The Right to Adequate Housing in Canada

by Bruce Porter


1. The Gap Between International Commitments and Domestic Reality

At the international level, Canada has long been an advocate for social and economic rights and for the right to adequate housing. Canada ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1976. Unfortunately, the image projected by Canada internationally is increasingly at odds with domestic policy and legislation. There is no evidence of any commitment on the part of the federal government or provincial governments in Canada to give effect to the right to adequate housing. Nor is there any explicit recognition of the right to adequate housing anywhere in Canadian law. The policy direction in recent years in Canada has been toward the withdrawal of commitments to ensure access to adequate housing and meaningful security of tenure.

Since Canada ratified the ICESCR in 1976, violations of the right to adequate housing have reached unprecedented proportions. Dozens of people die on the streets of Canada’s cities every winter. About 30,000 individuals use shelters for the homeless in the City of Toronto every year, including more than 6,000 children. Aboriginal people living on reserves endure housing conditions described as “intolerable” by a Royal Commission on Aboriginal Peoples.

The Canadian government is fond of telling 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 seven rooms and an average 1996 value of $150,000 (Cdn). Almost three-quarters of a million households own an additional vacation home in the country. In the context of such affluence, violations of the right to adequate housing in Canada among those who are disadvantaged are clearly the result of explicit legislative choices rather than a lack of resources.

2. Forced Evictions and Security of Tenure

During the late 1960s and 1970s, tenants across Canada fought for and won important protections of security of tenure, requiring landlords to go to court to terminate a tenancy. Previously, these issues had been resolved primarily outside of the judicial system, and in the words of one government member introducing new legislation in Ontario, “the landlord ruled like a medieval baron over his tenant.” By the time Canada ratified the ICESCR, legal security of tenure had become a reality for many residential tenants.

Increasing numbers of households in Canada, however, do not enjoy statutory protections of security of tenure because of their housing situation. Many low-income tenants share a kitchen or bathroom with an owner and are usually denied the protection of both landlord and tenant and human rights legislation. Increasingly, low-income families with children live in small motel units that are rented by the week and are also generally exempt from security of tenure provisions. Even in apartments protected by security of tenure legislation, women and children may be forced from their home after a male partner whose name was on the lease or who usually paid the rent vacates for some reason.

Tenants who enjoy the legal protection of security of tenure find that this right is increasingly reduced to procedures designed to provide expeditious eviction for landlords, without any recognition of the substantive right to adequate housing.
Revised landlord and tenant legislation in Ontario, for example, permits landlords 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. Not surprisingly, most tenants do not manage to file a written dispute and most evictions in Ontario occur without a hearing.

Tenants are routinely evicted for minimal arrears of rent. About 80% of applications to evict for arrears in Toronto, where homelessness is a serious risk for any evicted household, are for amounts of less than an average month’s rent. In many cases, households may be evicted when the landlord actually owes the tenant money, because the arrears are less than the initial deposit the tenant paid the landlord to cover the last month’s rent.

In many countries, 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 being evicted. In Canada, this pattern of forced relocation of entire communities has characterized some of the violations of the right to adequate housing of Aboriginal people. These include displacement and relocation through the destruction of habitat and resources, massive flooding for hydroelectric projects, or deliberately engineered “relocations” for administrative or developmental purposes. Forced evictions of communities of homeless people from squatter communities in Canada has also occurred.

Most evictions leading to homelessness in Canada, however, 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. 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 that covers only half of the average rent, is, like her counterparts in other countries, forcibly removed 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 that prides itself in its human rights record.

3. The Right to Housing and Canadian Law

Rights recognized in international human rights treaties ratified by Canada are not enforceable by domestic courts unless they are incorporated into Canadian law by parliament or provincial legislatures. Nowhere in Canada’s domestic law is there any explicit recognition of the right to adequate housing – not in the twenty-year-old Constitution Act, 1982, including the Canadian Charter of Rights and Freedoms, nor in provincial or federal human rights legislation, national, provincial or territorial housing legislation, or federal-provincial agreements.

When the Charter was drafted, food banks did not exist in Canada and the term “homelessness” referred to a small number of transient men living in rooming houses. Jean Chrétien, then Minister of Justice, noted during debates on the Charter that Canada was committed to implementing the ICESCR and did not need to list specific economic and social rights in the Constitution. Section 36 of the Constitution contains a joint commitment of federal and provincial/territorial governments to “promote the well-being of Canadians and to provide essential public services of reasonable quality to all Canadians.”

Ten years later, after the severe housing shortage of the 1980s made homelessness and food banks a reality, the Liberal Housing Task Force, co-chaired by Paul Martin, recommended amending the Charter to include the right to adequate housing. The recommendation was never followed up.

The following year, during constitutional discussions leading to the failed Charlottetown Constitutional Accord, the provincial government of Ontario proposed the inclusion of a “social charter” in the constitution. However, despite a strong lobby from human rights groups across the country for an alternative social charter that would have included enforceable social and economic rights, the First Ministers in Charlottetown adopted a different approach. As noted subsequently by the UN Committee on Economic, Social and Cultural Rights (CESCR), the proposed text of the revised Constitution would have reduced fundamental human rights such as the right to adequate housing to unenforceable

**Tenants are unprotected**

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In Ontario, tenants may be evicted for arrears of rent, even when the amount owed the landlord is less than the initial deposit paid by the tenant to cover the last month’s rent.
“policy objectives” of governments. The Charlottetown Accord was defeated in a referendum, after women’s groups and other human rights groups argued that its provisions would weaken rights in the Charter of Rights and Freedoms.

Quebec’s Charter of Human Rights and Freedoms is the only human rights legislation in Canada that refers to social and economic rights. It does not explicitly mention the right to adequate housing, but it guarantees to every person in need “the right for himself and his family to measures of financial assistance and to social measures provided for by law, susceptible of ensuring such person an acceptable standard of living.”

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.

4. The Right to Housing in the Interpretation of Canadian Law

Given the absence of explicit provisions in Canadian law guaranteeing the right to adequate housing, the interpretation of the open-ended provisions of the Canadian Charter of Rights and Freedoms is critical for giving domestic effect to this right in Canada.

The CESCR notes, “Domestic law should be interpreted as far as possible in a way which conforms to a State’s international legal obligations.” The Supreme Court of Canada has affirmed that this “interpretive presumption” must apply when Canadian courts interpret laws and when administrators exercise discretion.

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 the Charter does not explicitly refer to the right to adequate housing.

The right to equality in section 15 of the Charter and the right to “life, liberty and security of the person” in section 7 are of particular importance in giving domestic effect to the right to adequate housing.

The Supreme Court of Canada has referred to the ICESCR in interpreting provisions of the Charter. It has been careful to distinguish “corporate-commercial economic rights” (which were deliberately excluded from the 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.” 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.

The Supreme Court of Canada has adopted a “substantive” approach to interpreting the right to equality, which includes positive obligations to provide the resources necessary for disadvantaged groups to enjoy the equal benefit of government programs and maintain human dignity.

While reacting positively to these developments at the Supreme Court of Canada, the CESCR has been harshly critical of government pleadings and lower court decisions in a number of Charter cases addressing the right to adequate housing. The CESR noted 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.”

Of particular concern to the Committee were the cases of Gosselin, in Quebec, Fernandes, in Manitoba and Masse, in Ontario. In all of these cases, failure to provide adequate financial assistance resulted in the violation of the right to adequate housing. In the Masse case, uncontested evidence showed that the 22% cut to social assistance payments in Ontario would force 67,000 single mothers and their children from their homes. Yet in all three cases, lower courts found that the Charter does not guarantee a right to adequate housing or to adequate financial assistance to cover the cost of housing.
Although claims to a level of financial assistance sufficient to provide for adequate housing have met stiff resistance from lower courts in Canada, important advances have been made in other types of equality claims. For example, before 1993, public housing tenants in three provinces were protected from the eviction of landlord and tenant law. 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, successfully challenged this exclusion as discrimination against racialized minorities, single mothers, and people living in poverty.

A form of discrimination in housing that has been the subject of extensive litigation in Ontario and Quebec under provincial human rights legislation is landlords’ use of “minimum income criteria” to disqualify low-income applicants for apartments. Many landlords disqualify applicants who would be paying more than 30 percent of income on rent, even though all social assistance recipients and most single mothers, young families, young people, and newcomers to Canada must spend much more than this on rent.

Landlords argue that such policies are a reasonable way to assess the risk of rental default, but low-income tenants have successfully challenged income requirements as discriminatory and have disproved the stereotype that low-income applicants are more likely to eventually default on rent. Tribunal and court decisions in these cases are the first in Canada and internationally to establish that discrimination in housing because of poverty constitutes discrimination on the basis of sex, race, citizenship, and other prohibited grounds.

5. Reviews by the CESCR

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.

In 1993, as Canada’s second review under the ICESCR approached, several Canadian NGOs wrote to the CESCR asking for permission to appear before the Committee. The Committee agreed to try out a new procedure, unprecedented at the time in the UN treaty monitoring system, allowing for oral submissions on behalf of domestic NGOs at the beginning of its session. This process has greatly enhanced the Committee’s credibility and influence in Canada and elsewhere.

The 1993 CESCR review noted the evidence of homelessness and inadequate living conditions in Canada, high rates of poverty among single mothers and children, and evidence of families being forced to relinquish their children to foster care because of inability to provide adequate housing or other necessities. The review also covered inadequate welfare entitlements, growing reliance on food banks, evidence of widespread discrimination in housing against families with children, and inadequate protection of security of tenure for low-income households.

Despite unprecedented media coverage and parliamentary debate of the CESCR’s Concluding Observations, Canadian governments did not address any of the committee’s concerns. On the contrary, in the five-year period between Canada’s second review in 1993 and its third review in 1998, retrogressive measures were taken in all of the critical areas identified by the Committee relating to the right to adequate housing.

The federal government froze its social housing budget and eliminated further funding for new social housing from 1994 on, with the exception of on-reserve Aboriginal housing. Between 1985 and 1997, provincial spending on housing was cut by more than 90% to about $100 million.

The year after the federal freeze on social housing, the federal government introduced a bill that represented an unprecedented attack on the right to adequate housing in Canada. Without any public consultation or warning, the federal government revoked the Canada Assistance Plan Act (CAP) as of April 1, 1996. CAP had been a central pillar of the right to an adequate standard of living, ensuring that those in need received enough financial assistance to cover the cost of necessities such as housing. The adequacy requirements under CAP were enforceable, not only by the federal government, but also by affected individuals. If rates were inconsistent with basic requirements (allowing for some provincial flexibility), the court could order that federal transfer payments be withheld until the province complied with the requirements of CAP.

Under the new block funding arrangement that replaced CAP, 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 was not provided were eliminated.

In May 1995, a delegation of Canadian NGOs appeared before the CESCR in Geneva to outline the implications of the bill to revoke CAP. The Committee responded by sending a letter to the Canadian government, 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 to revoke CAP.
This move led to dramatic cuts in benefits by several provinces and a growing gap between the assistance available and the money needed for adequate housing. In Ontario, social assistance rates were cut by 22% in October 1995, forcing an estimated 120,000 households from their homes. Since that time, rents have risen and benefit levels have remained frozen. In its third periodic review of Canada, the CESCR noted, “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.”

In its recommendations, the CESCR suggested that new federal, provincial, and territorial agreements for social programs clarify the legal obligations of provincial governments. However, the Social Union Framework Agreement signed by the federal government and all provinces except Quebec three months later contained no legally enforceable rights and did not refer to governments’ obligations under the ICESCR or other human rights treaties. It contained only a commitment to the “principle” of “meeting the needs of Canadians,” including ensuring access “to essential social programs” and providing “appropriate assistance to those in need.”

A year after CAP was revoked, the federal government implemented dramatic changes to Canada’s unemployment insurance system. Since most tenant evictions for rent arrears result from unexpected job loss or reduction of income, protection from income loss is a critical component of security of tenure in Canada. The changes put in place in 1997, however, disqualified many of those who were vulnerable to homelessness, making it much more difficult for part-time workers, 80% of whom are women, to qualify for benefits.

In 1998, the federal and provincial governments reached an agreement on a supplementary child benefit for low-income families that, under the terms of the agreement was to be “clawed back” from social assistance recipients with children. All but three provinces decreased social assistance payments for families with children by the amount of the benefit. As a result of this “clawback” of the National Child Benefit, many of the poorest families at greatest risk of homelessness are disqualified from a benefit they desperately need to pay the rent. The CESC recommended amending the National Child Benefit scheme to prevent provinces deducting the benefit from social assistance, but this recommendation has not been acted upon.

In 1998, the CESC also noted that there had been “little or no progress” in alleviating social and economic deprivation among Aboriginal people. Many Aboriginal communities lacked even safe drinking water and a quarter of dwellings were in need of major repairs and lacking basic amenities.

In summary, the CESC 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.

### 6. Reviews under the ICCPR and CEDAW

Three months after Canada’s review by the CESC and a month before Canada was scheduled for its fifth periodic review by the Human Rights Committee (HRC), Lynn Maureen Bluecloud, a homeless, pregnant Aboriginal woman, died of hypothermia within sight of the Parliament Buildings in Ottawa. Her death helped convince the HRC to put aside some of the traditional divisions between civil and political rights and social and economic rights to address the implications of Canada’s failure to relieve poverty and homelessness as a potential violation of rights in the International Covenant on Civil and Political Rights (ICCPR).

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. For the first time, the HRC stated in its 1999 concluding observations on Canada that “positive measures” to address homelessness are required to comply with the right to life under the ICCPR.

The HRC’s concluding observations in 1999 echoed a number of the other concerns of the CESC about the effect of social program cuts on women and the children in their care. The HRC also joined the CESC in condemning the discriminatory clawback of the Na-
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8. 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 appointed a cabinet minister to coordinate the federal response to homelessness and formed a National Secretariat on Homelessness. The Secretariat has tended to focus on providing support services and emergency shelter. Despite this and similar initiatives by provincial and municipal governments to help homeless people survive Canada’s winters, there has been no dramatic reduction in deaths on the streets.

But neither the CESCR nor the HRC recommended that Canada merely do a better job of preventing homeless people from dying. Both committees stated that effective, positive measures were needed to redress imbalances in the allocation of available resources and the devastating consequences of social program cuts, to ensure that disadvantaged households have access to adequate income and housing.

Although to date, the federal and provincial governments have acted on only a few recommendations made by the CESCR and the HRC, the reviews by the two committees have nevertheless had a significant impact. Advocates for the right to adequate housing in Canada continue to place considerable emphasis on the treaty monitoring process because we derive from it a new paradigm of human rights, one that fills out the substance of rights in domestic law and challenges structural changes that systematically violate the fundamental rights of many disadvantaged constituencies. A more global perspective has challenged the arrogant complacency of a country that 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 to strengthen international mechanisms that enforce the right to adequate housing, while pressing for more effective domestic protection of this right. These two areas of activity are interconnected – advances must be made simultaneously on both the domestic and international fronts if Canadians are to move forward in claiming and enforcing the right to adequate housing.

The Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) reviewed Canada in 1997. It noted 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, it is pursuing economic policies that relegate increasing numbers of women to homelessness and poverty, not only in Canada, but in all countries.

7. A Global Pattern

Although Canada represents one of the starkest examples 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, recommended that the federal government reduce spending on social housing and 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 built-in rights or entitlements. Nearly all the drastic measures that have led to the violation of the right to adequate housing in Canada in the last decade were encouraged and recommended by the IMF. Its list of “recommendations” was virtually identical to the CESCR’s list of “concerns” – and it is obvious which document got more attention from the Finance Minister.
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