S.R. (2d) 389 (Cty. Ct.), (hereafter *Sparks*).
2. (1988), 88 N.S.R. (2d) 190.
3. R.S.N.S. 1989, c. 401
4. *Sparks*, p. 394.

that single-parent mothers have a more difficult time economically and in finding appropriate housing,[5] and that "one can almost take judicial notice that the Black Community in Nova Scotia has always been at the low end of the economic scale".[6]

However, despite these findings, Palmeter J. finds that there is no violation of s. 15. In particular, he holds that the lesser protection for those in public housing is not an instance of adverse effect discrimination.

There is cause to be less than satisfied with the reasoning behind this conclusion. First, the test Palmeter J. adopts to determine whether adverse effect discrimination exists is not consistent with Supreme Court of Canada decisions on the issue. Further, even accepting the test as Palmeter J. formulates it, it is not clear why that test is not met in this case.

I. *The Test for Adverse Effect Discrimination*

The test for adverse effect discrimination is found in *Re Ontario Human Rights Commission and Simpson-Sears Ltd.* (normally referred to as *O'Malley*):

> It arises when an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force.[7]

Palmeter J. focuses, in his decision, on the statement that the discrimination must result "because of some special characteristic of the employee or group". He denies that that portion of the test is met in this case.

He holds that "there has to be a connection between the characteristic of the sex, or the race, or the source of income, and the different treatment for a charge of discrimination to be even considered".[8] But, he says:

> it is not a characteristic of being black that one resides in public housing. Similarly, it is not a characteristic of being a single mother or a female that one resides in public housing. In my opinion, it is not a characteristic of having a low income that one resides in public housing.[9]

It was an agreed fact in the case that "women, blacks and social assistance recipients form a disproportionately large number of tenants in public

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5. *Ibid.*
6. *Ibid.*
7. (1985), 23 D.L.R. (4th) 321 (S.C.C.) at 332, per McIntyre J.
8. *Sparks*, p. 401.
9. *Ibid.*

housing".[10] Accordingly, Palmeter J. presumably does not simply mean that residing in public housing is not *in fact* a characteristic of these groups. Rather, it seems he must have in mind that residing in public housing is not *necessarily* a characteristic of these groups.

In *O'Malley*, for example, one might take it to be fundamental to Seventh Day Adventists that they not work on Saturdays - if one were willing to do so, one could not be a Seventh Day Adventist. Accordingly, "special characteristic" in the *O'Malley* test might refer to a characteristic necessarily possessed by an individual or group: that is how Palmeter J. interprets the test.

However, the *O'Malley* test can be interpreted in at least two ways, either of which would be consistent with the actual result. By "special characteristic", McIntyre J. may have meant a characteristic that is *necessarily* possessed by the individual or group. Alternatively, he may only have meant a characteristic that is *in fact* possessed by the individual or group.

To determine the correct interpretation, one must not look at this single phrase in isolation, but rather in the context of the decision as a whole, and in light of other decisions. Elsewhere in *O'Malley*, McIntyre says "It is the result or the effect of the action complained of which is significant. If it does, *in fact*, cause discrimination...it is discriminatory" [emphasis added].[11] This statement has been further adopted by the Supreme Court of Canada in *Action Travail Des Femmes* v. *Canadian National Railway Co.*[12] and in *Andrews* v. *Law Society of British Columbia.*[13] All of this suggests that a necessary connection is not required.

Further evidence of the problem with the approach in this case is found in its inconsistency with other decisions. Under this interpretation, the American case of *Duke Power*[14] - the very case from which the Supreme Court of Canada adopted the concept of adverse effect discrimination - would not meet the test. It was not necessarily true that blacks would be less likely to have a high school diploma, but nonetheless because that requirement acted to exclude more blacks, it was struck down. Similarly, in *Action Travail*,[15] it was not necessarily true that supervisors at CN would have a low opinion of women: it was only in fact true.

Most importantly, Palmeter J.'s formulation of the test does not take into account the special nature of adverse effect discrimination. He insists

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10. *Ibid.*, p. 393.
11. *Supra*, note 7, p. 329.
12. (1987), 40 D.L.R. (4th) 193 (S.C.C.)
13. (1989), 56 D.L.R. (4th) 193 (S.C.C.).
14. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1970).
15. *Supra*, note 12.

that the claim must fail unless the government has singled out a characteristic of being black, female, or on social assistance in the legislation.[16] But if the government had singled out, in the statute, something *necessarily* a characteristic of being black, female, or on social assistance, that would be direct discrimination, not adverse effect discrimination. To say "people with dark skin are only entitled to one month's notice" is to discriminate directly. It is only when an apparently neutral rule - i.e., one that does not single out a necessary characteristic of some group - is discovered to have an adverse effect that one speaks of adverse effect discrimination.

Accordingly, although Palmeter J.'s test is consistent with the precise quote from *O'Malley*, it is not consistent with other statements in that case, with a liberal interpretation of the *Charter*,[17] or with other cases. The very nature of adverse effect discrimination requires a broader reading.

II. *The Limited Test Proposed in the Case is Met*

Even granting Palmeter J.'s test, however, it seems that one should find a s. 15 violation in this case.

Palmeter J. denies that it is a characteristic of blacks, women, or those on social assistance to live in public housing. It may be that living in public housing is not necessarily a characteristic of blacks and women - one can imagine a world in which it were not true. But it is hard to see why there is not a necessary connection between living in public housing and receiving social assistance. Both are social measures undertaken by the government to assist low income groups.

The *Bernard* decision, for example, says that "the public housing scheme is clearly designed for the relief of poverty" - that is, those in public housing are poor. Social assistance legislation has the same goal - those on social assistance are poor. It is difficult to imagine someone asserting that being poor is not a characteristic of those who are poor, and yet that is what this decision amounts to saying.

The decision's answer to this, it seems, is that although it is a characteristic of those in public housing to be black, female, and poor, the reverse does not hold:

16. *Sparks*, note 4, p. 402.

17. Note specifically the warning in *O'Malley* against restricting oneself to "the narrowest interpretation of the words employed" (*supra*, note 7, pp. 328-329).

> the fact that public housing tenants are disproportionately black, females on social assistance tells us something about public housing but doesn't tell us anything about being black, about being female or [about] being on social assistance.[18]

This conclusion seems mistaken. First, if it is true that (to simplify matters) public housing tenants are disproportionately black, then it is equally true that blacks are disproportionately public housing tenants - that is what is meant by "disproportionately", that the correlation between the two is higher than expected. If the first statement tells us something about public housing, the second ought to tell us something about being black.

It may be that Palmeter J. has in mind a question of numbers: if you look at public housing tenants, you find that most are black, female, and/or poor, but if you look at those who are black, female, and/or poor, you don't find that most are public housing tenants. If this is the rationale, then it is mistaken. First, "disproportion" does not require a majority. More to the point, it assumes - falsely - that there is sufficient public housing. Palmeter J. acknowledges the waiting list for public housing.[19] The better comparison would be the percentage of blacks, females, or poor people who want to be in public housing, rather than those who in fact are.

Second, this approach assumes that it matters whether we characterize the facts as being about public housing, or as being about black single mothers. But in *Action Travail*, the problem was that women were held in low esteem by CN supervisors. It would be an idiosyncratic use of language to describe this situation by saying that it is a characteristic of women to be held in low esteem by CN supervisors: nonetheless, that conclusion can be drawn, since the situation meets the adverse effect discrimination test. By the same token, if the form of words is really all that important, it seems we can say that living in public housing is a characteristic of black single mothers.

But most importantly, this decision does not take into account the difference between individuals and groups, which again is part of the difference between direct and adverse effect discrimination.

The judgement seems to say that something can only be a characteristic of blacks, women or social assistance recipients if it is true of (virtually) all of them. It is a characteristic of women to have female sexual organs. It is a characteristic of blacks to have relatively darker skin. It is a characteristic of social assistance recipients to have a low income. Take

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18. *Sparks*, p. 402.
19. *Sparks*, p. 396.

any individual women, black, or social assistance recipient, and this characteristic will (almost certainly) be true of them. But the characteristic "lives in public housing" may not be true of that individual, and so it is not a characteristic.

This approach ignores the difference between being a characteristic of an individual and of a group. It is not true of each individual woman that she cannot get promoted, but it is true of *women* that they are typically in lower level jobs: being less likely to hold a senior position is a characteristic of women. Not every black is under-educated, but it is a characteristic of blacks as a group to be less likely to have attended university. In this sense, "lives in public housing" is a characteristic of black single mothers.

Put another way, the question is not whether "lives in public housing" is a characteristic of women, blacks, or the poor: it is whether "*is more likely to* live in public housing" is a characteristic of the members of those groups. But that question just amounts to asking whether that group is disproportionately represented. In this case, all parties agree that blacks, women, and social assistance recipients are in fact disproportionately represented in public housing: further, being more likely to live in public housing seems necessarily a characteristic of those on social assistance, since they are the very people for whom it was designed.[20] It appears therefore that the test, even as Palmeter J. formulates it, is met.

III. *A Questionable Assumption of Fact*

One final issue is worth noting, again related to whether discrimination has been shown on the facts of this case.

Palmeter J. notes from *Andrews* that:

> Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination while those based on individuals' merits and capacities will rarely be so classified.[21]

This distinction is a sensible one (though it does not really relate to adverse effect discrimination cases). What is disturbing in *Sparks* is the use of this distinction: "Counsel for the Landlord submits that what we are dealing with in this case is an individual's merits and capacities and not an individual's personal characteristics. With that submission I am in

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20. Indeed, in one sense it is difficult to speak of social assistance recipients being "disproportionately" represented in public housing. "Disproportion" implies that there are more of a particular group than one expects - but one expects public housing to be occupied by people with low incomes.

21. *Sparks*, p. 400, citing p. 18 of *Andrews*, *supra*, note 13.

agreement"; and "the distinction is not based on the Tenant's personal characteristics but rather on her merits and capacities".[22]

Applied directly to the facts of this case, these statements seem to say that women and blacks are disproportionately represented in public housing because of their own merits and capacities. At the very least, they say that Irma Sparks is in public housing due to her own inability to manage anything better.

It is, perhaps, possible that women and blacks generally earn lower incomes simply because, judged objectively, they are less capable. However, one would like to see some very persuasive evidence before adopting such a view - and certainly before relying on it as a justification for limiting equality rights. These two isolated comments should not be blown out of proportion: neither is pursued at any length, and the decision does not hinge on them. Nonetheless, it is both disappointing and disturbing to see that assumption apparently reflected in this decision.

IV. Conclusion

The equality rights provision in the *Charter* has proven to be difficult, as courts have had to sort their way through differences that are not discriminatory, and equal treatment that promotes inequality. Adverse effect discrimination in particular is a difficult concept, requiring different considerations from direct discrimination. The central issue in this case is whether the difference in treatment between public and private tenants is objectionable. But due to confusion between direct and adverse effect discrimination, and the ambiguity of the test proposed, this decision never really comes to grips with that issue.

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22. *Sparks*, p. 401 and p. 402.