

LAW REFORM
COMMISSION
OF
NOVA SCOTIA



Seniors-only Housing

Discussion Paper - December 2010

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Discussion Paper

Seniors-only Housing

**Law Reform Commission of Nova Scotia
December 2010**

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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WHAT DO YOU THINK?

The Law Reform Commission is interested in what you think about the issues raised in this Discussion Paper on seniors-only housing.

This Discussion Paper does not represent the final views of the Commission. It is designed to encourage discussion and public participation in the work of the Commission. Your comments will assist us in preparing a Final Report for the Minister of Justice. The Final Report will contain recommendations on how the law should deal with this issue.

If you would like to comment on the Discussion Paper, you may:

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In order for us to fully consider your comments before we prepare our Final Report, please contact us by **January 31, 2011**.

Please note that the Final Report will list the names of individuals and groups who make comments or submissions on this Discussion Paper. Unless comments are marked confidential, the Commission will assume respondents agree to the Commission quoting from or referring to comments given. Respondents should be aware that the Nova Scotia *Freedom of Information and Protection of Privacy Act* may require the Commission to release information, including personal information, contained in submissions.

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INTRODUCTION

This discussion paper considers whether to amend the Nova Scotia *Human Rights Act*¹ 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. The question of whether to introduce such an exemption into the Nova Scotia *Act* has now been referred to the Commission by the Attorney-General.

This paper 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 outlines 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 paper proposes a framework for examining those issues.

We have come to a preliminary conclusion, for discussion purposes, that the Nova Scotia *Human Rights Act* should not be amended to expressly exempt seniors-only housing. The compelling interests served by some forms of housing that cater to seniors’ distinctive needs are better protected, we propose, 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.

We invite comment from interested members of the public on this preliminary conclusion, as well as the broader discussion and various points addressed herein.

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 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

¹ R.S.N.S., 1989, c.214 (as am.) (“the *Act*”).

community based residential facilities are governed by the *Homes for Special Care Act*,² and are supervised by the Provincial government.³

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 recreational and social programs geared for seniors may be available, 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.⁴ 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.⁵ It is estimated that proportion will rise to 28.4% by 2031.⁶ 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%.⁷

² R.S.N.S., 1989, c.203 (as am.).

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

⁴ 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.

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

⁶ *Ibid.*, at 16.

⁷ *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.⁸ 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 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 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].

⁸ *Ibid.*, at 65.

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. In order to determine whether an express exemption for seniors housing is needed, we first need to consider the extent to which the existing exemptions achieve the same end.

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,⁹ 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 accomplish 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.¹⁰ While this could shield certain seniors-only residences, it would likely not apply to seniors-exclusive developments in general. More likely, only those facilities serving significantly distinctive needs of seniors would qualify.

Finally, the *Act* provides an exemption for so-called affirmative action programs, such that the prohibition on discrimination shall 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

⁹ 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.”

¹⁰ *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 particularly 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. If the policy goal is to ensure that seniors-only housing developments of all varieties are immune from any human rights complaint, then an express exemption would almost certainly be needed. We consider whether this is a desirable objective below.

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*¹¹ provides that the *Act's* protection against age-related discrimination in rental tenancy does not apply:

¹¹ 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;¹²

...

The *Saskatchewan Human Rights Code*¹³ 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.¹⁴

...

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.¹⁵

...

The Newfoundland and Labrador *Human Rights Act, 2010*¹⁶ 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 55.¹⁷

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:

¹² *Ibid.*, at s. 10(2)(b)(i).

¹³ S.S. 1979, c. S-24.1.

¹⁴ *Ibid.*, at s. 11(4).

¹⁵ *Ibid.*, at s.10(3).

¹⁶ S.N.L. 2010, c.H-13.1.

¹⁷ *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.¹⁸

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,¹⁹ or tenancies.²⁰ British Columbia provides none with respect to the purchase of real property.²¹

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*,²² 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:

¹⁸ *Supra*, note 9.

¹⁹ *Alberta Human Rights Act*, R.S.A. 2000, c. A-25.5, s.4 (goods, services, accommodation or facilities).

²⁰ *Alberta Human Rights Act*, *supra* note 19, s.5 (tenancy). Purchase and sale of property is not covered by the *Alberta Act*.

²¹ *Human Rights Code*, *supra* note 11, s.9.

²² *Craig v Williams*, (1995) 24 C.H.R.R. D/265 (B.C. Coun. H.R.).

... 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.²³

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.²⁴ 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.²⁵

In *North Vancouver (District) v. Lunde*,²⁶ 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

²³ *Ibid.*, at para. 21.

²⁴ *Ibid.*, at para. 24.

²⁵ 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.

²⁶ *North Vancouver (District) v. Lunde*, [1997] B.C.W.L.D. 199 (S.C.).

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).

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.²⁷

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.²⁸

In *Condominium Plan No. 931 0520 v. Smith*,²⁹ 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 45.³⁰ Hawco J. spoke approvingly of condos developed for specialized populations like seniors and the handicapped,³¹ but rested his decision on the more fundamental premise that by-laws passed by

²⁷ *North Vancouver (District) v. Lunde*, (1998) 162 D.L.R. (4th) 402 (B.C.C.A.) at para. 15.

²⁸ 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."

²⁹ *Condominium Plan No. 931 0520 v. Smith*, (1999) 239 A.R. 319 (Q.B.)

³⁰ 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.

³¹ *Ibid.*, at para. 8, citing *Condominium Plan No. 8810455 v. Spectral Capital Corp.* (1990), 14 R.P.R. (2d) 305 (Alta. Q.B.),.

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.³²

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.*,³³ 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*.³⁴

In *Desroches v Québec (Comm. des droits de la personne)*,³⁵ 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,³⁶ and *prima facie* discriminatory as such, the Court determined that it was nonetheless rationally related to the running of the landlord's business.³⁷ But, the landlord had failed in its duty to accommodate the complainant, since the landlord 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.³⁸

In *Leonis v Metropolitan Toronto Condominium Corp. No. 741*,³⁹ 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,⁴⁰ and went on to assess whether

³² *Ibid.*, at para. 7, citing *York Condominium Corp. No. 216 v. Borsodi* (1983), 148 D.L.R. (3d) 290 (Ont. Co. Ct.).

³³ *Moxon v Samax Investments Ltd.*, (1985) 5 C.H.R.R. D/2835 (Man. Bd. Adj.).

³⁴ *Ibid.*, at paras. 23198-23199.

³⁵ *Desroches v Québec (Comm. des droits de la personne)*, (1997) 30 C.H.R.R. D/345 (Que. C.A.)

³⁶ *Ibid.*, at para. 72.

³⁷ *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."

³⁸ *Ibid.*, at para. 113.

³⁹ *Supra*, note 10.

⁴⁰ Age was unavailable as a prohibited ground of discrimination because Ontario's *Act* limited the protection against age discrimination to those between 18-65.

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.⁴¹ The Board acknowledged the distinct issues presented by children’s access to fitness and pool facilities,⁴² which militated against eliminating all age-based rules, and instead ordered that the new rules be maintained.⁴³ It further ordered that the committee which reviewed the rules from time to time would have to include a parent with one child under 16.⁴⁴

In Nova Scotia, by 2004, in *Leadley v Oakland Developments Ltd.*,⁴⁵ 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.⁴⁶

The relevant *Canadian Charter of Rights and Freedoms* cases have also faced the 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, broader age-discrimination exempting provisions have been.

In *Hsuen v. Mah*,⁴⁷ 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

⁴¹ *Ibid.*, at para. 58.

⁴² *Ibid.*, at paras. 63-64.

⁴³ *Ibid.*, at para. 65.

⁴⁴ *Ibid.*, at para. 66.

⁴⁵ *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.

⁴⁶ *Ibid.*, at para. 74.

⁴⁷ *Hsuen v. Mah*, (1986) 31 D.L.R. (4th) 199 (B.C.S.C.),

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.⁴⁸

But in *Dudnik v. York Condominium Corp. No. 216*⁴⁹ 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,⁵⁰ 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*.⁵¹ 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.⁵² 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.⁵³

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:

⁴⁸ *Ibid.*, at para. 15.

⁴⁹ *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 paper, 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*.

⁵⁰ *Ibid.*, at para. 178.

⁵¹ *Ibid.*, at para. 188.

⁵² *Ibid.*, at paras. 198-199.

⁵³ *Ibid.*, at paras. 193-194, 200-201.

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.⁵⁴

DISCUSSION AND PRELIMINARY 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?

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.⁵⁵ More importantly, the justification analysis under section 1 of the *Charter* - the *Oakes* test⁵⁶ - offers the best way to illuminate and arrange the policy issues that ought to be considered in deciding the matter.

It should be obvious that a seniors-only housing exemption in the *Act* would violate equality rights.⁵⁷ On its face, such an exemption would deny younger persons the opportunity to challenge an age-based restriction on available housing. If the exemption actually resulted in the denial of housing space to younger persons, (and it is likely that only in such a case would a challenge be brought) then that deprivation would be a further ground to challenge the exemption. 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, assistive facilities, and so on.

⁵⁴ *Ibid.*, at para. 196.

⁵⁵ 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*, and *Dudnik*, *supra*, 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.

⁵⁶ *R v Oakes*, [1986] 1 S.C.R. 103.

⁵⁷ 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.

The real issue is whether such a blanket exemption is 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 ...⁵⁸

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

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?

Purposes of seniors-only housing

First, is the objective pressing and substantial? We take it that there are very good reasons to permit and encourage seniors-only housing developments of some kinds, in some circumstances. 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 may be better ensured at such a facility than in a single-unit home. Seniors' special needs (related to mobility and care) may be better addressed with specialized personal care in such a facility.

We will broadly consider such facilities and communities under the term 'assisted living' - what is generally acknowledged as the 'middle option' for seniors housing in Canada.⁵⁹ 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.

⁵⁸ Law Commission of Ontario, *The Law As It Affects Older Adults: Moving The Project Forward: Report On The Preliminary Consultation* (December 2008) at 16.

⁵⁹ See generally, Canadian Centre for Elder Law, *Discussion Paper on Assisted Living*, *supra* note 3.

As well, seniors-only 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:

... [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.⁶⁰

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*.⁶¹

We invite comment from the public as to the importance of seniors-only residences, in terms of the variety of interests such residences are designed to serve, and their success in meeting their objectives.

Are there examples of developments that have greater, or lesser success, in providing non-nursing home assistance and/or care?

Is there a role for the *Human Rights Act* in protecting and/or promoting such housing options?

⁶⁰ 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.

⁶¹ *Supra*, note 49.

Achieving the purposes

Second, would a legislative exemption for seniors housing rationally serve these objectives? 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 perceived legal barrier to a seniors-only housing development will facilitate, if not encourage, such developments.

We invite comment from the public as to whether the existing provisions of the *Act* serve as an impediment to the development of housing options for seniors.

Are there examples of potential housing developments that have not proceeded because of the *Act*?

In what ways, if at all, does the *Act* make it more difficult to market such options to seniors who might benefit?

Do the current provisions of the *Act* adequately protect some kinds of seniors-only housing options, but not others?

Other policy options

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 infringe equality rights to a lesser extent?

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,⁶² or a program to ameliorate conditions of disadvantage experienced by seniors.⁶³ Along with the capacity of the Commission to approve such a restriction and thus pre-emptively shield it from a complaint,⁶⁴ 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, without unduly compromising the equality rights of younger persons.

Although we have not found a case in which a seniors-only rule for housing was 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

⁶² *Human Rights Act*, R.S.N.S. 1989, c.214, s.6(f)(i).

⁶³ *Ibid.*, s.6(i).

⁶⁴ *Ibid.*, s. 9, s. 25.

an environment that protects and promotes interests and needs that are distinctive to seniors. 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.⁶⁵

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.⁶⁶

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*.

Indeed, it may be that the *bona fide* qualification and ameliorative program defences, by definition, will 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.

This 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 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 *per se*. Under the proposed statutory exemption, the

⁶⁵ Ontario Human Rights Commission, *Policy on Discrimination Against Older Persons because of Age*, at 23.

⁶⁶ *Ibid.*

facility's age limit would be immune from challenge, notwithstanding that it excludes younger individuals whose need is as great, and who stand to benefit just as much from the facilities and programs on offer.

In sum, we are not persuaded that a statutory exemption for all seniors-only rules would generally preserve and promote the sorts of important interests we have identified any better than the existing legislation does.

Two issues may be raised following from this general discussion. First, does the *status quo* provide the requisite level of certainty to allow a developer to proceed with a defensible age-restricted housing development? The existing *bona fide* requirement and ameliorative program exceptions provide the opportunity for case-specific assessment of any given seniors-only restriction, but we do not rule out the possibility that such language could be improved. And, while the Human Rights Commission has the authority to approve programs, which in theory should afford adequate certainty as it apparently has in other areas⁶⁷ there may be some question as to whether the existing provisions permit agreements which are sufficiently binding to enable a property developer to proceed with confidence. Here again, legislative amendment may appropriate.

On the other hand, it may be that only an express exemption would provide substantially greater certainty for developers, and thereby promote the development of housing which serves seniors' genuinely distinctive needs.

We invite comment as to whether the present lack of a seniors housing exemption actually discourages development of seniors' housing options. Which sorts of developments are viewed as being liable to a complaint under the existing provisions of the Act?

In the absence of a blanket statutory exemption, should the *bona fide* requirement or ameliorative program exception be amended so as to better facilitate the development of justifiable seniors-only housing?

In the absence of a blanket statutory exemption, should the program approval provisions in s.9 and s.25 of the Act be amended so as to ensure that approvals or exemptions granted by the Human Rights Commission are sufficient to allow developers to proceed?

Do developers require the added certainty of an express exemption?

Would having an exemption encourage development of assisted living, or supportive housing options?

⁶⁷ See, e.g., *Watson v. Nova Scotia (Human Rights Commission)*, (1996) 135 D.L.R. (4th) 764 (N.S.C.A.), upholding an agreement between the Commission and a municipality to permit the latter to engage in affirmative action hiring.

Would it improve the services and programs on offer at such developments?

Is there evidence that seniors' housing options are better in those provinces that do provide an express legislative exemption?

Second, at a more general level, do we wish to limit seniors-only developments to only those that in theory should be able to pass a *bona fide* qualification, or ameliorative program analysis? The prospects for 'adult lifestyle' communities might be 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*.⁶⁸ 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 seniors housing *per se*, encompassing developments with some degree of assisted living to promote seniors' independence and other special needs, but also straightforward lifestyle communities or residences for the sheer sake of peace and quiet in a 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.

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 specialized seniors-only housing where it genuinely serves seniors' distinctive needs and significantly promotes their independence. This remains an open question, on which we invite comment. If it does not, then the case for a statutory exemption would be compelling. But if so, then the question is whether those forms of seniors-exclusive housing which do not serve significant and distinctive senior needs should also be protected. That is, we must be concerned with housing that would not likely be valid on its own under the existing exemptions in the *Act* - 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 and distinctive personal or medical care needs of seniors, but rather simply provides conditions of relative peace and quiet - i.e., the freedom from having children and young adults as neighbours - amid a social community of elder 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. These are not trivial interests, bearing as they do on the

⁶⁸ Ontario Human Rights Commission, *supra* note 65, 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 49).

feelings of security, comfort and dignity that may arise with greater acuteness in one's elder years. But on the other hand there are general human rights concerns about segregation of various populations in society, as well as the potential problem of denial of housing opportunities to younger adults and families.

This is in part an empirical question. To what extent is there a problem of scarcity of housing in Nova Scotia, and to what extent is it experienced to a greater or lesser extent by various segments of society? Seniors are generally acknowledged as one of the populations that is in greater need of social housing because of relative disadvantage,⁶⁹ but they are not the only ones, nor are they necessarily the most vulnerable. If a blanket seniors-only housing policy were to encourage reservation of a significant amount of housing space for seniors, to the detriment of other groups which experience equal or greater housing vulnerability (single parents, the poor and the mentally ill come to mind) we would have to say that a blanket exemption would be unjustified and a more case-specific approach would be preferable.

We invite public comment as to whether there is a problem of scarcity of housing in Nova Scotia, and the extent to which it is experienced to a greater or lesser extent by various segments of society.

To what extent can any current scarcity be attributed to the reservation of available housing supply for seniors?

Can we expect a blanket statutory exemption for seniors-only housing developments to have any effect on housing supply?

Beyond the empirical question, there are important issues of principle. 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. And many younger persons and children present no genuine threat to the security of seniors or anyone else. We are mindful that 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.⁷⁰

⁶⁹ See *Dartmouth/Halifax County Regional Housing Authority v. Sparks*, (1993) 101 D.L.R.(4th) 224 (N.S.C.A.) at 234: "As a general proposition, persons who qualify for public housing are the economically disadvantaged and are so disadvantaged because of their age and correspondingly low incomes (seniors) or families with low incomes, a majority of whom are disadvantaged because they are single female parents on social assistance, many of whom are [B]lack. The public housing tenants group as a whole is historically disadvantaged as a result of the combined effect of several personal characteristics listed in s. 15(1)."

⁷⁰ Ontario Human Rights Commission, *Policy on discrimination against older adults*, *supra* note 65 at 12, citing *Meiorin*, *supra* note 10; and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868.

At bottom, we are concerned that seniors-only housing rules by themselves (that is, in contexts other than assisted living or senior-specific care and/or programs) rely on an unjustified stereotype of younger persons and families as disruptive, noisy, and potentially abusive or threatening.⁷¹ 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 and deserve to remove themselves from the social problems that are perceived to accompany the presence of young people in a community.

We are also mindful that the current legislative context does not appear to dissuade proponents of housing for seniors; rather, it provides them the opportunity to offer living environments that may be suitable for seniors, and also to others interested in the same sorts of living arrangements.⁷²

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 senior 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 a blanket exemption in the *Act* would not necessarily serve the important interests we have identified in respect of having exclusive seniors-only housing options available in Nova Scotia, but would, on the other hand, certainly compromise the interests of those excluded in having access to the housing options that best suit them.

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.⁷³ As observed above, the intersection of age and lower income may justify special programs under s.25 of the *Act* to

⁷¹ 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."

⁷² 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.

⁷³ Spencer, "Discrimination", *supra* note 60, at 279-281.

ameliorate the situation of persons who find themselves in situations of housing vulnerability, or inadequate shelter as a result.⁷⁴

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.⁷⁵ 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.

Preliminary conclusion

Our examination of the issues has led us to the preliminary conclusion that the Nova Scotia *Human Rights Act* should not be amended to provide an express exemption for seniors-only housing. In our view, where a seniors-only rule serves significant interests that are genuinely distinctive to seniors, such a rule would be adequately protected by the existing defences in the *Act*. Where a seniors-only rule is no more than a proxy for familiar stereotypes - that of the quiet, peaceful older person on one hand, versus the noisy, threatening younger person on the other - we think it inadvisable to protect it by virtue of a blanket statutory exemption, particularly in light of the interests that stand to be impaired.

⁷⁴ Charmaine Spencer, "Housing Discrimination and Seniors," in (2005) 14:2 *Seniors Housing Update* 1 at 3.

⁷⁵ Leo Poirier, "Up Front," (Sept/Oct 2005) *Community Links: Seniors and Housing* 1 at 1.

We invite comment on this preliminary conclusion, as well as the considerations above that lead us to it.

PRACTICALITIES

If the choice is to proceed with a statutory exemption, several practical issues will arise. Most obvious is the question of what age the exemption should specify. British Columbia, Saskatchewan and Newfoundland & Labrador adopted the age of 55. This extends the traditional definition of seniors - i.e., age 65, which was once considered typical for retirement, and therefore a fixed income - to include those younger adults who may well be still working, but are likely not to have children living at home.

There is also the question of permitting flexibility in the age of residents. The statutory exemptions in British Columbia and Newfoundland & Labrador make allowance for a household in which only one member is over 55. This resolves the problems that would otherwise arise with spouses of different ages, a live-in caregiver, or when an elderly resident suddenly needs to take care of a younger family member. In some cases, further flexibility may be needed to allow for non-custodial visitation rights with a resident's children.

Ontario's senior citizen's exemption allows preferential treatment for those over 65, but in mind of these sorts of issues, housing providers told the Ontario Human Rights Commission that this was too restrictive; that exclusive seniors housing needed to be made available on a more flexible basis.⁷⁶ Nova Scotia's preferential treatment provision simply refers to "senior citizens", without a defined age.

If a statutory exemption for seniors-only housing is to be adopted, should the exemption specify an age, and if so, what should that age be?

Should the exemption permit a rule in which only one (or more) members of the household are required to be above the minimum age?

There is also the issue of how best to amend the legislation. Simply inserting a new exemption like those in British Columbia, Saskatchewan and Newfoundland & Labrador is one way, but it would also be possible to amend the general preferential treatment provision in s.6(a) of the Nova Scotia *Act*, to include accommodation and real property purchase and sale transactions along with facilities and services.

We invite comment on how an exemption ought to be introduced; in particular, whether a stand-alone exemption is required, or whether the current section 6(a) of the Act should be amended to include housing.

⁷⁶ *Right at Home*, *supra* note 60 at 18.

There is also the question of whether the exemption ought to apply to purchase and sale transactions, in addition to residential tenancies. A seniors-only rule would significantly limit the marketability of a condominium, for example. Succession and estate planning in respect of such a property might be complicated, such as in the case of an *inter vivos* transfer to avoid probate taxes, because of the inherent limit on transferability. We consider that these concerns are best considered by the resident when considering whether to buy, and are not a reason to limit the exemption to rental properties, but invite discussion on the point.

Should an exemption apply to rental housing and purchase and sale transactions?

Related to this is the issue of whether to permit the conversion of existing properties into seniors-only complexes, and the potential for loss of value as was alleged in *Craig v Williams, supra*.

Should there be any special limits on the conversion of existing housing developments to seniors-only housing, to protect the investment of current residents?

On another practical dimension, making the policy choice to expand the availability of seniors-only housing might lead to increases in the sorts of abuses that are reported to occur in the private housing market.

Is there adequate recourse available now to residents of assisted living facilities, adult lifestyle communities, and seniors' social housing to deal with deficiencies in the accommodation, care, food or programs on offer?

In the private rental market, are existing protections (e.g., the *Human Rights Act* and the *Residential Tenancies Act*) sufficient to deal with problems of discrimination and abuse of older persons, that may occur with greater frequency in exclusive seniors residences?