

Testimony of Bruce Porter
Director, Social Rights Advocacy Centre
On Behalf of
The Centre for Equality Rights in Accommodation
The Charter Committee on Poverty Issues
And the National Anti-Poverty Organization
Washington, D.C., U.S.A.
Before the
Inter-American Commission on Human Rights
Situation of the right to adequate housing in the Americas
Hearing—122nd Period of Sessions

Thank you for the opportunity to testify. My name is Bruce Porter. I am the Director of the Social Rights Advocacy Centre and the Co-ordinator of the Charter Committee on Poverty Issues, which has intervened on many occasions before the Supreme Court of Canada and before international human rights bodies to defend the rights of people living in Canada. Along with these two organizations I am also representing the Centre for Equality Rights in Accommodation (CERA), an organization which has been a leader in the area of human rights in housing in Canada, and the National Anti-Poverty Organization (NAPO) Canada's national organization of poor people.

In my brief presentation on the situation in Canada with respect to the right to adequate housing, I want to emphasize three points:

- 1) Widespread and systemic violations of the right to adequate housing in Canada must be considered in the context of an abundance of resources to remedy them. As such they infringe the obligations to respect and ensure a number of the rights in the American Declaration that is binding on Canada, as outlined by Ms. Melish .

- 2) The consensus among a number of UN treaty monitoring about the nature of the violations of the right to adequate housing in Canada and the specific obligations on Canadian governments to implement positive measures to remedy them, as well as emerging domestic constitutional jurisprudence on the right to adequate housing as a component of the right to “life liberty and security of the person” and the right to equality, provide a solid legal framework for considering

compliance with the right to adequate housing in the Context of the American Declaration on the Rights and Duties of Man as well as the American Convention on Human Rights; and

3) It is critical, in developing a legal framework for the right to adequate housing, that the full range of obligations to respect and ensure the right, including obligations that are subject to availability of resources, are understood as subject to the requirement of effective remedies and judicial oversight.

1. Overview of Violations of the Right to Housing in Canada

i) Homelessness has Become a National Disaster in Canada

There is no reliable data on the number of homeless in Canada but most experts agree that there are now at least 250,000 individuals who experience homelessness each year in Canada.¹ This is only the tip of the iceberg, of course, as hundreds of thousands more double up with friends or family or live in overcrowded or inadequate housing. Homelessness in Canada 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 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 dramatically affected by the epidemic of homelessness in Canada.² The number of single parent households using shelters in Toronto increased by more than 50 per cent between 1990 and 200 (City of Toronto 2003: 41).³ Approximately 32,000 individuals use shelters for the homeless in the City of Toronto every year, including almost

¹ National Housing and Homelessness Network, *State of the Crisis Report: A report on housing and homelessness in Canada* (November, 2001) online at <http://www.tdrc.net>.

² Shelter data from Toronto showed a 130 per cent increase in the number of children in homeless shelters between 1989 and 1999: Toronto Campaign 2000 (2001): 16.

³ Approximately 2300 single parent households, mostly women and children, use Toronto shelters every year: City of Toronto (2003) *Toronto Report Card on Housing and Homelessness 2003* [Online] City of Toronto (2003) *Toronto Report Card on Housing and Homelessness 2003* [Online] www.toronto.ca/homelessness/pdf/reportcard2003.pdf [2004, 10] 41.

5000 children.⁴ This is a rate of shelter use equivalent to that of New York City. Aboriginal people are over-represented among the homeless in Canada by a factor of about 10 times.⁵ Women are the fastest rising group among the homeless and have been the most dramatically affected by social program cuts.⁶

ii) Consequences of Homelessness for Health and Security

Homelessness in Canada violates the right to health and well-being as guaranteed in Article XI of the Declaration. As a prominent medical doctor working with homeless people has documented in a study published by the Canadian Medical Association Journal, homelessness in Canada has tragic health implications for those who are affected:

Homelessness affects tens of thousands of Canadians and has important health implications. Homeless people are at increased risk of dying prematurely and suffer from a wide range of health problems, including seizures, chronic obstructive pulmonary disease, musculoskeletal disorders, tuberculosis, and skin and foot problems. Homeless people also face significant barriers that impair their access to health care.⁷

The widened gap between income and the cost of housing in Canada is directly related to a rise in hunger. There are now approximately 2.4 million hungry adults and children in Canada.⁸ Many living in poverty must forego adequate food or rely on emergency food because they are confronted with the choice of either paying the rent or feeding the kids.⁹ Emergency provision of food through 'food banks', which was unheard of twenty-five years ago in Canada, is now a

⁴ Toronto shelters reported that 31,985 homeless individuals (including 4779 children) stayed in a Toronto shelter at least once during 2000: City of Toronto (2003).

⁵ *State of the Crisis Report, supra.*

⁶ Centre for Equality Rights in Accommodation, Women and Housing: Barriers to Equality (March, 2002) online at <<http://www.equalityrights.org/cera/docs/barriers.htm>>

⁷ Dr. Stephen Hwang, Homelessness and Health, CMAJ 2001;164(2):229-33 (January 2001) online at <http://www.cmaj.ca/cgi/reprint/164/2/229>

⁸ Orchard L, Penfold R and Sage D (2003) *Hunger Count 2003: A Surplus of Hunger Canadian Association of Food Bank, Toronto* [Online] Available: www.cafb-acba.ca/pdfs/other_documents/HC2003_ENG.pdf [2004, 11 August]. The first food bank in Canada opened in 1981 in Edmonton.

⁹ Hurtig M (1999) *Pay the Rent or Feed the Kids: The Tragedy and Disgrace of Poverty in Canada* McClelland and Stewart, Toronto.

critical means of survival for three quarters of a million people every month, including over 300,000 children.¹⁰

Homelessness in Canada also constitutes a direct assault on the right to a family and to the protection of family life. Inability to afford or obtain adequate housing has become a significant factor in parents losing or relinquishing custody of their children in Canada.¹¹

ii) Retrogressive Measures Leading to Increased Homelessness in Canada

Unlike more impoverished countries in OAS, homelessness in Canada in 2004 is a matter of governmental choice. There is no scarcity of resources in Canada which can justify the failure to take positive measures to address this problem. Sixty four per cent of Canadians own their own homes with, on average, more than seven rooms.¹² Fifty seven per cent of Canadians live in detached houses. Almost three quarters of a million households, representing 14 per cent of the population, own an additional vacation home in the country.¹³ Homelessness in Canada is an issue of inequality and social exclusion.

In 1994, 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. Only recently have any new housing programs or rent supplement programs been initiated under a federal/provincial/territorial affordable housing framework agreement, with little in the way of concrete results.¹⁴

¹⁰ *Hunger Count 2003*, supra.

¹¹ Inadequate housing or homelessness was a factor in one of five admissions of children into foster care in Toronto. Chau S, Fitzpatrick A, Hulchanski J D, Leslie B and Schatia D (2001) *One in Five ... Housing as a Factor in the Admission of Children to Care* Centre for Urban and Community Studies, Toronto.

¹² Statistics Canada (1996) 'Occupied Private Dwellings by Tenure and Number of Rooms, Showing Structural Type of Dwelling, for Canada' [Online] Available: www.statcan.ca/english/census96/june9/d6can.htm

¹³ Statistics Canada (1996) 'Occupied Private Dwellings by Tenure and Number of Rooms, Showing Structural Type of Dwelling, for Canada'

¹⁴ Michael Shapcotte, *The swinging pendulum. . . A snapshot of the changing affordable housing crisis and homelessness disaster in Canada and the responses of government.* (2003) Community-University Research Partnerships Unit, University of Toronto (September, 2003) online at <www.cahhalifax.org/DOCS/swinging.pdf

The year after the federal freeze on social housing, the Federal Government introduced a bill that represented an unprecedented attack on the right to financial assistance necessary to obtain housing. Without any public consultation or warning, the Federal Government revoked the *Canada Assistance Plan Act* as of 1 April 1996.¹⁵ The Canadian Assistance Plan Act (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.¹⁶ The adequacy requirements under CAP were enforceable both by the Federal Government and by courts at the initiation of affected individuals.¹⁷ If rates were inconsistent with basic requirements the court could order that federal transfer payments be withheld until the province complied with the requirements of CAP.¹⁸ 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.¹⁹

The federal move was followed by dramatic cuts in social assistance benefits in several provinces and a growing gap between the assistance available and the money needed for rental housing. In Ontario, for example, social assistance rates were cut by 22 per cent in October 1995, forcing an estimated 120,000 households from their homes.²⁰ Since that time, rents have risen dramatically while benefit levels remained frozen until September, 2004, when they were raised by a meager 3%. The gap between income on social assistance and the amount needed for rent has now become completely unmanageable for many low income households.²¹

¹⁵ *Budget Implementation Act, 1995*, 1995, c 17.

¹⁶ 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).

¹⁷ 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].

¹⁸ *Finlay v Canada (Minister of Finance)* [1986] 2 SCR 607; *Finlay v Canada (Minister of Finance)* [1993] 1 SCR 1080

¹⁹ Scott C 'Covenant Constitutionalism and the Canada Assistance Plan' (1995) 6 *Constitutional Forum* 79-87

²⁰ Porter, B. 'Judging Poverty: Using International Human Rights Law to Refine the Scope of Charter Rights' (2000) 15 *Journal of Law and Social Policy* pp 117-162.

²¹ Pay the Rent and Feed the Kids Fact Sheet (2003) online at <http://www.acto.ca/docs/prfk_fact_sheet_postcard_drop.pdf>

Governments argued in the mid-1990s that these unprecedented retrogressive measures were justified to deal with large budgetary deficits. Yet after several years of large surpluses and unprecedented economic prosperity, none of the critical changes to Canada's social programs or legal protections have not been reversed. A recent federal budget provided no new money for housing.²²

iii) Violations of the Right to Adequate Housing, Land and Resources of Aboriginal People in Canada

Aboriginal people in Canada living on reserves suffer housing conditions described as 'intolerable' by a Royal Commission on Aboriginal Peoples [RCAP].²³ Aboriginal people make up four per cent of the Canadian population, with about half living on traditional lands. Lands set aside for Aboriginal people make up less than half of one per cent of Canadian land, most in the near or far north.²⁴ RCAP found that Aboriginal households are more than 90 times more likely than other Canadian households to be living without a piped water supply and that fourteen per cent lived without indoor plumbing.²⁵ Aboriginal women have twice the poverty rate of non-Aboriginal women and are over-represented in the population of families in homeless shelters.²⁶ Seventy three per cent of Aboriginal female lone parents live in poverty, the majority living in cities and most characterised as being in 'core housing need.'²⁷

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 RCAP, the number of Aboriginal suicides sends a 'blunt and shocking

²² Goar, C. "Not one new penny for housing" *Toronto Star*, Feb. 28, 2005.

²³ Royal Commission on Aboriginal Peoples (1996) *Report of the Royal Commission on Aboriginal Peoples* Indian and Northern Affairs, Canada, (RCAP) vol 4, ch 3.

²⁴ *Ibid.*

²⁵ *Ibid.*, vol 3, ch 4, 1.1.1

²⁶ Ministry of Social Development and Economic Security (British Columbia) (2001) *Homelessness - Causes and Effects: A Profile, Policy Review and Analysis of Homelessness in British Columbia* [Online] www.mcaaws.gov.bc.ca/housing/homeless vol 2, 23; vol 4, 8) vol 2, 23; vol 4, 8)

²⁷ Canada Mortgage and Housing Corporation (1997) *Core Housing Need Among Off-Reserve Aboriginal Lone Parents in Canada* [Online] Available: dsp-psd.pwgsc.gc.ca/Collection/NH18-23-34E.pdf

message to Canada that a significant number of Aboriginal people in this country believe that they have more reasons to die than to live'²⁸ Most Indigenous groups in Canada have been unable to make significant progress in negotiating and implementing land claim treaties.²⁹

iv) Forced Evictions

Internationally, the term 'forced evictions' is most often associated with entire communities or neighbourhoods being evicted, often from squatter settlements. In Canada, this pattern of forced relocation of entire communities has characterised some of the many violations of the right to adequate housing of Aboriginal people who, after 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.³⁰ Aboriginal people have faced violent police tactics when occupying land in protests over unrecognised land claims. A fatal shooting by police of a peaceful demonstrator at Ipperwash, Ontario in 1995 has only recently become the subject of a Commission of Inquiry, five years after a public inquiry was strongly recommended by the UN Human Rights Committee in 1999.³¹ Other communities of homeless people have begun to organise squatter communities and have often faced violent evictions from police.³²

Respecting the right to housing by ensuring alternative accommodation prior to displacing communities has in fact proven more cost-effective for governments. Under an Emergency Homelessness Pilot Project (EHPP) in Toronto, individuals and families who had been homeless

²⁸ Coon Come M (2001) 'No Apologies: Structural Racism, "White Mobs", and the Pushing of Indigenous Peoples in Canada to the Edge of Social, Political and Cultural Extinction' (Speech presented to the Canadian Bar Association, 1 October 2001, Ontario).

²⁹ Farha L (2004) *Indigenous Peoples' Right to Adequate Housing: A Global Overview* United Nations Centre for Human Settlements, New York.

³⁰ RCAP, supra, vol 1, ch 11.

³¹ Only after a previous government was removed from office has the recommendation of the UN Human Rights Committee for a public inquiry into this matter been implemented by the Government of Ontario: Human Rights Committee (1999): para 11; Government of Ontario, Executive Council (2003).

³² For example, about 30 squatters were evicted from an abandoned building by police in Montreal on 4 October 2001: Macafee (2001).

for a considerable length of time, living in a tent city in Toronto, were provided with rent supplements and successfully housed in private market housing. 89% remained housed after 18 months, and the cost of the permanent housing was less than the cost of placing the individuals and families in emergency shelters.³³

Most of the evictions leading to homelessness in Canada, however, occur in individual households, and no attention is paid to whether the evictions will lead to homelessness. In Ontario, there are approximately 60,000 evictions a year, but because these evictions 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.

Tenants are routinely evicted for minimal arrears of rent. In Toronto, 80 per cent of applications to evict for arrears are for less than \$1000, equivalent to an average month's rent.³⁴ In many cases, households are evicted when the landlord actually owes the tenant money because the arrears for the current month are less than the deposit the tenant has paid the landlord at the commencement of the tenancy as a deposit for the last month's rent. Thousands of adults and children are thus unnecessarily forced into homelessness every year, children displaced from their schools and their physical and emotional health put at risk, because a temporary set-back has left them a little short on their rent. Such actions would certainly appear to be in violation of obligations under ICESCR, enunciated by General Comment No 7 of the Committee on Economic Social and Cultural Rights (CESCR), to ensure that evictions should not result in individuals being rendered homeless; but rental tribunals have shown little willingness to consider the human rights norms in exercising their discretion (CESCR 1997).

Tenants who enjoy the protection of legal security of tenure in Canada find that the right is increasingly reduced to procedures designed for expeditious eviction for landlords. For example, new landlord and tenant legislation which came into effect in Ontario in 1998, the so-called

³³ Gloria Gallant, Joyce Brown and Jacques Tremblay, *From Tent City to Housing: An Evaluation of the City of Toronto's Emergency Homelessness Pilot Project* (June, 2004) online at < <http://www.tdrc.net/tentcity5.pdf>>

³⁴ Ontario Rental Housing Tribunal (2000), Ontario Rental Housing Tribunal Records Secured from the Ontario Rental Housing Tribunal by the Centre for Equality Rights in Accommodation.

Tenant Protection Act (SO 1997, c 24), 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 a hearing.³⁵

Increasing numbers of households in Canada do not enjoy even these inadequate statutory protections of security of tenure because of the nature of their housing situation. Lower rent accommodation that is not self-contained is usually exempt from both landlord and tenant and human rights legislation. Astonishingly, it is legal in such situations for landlords to evict tenants at whim, or to deny accommodation because of race or any other discriminatory ground. Small motel units that are rented by the week, often relied on by families in winter months, are also usually exempt from security of tenure provisions.

v) Criminalization of Homelessness

As in the United States, Canada has seen a growing trend toward criminalizing homelessness as a strategy to keep the problem out of sight and to vilify those whose rights to adequate housing are violated. Many cities in Canada now have anti-panhandling by-laws through which homeless people can be fined for begging for necessities of life, with terms of imprisonment possibly resulting from non-payment.³⁶ In 2,000, Ontario passed a *Safe Streets Act*³⁷ and similar legislation has recently been passed in the province of British Columbia to prohibit solicitation of various sorts in public places.³⁸ As the British Columbia Civil Liberties Association has noted, the law creates authority to sweep perceived undesirables off of city streets and criminalizes behaviour that is the result of poverty and homelessness.³⁹ A court challenge to the legislation in Ontario for violating a number of rights, including the right to equality, the right to "life, liberty

³⁵ In Ontario in 2001, 57 per cent of the over 60,000 landlord applications for termination of tenancy resulted in 'default' eviction orders without any hearing: Ontario Rental Housing Tribunal (2001).

³⁶ National Anti-Poverty Organization Short-Changed on Human Rights: A NAPO Position Paper on Anti-Panhandling By-laws (1999) online at < <http://www.napo-onap.ca/docs/panhandling%20en.pdf>>

³⁷ *Safe Streets Act*, 1999, SO 1999, c. 8.

³⁸ Bill 71 -- 2004, *Safe Streets Act* online at < http://www.legis.gov.bc.ca/37th5th/3rd_read/gov71-3.htm>

³⁹ British Columbia Civil Liberties Association, *Civil Rights Group Speaks Out Against Safe Streets Act: Calls It Street Sweeping the Poor* (7 October 2004) online at <<http://www.bccla.org/pressreleases/04octsafestreeets.htm>>

and security of the person” and the right to freedom of expression has been unsuccessful, but leave is being sought to the Ontario Court of Appeal.⁴⁰

vi) Widespread Discrimination in Housing

Despite extensive federal and provincial human rights legislation prohibiting discrimination in housing, poor people, social assistance recipients, racialized minorities, newcomers, single mothers, people with disabilities and young people continue to face widespread discrimination in housing.⁴¹ Human Rights Commissions have been largely ineffective in addressing the problem. Landlords routinely screen tenants on the basis of income, credit rating and employment, despite the fact that human rights tribunals and courts have ruled such practices to be discriminatory.⁴² The result of extensive systemic discrimination against low income households is that the poorest households are forced to rent the most overpriced accommodation on the market, often at the cost of several hundred dollars a month in rent.⁴³ Women, young families and other low income earners also face discrimination in access to credit for home ownership, often the most affordable or only housing option in rural areas, because of income discrimination imposed by Canada Mortgage and Housing in access to mortgage insurance.⁴⁴ Such households are often paying significantly higher monthly payments in rent than would be required for a mortgage, yet banks do not consider regular rent payment as proof of credit-worthiness.

vii) Denial of Access to Effective Remedies to Violations of the Right to Adequate Housing in Canada

⁴⁰ *R. v. Banks* [2005] O.J. No. 98 online at <http://www.flora.org/legal/tickets/R_v_Banks.pdf>

⁴¹ Discrimination because of receipt of public assistance 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>

⁴² *Whitton v Québec (Comm des droits de la personne)* (1997) 29 CHRR D/1 (Que CA); *Kearney v Bramalea Ltd* (1998) 34 CHRR D/1 (Ontario Board of Inquiry); *Shelter Corporation v Ontario Human Rights Commission* (2001) 143 OAC 54; *Ahmed v Shelter Corporation* (Unreported, Ontario Human Rights Board of Inquiry, Mary Anne McKellar, Decision No 02-007, 2 May 2002); *Sinclair and Newby v Morris A Hunter Investments Limited* (Ontario Human Rights Board of Inquiry, Mary Anne McKellar, Decision No 01-024, 5 November 2001).

⁴³ 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>.

⁴⁴ *Women and Housing: Barriers to Equality*, supra, at <<http://www.equalityrights.org/cera/docs/barriers.htm>>

While the right to adequate housing is not explicitly recognized in any legislation or constitutional provisions in Canada, there is significant room for providing effective remedies through existing domestic law in Canada, if courts and tribunals wished to do so. There have been some positive developments in Canadian domestic law in this respect, particularly in the understanding of the scope of the right to “life, liberty and security of the person” in section 7 of the *Canadian Charter of Rights and Freedoms*⁴⁵ and the right to equality and non-discrimination in section 15 of the *Charter*.

Referring to protections in the International Covenant on Economic, Social and Cultural Rights, and in the Convention on the Rights of the Child, the Supreme Court of Canada has affirmed that “the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified”⁴⁶ and that international law is “a critical influence on the interpretation of the scope of the rights included in the *Charter*.”⁴⁷ The Court has affirmed that this ‘interpretive presumption’ must also apply when Canadian courts interpret laws and when administrators exercise discretion. The Court has found that international human rights contains ‘the values that are central’ in determining whether a decision or an exercise of discretion is ‘reasonable’. In this sense, judicial review for the reasonableness of governmental decision-making in light of obligations under international law to respect and ensure the right to adequate housing is entirely appropriate.

[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.⁴⁸

⁴⁵ *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, being Schedule B to the Canada Act 1982 (UK) c 11*

⁴⁶ *Slaight Communications, supra*, at 1056-1057, 1078-1081. See also R. Sullivan, *Driedger on the Construction of Statutes*, 3d ed (Toronto: Butterworths, 1994) at 330: “... the legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. In so far as possible, therefore, interpretations that reflect these values and principles are preferred”; cited in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 70 and in *R. v. Sharpe*, [2001] 1 S.C.R. 45 at para. 175.

⁴⁷ *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 at para. 70

⁴⁸ *Ibid.*

The right to equality in s 15 of the *Canadian Charter* and the right to ‘life, liberty and security of the person’ are particularly important in giving domestic effect to international human rights because these rights “embody the notion of respect of human dignity and integrity”.⁴⁹ The Court has been careful to distinguish ‘corporate-commercial economic rights’ which were deliberately excluded from the *Canadian Charter*, from “rights to social security, equal pay for equal work, adequate food, clothing and shelter.”⁵⁰ At its periodic reviews under ICESCR, the Government of Canada has informed the Committee on Economic, Social and Cultural Rights that the protection of ‘life, liberty and security of the person’ in the *Canadian Charter* at least guarantees that people are not to be deprived of basic necessities such as food, clothing and housing.⁵¹

In the first Supreme Court of Canada case to deal with issues of homelessness and the right to housing as a component of the right to “life, liberty and security of the person” the majority of the Court left open the possibility that this right imposes a positive duty on governments to provide adequate social assistance, but did not find the evidence warranted such a finding in that case.⁵² Justice Louise Arbour, now the UN High Commissioner on Human Rights, in a powerful dissenting judgment, found that “positive rights are not an exception to the usual application of the *Charter*, but an inherent part of its structure.”⁵³ She found that the right to “life, liberty and security of the person” imposes a positive duty on governments in Canada to provide a minimum level of welfare to ensure access to housing and other necessities. In making this finding, she referred to evidence of the effects of inadequate housing and homelessness on health:

First, there are the health risks that flow directly from the dismal living conditions that \$170/month afford. Obviously, the inability to pay for adequate clothing, electricity, hot water or, in the worst cases, for any shelter whatsoever, dramatically increases one’s vulnerability to such ailments as the common cold or influenza. According to Dr. Christine Colin, persons living in poverty are six times more likely to develop diseases

⁴⁹ *R v Ewanchuk* [1999] 1 SCR 330 at para 73.

⁵⁰ *Irwin Toy* [1989] 1 SCR 927 at 1003-1004.

⁵¹ Committee on Economic, Social and Cultural Rights (1993b) *Summary Record of the Fifth Meeting* UN Doc E/C.12/1993/SR.5 (25 May 1993) paras 3, 21; Government of Canada (1998) *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 questions 16 and 53.

⁵² *Gosselin v. Quebec (Attorney General)* [2002] 4 S.C.R. 429 at paras 82-83.

⁵³ *Ibid.*, para. 350.

like bronchial infections, asthma and emphysema than persons who live in decent conditions. Dr. Colin also testified that the poor not only develop more health problems, but are also more severely affected by their ailments than those who live in more favourable conditions.⁵⁴

The right to equality and non-discrimination under both the Canadian Charter and under human rights legislation has similarly been interpreted as including both positive and negative dimensions linked to the obligation to both protect and ensure equality. Where governments, responding to equality claims, have argued that the right to non-discrimination and equality “does not oblige governments to implement programs to alleviate disadvantages that exist independently of state action”, a unanimous Supreme Court of Canada has responded that “this position bespeaks a thin and impoverished vision of s 15(1) [equality rights]. It is belied, more importantly, by the thrust of this Court's equality jurisprudence.”⁵⁵

The right to non-discrimination has been interpreted expansively, not only as requiring positive measures to alleviate disadvantage but also to address discrimination on the ground of poverty, discrimination against public housing residents and discrimination against those relying on social assistance.⁵⁶ On the basis of this approach to the right to equality, courts have extended security of tenure provisions to include public housing residents who were previously excluded and struck down regulations that deny full social assistance benefits to women living with men in what would be considered non-spousal relationships in other areas of law.⁵⁷

Unfortunately, lower courts, tribunals and human rights commissions have often failed to interpret and apply domestic law consistently with the right to adequate housing. In *Fernandes v Director of Social Services (Winnipeg Central)*,⁵⁸ 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

⁵⁴ *Ibid*, para. 373.

⁵⁵ *Eldridge v British Columbia (Attorney General)* [1997] 3 SCR 624 at 677-678.

⁵⁶ *Dartmouth/Halifax County Regional Housing Authority v Sparks* (1993) 101 DLR (4th) 224; *Falkiner et al. v. Ontario* (Attorney General) (2002), 220 DLR (4th) 411.

⁵⁷ *Ibid*.

⁵⁸ *Fernandes v Director of Social Services (Winnipeg Central)* (1992) 93 DLR (4th) 402 (Man CA)

Canada's international human rights obligations to ensure an adequate standard of living including adequate housing. The Court of Appeal in Manitoba, however, found that the interests raised in the appeal were outside the scope of ss 7 and 15 of the *Charter*.

In *Masse*,⁵⁹ 12 social assistance recipients in Ontario, including seven sole support mothers, asked the Ontario Court (General Division) to strike down a 22 per cent 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 homeless⁶⁰

The Court found, however, that it had no jurisdiction 'to second guess policy/political decisions'.⁶¹

When social assistance recipients have turned to the Ontario Human Rights Commission and asked it to investigate whether the gross inadequacy of shelter components of social assistance violate the rights of welfare recipients to substantive equality in housing, the Human Rights Commission has dismissed the complaints as 'frivolous' and denied the complainants access to a hearing⁶²

In the face of these denials of access to effective domestic remedies to violations of the right to adequate housing in Canada, affected constituencies have increasingly turned to international human rights law and to international bodies in the hope that they will provide clear guidance to governments and courts in Canada that the right to adequate housing is a right which must be subject to an effective remedy.

⁵⁹ *Masse v Ontario Ministry of Community and Social Services* (1996) 134 DLR (4th) 20; leave to appeal to Ontario Court of Appeal denied (1996) 40 Admin LR 87N; leave to appeal to the Supreme Court of Canada denied (1996) 39 CRC (2d) 375

⁶⁰ *Ibid*, per Corbett J at paras 42-49

⁶¹ *Ibid*, per O'Brien J at para 224; O'Driscoll J at paras 351, 386

⁶² *C B v Her Majesty the Queen in Right of Ontario, as represented by the Minister of Community, Family and Children's Social Services* (Unreported, Ontario Human Rights Commission, File No JWIS-5JUR3L, 17 March 2004) [On file with the author] Reconsideration of the decision has been requested by the complainants.

II. International Jurisprudence on the Right to Adequate Housing in Canada: Toward an Integrated Legal Framework

Although Canada has not ratified the Inter-American Convention on Human Rights or the Protocol of San Salvador, it has ratified virtually all UN treaties, including those which explicitly recognize the right to adequate housing, including the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women. With growing attention to the critical issues related to the right to adequate housing in Canada, the jurisprudence emerging from various UN treaty monitoring bodies on Canada, as well as from domestic courts in Canada, points the way toward a coherent legal framework for assessing compliance with the right to adequate housing in wealthy countries like Canada and the U.S., as well as developing appropriate recommendations for effective remedies to violations of this right.

i) Failure to take appropriate ‘positive measures’ to address homelessness violates the right to life and security of the person

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 [the right to life] to address this serious problem. (UN Human Rights Committee, 1999)⁶³

This finding of the Human Rights Committee, the first to explicitly mention positive measures to address homelessness as an obligation derived from the right to life has been critical to promoting a substantive interpretation of the right to life, liberty and security of the person under *Canadian Charter*, so as to include the right to adequate housing as a component of this broader right. The Human Rights Committee has thus reinforced the view of Justice Arbour as expressed in her minority decision in the *Gosselin* case.⁶⁴

⁶³ Concluding Observations of the Human Rights Committee: Canada, UN Doc. CCPR/C/79/Add.105 (7 April 1999).

⁶⁴ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, being Schedule B to the *Canada Act 1982* (UK) c 11. Section 7 reads: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with principles of fundamental justice.”

The UN Committee on Economic, Social and Cultural Rights has expressed similar concerns about the rise of homelessness in Canada, explicitly relating it to the availability of resources to address it and to retrogressive measures which have given rise to it. In its 1993 review, the Committee referred explicitly to comparative budgetary allocation to housing in Canada, and in 1998, to the fact that Canada's relative affluence makes homelessness difficult to justify.

Given the evidence of homelessness and inadequate living conditions, the Committee is surprised that expenditures on social housing are as low as 1.3 per cent of Government expenditures. (CESCR, 1993)⁶⁵

The Committee is 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. (UN CESCR, 1998)⁶⁶

ii) Retrogressive Measures

The CESCR identified a number of retrogressive measures which have led to the rise of homelessness in Canada, including the revoking of the Canada Assistance Plan Act and dramatic cuts to social assistance.

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. ... The Committee regrets that, by according virtually unfettered discretion to provincial governments in relation to social rights, the Government of Canada has created a situation in which Covenant standards can be undermined and effective accountability has been radically

⁶⁵ Committee on Economic, Social and Cultural Rights (1993) *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada* UN Doc E/C.12/1993/5 (10 June 1993)

⁶⁶ Committee on Economic, Social and Cultural Rights (1998) *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada* UN Doc E/C.12/1/Add.31 (10 December 1998)

reduced. The Committee also recalls in this regard paragraph 9 of General Comment No. 3. [prohibition of “deliberately retrogressive measures”](CESCR, 1998, para.19)

The CESCR noted that social assistance cuts had led directly to homelessness.

The Committee is concerned that provincial social assistance rates and other income assistance measures have clearly not been adequate to cover rental costs of the poor. (CESCR, 1998)

The Committee expresses its grave concern at learning that the Government of Ontario proceeded with its announced 21.6 per cent cuts in social assistance in spite of claims that this would force large numbers of people from their homes. (CESCR, 1998)

iii) Discriminatory Effect of Homelessness on Disadvantaged and Vulnerable Groups

A consistent focus of treaty monitoring bodies has been on the discriminatory effect of social program cuts on disadvantaged and vulnerable groups, leading to a greater risk of homelessness and linking the right to equality and non-discrimination with the right to adequate housing. Identified groups have included the following:

Women

[T]he 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. (Human Rights Committee, 1999)

The Committee is concerned that the significant reductions in provincial social assistance programmes, the unavailability of affordable and appropriate housing and widespread discrimination with respect to housing create obstacles to women escaping domestic violence. Many women are forced, as a result of those obstacles, to choose between returning to or staying in a violent situation, on the one hand, or homelessness and inadequate food and clothing for themselves and their children, on the other. (CESCR, 1998)

The Committee, although recognizing the efforts undertaken by the State party concerning the provision of social housing, is concerned that such efforts might be inadequate to address the needs of women with low incomes and those of female single parents (CEDAW, 2003)

The Committee recommends that the State party reconsider and, if necessary, redesign its efforts towards socially assisted housing after a gender-based impact analysis for vulnerable groups of women. (CEDAW, 2003)

Young Families

The Committee is concerned at the crisis level of homelessness among youth and young families. According to information received from the National Council of Welfare, over 90 per cent of single mothers under 25 live in poverty (CESCR, 1998)

People with Disabilities

Programmes for people who have been discharged from psychiatric institutions appear to be entirely inadequate. Although the Government failed to provide to the Committee any information regarding homelessness among discharged psychiatric patients, the Committee was told that a large number of those patients end up on the street, while others suffer from inadequate housing, with insufficient support services. (CESCR, 1998)

Aboriginal People

In particular, the Committee is deeply concerned at the shortage of adequate housing, the endemic mass unemployment and the high rate of suicide, especially among youth, in the Aboriginal communities. Another concern is the failure to provide safe and adequate drinking water to Aboriginal communities on reserves. The delegation of the State Party conceded that almost a quarter of Aboriginal household dwellings required major repairs and lacked basic amenities.

The Committee views with concern the direct connection between Aboriginal economic marginalization and the ongoing dispossession of Aboriginal people from their lands, as recognized by RCAP [Royal Commission on Aboriginal People], and endorses the recommendations of RCAP that policies which violate Aboriginal treaty obligations and the extinguishment, conversion or giving up of Aboriginal rights and title should on no account be pursued by the State Party. The Committee is greatly concerned that the recommendations of RCAP have not yet been implemented, in spite of the urgency of the situation. (CESCR, 1998)

[T]he 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 [Royal Commission on Aboriginal Peoples] recommendations on land and resource allocation. (Human Rights Committee, 1999)

Children

The Committee is concerned that differences in the way in which the National Child Benefit Supplement for low-income families is implemented in some provinces may result in a denial of this benefit to some children [ie. those whose parents rely on social assistance] This may lead to non-compliance with article 24 of the Covenant. [right of children to non-discrimination and measures of protection] (Human Rights Committee, 1999)

The Committee recommends that the State party strengthen its efforts to ensure that children from vulnerable and disadvantaged groups, such as aboriginal children, benefit from positive measures aimed at facilitating access to education and housing. (CRC, 2003)

iii) Failure to Ensure Adequate Protection from Evictions and to Provide Security of Tenure

The CESCR made the following comments on Canada's obligation to provide inclusive protections from evictions:

The Committee is concerned that the right to security of tenure is not enjoyed by all tenants in Canada. (CESCR, 1998)

The Committee recommends the extension of security of tenure to all tenants and draws the attention of the State party to its General Comment No. 4 on the Right to Adequate Housing (article 11-1 of the Covenant), in particular paragraph 8. (CESCR, 1998)

iv) Failure to Provide Effective Remedies to Discrimination in Housing

Both the Human Rights Committee and the CESCR have expressed strong concern about the lack of effective remedies to discrimination in housing.

The Committee learned from non-governmental organizations of widespread discrimination in housing against people with children, people on social assistance, people with low incomes, and people who are indebted. Although prohibited by law in many of Canada's provinces, these forms of discrimination are apparently common. A more concerted effort to eliminate such practices would therefore seem to be in order. (CESCR, 1998)

The Committee is concerned with the inadequacy of remedies for violations of articles 2, 3 and 26 of the Covenant. The Committee recommends that the relevant human rights legislation be amended so as to guarantee access to a competent tribunal and to an effective remedy in all cases of discrimination. (Human Rights Committee, 1999)

v) Failure to Interpret and Apply Domestic Law Consistently with the Right to Adequate Housing so as to Provide Effective Domestic Remedies to Violations

Both the Human Rights Committee and the CESCR have provided strong support for a substantive interpretation of the right to life and of the right to non-discrimination which would require governments in Canada to take positive measures to address homelessness.

The CESCR, in particular, has expressed concern about decisions of some lower courts in Canada to the effect that the right to housing and to an adequate standard of living is a “policy objective” of government rather than an enforceable human right requiring judicial oversight. Commenting on the trial decision in *Gosselin*, the CESCR in 1993 noted that:

The Committee is concerned that in some court decisions and in recent constitutional discussions, social and economic rights have been described as mere "policy objectives" of governments rather than as fundamental human rights. The Committee was also concerned to receive evidence that some provincial governments in Canada appear to take the position in courts that the rights in article 11 of the Covenant are not protected, or only minimally protected, by the Charter of Rights and Freedoms. The Committee would like to have heard of some measures being undertaken by provincial governments

in Canada to provide for more effective legal remedies against violations of each of the rights contained in the Covenant. (CESCR, 1993)

The Committee, as in its review of the previous report of Canada, reiterates that economic and social rights should not be downgraded to "principles and objectives" in the ongoing discussions between the Federal Government and the provinces and territories regarding social programmes. The Committee consequently urges the Federal Government to take concrete steps to ensure that the provinces and territories are made aware of their legal obligations under the Covenant and that the Covenant rights are enforceable within the provinces and territories through legislation or policy measures and the establishment of independent and appropriate monitoring and adjudication mechanisms. (CESCR, 1998)

The Committee has received information about a number of cases in which claims were brought by people living in poverty (usually women with children) against government policies which denied the claimants and their children adequate food, clothing and housing. Provincial governments have urged upon their courts in these cases an interpretation of the Charter which would deny any protection of Covenant rights and consequently leave the complainants without the basic necessities of life and without any legal remedy. (CESCR, 1998)

The Committee is deeply concerned at the information that provincial courts in Canada have routinely opted for an interpretation of the Charter which excludes protection of the right to an adequate standard of living and other Covenant rights. The Committee notes with concern that the courts have taken this position despite the fact that the Supreme Court of Canada has stated, as has the Government of Canada before this Committee, that the Charter can be interpreted so as to protect these rights. (CESCR, 1998)

III Conclusion

As Professor Craig Scott has observed, the converging concerns expressed in recent concluding observations of UN treaty monitoring bodies dealing with both civil and political rights and economic, social and cultural rights on issues such as homelessness and poverty suggest a much more integrated approach to these two sets of rights, in which the right to adequate housing would be a central component not only of the right to an adequate standard of living in article 11 of the ICESCR, but also of many of the rights in the ICCPR, particularly the right to life and the right to non-discrimination interpreted substantively.

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.⁶⁷

In our respectful submission, the Inter-American Commission on Human Rights, like UN human rights treaty monitoring bodies, can play a decisive and important role in developing a coherent legal framework for the protection of the right to an adequate standard of living in the Americas which will provide a foundation not only for more coherent and decisive government action to address violations of the right to housing, but also provide a means through which those whose rights are violated can receive an appropriate hearing and have access to effective domestic remedies.

It is critical, in our view, that such a coherent framework for the right to housing recognize all aspects of obligations to respect and ensure the right, both negative and positive dimensions of the right, as requiring effective adjudication and remedy, particularly where unreasonable allocation of available resources results in violations of the right.

While extent and levels of homelessness and destitution in Canada may not directly compare with the situation in less affluent countries, violations of the right to adequate housing in Canada are nevertheless serious and widespread. Moreover, the fact that they derive from deliberate governmental choices, and could easily be remedied with available resources, makes the role of international human rights bodies extremely important.

If the rights in the Declaration on the Rights and Duties of Man and the American Convention on Human Rights are to be interpreted in a way which is true to the spirit and purpose of the provisions, we submit that they must be interpreted and applied so as to respect and ensure the right to adequate housing – to provide effective remedies to those whose health, well-being,

⁶⁷C. Scott, “Canada’s International Human Rights Obligations and Disadvantaged Members of Society: Finally into the Spotlight?” (1999) 10:4 *Constitutional Forum* 97 at 99.

family and sometimes life are at risk because of governmental decisions to cut back on social programs and housing assistance, or to refuse to take positive measures to address this growing crisis, in the midst of prosperity and affluence.

Thank you very much for your attention.