

LAW REFORM  
COMMISSION  
OF  
NOVA SCOTIA



# Seniors-only Housing

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Final Report - April 2011

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# **Final Report**

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## **Seniors-only Housing**

**Law Reform Commission of Nova Scotia  
April 2011**



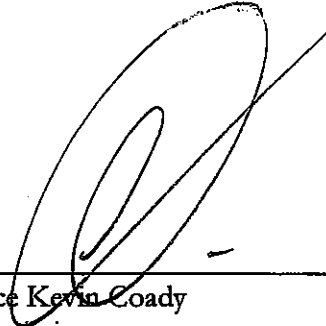
Law Reform Commission of Nova Scotia

To: Ross Landry  
Minister of Justice and Attorney General

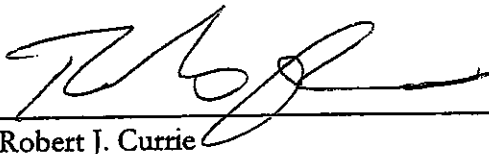
In accordance with section 12(3) of the *Law Reform Commission Act*, we are pleased to present the Commission's Final Report, *Seniors-only Housing*.




Anthony L. Chapman Q.C.  
President



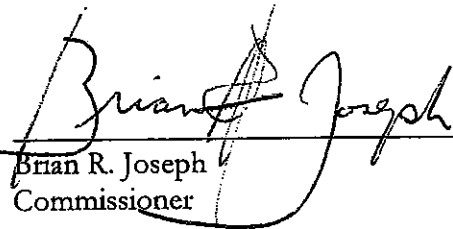
Justice Kevin Coady  
Commissioner



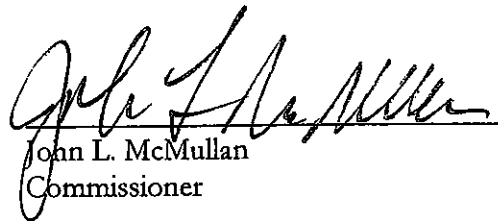
Robert J. Currie  
Commissioner



Darlene A. Jamieson Q.C.  
Commissioner



Brian R. Joseph  
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John L. McMullan  
Commissioner

The Law Reform Commission of Nova Scotia was established in 1991 by the Government of Nova Scotia under an *Act to Establish an Independent Law Reform Commission*.

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Justice Kevin Coady  
Robert J. Currie  
Darlene Jamieson Q.C.  
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## **INTRODUCTION**

This report considers whether to amend the Nova Scotia *Human Rights Act*<sup>1</sup> to provide an exemption for seniors-only housing. Under such an exemption, a housing development (nursing home, assisted living facility, mobile home park, public housing, condominium project, subdivision, etc.) which restricted residence to seniors would be immune from a complaint of age discrimination under the *Act*. Such an exemption has been adopted in British Columbia, Saskatchewan and Newfoundland & Labrador.

In Nova Scotia, a private members bill along similar lines was introduced in 2006, but did not pass. In 2007 Halifax Regional Council recommended that the province consider such an amendment, to address an increasing need for housing restricted to seniors. The question of whether to introduce such an exemption into the Nova Scotia *Act* was referred to the Commission by the Attorney-General in March of 2010.

The Commission published a Discussion Paper in December of 2010. The Paper set out the Commission's preliminary conclusion that an exemption for seniors-only housing should not be introduced into the Nova Scotia *Human Rights Act*. The Paper invited public comment on this proposal, and some related questions. We received a number of responses (see Appendix A). Some voiced support for the Commission's preliminary conclusion, and some not. In the end, we remain of the view that the *Act* should not be amended to include an exemption. In the discussion to follow, we address the concerns of those respondents who favoured a statutory exemption.

This report first discusses the potential scope of 'seniors only housing' developments, and outlines the current situation in Nova Scotia. It then identifies the problem of age discrimination under the *Human Rights Act*, and describes the legislative provisions that some other provinces have adopted to avoid that problem.

A number of social policy issues are raised by the question of introducing an express amendment into the *Human Rights Act*. The report adopts a justification framework for examining those issues.

We conclude that the Nova Scotia *Human Rights Act* should not be amended to expressly exempt seniors-only housing. The compelling interests that may be served by some forms of housing that cater to seniors' distinctive needs are better protected, we suggest, by a case-specific approach under the existing provisions of the *Human Rights Act*, rather than a blanket exemption for any seniors-only rule in respect of housing.

## **SENIORS-ONLY HOUSING IN NOVA SCOTIA**

As used here, the term 'seniors-only housing' encompasses a variety of accommodation which may be restricted to senior residents. In Nova Scotia, there is a spectrum of housing options which to some extent cater to the special needs of seniors. At one end of the spectrum is the

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<sup>1</sup> R.S.N.S., 1989, c.214 (as am.) ("the *Act*").

traditional nursing home. Short of that are residential care facilities, which provide personal (non-nursing) care, supervision and accommodation. In addition to the larger residential care facilities are smaller, privately operated facilities, which are referred to in Nova Scotia as community-based residential facilities. Nursing homes, residential care facilities and community based residential facilities are governed by the *Homes for Special Care Act*,<sup>2</sup> and are supervised by the Provincial government.<sup>3</sup>

Beyond the traditional sorts of care facilities are assisted or 'enriched' living arrangements, in which some of the residents' daily living needs and activities are met through services provided by the facility, but in which the resident often resides in a separate, self-contained unit to which he or she controls access, and which are governed by an agreement between the resident and the operator.

Finally, at the furthest end from the nursing home option would be any sort of residence or community which caters to seniors as a target market but is otherwise similar to generally available forms of housing. The building may be designed with accessibility in mind, and there may be recreational and social programs geared for seniors, but the facility is not intended to provide care or assistance with nursing or non-nursing personal needs. Such developments may include condominium corporations, mobile home parks, restricted public housing, rental apartment buildings, and gated communities or subdivisions of single-unit homes.

In Nova Scotia, there are a variety of housing options that cater to seniors needs, but with one exception they do not specifically restrict occupancy to seniors.<sup>4</sup> Exclusive rules on the basis of age are generally understood to be discrimination under the *Human Rights Act*. Instead, these developments may be built and/or marketed as 'senior-friendly', 'adult lifestyle', or simply "for seniors".

The issue arises as the Nova Scotia population grows proportionally more elderly, and demands for housing options for seniors continue to increase. Already Nova Scotia's population includes the highest proportion (15.4%) of seniors over the age of 65 of any Canadian province.<sup>5</sup> It is estimated that that proportion will rise to 28.4% by 2031.<sup>6</sup> While the overall Nova Scotia population is projected to decline between now and 2033, the population of over 65 year-olds will increase by almost 90%.<sup>7</sup>

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<sup>2</sup> R.S.N.S., 1989, c.203 (as am.).

<sup>3</sup> For a survey of the regulatory regime in Nova Scotia, see Canadian Centre for Elder Law, *Report on Assisted Living: Past, Present and Future Legal Trends in Canada* (October 2008) at 62-67.

<sup>4</sup> The exception is social housing under the Department of Community Services, which reserves a sizeable proportion of its available spaces for persons over the age of 58.

<sup>5</sup> Nova Scotia Department of Seniors, *Seniors Statistical Profile 2009* (online: [http://www.gov.ns.ca/seniors/pub/2009\\_StatProfile.pdf](http://www.gov.ns.ca/seniors/pub/2009_StatProfile.pdf)) at 8.

<sup>6</sup> *Ibid.*, at 16.

<sup>7</sup> *Ibid.*, at 12.



Generally seniors over the age of 65 in Nova Scotia own or rent their own homes. In 2009, 3.6% of seniors over 65 lived in licensed nursing homes, and 0.8% lived in residential care facilities.<sup>8</sup> We can expect, in other words, demand for housing options other than institutional care to increase dramatically as the population ages in both absolute and relative terms.

Some of that demand will be for housing which is exclusive to seniors, as is available elsewhere in Canada and the United States. The Atlantic Seniors Housing Research Alliance (ASHRA) conducted surveys of seniors in the Atlantic provinces and found a broad preference for seniors-only and adults-only residences, which tended to increase as the survey respondents aged:

**Preferred type of housing arrangement in the future<sup>9</sup>**

(n=1395)	For seniors only	For seniors and middle-aged adults	For people of all ages, including families with children
Lowest thru 64	23.3	50.0	26.7
65-69	31.2	46.0	22.5
70-74	31.8	46.4	21.5
75-79	38.4	43.5	17.8
80-84	44.7	40.9	14.4
85 thru highest	54.0	35.6	10.3

As well, ASHRA has identified certain sectoral gaps in the available housing market for seniors. Certainly the private market for seniors housing, and particularly assisted living facilities, has proliferated in recent years, and Nova Scotia now has one of the highest vacancy rates for seniors housing in the country.<sup>10</sup> But ASHRA notes:

There appear to be gaps in availability of housing with supports, particularly for people with limited incomes:

The gap between independent housing and assisted living: housing that might include on-call help with a variety of personal and housing-related needs, but primarily independent, worry-free living (no yard or house maintenance). Public housing for seniors is targeted at seniors who are capable of independent living. There are “high end” options in some of the major centres in Atlantic Canada, but there are few assisted living options for persons of “moderate/modest” income.

<sup>8</sup> *Ibid.*, at 65.

<sup>9</sup> Donald V. Shiner, *Report on the Atlantic Seniors’ Housing and Support Services Survey* (Halifax: Atlantic Seniors Housing Research Alliance, 2007) at 31.

<sup>10</sup> At 15.0%, compared to a national vacancy rate of 9.2% in 2010: Canada Mortgage and Housing Corporation, *Seniors’ Housing Report - Canada Highlights 2010* (online: [http://www.cmhc-schl.gc.ca/odpub/esub/65991/65991\\_2010\\_A01.pdf?lang=en](http://www.cmhc-schl.gc.ca/odpub/esub/65991/65991_2010_A01.pdf?lang=en)).

People who live with mental illness are often in need of affordable housing with supports and supervision, but do not necessarily need help with tasks.

The gap between assisted living and nursing home living: housing that might be more home-like than nursing home care, but with more supervision than is currently available in assisted living.<sup>11</sup>

## THE ISSUE: AGE DISCRIMINATION

The legal issue is fairly straightforward. The Nova Scotia *Human Rights Act* prohibits discrimination on the basis of age in the provision of accommodation or the purchase and sale of property. A residence or housing development, restricted to persons above a certain age, is *prima facie* age discrimination.

In particular, the *Act* provides:

5 (1) No person shall in respect of

...

(a) the provision of or access to services or facilities;

(b) accommodation;

(c) the purchase or sale of property;

...

discriminate against an individual or class of individuals on account of

...

(h) age; ...

Nova Scotia's *Act* does not expressly address residential tenancies, as some other provinces do. But 'accommodation' appears to include residential tenancies; in particular, section 6(b) of the *Act* provides that a landlord can discriminate in the rental of a one-room home apartment, such that the anti-discrimination provision does not apply:

in respect of *accommodation*, where the only premises *rented* consist of one room in a dwelling house the rest of which is occupied by the landlord or the

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<sup>11</sup> Atlantic Seniors Housing Research Alliance, *Key Issues in Housing for Atlantic Canadian Seniors: Ideas for Discussion - draft version* (Halifax: Atlantic Seniors Housing Research Alliance, 2009) (online: <http://ashra.msvu.ca/Stadnyk%20ashra%20gaps%20May09%20final.pdf>) at 11.

landlord's family and the landlord does not advertise the room for rental by sign, through any news media or listing with any housing, rental or tenants' agency; *Act*, s.6(b) [emphasis added].

So accommodation includes rental housing, and in general a landlord may not discriminate in the provision of accommodation, including on the basis of age.

The *Act* has a number of exemptions that may be relevant to a seniors-only rule. For example, the *Act* allows for certain preferential treatment for seniors, at s.6(a). But this is a narrow exemption, applicable only in the limited context of providing services or facilities. Section 6 (a) provides that the protection against discrimination does not apply:

in respect of the provision of or access to services or facilities, to the conferring of a benefit on or the providing of a protection to youth or senior citizens;

...

Unlike comparable provisions in other provinces,<sup>12</sup> this does not apply to accommodation or to the purchase and sale of property. While some seniors housing options provide programs and services, and might be exempt in respect of a seniors-only rule to that extent, the 6(a) exemption does not encompass housing *per se*. It does not do what the proposed statutory exemption would; that is, immunize seniors-only housing as such from any human rights complaint.

The *Act* provides a more general exemption for legitimate differentiation, at s.6(f)(i). It provides that the prohibition on discrimination does not apply where the alleged discrimination is “based on a *bona fide* qualification”. This would permit an age-based eligibility requirement for housing, but only where it meets the test for a *bona fide* qualification - rationally connected to the development’s objectives, made in good faith, and subject to the duty to accommodate to the point of undue hardship.<sup>13</sup> While this may shield certain seniors-only residences, it would likely not apply to seniors-exclusive developments in general. Rather, it would apply to only those facilities serving significantly distinctive needs of seniors, in situations where allowing younger persons in would constitute undue hardship.

Finally, the *Act* provides an exemption for so-called affirmative action programs. The prohibition on discrimination does not apply:

(i) to preclude a law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or classes of individuals, including those

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<sup>12</sup> For example, section 15 of Ontario’s *Human Rights Code*, R.S.O. 1990, c. H.19, provides that, “A right under Part I to non-discrimination because of age is not infringed where an age of sixty-five years or over is a requirement, qualification or consideration for preferential treatment.”

<sup>13</sup> *British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U.*, [1999] 3 S.C.R. 3 (S.C.C.) (“*Meiorin*”). In the housing sector see, e.g., *Leonis v Metropolitan Toronto Condominium Corp. No. 741*, (1998) 33 C.H.R.R. D/479 (Ont. Bd. Inq.).

who are disadvantaged because of a characteristic referred to in clauses (h) to (v) of subsection (1) of Section 5.

This might apply to certain seniors housing developments, that are designed to remedy conditions of disadvantage suffered by seniors. The most likely example would be seniors-only social housing. Seniors, and in particular elderly women, are disproportionately affected by poverty and attendant disadvantage. But like the *bona fide* qualification exemption, it would not likely cover adult lifestyle residences.

It is worth mentioning that under the *Act*, the Nova Scotia Human Rights Commission may exempt certain programs or activities from the *Act's* non-discrimination provisions, in its discretion. In particular, ss. 9 and 25 of the *Act* provide:

#### Exemption by Commission

9 Notwithstanding anything in this Act, the Commission may exempt a program or activity from subsection (1) of Section 5, or a part thereof, where, in the opinion of the Commission, there is a *bona fide* reason to do so.

...

#### Approval of program

25 The Commission may approve programs of Government, private organizations or persons designed to promote the welfare of any class of individuals, and any approved program is deemed not to be a violation of the prohibitions of this Act.

It is worth considering whether such Commission approval of seniors-only housing projects on a case-specific basis would serve as an adequate, or even preferable, alternative to a blanket statutory exemption. We address this below.

In summary, while the *Act* at present provides some opportunities for protection for seniors-only housing, it would not likely protect all such developments.

## **OTHER JURISDICTIONS**

British Columbia, Saskatchewan and Newfoundland and Labrador provide a blanket statutory exemption for seniors-only housing. They differ in terms of the types of housing to which each applies, and also in terms of flexibility regarding the number of residents who may be below the age limit. British Columbia's *Human Rights Code*<sup>14</sup> provides that the *Act's* protection against age-related discrimination in rental tenancy does not apply:

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<sup>14</sup> R.S.B.C. 1996, c. 210.

if the space is a rental unit in residential premises in which every rental unit is reserved for rental to a person who has reached 55 years of age or to 2 or more persons, at least one of whom has reached 55 years of age;<sup>15</sup>

...

The *Saskatchewan Human Rights Code*<sup>16</sup> provides:

Nothing in subsection (1) prohibits the renting or leasing, the offering for rent or lease or the advertising for rent or lease, of any housing accommodation for occupancy by persons over 55 years of age exclusively.<sup>17</sup>

...

The Saskatchewan *Code* extends the exemption to the purchase and sale of property:

Nothing in subsection (1) prohibits the sale, the offering for sale or the advertising for sale of a place of dwelling for occupancy by persons over 55 years of age exclusively.<sup>18</sup>

...

The Newfoundland and Labrador *Human Rights Act, 2010*<sup>19</sup> provides that its protection against discrimination in rental housing does not apply:

... to the renting or leasing, the offering for rent or lease, or the advertising for rent or lease of a commercial unit or self-contained dwelling unit, where the unit is a rental unit in premises in which every rental unit is reserved for rental to a person who has reached the age of 55 years, or to 2 or more persons, at least one of whom has reached the age of 55.<sup>20</sup>

Seniors-only housing can be exempted from anti-discrimination provisions in more general ways as well. Section 15 of the Ontario *Human Rights Code* provides:

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<sup>15</sup> *Ibid.*, at s. 10(2)(b)(i).

<sup>16</sup> S.S. 1979, c. S-24.1.

<sup>17</sup> *Ibid.*, at s. 11(4).

<sup>18</sup> *Ibid.*, at s.10(3).

<sup>19</sup> S.N.L. 2010, c.H-13.1.

<sup>20</sup> *Ibid.*, at s. 12(4).

A right under Part I to non-discrimination because of age is not infringed where an age of sixty-five years or over is a requirement, qualification or consideration for preferential treatment.

Finally, the legislation may simply deny the protection against age related discrimination in the area of housing altogether. Alberta provides no protection from age-based discrimination in the area of accommodation,<sup>21</sup> or tenancies.<sup>22</sup> British Columbia provides none with respect to the purchase of real property.<sup>23</sup>

## Cases

Age-based restrictions on housing eligibility have been the subject of human rights cases in other jurisdictions. But because these cases have concerned the particulars of exemptions in the legislation in the relevant jurisdiction, they are not necessarily instructive in assessing how age-related restrictions will, or ought to, fare under human rights scrutiny, absent an exemption. The critical analysis of a *bona fide* qualification or ameliorative program is largely missing from these decisions. On the other hand, they provide some indication of the sorts of issues that can arise in respect of seniors-only rules in the area of accommodation.

In *Craig v Williams*,<sup>24</sup> the complainant wished to sell her mobile home. The mobile home park had recently adopted a policy that pads would only be leased to households with no children, in which at least one resident was over the age of 55. The existing residents were grandfathered, but any new residents would have to be in compliance with the policy. The complainant challenged the policy on the basis of age and family status discrimination. The park owners relied on the over-55 exemption in s. 10(2)(b)(i) of British Columbia's *Act*, where all of the units are "reserved for" rental by persons over 55, or at least one of whom is. The complainant argued that the exemption did not apply, since not all of the mobile homes were occupied by families which were compliant with the policy - some of the grandfathered homes had younger adults in them. Thus the issue was whether "reserved for" could accommodate grandfathering, or instead meant only "currently occupied by".

The Council of Human Rights noted the purpose for the exemption, as given during legislative debates:

... the legislation provides an exemption for seniors, to allow people of advanced years to have an opportunity to choose their lifestyle and to live in seniors' accommodations which are specifically designed and operated for their convenience.<sup>25</sup>

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<sup>21</sup> *Alberta Human Rights Act*, R.S.A. 2000, c. A-25.5, s.4 (goods, services, accommodation or facilities).

<sup>22</sup> *Ibid.*, s.5 (tenancy). Purchase and sale of property is not covered by the *Alberta Act*.

<sup>23</sup> *Human Rights Code*, *supra* note 14, s.9.

<sup>24</sup> *Craig v Williams*, (1995) 24 C.H.R.R. D/265 (B.C. Coun. H.R.).

<sup>25</sup> *Ibid.*, at para. 21.

Finding therefore that the exemption was not a limitation on human rights that ought to be narrowly construed, the Council determined that ‘reserved for’, according to its plain meaning, must include grandfathering.<sup>26</sup> Otherwise, the park owners would have to evict all those who were under the age limit, or jettison their older adult-only housing concept entirely.<sup>27</sup>

In *North Vancouver (District) v. Lunde*,<sup>28</sup> a residential complex was subject to a restrictive covenant to the effect that at least one person in every unit would have to be over the age of 50, and no person could be younger than 19. The 182-unit building was initially developed as an enriched living community, providing activities and programming at the developer’s neighbouring recreational club, meals, and personal (non-medical) care. At the time, this did not present a problem in human rights law; BC’s *Act* did not cover discrimination in sale or rental of property on the basis of age. The *Act* was subsequently amended to prohibit age-based discrimination with regard to residential tenancies, however.

The developer eventually abandoned the concept of a congregate seniors community with programming, meals and so forth. It converted the units into strata lots for sale, and requested elimination of the age restriction. Some of the occupant families were already not in compliance with the age limits, and some of the unit owners wished to rent their units without being bound by the covenant. The municipality refused the request, and sought a declaration as to the enforceability of the restriction.

At the time of the application, British Columbia’s *Act* limited age-based protection to those between 19 and 65 years. It further contained an exemption for seniors housing, to the effect that the prohibition on age-based discrimination did not apply, “if the space is a rental unit in residential premises in which every rental unit is reserved for rental to a person 55 years of age or older or to 2 or more persons, at least one of whom is 55 years of age or older ...”

The chambers judge considered that the covenant did not breach the *Act*. In the first place, there was no prohibition on age discrimination in the purchase and sale of property, such as the strata lots. Therefore the covenant, as applied to owner-occupiers, was not in breach of any provision in the *Act*. As for the *Act*’s prohibition on age discrimination in rental housing, there was no breach since the owners who wished to rent their units could respect both the *Act* and the covenant by offering their units for rent to those 65 or older, thus falling outside the *Act*’s age limit for protection. Alternatively, the unit owners could rent such that at least one occupant was over the age of 55, rather than 50 (thereby coming under the *Act*’s limited exemption for seniors housing).

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<sup>26</sup> *Ibid.*, at para. 24.

<sup>27</sup> The park had been originally developed with specific activities and programs for seniors, and at the time only 2 per cent of the mobile homes were occupied by persons under the age limit. The change in policy was prompted by a change in British Columbia’s legislation, prohibiting age discrimination in housing, except for the over-55 exemption.

<sup>28</sup> *North Vancouver (District) v. Lunde*, [1997] B.C.W.L.D. 199 (S.C.).

The Court of Appeal more or less agreed with this rather strange result, saying:

The age restriction in the Covenant does not require any strata lot owner to commit the strata lot to occupancy by a tenant. ... As Madam Justice Allan said, an owner-occupier who is contemplating committing his or her strata lot to occupancy by a tenant must comply with both the Restrictive Covenant and the *Human Rights Act*. That can be done by either not renting out the strata lot at all or by renting it only to someone over 64. That restriction on renting out a strata lot does not involve any conclusion that the age restriction in the Covenant is discriminatory in any relevant sense, nor any conclusion that it contravenes s.5 of the *Human Rights Act*. The Restrictive Covenant does not require or compel an owner to rent out that owner's strata lot to someone over 50, or at all.<sup>29</sup>

*Lunde* therefore does not deal with the important issue of whether and in what circumstances an age-related restriction for housing eligibility will unjustifiably infringe human rights principles, absent a statutory exception.<sup>30</sup>

In *Condominium Plan No. 931 0520 v. Smith*,<sup>31</sup> the Alberta Court of Queen's Bench side-stepped the issue, deciding that condominium by-laws passed by the approved procedure could legitimately restrict the 25-unit condo development to occupation solely by those over 45.<sup>32</sup> Hawco J. spoke approvingly of condos developed for specialized populations like seniors and the handicapped,<sup>33</sup> but rested his decision on the more fundamental premise that by-laws passed by special resolution of the condo corporation were important expressions of the private contractual and property rights of the owners, interference with which would compromise their enjoyment of property and quality of life.<sup>34</sup>

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<sup>29</sup> *North Vancouver (District) v. Lunde*, (1998) 162 D.L.R. (4th) 402 (B.C.C.A.) at para. 15.

<sup>30</sup> See also *Marshall v. Strata Plan No. NW 2584*, (1996) 27 B.C.L.R. (3d) 70 (S.C.) at para. 23 (in obiter): "As far as rental accommodation is concerned, the Legislature has prohibited discrimination against tenants on the basis of age, but has made an express exception for premises in which every rental unit is designed for people 55 years of age or older. Clearly, the legislation recognizes the legitimacy of retirement communities where people of advancing years may live together with other members of their own generation. The Legislature has made a policy choice to permit this differentiation, based upon age, to exclude younger tenants. The benefits resulting from permitting older people to band together in retirement communities must be taken to outweigh the adverse consequence of placing some rental accommodation beyond the reach of younger people."

<sup>31</sup> *Condominium Plan No. 931 0520 v. Smith*, (1999) 239 A.R. 319 (Q.B.).

<sup>32</sup> As noted above, Alberta's *Act* does not protect against age-based discrimination in the area of accommodation, but presumably the human rights challenge was on the basis of family status; the condominium corporation was petitioning to have the respondents' son prohibited from living with them.

<sup>33</sup> *Ibid.*, at para. 8, citing *Condominium Plan No. 8810455 v. Spectral Capital Corp.* (1990), 14 R.P.R. (2d) 305 (Alta. Q.B.).

<sup>34</sup> *Ibid.*, at para. 7, citing *York Condominium Corp. No. 216 v. Borsodi* (1983), 148 D.L.R. (3d) 290 (Ont. Co. Ct.).



Absent an exemption from anti-discrimination provisions, blanket age-based restrictions in the area of accommodation have tended to fare poorly in human rights challenges. In *Moxon v Samax Investments Ltd.*,<sup>35</sup> the complainants and their children were denied housing in adults-only buildings. The Board considered that the policy was grounded in a stereotype of noisy children, with no individual assessment of applicant families, and was therefore discriminatory (on the basis of family status) under Manitoba's *Human Rights Act*.<sup>36</sup>

In *Desroches v Québec (Comm. des droits de la personne)*,<sup>37</sup> the complainant challenged a landlord's policy of renting apartments to a maximum of two occupants. The complainant wanted to host her two children on Sundays, by the terms of a custody arrangement with her former spouse. Finding that the landlord's policy was a clear and very effective anti-child policy,<sup>38</sup> and *prima facie* discriminatory as such, the Court determined that it was nonetheless rationally related to the running of the landlord's business.<sup>39</sup> But, the landlord failed in its duty to accommodate the complainant, since he could simply have made an exception and rented her the apartment she wanted. The Court observed that there would have been no inconvenience or cost for landlord in doing so, and only minimal nuisance for the other tenants.<sup>40</sup>

In *Leonis v Metropolitan Toronto Condominium Corp. No. 741*,<sup>41</sup> the complainant challenged the adults-only rules on the use of the condominium's recreation facilities. He wished to use the facilities with his daughter, when she visited him. The condominium restricted use of some facilities (e.g., the pools) by children at certain times of the day, and completely denied children's access to other facilities (e.g., billiard room, fitness room and whirlpool). The Board found *prima facie* discrimination on the basis of family status,<sup>42</sup> and went on to assess whether the rules were a "reasonable and *bona fide*" restriction, meaning that the complainant could not be accommodated short of undue hardship. The Board found that the rules in place at the time of the application were not, since they had since been replaced by less restrictive rules, to no apparent hardship.<sup>43</sup> The Board acknowledged the distinct issues presented by children's access

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<sup>35</sup> *Moxon v Samax Investments Ltd.*, (1985) 5 C.H.R.R. D/2835 (Man. Bd. Adj.).

<sup>36</sup> *Ibid.*, at paras. 23198-23199.

<sup>37</sup> *Desroches v Québec (Comm. des droits de la personne)*, (1997) 30 C.H.R.R. D/345 (Que. C.A.)

<sup>38</sup> *Ibid.*, at para. 72.

<sup>39</sup> *Ibid.*, at para. 93: per Zerbisias J.A.: "A landlord hopes to have happy tenants, and it is only natural that a policy be developed to avoid overcrowding or other problems."

<sup>40</sup> *Ibid.*, at para. 113.

<sup>41</sup> *Supra*, note 13.

<sup>42</sup> Age was unavailable as a prohibited ground of discrimination because Ontario's *Act* limited the protection against age discrimination to those between 18-65.

<sup>43</sup> *Ibid.*, at para. 58.

to fitness and pool facilities,<sup>44</sup> which militated against eliminating all age-based rules, and instead ordered that the new rules be maintained.<sup>45</sup> It further ordered that the committee which reviewed the rules from time to time would have to include a parent with one child under 16.<sup>46</sup>

In Nova Scotia, by 2004, in *Leadley v Oakland Developments Ltd.*,<sup>47</sup> it was taken as a given that an adults-only building was simply discriminatory on the basis of family status, with no examination of justification, *bona fides* or reasonableness.<sup>48</sup>

The relevant *Canadian Charter of Rights and Freedoms* cases have also faced many of the same substantive issues. While to our knowledge none of the British Columbia, Saskatchewan or Newfoundland & Labrador seniors-only housing exemptions have been challenged under the *Charter*, broader age-discrimination exempting provisions have been.

In *Hsuen v. Mah*,<sup>49</sup> the tenants were served with a notice of termination of tenancy after they had a child; their lease agreement restricted the building to adults only. At the time, the British Columbia *Human Rights Act* did not prohibit discrimination on the basis of age in the area of rental tenancies. The tenants challenged the absence of such legislative protection as a breach of their equality rights under section 15 of the *Charter*. Cumming J. disagreed, observing:

... [T]here are a number of "natural classifications" of rental accommodation. There are, for example, residential developments for senior citizens, for adults only (of which this is one), and for families. While this list is not exhaustive, it shows that residential development may be designed to serve different lifestyles; people enjoy different environments and seek accommodation to meet and suit their needs. It is not unreasonable, nor is it unfair, that a landlord should be free to cater to these different groups in the market-place, to provide accommodation to meet their needs. I agree. There may well be other reasons why a particular apartment building may not be suitable for children: a location on a busy thoroughfare, distance from schools or playgrounds, a lack of space adjacent to the building suitable for children's play, and other considerations could militate against having children reside in it. All of these considerations are in my view reasonable and fair.<sup>50</sup>

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<sup>44</sup> *Ibid.*, at paras. 63-64.

<sup>45</sup> *Ibid.*, at para. 65.

<sup>46</sup> *Ibid.*, at para. 66.

<sup>47</sup> *Leadley v Oakland Developments Ltd.*, (2004) 51 C.H.R.R. D/273 (N.S. Bd. Inq.). The case cites a number of earlier cases in which adults-only buildings were held to be a breach of human rights.

<sup>48</sup> *Ibid.*, at para. 74.

<sup>49</sup> *Hsuen v. Mah*, (1986) 31 D.L.R. (4th) 199 (B.C.S.C.),

<sup>50</sup> *Ibid.*, at para. 15.

But in *Dudnik v. York Condominium Corp. No. 216*<sup>51</sup> a Board of Inquiry under the Ontario *Human Rights Code* considered the constitutionality of the *Code*'s age discrimination provision, which limited protection to those over 18 years of age. The issue arose in relation to a number of adults-only condominiums, which limited occupancy to those over 16 years of age. Because of the age-18 limitation in the *Act*, the condominium age limit was not subject to a human rights challenge. Therefore the complainants challenged the *Act*'s limitation itself, as a breach of the equality rights under the *Charter*.

The Board found that the adults-only restriction discriminated against the complainants on the basis of family status,<sup>52</sup> but went on to consider the age discrimination issue as well.

The Board held that the *Act*'s exclusion of human rights protection for those under age 18 violated the equality rights under section 15(1) of the *Charter*.<sup>53</sup> Turning to justification under section 1 of the *Charter*, the Board found that there were no pressing and substantial objectives that justified limiting the protection against age discrimination, in the context of children living with their families. Specifically, the Board found that the age-18 limit was included in the *Act* because of concerns about children's capacity to contract. Generally, the Board acknowledged that a vendor ought not to be held liable to a human rights violation for refusing to contract with a minor person.<sup>54</sup> But that objective did not justify the limit in the context of the adults-only condominiums, where no contractual relationship with the children was at issue. The Board found that the exclusion was simply too sweeping, thus failing the rationality, minimal impairment and proportionality stages of the section 1 *Oakes* test as well.<sup>55</sup>

The Board paid some mind to the interests of those, especially seniors, who preferred to live in adults-only buildings. But ultimately, having heard a great deal of evidence about the housing shortage in Ontario and the market distortions caused by adults-only condominiums, the Board considered that such interests amounted to no more than matters of convenience:

Real, well-meaning people are affected by the decision of this Board. However, the effects upon the complainants and others in their position significantly outweigh the effects of inconvenience upon some condominium owners through having children as neighbours.<sup>56</sup>

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<sup>51</sup> *Dudnik v. York Condominium Corp. No. 216*, (1990) 12 C.H.R.R. D/325; rev'd in part, (1991) 79 D.L.R. (4th) 161 (Ont. Div. Ct). The Divisional Court reversed part of the Board's decision which is not relevant to this report, and otherwise upheld the Board's ruling against the adults-only rule on the basis of family status discrimination. It did not address the issues of age discrimination or the constitutional question of the over-18 age limit in the *Code*.

<sup>52</sup> *Ibid.*, at para. 178.

<sup>53</sup> *Ibid.*, at para. 188.

<sup>54</sup> *Ibid.*, at paras. 198-199.

<sup>55</sup> *Ibid.*, at paras. 193-194, 200-201.

<sup>56</sup> *Ibid.*, at para. 196.

## **DISCUSSION AND CONCLUSION**

The law reform issue can be stated succinctly: would a provision expressly exempting seniors-only housing developments from the anti-discrimination provisions of the *Human Rights Act*, akin to those in British Columbia, Saskatchewan and Newfoundland & Labrador, be a justifiable limitation on the equality rights of younger persons?

In the Discussion Paper, our preliminary conclusion was that the case-specific approach under the existing provisions of the *Act* was preferable to a blanket exemption. As the *Act* presently stands, exclusive developments which genuinely serve distinctive seniors' needs, where the age limit is necessary for those purposes, may be upheld, while those that unjustifiably exclude all younger persons would be vulnerable to a complaint. In particular, we pointed to the existing defences under the *Act* for a '*bona fide* requirement' and ameliorative programs. As well, we noted that if a developer required more certainty before proceeding to impose a seniors-only restriction, it could approach the Human Rights Commission for prior approval, as provided under the *Act*.

### **Responses to Discussion Paper**

In response to our Discussion Paper, we received submissions in favour of, and against, a blanket exemption for seniors-only housing. Respondents who supported an exemption voiced general support for seniors-only housing, for a number of reasons. Above all, it was generally observed that seniors housing can promote the independence of seniors who cannot live independently in their own home. The emphasis was on assisted living facilities, which promote aging in place and independent living, short of nursing home care. The environment of such facilities promotes a more supportive community, with a system of informal supports, than is available in regular housing. A number of respondents agreed with us that demand for such assistive seniors housing is likely to increase as the Nova Scotia population ages. It was suggested that it should not be considered discriminatory to limit a housing development to seniors when the facilities have been designed with accessibility features (grab bars in washrooms, door handles designed for arthritic hands, wheelchair and walker accessibility, elevators, etc.), in order to ensure that seniors can age in place.

It was also suggested that seniors developments which have been undertaken to date are generally supported by the community, despite the human rights restrictions on such developments. Respondents observed that seniors-only housing promotes security, and the perception of security, for elderly residents in general, and particularly older women. Some emphasized the importance of choice, and especially respecting the choice of some seniors to live in seniors-only facilities if they wish, rather than being required to live with young adults, children or the mentally challenged. Others pointed to the importance of access to affordable public housing given the vulnerability of many seniors, with services and facilities to meet residents' changing needs as they age.

In response to our observation that developers may seek prior approval from the Human Rights Commission, we received comment that this could be an unduly cumbersome and time consuming process, unnecessarily slowing seniors-housing developments by introducing

another step in a regulatory review process that is already subject to public criticism. An exemption, it was said, would allow municipalities (and Halifax Regional Municipality in particular) to proactively develop policies and regulations that would specifically pertain to seniors-only housing.

A number of the specific concerns we address in the following section. But in general we must observe that the question we deal with in this Report is a narrow one. We are not concerned with whether to permit or encourage housing options for seniors. In our view the *Act* presently raises no obstacle to the development of specialized housing for seniors, in the sense of having design elements, accessibility features and other supports that promote independence and aging in place. Indeed, the available evidence suggests that such developments are already being built to respond to growing market demand. We received no indication that the Nova Scotia *Act* actually impedes development of assisted living facilities and other sorts of residences designed for seniors in any way. Again, the vacancy rate for seniors housing in Nova Scotia is one of the highest in the country. Neither does the *Act* prevent the development and implementation of special planning rules for assisted living facilities.

Rather, the issue we address in this Report is whether to permit seniors-only housing - that is, housing with an age limit that excludes persons because they have not attained a certain age. We are asked to assess whether excluding a person, on the basis of age, from a housing opportunity that may suit him or her - think of a younger disabled person who may greatly benefit from assistive facilities that provide the opportunity for independent living - is justifiable. It bears mentioning too that in this analysis we are concerned with a spectrum of housing options that would be shielded by a blanket statutory exemption - including assisted living facilities and nursing homes, but also so-called 'adult lifestyle' communities, condominiums, gated communities, and so forth.

As for the concern about complicating the development process if proponents were required to seek approval from the Human Rights Commission, a number of comments are relevant. First, developers would not be required to seek such approval, but rather would do so only for the additional prior certainty of immunity from a human rights complaint. And they could do so well in advance of, or in tandem with, other processes. We would encourage the Human Rights Commission to be prepared for such applications, and to have speedy processes and policies for assessing each application as it is received - a matter to which we return below. But the more fundamental point is that in the balancing of the competing interests at stake, concerns about red tape must be secondary to a clear-eyed engagement with the substantive issues of discrimination, versus the needs served by seniors-only age limits. Administrative costs and delays would have to be extraordinary in order to prevail over an assessment that a blanket exemption for exclusive age limits is unjustified on its own merits.

## **Justification**

We consider the *Charter's* framework of rights *versus* justified limits to be a useful method for addressing the basic issue. This is only in part because a challenge to such a statutory restriction

on the *Act's* protection may be anticipated.<sup>57</sup> More importantly, the justification analysis under section 1 of the *Charter* - the *Oakes* test<sup>58</sup> - provides a useful way to illuminate and arrange the policy issues that ought to be considered in deciding the issue.

It should be obvious that a seniors-only housing exemption in the *Act* would violate equality rights.<sup>59</sup> Such an exemption would deny younger persons the opportunity to challenge an age limit on available housing, and the corresponding denial of housing opportunities, simply on the basis of their age.

The interests at stake are not trivial. Especially in a situation of housing scarcity, the limitation would raise the risk of exposing younger persons and families to situations of severe vulnerability from inadequate shelter. Short of this, the restriction would nevertheless deny younger persons and families access to housing options that might otherwise suit them - for reasons of proximity to a job, a school, family, assistive facilities, and so on. For us, the prospect of denying persons access to shelter and housing options, on the basis of a characteristic over which they have no control, raises serious issues and requires a strong justification.

The real issue is whether such a blanket exemption would be justifiable. As the Law Commission of Ontario observed:

... [ U]nder the *Code*, all age-based decisions and policies are not necessarily problematic: one must enquire into the basis and effects of such distinctions in order to determine their appropriateness. For example, such provisions may shield seniors' housing projects that aim to provide the community, supports and income security that enable older adults to age in place ...<sup>60</sup>

This more or less encapsulates the policy question. To what extent, and in what circumstances, do the interests served by exclusive seniors housing developments justify the potential denial of housing for younger persons, and the corresponding breach of their equality rights? If we

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<sup>57</sup> We are not aware of any cases in which the exempting provisions for seniors housing in British Columbia or Saskatchewan were challenged, but limits on protection against age-based discrimination have garnered significant attention. In addition to *Hsuen v Mah*, *supra* note 49, and *Dudnik*, *supra* note 51, we have the example, closer to home, of *Sniders v Nova Scotia (Attorney General)*, (1988) 55 D.L.R. (4th) 408 (N.S.C.A.), ruling that the *Act's* restriction on protection against age discrimination to those between 40-65 violated section 15(1) of the *Charter*, and was not saved under s.1.

<sup>58</sup> *R v Oakes*, [1986] 1 S.C.R. 103.

<sup>59</sup> We leave aside here the Supreme Court of Canada's difficult road in setting out a clear and readily applied conception of discrimination under section 15(1). Though the section 15 case against a seniors-only housing exemption may be arguable because of the restrictions the court has from time to time imposed on the basic concept of equality (e.g., 'dignity', per *Law v Canada*, [1999] 1 S.C.R. 497, or 'perpetuating disadvantage and stereotyping', per *R. v. Kapp*, 2008 SCC 41), we consider the violation of equality rights in the case of seniors only housing to be, on basic principles, inarguable.

<sup>60</sup> Law Commission of Ontario, *The Law As It Affects Older Adults: Moving The Project Forward: Report On The Preliminary Consultation* (December 2008) at 16.

conclude that seniors-exclusive housing of all kinds, in all circumstances, is a valid and justifiable good, then a blanket exemption would be an appropriate policy. If, on the other hand, we conclude that some forms of seniors-only housing may be justifiable in some circumstances, but others not, then we would have to examine the existing law to determine whether it practically accommodates valid age limits. If it does not, then a blanket exemption may be justifiable on the basis that, practically speaking, it is the only way to ensure that valid and justifiable types of seniors only housing will be protected.

We will consider whether a seniors-only housing exemption would be justifiable, using the framework of the *Oakes* test:

- a) **objective**: is there a pressing and substantial objective for such an exemption?
- b) **rational connection**: would the exemption rationally accomplish the objective?
- c) **minimal impairment**: are there other ways that would achieve the same objective to the same extent, while infringing the equality rights of younger persons to a lesser extent?
- d) **proportionality**: would the interests served by the exemption outweigh the interests of those adversely affected by it?

### ***a) Objectives***

First, is the objective pressing and substantial? Of course, there are very good reasons to permit and encourage seniors housing developments. In the first place, such developments promote the independence of seniors who have reached the point of needing to leave their family homes, but are not yet in need of residential or nursing home care. Many such developments provide meals and personal care facilities in close proximity. Many will tend to gather a social community of persons of like age and interests, alleviating mobility and isolation issues. Personal security - and the perception of it - may be better ensured at such a facility than in a single-unit home or regular apartment building. Seniors' special needs (related to mobility and care) may be better addressed with specialized personal care in such a facility.

Facilities for seniors, and especially assisted living facilities - generally referred to as the 'middle option' for seniors housing in Canada<sup>61</sup> - serve such interests. As many of the respondents to our Discussion Paper noted, providing options for seniors to 'age in place', avoiding the necessity of residence in a nursing home, is a highly significant policy objective, bearing as it does on feelings of independence, autonomy, security, community and dignity.

As well, seniors housing may serve as a refuge, to some extent, from the discrimination against seniors that has been reported in the broader housing market. As the Ontario Human Rights Commission found:

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<sup>61</sup> See generally, Canadian Centre for Elder Law, *Report on Assisted Living*, *supra* note 3.

... [O]lder tenants are often denied housing because landlords perceive them to be at greater risk of injury and death or unable to pay and carry out proper maintenance. Difficulties obtaining accommodation to allow tenants to continue to live independently in their units were raised by a number of consultees as being a major issue of concern to older tenants. ...

The Commission was told that vacancy decontrol may increase the vulnerability of older tenants to eviction as they may be viewed as limiting the landlords' ability to raise the rents. One tenant advocate described attending a landlord and property manager's conference in which a speaker described seniors as a huge problem because "the only way you usually 'get rid of them' is 'to the seniors' home or to the funeral home,' which was responded to by a very raucous round of laughter from most of the landlords and property managers in attendance."

Throughout the consultation, the Commission heard about barriers to access and the lack of accommodation to meet the needs of older people with disabilities, including hearing loss, mobility issues and mental illnesses.<sup>62</sup>

The Commission concluded, however, that the primary barriers had more to do with affordability and accessibility than with overt prejudice:

While there are some exceptions, older persons tend not to be turned away from housing due to discriminatory perceptions about age. Rather the main barrier to housing experienced by older persons is a lack of housing to meet their needs both in terms of affordability and also in terms of accessibility.<sup>63</sup>

Finally, seniors may simply enjoy the peace and quiet of a residential community without children or young adults nearby. We do not think this matter of a comfortable lifestyle in one's elder years can be trivialized as a matter of mere convenience, as appeared to be the suggestion in *Dudnik*.<sup>64</sup>

But having identified a number of benefits that are associated with seniors housing options, it must be remembered that we are concerned not with seniors housing, but seniors-*only* housing. The independent living and therapeutic benefits of assistive seniors housing options identified above can be - indeed, are being - delivered through residential developments that are designed for seniors but do not impose an age limit. So we must focus on those interests that are distinctly served by an age-limit.

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<sup>62</sup> See Ontario Human Rights Commission, *Right At Home: Report On The Consultation On Human Rights And Rental Housing In Ontario* (May 2008) at 18. See also Charmaine Spencer, "Discrimination: The law and older adults," in Ann Soden, ed., *Advising the Older Client* (Markham, ON: Lexis-Nexis Butterworths, 2005) at 281-82.

<sup>63</sup> Ontario Human Rights Commission, *Policy on Discrimination Against Older People because of Age*, (online: <http://www.ohrc.on.ca/en/resources/Policies/agepolicyen/pdf>) at 23.

<sup>64</sup> *Supra*, note 51.



We identify three such interests: enhanced personal security and the perception thereof, the gathering of a community of social peers, and the desire for peace and quiet. We also recognize that seniors-only housing can serve as a refuge from discrimination against seniors in the wider housing market, in certain circumstances. These are important objectives.

### ***b) Rational Connection***

The second part of the *Oakes* test asks whether the measure in question actually serves the important objectives identified in the first step. In this case, would a legislative exemption for seniors housing rationally serve seniors' interests in security, a supportive community and a comfortable lifestyle? In other words, would such an exemption actually promote greater availability of housing which serves these important needs? It may be difficult to gauge whether there is a demand for seniors-only housing that is not being met because of the present lack of such an exemption. In principle, however, we consider it fairly obvious that eliminating a legal barrier to a seniors-only housing development will facilitate, if not encourage, such developments. As indicated above, there is a demand for such housing and we may expect that developers will respond to that demand, if permitted to do so.

### ***c) Minimal Impairment***

Third, would such an exemption minimally impair the equality rights of younger persons? In other words, are there other policy or legislative options that would achieve the important objectives we have identified, but without necessarily denying housing opportunities to younger persons?

Here we reach a more difficult issue. The obvious policy alternative, against which a statutory exemption must be examined, is the *status quo*. As described above, in certain circumstances a seniors-only restriction may be justifiable under the current *Act* as a *bona fide* qualification,<sup>65</sup> or a program to ameliorate conditions of disadvantage experienced by seniors.<sup>66</sup> Along with the capacity of the Commission to approve such a restriction and thus pre-emptively shield it from a complaint,<sup>67</sup> these provisions may be sufficient to protect seniors-only housing developments where they actually serve the important objectives of protecting seniors' independence, security and relationships, and ensuring they are not vulnerable to housing discrimination themselves, without unduly denying housing opportunities to younger persons.

Although we have not found a case in which a seniors-only rule for housing was successfully defended as a *bona fide* qualification or ameliorative program, there are significant indications that such a rule would be found valid - that is, not discriminatory under the *Act* - when the objective is to ensure an environment that protects and promotes interests and needs that are

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<sup>65</sup> *Human Rights Act*, R.S.N.S. 1989, c.214, s.6(f)(i).

<sup>66</sup> *Ibid.*, s.6(i).

<sup>67</sup> *Ibid.*, s. 9, s. 25.

distinctive to seniors, and an age limit is necessary for that purpose. In particular, the Ontario Human Rights Commission's *Policy on Discrimination Against Older People Because of Age* specifically addresses age limits for seniors housing, as follows:

It is the OHRC's view that older persons benefit from the support, community and income security offered by seniors' housing projects. As well, the concept of "aging in place" has been recognized by the OHRC as a central consideration so that in some cases it may be appropriate to offer "seniors' housing" to those under the age of 65 who may have special needs that will remain as they age.

Therefore, the OHRC would encourage housing aimed at older persons ... which will foster the objectives of the Code. However, those responsible for such housing must be aware that age restrictions are *prima facie* discriminatory and that they must be able to justify them using one of the defences in the Code.<sup>68</sup>

In reference to Ontario's version of the ameliorative program defence, the Commission further comments:

This may allow social housing aimed at older low-income persons over a certain age ... if it can be shown that this group experiences particular disadvantage associated with their socio-economic status that younger persons do not experience. This might also permit specially designed barrier-free housing projects offered exclusively to older persons with disabilities.<sup>69</sup>

In short, where the age limit responds to a situation of distinctive need or disadvantage of seniors, it will be justifiable, and hence not discriminatory under the *Act*.

With this general survey in mind, we return to the interests we see as distinctively served by a seniors-only age limit - that is, as opposed to housing built or marketed for seniors, which does not need to be justified absent an age limit. It is clear to us that where a seniors-only age limit is imposed simply to preserve a certain lifestyle of peace and quiet, or encourage a gathering of social peers, or to facilitate the perception of personal security, it would not likely be shielded by the existing statutory defences. First, in terms of the *bona fide* requirement defence, we do not see that conditions of peace and quiet require that **all** younger adults and families be excluded; rather, such reasoning relies on a stereotype of how adults below a certain age, and even children, will generally behave. The same must obviously be said of security concerns. Finally, we do not see that gathering a community of social peers in a residential setting justifies an exclusive age limit. That is, we are not persuaded that having to admit younger persons would rise to the standard of undue hardship. We know from the adults-only residence cases described above that making allowance for the housing needs of younger persons is considered more important than the loss of community that may result for the group that wishes to remain

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<sup>68</sup> Ontario Human Rights Commission, *Policy on Discrimination Against Older People because of Age*, *supra* note 63, at 23.

<sup>69</sup> *Ibid.*

together to the exclusion of others, absent other factors. We do not mean to suggest that there is no case to be made, but we would not expect the defence purely on the basis of gathering a social peer group of seniors in an exclusive residential community to succeed.

With regard to the ameliorative program defence, while it may shield some types of seniors-only age limit - particularly where one is imposed so as to attenuate conditions of economic or social disadvantage or discrimination suffered by some segments of the senior population, such as lower-income seniors - it would not likely shield seniors-only rules *per se*. A seniors-only rule designed solely to insulate a certain peer group, to create a quieter residential environment, or to facilitate the perception of personal security could not in our view be sustainable as a measure to ameliorate conditions of disadvantage, absent a demonstration that the individuals protected by the age limit bear some distinctive disadvantage, as a group, that the age limit is designed to remedy. Not all, or even most seniors in the relevant age group (those over 55, or whatever age is chosen) suffer such disadvantage, and the population of vulnerable adults is not limited to seniors.

In short, the existing statutory defences would not likely shield a seniors-only rule *per se*, absent other circumstances. Therefore a statutory exemption for seniors-only housing would likely pass the minimal impairment standard of *Oakes*. That is, the alternatives to a blanket exemption would not accomplish the same objectives, and the blanket exemption would be justified to that extent.

But what emerges from this analysis is the insight that the *bona fide* qualification and ameliorative program defences, by definition, may shield the sort of housing that ought to be immune from a complaint of discrimination. Relying on such provisions ensures that each exclusive age limit for housing is assessed on its own merits. Rather than carving a broad exemption from the important protections in the *Act*, regardless of the significance of the interests served by the age restriction in question or the interests affected on the other side, the two substantive defences provide the opportunity for case-specific inquiry.

As well, developers who require additional certainty that an age limit will be upheld may seek prior approval of the Human Rights Commission. In response to our Discussion Paper, the Human Rights Commission has indicated it will consider applications for approval on a case-by-case basis, and that once granted, its approval would be sufficient to shield any approved age limit from a human rights complaint. In this regard we encourage the Commission to develop a policy with criteria for the approval of such age limits. Such a policy would permit developers to develop proposals with a clear sense of the factors they will need to address to ensure a successful application.

We also encourage the Commission to be prepared to issue approvals of sufficient duration to serve developers' need for certainty in this area, where the age limit is shown to be necessary and justifiable under the provisions of the *Act*. Other jurisdictions have a practice of issuing special program approvals for a few years or less. This may be appropriate in the employment equity context, where special program approvals are most common, but a short-term approval would not do in the case of a housing development which the residents and the developer will expect to remain 'seniors-only' for the indefinite future. Seniors-only housing, where an age limit is proven to be necessary, is not meant to remedy a temporary disadvantage but rather an

ongoing need. If it were thought necessary to preserve flexibility to adapt to changing needs in this field, the Commission could issue an approval for the construction of age-limited housing which would expire after a certain period of time, or in relation to a certain number of units only. But once the units were leased or sold, the approval in relation to them would have to be, in effect, indefinite.

The opportunity for a case-specific analysis of necessity is a highly significant consideration in our view, which weighs against the need for or desirability of a blanket statutory exemption. A seniors-only housing development *may* serve interests that are distinct to seniors. But those interests may not be sufficient to warrant an age limit, where the presence of younger persons can be accommodated without undue hardship. And it may be that such a facility is ‘for seniors’ in name only, and in reality is simply built with accessibility in mind. That is, its distinctive features serve interests of *disabled* persons who require some assistance to live independently, rather than any distinctive interests of *seniors*. Under the proposed statutory exemption, such a facility’s age limit would be immune from challenge, notwithstanding that it excludes younger individuals whose need may be as great, and who stand to benefit just as much from the facilities and programs on offer.

The remaining question is whether we wish to limit seniors-only developments to only those that are able to pass a *bona fide* qualification, or ameliorative program analysis. The prospects for ‘adult lifestyle’ communities are fairly bleak. Indeed, the Ontario Human Rights Commission specifically noted that such developments would not be shielded under the comparable provisions of the Ontario *Human Rights Code*,<sup>70</sup> unless the age limit was set at 65 or older. More problematically, it may be hard to defend seniors-only social housing, to the extent that such housing serves interests which are not distinctive to seniors.

This is a question of policy and principle. Do we wish to preserve and encourage communities or residences which exclude younger persons and families for the sake of peace and quiet, and potentially enhanced feelings of personal security, in a social community of one’s peers? This we see as the most critical policy question to be addressed in deciding whether to adopt a blanket statutory exemption, and we consider it in the next section.

#### ***d) Proportionality***

Finally, there is the overall proportionality of such an exemption, or the balance of the competing interests at stake. In the previous section, we considered whether the existing legislation adequately shields exclusive seniors-only age limits where they would genuinely serve seniors’ distinctive needs, significantly promote their independence, or ameliorate conditions of disadvantage that are distinct to seniors. We conclude that the existing provisions would do so, but that very few seniors-only age limits would actually meet that standard. So the question is whether those that do not should also be immune from a complaint. That is, we must be concerned with age limits that would not likely be valid on their own under the existing

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<sup>70</sup> Ontario Human Rights Commission, *supra* note 63, at 24: “There is no defence, however, that will permit “adult lifestyle” housing that results in the exclusion of children or persons under a certain age.” (citing *Dudnik*, *supra* note 51).

exemptions in the *Act*. We consider this would include adult lifestyle communities, including condominiums, gated retirement subdivisions, mobile home parks, etc. This might also include seniors-only social housing.

We take this category to include housing that serves no significant personal or medical care needs which are distinctive to seniors (as opposed to the disabled generally), but rather simply provides the freedom from having children and young adults as neighbours, amid a social community of older adults, perhaps with activities and programs to promote an active lifestyle. These sorts of developments may be particularly appealing to younger ‘empty-nesters’, who wish to reduce the carrying costs of a family sized home, and/or free up assets tied up in a larger home for travel, investment, and so forth. This market of younger, more active seniors is highly attractive to housing developers.

We identified three interests that may be served by age limits *per se*: an enhanced perception of personal security, opportunities for socializing with one’s peers, and an environment of peace and quiet. These are not trivial interests. But on the other hand there are general human rights concerns about segregation of various populations in society - we can think of many groups that would prefer to exclude others from a building or neighbourhood. More significant is the problem of denial of suitable housing opportunities to younger adults and families.

The problem is one of drawing too bright a line between seniors and younger persons. To put it simply, interests in dignity, security and comfort are not limited to seniors. Many younger adults would also prefer to live without the noise and stress of having young persons and children around. Most younger persons and children present no genuine threat to the security of seniors or anyone else. Some seniors can be just as intimidating or abusive as a younger person. While age is frequently used as a proxy indicator for other, individualized conditions and characteristics (especially mental and physical ability, but also social habits and levels of activity), this can often mask discrimination against persons who do not fit the stereotype. Our starting point is that an individualized approach, where feasible, is always preferable.<sup>71</sup>

At bottom, we are concerned that seniors-only housing rules by themselves rely on an unjustified stereotype of younger persons and families as disruptive, noisy, and potentially abusive or threatening.<sup>72</sup> And, to the extent they indeed are, such rules nevertheless exclude other persons who may similarly desire peace and quiet, and who stand to benefit just as much from an exclusive environment. It is not only seniors who may wish to remove themselves from the social problems that are perceived by some to accompany the presence of young people in a community.

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<sup>71</sup> Ontario Human Rights Commission, *Policy on discrimination against older adults*, *supra* note 63 at 12, citing *Meiorin*, *supra* note 13; and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868.

<sup>72</sup> See, e.g., Chris Lambie, “It’s for seniors, but shhh!” *Chronicle-Herald* (October 10, 2010) (on-line edition), quoting an adult-lifestyle property developer on the benefits for adult residents: “With families and so on, teenagers and that kind of stuff, there’s noise, there’s sometimes violence and all that kind of stuff that comes along with people growing up and coming of age type of thing. So without having any children really around or teenagers, or any of that, it’s a quieter community; they feel safer, a sense of security.”

In short, we are concerned that a community or housing development which offers seniors-only housing with no particular attention to distinctive senior needs for specialized care or otherwise - the so-called adult lifestyle communities, in other words - would be underinclusive (in excluding younger adults who might also desire such a living environment) and also over-exclusive (in excluding younger adults and families who present no real threat to the peace and quiet of such communities). It seems to us that while a blanket exemption in the *Act* would certainly serve the important interests we have identified in respect of having exclusive seniors-only housing options available in Nova Scotia, it would, on the other hand, compromise the interests of those excluded in having access to the housing options that best suit them.

The issue boils down to an unfortunate clash of competing interests. On one hand are the interests of seniors who wish to live without younger people around, for perfectly legitimate reasons. On the other are those of the younger people who may be denied housing opportunities - including accessible housing to enable independent living for disabled persons - that suit them simply because they have not reached the 'magic number' of years to gain access. This is not a simple or an easy problem. But it is made easier by the fact that the Nova Scotia *Human Rights Act* already permits seniors-only rules where they can be shown to be necessary to ensure the protection of seniors' distinctive interests, or to ameliorate seniors' particular disadvantage. As well, the current legislative context does not appear to dissuade proponents of housing developments for seniors; rather, it provides them the opportunity to offer living environments, including assisted living options, that may be suitable for seniors, and also to others interested in the same sorts of living arrangements.<sup>73</sup> And, it seems clear enough that the interests served by seniors-only housing - including peace and quiet and security - are in fact not limited to seniors and can be served in ways other than an age limit. In our consultations we have heard that developers and operators have many means other than age limits to preserve a quieter environment - in particular, through a combination of marketing, applicant assessment and counselling, residents' rules of conduct, cost, and occupancy limits.

We are in the end persuaded that the interests of non-seniors in suitable housing must prevail over the interests of those who wish to live in an age-exclusive setting, for its own sake. Denial of appropriate housing opportunities can have severe consequences, particularly where the housing in question is distinctly advantageous because of the facilities and services - such as those that enable independent living for disabled persons - on offer, or because of location in proximity to a certain job, family, an educational institution, public transportation and other amenities, or otherwise. Certainly such hardship will not be present in all cases, but the issue raised in this case requires us to consider them - a blanket statutory exemption would apply to any and all seniors-only age limits, and must be expected to result in the exclusion of younger persons from housing that is suited to their needs.<sup>74</sup> It is on such cases that our inquiry into the justification for such an exemption must focus.

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<sup>73</sup> See, e.g., *ibid.*, describing a "manufactured home community" of single-level detached units, marketed as an "adult living community" for those over 55. The development of 200 lots is currently being prepared for construction near Windsor, N.S.

<sup>74</sup> See, e.g., *Leadley v. Oakland Developments Ltd.*, *supra* note 47.

Finally, there is the matter of social housing. The Province maintains a supply of rent-assisted housing units for persons over the age of 58, and is in that regard the single-largest purveyor of non-assistive seniors-only housing in Nova Scotia.

Here the challenges are more complex; seniors social housing programs in Canada have always been meant to address situations of lower income and housing scarcity which are sociologically more prevalent amongst older persons - and particularly older women.<sup>75</sup> As observed above, the intersection of age and lower income may justify special programs under s.25 of the *Act* to ameliorate the situation of persons who find themselves in situations of housing vulnerability, or inadequate shelter as a result.<sup>76</sup>

But conditions of persistent low income and inadequate shelter are not restricted to seniors as a group. And, while concerns about adequate shelter for seniors certainly require that shelter be made available to them, they do not explain why certain social housing facilities, or blocks of space, must be reserved for seniors, to the exclusion of other persons in need. The distinctive interests served by seniors-only social housing, in other words, appear to mirror in many respects those served by other forms of housing without a distinctive personal or nursing care component; that is, the desire for peace and security, in a community of one's social peers.

To be sure, the experience of Nova Scotia and other jurisdictions in permitting encroachments on seniors-only housing projects - that is, by allowing for younger adults to occupy spaces in seniors-only buildings - is not necessarily encouraging. But the difficulties that arise appear largely to result from disruptive, or even threatening behaviours of some of the younger residents, who may be dealing with physical and mental disabilities, mental illness and/or addictions.<sup>77</sup> Due to the vulnerability of some of the elder residents, the building may simply be an inappropriate place to locate a person with a significant behavioural disorder or a propensity for threats or violence.

In our view, this is much more a question of appropriate social housing policy design and administration. A statutory exemption for seniors only housing would be permissive only, and therefore would not protect against a government program to desegregate seniors' residences. It would do nothing to ease the policy constraints which have led governments to open space in seniors' residences to younger adults in need of shelter. And most importantly, the existing legislation does not require social housing providers to give space to disruptive or threatening persons in residences which are intended to be quiet and comfortable. Neither does it prevent the implementation of appropriate screening procedures to exclude individuals whose behaviours may be inappropriate for a given living environment, provided that such procedures are not discriminatory in the sense of relying on stereotypes.

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<sup>75</sup> Spencer, "Discrimination", *supra* note 62, at 279-281; Canada Mortgage & Housing Corporation, *2006 Census Housing Series: Issue 10 -The Housing Conditions of Canada's Seniors* (December 2010) at 6-7.

<sup>76</sup> Charmaine Spencer, "Housing Discrimination and Seniors," in (2005) 14:2 *Seniors Housing Update* 1 at 3.

<sup>77</sup> Leo Poirier, "Up Front," (Sept/Oct 2005) *Community Links: Seniors and Housing* 1 at 1.

## **Recommendation**

We conclude that the Nova Scotia *Human Rights Act* should not be amended to provide an express exemption for seniors-only housing. While such an exemption would facilitate seniors-only age limits, and the benefits that may spring from them, we are not persuaded that such benefits are more significant than the interests of those who would be excluded from housing that is otherwise suitable for them. Denial of housing, on the basis of age, is discriminatory and needs to be justified by strong competing considerations. The Nova Scotia *Human Rights Act* already permits seniors-only age limits where they are shown to be necessary to ensure the protection of seniors' distinctive interests, or to ameliorate seniors' particular disadvantage. The current legislative context does not appear to dissuade proponents of housing developments for seniors. The interests served by seniors-only housing - including peace and quiet and security - are not limited to seniors and can be accommodated to some extent in ways other than an age limit. Finally - and most importantly - when we consider whether to introduce an amendment that would immunize any seniors-only age limit from a complaint under the *Act*, we cannot escape the conclusion that the interests served by housing which is exclusive to those over a certain age are not as significant as those which stand to be affected on the part of those excluded - namely, denial of housing opportunities that may be suitable - or even ideal - for the affected individual.



## **APPENDIX - ADVISORY GROUP AND RESPONDENTS TO DISCUSSION PAPER**

### **Advisory Group:**

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