



January 1986

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Linda Gehrke

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### Citation Information

Gehrke, Linda. "The Charter and Publicly Assisted Housing." *Journal of Law and Social Policy* 1. (1985): 17-20.

DOI: <https://doi.org/10.60082/0829-3929.1174>

<https://digitalcommons.osgoode.yorku.ca/jlsp/vol1/iss1/2>

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## THE CHARTER AND PUBLICLY ASSISTED HOUSING

Linda Gehrke\*

This article is an attempt to address, in an introductory way, the issues of whether the Canadian Charter of Rights and Freedoms (the Charter) creates a positive right to shelter (section 7); and whether section 15 of the Charter protects public housing tenants from discrimination, or leaves publicly assisted housing programs open to attack.

Article 25 of the Universal Declaration of Human Rights, 1948 defines "security of the person" as:

"Every one has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age, or other lack of livelihood in circumstances beyond his control."

Section 7 of the Charter provides the right to security of the person as follows:

"Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

Section 15 of the Charter provides equality rights as follows:

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

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\* Linda Gehrke is senior staff lawyer at Jane-Finch Community Legal Services. For a more detailed (but less recent) examination by her of the same topic, see her article in the Statute Audit conducted by the Charter of Rights Education Fund. © 1985 Copyright in this article remains with the author.

1. Ministry of the Attorney General, Sources for the Interpretation of Equality Rights under the Charter: A Background Paper (January, 1985), at 57-58.

It might be argued that Article 25 of the Universal Declaration of Human Rights, 1948, which provides for a right to housing, ought to be read into section 7 of the Charter since the Declaration is regarded as a part of the law of the United Nations and international law.

A right to shelter would require the state to provide shelter as a part of "security of the person". This position goes beyond the Federal and Provincial Legislatures' present duty to provide housing under the National Housing Act (Canada), the Ontario Housing Development Act and the Ontario Housing Corporation Act. These acts enable government to fund and provide publicly assisted housing for low income families. They do not, however, create a positive duty to provide publicly assisted housing to all those in need.

Although the Universal Declaration of Human Rights is regarded as international law, it is not a legally binding instrument as such. This Declaration was converted into two conventions - the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Cultural and Social Rights (ICECSR).<sup>1</sup> The right to shelter is an "economic right" and falls under the International Covenant on Economic, Cultural and Social Rights. The ICECSR appears to be meant to be progressively implemented. Although it recognizes the right to "an adequate standard of living" including adequate housing, it does not appear to place a positive duty on governments to provide such an adequate standard of living. It has been argued that the ICECSR may not create positive rights; but in section 15 Charter arguments, where discrimination occurs with respect to ICECSR rights, the ICECSR may be used as an indication of the importance of the individual right which has been affected by government.<sup>2</sup> Thus, the right to housing enumerated in the Universal Declaration of Human Rights and the International Covenant on Economic and Social Rights might be read into the rights protected from discrimination by section 15 of the Charter.

As well, it can be argued on the basis of the case of Re Webb and OHC<sup>3</sup> that subsidized shelter is viewed by Canadian courts as a "benefit" that ought to be protected from discrimination by section 15(1) of the Charter, which provides for equal benefit of the law.

2. Ibid., p.67

3. Re Webb and Ontario Housing Corporation (1977), 18 OR (2d) 427 (Div. Ct.), (1978), 22 O.R. (2d) 257 (C.A.)

The enumerated grounds for discrimination under section 15 are race, national or ethnic origin, colour, religion, sex, age, mental or physical disability. They do not include discrimination on the basis of economic or social status. However, it can be argued that the word "discrimination" in section 15 is not limited to the enumerated grounds. The Ontario Human Rights Code, 1981 prohibits discrimination in housing accomodation based on receipt of public assistance, clearly recognizing an economic or social status ground of discrimination. Thus, denial of publicly assisted housing on the basis of race or sex is likely to be an infringement of the section 15 right to equal benefit of the law; and denial of housing on the basis of economic or social status is arguably an infringement of section 15.

An attack on publicly assisted housing programs because they discriminate on the ground of economic status (wealth) would hopefully be thwarted by section 15(2) of the Charter, which provides for affirmative action programs whose object is the amelioration of conditions of disadvantaged individuals. Section 15(2) appears also to protect publicly assisted housing programs from attack on the basis that they primarily house families headed by single mothers,<sup>4</sup> since women, particularly elderly widows and single mothers, have been shown by statistics to be disadvantaged groups.<sup>5</sup>

In R. v. Videoflicks,<sup>6</sup> the Ontario Court of Appeal concluded that it is the "effect" or "adverse impact" of impugned legislation which is most important in the interpretation of the Charter. Thus, discrimination would include discrimination not only by intent or purpose, but also by adverse impact on disadvantaged groups. The adverse impact analysis is very important for the advancing of the interests of women, visible minorities and the disabled.

The Ontario Film and Video Appreciation Society<sup>7</sup> case (OFAVAS)

4. In July, 1983 among OHC tenants, 52,466 were female primary tenants, while 23,144 were male; and there were 24,464 single mother-led families compared to 950 single father-led families: Ontario Housing Corporation Statistics, (Easytrieve, July 22, 1983).
5. CCSD, National Task Force Report 1984, Not Enough, the Meaning and Measurement of Poverty in Canada.
6. R. v. Videoflicks Ltd. (1984), 48 O.R. (2d) 395 at 415 (Ont. C.A.).
7. (1985), 41 O.R. (2d) 583 (Div. Ct.), Affirmed, 24 A.C.W.S. (2d) 285 (C.A.)

raises interesting possibilities for challenging discriminatory housing policies. In the OFAVAS case the Divisional Court (affirmed by the Ontario Court of Appeal) held that where the standards used by the Ontario Board of Censors to censor films were not prescribed by statute or regulation, but were left to the discretion of the Board, the limitation on freedom of expression imposed by the legislation cannot be permitted by operation of section 1 of the Charter. The rationale of the decision is that a limitation left to administrative discretion, whether or not reasonable, is not one prescribed by law.

In the case of OHC, eligibility for housing is not set out in the statutes or regulations, except to enable governments to provide publicly assisted housing for low income families.<sup>8</sup> Thus, OHC eligibility policies which discriminate against disadvantaged groups by adverse impact or otherwise may ultimately be struck down as being limitations to the right to equal benefit of the law which are not "prescribed by law".

There may be discrimination on the face of housing legislation on the ground of family status. Although not an enumerated ground in s. 15(1) of the Charter, marital status is a ground for discrimination in the Ontario Human Rights Code, 1981.

OHC policies which discriminate on enumerated grounds in the provision of publicly subsidized housing (for example, more stringent eligibility requirements for sponsored immigrants or the disabled) might be challenged under section 15; it might also be argued that OHC policies fail to meet the section 1 Charter test of being "prescribed by law", on the reasoning adopted by the Ontario Court of Appeal in the OFAVAS case. Policies which are not discriminatory on their face but discriminate by adverse effect may be challenged, based on the reasoning in the Videoflicks case. Policies which discriminate on enumerated grounds (race, sex, disability) would make stronger cases for challenge than discrimination on non-enumerated grounds (status). As well, it may be worthwhile to consider whether paragraph 36(1)(a) of the Charter which provides a commitment to promoting equal opportunities for the well-being of Canadians can be argued in support of expenditures for publicly assisted housing projects.

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8. National Housing Act (Canada).