

**NATIONAL PERSPECTIVES ON
HOUSING RIGHTS**

NATIONAL PERSPECTIVES ON HOUSING RIGHTS

Edited by

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This book is dedicated to everyone who lives in squalor and who wishes for nothing more than human dignity and a decent place to call home.

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FOREWORD

Wherever we go today, we hear talk of the globalisation of the economy and its impact on States. Globalisation has become a dominant feature of the analysis of international and national development. There is, however, another form of globalisation which could and should also have a fundamental impact on States. That is the globalisation of human rights.

Today, when we talk of human rights we understand that this discussion should not be limited to the traditional civil and political rights. The international world has gradually come to realise the critical importance of social and economic rights in building true democracies which meet the basic needs of all people. The realisation of these needs is both an essential element of a genuine democracy, as well as essential for the maintenance of democracy.

This is nowhere more evident than in the right to housing. Everyone needs a place where they can live with security, with dignity, and with effective protection against the elements. Everyone needs a place which is a home.

In South Africa, the apartheid regime's programme of forced removals caused terrible human suffering. It also galvanised popular mobilisation and resistance. The forced removal in the 1950s of communities such as Sophiatown, Alexandra, New Ermelo and Lady Selborne played a major role in building resistance to apartheid.

But the right to housing goes further than the right not to be subjected to arbitrary or forced eviction. It also involves a duty on the State to take effective action to enable its people to meet their need for a safe and secure home where they can live with dignity. That is not achieved easily or overnight – but as reflected in the International Covenant on Economic, Social and Cultural Rights, it is now internationally recognised that States must take appropriate steps to ensure the realisation of this right.

The South African Constitution of 1996 contains a right to housing. It prohibits arbitrary eviction, and places a duty on the state to take reasonable measures to achieve the progressive realisation of this right. In formulating our Constitution, we learned from the experiences of people in other countries, who have struggled with similar problems. In this way and in other ways, our Constitution demonstrates the growing globalisation of the struggle for human rights. I hope that this book, which reflects the experience and knowledge of people from many parts of the world, will play a significant role in the effective globalisation of the right to housing.

Nelson Mandela
Johannesburg

ABBREVIATIONS

CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
NGO	Non-Governmental Organisation
PD	Presidential Directive
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHRP	United Nations Housing Rights Programme

The Right to Adequate Housing in Canada

BRUCE PORTER

1. The Growing Gap Between International Commitments and Domestic Reality in Canada

At the international level, Canada has always been a strong advocate for social and economic rights and for the right to adequate housing. Canada ratified the ICESCR in 1976 and played a leading role in promoting the adoption and ratification of the *Convention on the Rights of the Child* in 1989, both of which contain explicit recognition of the right to adequate housing. In recent years, such as during the preparation for Habitat II, Canada has resisted U.S. opposition to recognition of the right to adequate housing.¹ In 2000 and 2001, Canada co-sponsored the Resolution on *Women's equal ownership of, access to and control over land and the equal rights to own property and to adequate housing*, subsequently approved by the UN Commission on Human Rights.² This leadership role in promoting the right to adequate housing is consistent with Canadians' self-image as being different from their neighbours to the south in regard to questions of social and economic rights and the responsibilities of governments toward disadvantaged citizens.

Unfortunately, Canadians' self-image and the image projected by Canada internationally is increasingly at odds with domestic policy and legislation. At the domestic level, there is no evidence of any commitment on the part of the federal government or provincial governments in Canada to give domestic content or effect to the right to adequate housing. There is no explicit recognition of the right to adequate housing anywhere in Canadian law and the consistent policy direction in recent years in Canada has been toward unprecedented withdrawal of commitments to any of the most critical components of a strategy to ensure access to adequate housing and meaningful security of tenure.

When Canada ratified the ICESCR in 1976 and undertook to ensure that domestic law and policy conformed with the Covenant's guarantee of the right to adequate housing, homelessness was virtually unheard of in Canada. Scarce references to the "homeless" at that time referred to transient men housed in rooming houses.³ In the intervening years of strong economic growth and a general level of well-being that placed Canada atop the UNDP Human Development Index from 1993 until 2001, violations of the right to adequate housing have reached unprecedented proportions. Homelessness has been identified as a "national disaster" by the mayors of the ten largest cities in Canada. Dozens of people die on the cold streets of

¹J. David Hulchanski, "Canada's Role at the UN Habitat II Conference in Istanbul: Politics, Market and Housing Rights, (1996) *Canadian Housing Magazine*, online at: <<http://resources.web.net/show.cfm?id=611&APP=housing>>.

²United Nations Commission on Human Rights, *Women's equal ownership of, access to and control over land and the equal rights to own property and to adequate housing*. UN Doc No. CN.4/RES/2001/34 (20 April 2001).

³City of Toronto Planning Board, Report on Skid Row, (1977).

Canada's cities every winter and high rates of Tuberculosis, Hepatitis B and HIV are now a common feature of an expanding homeless population. Women and children have been the most dramatically affected.⁴ 30,000 individuals use shelters for the homeless in the City of Toronto every year, including over 6,000 children and increasing numbers of children are born into shelters. The number of homeless families increased by 123% between 1992 and 1996 in Toronto and the number of homeless two parent families has grown by over 600% since 1988.⁵

Statistics on shelter use and street homelessness, however, are only the tip of the iceberg. Women with children avoid at all costs living on the streets for fear of losing their children or being vulnerable to assault. They turn instead to friends, family or acquaintances to provide temporary housing or accept overpriced, inadequate housing at the expense of other necessities such as food and clothing. The number of single mothers living in poverty has increased by more than 50% since 1989.⁶ Emergency provision of food through "food banks", which was unheard of when Canada ratified the ICESCR, is now a critical means of survival for three quarters of a million people, including over 300,000 children who rely every month on emergency assistance from a national network of over 615 food banks and over 2,000 agencies providing emergency food.⁷ This emergency food has been referred to as "edible rent supplements" because low-income households are often only able to keep their housing by relying on emergency foodstuffs. They are increasingly confronted with the choice, as captured in the title of a recent book on poverty in Canada, of either paying the rent or feeding the kids.⁸ The 1996 census showed an increase of 43% over the previous five years in the number of renters in Canada spending more than 50% of their household income on shelter.⁹ Inability to afford or obtain adequate housing has become a significant factor in parents losing or relinquishing custody of their children.¹⁰

Aboriginal people in Canada living on reserves suffer housing conditions described as "intolerable" by a Royal Commission on Aboriginal Peoples.¹¹ Aboriginal households are more

⁴ Shelter data from Toronto show 130% increase in number of women and children between 1989 and 1999.

⁵ City of Toronto Homelessness Report 2001, online at: <www.city.toronto.on.ca/homelessness/homelessnessreport.pdf>

⁶National Council on Welfare *Poverty Profile: 1998*, Vol. 113 (Autumn, 2000). While Canada has no official poverty line, Statistic Canada calculates a "low income cut-off" for various household sizes, below which people can be said to "live in straightened circumstances, substantially below the average". This is widely used as a measure of poverty, including by the National Council on Welfare, and is particularly useful in identifying changes over time.

⁷Canadian Association of Food Banks, *Hunger Count2000: A Surplus of Hunger*, Prepared by Beth Wilson and Carly Steinman (Toronto, October, 2000). The first food bank in Canada opened in 1981 in Edmonton.

⁸M. Hurtig, *Pay the Rent or Feed the Kids: The Tragedy and Disgrace of Poverty in Canada* (Toronto: McClelland & Stewart, 1999).

⁹ Statistics Canada, *The Daily*, June 9, 1998, Catalogue No. 11-001E, p. 5; United Nations Committee on Economic, Social and Cultural Rights, *Concluding Observations on Canada*, E/C.12/1/Add.31 (10 December 1998) [hereafter CESCR, *Concluding Observations*, 1998] para. 25.

¹⁰S. Chau, A. Fitzpatrick, J. D. Hulchanski; B. Leslie and D. Schatia, *One in Five: Housing as a Factor in the Admission of Children into Care. A Joint Research Project by the Children's Aid Society of Toronto and the Faculty of Social Work, University of Toronto*. The study found that inadequate housing or homelessness was a factor in one of five admissions of children into foster care in Toronto.

¹¹ *Report of the Royal Commission on Aboriginal Peoples* (hereinafter *RCAP*) Vol III, Chapter 4 (Ottawa, 1996).

than 90 times more likely than other Canadian households to be living without a piped water supply. 14% live without indoor plumbing.¹² Aboriginal women have twice the poverty rate of non-Aboriginal women and are over-represented in the population of families in homeless shelters.¹³ 73% of Aboriginal female lone parents live in poverty, the majority living in cities and most characterized as being in “core housing need.”¹⁴ Inuit peoples in Canada’s Arctic regions are suffering from some of the most severe housing conditions, with widespread overcrowding and grossly inadequate housing supply. Traditionally nomadic societies have been robbed of their habitat and provided with culturally inappropriate and inadequate housing. Widespread family violence, suicide and hopelessness have been the result. As noted by the Royal Commission on Aboriginal Peoples, the number of Aboriginal suicides sends a “blunt and shocking message to Canada that a significant number of Aboriginal people in this country believe that they have more reasons to die than to live.”¹⁵

The Canadian government is fond of pointing out to UN treaty monitoring bodies that Canadians enjoy one of the highest standards of housing in the world. 64% of Canadians own their own homes with, on average, more than 7 rooms and an average 1996 value of \$150,000 (Cdn). 57% of Canadians live in detached houses.¹⁶ Almost three quarters of a million households, representing 14% of the population, own an additional vacation home in the country.¹⁷ Homeowners, who receive significant tax breaks in comparison to renters, have seen their wealth increase to 70 times that of renters in recent years.

In the context of such affluence, violations of the right to adequate housing in Canada are clearly the result of explicit legislative choices rather than a lack of resources. Governments in Canada have increasingly targeted policies at what the Canadian economist John Kenneth Galbraith has described in the U.S. context as a “Contented Electoral Majority” even at the cost of the basic dignity and security of those who are disadvantaged.¹⁸ When Canada was asked at its most recent periodic review in 1998 by the CESCR if it is “applying the ‘maximum of available resources’ to eliminating homelessness” and if it agrees “that guaranteeing the right to housing is a core responsibility of governments and a matter of the highest priority,” the Government of Canada responded that it is “fostering a strong economy that sustains and creates jobs, which in turn enable the vast majority of Canadians to address their own housing needs without direct government subsidy.”¹⁹ As Craig Scott has observed:

¹²*Ibid.*

¹³British Columbia, Ministry of Social Development and Economic Security, *Homelessness – Causes & Effects: A Profile, Policy Review and Analysis*, Vol. 2 at 23 and Vol. 4 at 8 (March 2001).

¹⁴Statistics Canada, *Women in Canada 2000*, CS89-503-XPE, at 248-249; *Core Housing Need Among Off-Reserve Aboriginal Lone Parents in Canada* at iii.

¹⁵Quoted by Matthew Coon Come, “No Apologies: Structural Racism, “White Mobs”, and the Pushing of Indigenous Peoples in Canada to the Edge of Social, Political and Cultural Extinction”, Speech to the Ontario Bar Association, Toronto: October 1, 2001).

¹⁶ Statistics Canada, “Occupied Private Dwellings by Tenure and Number of Rooms, Showing Structural Type of Dwelling, for Canada, 1996 Census Cat. No. 93F0030XDB96013.

¹⁷Federation of Provincial Cottagers’ Associations, <<http://www.cottager.org/ccpca/presmess.htm>>

¹⁸J. K. Galbraith, *The Culture of Contentment* (Boston: Houghton Mifflin, 1992) at p. 15.

¹⁹Government of Canada, *Responses to the Supplementary Questions to Canada’s Third Report on the International Covenant on Economic, Social and Cultural Rights*, HR/CESCR/NONE/98/8 (October, 1998)

*Canadian governments have long invoked averages and medians as adequate accounts of the state of human rights enjoyment in Canada, thereby showing just how little understanding (or sincere attempt to understand) there is of the very nature of human rights. That Canadians on average are not homeless, on average have adequate nutrition, on average go to adequate schools, or on average can raise their children in a dignified way says nothing at all about whose human rights are being respected and whose are being violated.*²⁰

2. Forced Evictions and Security of Tenure

During the late 1960's and 1970's, tenants across Canada fought for and won important protections of security of tenure within provincial legislation governing landlord and tenant law. Such legislation substituted statutory rights and duties for common law contract and property law principles which had evolved from feudal times. The new legislation recognized, at least implicitly, that tenants are in an unequal power relationship with landlords and rejected the previous model according to which, in the words of one government member introducing the new legislation, "the landlord ruled like a medieval baron over his tenant."²¹ By the time Canada ratified the ICESCR in 1976, landlord and tenant legislation had been put in place in many provinces across Canada requiring landlords to go to court if they wished to terminate a tenancy and restricting termination of tenancy to specific reasons enumerated in legislation, such as non-payment of rent, illegal activity or disturbing the enjoyment of other tenants. These provisions applied regardless of the terms of a lease or of any other statute.²² Matters that previously had been resolved primarily outside of the judicial system, according to unregulated powers of property owners, were thus integrated into the Canadian judicial system and legal security of tenure became a reality for many residential tenants.²³

Increasing numbers of households in Canada, however, do not enjoy statutory protections of security of tenure because of the nature of their housing situation. Lower rent accommodation that is affordable to the poorest households is often not self-contained. If kitchen or bathroom facilities are shared with the owner, rental accommodation is usually exempt from both landlord and tenant and human rights legislation.²⁴ Increasing numbers of low-income families with

(Hereafter "Government of Canada, *Responses, CESCR*, 1998") question 44.

²⁰C. Scott, "Canada's International Human Rights Obligations and Disadvantaged Members of Society: Finally into the Spotlight?" (1999) 10:4 *Constitutional Forum* 97.

²¹ A.F. Lawrence, MPP, Legislature of Ontario, 2nd Session of the 28th Legislature (1969) Official Records (Hansard) p. 9199; Donald Lamont, *Residential Tenancies* (5th Edition) (Toronto: Carswell, 1993) p. 1.

²²See, for example, Ontario's *Landlord and Tenant Act* R.S.O. 1970 c. L.7, Nova Scotia's *Residential Tenancies Act*, S.N.S. 1970, c. 13; and Alberta's *Residential Tenancies Act* (RSA 1980, c. R-15.3). Until 1992 Alberta's *Act* permitted termination of tenancy without cause with 90 days of notice, which permitted large scale eviction prior to the 1988 Calgary Winter Games. It now permits termination by the landlord only for "substantial breach" of the tenancy agreement.

²³ As noted by Lamer, C.J. in *Reference re Amendments to the Residential Tenancies Act* (N.S.) [1996], *supra*, at para. 45, it appears that "few residential tenancy matters found their way into our courts prior to 1970."

²⁴See, for example, the *Tenant Protection Act*, S.O. 1997, c.24, s.3 and the *Human Rights Code*, R.S.O. 1990, c.H.19, s 21(2).

children are now forced to live in small motel units which are rented by the week. These too are generally exempt from security of tenure provisions.²⁵ Even in apartments protected by security of tenure legislation, women may be forced to leave when a male partner vacates. Where the male spouse's name is on the lease or where he was the one to have paid the rent to the landlord, women have been found in some cases not to be "tenants" and therefore denied security of tenure.²⁶

Even for those tenants who enjoy the protection of legal security of tenure in Canada, the protections that were put in place twenty-five or thirty years ago have been increasingly reduced to a procedural protection only, and administered without any recognition of the substantive right to adequate housing. Procedures are primarily designed to provide expeditious eviction for landlords. New landlord and tenant legislation which came into effect in Ontario in 1998, for example, permits landlords to obtain an order to evict tenants if, after five days of receiving a notice of termination of tenancy from the landlord, tenants do not file a written notice of intent to dispute the landlord's application. Not surprisingly, most tenants do not manage to file a written dispute and the majority of evictions in Ontario thus occur without any hearing at all.²⁷

Tenants are routinely evicted for minimal arrears of rent. In Toronto, 80% of applications to evict for arrears are for less than \$1,000 or an average month's rent. About 700 applications each year in Toronto are against tenants who owe nothing, but are alleged to have been "persistently late" in the past.²⁸ In many cases, households are evicted when the landlord actually owes the tenant money because the arrears are less than the deposit the tenant has paid the landlord at the commencement of the tenancy to cover the last month's rent. Landlords have been provided with greater incentive to evict tenants by rent 'decontrol' which allows landlords to increase rents by any amount once the existing tenant leaves or is evicted and a new tenancy is commenced.²⁹ Thousands of adults and children are thus forced into homelessness every year, children displaced from their schools and their physical and emotional health put at risk, because some temporary set-back has left them a little short on their rent, usually less than a month's rent. Such actions would certainly appear to be in violation of obligations under the ICESCR, enunciated the General Comment No. 7, to ensure that evictions should not result in individuals being rendered homeless.³⁰

In less affluent countries than Canada, poor and homeless people tend to be located in particular communities, often as squatters occupying particular tracts of land. In these situations the term "forced evictions" is associated with entire communities or neighbourhoods being evicted. In Canada, this pattern of forced relocation of entire communities has characterized some of the many violations of the right to adequate housing of Aboriginal people who, after

²⁵*Tenant Protection Act, supra*, f.n. 23, s.3.

²⁶See for example *Minto Management Limited v. Torres*, (June 5, 2001) unreported, (Ontario Rental Housing Tribunal).

²⁷In Ontario in 2001, 57% of the over 60,000 landlord applications for termination of tenancy resulted in "default" eviction orders without any hearing. (Ontario Rental Housing Tribunal Workload Reports). See also Jennifer Ramsay, "Manufacturing Homelessness" (Toronto Star, June 30, 2000) Online at www.equalityrights.org/cera/mh.htm.

²⁸Ontario Rental Housing Tribunal Records, 2,000.

²⁹*Tenant Protection Act, supra*, f.n.23, s.116.

³⁰ICESCR, *General Comment No. 7*, at para. 16.

having been first forced by Europeans from their lands and homes, continue to face displacement and relocation through the destruction of habitat and resources, massive flooding for hydro-electric projects or deliberately engineered “relocations” for administrative or developmental purposes.³¹ Aboriginal people have faced violent police tactics when occupying land in protests over unrecognised land claims, including a fatal shooting by police of a peaceful demonstrator at Ipperwash, Ontario in 1995 - for which U.N. Human Rights Committee recommended a public inquiry at its last review of Canada.³²

Forced evictions of communities of homeless people from squatter communities in Canada is also not unknown. Mega project development has been responsible for dislocations of hundreds of households from low-income communities in preparation for Expo '86 in Vancouver and for the 1988 Calgary Winter Olympics.³³ More recently communities of homeless people have begun to organize squatter communities and have faced violent evictions from police.³⁴

It would be unfortunate, however, if forced evictions were only to receive attention in Canada when they affect a geographically defined community. Most of the evictions leading to homelessness in Canada occur in individual households. If Ontario's 60,000 evictions a year were imposed on a single community with bulldozers, they would attract the attention of the international community. Because they are carried out on dispersed households, through legally sanctioned processes, and within a culture in which poor people are made to feel that their inability to pay the rent is a mark of inferior character, they attract little attention. Yet these evictions derive as much from deliberate government choice as the forced evictions of squatter communities elsewhere. A single mother in Toronto relying on social assistance, unable to pay the rent with a shelter allowance of half of the average rent, is, like her counterparts in other countries, forcibly removed by a man in a uniform and left on the street with her belongings and a crying child. No one, from the tribunal adjudicator to the sheriff who carries out the eviction, is likely to inquire if she and her child have a place to go. The weather may be frigid and the shelters may be full. Yet hundreds of these evictions occur every day in Canada and are accepted as part of the “rule of law” in a country which prides itself in its human rights record.

3. Proposals for Incorporating the Right to Adequate Housing as a Distinct Right in Canadian Law

Nowhere in Canada's domestic law is there any explicit recognition of the right to adequate housing, either as an enforceable right or even as a policy commitment of government - not in the twenty year old *Constitution Act, 1982*, including the *Canadian Charter of Rights and*

³¹*Report of the Royal Commission on Aboriginal Peoples*, Vol 1, Chapter 11 “Relocation of Aboriginal Communities.”

³²U.N. Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee (Canada)*, Geneva, 07 April 1999, CCPR/C/79/Add. 105 (1999) [hereinafter *Concluding Observations, HRC, 1999*] at para.11.

³³Kris Olds, “Canada: Hallmark Events: Evictions and Housing Rights” in A. Azuela, E. Duhau, and E. Ortiz (eds) *Evictions and the Right to Housing: Experience from Canada, Chile, the Dominican Republic, South Africa, and South Korea* (Ottawa: IDRC, 1998) ISBN 0-88936-861-9 Online at <www.idrc.ca/books/focus/861>.

³⁴For example, about 30 squatters were evicted from an abandoned building by police in Montreal on October 4, 2001. Michelle Macafee, *Seven people arrested as Montreal police evict about 30 squatters* (Montreal: Canadian Press, October 4, 2001).

Freedoms,³⁵ in provincial or federal human rights legislation, in national, provincial or territorial housing legislation or in federal-provincial agreements.

Moreover, rights recognized in international human rights treaties ratified by Canada are not directly enforceable by domestic courts without incorporation into Canadian law by parliament or provincial legislatures.³⁶ Claimants of the right to adequate housing in Canada are thus precluded from directly invoking article 11 of the *ICESCR* as a self-standing justiciable right in Canada. It might conceivably be the basis for seeking a declaratory order from a Canadian court, but it is not clear that such an order would have any more impact on Canadian governments than the very explicit findings that have been made by U.N. treaty monitoring bodies in recent years.³⁷ As in most other common law countries, direct incorporation of human rights treaties does not seem to be taken seriously as an option in Canada, where we have adopted our own *Constitution* and *Charter of Rights and Freedoms* seen, by the Supreme Court of Canada, to provide protection “at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.”³⁸

When Prime Minister Trudeau initiated debate on repatriating the Constitution from the Parliament at Westminster and adopting a new *Canadian Charter of Rights and Freedoms* at the beginning of the 1980's, there was no serious consideration given to including the right to adequate housing as an individually enumerated right in the new *Charter*. Trudeau certainly recognized the interdependence of economic, social and cultural rights and civil and political rights, having warned earlier in his career that unless society evolves “an entirely new set of values” and produces the services that private enterprise is failing to produce “any claim by lawyers that they have done their bit by upholding civil liberties will be dismissed as a hollow mockery.”³⁹ Trudeau’s vision of a “just society”, as noted by the Supreme Court of Canada, underpinned the broader vision behind the new *Charter*, based on a substantive, progressively realized conception of equality which “permits every individual to live in dignity and in harmony with all.” and “worth the arduous struggle to attain.”⁴⁰

At the time the *Charter* was drafted, however, this value system, linked explicitly to an emerging international human rights movement, was not seen to require individually enumerated social and economic rights such as the right to adequate housing. As noted above, Canada was a different society at that time, in which food banks did not exist and homelessness was virtually unknown.

The federal government and its provincial counterparts saw themselves as fundamentally

³⁵*Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11.

³⁶See *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras 69-71.

³⁷The Supreme Court of Canada has recognized that declaratory remedies may be issued in order to clarify issues of rights that are not subject to judicial remedy but have political implications See *Dumont v. Canada* (1990), 67 D.L.R. (4th) 159 (S.C.C.) and *Landreville v. The Queen* (1973), 41 D.L.R. (3d) 574 (F.C.T.D.) at 580-1. The Court has rejected arguments that it exceeds its jurisdiction in resolving questions of international law *Reference re Secession of Quebec* and [1998] 2 S.C.R. at paragraphs 20-22.) In *Montana Indian Band et al. v. Canada* (1991), 120 N.R. 200 (F.C.A.) at 203 an application was allowed in which the court would consider whether the *ICCPR* had been violated.

³⁸*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at 1056-1057, 1078-1081.

³⁹Pierre Trudeau, “Economic Rights” *McGill Law Journal*, 1961.

⁴⁰*Vriend v. Alberta*, [1998] 1 S.C.R. 493 (per Cory, J.) para. 68.

committed, in the words of s.36 of the *Constitution*, to “promote the well-being of Canadians and to provide essential public services of reasonable quality to all Canadians.”⁴¹ Social and economic rights like the right to adequate housing, though recognized in the ICESCR, were at that time not subject to any form of rigorous review or adjudication within the U.N. treaty monitoring system and there was no major impetus for their inclusion as specific rights within Canada’s new *Charter*.⁴² Reference to the ICESCR during the debates on the *Charter* were to government “commitments” rather than to individual rights. The Special Joint Committee of the Senate and of the House of Commons considered an amendment to s. 36 of the *Constitution* to add a “commitment to fully implementing the *International Covenant on Economic, Social and Cultural Rights* and the goals of a clean and healthy environment and safe and healthy working conditions.”⁴³ However, as Jean Chrétien, the Minister of Justice of the time, noted, Canada was already committed to implementing the *ICESCR*.” and did not need to put “everything” in this section of the Constitution.⁴⁴

Ten years later, after the severe housing shortage of the 1980's had begun to make homelessness a reality in Canada and food banks an emerging phenomenon, a Liberal Housing Task Force, co-chaired by Paul Martin (who as Finance Minister in later years would preside over most of the dramatic programme cuts that have created the homelessness crisis in Canada) recommended that the *Canadian Charter of Rights* be amended to include the right to adequate housing. The Report observed that although Canada had signed onto the rights in the ICESCR, these rights “tend still to be looked upon only as worthy goals of social and economic policy rather than legally enforceable rights.”⁴⁵ “The Task Force believes that those searching for adequate, affordable housing may be better served by giving them some form of constitutionally guaranteed right to shelter”.⁴⁶

The following year, when a new round of constitutional discussions commenced in Canada, the social democratic government of the Province of Ontario proposed that a “social charter” be included in a revised Constitution of Canada.⁴⁷ As discussions proceeded, however,

⁴¹*Constitution Act*, 1982, s.36.

⁴²B. Porter, “ReWriting the *Charter* at 20 or Reading it Right: The Challenge of Poverty and Homelessness in Canada” in *The Canadian Charter of Rights and Freedoms: Twenty Years Later* (Ottawa: Canadian Bar Association, April, 2001)

⁴³Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, First Session of the Thirty-second Parliament, 1980-1981, Issue no. 49 (30 January 1981) at pp. 65-71.

⁴⁴*Special Joint Committee Minutes*, *supra*, at 49:68-49:69. The Government of Canada has pointed to s. 36 as being “particularly relevant in regard to ... the protection of economic, social and cultural rights” in its reports to treaty monitoring bodies, but the direct justiciability of the s.36 “commitment” has not yet been tested by Canadian courts. *Core Document Forming Part of the Reports of States Parties (Canada)*, HRI/CORE/1/Add.91 (12 January, 1998) at para. 127. On the justiciability of s. 36 see: A. Nader, “Providing Essential Services: Canada’s Constitutional Commitment under Section 36” (1996) 19 *Dalhousie L.J.* 306; See also *Winterhaven Stables Ltd. v. A.G. Canada* (1988), 53 D.L.R. (4th) 413 (Alta. C.A.) at 432,434.

⁴⁵Paul Martin and Joe Fontana, *Report of the National Liberal Caucus Task Force on Housing* (National Liberal Caucus, Parliament of Canada, 1990).

⁴⁶*Report of the Liberal Housing Task Force*, (Ottawa, Parliament of Canada, 1990).

⁴⁷Ontario Ministry of Intergovernmental Affairs, *A Canadian Social Charter: Making Our Shared Values*

it became clear that by the time any political consensus was reached, the wording of a social charter in the Constitution would serve more to undermine the right to adequate housing and other social and economic rights rather than providing any effective legal protection of these rights. The “social and economic union” clause agreed to by the provincial governments and the federal government in the Charlottetown Accord of 1992 listed as one of a number of unenforceable policy objectives” “Providing adequate social services and benefits to ensure that all individuals resident in Canada have reasonable access to housing, food and other basic necessities.” The consensus agreement, on the basis of which a national referendum was held, stated explicitly that these policy objectives were not justiciable. The U.N. CESCR accurately observed in its concluding observations after its 1993 review of Canada that the Charlottetown Accord seemed to confuse unenforceable “policy objectives” of governments with fundamental human rights.⁴⁸ The Charlottetown Accord was defeated in a referendum after women’s groups and other human rights groups argued that its provisions would serve to weaken rights in the *Charter of Rights and Freedoms*.⁴⁹

During the discussions leading up to the Charlottetown Accord, an *Alternative Social Charter* was endorsed by a national coalition of anti-poverty and equality seeking groups. The *Alternative Social Charter* included a right to “a standard of living that ensures adequate food, clothing, housing, child care, support services and other requirements for security and dignity of the person.” The *Alternative Social Charter* would have established both a Social Rights Council, charged with monitoring and reporting on social and economic rights, and a Social Rights Tribunal to adjudicate claims of systemic or public importance. The text encouraged interpretations of the *Canadian Charter of Rights and Freedoms* that would include substantive social and economic rights. While the *Alternative Social Charter* was not part of the proposal adopted by the first ministers in Charlottetown, it has been recognized in Canada and elsewhere as an innovative model for the protection and adjudication of social and economic rights such as the right to adequate housing.⁵⁰

Quebec’s *Charter of Human Rights and Freedoms*⁵¹ (the *Quebec Charter*) is the only human rights legislation in Canada to include reference to social and economic rights. It does not make explicit reference to the right to adequate housing, but it guarantees to every person in need “the right for himself [herself] and his [her] family, to measures of financial assistance and to social measures provided for by law, susceptible of ensuring such person an acceptable standard of living (niveau de vie décent).”⁵² This provision is not subject to the complaints provision under Quebec’s *Charter* and has been rarely invoked in court, but it is currently before the Supreme Court of Canada in that Court’s first case involving the right to financial assistance

Stronger. A Discussion Paper. (Toronto, Ministry of Intergovernmental Affairs, September, 1991).

⁴⁸U.N. Committee on Economic, Social and Cultural Rights, *Concluding Observations on Canada*, E/C.12/1993/5 (10 June 1993) [hereafter CESCR, *Concluding Observations*, 1993] at para. 21.

⁴⁹B. Porter, “Social Rights and the Question of a Social Charter,” in P. Leduc Browne ed., *Finding Our Collective Voice, Options for a New Social Union* (Ottawa: Canadian Centre for Policy Alternatives, 1998) 59.

⁵⁰ The *Alternative Social Charter* is discussed and reproduced in J. Bakan & D. Schneiderman, eds., *Social Justice and the Constitution: Perspectives on a Social Union for Canada* (Ottawa: Carleton University Press, 1992), Appendix I at 155.

⁵¹*Charte des droits et liberté de la personne*, R.S.Q. c. C-12.

⁵²*Ibid.*, s.45.

sufficient to ensure adequate housing.⁵³

A consistent recommendation of the CESCR in its most recent reviews of Canada has been that human rights legislation in other Canadian jurisdictions be amended to include social and economic rights.⁵⁴ This recommendation has been endorsed by the Canadian Human Rights Commission⁵⁵ and by the majority of human rights groups across Canada. However, a panel charged with reviewing the scope and jurisdiction of the *Canadian Human Rights Act*,⁵⁶ though it supported a number of important changes to the Act, did not recommend in its report the inclusion of social and economic rights such as the right to adequate housing “at this time.”⁵⁷

4. Giving Domestic Effect to the Right to Adequate Housing in Canada Through the Interpretation of Domestic Law

Given the absence of any explicit provisions in the *Charter of Rights* or elsewhere in Canadian law guaranteeing the right to adequate housing, what is most critical for giving domestic effect to this right in Canada is its effect on the interpretation of the open-ended provisions of the *Charter of Rights and Freedoms* and on other domestic law relevant to access to adequate housing.

As noted by the CESCR’s *General Comment No. 9 on the Domestic Application of the Covenant*:

*It is generally accepted that domestic law should be interpreted as far as possible in a way which conforms to a State's international legal obligations. Thus, when a domestic decision maker is faced with a choice between an interpretation of domestic law that would place the state in breach of the Covenant and one that would enable the State to comply with the Covenant, international law requires the choice of the latter. Guarantees of equality and non-discrimination should be interpreted, to the greatest extent possible, in ways which facilitate the full protection of economic, social and cultural rights.*⁵⁸

The Supreme Court of Canada has affirmed that this “interpretive presumption” must apply when Canadian courts interpret laws and when administrators exercise discretion. Considering the status of the *Convention on the Rights of the Child* as an interpretive framework for judicial interpretation and administrative discretion under domestic law, L’Heureux-Dubé, J. asserted for the majority of the Supreme Court that while it is true that the provisions of a treaty

⁵³See the discussion of the *Gosselin* case below.

⁵⁴CESCR, *Concluding Observations*, 1993, at para. 25, CESCR, *Concluding Observations*, 1998, para. 51.

⁵⁵Canadian Human Rights Commission, *Annual Report 1997* (Ottawa: Canadian Human Rights Commission, 1998) 2.

⁵⁶For the specific proposals endorsed by the majority of the groups, see M. Jackman and B. Porter, “Women’s Substantive Equality and the Protection of Social and Economic Rights under the Canadian Human Rights Act” in Status of Women Canada, *Women and the Canadian Human Rights Act: A Collection of Policy Research Reports* (Ottawa: Status of Women Canada, 1999). Online at <www.swc-cfc.gc.ca>.

⁵⁷Canadian Human Rights Act Review Panel, *Report of the Canadian Human Rights Act Review Panel* (Department of Justice, Ottawa, 2000) at pp.114-117.

⁵⁸CESCR, *General Comment No. 9*, E/C.12/1998/24 (4 December, 1998) at paras. 14, 15.

which has not been implemented by statute into the law of Canada have no direct application in Canadian law, they nevertheless will have considerable interpretive effect. International human rights law, she wrote, contains “the values that are central” in determining whether a decision or an exercise of discretion is “reasonable”.

*[T]he legislature is presumed to respect the values and principles contained in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred.*⁵⁹

In this case, the Court dealt with a review of a deportation order, but the principle would equally apply to exercising discretion not to evict a family with no alternative accommodation.

The Supreme Court of Canada recognizes that Canada’s international human rights commitments will be a “critical influence” in determining the scope of the broadly framed rights and freedoms in the *Canadian Charter of Rights and Freedoms*.⁶⁰ The right to equality in section 15 of the *Canadian Charter* and the right to “life, liberty and security of the person” in section 7, derived directly from articles 2 and 3 of the *Universal Declaration of Human Rights* are of particular importance in giving domestic effect to international human rights because these rights “embody the notion of respect of human dignity and integrity.”⁶¹

In comparison to South Africa’s *Bill of Rights* or other modern national constitutions, Canada’s *Charter* is comparatively sparse and contains few references to social and economic rights. But its brevity need not be taken as a deliberate exclusion of social and economic rights. The fundamental idea of interdependence and indivisibility behind the holistic approach in the South African *Bill of Rights*, to which Canada has also committed itself under international law, is entirely consistent with the provisions of the *Canadian Charter*. As Justice Jacob noted in regard to the South African Bill of Rights in the *Grootboom* decision: “All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter.”⁶² The Supreme Court of Canada has affirmed that the same fundamental values lie at the heart of the *Canadian Charter of Rights and Freedoms*, and that it, like the South African *Bill of Rights*, must be interpreted consistently with the fundamental values of international human rights law. Denial of the right to adequate housing to marginalized, disadvantaged groups in Canada clearly assaults fundamental rights in the *Canadian Charter of Rights and Freedoms*, even if they do not include explicit reference to the right to adequate housing.

While the Supreme Court of Canada has not yet released a ruling addressing the right to adequate housing under the *Canadian Charter of Rights*, it has referred extensively to the *ICESCR* in interpreting provisions of the *Charter*, particularly the right to freely chosen work.⁶³

⁵⁹*Baker v. Canada*, *supra*, at para. 70.

⁶⁰*Ibid.*

⁶¹*R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at para. 73.

⁶²*Government of the Republic of South Africa v. Grootboom* (2001) (1) South African Law Reports 46 (CC) at para. 5.

⁶³*R. v. Advance Cutting and Coring Limited*, [2001] S.C.C. 70 (October 19, 2001) per Bastarache, J. para. 12; *Slaight Communications [Inc. v. Davidson]*, [1989] 1 S.C.R. 1038].

It has been careful to distinguish “corporate-commercial economic rights” which were deliberately excluded from the *Canadian Charter* when “property rights” were rejected, from “such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter.”⁶⁴ It is thus reasonable to assume that at least some components of the right to adequate housing will be protected under the rubric of “life, liberty and security of the person” in section 7 of the *Canadian Charter of Rights and Freedoms*, and the right to equality in section 15.

In fact, in its Second Periodic Review under the ICESCR in 1993, the Government of Canada informed the CESCR that the protection of “life, liberty and security of the person” in the *Charter* at least guarantees that people are not to be deprived of basic necessities such as food, clothing and housing.⁶⁵ At its third periodic review, Canada confirmed that this was still its position.⁶⁶

Similarly, with respect to the equality rights protected in section 15 of the *Charter*, the Supreme Court of Canada has adopted a “substantive” approach to the interpretation of the right to equality which includes positive obligations to provide resources necessary for disadvantaged groups to enjoy the equal benefit of government programmes and to protect fundamental dignity interests. In the *Eldridge*⁶⁷ case, where the Supreme Court considered a failure of the British Columbia Government to provide interpreter services for the Deaf and Hard of Hearing in the provision of healthcare, the Government of British Columbia had argued successfully in lower courts that the right to equality does not impose positive obligations on governments to allocate resources to particular programmes or to address the social and economic disadvantage or particular groups. Writing for a unanimous Court, Justice La Forest wrote that:

[T]he respondents and their supporting interveners maintain that s. 15(1) does not oblige governments to implement programs to alleviate disadvantages that exist independently of state action. They assert, in other words, that governments should be entitled to provide benefits to the general population without ensuring that disadvantaged members of society have the resources to take full advantage of those benefits.

*In my view, this position bespeaks a thin and impoverished vision of s. 15(1). It is belied, more importantly, by the thrust of this Court's equality jurisprudence.*⁶⁸

Similarly, in the *Vriend* case, where the Court considered the refusal by the Province of Alberta to include protection against discrimination because of sexual orientation in housing, services or employment, the Court rejected arguments that these types of positive legislative

⁶⁴*Irwin Toy*, [1989] 1 S.C.R. 927 at 1003-4.

⁶⁵United Nations Committee on Economic, Social and Cultural Rights, *Summary Record of the Fifth Meeting*, E/C.12/1993/SR.5 (25 May, 1993) at paras. 3, 21.

⁶⁶Government of Canada, *Responses*, CESCR, 1998, *supra* note 39, Question 53 (Government of Canada). The Canadian Delegation’s description of the *Irwin Toy* decision actually goes somewhat further than the decision itself, which simply did not “rule out” an interpretation that would include rights like the right to housing. CESCR, *Concluding Observations*, 1998, at paragraph 5.

⁶⁷*Eldridge v. British Columbia (Attorney General)* [1997] 3 S.C.R. 624.

⁶⁸*Ibid.*

measures are solely within the legislative domain and that courts are “wrongfully usurping the role of the legislatures” when they require governments to ensure that disadvantaged groups are provided the necessary protections. Such an allegation, a unanimous Court held, “misunderstands what took place and what was intended when our country adopted the *Charter* in 1981-82.”⁶⁹

The *Eldridge* and *Vriend* decisions were welcomed by the CESCR in its 1998 review of Canada, as establishing the basis for an approach to the equality provisions of the *Canadian Charter*, which would provide for effective remedies to violations of social and economic rights.

*The Committee notes with satisfaction that the Supreme Court of Canada has not followed the decisions of a number of lower courts and has held that section 15 (equality rights) of the Canadian Charter of Rights and Freedoms (the Charter) imposes positive obligations on governments to allocate resources and to implement programmes to address social and economic disadvantage, thus providing effective domestic remedies under section 15 of the Charter for disadvantaged groups.*⁷⁰

While reacting positively to these developments at the Supreme Court of Canada, the U.N. CESCR has noted considerable resistance among lower courts in Canada to take seriously the requirement of the “interpretive presumption” established by the Supreme Court, particularly as it applies to the right to “life liberty and security of the person” under section 7 of the *Canadian Charter*. In *Fernandes v. Director of Social Services (Winnipeg Central)*,⁷¹ for example, a permanently disabled man appealed a denial of special assistance from social services to cover the cost of attendant care, without which he would be forced to abandon his home to live permanently in a hospital. He argued that the right to security of the person and the right to equality ought to be interpreted consistently with Canada’s international human rights obligations to ensure an adequate standard of living, but the Court of Appeal in Manitoba agreed with the Attorney General’s submissions and found that the interests raised in the appeal were outside the scope of sections 7 and 15 of the *Charter*.⁷²

In *Masse v. Ontario (Ministry of Community and Social Services)*,⁷³ twelve social assistance recipients in Ontario, including seven sole support mothers, asked the Ontario Court (General Division) to strike down a twenty-two percent cut in provincial social assistance rates which the court found would mean that many recipients “will be forced to find other accommodation or make other living arrangements. If cheaper accommodation is not available, as may well be the case, particularly in Metropolitan Toronto, many may become homeless.”⁷⁴ The Court agreed with the lawyers for the Province of Ontario, who argued “that while poverty is

⁶⁹ B. Porter, “Beyond *Andrews*: Substantive Equality and Positive Obligations After *Eldridge* and *Vriend*” (1998) 9 *Constitutional Forum* 71.

⁷⁰ CESCR, *Concluding Observations*, 1998, at paragraph 4.

⁷¹ (1992), 93 D.L.R. (4th) 402 (Man. C.A.).

⁷² *Ibid.*

⁷³ *Masse v. Ontario Ministry of Community and Social Services* (1996), 134 D.L.R. (4th) 20, leave to appeal to Ontario Court of Appeal denied (1996), 40 Admin. L.R. 87N, leave to appeal to the Supreme Court of Canada denied (1996), 39 C.R.C. (2d) 375.

⁷⁴ *Ibid.* at paras. 42-49 (per Corbett J.).

a deeply troubling social problem, it is not unconstitutional.” and found that the court has no jurisdiction “to second guess policy/political decisions.”⁷⁵

The CESCR was harshly critical of both the government pleadings and the courts’ decisions in these cases, noting that “provincial governments have urged upon their courts in these cases an interpretation of the *Charter* which would deny any protection of Covenant rights” and that the courts had “opted for an interpretation of the *Charter* which excludes protection of the right to an adequate standard of living and other Covenant rights.”⁷⁶

It is to be noted that none of these *Charter*-based claims to the right to an adequate standard of living, including adequate housing, has been heard by the Supreme Court and all of them preceded that Court’s reversal of lower court decisions in *Eldridge* and *Vriend*. On 29 October 2001 the Supreme Court heard its first case dealing with whether sections 7 and 15 of the *Canadian Charter* include components of the right to an adequate standard of living, including adequate housing. In *Gosselin v. Quebec*, the claimant, Louise Gosselin, was subject to a provision of Quebec’s Social Aid Regulation which set a lower rate of assistance - \$170 per month – for employable recipients under the age of 30. The rate of \$170 was 20% of Statistics Canada’s Low Income Cut-Off and was the lowest rate in any province in Canada. When trying to survive on the lower rate, Ms. Gosselin was frequently homeless.⁷⁷ She had to sleep in shelters or on the street and when she found housing, it was grossly inadequate. She described one basement she lived in for a winter: “It was badly lit, there were bugs everywhere, it wasn’t heated, I rented it from the landlord heated but we froze like rats, my feet were blue all winter, my ankles hurt so much that I had trouble walking and I was cold.”⁷⁸

Ms. Gosselin alleges that the inadequacy of assistance provided to those under thirty violated her right to “security of the person” under section 7 and her right to freedom from discrimination because of age under section 15 of the *Canadian Charter*. She also relied on the right “to measures of financial assistance and to social measures provided for by law, susceptible of ensuring such person an acceptable standard of living” in section 45 of the Quebec *Charter*.⁷⁹

The trial court in *Gosselin* found that there is no justiciable right to adequate financial assistance either under the Quebec *Charter* or the *Canadian Charter*, finding that the right in article 11 of the ICESCR is subject to “progressive realization” and “signifies a mere intent” or “policy objective” of government rather than an enforceable human right.⁸⁰ This decision was the subject of a concern expressed by the CESCR in 1993 that lower courts had characterized social and economic rights as “mere policy objectives of governments rather than as fundamental human rights.”⁸¹ A critical issue for the Supreme Court will be to take up the challenge from the CESCR to properly recognize the right to adequate housing as a fundamental right while finding

⁷⁵*Ibid*, at para. 224 (per O’Brien, J) and paras. 351, 386 (per O’Driscoll J.)

⁷⁶CESCR, *Concluding Observations*, 1998, at paras. 14, 15.

⁷⁷*Gosselin v. Québec*, [1992] R.J.Q. 1647 (C.S.) at 1669, aff’d (6 April 1999) Montreal 500-09-001092-923 (C.A.). Leave granted to S.C.C. [hereinafter *Gosselin*]. Appellant’s Record, Testimony of L. Gosselin, Vol. 1 at 112, 126, 137.

⁷⁸*Ibid*, at 106 (Translation).

⁷⁹*Charte des droits et liberté de la personne*, R.S.Q. c. C-12., s.45.

⁸⁰*Gosselin*.

⁸¹CESCR, *Concluding Observations*, 1993, at para. 21.

an appropriate role for the Court in reviewing the adequacy of social programs of this sort. Obviously, it is an extremely important case for the right to adequate housing in Canada.⁸²

While to date, substantive claims to an adequate level of financial assistance sufficient to provide for adequate housing have met stiff resistance from lower courts in Canada, claimants of the right to adequate housing have made important advances in other types of equality claims.

Up until 1993 public housing tenants in three provinces were denied the protection of landlord and tenant law. This meant that those who tended to be the lowest-income tenants and often disadvantaged in other ways as well were denied the protection of landlord and tenant legislation. A significant victory was won under section 15 of the *Charter* in 1993 when Irma Sparks, a black single mother living in public housing in Nova Scotia challenged this exclusion after she was given 30 days notice to leave her subsidized apartment. She argued that because women, single mothers and people of colour make up a large number of public housing tenants, the exclusion of this form of housing from security of tenure protections discriminates on the basis of race, sex and family status. The Nova Scotia Court of Appeal found that the denial of landlord and tenant protections to public housing tenants violated the equality rights provisions of the *Charter* by discriminating against public housing tenants, who are disproportionately black and single mothers, and that the common characteristic of poverty shared by these tenants is a personal characteristic that warrants protection from discrimination.⁸³ The result, as noted by the CESCR in its 1993 review, was that the court applied section 15 so as to extend security of tenure protections to a disadvantaged group that was previously denied these protections.⁸⁴

Canada's *Charter of Rights and Freedoms* applies to governments and not to non-state actors. Thus, discrimination against low-income tenants by private landlords is addressed through provincial human rights legislation rather than the *Charter*. All provinces prohibit discrimination in housing on a broad range of grounds such as age, disability, sexual orientation, family status (having children) and marital status (including common law).⁸⁵ To address widespread discrimination in housing against social assistance recipients and other low-income tenants, most provinces now have protection from discrimination in housing on the basis of "receipt of public assistance", "source of income" or "social origin." Quebec's *Charter of Human Rights and Freedoms* prohibits discrimination because of "social condition", which has been interpreted by tribunals and courts to include protection from discrimination because of poverty or reliance on social assistance.⁸⁶

A form of discrimination in housing which has been the subject of concern by the CESCR and of extensive litigation in Ontario and Quebec is landlords' use of "minimum income criteria" or "rent-to-income ratios" to exclude low income applicants for apartments.⁸⁷ A common rule

⁸²Pleading and updates on the case are available Online at <www.equalityrights.org/ccpi>.

⁸³*Dartmouth/Halifax County Regional Housing Authority v. Sparks* (1993), 101 D.L.R. (4th) 224 at 232-235.

⁸⁴CESCR, *Concluding Observations*, 1993, at para. 5.

⁸⁵ It is the most common ground of discrimination reported to the Centre for Equality Rights in Accommodation, which deals with over 1,000 calls a year from people dealing with discrimination in housing. See CERA Annual Report 2000-2001 Online at <www.equalityrights.org/cera>

⁸⁶*Commission des droits de la personne du Québec c. Gauthier*, (1993), 19 C.H.R.R. D/312 (Que. Trib.) For a full discussion of the meaning of "social condition" see Wayne McKay, Tina Piper and Natasha Kim, *Social Condition as a Prohibited Ground of Discrimination under the Canadian Human Rights Act* (Submitted to the Canadian Human Rights Act Review Panel December, 1999). Online at www.equalityrights.org/cera.

⁸⁷CESCR, *Concluding Observations*, 1993, at para.18.

applied by landlords is that applicants who would be paying more than 30 per cent of income toward rent are disqualified on the basis of their income level. The rule is applied despite the fact that all social assistance recipients and most single mothers, young families, young people and newcomers to Canada have to pay considerably more than 30 percent of income toward rent. Landlords try to defend such policies as a reasonable basis for assessing risk of rental default but low income tenants have successfully challenged such policies as discriminatory on a number of grounds, and have disproved the stereotype that low income applicants are more likely to eventually default on rent. In the *Whittom* case in Quebec, minimum income requirements were found to constitute discrimination against single mothers and low-income tenants on the ground of “social condition”.⁸⁸ More recently, a challenge to minimum income criteria brought by three low income women in Ontario and vigorously fought by Ontario’s landlords resulted in a finding that such criteria discriminate on various prohibited grounds, including sex (against women), marital status (against single mothers and single applicants) citizenship (against newcomers), age (against young people) and race (against visible minorities).⁸⁹ The finding of the human rights board of inquiry of discrimination was upheld on appeal.⁹⁰ Subsequent rulings from Ontario boards of inquiry have found that rejecting young applicants or newcomers because they lack minimum length of employment, landlord references or credit rating constitutes discrimination against young applicants and newcomers and that minimum income criteria “result in the creation of “ghettoized” communities of low income visible minority tenants in poor quality housing about whom prejudices and stereotypes develop and flourish.”⁹¹ In these cases, claimants relied extensively on jurisprudence from the U.N. CESCR, both on the specific issue of income discrimination in Canada, and on broader principles enunciated particularly in *General Comment No. 4*, with respect to non-discrimination and access to adequate housing.⁹² The decisions are the first in Canada and internationally to establish that discrimination in housing because of poverty is a form of discrimination because of sex, race and other prohibited grounds of discrimination.

5. The Jurisprudence of the CESCR on the Right to Adequate Housing in Canada: Adjudicating Progressive Realization and Resource Allocation

It has been important for advocates for the right to adequate housing in Canada to utilize to their fullest potential of Canada’s international human rights commitments. When it became clear in the early 1990's that political initiatives to include the right to adequate housing in Canadian law were likely to end up downgrading this fundamental right to an unenforceable “policy objective” of governments, advocates began to appreciate the value of jurisprudence emerging from the CESCR. Here, at least, was an established framework of “rights”, not “policy objectives” which could have a critical influence on evolving domestic jurisprudence under the *Canadian Charter*

⁸⁸*Whittom v. Quebec (Comm. des droits de la personne)* (1997) 29 CHRR D/1 (Que C.A.).

⁸⁹*Kearney et al. v. Bramalea Ltd et al.* (1998), 34 CHRR D/1 (Ont. Bd. Inq.).

⁹⁰*Shelter Corporation et al. v. Ontario Human Rights Commission et. al.* (2001) 143 O.A.C. 54.

⁹¹*Jennifer Newby and Harcourt Sinclair v. Moris A. Hunter Investments Limited*, (November 5, 2001) (Decision No.01-0242001) at 13; *Aslam Ahmed v. Shelter Corporation* (May 2, 2002)(Decision No. 02-007).

⁹²See, for example, the Report of Scott Leckie submitted on behalf of the complainants in *Kearney et. al. v. Bramalea Ltd. et al, Income Discrimination in Rental Housing and Canada's International Human Rights Obligations*, Exhibit 42 at 10, 25, 28.

and human rights legislation. Over the last decade housing rights advocates have made extensive use of the treaty monitoring process to create a solid jurisprudence on violations of the right to adequate housing in Canada. The concluding observations of the CESCR and the U.N. Human Rights Committee on income and housing issues now pervade almost all domestic litigation on housing issues as well as advocacy and mobilizing strategies in the political domain. Few advocates or politicians are unfamiliar with the recent findings of treaty monitoring bodies with respect to homelessness in Canada.

In a country as affluent as Canada, it is crucial that violations of the right to adequate housing be assessed in the context of article 2 of the *ICESCR* and the obligation to devote “the maximum of available resources” to the full realization of the right. Moreover, in a country in which hard-won victories of the 1960s and 1970s with respect to both the legal protection and substantive implementation of the right to adequate housing have been systematically rolled back, it has been important for the CESCR to place considerable weight on the issue of “retrogressive measures.” As enunciated in *General Comment No. 3*, the CESCR takes the position that except in the most exceptional circumstances, governments are not permitted to take any “deliberately retrogressive measures” which would set back the substantive enjoyment of a Covenant right such as the right to adequate housing.⁹³

Audrey Chapman has described the issues related to the progressive realization of the right to adequate housing as “soft” questions, proposing that legal advocates focus on more “serious” violations related to State action (particularly forced evictions), discrimination or denial of the most minimal requirements of adequate housing.⁹⁴ Canadian governments have similarly tended to distinguish these more traditional types of violations related to State action or minimum requirements of the right, from what it would like to consider softer, discretionary policy decisions. The Canadian government argued, in response to the draft optional protocol to the *ICESCR* to allow for an individual complaints procedure related to violations of economic, social and cultural rights, that “progressive realization is not a concept which easily lends itself to adjudication.”⁹⁵ Provincial governments in Canada have consistently advanced similar positions when challenged in domestic courts for violations of rights related to the right to adequate housing.⁹⁶

The approach to violations of economic, social and cultural rights enunciated by Audrey Chapman is preferred by governments in Canada, of course, because it tends to more readily identify violations in poorer countries where the “minimum content” of the right is less likely to be satisfied and where legal processes to address state sponsored violations such as forced evictions may not be so well established and readily available. The responsibilities of more affluent countries to reasonably allocate plentiful resources so as to protect disadvantaged groups from having to live in shelters or relinquish custody of children, or to administer judicial eviction

⁹³ CESCR, *General Comment No.3*, para. 9. For discussion of the importance of recognizing this “ratchet effect” in identifying violations of social and economic rights in Canada, See C. Scott, (1995) “Covenant Constitutionalism and the Canada Assistance Plan” 6 *Constitutional Forum* 79 at 82.

⁹⁴ A.R. Chapman, “A Violations Approach for Monitoring the International Covenant on Economic, Social and Cultural Rights” (1996) 18 *Human Rights Quarterly* 23.

⁹⁵ U.N. Commission on Human Rights, Fifty-fourth session, Agenda item 13, *Status of The International Covenants on Human Rights: Draft optional protocol to the International Covenant on Economic, Social and Cultural Rights. Report of the Secretary-General* (E/CN.4/1998/84/Add.1, 16 March 1998).

⁹⁶ CESCR, *Concluding Observations*, 1998, para.14.

processes in accordance with the substantive right to adequate housing, are likely to escape notice under a narrow “violations” approach.

The reasonable allocation of available resources between the relatively advantaged compared to those who are disadvantaged, however, is surely central to the issue of compliance with the right to adequate housing and with Article 2 of the ICESCR, obliging States both to allocate the maximum available resources to the fulfilment of the rights in the Covenant and to "guarantee that the rights ... will be exercised without discrimination."⁹⁷

The CESCR's reviews of Canada in the last decade have shown a new appreciation that affluent countries can indeed be held accountable for violations of the right to adequate housing, and an unequivocal rejection of a negative rights orientation to the question of violations of social and economic rights such as the right to adequate housing. Procedurally, as well as substantively, the CESCR has established in its reviews of Canada that the question of whether adequate resources have been allocated and whether deliberately retrogressive measures have been implemented without justification can and must be the subject of rigorous review and adjudication under both international and domestic law.

In 1993, as Canada's Second Periodic Review under the ICESCR approached, Canadian NGOs wrote to the U.N. CESCR asking that we be permitted to make brief oral submissions. We noted that issues of poverty and homelessness had been largely ignored in Canada's voluminous Periodic Report, and that we could assist the Committee in its review by providing additional information. To our surprise, the Committee agreed to try out a new procedure, unprecedented at the time in the U.N. treaty monitoring system, allowing for oral submissions on behalf of domestic NGOs at the beginning of its session. This established what Mathew Craven has accurately described as an “informal petition procedure” at the U.N. CESCR which greatly enhanced the Committee's credibility and influence in Canada and elsewhere.⁹⁸ Our submissions on behalf of the National Anti-Poverty Organization and the Charter Committee on Poverty Issues, entitled “The Right to An Adequate Standard of Living in a Land of Plenty” emphasized the Committee's emerging jurisprudence on progressive realization and the “maximum of available resources” standard in article 2 of the ICESCR. We described the spectre of homelessness and poverty in the context of a relative abundance of resources.⁹⁹ It was in this context that the Government of Canada was, to the surprise of many, harshly criticized by the CESCR with respect to its record on homelessness and poverty:

In view of the obligation arising out of article 2 of the Covenant to apply the maximum of available resources to the progressive realization of the rights recognized in the treaty, and considering Canada's enviable situation with regard to such resources, the Committee expresses concern about the persistence of poverty in Canada. There seems to have been no measurable progress in alleviating poverty over the last decade, nor in alleviating the severity of poverty

⁹⁷CESCR, *General Comment No. 3*, para.1.

⁹⁸M. Craven “Towards an Unofficial Petition Procedure: A Review on the Role of the UN Committee on Economic, Social and Cultural Rights” in K. Drzewicki, C. Krause and A. Rosas eds., *Social Rights as Human Rights: A European Challenge* (London: Martinus Nijhoff, 1994) 91.

⁹⁹Charter Committee on Poverty Issues, *The Right to an Adequate Standard of Living in a Land of Plenty: Submission of the National Anti-Poverty Organization and the Charter Committee on Poverty Issues to the Committee on Economic, Social and Cultural Rights* (Ottawa: Charter Committee on Poverty Issues/National Anti-Poverty Organization, 17 May 1993).

*among a number of particularly vulnerable groups.*¹⁰⁰

The Committee noted that Canada had enjoyed “one of the highest rates of economic growth” during the previous decade.¹⁰¹ Considering “the evidence of homelessness and inadequate living conditions” in so affluent a society, it was “surprised that expenditures on social housing are as low as 1.3 per cent of Government expenditures.”¹⁰² The Committee also expressed concern about exceptionally high rates of poverty among single mothers and children, and at evidence of families being forced to relinquish their children to foster care because of inability to provide adequate housing or other necessities.¹⁰³ Inadequate welfare entitlements, growing reliance on food banks, evidence of widespread discrimination in housing against families with children and low-income households and inadequate protections of security of tenure were also cited as areas of serious concern.¹⁰⁴

Despite unprecedented media coverage and parliamentary debate of the CESCR’s 1993 *Concluding Observations*,¹⁰⁵ virtually no action was taken by Canadian governments to address any of the Committee’s concerns. On the contrary, in the five-year period between Canada’s Second Periodic Review under the *ICESCR* in 1993 and its Third Periodic Review in 1998, dramatic retrogressive measures were taken in all of the critical areas identified by the Committee with respect to compliance with the right to adequate housing. As the CESCR caustically observed in 1998, “the State party did not take into account the Committee’s 1993 major concerns and recommendations when it adopted policies at federal, provincial and territorial levels which exacerbated poverty and homelessness among vulnerable groups during a time of strong economic growth and increasing affluence.”¹⁰⁶

Rather than increase funding for social housing from 1.3% of the budget, the federal government froze its social housing budget and eliminated any further funding for new social housing from 1994 onward, with the sole exception of on-reserve Aboriginal housing. When the CESCR raised this issue with Canada in its 1998 review, noting that expenditure seemed to have decreased rather than increased in response to an emerging crisis of homelessness, the federal government responded by noting that “Canada has a federal system with more than one ‘level’ of government having independent responsibilities with regard to housing issues.”¹⁰⁷ Yet the federal government has simply acted in consort with the provinces in withdrawing funding for new affordable housing. Between 1985 and 1997, provincial spending on housing was cut back

¹⁰⁰CESCR, *Concluding Observations, 1993* at para. 12.

¹⁰¹*Ibid*, at para. 10.

¹⁰²*Ibid*, at para. 21.

¹⁰³*Ibid*, at paras. 13, 14.

¹⁰⁴*Ibid*, at paras. 15-19.

¹⁰⁵G. York, "UN Body Chastises Canada on Poverty" *The Globe and Mail* (29 May 1993) A1; R. Speirs, "UN Report on Poverty Levels is Flawed, Tories Say" *Toronto Star* (1 June 1993) A12; V. Lawton, "UN Condemns Canadian Poverty" *Toronto Star* (5 December 1998) A5; House of Commons Debates No. 161 (27 November 1998).

¹⁰⁶CESCR, *Concluding Observations, 1998*, par. 34.

¹⁰⁷Government of Canada, *Responses, CESCR, 1998*, supra note 23, Question 44 (Government of Canada).

by over 90% to just over \$100 million.¹⁰⁸ In its *Concluding Observations* in 1998, the U.N. CESCR recommended that “the federal, provincial and territorial governments address homelessness and inadequate housing as a national emergency by reinstating or increasing, as the case may be, social housing programmes for those in need.” Despite a rigorous campaign by housing advocates for a “one per cent solution” - a commitment of an additional one per cent of federal budget to affordable housing - and continual dissemination of the Committee’s concerns and recommendations by housing advocates, nothing was done for three years in response to the 1998 recommendations of urgent action. An agreement was reached in November, 2001 to reinstate a minimal programme for building affordable housing beginning in 2002.¹⁰⁹

The year after the federal freeze on social housing, a bill was introduced by the federal government which represented an unprecedented attack on the right to adequate housing in Canada. Without any public consultation or warning, the federal government introduced by way of a budget bill¹¹⁰ a radical restructuring of Canada’s social programs which revoked the *Canada Assistance Plan Act* (CAP)¹¹¹ as of April 1, 1996. CAP had been, since its introduction in 1966, a central pillar of the right to an adequate standard of living in Canada, ensuring that those in need would receive enough financial assistance to cover the cost of necessities such as housing.¹¹² In response to an historic court challenge initiated by Jim Finlay, a social assistance recipient from Manitoba, the Supreme Court of Canada had found that CAP “requires assistance to be provided in an amount that is compatible, or consistent, with an individual’s basic requirements,” and that the adequacy requirements under CAP were enforceable not only by the federal government but also by affected individuals.¹¹³ If rates were found to be inconsistent with basic requirements, (providing for some provincial flexibility) the court could order that federal transfer payments be withheld until the province complied with the requirements of CAP.

In a country in which about 95% of low-income households rely on the private market to find appropriate housing, this justiciable guarantee of sufficient financial assistance to cover the cost of housing was critical to the domestic implementation of Article 11 of the ICESCR. Under the new block funding arrangement which came into effect in 1996 after CAP was revoked, however, both the requirement of an adequate level of assistance to cover the cost of housing and other necessities and the mechanism for providing legal remedies when such assistance is not

¹⁰⁸Canada Mortgage and Housing Corporation, *Canadian Housing Statistics: 1997* (Ottawa: CMHC, 1997), Table 65.

¹⁰⁹Toronto Disaster Relief Committee The 1% Solution Letter Writing Campaign. Online at <www.tao.ca/tdrc/pastart.shtml. At a meeting in Quebec on November, 30, 2001, federal, provincial and territorial governments agreed to spend \$1.4 billion in cash or in-kind over the next five years on new housing - the first new federal money since they cut spending in 1994.

¹¹⁰*Budget Implementation Act*, 1995, S.C. 1995, c. 17

¹¹¹R.S.C. 1985, c. C-1.

¹¹² Under CAP, for provinces to receive federal cost-sharing of social assistance, the level of assistance provided to persons in need must take into account the cost of basic requirements, including food, shelter, clothing, fuel, utilities, household supplies and personal requirements CAP, s. 6(2)(a).

¹¹³*Finlay v. Canada (Minister of Finance)*, [1993] 1 S.C.R. 1080. An individual in financial need, who allegedly did not receive adequate assistance to provide for adequate housing or other basic requirements, had “public interest standing” to go to court to challenge any provincial violation of the adequacy requirements of CAP. *Finlay v Canada (Minister of Finance)* [1986] S.C.R. 607

provided, were eliminated.

Unfortunately, all of this happened midway between scheduled periodic reviews of Canada under the ICESCR. NGOs petitioned the CESCR to hear submissions on an urgent basis, as a matter of follow-up to the previous review. The Committee agreed to the request and in May, 1995 a delegation of Canadian NGO's appeared before the CESCR in Geneva to outline the implications of the bill before parliament that would revoke CAP. The Committee responded by sending a letter to the Canadian Government relating the NGO concerns, politely reminding the Government of its obligations under the ICESCR and requesting that a report on the legislation be included in Canada's Third Periodic Report, due later that year.

The federal government proceeded as planned to revoke CAP and bring into effect the new block funding agreement under the Canada Health and Social Transfer. Spending was reduced by \$25.3 billion from 1995-96 through 1997-1998, reducing the percentage of Gross Domestic Product allocated to social programs to the level of the 1940's. The Finance Minister described these changes as "by far the largest set of actions in any Canadian budget since demobilization after the Second World War"¹¹⁴.

The removal of adequacy requirements for social assistance led to dramatic cuts to benefit levels in a number of provinces and a growing gap between assistance available and the money needed to access adequate housing. In Ontario, social assistance rates were cut by 22% in October, 1995, forcing an estimated 120,000 households, including 67,000 single mothers, from their homes.¹¹⁵ Since that time, rents have risen and benefit levels have remained frozen. In 1994, prior to CAP being revoked, a single parent on social assistance renting an average priced apartment in Toronto would have had \$575 left over each month after paying the rent - an amount which might reasonably cover the most basic necessities only. In October 2001, with rate cuts and increased rents, she would have only \$63 - an amount which cannot possibly cover basic requirements for a mother and child.¹¹⁶

In its Third Periodic Review of Canada by the U.N. CESCR, the revoking of CAP was a central issue in the "dialogue" between Canada's delegation and the members of the Committee. On this

¹¹⁴*Budget Speech*, The Honourable Paul Martin (February 27, 1995), at p. 4. On the significance of the revoking of CAP for social and economic rights in Canada, see generally M. Jackman, "Women and the Canada Health and Social Transfer: Ensuring Gender Equality in Federal Welfare Reform" (1995) 8 *Canadian Journal of Women and the Law* 371; S. Day & G. Brodsky, *Women and the Equality Deficit: The Impact of Restructuring Canada's Social Programs* (Ottawa: Status of Women Canada, 1998); see C. Scott, "Covenant Constitutionalism and the Canada Assistance Plan" (1995) 6 *Constitutional Forum* 79 at 82.

¹¹⁵Affidavit of Michael Ornstein, Application Record, Volume II, Tab 15; Affidavit of Gerard Kennedy, Application Record, Volume II, Tab 14 in *Masse v. Ontario*, Ont.C. J. (Gen. Div.) Court File No. 590/95. On file at CERA.

¹¹⁶In October, 1994, a single mother with an eight year old child of paying the average rent of \$782 in Toronto received \$1272 in social assistance and \$85 in a monthly child tax credit, leaving her with \$575 to pay for food, clothing and other necessities for herself and her child. In October 2001, the average rent for the same sized apartment was \$1,027 but a single mother with an eight year old child receives only \$892 in social assistance and \$198 in monthly tax credits, leaving her with an impossible \$63 for other necessities. Unfortunately, in a tight vacancy market, where landlords frequently discriminate against single mothers and social assistance recipients, a single mother on social assistance is unlikely to be able to secure an apartment at the average rent. A study by CERA using census data found that the majority of single mothers, when forced to move, have to pay more than the average rent for an apartment. "Human Rights, Access and Equity: CERA's Recommendations for the Homelessness Action Task Force" in *Taking Responsibility for Homelessness: An Action Plan for Toronto. Report of the Mayor's Homelessness Action Task Force. Background Papers. Vol. 1.* (Toronto, 1998). Online at <www.equalityrights.org/cera/golden.htm>

occasion, the dialogue was more of a heated exchange. The Canadian delegation insisted that CAP had merely been an outdated “administrative arrangement” between the federal and provincial governments, replaced by a new, more flexible approach.¹¹⁷ The Committee, however, reached a different conclusion:

*The replacement of the Canada Assistance Plan (CAP) by the Canada Health and Social Transfer (CHST) entails a range of adverse consequences for the enjoyment of Covenant rights by disadvantaged groups in Canada. The Government informed the Committee in its 1993 report that CAP set national standards for social welfare, required that work by welfare recipients be freely chosen, guaranteed the right to an adequate standard of living and facilitated court challenges of federally-funded provincial social assistance programmes which did not meet the standards prescribed in the Act. In contrast, CHST has eliminated each of these features and significantly reduced the amount of cash transfer payments provided to the provinces to cover social assistance.*¹¹⁸

The Committee observed that drastic cuts to social assistance in a number of provinces “appear to have had a significantly adverse impact on vulnerable groups, causing increases in already high levels of homelessness and hunger.”¹¹⁹ The Committee stopped short of referring to the welfare cuts as “forced evictions,” as the NGO’s had argued, but noted that Ontario had proceeded with its cuts to social assistance despite evidence that many would be forced from their homes by the cuts.¹²⁰

In its recommendations the CESCR suggested that new federal/provincial/territorial agreements with respect to social programs should not downgrade social and economic rights to “principles and objectives” but rather should clarify the legal obligations of provincial governments. However, the new Social Union Framework Agreement signed by the federal government and all provinces except Quebec three months later, contained no legally enforceable rights and made no reference to governments’ obligations under the ICESCR or other human rights treaties. It contained only a commitment to the “principle” of “meeting the needs of Canadian” including ensuring access “to essential social programs” and providing “appropriate assistance to those in need.”¹²¹

The year after CAP was revoked, the federal government proceeded to further erode the income security of low income households by implementing dramatic changes to Canada’s unemployment insurance system. Surveys of renters facing eviction have found that the majority of evictions for arrears result from unexpected job loss or reduction of income, so effective protection from income loss in these situations is a critical component of substantive security of tenure in Canada.¹²² The changes put into place in 1997, however, rendered many of those who

¹¹⁷Government of Canada, *Responses, CESCR*, 1998, Question 17 (Government of Canada).

¹¹⁸*CESCR, Concluding Observations*, 1998, 43 at paragraph 19.

¹¹⁹*Ibid.* at para. 21.

¹²⁰*Ibid.*, at para.27.

¹²¹*A Framework to Improve the Social Union for Canadians: An Agreement between the Government of Canada and the Governments of the Provinces and Territories* (February 4, 1999) Online at <socialunion.gc.ca>.

¹²²See for example, the survey conducted by Metro Tenants’ Legal Services in Lenny Abramovicz, *The Landlord*

are most vulnerable to homelessness ineligible for benefits, making it significantly more difficult for part-time workers, 80% of whom are women, to qualify for benefits.¹²³ As noted by the CESCRC in its 1998 review, these changes “resulted in a dramatic drop in the proportion of unemployed workers receiving benefits to approximately half of previous coverage, in the lowering of benefit rates, in reductions in the length of time for which benefits are paid and in increasingly restricted access to benefits for part-time workers.”¹²⁴ Subsequent to the CESCRC’s review, a *Charter* challenge from a woman alleging that the restrictions discriminate against women was upheld by an Umpire.¹²⁵

With respect to the U.N. CESCRC’s concern at the 1993 review about governments’ failure to address poverty and homelessness among families with children, particularly single mothers, the federal government pointed during the 1998 review to the introduction of a new National Child Benefit in that year as proof that “children are a public priority for the Government of Canada and the provinces.”¹²⁶ Prior to introducing the benefit, however, the government had commissioned a poll to determine public support for an initiative to ameliorate child poverty. The consultant noted that while there was strong support for the initiative generally,

*Welfare recipients are seen in unremittingly negative terms by the economically secure. Vivid stereotypes (bingo, booze, etc.) reveal a range of images of [social assistance recipients] from indolent and feeble to instrumental abusers of the system. Few seem to reconcile these hostile images of SARs as authors of their own misfortune with a parallel consensus that endemic structural unemployment will be a fixed feature of the new economy.*¹²⁷

Provincial governments were similarly receiving information from opinion polls of a dramatic rise in discriminatory attitudes toward social assistance recipients and single mothers following the recession of the early 1990s - a classic “scapegoating” reaction to a threatening systemic issue that imputed moral failure to the victims - and began to model social policy around these discriminatory attitudes.

The federal and provincial governments reached an agreement in 1998, according to which the federal government would provide a “supplementary” child benefit to low-income families while the provinces would correspondingly “decrease social assistance payments for families with children.”¹²⁸ The result of this “claw back” of the National Child Benefit from

and Tenant Relationship in Ontario (Toronto: 1994), on file at CERA.

¹²³*Lesiuk v. Canada (Employment Insurance Commission)* [2001] C.U.B.D. No. 1 CUB 51142; Shelagh Day, Feminist Alliance for International Action, *Toward Women’s Equality: Canada’s Failed Commitment* (September 2000), available on: <www.fafia.org>.

¹²⁴*Ibid*, at para. 35.

¹²⁵*Lesiuk v. Canada, supra*.

¹²⁶Government of Canada, *Responses*, CESCRC, 1998, *supra* note, Question 48, (Government of Canada).

¹²⁷Ekos Research Inc., *Memorandum on Child Poverty Focus Groups: Revised Conclusions*, (Toronto, 1997) pp. 3-7, cited in J. Swanson, *Poorbashing: The Politics of Exclusion* (Toronto: Between the Lines, 2001) p. 111.

¹²⁸Federal/Provincial/Territorial Ministers Responsible for Social Services, NCB Governance and Accountability Framework. Online at http://socialunion.gc.ca/ncb/geston3_e.html22.

social assistance recipients is that in all but three provinces which now refuse to claw the benefit back, many of the poorest families who are at greatest risk of homelessness are disqualified from a benefit they desperately need to pay the rent.¹²⁹ Of the more than one million lone parent families in Canada, it was estimated in 1998 by the National Welfare Council in 1998 that only 17% would keep the new supplementary benefit. The CESCR thus recommended that “the National Child Benefit Scheme be amended so as to prohibit provinces from deducting the benefit from social assistance entitlements,”¹³⁰ but this recommendation has not yet been acted upon.

The CESCR also found in 1998 that there had been “little or no progress” in alleviating social and economic deprivation among Aboriginal people, with many Aboriginal communities lacking even safe drinking water and a quarter of dwellings in need of major repairs and lacking basic amenities. The Committee affirmed “the direct connection between Aboriginal economic marginalisation and the ongoing dispossession of Aboriginal people from their lands” and recommended urgent action to implement the recommendations of the Royal Commission on Aboriginal People and “to restore and respect an Aboriginal land and resource base adequate to achieve a sustainable Aboriginal economy and culture.”¹³¹ In addition, the Committee expressed concern that Aboriginal women living on reserves do not have the right to an equal share of matrimonial property at the time of marriage breakdown. This means that Aboriginal women may be forced to choose between remaining in an abusive situation or seeking housing off-reserve away from their community, kin and networks of support.¹³²

In summary, the CESCR found in 1998 that in virtually every respect, governments in Canada had taken unprecedented, and arguably deliberate, retrogressive measures undermining the right to adequate housing. It was “gravely concerned “that such a wealthy country as Canada has allowed the problem of homelessness and inadequate housing to grow to such proportions that the mayors of Canada’s 10 largest cities have now declared homelessness a national disaster.”

6. The Right to Adequate Housing Under the ICCPR

Three months after Canada’s review by the CESCR and one month before Canada was scheduled for its Fifth Periodic Review by the Human Rights Committee (HRC), Lynn Maureen Bluecloud, a homeless Aboriginal woman who was five months pregnant, died of hypothermia on a cold February night within sight of Canada’s parliament buildings in Ottawa.¹³³ Her death

¹²⁹The three provinces not clawing back the benefit are New Brunswick, Newfoundland and, more recently, Manitoba.

¹³⁰CESCR, *Concluding Observations*, 1998, at paras 22, 44.

¹³¹*Ibid*, para. 43.

¹³²*Ibid*, para. 29. According to a 1986 decision of the Supreme Court of Canada, a woman is not entitled to a one-half interest in on-reserve property for which her husband holds a certificate of possession under the *Indian Act*. She may only receive an award of compensation to replace her half-interest in such properties. See *Derrickson v. Derrickson* [1986] 1 S.C.R. 285. See also RCAP, *supra* note 14, Part 4.2, Division of Property on Marriage Breakdown. The order of compensation may be of little practical value because usually the only substantial asset is the house itself. Shelagh Day, *Toward Women’s Equality: Canada’s Failed Commitment*, Feminist Alliance for International Action Online at: <www.fafia.org>.

¹³³Ken Gray and Hattie Klotz, “Homeless pregnant woman died of exposure” *The Ottawa Citizen*, March 1, 1999; Toronto Disaster Relief Committee, *Death on the Streets of Canada: A Report Submitted to the United*

received no particular attention from the busy parliamentarians a short distance away. They had become used to stepping over homeless people huddled over grates for warmth and reading of homeless deaths during Canada's cold winters. But Ms. Bluecloud's death played an important role in convincing the HRC to cast aside some of the traditional divisions between civil and political rights and social and economic rights in order to address the implications of Canada's failure to adequately address poverty and homelessness as a potential violations of rights in the *International Covenant on Civil and Political Rights (ICCPR)*.

It had become clear to housing advocates in the late 1990's that the violations of the right to adequate housing in Canada were not solely violations of the ICESCR. The direct link between governments' failures to address homelessness and the right to life, protected in article 6 of the *International Covenant on Civil and Political Rights*, had become particularly stark in a country with so cold a climate as Canada. And in a country with an abundance of housing and economic resources, the discriminatory basis of governments' decisions to deny disadvantaged groups what is necessary for access to adequate housing was more transparent than in situations where the majority may be deprived of such access. Further, a critical issue emerging in domestic litigation was the extent to which positive obligations to address homelessness and inadequate housing might be found to be components of the right to "life, liberty and security of the person" in section 7 of the *Canadian Charter* and the equality rights in section 15.

A number of Canadian NGOs in New York for Canada's Fifth Periodic Review made submissions to Committee members at the Pre-Sessional Working Group, submitting that poverty and homelessness in Canada directly engaged rights in the *ICCPR*.¹³⁴ Particular emphasis was placed on the right to equality and non-discrimination in articles 2 and 26 of the *ICCPR* and the right to life in article 6. The right of self-determination, which appears in identical form in both the ICESCR and the *ICCPR* was also emphasized as a right of Aboriginal people which bridges the two Covenants.

Upon first hearing the pre-sessional NGO submissions on poverty and homelessness in Canada, a number of Committee members expressed the view that these were really matters for the CESCR. At a final briefing prior to the session with the Canadian delegation, however, we referred to Lynn Bluecloud's death as an example to suggest that her right to life is no less a matter for review by the Human Rights Committee simply because her death resulted, apparently, from homelessness. Nor, we argued, were decisions to cut social programmes on which women rely beyond the scope of the HRC's mandate to consider serious issues of discrimination in Canada. Finally, we argued that these were critical issues which arose domestically in the context of compliance with sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*, so that courts and governments would benefit from guidance from the HRC on these issues.

For the second time in a few months, the Canadian delegation found itself at the receiving end of vigorous questioning about failure to allocate abundant resources to deal with poverty and homelessness and to address the economic deprivation of Aboriginal people. The HRC's concluding observations of 1999 echoed a number of the concerns of the CESCR about the effect of social programme cuts on women and on the children in their care:

Nations Human Rights Committee Regarding Compliance with Article 6 of the ICCPR by Canada (March, 1999) available online at <www.tao.ca/~tdrc/deathon.shtml>.

¹³⁴Organizations making submissions on poverty and homelessness included the Grand Council of the Cree, the National Association of Women and the Law, the Charter Committee on Poverty Issues, the National Anti-Poverty Organization and Low Income Families Together.

*The Committee is concerned that many women have been disproportionately affected by poverty. In particular, the very high poverty rate among single mothers leaves their children without the protection to which they are entitled under the Covenant. While the delegation expressed a strong commitment to address these inequalities in Canadian society, the Committee is concerned that many of the programme cuts in recent years have exacerbated these inequalities and harmed women and other disadvantaged groups. The Committee recommends a thorough assessment of the impact of recent changes in social programmes on women and that action be undertaken to redress any discriminatory effects of these changes.*¹³⁵

The HRC also joined the CESCR in condemning the discriminatory clawback of the National Child Benefit from families on social assistance, noting that it may lead to non-compliance with article 24 of the ICCPR, which guarantees to every child, without discrimination “the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.”¹³⁶

And finally, the HRC identified the failure to address the growing problem of homelessness in Canada as a potential violation of the right to life under article 6 of the ICCPR:

*The Committee is concerned that homelessness has led to serious health problems and even to death. The Committee recommends that the State party take positive measures required by article 6 to address this serious problem.*¹³⁷

This was the first time that the HRC has found that “positive measures” to address homelessness are required to comply with the right to life under the ICCPR, providing a strong foundation for arguing that such failures similarly constitute violations of the right to “life, liberty and security of the person” in the *Canadian Charter of Rights and Freedoms*.

With respect to Aboriginal people, the Human Rights Committee reiterated the strong recommendation from the CESCR that the Canadian Government immediately implement the recommendations of the Royal Commission on Aboriginal Peoples, emphasizing the link between land and resource allocation and the right to self-determination.

*With reference to the conclusion by RCAP that without a greater share of lands and resources institutions of aboriginal self-government will fail, the Committee emphasizes that the right to self-determination requires, inter alia, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence (art. 1, para. 2). The Committee recommends that decisive and urgent action be taken towards the full implementation of the RCAP recommendations on land and resource allocation.*¹³⁸

¹³⁵HRC, *Concluding Observations, 1999* at para. 20.

¹³⁶*Ibid.* at paragraph 18.

¹³⁷*Ibid.*, at paragraph 20.

¹³⁸*Ibid.*, at para. 8.

The degree to which the consecutive reviews of Canada by the CDESCR and the HRC converged on critical issues of poverty and homelessness sent a concrete message, not only to Canada, but to the international community, that the right to adequate housing is not simply a discrete right within the ICESCR but rather a fundamental right which is inextricably linked to the right to dignity and security at the heart of international human rights law, including civil and political rights. As Craig Scott has noted:

*These Concluding Observations represent an interlinked expression of concern about a host of failures by Canada to adhere fully to its international human rights obligations in the two treaties. Indeed, it is not an overstatement to describe the two sets of Concluding Observations as pathbreaking in their focused treatment of the overlapping and shared obligations which emanate from the two Covenants as a partly fused legal order. In particular, the rich potential meaning the HRC has already given to the right to life and the right to non discrimination in the above-mentioned General Comments has moved from the realm of potential to the realm of firm legal obligations vis-à-vis the less advantaged in an affluent state like Canada.*¹³⁹

7. Responses and the Way Forward

A few days before Canada was to appear before the HRC in April, 1999 in New York, the Prime Minister announced the appointment of a Cabinet Minister to co-ordinate the Federal Response to Homelessness and the formation of a National Secretariat on Homelessness. The focus of the Secretariat has tended to be on what is referred to as “absolute homelessness”, providing necessary support services and enhanced emergency shelter. Despite this, and similar initiatives by provincial and municipal governments to try to help homeless people survive Canada’s winters, there has been no dramatic reduction in deaths on the streets.¹⁴⁰

As necessary as such emergency action may be, it is important to note that neither the CDESCR nor the HRC recommended merely that Canada do a better job of meeting the needs of homeless people to prevent them from dying. Both Committees stated that serious, positive measures were needed to redress imbalances in the allocation of available resources and devastating consequences of social program cuts, to ensure that disadvantaged households have access to adequate income and housing.¹⁴¹

Despite the fact that to date, only a few of the recommendations of the CDESCR and the HRC have been acted upon by governments, the concerns and recommendations of the two Committees have nevertheless had significant impact in Canada. They have been incorporated in new advocacy and litigation initiatives and will be important in the coming months and years. Advocates for the right to adequate housing continue to place considerable emphasis on the treaty monitoring process because we derive from it a new paradigm of human rights, one which fills out the substance of rights in domestic law and challenges fundamental structural changes occurring in Canada which are systematically violating the fundamental rights of the many

¹³⁹C. Scott, “Canada’s International Human Rights Obligations and Disadvantaged Members of Society: Finally into the Spotlight?” (1999) 10:4 *Constitutional Forum* 97 at 99.

¹⁴⁰ City of Toronto *Homelessness Report 2001*, supra note 4.

¹⁴¹ Homelessness Secretariat, online at: <www.hrhc-drhc.gc.ca/hsh-snsa/homepage_e.html>

disadvantaged constituencies.

This is not a struggle restricted to Canada nor is it one that Canadians can win in a domestic context only. While Canada represents one of the starkest examples to come before the CESCR and the HRC of unnecessary violations of the right to adequate housing in the midst of plentiful resources and a robust economy, what has occurred in Canada is part of a larger global pattern.

A confidential letter to Canada's Finance Minister, Paul Martin, from the International Monetary Fund (IMF) written in December 1994 was recently released pursuant to a Freedom of Information Request. In the letter, the IMF recommended that the Federal Government reduce expenditures on social housing, dramatically reduce spending on social programs, restrict eligibility for unemployment insurance, limit its regulatory role over social policies, and revoke the *Canada Assistance Plan* in favour of a system of block funding with no rights or entitlements built in.¹⁴² It is quite astounding to discover that virtually all of the drastic measures which have led to the violation of the right to adequate housing in Canada in the last decade were encouraged and recommended by the International Monetary Fund. The IMF's list of "recommendation" was virtually identical to the CESCR's list of "concerns", and it is obvious which document got more attention from the Finance Minister.

The Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) last reviewed Canada in 1997. Like the CESCR and the HRC, CEDAW expressed concern about "the deepening poverty among women, particularly among single mothers, aggravated by the withdrawal, modification or weakening of social assistance programmes." The Committee observed politely that Canada's domestic policies seem to be at odds with its leadership role on women's issues internationally, so that on the one hand Canada is promoting equality for women internationally but on the other, pursuing economic policies that relegate increasing numbers of women to homelessness and poverty, not only in Canada, but in all countries.

*The restructuring of the economy, a phenomenon occurring in Canada and other highly industrialized countries, appeared to have had a disproportionate impact on women. Although the Government had introduced many measures designed to improve the status of women, the restructuring was seriously threatening to erode the significant gains and advances made by Canadian women. Given the Government's proud record of leadership on women's issues globally, those developments would not only have an impact on Canadian women, but would also be felt by women in other countries.*¹⁴³

Housing rights advocates in Canada recognize that poverty and homelessness in Canada cannot be compared in severity to that of less affluent countries. But at the same time, we have come to recognize the common features of violations of housing rights in rich and poor countries. Though the levels of deprivation may be different, the structural causes are the same. Relieving

¹⁴²The document was released in February, 1999 to the "Halifax Initiative", a coalition of organizations dealing with . See the Ecumenical Coalition on Social Justice, *Structural Adjustment in Canada* online at <<http://www.ecej.org/WSSDSAPs.htm>>.

¹⁴³United Nations Committee on the Elimination of Discrimination Against Women, *Adoption of the Report of the Committee on the Elimination of Discrimination Against Women on its Sixteenth Session: Concluding Observations of the Committee on the Elimination of Discrimination Against Women (Canada)*, 29 February 1997, A/52/38/Rev.1 at paragraph 321.

affluent countries of responsibility for violations of the right to adequate housing damages the integrity and universality of the right and violates the international rule of law.

If the international community cannot agree that a country as affluent as Canada violates fundamental human rights when it chooses to leave significant numbers of its population homeless, then there is very little content to the obligation under international law to allocate the “maximum of available resources” to realizing the right to adequate housing. The struggle for the right to adequate housing in Canada is grounded in a wide variety of domestic struggles but is at the same time an international struggle.

Housing rights advocates have found that developing an international perspective on struggles for housing rights in Canada has not trivialized the issues of so affluent a country, as some might argue. On the contrary, a more global perspective has served to challenge the arrogant complacency of a country which prides itself on its high average standard of living, while choosing to deny increasing numbers access to the dignity and security of adequate housing. Housing rights advocates in Canada will continue to work for a strengthening of international mechanisms for enforcing the right to adequate housing at the same time as pressing for more effective domestic protection of this right. Increasingly, these two areas of activity are critically interconnected, such that advances must be made simultaneously on both the domestic and international fronts, if we are to move forward in claiming and enforcing the right to adequate housing.