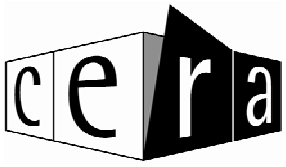

HUMAN RIGHTS IN THE NORTHWEST TERRITORIES

An Advocate's Kit

Part 1: The Law

Produced by the Centre for Equality Rights in Accommodation
2007

ACKNOWLEDGEMENTS

This kit was produced by the Centre for Equality Rights in Accommodation (CERA). CERA is an Ontario-based non-profit housing and human rights organization that works to remove the discriminatory barriers that keep disadvantaged individuals and families from accessing and retaining the housing they need.

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CHAPTER 1

OVERVIEW OF THE ADVOCATE'S KIT

The objective of this kit is to provide community advocates with tools to help them promote human rights using the NWT *Human Rights Act*. While this kit is concerned with promoting human rights under the *Act* generally, CERA's experience is limited to human rights in the housing context and, as a result, human rights provisions and examples related to housing will figure prominently. That being said, it should not be difficult transfer examples related to housing to other contexts such as employment and services.

THE CHAPTERS OF THE KIT

Chapter 2 of the kit will discuss the fundamentals of human rights – the basic principles that guide the application and enforcements of human rights generally.

Chapter 3 will examine key sections of the *Act*.

Chapter 4 will explore the particular types of discrimination in housing that are prohibited under the *Act*.

Chapter 5 will discuss the legal duty to accommodate the needs of persons with disabilities.

Chapters and 6 and 7 will provide an overview of the entire human rights complaint process - from the initial filing of a complaint to adjudication.

Chapter 8 will look at the issue of human rights primacy and the operation of human rights laws in administrative tribunals such as housing and social benefits tribunals.

Chapter 9 explores strategies for using the *Act* to promote income security.

CHAPTER 2

FUNDAMENTALS OF HUMAN RIGHTS

1. WHAT ARE HUMAN RIGHTS?

Although the concept of human rights has existed and evolved over the last 4000 years, the *Universal Declaration of Human Rights* ("UDHR"), adopted by the United Nations in 1948[1], embodies and codifies what are accepted as the modern world standard for human rights.[2] The UDHR states: "All human beings are born free and equal in dignity and rights", and to this end, recognizes the inherent dignity and inalienable rights of all members of the human family as the foundation for freedom, justice and peace in the world.

The UDHR further states that all human beings are entitled to all the rights and freedoms set out in the UDHR *without distinction* of any kind, including distinction based on such things as race, colour, sex, language, religion, political opinion, birth or other status and national or social origin. Since the adoption of the UDHR, human rights protections have evolved to also include ethnic origin, place of origin, creed, age, disability, sexual orientation, marital status, family status, gender identity, political belief, political association, family affiliation, social condition and criminal conviction.[3]

Eighteen years after its adoption, the UDHR was separated into two covenants entitled the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and the *International Covenant on Civil and Political Rights* (ICCPR).[4] These Covenants expanded the rights and protections afforded under the UDHR and together form the **International Bill of Rights.**[5]

The basic principles of equality and dignity enshrined in the UDHR, the ICESCR and the ICCPR form the basis of modern human rights legislation in Canada (and across the globe) and they embrace the notion that all

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[1] Leifer, R. and Tam, J. Human Rights: The Pursuit of an Ideal, Available at: http://library.thinkquest.org/C0126065/index.html.
[2] Bailey, P., *The Creation of the Universal Declaration of Human Rights*, Available at: http://www.universalrights.net/ main/history.htm***. See also***, Leifer, R. and Tam, J. Human Rights: The Pursuit of an Ideal, Available at: http://library.thinkquest.org/C0126065/index.html
[3] See for example *Human Rights Act,* S.N.W.T. 2002, c. 18; *Human Rights Code,* R.S.O. 1990, c. H.19.
[4] Leifer, R. and Tam, J. Supra.
[5] See: http://www.unhchr.ch/html/menu6/2/fs2.htm. The optional Protocols to the ICCPR also comprise the International Bill of Rights.

human beings have the right to be free from any form of discrimination (based on the characteristics noted above) in the attainment of their rights and protections. Rights to non-discrimination and equality are particularly relevant for people who are poor and/or who face other disadvantage, such as Aboriginal peoples, single mothers, persons with disabilities, visible minorities, newcomers to Canada, the elderly and the young.

Human rights can provide an effective means to review governments' performance in areas such as health, education, income security and housing. The enforcement of human rights through litigation and advocacy provides an important mechanism to hold governments accountable for their actions and/or inaction.

2. THE IMPORTANCE OF HUMAN RIGHTS IN CANADA

Provincial and territorial human rights legislation along with the *Canadian Human Rights Act* govern human rights in Canada. Although human rights legislation is not part of the Constitution (like the *Canadian Charter of Rights and Freedoms* (*Charter*)), the courts have recognized that it is **quasi-constitutional** in nature. The Supreme Court of Canada held that human rights legislation is "not quite constitutional but certainly more than the ordinary" and that it "is not to be treated as another ordinary law … It should be recognized for what it is, a fundamental law." In keeping with this fact, courts and tribunals, in applying human rights legislation, should aim to give it a liberal or broad interpretation that accords with its important purpose, which is to "declare public policy".[6]

Human rights legislation also takes precedence over, or "trumps", other legislation. For example, if there is a conflict between a territorial human rights act and the building code of the same territory, the human rights act takes precedence and has what is said to be "paramountcy".

Lastly, the courts have held that no one can "contract out" of their human rights. Any contract that purports to do so will be null and void.

3. WHAT IS DISCRIMINATION?

A person discriminates when they make a distinction, whether intentional or not, based on a characteristic or perceived characteristic that has the *effect* of imposing burdens, obligations or disadvantages on an individual or group of individuals not imposed on others or which withholds or limits

[6] Zinn and Brethuor, *The Law of Human Rights in Canada: Practice and Procedure,* (Canada Law Books) at p.1-2,3 (Insert October 2005)

access to opportunities, benefits and advantages available to others.[7] There are different types of discrimination.

31. DIRECT DISCRIMINATION

When most people think of discrimination, they think of direct discrimination, which is the most obvious form. Direct discrimination occurs when, for example, an employer advertises a job and limits applications to “men only” or “whites only”.

3.2 CONSTRUCTIVE OR ADVERSE EFFECT DISCRIMINATION

Constructive discrimination or adverse effect discrimination is a subtler and arguably more widespread form of discrimination. Constructive discrimination refers to rules, policies or practices that may not be **intentionally** or **obviously** discriminatory, but which have a discriminatory **effect** on persons protected by human rights legislation. For example, an employer who requires that all employees must work on Saturday constructively discriminates against those employees who, for religious reasons, cannot work on Saturdays. In this case, the rule applies equally to everyone, but only those with particular religious observances are negatively affected.

4. INTENTION AND DISCRIMINATION

As the earlier discussion suggests, intention is **not** necessary to a finding of discrimination. In this regard, a person who complains of discrimination is not required to prove that the discrimination they encountered was intended. In fact, a finding of discrimination can be made even where someone is acting in good faith. For example, it would be discriminatory for an employer to prohibit a disabled employee to work overtime because of a belief that it is too tiring and, therefore, not in the employee's best interests,

Where the **effect** of a distinction results in a burden, disadvantage, additional obligation, limits access, etc., discrimination has occurred. This is so whether the distinction was made in good faith or bad, intentionally or not.

It is also important to note that a finding of discrimination can be made even when the discrimination constitutes only one of several ongoing conflicts between, for example, and employer and employee.

[7] Ibid at p.1-3 (Insert October 2005)

5. MODELS OF EQUALITY: FORMAL AND SUBSTANTIVE

5.1 FORMAL EQUALITY

Formal equality assumes that equality is achieved if the law treats all persons alike. However, when individuals or groups are not identically situated (for example a black woman versus a white man), the formal equality model tends to perpetuate discrimination and inequality, because it cannot address **real inequality in circumstances**.[8] In fact, by treating different individuals as equals despite unequal access to power and resources, formal equality creates an illusion of equality while allowing real economic, legal, political and social disparities to grow.[9]

Formal Equality Example: Mortgage Loan

Two people apply for a mortgage loan. The first is a single mother who can only work part-time, contract hours because she cannot afford full-time childcare. Although she works part time, she has not been unemployed at any time during the past 8 years. If she is able to qualify for a mortgage, her monthly mortgage payment will be less than her current market rent and she will then be able to afford full-time child care and will then be able to get a better paying full-time job, get a car, etc. She has a perfect rental payment record. The second applicant is a single man with no children who works full time. If he qualifies, he will also be able to pay less for a mortgage than he does on rent.

They complete **identical** bank loan applications and the bank uses **identical** criteria to evaluate each application. The applicants must answer questions on the application regarding job security. When the bank reviews the applications, the woman does not qualify because she is a part-time contract employee. The single man does qualify and the woman continues to be denied the benefits of home ownership.

5.2 SUBSTANTIVE (REAL) EQUALITY

Achieving substantive equality requires that the **effects** of laws, policies, and practices, be examined to determine whether they are discriminatory.[10] Substantive equality requires that the *roots of inequality* be identified, the goal of equality of opportunity be established and that a legal mechanism be established that will achieve this goal in a principled way. "Substantive equality" (i.e. equality of opportunity) is different from "equality of results" in that the

[8] Shelagh Day and Gwen Brodsky, Women and the Equality Deficit: The Impact of Restructuring Canada's Social Programs (March 1998), Chapter 2 "Women's Equality: The Normative Commitment". Available at: http://www.swc-cfc.gc.ca/pubs/ 0662267672 /index_e.html at p. 43

[9] See Factum of the Intervenor Canadian Council of Disabilities. Available at: http://www.ccdonline.ca/law-reform/Intervention/ andrews%20factum.htm at Part III Argument, par. 3.

[10] Ibid at p.1.

mechanism for achieving the goal involves removing the barriers associated with the group's "special characteristics" rather than securing an equal result. Substantive equality provides no guarantee that members of a particular group will achieve equality of results, only that they will have that opportunity. In other words the role of individual merit and initiative is not displaced.[11]

Substantive Equality Example: Mortgage Loan

Using the example above, imagine that the bank's mortgage loan application criteria accommodated the very real differences in each of the applicant's lives. In order to obtain real equality, the banks evaluation criteria would look at each applicant's circumstances and consider the fact that even while the single mother was employed on a part time basis, her rental and work records were perfect. Moreover, while her employment was contractual, she was consistently and steadily employed. The bank's criteria would recognize that her priority, particularly because she had children to care for, was to make sure she kept a roof over their heads.

A substantive equality approach to the bank's criteria would recognize that the effect of identical treatment of women and men would result in the exclusion of most women from securing loans. This approach allows us to reach this conclusion because it requires us to understand women's material conditions including their marginalization in the labour force, their primary role as unpaid caregivers, etc.

The goal of human rights legislation is to achieve **substantive equality** for all.

6. DEFENCES TO DISCRIMINATION

Discrimination is not always a violation of human rights law. An individual, company or organization may be protected from a charge of discrimination if it can be shown that the discriminatory policy or practice is **bona fide** and has a **reasonable justification** (BFRJ). To aid in making this determination, the Supreme Court of Canada developed a three-pronged test in its decision in *British Columbia (Public Service Employee Relations Commission)* v. *BCGSEU* (*Meiorin*).[12] In order to benefit from the BFRJ defence, an individual/company/organization has to establish that the discriminatory rule, policy or practice:

(a) was adopted for a purpose that is rationally connected to the goals of the program/business;

[11] ibid at p.2, paras. 4, 6
[12] *British Columbia (Public Service Employee Relations Commission)* v. *BCGSEU*, [1999] 3 S.C.R. 3 [Hereinafter *Meiorin*].

(b) was adopted in the honest and good faith belief that it was necessary for fulfilling that legitimate program/business-related purpose; and

(c) is reasonably necessary for fulfilling that legitimate business/program-related purpose, and "accommodates" the needs of the individual or group affected to the point of **undue hardship**.

Case law and human rights policy in a number of jurisdictions suggests that to demonstrate undue hardship, it would be necessary to prove that the accommodation will result in an unreasonable health or safety risk (the risk would outweigh the benefit of promoting equality), that the costs will be so high as to change the essential nature of the business or threaten its viability, and that no funding is available from outside sources. (The "duty to accommodate" and undue hardship under human rights legislation will be discussed in further detail in a later Chapter of the kit).

To illustrate, let us consider the example of a landlord who requires **Canadian credit and landlord references** from **all** potential tenants. The result of this practice is to restrict or exclude recent immigrants and refugees from accessing that landlord's apartments.[13] While the landlord may be able to meet the first two branches of BFRJ test, it is unlikely that he/she will be able to meet the third. Applying the test it could be argued that:

(a) Requiring credit and landlord references is **rationally connected** to operating a rental housing business and
(b) the policy or rule was adopted in **good faith** (i.e.: it was implemented to improve business, not discriminate against any particular group).

With respect to the third branch, it is unlikely that the housing provider would be able to show that accommodating the circumstances of recent immigrants and refugees with no Canadian credit or landlord references – e.g. by considering savings or other income rather than their credit or landlord references – would impose undue hardship or "break" the business. Therefore, CERA would argue that this practice would not meet the BFRJ test, and would therefore violate human rights legislation.

[13] As will be discussed later in the kit, these policies have been found to discriminate against newcomers to Canada who cannot provide such references

CHAPTER 3

KEY SECTIONS OF THE NWT HUMAN RIGHTS ACT

In this chapter, we will review some sections of the *Act* that are particularly important for advocates.

PREAMBLE

The "preamble" is the first section of a statute and refers to the broad objectives and principles that underlie the legislation. It is a fundamental part of any statute and can guide decision-makers in their interpretation of the law.

The preamble of the *Act* recognizes the “inherent dignity and inalienable rights of all members of the human family”. It further states that it is of *vital importance* to promote respect for and observance of human rights in the NWT, including the rights protected by the *Charter* and international human rights instruments.

International human rights instruments, such as the *International Covenant on Economic, Social and Cultural Rights*, include the protection of social and economic rights, including the right to an adequate standard of living and the right to adequate housing. Thus, the preamble may be used to encourage the Human Rights Commission (Commission) and human rights adjudicators to interpret the *Act* to include these rights.

Notably, the preamble also states that the rights and freedoms of aboriginal peoples recognized and affirmed under the Constitution of Canada *will not be infringed* in any way by the application of the *Act*.

SECTION 1: DEFINITIONS

This section provides definitions for many terms and concepts used in the Act, such as "disability", "social condition", "adjudication panel", etc. As is the case in most human right legislation, the definition section is far from complete, leaving many concepts to be defined through case law.

SECTION 2: ABORIGINAL RIGHTS

This is a very important section. It attempts to address the understandable concern among Aboriginal communities in the NWT that the *Human Rights Act* may override collective rights of Aboriginal peoples. Section 2 states:

> Nothing in this *Act* shall be construed so as to abrogate or derogate from the protection provided for existing aboriginal or treaty rights of the aboriginal peoples of Canada by the recognition and affirmation of those rights in section 35 of the *Constitution Act, 1982*.

In other words, the purpose of Section 2 is to clarify that existing Aboriginal and treaty rights - and future treaty rights, since the *Constitution Act* recognizes and affirms existing rights and those that *may be acquired* - will **not be infringed** by the *Human Rights Act.*

Education related to this section will be a critical component of promoting the *Act* among Aboriginal communities in the NWT.

SECTION 5: PROHIBITED GROUNDS OF DISCRIMINATION

This is another essential section of the *Act*, as it sets out the prohibited grounds of discrimination, which are:

- Race or colour
- Ethnic origin
- Ancestry, nationality, or place of origin
- Religion or creed
- Age
- Disability
- Sex (includes being pregnant)
- Sexual orientation
- Gender Identity
- Marital status (single, married, common-law, divorced, widowed, etc.)
- Family status or family Affiliation
- Conviction (pardoned)
- Political belief or association
- Social condition

Definitions and/or interpretation of grounds of discrimination may vary between different provinces and territories and not every prohibited ground of discrimination is found in every jurisdiction in Canada. For example, the NWT is the only jurisdiction in Canada to include the prohibited ground of “gender identity” and "family affiliation" in its human rights legislation. While most of the definitions are self-explanatory and/or have been clearly defined by courts and tribunals across the country, several require clarification (provided below). It is anticipated that the

NWT Adjudication Panel will formulate its own definitions for those prohibited grounds not explicitly defined in the *Act* as cases come before it.

Possible Interpretations of Prohibited Grounds:

Creed: Case law from the federal level and from Ontario holds that creed is interchangeable with religion and religious belief, but that it is not related to political belief.[14]

Family Status: Family status includes the inter-relationships that arise from marriage, blood relationship, or legal adoption. A restrictive definition could limit it to parent and child relationships. However, a more progressive interpretation would include the relationship between spouses, siblings, in-laws, uncles or aunts and nephews or nieces, cousins, etc., in addition to the parent-child relationship.[15]

Family Affiliation: While the *Act* does not provide a definition of family affiliation, this term is likely intended to provide protection from discrimination to those who are members of "small close-knit communities" where family status may not be applicable.[16] For example, family affiliation may apply in situations where a particular family controls much of the housing or employment in a community.

Gender Identity: This term is distinct from sexual orientation. Its purpose is to protect from discrimination transgendered persons and people who identify or live as a gender that different from their biological sex.[17]

Social Condition: Social Condition is defined in the *Act* as "…the condition of inclusion of the individual, other than on a temporary basis, in a socially identifiable group that suffers from social or economic disadvantage resulting from poverty, source of income, illiteracy, level of education or any other similar circumstance."

In CERA's view, the term "social condition" is preferable to the more restrictive related grounds, such as "source of income" and "receipt of public assistance," frequently seen in other human rights laws. While in practice "social condition" will often be used as a proxy for discrimination based on source of income, the term has the potential to be interpreted more broadly, and to include, for instance, economic and social rights. Every effort should be made to ensure that

[14] Keene, J., *Human Rights in Ontario, Second Edition* (Carswell: 1992) at pp 62-71
[15] Tarnopolsky, W., *Discrimination and the Law (Looseleaf Edition),* at 2004-Rel.4 9-3 and 9-23.
[16] Northwest Territories Legislative Assembly Standing Committee on Social Programs, *Report on Bill 1: Human Rights Act* at p. 12
[17] Ibid at p. 10

interpretation of the term retains the expansive approach seen in the definition.

Pardoned Criminal Conviction: A “criminal conviction” per se, is not a protected ground under the *Act*. Where a potential tenant has obtained a pardon, however, a landlord is prohibited from denying that individual housing, employment or services, etc. because of the conviction. It is important to know that the legislation that deals with pardons (the *Criminal Records Act)* prohibits an individual from denying the existence of a conviction simply because that person received a pardon.

Multiple Grounds of Discrimination:

Section 5 also clarifies that the *Act* protects the residents of the NWT from discrimination on the basis of two or more grounds of discrimination, "or the effect of a combination of prohibited grounds." In CERA's experience, individuals frequently experience discrimination on a number of different, interrelated grounds. For example, when an Aboriginal single mother receiving public assistance applies for an apartment, she will frequently experience discrimination based on her race and colour, her family and marital status and her social condition - all at the same time. Significantly, this kind of discrimination is qualitatively different from discrimination based on individual grounds, as the various grounds can mutually reinforce each other and significantly intensify the experience of discrimination. Discrimination on multiple grounds is far more than the "sum of its parts".

Discrimination Based on Association:

Finally, Section 5 states that it is illegal to discriminate against someone because of his/her relationship - either actual or presumed - with an individual or class of individuals identified by a prohibited ground of discrimination. For example, if a landlord refuses to rent to a mixed-race couple because one member of the couple is black, the landlord has not only discriminated against the individual who is black, but also his/her partner – by association.

SECTION 6: INTENT

Consistent with human rights case law in Canada, this section makes it clear that intent to discriminate is not necessary for a policy or practice to be in violation of the *Act.* In other words, it is just as illegal to discriminate by mistake as it is to discriminate on purpose.

SECTION 7: EMPLOYMENT

Section 7 of the *Act* prohibits discrimination with respect to employment or any term of employment unless based on a *bona fide* occupational requirement. A more detailed discussion of the process of determining whether a discriminatory rule, policy or practice is a *bona fide* requirement can be found in the previous chapter under “defences to discrimination”.

Exceptions to the prohibition against discrimination are provided for charitable, educational, fraternal, religious, etc. organizations that give preference with respect to fundamental objects of the organization. For example, a non-profit disability rights organization would not likely be in violation of the *Act* if it gives preference in hiring to persons with disabilities.

In addition, an owner of a business can give preference in employment to a member of his/her family.

SECTION 8: EMPLOYMENT APPLICATIONS AND ADVERTISEMENTS

Employers cannot use or circulate any form of application, publish any employment ad or make inquiries of an applicant that would indicate any limitations, specifications or preference based on a prohibited ground of discrimination. Employers also cannot require applicants to provide information related to a prohibited ground of discrimination. For example, a job application form that asks the applicant to specify whether he/she is married or single would be in violation of the *Act.* As above, there could be an exception if the discriminatory factor is a *bona fide* occupational requirement.

SECTION 9: EQUAL PAY

The *NWT Human Rights Act* includes “equal pay for equal work” provisions.

SECTION 10: MEMBERSHIP IN ORGANIZATIONS

This section protects individuals in the NWT from discrimination with respect to membership and participation in employees’, employers’ or occupational associations, including unions.

SECTION 11: GOODS, SERVICES, ACCOMMODATION AND FACILITIES

Section 11 prohibits discrimination with respect to goods, services, accommodation or facilities commonly available to the public. This can include, among other things, discrimination in attempts to access or participate in educational, health or other public services, restaurants, movie theatres, hotels/motels, sports teams, etc.

SECTIONS 12: DISCRIMINATION WITH RESPECT TO TENANCY

These are the sections of the *Human Rights Act* that outline the prohibitions against discrimination with respect to commercial and residential tenancies. This section will be discussed in detail in the following chapter of the kit.

SECTION 13: DISCRIMINATORY PUBLICATIONS

Under Section 13 of the *Act*, it is illegal for a newspaper, magazine, business, housing provider, government agency, company, etc. to publish or display anything that:

- expresses or implies discrimination or any intention to discriminate against any individual or class of individuals;
- incites or is calculated to incite others to discriminate against any individual or class of individuals; or
- is likely to expose any individual or class of individual to hatred or contempt

As a result, rental advertisements, for example that include phrases such as, "no kids", "singles or couples preferred", or "suitable for professional couple", "working single", "looking for Christian family", etc., are likely illegal.

When a discriminatory advertisement is placed in a newspaper or magazine, it is not just the individual or company that placed the ad that would be liable under the *Act*, but also the publisher of the newspaper or magazine. It is therefore in the best interests of these publishers to carefully screen submitted ads to ensure that they are in compliance with the *Act.* When assisting someone to file a complaint regarding a discriminatory publication, it is particularly important to include the

publisher in the complaint. If the complainant does this, he/she may be able to have the publisher print information on discrimination as part of a settlement.

SECTION 14: DISCRIMINATORY HARASSMENT

It is a violation of the *Act* for anyone to harass another person on the basis of any prohibited ground of discrimination. Section 14 of the *Act* defines harassment as engaging "…in a course of vexatious comment or conduct that is known or ought to reasonably be known to be unwelcome by the individual or class." It is important to realize that harassment in human rights legislation requires a "course of conduct" and not just one incident of unwelcome behaviour. That being said, where a single discriminatory statement or act is severe enough to create a "poisoned environment", it could also be in violation of the *Act.*

In the housing context, tenants frequently confuse harassment that would typically be covered by residential tenancies legislation with discriminatory harassment. For example, a tenant may feel that a landlord has violated the *Act* because of perceived harassment related to the tenant forming a tenants' group or complaining about maintenance problems. Unless the harassment is directly related to a prohibited ground of discrimination, it will not fall under the *Act.* This example would more likely be considered harassment under residential tenancy laws.

While not stated explicitly in the *Act*, if one resident or employee is subjecting another to discriminatory harassment, the landlord or employer may also have a responsibility to ensure that the harassment stops. If the landlord or employer is aware of the problem and takes no action to stop it, he/she may be violating the *Act.*

SECTION 15: DISCHARGE, SUSPENSION AND INTIMIDATION

Under the *Act*, it is illegal to retaliate against a person who made or attempted to make a human rights complaint. Similarly, it is illegal to take any action against someone for assisting with a human rights complaint. This means that, for example, an employer or landlord that intimidates, coerces, harasses, imposes a financial penalty, denies a right, or otherwise treats a tenant or employee unfairly because the person attempted to enforce his/her rights under the *Act*, would be violating the *Act*.

While not stated explicitly in the *Act*, it is also likely that an employer or landlord would be prohibited from taking action against someone who

refused to violate a tenant/prospective tenant or employee's rights. For example, an employer or landlord that penalizes or fires an employee for refusing to apply a discriminatory policy would likely be violating the *Human Rights Act.*

SECTION 67: AFFIRMATIVE ACTION PROGRAMS

As a rule, programs or activities that aim to eliminate the disadvantage of individuals or classes of individuals identified by a prohibited ground of discrimination - affirmative action programs – will not violate the *Act.* This means that, for example, a housing program that restricts tenancies to Aboriginal people would not be contrary to the *Act* if its purpose is to reduce the disadvantage of this group. Similarly, housing restricted to single mothers, or youth, or homeless people, among others, would not violate the *Act* if its purpose was to reduce the disadvantage of these groups.

However, this does not mean that individuals cannot file human rights complaints against housing providers when they discriminate in ways not justifiable in terms of the purposes of the program. For example, housing restricted to Aboriginal people that excludes families with children could be challenged under the *Act* if the "adults only" aspect of the program could not be justified. Any attempts to exempt social housing, generally, from the provisions of the *Act* on the basis of Section 67 should be strongly opposed.

CHAPTER 4

DISCRIMINATION IN HOUSING UNDER THE *HUMAN RIGHTS ACT*

The following chapter provides a detailed discussion of provisions in the *Human Rights Act* that relate to discrimination in housing. This chapter also provides a number of examples which will help human rights advocates get a better understanding of the day-to-day applications of the *Act.*

1. TENANCY

Section 12 of the *Human Rights Act* (*Act*) prohibits discrimination with respect to residential tenancies in the NWT. Under the *Act*, it is illegal for a housing provider to refuse to rent to a person, or to treat that person unfairly with respect to any of the prohibited grounds of discrimination. Specifically, Section 12 states:

> 12. (1) No person shall, on the basis of a prohibited ground of discrimination and without a bona fide and reasonable justification,
>
> (a) deny to any individual or class of individuals the right to occupy as a tenant any commercial unit or self contained dwelling unit that is advertised or otherwise in any way represented as being available for occupancy by a tenant; or
>
> (b) discriminate against any individual or class of individuals with respect to any term or condition of occupancy of any commercial unit or self-contained dwelling unit.
>
> (2) In order for the justification referred to in subsection (1) to be considered bona fide and reasonable, it must be established that accommodation of the needs of an individual or class of individuals affected would impose undue hardship on a person who would have to accommodate those needs.

(3) It is not a contravention of subsection (1) for an owner of a commercial unit or self-contained dwelling unit to give preference in the occupation of a commercial unit or self-contained dwelling unit or with respect to a term or condition of such an occupancy, on the basis of family affiliation, to a member of his or her family.

1.1 Defining a "Tenant"

There is no definition of "tenant" contained in the *Human Rights Act.* While a tenant is typically presumed to be an individual who is renting from a landlord, this is not necessarily the case. For example, the British Columbia Council of Human Rights held that, ""Tenancy" is a broad term, indicating the right to occupy property through ownership, lease or rental (*The Oxford Concise Dictionary*)."[18] In our view, the term tenant should encompass individuals in a range of housing circumstances, including members of co-operative housing and even, in certain circumstances, owners of condominiums. This interpretation appears to be supported by Section 12 (1) (b) which refers to terms and conditions of **occupancy** rather than terms and conditions of a **lease***.*

That being said, it is possible that some adjudicators will take a restrictive definition of "tenant". In cases where the owner of a condominium unit believes he/she was discriminated against by the condominium board of directors or "strata corporation/council", it might be safest to refer to Section 11 of the *Act* on discrimination related to "public services." This approach is supported by a recent decision of the British Columbia Human Rights Tribunal which confirmed that strata corporations provide a service to owners of condominiums that could be considered a "public service" under the B.C. *Human Rights Act.*[19]

1.2 What is a "Self-Contained Dwelling Unit"?

The NWT *Human Rights Act* prohibits discrimination with respect to "self-contained dwelling units". Unfortunately, the *Act* does not provide a definition of this term. However, the term is defined in other Canadian human rights legislation. Newfoundland's *Human Rights Code* defines a self contained dwelling unit as a "dwelling house, apartment or other similar place of residence that is used or occupied or is intended, arranged or designed to be used or occupied as

[18] *Emard v. Synala Housing Co-Operative* (1993), 26 C.H.R.R. D/106 (B.C. Council of Human Rights) at p. D/113.
[19] *Konieczna v. Owners Strata Plan NW2489 (No.2)* (2003), 47 C.H.R.R. D/144, 2003 BCHRT 38.

separate accommodation for sleeping and eating."[20] Generally, the concept of a self-contained dwelling unit presumes that the tenant has a living environment largely independent of the owner's. This means that an individual who is renting a room in someone's house and sharing living space (such as a kitchen or bathroom) with the owner, may not be covered by the *Act*.

2. TENANCY APPLICATIONS

While the *Act* has a section related to employment application forms, there is no similar section related to rental applications. However, case law in other provinces suggests that landlords should carefully consider human rights law when designing their application forms. For example, in Ontario, asking for the age of prospective occupants on an application form was found to be an act of discrimination.[21]

Questions on an application form that directly relate to a prohibited ground of discrimination may be found to be in violation of the *Act.* For example, it may be discriminatory to ask about marital status or religion, particularly because these types of questions may indicate an intention to discriminate.

3. EXAMPLES OF DISCRIMINATION IN HOUSING

The *Act*, like other human rights legislation, does not spell out exactly what policies or practices constitute illegal discrimination. What is considered discrimination is frequently a matter of interpretation, and requires a review of related case law and policy. As a result, it is often difficult to determine whether a rule or practice will be in violation of the *Act*. This is particularly true for constructive or adverse effect discrimination. In CERA's experience, housing providers frequently violate human rights legislation - even when they have an understanding of the law - because they honestly do not realize that what they are doing is discriminatory. Below is a discussion of some of the common types of discrimination related to housing, focusing on types of discrimination that may be "hidden" through apparently neutral policies or rules.

[20] *Human Rights Code*, RSNL 1990, Chapter H-14.
[21] *St. Hill v. VRM Investments Ltd.* (2004) CHRR Doc. 04-023.

3.1 Race, Colour, Ethnic Origin and Ancestry

After a year of dating, Vicky - an Aboriginal woman - and Pete - a non-Aboriginal man - decided to move in together. They saw an advertisement for a 1-bedroom apartment and made an appointment to view it. Vicky decided to check out the apartment while Pete used the car to pick up a few groceries. Pete said he would drive by the apartment building after shopping to get Vicky. When Pete arrived at the building, Vicky was waiting by the sidewalk. She said the landlord told her the apartment was already rented. Vicky and Pete thought this seemed suspicious, as they had just called the landlord a few hours earlier. Pete decided to check into the apartment himself. While Vicky waited at the car, he went to the building and buzzed the landlord. The landlord opened the door and when Pete asked about the apartment, the landlord said it was available and offered to show him the unit.

When landlords wish to keep people out because of their race, colour, ethnic origin or ancestry, they will seldom do it directly by saying they do not want people of a certain colour or ethnic background. More frequently, they will lie and say the apartment is already rented, or take an application and wait until someone else applies. They will sometimes discriminate indirectly on these grounds by asking for co-signors or guarantors or by asking newcomers for proof of immigration papers or landing papers, or proof of a social insurance number in order to receive an application or sign a lease.

Racial discrimination tends to be difficult to prove. As in the case of Vicky and Pete, you may need to follow-up with the landlord to see if a "rented" apartment is in fact still available. If possible, try to line up a number of "testers" by arranging for racialized and non-racialized applicants with similar qualifications to inquire in person about an apartment and monitor the different responses. Make sure the people you select are willing to provide a witness statement and will be available to provide evidence months or years later if the case goes to the Adjudication Panel. It is also helpful to get the complainant to interview any other tenants in the building to see if they have evidence of discriminatory practices, get them to fill out "Witness Statement Forms" and provide their names and contact information so they can be found months or years later.

Harassment because of race, colour, ethnic origin or ancestry may consist of racial slurs, comments or concerted attempts to make life miserable for a tenant in order to get them to leave. Many tenants feel "harassed" by their landlord, but it is only worthwhile pursuing a human rights complaint if there is reliable evidence that the harassment is related to race or ethnicity. Otherwise, it is a matter that falls more

appropriately under the *Residential Tenancies Act* and should be addressed through the Rental Officer.

3.2 Place of Origin and Nationality

Ajit immigrated to Canada with his wife, Swapna in November 2005. In December, he went to view a two-bedroom apartment that had been advertised for rent. As they were so new to the country, he and his wife were not working. However, they had $50,000 in savings to support themselves until they could find suitable employment. When the landlord saw on their application form that neither Ajit nor his wife was employed, he asked how they would afford the apartment. Ajit told him about their savings and offered to show the landlord the bank balance. The landlord refused to see the balance. Instead, he required Ajit and Swapna to pay twelve months rent as a deposit.

The *Act* prohibits discrimination based on place of origin and nationality. This prohibition has significant implications for the use of credit and reference checks by landlords. While it is unlikely that the Human Rights Commission will challenge landlords who request information concerning an individual's rental history or credit rating, human rights tribunals in Ontario have held that it is discriminatory to refuse an applicant because they have no previous rental history or credit rating, or because the relevant records cannot be obtained. There is a difference between a **bad** credit rating, a **poor** reference from a previous landlord, and **no** credit or landlord references. To refuse people in these situations would unjustly disadvantage recent immigrants and refugee claimants who have no access to Canadian credit or landlord references.

Similarly, as illustrated in the example described above, landlords need to be flexible with respect to income requirements of newcomers to Canada. A large proportion of immigrants arrive in Canada without employment arranged and have to rely on savings for a period of time. Housing providers should take this into consideration when assessing the applications of newcomers.

It would also be discriminatory for a landlord to require recent immigrants or refugees to pay extra rent in advance, when this is not required of other tenants.

3.3 Age

Because of stereotypes, it is often very difficult for young people to access rental housing. Many people assume that young people will be noisy, damage the apartment, and/or not pay the rent. When a landlord

refuses to rent to someone because of stereotypes about young people, they will be violating the *Act.* Similarly, as discussed above with respect to recent immigrants and refugees, if a landlord refuses to rent to young, first-time renters because they do not have credit or landlord references, they should be challenged. Such a rental policy would make it impossible for these individuals to access housing. Rules related to length of employment could also unfairly disadvantage young people.

Unfortunately, the *Act* will not always protect individuals under the age of 19, as contractual agreements are not enforceable against persons under this age. Housing providers may be able to argue that it would impose an undue hardship to require them to rent to anyone they cannot enforce a contract against (i.e. a contract to pay rent).

3.4 Sex

Marie is a divorced woman with three children. As a result of her divorce, Marie was forced to declare bankruptcy. Marie heard from her parents that a nice three-bedroom apartment was coming available in their neighbourhood. She was very excited as her parents' neighbourhood was close to the shopping centre and library, and because it would make it easier for them to help with childcare. When Marie called the property manager to see if she was accepted, the property manager said her application had been rejected because of her poor credit rating. Marie explained that, until her divorce, she'd had a perfect credit rating. She also explained that she had never had any problems paying the rent on time and that she has excellent landlord and employment references. The property manager replied that she would need a good credit rating to be accepted as a tenant.

In addition to blatant discrimination related to sex or pregnancy, there are a variety of situations where housing policies or requirements could have a discriminatory impact on women. For example, women leaving a relationship are much more likely than men to be entering the housing market with no previous credit or landlord references. And where a credit record is present, it would not be unusual for that record to be negative, as women frequently suffer particular financial hardship after a break-up. Housing providers should, therefore, be flexible in applying credit and reference requirements to women entering the rental market after leaving a relationship.

A policy of preferring applicants with stable, long-term employment, besides discriminating against recent immigrants, young people and individuals living on income assistance, could also unfairly disadvantage women as they are disproportionately represented in

unstable, marginal employment, and are more likely than men to have their work life disrupted due to care-giving responsibilities.

3.5 Family Status

> Karen is married and has four children - three daughters and one son. She called to inquire about a three-bedroom apartment she saw advertised in the Yellowknifer. Karen spoke to the building's rental agent who told her that the apartment was still available. The agent then asked Karen who would be living there. When she described her family, the rental agent told her that management of the building allows a maximum of five people to reside in a three-bedroom apartment. Karen then told the rental agent that she and her husband would share one bedroom, while the four children would share the other two. To this, the rental agent responded, "And besides, children of different sexes cannot share a bedroom." Karen was told not to apply for the apartment.

In CERA's experience, discrimination against families with children - both intentional and unintentional - is widespread. The following are some common forms of family status discrimination.

"Adults Only":

It is illegal to declare a building "adult only" or for a landlord to declare a unit "not suitable for children". It is also illegal to designate certain floors for people with children and certain floors for people without children.

"Adult Lifestyle" condominiums are also likely contrary to the *Human Rights Act.* Adult only by-laws in condominiums have been declared by the courts to be of no force and effect.[22] If someone is refused an apartment in a condominium because of such a by-law, or harassed by other members of the condominium, they should file a complaint.

Overcrowding:

Because of the disparity between family incomes and housing costs, low income families frequently need to move into smaller apartments than would be ideal. Housing providers may refuse to rent to these families on the basis of rules limiting the number of occupants in units of a particular size. A couple with four children, for example, may be told that six people cannot live in a three bedroom apartment, even

[22] *Dudnik v. York Condominium Corp. No. 216 (No. 2)* 12 CHRR D/325, affirmed (1991) 14 CHRR D/406 *Leonis v. Metropolitan Toronto Condominium Corp. No. 741* (1998), 33 C.H.R.R. D/479 (Ont. Bd.Inq.).

though it is not overcrowding to have children share bedrooms. Unless the rules relate to compliance with established overcrowding and/or health and safety legislation, a housing provider should not refuse a family because of rules limiting the number of occupants. Related to this, housing providers should not refuse to rent to a family because of rules prohibiting children of the opposite sex from sharing bedrooms.

Apartment Transfers:

It is not unusual for landlords to refuse to transfer families who need a larger apartment because of a change in their family size. Many housing providers complain that allowing transfers is too much administrative hassle. However, families are often desperate to remain in the same building and neighbourhood, where they have supports and where children are enrolled in schools. Case law in Ontario[23] has established that landlords have a duty to accommodate the needs of families with additional children by allowing them to transfer in a timely fashion to a larger unit if requested.

In applying this case law, however, it is important to restrict it to people whose needs for a transfer are clearly related to having additional children. There are no human rights protections for those who simply want to transfer to a larger unit out of preference, or who want to move to an apartment with a better view.

Reasonable Children's Noise:

Sometimes, housing providers try to evict families with children because of normal children's noise. Often these are buildings where some tenants or the owner would prefer to have no children. A certain amount of noise is to be expected from families with children. As long as parents make a reasonable effort to minimize their children's noise, housing providers should not threaten to evict them because of noise problems. To do so could be considered discrimination based on family status and may be a violation of the *Act.* In these situations, in addition to filing a human rights complaint, it will be important to make human rights arguments before the Rental Officer. The Rental Officer should consider these arguments.

[23] *Ward v. Godina* (1994), CHRR Doc. 94-130 (Ont. Bd. Inq.)

3.6 Social Condition

Dave is unemployed and is presently receiving income assistance. He responded to a newspaper ad for a bachelor apartment. Unfortunately, when he told the superintendent over the phone that he was on income assistance, the superintendent said, “If you’re receiving assistance, you’ll have to provide a co-signor. That’s the building’s policy”. Because Dave did not have a co-signor, he was unable to apply for the apartment.

As discussed earlier in this kit, the term "social condition" is broad and covers a wide range of social and economic disadvantage. However, in many circumstances it will likely act as a proxy for "poverty" or "receipt of social assistance". In CERA's experience, one of the most common forms in discrimination related to housing is discrimination against people receiving government income supports - and in particular, welfare or disability benefits.

Unlike many other forms of discrimination, housing providers are frequently very comfortable stating explicitly that they will *not* rent to people receiving welfare. Often, a refusal will be prefaced by, "I've had trouble with people on welfare in the past." Prejudice against low-income people is so pervasive in Canadian society that it often very challenging to convince landlords that they are violating anyone's human rights by having a "no welfare" rule.

Asking applicants about income and employment is not specifically prohibited. It is best to advise applicants to provide the information requested and challenge as discriminatory a landlord's refusal to rent that is made on the basis of this information.

"Preference":

While it is clearly a violation of the *Act* to refuse to rent to someone or to treat them unfairly because they are receiving income supports, it is also illegal to give preference to people who are in paid employment. For example, landlords should not advertise for working people. Similarly, a landlord should not choose an applicant who applied later over an applicant on social assistance because they prefer someone with employment. It would also be discriminatory for a landlord to respond more quickly to the maintenance or other concerns of tenants that are employed or those that are paying full market rent.

Quotas:

It would be in violation of the *Act* to set "quotas" on the number of people receiving income assistance that a housing provider will rent to.

Direct Payment of Rent:

Landlords should not automatically require income assistance recipients to provide direct payment of rent from the Education, Culture and Employment Office. However, direct payment of rent could be a requirement if the landlord has other, legitimate reasons for turning down the application (e.g. the tenant has a history of defaulting on his/her rent).

Co-Signor or Guarantor Requirements:

A landlord cannot ask for a co-signor or guarantor of people on social assistance when this requirement is not made of others applicants. A Manitoba human rights board decision, *Spence v. Kolstar*[24], found that a co-signor requirement applied to social assistance recipients and other low-income applicants was illegal.

Rules Relating to Social Housing:

Denise and her two children were approved for subsidized housing operated by the Yellowknife Housing Authority. A few weeks after the family had moved into the housing complex, the superintendent mentioned to Denise that her family would not be covered by NWT residential tenancies law until her three month "probationary" period had been successfully completed. Denise was concerned and asked the superintendent how this could affect her family. The superintendent was not sure, but said he thought it meant that the housing authority could evict Denise without following the usual procedures if there were any problems

Where social housing providers establish rules or policies that disadvantage social housing tenants or tenants paying subsidized rents, the housing provider may be violating the *Act*. For example, any social housing rule or policy that negates rights contained in the *Residential Tenancies Act* is likely illegal. To avoid violating the *Act*, the social housing provider would have to show that the rule or policy is *bona fide* and reasonable, and that the housing provider cannot accommodate the needs of the tenants without undue hardship.

[24] *Spence v. Kolstar Properties Inc*. (1986) C.H.R.R. D/3593 (Manitoba Board of Adjudication).

CHAPTER 5

DISABILITY AND THE DUTY TO ACCOMMODATE UNDER THE HUMAN RIGHTS ACT

Simone is a single mother living with her 18-year-old daughter, Lise. Lise has spina bifida and must use a wheelchair to get around. Simone and Lise live in a building that has stairs leading to the front entrance. As a result, they have to enter and leave the building through the garbage storage room that has a small ramp leading to it from the outside. Besides being an offensive way to have to enter and leave the building, the steel door to the garbage room is hard for Simone to open. Simone and Lise have spent years trying to persuade the company that owns the building to make it accessible for people with disabilities, such as through installing a ramp and automatic doors at the front of the building. The company has repeatedly refused, saying that it would be too expensive and that it would be better for Simone and Lise to move to an accessible building.

1. THE SOCIAL COMPONENT TO DISABILITY: "SOCIAL HANDICAPPING"

The Supreme Court of Canada has recognized that there is a social component to disability. It has called this social component “social handicapping.” What this means is that society’s response to persons with disabilities is often the cause of the “handicap” that persons with disabilities experience. For example:

- elevators without Braille or transit systems without sound systems that prevent persons who are blind from using them independently
- a housing provider who refuses to install, for instance, an accessible shower that forces a person who could otherwise live independently to rely on caregivers
- restaurants without ramps for access that preclude persons who rely on mobility aids from participating in social functions at a restaurant of their choice.

These “handicaps” are *not* caused by being blind or having a mobility impairment, but instead by the absence of Braille and the lack of an appropriate shower or ramp. The exclusion in society of persons with disabilities is *not* the result of the disability, but instead, the social and physical barriers that prevent independent and inclusive living with dignity.

2. DEFINING DISABILITY

The definition of disability under the *Human Rights Act* is very broad, and goes well beyond stereotypical assumptions about what it means to be disabled. Section 1 of the *Act* defines disability as:

> (a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness,
>
> (b) a condition of mental impairment or a developmental disability,
>
> (c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or language,
>
> (d) a mental disorder (*incapacité*)

The *Act* also provides examples of specific conditions that are deemed to be disabilities. Examples include, **but are not limited to***,* conditions such as diabetes, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impairment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or on a wheelchair or other remedial appliance or device.

These examples are intended to illustrate the definition of disability under the *Act*, not limit it. Other examples may include environmental or chemical sensitivities, chronic pain, chronic fatique, depression, anxiety disorders, post-traumatic stress disorder, and drug or alcohol addiction.

The *Act* also prohibits discrimination against persons on the basis of **perceived disabilities** or based on the fact that a person **may develop** a disability in the future. Section 5(1)(2.1) of the *Act* provides further explanation:

> Whenever this *Act* protects an individual from discrimination on the basis of disability, the protection includes the protection of an individual from discrimination on the basis that he or she

a) has or has had a disability;

b) is *believed* to have or have had a disability; or

c) has or is believed to have a *predisposition* to developing a disability. (emphasis added)

Some landlords or employers may, for example, refuse to rent to or hire older people due to a concern that they will become disabled **in the future** and require special building modifications or job accommodations.

Persons with disabilities have the right to full equality. In fact, housing providers, employers, service providers, etc. have a positive duty to accommodate the particular needs of persons with disabilities to the point of undue hardship.

3. WHAT IS THE DUTY TO ACCOMMODATE?

The duty to accommodate means that structures, rules, policies or practices that discriminate may have to be changed within a reasonable timeframe in order to ensure that persons with disabilities are able to fully enjoy equality with respect to housing, employment, services, etc. Accommodation must be made short of undue hardship.

4. WHAT ARE THE PRINCIPLES OF ACCOMMODATION?

Although there is no textbook definition of accommodation, there are underlying principles that can help us understand how it can be accomplished. In this regard, the most appropriate accommodation is one that most respects the dignity of the individual with a disability, meets individual needs, and best promotes integration and full participation.

4.1 DIGNITY

Dignity is a critical principle underlying the duty to accommodate in human rights legislation. In its introduction, the *Act* specifically refers to recognizing the "inherent dignity…of all members of the human family…" Therefore, attempts to accommodate the unique needs of people with disabilities should do so in a manner that respects their dignity. The Supreme Court of Canada has made it clear that it is inappropriate to accommodate the needs of a person with a disability in a manner that marginalizes or stigmatizes the person, or hurts their sense of self worth. This means that it would not be acceptable for a housing provider to, for example, "accommodate" the needs of a

tenant using a wheelchair by forcing the tenant to access his/her apartment through a loading area or garbage storage room.

4.2 Individualized Accommodation

Another important principle is the need for individualized accommodation. This means that it is critical to consider the unique needs of the person with a disability when determining the appropriate accommodation. Companies and housing providers should not look for a "one size fits all" solution. For example, two people with the same medical condition may have very different needs.

4.3 Integration and Full Participation

Related to the principal of "dignity", individuals with disabilities should have their needs accommodated in a way that is inclusive and allows them equal enjoyment of and participation in their housing or employment, or with respect to the provision of goods, services or facilities. Accommodation that segregates a disabled individual would generally not be considered acceptable unless it was the only way to achieve substantive equality short of undue hardship.

For example, a housing provider may say to a prospective tenant: "This is not an accessible building. I have another building that is accessible - you can apply for an apartment there." Equal treatment with respect to housing, and more specifically integration and full participation, requires that the person with the disability have equal access to all of the buildings - just like a person applying who does not have a disability.

5. Determining Undue Hardship

As mentioned earlier, the needs of individuals with disabilities must be accommodated to the point of undue hardship. While there is no explicit definition of undue hardship in the *Act*, the courts have provided guidance regarding what factors will be considered in determining whether undue hardship has been reached. Key factors include: cost, and health and safety.

5.1 Cost

In determining whether the costs of accommodation would result in undue hardship, the individual or company responsible for providing the accommodation must show that these costs are quantifiable, and so substantial that they would alter the essential nature of the

business, or affect its viability. It is not enough for the housing provider or employer to merely claim that the cost of accommodation is too high. Records – actual proof – must be provided. The Ontario Human Rights Commission provides a useful example in its *Policy and Guidelines on Disability and the Duty to Accommodate*:

> A deaf patient requires a sign language interpreter in a hospital. The hospital administrator refuses to provide the accommodation, stating "if everyone wanted signers, it would bankrupt us." The hospital administrator does not provide financial information to justify this claim, nor does he provide demographic evidence to show the likely number of patients who may require signers. As a result, the hospital's defence will be unlikely to succeed.[25]

In addition, before claiming undue hardship, it is necessary to consider outside sources of funding that could offset costs. In the case of modifications to residential housing, this could include funds provided through Canada Mortgage and Housing Corporation's Residential Rehabilitation Assistance Program

5.2 Health and Safety Requirements

Health and safety risks will amount to undue hardship if the degree of risk that remains after the accommodation outweighs the benefit of enhancing equality for persons with disabilities. For example, a housing provider may assert that it would impose undue hardship to rent to a person with a mental disability because that person cannot live independently. Such a claim may be successful if it was established that the person with the mental disability could not live alone **safely**. In this case, the safety risks posed both to the tenant and other residents in the building may outweigh the right to live independently. Similarly a community centre that does not allow children under a certain age to use its exercise equipment could argue that it would be to great of a health and safety risk have a "non-discriminatory" policy.

It is important to note that the threshold for determining undue hardship is typically high. The term "undue hardship" presumes that accommodating a person's disability may impose some hardship. One cannot point to business disruption, employee morale, inconvenience or preference as the basis for failing to accommodate the needs of a person with a disability. For example, it is not relevant to the determination of undue hardship that it would be administratively inconvenient for an employer to allow a parent with a severely disabled child to shift her work hours slightly so that she

[25] Ontario Human Rights Commission (2000) *Policy and Guidelines on Disabibility and the Duty to Accommodate. Available online at: http://www.ohrc.on.ca/en/resources/Policies/PolicyDisAccom2*

leave can work early twice a week to pick up her child up from her special education program.

In addition, accommodating the needs of a person with a disability is not an "all or nothing" proposition. For example, a housing provider that cannot afford to make all of the necessary changes or modifications to the housing complex will need to work with the resident to determine the "next best" solution that would not impose undue hardship. The housing provider must take steps to minimize the cost by, for example:

- distributing the cost across the entire budget of the organization/company
- spreading out the cost over time (making the required changes in stages)
- exploring the possibility for tax deductions
- creative design solutions
- expert assessment

6. WHAT ARE THE OBLIGATIONS OF THE PERSON REQUIRING ACCOMMODATION?

If a person with a disability requires a specific change to a rule, policy or structure, he/she will first need to make sure that his/her landlord or employer, etc. is aware of the need for accommodation. The individual will also potentially need to provide evidence from a medical practitioner as to why the accommodation is required. However, there is no legal requirement to disclose a diagnosis. In many cases, the person with a disability may not feel comfortable having the specifics of his/her condition revealed. In these situations, it should be acceptable for the person to provide medical documentation confirming that, due to a medical condition, the person has certain limitations that require the particular changes to structures, rules or policies.

It is important that this medical documentation be as specific and strongly worded as possible regarding what accommodation is required. For example, a letter from a doctor stating that “X has multiple chemical sensitivities and it would be best to limit her exposure to strong chemical smells” is too vague and weak. It would be best if the doctor could describe in as much detail as possible what *needs* to done to accommodate the person’s chemical sensitivities (e.g. replace current cleaning materials with appropriate, scent-free products in consultation with the individual; provide adequate notice and alternate housing or work

options before any major maintenance/repair work is done, such as painting the halls or cleaning the carpets, etc.).

Individuals requiring accommodation must also recognize that "ideal" accommodation may not always be possible. They will frequently need to be flexible in their requests for accommodation. For example, an employer may not be able to afford to make all the necessary changes at once, and may have to "phase in" changes over time. Similarly, some buildings because of their age or design cannot be made entirely barrier free at a cost that is affordable (e.g. an elevator in a three story building).

It is best for the individual needing accommodation and the person or organization making the changes to work closely together to determine the most appropriate accommodation.

7. LIMITATIONS OF THE ACCOMMODATION PRINCIPLE

The Supreme Court of Canada in *Meiorin* (1999) recognized the limitations of the accommodation principle. It has said, citing Day and Brodsky from “The Duty to Accommodate: Who will Benefit?”:

> The difficulty with this paradigm is that it does not challenge the imbalances of power, or the discourses of dominance, such as racism, ablebodyism and sexism, which result in a society being designed well for some and not for others. It allows those who consider themselves “normal” to continue to construct institutions and relations in their image, as long as others, when they challenge this construction are “accommodated”.
>
> Accommodation conceived in this way, seems to be rooted in the formal model of equality. As a formula, different treatment for “different’ people is the flip side of like treatment for likes. Accommodation does not go to the heart of the equality question, to the goal of transformation, to an examination of the way institutions and relations must be changed in order to make them accessible, meaningful and rewarding for the many diverse groups of which our society is composed. Accommodation seems to mean that we do not change procedures or services, we simply “accommodate” those who do not quite fit. We make some concessions to those who are “different”, rather than abandoning the idea of “normal” and working for genuine inclusiveness.
>
> In this way, accommodation seems to allow formal equality to be the dominant paradigm, as long as some adjustments can be

> made, sometimes, to deal with unequal effects. Accommodation, conceived of in this way, does not challenge deep-seated beliefs about the intrinsic superiority of such characteristics as mobility and sightedness. In short, accommodation is assimilationist. Its goal is to try to make "different" people fit into existing systems. [26]

Although the legal framework within which we must work is "accommodation", the true spirit and goal of the *Act* and all human rights law generally is to achieve genuine inclusiveness - substantive equality - and a society where differences are valued and appreciated and full integration - not just accommodation - is the norm.

[26] *Meiorin* at par. 41

CHAPTER 6

THE NWT HUMAN RIGHTS COMPLAINT PROCESS

Human rights in the Northwest Territories is enforced and promoted through three independent, but interrelated bodies: the Human Rights Commission, the Office of the Director of Human Rights and the Human Rights Adjudication Panel. Individuals who feel that their rights under the *Act* have been infringed can file a complaint with the Commission.

1. THE NWT HUMAN RIGHTS COMMISSION

The NWT Human Rights Commission (Commission) administers the NWT *Human Rights Act* (*Act*). The Commission's main role is to promote human rights in the NWT, prevent discrimination, and work with individuals who feel that their rights under the *Act* have been violated. More specifically, the Commission and its five part-time members are responsible for:

- human rights public education
- human rights research
- assisting people with complaints
- administering and settling complaints
- initiating complaints where appropriate
- developing programs aimed at ending discrimination and
- promoting the "policy that the dignity and work of every individual must be recognized and that equal rights and opportunities must be provided without discrimination contrary to the law."[27]

2. THE DIRECTOR OF HUMAN RIGHTS

The Director of Human Rights has a variety of responsibilities including review of and inquiry into complaints, supervising the work of Commission employees, acting as the registrar of complaints filed under the *Act*, and deciding which complaints should be referred to adjudication. In practice, much of the day-to-day work of processing human rights complaints falls to the Director.

[27] *Human Rights Act,* S.N.W.T. 2002, c. 18.

It is important to note that the Commission and Director are **independent** from government. They also remain **neutral** throughout most, if not all, of the human rights complaint process. That is, the Commission and Director do not act on behalf of a person who has filed a complaint. It is very important to keep this in mind when working with complainants. Many complainants wrongly assume that the role of the Director of Human Rights and Commission staff is to advocate on their behalf. This is not the case and can lead to complainants failing to question or challenge decisions of the Director or staff, or their approach to the complaint. However, where the Commission initiates its own complaint, it will become a party to the complaint. The Commission may also, on referring a complaint for adjudication, decide to become a party.

3. FILING A COMPLAINT

If someone believes that an individual, corporation, government agency, etc., has violated his/her human rights, that person may file a complaint with the Commission. It must be on the **proper form**, which is available at the Commission's office, or online at www.nwthumanrights.ca.

The complaint must also be filed within **two years** of the discrimination taking place. However, if the person's complaint is late, he/she may request an extension of time to file it. The Director of Human Rights may extend the time limit if the request is made in good faith and will not result in unfairness.

Complainant: A person (or persons) who files a complaint

Respondent: The person(s) or corporation (etc.) alleged to have engaged in discriminatory behaviour.

Once the Commission receives the complaint, the Director of Human Rights will review it and make a determination (as soon as possible) about whether the complaint will proceed. The Director may also try to informally resolve the complaint. If the complaint proceeds, it will be delivered to the respondent, who is given an opportunity to reply to the allegation.

Individuals who are unable to complete the human rights complaint form on their own can contact the Human Rights Commission for assistance.

Filing a complaint is free and individuals have the right to have legal counsel throughout the complaint process.

4. DISMISSAL OF COMPLAINT

When the Director of Human Rights receives the complaint - or at any other time before the complaint is referred to a hearing - she can determine whether it should proceed, be dismissed or be deferred. If the Director decides to dismiss all or part of the complaint, she must do so in accordance with **Section 44** of the *Act.* Under Section 44, a complaint can only be dismissed for certain reasons. They are:

i. **The Commission has no jurisdiction**: For example, Aboriginal band councils are governed by federal jurisdiction. Therefore, a complaint relating to a band council is properly dealt with by federal legislation, not territorial human rights legislation.

ii. **The Act is not applicable:** This may apply where actions complained of are not covered by the *Act* (i.e. they are not human rights issues or the discrimination complained of is not covered by the *Act*). For example, if an individual files a human rights complaint against a landlord or employer for harassment that does not relate to a prohibited ground of discrimination, the Director of Human Rights will likely dismiss the complaint because the *Act* is not applicable.

iii. **The complaint is trivial, vexatious or made in bad faith**: Case law on this reason for dismissal suggests that it is generally very difficult to show that a complainant is acting in a vexatious manner or bad faith. However, the Director of Human Rights may use this as the basis for dismissing a case that does not have sufficient evidence to proceed to a hearing. It is important to note that the Director is **not** charged with weighing evidence or assessing credibility and there is, therefore, a low threshold of evidence required to warrant referral for a hearing. As stated in a recent decision of the Supreme Court of the Northwest Territories:

> "…there must be a reasonable basis in the evidence to proceed to a hearing. Since an adjudication panel at a hearing could accept a complainant's version of events rather than a respondent's, where there is contradictory evidence, the person screening the complaint should consider whether, if the complainant's version is accepted, the complaint could be found to have merit. If so, a hearing will likely be warranted even though the respondent may be able to point to contrary evidence."[28]

[28] *Aurora College v. Niziol*, 2007 NWTSC34 at p. 16. Note: this decision has been appealed.

iv. **The substance of the complaint has been appropriately dealt with in another proceeding:** This means that the issues complained of have already been resolved, for instance, through a collective agreement grievance procedure, or through a hearing under the *Residential Tenancies Act*. This reason for dismissal could prove problematic if the Director does not carefully consider whether the human rights issues were **adequately** and **appropriately** addressed by the other proceeding. In Ontario, CERA has found that the Ontario Human Rights Commission will sometimes dismiss or threaten to dismiss a complaint purely on the basis that another hearing dealt with the human rights issues - without considering whether the procedures and outcomes of the proceeding were appropriate.

v. **The limitation period has expired:** Two years have expired since the discrimination took place.

If a complaint is dismissed, the Director must provide written reasons to the complainant explaining why. The complainant then has 30 days to appeal the decision. An appeal must be in writing and it must be provided to the Director and all the parties to the complaint. The Adjudication Panel (discussed below) will hear the appeal and can make an order supporting, changing or reversing the dismissal.

5. DEFERRAL OF A COMPLAINT

At any time before the complaint is referred to adjudication, the Director may also decide to defer - or postpone - dealing with a complaint. The Director can do this if she believes that another proceeding is capable of appropriately dealing with the subject matter of the complaint. If the Director defers the complaint, she must provide written reasons as to why it was deferred. When the other proceeding is completed, the Director will either dismiss the complaint (citing that the complaint was appropriately dealt with at the proceeding) or re-open it.

6. MEDIATION

Mediation is a completely voluntary process that is available as soon as the Commission accepts a complaint, or at any time during the complaint process. During mediation, a properly trained neutral Commission or contract employee will sit with the parties in an effort to settle the complaint without going through the entire investigation process. The complainant can sit in the same room with the respondent or ask to be in a separate private room.

Mediation is completely confidential and nothing that is discussed can be used if the complaint goes to investigation, adjudication or to any other legal proceeding. For example, if a landlord admits during mediation to doing something discriminatory, that admission cannot be used against the landlord if mediation is not successful.

In CERA's experience in Ontario, where there is reasonably good evidence of discrimination, it is possible to negotiate good settlements and resolve a complaint relatively quickly through mediation. However, it is important to remember that mediators have a stake in settling the complaint at mediation and may put pressure on complainants to settle, even if it is not in the complainant's best interest to do so. Complainants should not feel pressured into settling a complaint through mediation. If the complaint is not settled at this stage, it should not prejudice complainant's case.

Similarly, it is very important that a complainant have support during mediation. There is a significant power imbalance between respondents and complainants, and, in CERA's experience, many mediators do not adequately address this imbalance. Having a support person at the mediation will make a huge difference. It could make the difference between having a settlement that validates the complainant's experiences, and one that makes him/her feel re-victimized. If a mediator does not permit the complainant to have a support person where one is desired, CERA would advise **against** participating in the mediation process.

7. INVESTIGATION

If the complaint is not resolved through mediation, the Director may appoint an investigator, who has the responsibility of gathering evidence about the complaint. It is important, again, to note that investigators are neutral. Their job is not to support the complainant and they are not acting on the complainant's behalf. They are gathering evidence to determine whether or not the complaint will proceed to a hearing.

Investigators have the right to make written or oral inquiries of any person who may have information about the complaint, they can demand that records be produced and can make copies of relevant documents. If a person or company refuses to grant the investigator access to the relevant documents, the Commission may obtain a warrant from the court in order to gain access. A person who interferes with an investigation or warranted search may be subject to maximum fines of $5,000.00 (individual) or $25,000.00 (corporation, etc.).

Though the Commission will investigate the complaint, do not assume that it will necessarily gather substantial “new” evidence to support a claim of discrimination. The Commission investigator may not have the time or resources to carry out as full an investigation as would be ideal. It is quite possible that the investigator will rely to a large degree on evidence collected and provided to him/her by the respondent and the complainant. Proceed on the assumption that you and the complainant will have to bring together the evidence – witnesses, copies of rental or job applications, etc. - required to prove the allegations. The more support that the complainant can provide to the Commission during the investigation process, the better the chances of a successful outcome.

On completion of the investigation, the investigator will provide a written report to the Director including details of the complaint, the respondent and complainant's positions, and any evidence that has been gathered. As indicated above, the investigator will also make a recommendation regarding whether there it would be appropriate to proceed to a hearing. The Director, in turn, will provide a copy to each of the parties to the complaint. Each party will then have an opportunity to respond to the report. This report is very important. In CERA's experience, the investigator's recommendation is an extremely good predictor of whether or not the complaint will proceed.

After receiving the report and any replies, the Director will make a determination about whether the complaint will be dismissed, deferred, or referred to the Adjudication Panel.

8. SETTLEMENT

If a settlement is reached through mediation, during the investigation process, or at any other point during the complaint process, a copy of the agreement must be provided to the Director within 14 days of it being reached. Once the Director obtains the settlement, she will immediately stop proceedings under the complaint process. If a settlement agreement is breached, the Director has the right to reopen the complaint. A settlement agreement is completely confidential unless there is consent - from both parties - to release a participant’s name.

While settlement can be an effective way to resolve a complaint quickly, it is important to keep in mind that the educational value of the complaint will be lost through a confidential settlement. Organizations, the Human Rights Commission and the complainant will not be able to use the complaint to educate others about the *Human Rights Act* and discriminatory practices. In addition, developing a body of human rights case law is a very important part of promoting human rights. In some circumstances - for

example, where the complaint is tackling a hidden or systemic form of discrimination - the complainant may decide against settling the complaint in order to get a formal decision on the case.

9. REFERRAL TO ADJUDICATION

If a complaint is not dismissed, deferred, or settled, the Director must refer it to the Adjudication Panel for a decision. The Director must inform the parties of the referral in writing.

CHAPTER 7

ADJUDICATION OF A HUMAN RIGHTS COMPLAINT

1. THE NWT HUMAN RIGHTS ADJUDICATION PANEL

The Human Rights Adjudication Panel (Panel) is an independent panel that holds hearings on human rights complaints to determine if there has been a violation of the *Human Rights Act*.The Panel and the Human Rights Commission (Commission) are separate bodies that act independent of one another. Commission members cannot be Panel members. The Panel has its own governing rules, policies and procedures, which are drafted by the Panel itself.

2. PARTIES TO A COMPLAINT

The parties to a complaint referred to adjudication are the complainant (if there is one), the respondent and any other person who appears to the adjudicator to have violated the *Act* in respect of the complaint before it. The adjudicator may add parties to the complaint at any time after the referral.

The Commission is not a party unless it initiated the complaint or requested that it be added on referral. If the Commission becomes a party to the complaint, it will be appearing before the Panel to represent the public interest. The Commission will not be appearing on behalf of the complainant. While in most cases the public interest will be consistent with the interests of the complainant, this is not necessarily the case.

3. THE HEARING AND THE DECISION

A hearing before the Panel is open to the public unless decided otherwise by the adjudicator. If one party does not show up, the adjudicator may proceed anyway. Human rights tribunal hearings, such as hearings before the NWT Adjudication Panel, are typically similar to court proceedings, but less formal. The adjudicator (or adjudicators) will hear legal arguments from the parties, witnesses will be examined and cross-examined, and in

certain cases parties may even decide to bring forward expert witnesses to testify on certain issues, such as the prevalence of discrimination against low income people, or the historical disadvantage of certain communities. While it is possible for a complainant to represent him/herself at a human rights hearing, the process can be complex and intimidating. In most circumstances, it will be best for the complainant to have a representative that has experience with the *Act* and tribunal hearings.

On completion of the hearing, the adjudicator will decide whether the complaint has merit or if it should be dismissed. If the complaint is dismissed, the adjudicator must provide written reasons.

If the adjudicator finds that the complaint has merit, the adjudicator may do any of the following:

- Order the respondent to stop the violation
- Order the respondent to refrain in the future from committing the same or a similar violation
- Grant the rights, etc. denied to the complainant
- Compensate the complainant for actual financial losses (this could include lost wages, or extra rent the complainant had to pay if he/she was forced to rent alternate, more expensive housing)
- Compensate the complainant for injury to dignity, feelings and self respect (any amount appropriate)
- Reinstate an employee (if it is an employment issue)
- Award extra compensation to a maximum of $10,000.00, if the respondent's conduct was willful or malicious
- Take any other appropriate action to put the complainant in the position he or she would have been in had the discrimination not occurred
- Declare that the conduct described in the complaint was discriminatory

Any or all of these orders may be made against each respondent. A written copy of the order must be provided to each of the parties and to the Director of Human Rights. The order is just like a court order and may be enforced in the same way.

4. COSTS AWARDS

An adjudicator can order that the complainant or the respondent pay the other parties' legal costs. The adjudicator may do so if the complaint was frivolous or vexatious, if the complaint proceeding has been frivolously or

vexatiously prolonged by conduct of a party, or if there are extraordinary reasons to do so. However, this should not frighten away potential complainants. Typically, it is very rare for a human rights adjudication body to order costs against a complainant.

5. APPEALING A DECISION OF THE ADJUDICATION PANEL

Any party to a complaint may appeal the adjudicator's order within 30 days of receiving it. An appeal should be made in writing to the NWT Supreme Court and must be served on all the parties involved. The Supreme Court can agree with, modify or reverse the order and make any other order it feels is appropriate.

6. PRECEDENT VALUE OF DECISIONS

Unlike decisions of a court, decisions of the Adjudication Panel are not precedent setting. That is, adjudicators at future hearings **do not** have to follow previous decisions. That being said, human rights tribunal decisions are generally seen to be very persuasive. It is safe to assume that a decision of the Panel on a particular issue will be a strong indication of how the Panel will approach that issue at future hearings. Decisions of the Panel are public and, therefore, can have a huge educational value. As will be discussed later in the kit, they can be very helpful in negotiations with housing providers, employers, service providers and others.

SECTION 8

HUMAN RIGHTS PRIMACY AND ADMINISTRATIVE TRIBUNALS

As discussed earlier, human rights legislation, such as the *Human Rights Act*, is **quasi-constitutional** in nature and takes precedence over, or "trumps", other pieces of legislation. Human rights laws have what is said to be “paramountcy” or “primacy”. Even where such primacy is not explicitly set out, the Supreme Court has held that human rights legislation "should be recognized [as] fundamental law.”[29]

The Supreme Court[30] recently affirmed the importance of human rights legislation. In a 2006 decision called *Tranchemontagne* the Court said that human rights law was indeed “fundamental, quasi-constitutional law” that “must be recognized as a law of the people” and accordingly, “must not only be given expansive meaning, but also offer accessible application”.[31] The decision held that boards and tribunals, who have the authority to decide legal questions, **must apply** human rights legislation where a human rights issue arises in a hearing before them. The Court said that this was “consistent with [the] Court’s jurisprudence affirming the importance of accessible human rights legislation”.[32]

The Court reiterated how important it is for an administrative tribunal to decide the **entire** dispute before it, particularly where that dispute encompasses human rights issues and the applicants are vulnerable:

> …encouraging administrative tribunals to exercise their jurisdiction to decide human rights issues fulfills the laudable goal of bringing justice closer to the people … [these] are not individuals who have time on their side… [they] merit prompt, final and binding resolutions for their disputes … human rights legislation [is] often … “the final refuge of the disadvantaged and the disenfranchised” and the “last protection of the most vulnerable members of society”. But

[29] Zinn and Brethuor, *The Law of Human Rights in Canada: Practice and Procedure,* (Canada Law Books) at p.1-2,3 (Insert October 2005)
[30] For the purposes of this section, it is important to note that Supreme Court decisions are binding on all courts and tribunals in Canada.
[31] *Tranchemontagne v. Ontario (Dir., Disability Support Program)* (2006), 56 C.H.R.R. D/1, 2006 SCC 14 at par. 33
[32] *Tranchemontagne* at par. 47

> this refuge can be rendered meaningless by placing barriers in front of it. Human rights remedies must be accessible in order to be effective[33].

In your work with administrative boards and tribunals other than the Adjudication Panel, these general principles regarding human rights law and the recent Supreme Court ruling have very important and practical implications. For example, with regard to housing this ruling means that the Rental Officer is legally obliged to consider the human rights issues that arise in the context of landlord and tenant disputes. Similarly, with regard to income security, Community Appeal Committees and the Territorial Social Assistance Appeal Board have an obligation to consider human rights issues raised in income assistance appeals brought before them.

While this may seem obvious, more often than not it is a struggle to get human rights issues heard by administrative tribunals that are not specifically set up to adjudicate human rights claims. Much of your work in this regard will be awareness-building: as an advocate, you will have to educate tribunals on the primacy of human rights legislation and on their obligations to consider human rights issues raised before them. The *Tranchemontagne* decision can be your ammunition. Hopefully, in time, this will become second nature to all tribunals.

Here are a few examples of where tribunals should be considering human rights arguments:

1. HOUSING TRIBUNALS

Jonas has Tourette Syndrome. He moved into an apartment complex last year. Over the course of the year, many tenants in the building have complained about Jonas and said that they are uncomfortable and even frightened by his behaviour. The landlord has filed an eviction application against Jonas pursuant to s.54(1)(a) of the *Residential Tenancies Act*, which states:

> (a) the tenant has repeatedly and unreasonably disturbed the landlord's or other tenant's possession or enjoyment of the residential complex;

Jonas and his landlord are now before the Rental Officer. Jonas' representative provides the Rental Officer with medical documentation regarding Jonas' disability. The Rental Officer refuses to consider the

[33] *Tranchemontagne* at par. 52, 48, 49

documentation and the representative's arguments regarding disability and tells Jonas that he should go to the Human Rights Commission. In a case like this, the refusal of the Rental Officer to deal with the human rights issue before him will likely result in Jonas being evicted, as it may be too late to obtain a timely resolution through filing a formal complaint with the Human Rights Commission. In accordance with *Tranchemontagne,* the Rental Officer is obligated to deal with the human rights issues to ensure that Jonas has real access to justice.

2. SOCIAL BENEFITS TRIBUNALS

Maz has recently arrived in Canada as a refugee. She is from Ethiopia. Although she speaks Italian, Swahili and Arabic, she is just learning English and working on her comprehension. For the past three months, Maz has relied completely on social assistance. This month, through the community centre she goes to, she got a job with the janitorial staff on Saturdays. She is thrilled because she has a job - even though it is one day a week – and she has a little bit of extra income.

One day while working, Maz sees her caseworker. She approaches her, proudly says hello and tries to tell her about the job. The caseworker responds, but Maz is not really sure what she says. A week later Maz receives correspondence from the caseworker advising her that her social assistance has been cancelled due to her failure to report income. A hearing is scheduled for the following week. At the hearing, it becomes clear that Maz did not understand that she had to report any additional income and it also becomes clear that this failure is the result of her limited English comprehension as a newcomer to Canada.

Maz's representative at the hearing tells the Community Appeal Committee that under human rights law, Maz's situation should be accommodated and that her benefits should not be cancelled.

CHAPTER 9

INCOME SECURITY, THE RIGHT TO HOUSING AND THE *HUMAN RIGHTS ACT*[34]

Having an adequate and secure income is a critical component of many rights, including the right to housing. Using human rights protections under the *Human Rights Act* to promote income security will thus be an important part of promoting and protecting housing rights under the *Act*.

The **Universal Declaration of Human Rights**, cited in the Preamble to the *Act*, and other international human rights law that is binding on the government of the Northwest Territories, recognizes the critical link between income and housing. It situates the right to adequate housing within the broader right to "an adequate standard of living, including food, clothing, and housing." Under international human rights law, governments must ensure that disadvantaged groups receive sufficient income to afford the housing that is available, and that they are protected from losing their housing because of sudden changes in income over which they have no control. While these obligations under international human rights law are not directly enforceable under the *Human Rights Act*, they are an important source of interpretation of the kinds of obligations that the NWT government may have under the *Act* to ensure that disadvantaged groups enjoy equal access to housing.

1. HUMAN RIGHTS IN EMPLOYMENT AND ACCESS TO HOUSING

Promoting access to employment without discrimination because of any of the grounds that have been described above is a critical component of advocating for housing rights. Groups with high unemployment rates, such as people with disabilities, Aboriginal people, young people and newcomers are particularly vulnerable to homelessness. Where members of these groups are denied employment or have employment terminated for discriminatory reasons, the respondent employer may not only be held liable for lost wages, but also for other consequences of a discriminatory act, including loss of housing. It is important in these cases to provide evidence of the link between employment discrimination and access to

[34] This section was written by Bruce Porter of the Social Rights Advocacy Centre.

housing to ensure that the Human Rights Commission and the Adjudication Panel are made aware of the severe consequences of employment discrimination in housing.

Employers, as well as landlords, also have obligations to accommodate the needs of protected groups where such accommodation does not impose undue hardship. Accommodation of the needs of disadvantaged groups in employment is often directly linked to income security and the ability to continue to pay rent. People with disabilities and parents caring for children in particular often have distinct needs as employees, including the need for flexibility in leave policies or scheduling. Employers who failed to make allowances for needs related to disability or childcare in probation or leave policies have been found to violate human rights legislation. Where employees face a loss of employment because of issues related to the care of children or distinctive needs related to disability, income security may be addressed by challenging employer actions under the *Act*.

2. CHALLENGING DISCRIMINATORY EXCLUSIONS FROM INCOME BENEFITS

An important strategy in using the *Human Rights Act* to promote income security is to challenge any discriminatory exclusions from income benefits programs.

A critical issue in this regard, highlighted by several United Nations human rights bodies, is the discriminatory exclusion of social assistance recipients from the **National Child Benefit Supplement** through a "clawback" of the benefit. [35] While the policy of the NWT to claw back this benefit may not, on its face, appear to treat social assistance recipients differently from others, the effect of the policy is clearly to deny recipients a benefit provided to other low income households with children. A challenge has been mounted by a number of social assistance recipients in Ontario to the NCBS clawback there, using the equality guarantee in the Canadian Charter of Rights and Freedoms. Similar arguments, however, can be made under the NWT *Human Rights Act*, benefiting from the explicit protection from discrimination because of social condition. A parallel challenge under the *Act* would be a welcome addition to national advocacy in this area.

[35] For a description of the effects of this policy, see Alternatives North, Canada: Stop the National Child Benefit Supplement Clawback. Presented to the UN Committee on Economic, Social and Cultural Rights. (May, 2006). Available at http://www.ohchr.org/english/bodies/cescr/docs/info-ngos/alternatives-north.pdf

Policies which deny fair wages or access to benefits or pensions to part-time workers may also be challenged, not only as discrimination on the ground of social condition, but also as having an adverse effect on women with children, young people, people with disabilities and others who disproportionately rely on part-time work.

Federal programs such as Employment Insurance and the Canada Pension Program (CPP) are governed by the *Canadian Human Rights Act* (*CHRA*) rather than the NWT *Act*, as are income programs administered by Band Councils. Although the protections in the *CHRA* are considerably narrower than those of the NWT *Act*, exclusions from federal programs and Band Council programs may, in many cases, be challenged under this legislation. For example, a refusal by a Band Council to provide social assistance to non-Aboriginal spouses of Aboriginal people living on a reserve was successfully challenged under the *CHRA*. [36]

3. CHALLENGING POVERTY AND INCOME ADEQUACY

In addition to challenging discriminatory exclusion from income programs, it may also be important to consider challenges to the inadequacy of government policies to address poverty and income adequacy. While these types of human rights cases are more difficult to win, they are often of critical importance. One of the greatest problems facing residents of NWT in need of housing is that of affordability – the growing gap between peoples' incomes and what they must pay to rent or own decent housing. Many believe that the right to equality in housing for disadvantaged groups will be largely illusory if government policies which create poverty are not challenged as violations of human rights.

While the *Human Rights Act* does not contain any specific provision guaranteeing an adequate income, there are a number of important aspects of the equality guarantees which can be applied to the issue of inadequate income and inability to pay for housing. When the NWT government makes decisions which affect peoples' level of income, such as when social assistance rates or a minimum wage are established, it can be argued that the government is obliged to consider and respect the rights of disadvantaged groups under the *Act*. If a decision or policy results in the exclusion of a protected group from access to housing, such a decision may be challenged under the *Act*.

Challenges to income inadequacy are a new and emerging area of human rights advocacy. As Louise Arbour, a former Justice of the Supreme Court of Canada and now the UN High Commissioner on Human Rights has

[36] *Shubenacadie Indian Band v. Canadian Human Rights Commission* (2000) F.C.J. No. 702

observed, Canadian advocates and courts have often been "timid" about challenging poverty as a human rights violation.[37] As a consequence, the Human Rights Commission and Adjudication Panel may be resistant to applying the *Act* to decisions of governments related to poverty, particularly those with significant resource implications such as the setting of welfare rates. However, it is important to insist that these issues go to the very heart of what we mean by "substantive equality", and that poverty and homelessness are, indeed, very serious human rights issues. While the government's resource constraints must be given proper consideration by any court or tribunal, the rights of disadvantaged groups to access so basic a right as housing must also be recognized. It is appropriate and necessary for governments to be held accountable by human rights tribunals to the important values affirmed in the Preamble to the *Human Rights Act*, and no category of government decision-making should be assumed to be exempt from human rights review.

One human rights strategy that has been employed by a number of families relying on social assistance in Ontario is to challenge policies which result in a level of social assistance which is too low to allow recipients to access housing. CERA and the Advocacy Centre for Tenants in Ontario assisted a number of social assistance recipients facing housing crises because of inadequate rates to file human rights complaints alleging that the inadequate level of the shelter allowance in social assistance is discriminatory. The complainants argued that the inadequate shelter allowance results in the exclusion of those relying on social assistance from even the most basic housing and that governments, as well as landlords, have obligations to accommodate the needs of this protected group where such accommodation does not impose an undue hardship. This kind of approach would be particularly strategic in the NWT, with the extreme affordability crisis and the broader protection from discrimination because of social condition.

There are also important strategies under the *Act* available to low income workers to challenge lack of income security. The inadequate level of minimum wage in relation to housing costs, for example, can be shown to have a discriminatory effect on low income workers, particularly women, young people, Aboriginal people and newcomers.

Other policies and decisions which deny low income people or social assistance recipients access to an adequate income sufficient to meet housing costs may also be challenged. Since the Residential Tenancies Act authorizes landlords to require a last month's rent deposit, a failure to

[37] L. Arbour, ' "Freedom From Want" – From Charity to Entitlement', LaFontaine-Baldwin Lecture, Quebec City (2005), p. 7, available at: www.unhchr.ch/huricane/huricane.nsf/0/58E08B5CD49476BEC1256FBD006EC8B1?opendocument

provide assistance with last month's rent deposit may be argued to result in the exclusion of social assistance recipients from housing.