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About this Article:

This article assesses Ontario's strategies to address poverty and homelessness from a human rights standpoint. It considers how incorporating rights to housing and an adequate standard of living would make these strategies more effective at engaging a range of decisions and programs, what roles existing and new institutions might play and whether rights-based approaches would give too prominent a role to courts.

About This Series

The É/Exchange working paper series is designed to facilitate sharing of results and to encourage discussion of concepts, practices, and policies in applied health. This series provides a way to disseminate well-written, but not yet published, reports of research. It is also a way to make research conducted by affiliated community members accessible to a wider readership. The series is co-sponsored by The Population Health Improvement Research Network (PHIRN), Réseau de recherche appliquée sur la santé des francophones de l'Ontario (RRASFO); and the Ontario Health Human Resources Research Network (OHHRRN).

Designing and Implementing Rights-Based Strategies to Address Homelessness and Poverty in Ontario

This paper is the final in a series addressing poverty and homelessness as human rights issues. It builds on work outlined in *A Human Rights Context for Addressing Poverty* and *Homelessness* and *Constitutional Framework for Rights-Based Strategies to Address Homelessness and Poverty as Social Determinants of Health* using international and domestic rights frameworks to create a rights-based architecture for housing and anti-poverty strategies in Ontario.

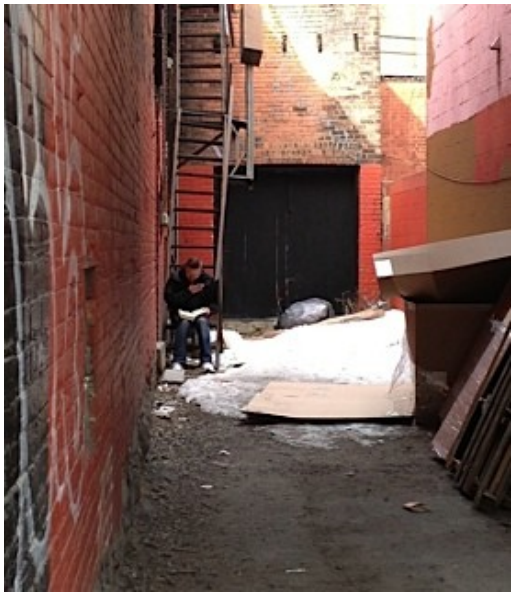
Such an approach will not require major legislation or institutional reform. As explained in the two previous papers, Ontario is already obliged under international human rights agreements, and domestic constitutional law and jurisprudence to ensure that all legislation and administrative decisions are consistent with social rights to adequate housing, adequate food and an adequate standard of living.

Rather than requiring an excessive reliance on the court system to enforce these rights, a rights-based approach would change the framework of values and rights which guide decision-making and ensure its alignment with human rights values of dignity, equality, security and social inclusion.

Rights as a Framework for Accountability to Targets and Timelines

Ontario is currently not meeting the modest targets for poverty reduction that it committed to under its *Poverty Reduction Strategy*. In addition, there are no effective mechanisms to ensure accountability for decision or policy-making to ensure goals and timelines are met under current poverty reduction or housing strategies.

While setting program targets of reductions in homelessness or poverty by a given percentage is a positive step forward, the absence of any mention of the right to adequate housing and to an adequate standard of living in current strategies is a serious omission, limiting the scope and effectiveness of the strategies. Entrenching these rights would affect decision-making and program design in all spheres which impact social rights. For example,



there is a vast array of decisions affecting access to housing, such as determination of the shelter component of social assistance, setting minimum wage, regulation of rent increases and decisions about eviction into homelessness. Currently, these decisions are likely made without refer-

"...homelessness, hunger and poverty in Ontario can be seed to flow not from scarcity of food or affordable housing per se, but from systemic entitlement system failures, tied to a broad range of policy choices, legislation, and program administration decisions in which access to adequate housing, food, or other requirements have not been considered as fundamental human rights."

ence to adequate housing as a human right.

Framing legal obligations as mere program targets and policy aspirations, as in current strategies, may have the effect of disempowering those whose rights are at stake. Rather than simply affirming commitments to improve particular program outcomes based on indicators and targets, Ontario's housing and anti-poverty strategies should be reframed as commitments to implementing fundamental human rights.

Recommendations:

Ontario should incorporate and implement the rights to adequate housing, food and standard of living by:

- Affirming that the *Canadian Charter of Rights and Freedoms* should be interpreted as providing effective remedies to violations of rights to an adequate standard of living and adequate food and housing.
- Amending the *Long Term Affordable Housing Act* to include recognition of the right to adequate housing as a 'provincial interest', requiring all municipalities' housing and homelessness plans to recognize this right.
- Affirming in a provincial "*Social Rights Implementation Act"* that all decision-makers operating under provincial statues should consider social rights as fundamental values to be considered and applied in decision-making.
- Establishing, an independent Social Rights Commission with authority to monitor compliance with these rights and assess progress in their implementation. The Commission should be authorized to institute a complaints procedure, hold hearings and issue recommendations. Alternately, the Ontario Human Rights Commission could be invested with the authority to provide external monitoring and the Ontario Human Rights Tribunal could be authorized to hear complaints of violations of social rights.

Making the rights to adequate standard of living and adequate housing legally binding rights in Ontario, and making them paramount over other statutes, in the same way that other human rights are paramount, will give 'teeth' to the principles and values embodied within current strategies. Over time, as the rights to adequate food, clothing, housing and an adequate standard of living are properly considered in relation to the range of decisions that impact the rights of Ontarians, any decisions that would reasonably be expected to lead to homelessness, hunger or similar deprivations will no longer be considered acceptable.

Reference: Porter B. Designing and Implementing Rights-Based Strategies to Address Homelessness and Poverty in Ontario. Exchange Working Paper Series, Volume 4, Number 4. University of Ottawa, Ottawa, Canada. Available at rrasp-phirn.ca.

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Designing and Implementing Rights-Based Strategies to Address Homelessness and Poverty in Ontario

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A. Introduction

Two previous papers have explored the primary sources of rights that could provide a framework for anti-poverty and housing strategies in Ontario: *International Human Rights, Health, and Strategies to Address Homelessness and Poverty in Ontario: Making the Connection*[1] explored emergent international social rights norms and new models for rights-based strategies within the UN human rights system; and *Strategies to Address Homelessness and Poverty in Canada: the Constitutional Framework*[2] assessed the extent to which constitutional rights, in particular rights in the *Canadian Charter of Rights and Freedoms*,[3] could offer a domestic legal framework for the implementation of rights to housing and to an adequate standard of living as required under international human rights law. This final paper will consider how the international and domestic rights frameworks described in the two previous papers can be applied to create a rights-based architecture for housing and anti-poverty strategies in Ontario.

The paper will assess Ontario's existing strategies from a human rights standpoint and contemplate the added value of a rights-based approach based on international and constitutional norms. It will explore whether these new rights-based frameworks could be implemented without major institutional or legislative changes, and consider what roles existing institutions and agencies might play. Finally, it will reflect on concerns about whether recognizing social

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1 Bruce Porter & Martha Jackman, *International Human Rights, Health, and Strategies to Address Homelessness and Poverty in Ontario: Making the Connection* (Ottawa: Institute of Population Health, 2011) [Porter & Jackman, *Making the Connection*].

2 Martha Jackman & Bruce Porter, *Strategies to Address Homelessness and Poverty in Canada: the Constitutional Framework*, (Ottawa: Institute of Population Health, 2012) [Jackman & Porter, *Constitutional Framework*].

3 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

rights as enforceable, in the context of Ontario's anti-poverty and housing strategies, would give too large a role to courts in the development of social policy.

To summarize the conclusions, this paper will argue that the modern conception of social rights described in the previous papers, understood now as rights that can be claimed and enforced in the same way as civil and political rights, provides a critical new paradigm for the design and implementation of housing and anti-poverty strategies. Applied in Ontario, the new paradigm would breathe life into and enhance the effectiveness of the poverty reduction and affordable housing strategies currently in place. Rather than simply affirming commitments to improve particular program outcomes based on indicators and targets, as Ontario's current strategies do, housing and anti-poverty strategies in Ontario should be reframed as commitments to implementing fundamental human rights to an adequate standard of living, adequate food, and adequate housing. Committing to achieving measurable outcomes within agreed upon timeframes will remain an important feature of a new rights-based approach, but simply committing to goals and targets based oncertain progress indicators will not in itself create a rights-based approach.

Systemic change is necessary to reach the goal of eliminating poverty and homelessness in Ontario; such change will require more than agreed upon targets and timelines. Reconstructing anti-poverty and housing strategies around international human rights and constitutional norms makes systemic change possible by engaging with a broad spectrum of law, policy and program administration. Aspirational commitments and targets would be transformed into enforceable human rights obligations that would influence decisions and policies across the full range of government activities. Under the rights-based model, accountability mechanisms would thus be

linked to the ability of affected individuals and groups to claim and enforce social rights when decisions are being made that threaten their wellbeing.

Affirming social rights as legal obligations does not, however, require an excessive reliance on courts. Just as the acceptance of new human rights norms regarding disability or sexual orientation have affected significant social transformation and policy reform without extensive litigation or judicial intrusion into social policy, so will emerging recognition of social rights as legally binding rely on courts only in rare cases. The courts' proper role is to interpret and apply rights - whether they be social rights or civil/political rights - not to design or implement social policy. Recognizing the right to adequate housing and an adequate standard of living as legal rights in Ontario would, however, change the framework of values and rights that guide decision-makers. It would challenge the structural social exclusion that lies behind the emergence of homelessness and poverty in the midst of affluence in Ontario by demanding that all decision-making be informed by and consistent with the human rights values of dignity, equality, security and social inclusion.

Finally, while instituting a social rights-based approach requires a significant paradigm shift from Ontario's current housing and poverty reduction strategies, it will be seen that the transformation can be effected without major legislative change and without significant institutional reform. Ontario need only affirm and put into practice the firm legal obligations under international human rights and domestic constitutional law described in the previous two papers. Rather than legislatively ignoring and judicially contesting enforceable social rights to housing and an adequate standard of living, Ontario would recognize, affirm, promote and implement these rights. Statutory bodies and administrative decision-makers already have obligations to exercise their authority in such a way as to ensure, wherever reasonably possible,

that the right to an adequate standard of living, adequate food, and adequate housing are not violated. These obligations have not been taken seriously thus far. A rights-based approach to housing and anti-poverty strategies would bring about the necessary change.

B. Ontario's Housing and Anti-Poverty Strategies: The Missing Rights

In Ontario's section of Canada's recently submitted Sixth Periodic Report to the UN Committee on Economic, Social and Cultural Rights, its housing and anti-poverty strategies are presented as evidence of compliance with the right to an adequate standard of living, and the right to adequate housing guaranteed in Article 11 of the *International Covenant on Economic, Social and Cultural Rights*[4]. With respect to the right to adequate housing, the Report states that:

> Ontario has committed to developing a Long-Term Affordable Housing Strategy, to improve the delivery of housing and homelessness programs and to guide the development of affordable housing. A key element of the Strategy is working with municipal partners to consolidate housing and homelessness programs into an outcomes-focused housing service that is more responsive to client needs.[5]

In relation to the right to an adequate standard of living, the Report states that:

> Ontario's Poverty Reduction Strategy, introduced in 2008, focused initially on giving children and their families the support they need to achieve their full potential. The target for

4 *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, Can TS 1976 No 46 (entered into force 3 January 1976, accession by Canada 19 May 1976) [*ICESCR*].

5 Government of Canada, *International Covenant on Economic, Social and Cultural Rights: Sixth Report of Canada (Advance Unedited Version)* at para 363, online: OHCHR www2.ohchr.org.

> the Strategy is to reduce the number of children living in poverty by 25 percent over five years, based on poverty reduction indicators such as: school readiness, educational progress, high school graduation rates, birth weights, Ontario housing measure, standard of living indicator (deprivation index), low-income measure and depth of poverty measure.[6]

By the time the UN Committee on Economic, Social and Cultural Rights (CESCR) holds its actual review of Canada's Sixth Periodic Report, probably late in 2014, the five year target of reducing child poverty by 25% will have lapsed. Advocates are refocusing on the next plan for 2014 to 2018.[7] Although there has been some slight progress in reducing child poverty through the introduction of the Ontario Child Benefit, it is difficult to find evidence of much success in either Ontario's anti-poverty or its housing strategies to date. An unprecedented 400,000 individuals now rely on food banks in Ontario. There have been significant increases in the number of homeless families seeking emergency shelter in Toronto, and a record number of households are now on the waiting list for subsidized housing.[8] Behind these numbers, of course, are hundreds of thousands of personal experiences of deprivation, serious mental and physical health consequences, broken families, violence, and prematurely ended lives.

The CESCR is likely to be concerned that strategies to improve program coherence and service delivery, even to reduce poverty among children, are having little effect in remedying such serious and widespread human rights violations. Ontario's strategies are described

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6 *Ibid* at para 366.

7 25 in 5: Network for Poverty Reduction, *Meeting the Poverty Reduction Target: Strong Leadership and Good Policy Required: Fourth Annual Progress Report on Poverty Reduction in Ontario* (4 December 2012), online: 25in5 http://25in5.ca. Five Priorities for Ontario's Next Poverty Reduction Strategy: Bold Action Needed to Develop a Fair and Prosperous Ontario, online http://25in5.ca/wp-content/uploads/2013/07/25in5-five-Priorities-for-the-next-PRS-July-2013.pdf.

8 Food Banks Canada, *Hunger Count 2012*, online: Food Banks Canada http://foodbankscanada.ca; City of Toronto, *Quick Facts About Homelessness and Social Hosing*, online: Toronto www.toronto.ca; Housing Connections, *Quarterly Activity Report July 1 – September 30, 2012*, online: Housing Connections www.housingconnections.ca.

primarily in terms of improved, outcome-focused service delivery and provision of support. They do not seem to respond effectively to the extreme level of concern, even shock, expressed during previous reviews of Canada that homelessness and poverty have been allowed to reach such critical proportions in one of the most affluent countries to appear before the CESCR. There seems to be a significant asymmetry between the concerns about a systemic human rights crisis, and the presentation of strategies aiming at somewhat modest improvements in program and service delivery.

There is nothing wrong with governments making efforts to ensure improved program coherence, better outcomes from housing or income support programs, or commitment to making progress on addressing child poverty based on agreed measures and indicators. Ontario's anti-poverty strategy was one positive outcome of concerted advocacy by a multitude of groups concerned about poverty, hunger and homelessness in Ontario. Similarly, the requirement imposed on all municipalities across Ontario by the *Strong Communities through Affordable Housing Act* (2011) to develop housing and homelessness plans may have important results. The absence of any reference to the human rights at stake in strategies to address violations of the right to adequate housing and to an adequate standard of living, however, is significant. There is no reference to the right to an adequate standard of living or to any other human rights—either domestic or international—in Ontario's 2008 *Breaking the Cycle: A Poverty Reduction Strategy*,[9] or in the *Poverty Reduction Act* (2009).[10] Ontario's "Long Term Affordable Housing Strategy"[11] makes no reference at all to Ontario's obligations to ensure the right to adequate housing under the ICESCR. It makes passing reference to the right to equal treatment

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[9] Government of Ontario, *Breaking the Cycle: Ontario's Poverty Reduction Strategy* (2008), online: Ontario www.children.gon.ca.

[10] 2009, SO 2009, c 10.

[11] Ministry of Municipal Affairs and Housing, *Building Foundations: Building Futures: Ontario's Long-term Affordable Housing Strategy* (2010), online: MAH www.mah.gov.on.ca [*Long-term Affordable Housing Strategy*].

without discrimination. The *Strong Communities through Affordable Housing Act* (2011)[12] makes no reference at all to human rights.

Strategies for effective public management should not displace or be mistaken for commitments to implement human rights. As the human and health-related costs of homelessness and poverty in Ontario become increasingly evident with each new study, it is clear that what are being measured as program "outcomes" go to the very core of fundamental rights to security, dignity and life itself. It is important to distinguish between strategies for effective program management, and strategies to ensure peoples' rights to dignity, security, life and health.

The *Poverty Reduction Act* affirms a number of principles that resonate with human rights values and with the principles described in the previous papers as components of rights-based approaches, such as:

- Eliminating barriers to full participation of groups facing discrimination
- Respect for individual dignity
- Recognizing diversity and heightened risk of poverty among
- Ensuring ongoing involvement of those affected in program and policy design
- Recognizing the role of civil society organizations
- Ensuring co-operation among various levels of government and non-governmental actors.[13]

Ontario' *Long Term Affordable Housing Strategy* similarly affirms that housing programs must be:

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[12] Bill 140, *An Act to enact the Housing Services Act, 2011, repeal the Social Housing Reform Act, 2000 and make complementary and other amendments to other Acts (Strong Communities through Affordable Housing Act)*, 2nd Sess, 39th Leg, Ontario, 2011 (assented to 4 May 2011) SO 2011 C.6.

[13] *Poverty Reduction Act*, above note 10.

- "People-centred" ("focusing on positive results for individuals and families")
- Based on strong partnerships of all levels of government, housing providers and those in need of housing;
- "Locally driven"
- Inclusive of groups facing discrimination;
- Provide necessary support services, and
- "Fiscally responsible."[14]

The Act requires that all municipalities in Ontario develop local housing and homelessness plans by January 2014. These plans must address issues defined as "provincial interests". Service Managers will ensure that housing and homelessness plans:

- provide measures to prevent homelessness including eviction prevention measures and the provision of supports appropriate to clients' needs;
- are based on a Housing First philosophy;
- support innovative strategies to address homelessness; and
- facilitate transitioning people from the street and shelters to safe, adequate and stable housing.[15]

Significantly, however, these "principles" of the anti-poverty strategy and "provincial interests" in the homelessness strategies are not linked to any human rights obligations under international human rights or domestic law. Even the obligation to provide supports necessary for people with disabilities and obligations to address the needs of groups facing discrimination,

[14] *Long-term Affordable Housing Strategy*, above note 11 at 3.

[15] Ministry of Municipal Affairs and Housing, *Ontario Policy Statement, 2011*, online: MAH www.mah.gov.on.ca.

which are existing legal obligations under human rights legislation and the *Charter*,[16] are affirmed only as "principles" with no provision for those whose rights are at stake to claim their rights.

The inclusion of measurable goals and timetables, and the emphasis on consultation and collaboration with affected communities, are additional components of both strategies that have resonance with rights-based approaches to housing and anti-poverty strategies recommended to Canadian governments by the CESCR and promoted by the UN Office of the High Commissioner on Human Rights (OHCHR).[17] In Ontario's strategies, however, indicators and targets remain largely aspirational, with no meaningful accountability mechanisms in place to see to it that decisions are made or that policies are implemented to ensure meeting targets. Goals, timelines and targets as recommended by the CESCR, on the other hand, must be situated in a human rights framework, and be reinforced with "complaints procedures, and transparent accountability mechanisms, in keeping with Covenant standards."[18]

C. Aspirational Targets or Human Rights Obligations?

The distinction between governmental aspirations and human rights obligations is critical to assessing whether anti-poverty and housing strategies comply with international human rights law. This issue has been at the core of concerns from UN human rights bodies about the status of social rights in Canadian provinces for many years. In all of its periodic reviews of Canada

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16 *Charter*, above note 3.

17 United Nations Office of the High Commissioner for Human Rights, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*, UN Doc HR/PUB/06/12 (Geneva: OHCHR, 2006) [OHCHR, *Guidelines*].

18 United Nations Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, UNCESCROR, 36th Sess, UN Doc E/C.12/CAN/CO/4 & E/C.12/CAN/CO/5, (2006) at para 60 [UNCESCROR, *Concluding Observations*, 2006].

dating back to 1993, the CESCR has emphasized that social rights such as the right to adequate housing, food, and an adequate standard of living must not be reduced to mere commitments, policy objectives or aspirational goals.[19] The CESCR has emphasized in its recommendations to Canada "that Covenant rights should be enforceable within provinces and territories through legislation or policy measures, and that independent and appropriate monitoring and adjudication mechanisms be established in this regard."[20] According to UN human rights bodies, a normative human rights framework is critical if governments are to be held accountable to obligations to make reasonable progress commensurate with available resources. As noted by the Office of the High Commissioner on Human Rights (OHCHR) in its *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*: "Experience from many countries teaches us that human rights are most readily respected, protected and fulfilled when people are empowered to assert and claim their rights."[21]

> The essential idea underlying the adoption of a human rights approach to poverty reduction is that policies and institutions for poverty reduction should be based explicitly on the norms and values set out in international human rights law. … Underpinned by universally recognized moral values and reinforced by legal obligations, international human rights provide a compelling normative framework for the formulation of national and international policies, including poverty reduction strategies….[22]

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19 United Nations Committee on Economic, Social and Cultural Rights, *Concluding Observations on Canada*, UNCESCROR, 1993, UN Doc E/C 12/1993/5 at para 21; Committee on Economic, Social and Cultural Rights, *Concluding Observations on Canada*, CESCROR, 1998, UN Doc E/C.12/1/Add.31 at paras 14-15; Committee on Economic, Social and Cultural Rights, CESCROR, 2006, *Concluding Observations on Canada*, UN Doc E/C.12/CAN/CO/5 at para 11.

20 United Nations Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, UNCESCROR, 36th Session, UN Doc E/C.12/CAN/CO/4 & E/C.12/CAN/CO/5, (2006) at para 35 [UNCESCROR, *Concluding Observations*, 2006].

21 UN Doc HR/PUB/06/12 (Geneva: OHCHR, 2006) [OHCHR, *Guidelines*].

22 *Ibid* at para 16.

Framing what are in fact legal obligations as mere principles and aspirations has the effect of disempowering those whose rights are at stake. Ontario's *Poverty Reduction Strategy* has been criticized for lacking "teeth." Critics have noted that little attention has been paid to equality issues for disadvantaged groups (women, people with disabilities, racialized groups, single mothers, aboriginal people, youth and the elderly, to name a few), and that the strategy lacks independent monitoring of progress in meeting targets.[23]

Similar concerns were expressed by many organizations about the lack of a rights-based framework in the *Long Term Affordable Housing Act*.[24] The missing ingredients in the Housing Strategy were most clearly laid out by Miloon Kothari, the UN Special Rapporteur on Adequate Housing, who conducted a mission to Canada in 2008. Special Rapporteur Kothari's mission included meetings with representatives of the Ontario Government and the Ontario Human Rights Commission. In the Report on his Mission presented to the UN Human Rights Council in 2009, the centerpiece of his recommendations to addressing what he found to be a serious human rights crisis was a national rights-based housing strategy engaging both provincial and federal governments.[2526] When Ontario's *Long Term Affordable Housing Act* was subsequently introduced without any reference to the right to adequate housing, Kothari wrote to Minister Bartolucci urging that the Government consider amendments to include an improved human rights framework.

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[23] See, for example, the Registered Nurses' Association of Ontario, "Submission to the Standing Committee on Bill 152: Poverty Reduction Act, 2009 Speaking Notes" (21 April 2009), online: RNAO http://rnao.ca.

[24] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 39th Parl, 2nd Sess, No 8 (24 March 2011) at 164 (Centre for Equality Rights in Accommodation) and at 166-69 (Social Rights Advocacy Centre); Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 39th Parl, 2nd Sess, No 9 (31 March 2011) at 162 (Registered Nurses' Association of Ontario) and at 198 (Federation of Metro Tenants' Associations).

[25] United Nations Human Rights Council, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context, Miloon Kothari - Addendum - Mission to Canada (9 to 22 October 2007)*, UNHRCOR, 10th Sess, UN Doc A/HRC/10/7/Add.3, (2009) at para 90.

[26] *Ibid*.

Kothari's central concern was that the government had failed to address what he had described in his Report as "the need for national and provincial housing strategies, based on legislative recognition of the right to adequate housing."[27] Kothari noted further that Ontario's housing strategy lacked any targets for the reduction and elimination of homelessness, had no independent monitoring and complaints mechanism, and failed to identify or address the obstacles facing vulnerable groups, including persons with disabilities. Mr. Kothari urged the government to consider amendments that would:

- Include firm goals and timetables for the elimination of homelessness and the realization of the right to adequate housing;
- Provide for independent monitoring and review of progress and for consideration of complaints of violations of the right to adequate housing;
- Prioritize the needs of groups most vulnerable to homelessness and discrimination; and
- Ensure meaningful follow-up to concerns and recommendations from UN Human Rights Bodies [28]

These key components of a rights-based approach identified by the UN Special Rapporteur on Adequate Housing have been recommended by many other experts and organizations in Canada in relation to both housing and anti-poverty strategies. The House of Commons Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities (HUMA), after holding extensive hearings into poverty reduction plans, concluded that poverty reduction strategies must not "only be guided by moral principles, but must be set within a human rights framework, specifically the recognition that

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[27] "Letter from Miloon Kothari to Honourable Rick Bartolucci, Minister of Municipal Affairs and Housing" (6 April 2011), online: SRAC www.socialrights.ca.

[28] *Ibid*.

governments have a duty to enforce socio-economic and civil rights."[29] In May, 2012 the Parliament of Canada passed, with unanimous support, a Motion stating that the Government "should keep with Canada's obligation to respect, protect and fulfill the right to adequate housing as guaranteed under the International Covenant on Economic, Social and Cultural Rights." The Ontario Human Rights Commission has recommended that the Government of Ontario pass legislation affirming the right to adequate housing as a legal right, as well as adopting a provincial housing strategy "ensuring access of all Ontarians, including those of limited income, to housing of an adequate standard without discrimination."[30] The new Premier of Ontario, Kathleen Wynne, has recently voiced support for demands for a national affordable housing strategy.[31] Additionally, the UN Special Rapporteur on the Right to Food, Olivier De Schutter, in the Report on his 2012 Mission to Canada to be presented to the UN Human Rights Council on March 4, 2013, leads off his recommendations with a plea that access to adequate food be recognized in Canadian law as a "legal entitlement." The Special Rapporteur urges Canadian governments to "formulate a comprehensive rights-based national food strategy clearly delineating the responsibilities of public officials at the federal, provincial/territorial, and municipal/local levels, identifying the measures to be adopted and the associated time frames..."[32]

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[29] Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities, *Federal Poverty Reduction Plan: Working in Partnership Towards Reducing Poverty in Canada*, 7th Report, (November 2010) (Chair: Candice Hoeppner), on line: Parliament of Canada www.parl.gc.ca [HUMA Committee, *Poverty Reduction Plan*].

[30] Ontario Human Rights Commission, *Right at Home: Report on the consultation on human rights and rental housing in Ontario* (May 2008), on line: OHRC www.ohrc.on.ca.

[31] Adrian Morrow, "Ontario's next premier promises she won't be like McGuinty" *The Globe and Mail* (31 January 2013) online: The Globe and Mail www.theglobeandmail.com.

[32] *Report of the Special Rapporteur on the right to food, Olivier De Schutter*. *Mission to Canada*, Human Rights Council, 22nd Sess, A/HRC/22/50/Add.1.

The key components of a rights-based strategy, as identified by the Special Rapporteurs and by the CESCR, have been included in a private member's bill that was first introduced in the previous parliament under the minority Conservative Government. Bill C- 304 required the negotiation of a rights-based national housing strategy jointly with provincial/territorial and First Nations representatives, as well as key stakeholders and housing providers. The bill received significant support from communities across Canada and had the support of the majority of members of the last Parliament.[33] It has been reintroduced as a private member's bill (C-400) in the new Parliament.[34] Even if Bill C-400 is not passed in the current parliament, it provides a useful model for Ontario to follow in designing provincial rights-based housing and anti-poverty strategies. Bill C-400 requires that the national housing strategy be "designed to respect, protect, promote and fulfill the right to adequate housing as guaranteed under international human rights treaties ratified by Canada." It includes, within this human rights framework, the following requirements:

- Engagement with multiple stakeholders: all levels of government, Aboriginal communities, and civil society.
- Focus on marginalized groups particularly vulnerable to homelessness
- Private sector as well as governmental engagement
- Financial supports for those who cannot otherwise afford housing
- Clear targets and timelines to eliminate homelessness
- Monitoring of progress by an independent agency to ensure ongoing accountability
- Mechanisms to ensure that affected individuals and groups can identify violations of the right to housing and get needed responses and actions.

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[33] Bill C-304, *An Act to ensure secure, adequate, accessible and affordable housing for Canadians*, 3d Sess, 40th Parl, 2011 (Committee report presented in House of Commons 21 March 2011).

[34] Bill C-400, *An Act to ensure secure, adequate, accessible and affordable housing for Canadians*, 1st Sess, 42st Parl, 2012 (first reading 16 February 2012).

These components are consistent with the requirements of international human rights norms as described in *Making the Connection*.[35]

D. Why Does Ontario Need a Rights-Based Approach?

While rights-based approaches have been widely recommended, it is not always clear to policy makers and legislators what the value-added would be of implementing a new framework based on enforceable human rights. Poverty and homelessness in Ontario, and throughout Canada, are certainly linked to programmatic failures. Strategies that implement commitments to improve programs and create some modest accountability to indicators of success would seem to be at least a step in the right direction. Why is it necessary to incorporate legally binding human rights and constitutional norms into such strategies? Is this not simply an invitation to courts and lawyers to intrude into spheres of social policy better left to the experts?

The answer to this question is, in part, related to the nature of the problem that is being addressed by housing and anti-poverty strategies. Emerging conceptions of social rights-based strategies understand poverty and homelessness as more than problems of inadequate or badly designed programs. Drawing on the early work of Amartya Sen, *Making the Connection* suggested that social rights approaches understand the emergence of hunger or homelessness -- whether in developing or developed counties -- as resulting from broadly based "entitlement system failures"[36] rather than the previously assumed causes such as faulty design,

[35] Porter & Jackman, *Making the Connection*, above note 1.

[36] Amartya Sen, "Property and Hunger" (1988) 4:1 Economics and Philosophy 57 reprinted in Wesley Cragg & Christine Koggel, eds, *Contemporary Moral Issues* (Toronto: McGraw-Hill Ryerson, 2004) 402.

administration of food distribution programs, crop failure, or scarcity of government resources. Sen discovered that famines are caused by systemic failures of social and economic organizations of entitlements – eg. property laws, minimum wages, benefit programs, land rights, social security, etc.[37] When access to food is not given the status of a fundamental right within a broader system of entitlements and socio-economic relationships, the right to adequate food is not prioritized over other interests. In some circumstances, many people may be left without access to food. Similarly, homelessness, hunger, and poverty in Ontario can be seen to flow not from a scarcity of food or affordable housing per se, but from systemic entitlement system failures, tied to a broad range of policy choices, legislation, and program administration decisions in which access to adequate housing, food, or other requirements have not been considered as fundamental human rights.

A vast array of decisions made by a myriad of decision-makers combine to create systemic entitlement system failures in Ontario that leave particular groups and individuals without adequate housing, food or other requirements of an adequate standard of living. Access to adequate housing, for example, may be affected by decisions such as the determination of the shelter component of social assistance; the setting of minimum wage; the regulation of benefits of part-time and temporary workers; regulation of rent increases; budgetary allocations to subsidized housing and rental assistance; zoning and planning bylaws; access to mortgages and credit; the level of the Ontario Child Benefit; funding of the Community Start-up and Maintenance Benefit, or a determination by a member of the Landlord and Tenant Board of what constitutes reasonable grounds for exercising discretion not to terminate a tenancy under the *Residential Tenancies Act*[38] when no alternative housing is available. All of these decisions

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37 *Ibid*.

38 2006, SO 2006, c 17.

impact access to adequate housing, but are likely made without any actual reference to adequate housing, or food, or an adequate standard of living as human rights. Entrenching these rights firmly in provincial law and policy would affect decision-making and program design in all spheres that impact upon the enjoyment of the right to adequate housing, food, or an adequate standard of living. These social rights would be accorded the same status as human rights that currently have legal status, such as rights to freedom from discrimination on the prohibited grounds of race or sex.

As explained in *Making the Connection*, social rights are now conceived of in international human rights law as claimable rights, equal in importance to civil and political rights, and central to both democratic participation and core human rights values of dignity and personal security. The new social rights paradigm is informed by modern conceptions of citizenship. It is resonant with some of the principles affirmed in Ontario's housing and anti-poverty strategies, such as dignity, diversity, support, inclusiveness and accountability to measurable outcomes. Rather than framing strategic obligations as governmental aspirations or political commitments, however, the new social rights paradigm starts from the assumption that rights are tied to firm legal obligations of governments, and that rights-holders must have access to hearings and effective remedies. With the new *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* adopted in 2008 now scheduled to come into force on May 5, 2013, social rights are officially claimable within the UN system. Any rigid distinction in access to remedies under domestic law between social rights and civil and political rights must now be considered suspect.[39]

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[39] The *Optional Protocol* will enter into force three months after the tenth ratification, *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, GA Res 63/117, UNGAOR, 63d Sess, Supp No 49, UN Doc A/RES/63/117, (2008) [*Optional Protocol*] at art 18(1). On 5 February 2013, Uruguay became the

A rights-based approach to housing and anti-poverty strategies in Ontario should similarly affirm that social rights can be claimed and enforced. Rather than functioning as aspirational goals or values, social rights should be embedded within housing and anti-poverty strategies themselves as central and indispensable to the process of progressive implementation and fulfillment of these rights. Social rights such as the right to adequate housing, adequate food, and an adequate standard of living are now understood both as goals of social policy and as tools through which rights-holders are able to become agents of the social transformation needed to fully realize social rights.[40]

E. Reframing Ontario's Housing and Anti-Poverty Strategies around Social Rights: The Blueprint.

1) Affirming the "Interpretive Presumption"

New rights-based housing and anti-poverty strategies in Ontario need not build a new architecture of social rights in Ontario from the ground up. They need only affirm and incorporate into provincial and municipal governance a human rights architecture that is already in place in Ontario's obligations under international human rights law and under the *Canadian Charter*. A central pillar of that architecture is what was described in the *Constitutional Framework* as the "interpretive presumption" - a principle of interpretation affirmed by the Supreme Court of Canada, according to which the rights contained in the *Canadian Charter of Rights and Freedoms* should be interpreted, where possible, in a manner which provides

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tenth state to have formally ratified it. For a description of the significance of the adoption of the Optional Protocol, see Porter & Jackman, *Making the Connection,* above note **Error! Bookmark not defined.** at 7-15, 37-41.

[40] Porter & Jackman, *Making the Connection*, above note 1 at 4.

protection of international human rights ratified by Canada. On the basis of this interpretive presumption, rights to life, security of the person, and equality in the *Charter* can and should be interpreted to include protection of the rights to adequate food, adequate housing, and an adequate standard of living. The Supreme Court of Canada has left undecided for the time being the question of the scope of the *Charter*'s protection of the right to housing, an adequate income, or standard of living. But governments with obligations under international human rights law to ensure effective domestic protection of social rights need not wait around for the Court to determine this issue. Governments are free to affirm and apply interpretations of the *Charter* that provide protection of social rights, as recommended by the CESCR, and oppose those which would place them in violation of international human rights.

To date, Ontario has done the precise opposite of this. When rights claimants have sought to have the *Charter* interpreted by courts in a manner that is consistent with the *ICESCR*, the Government of Ontario has consistently argued *against* the interpretive presumption.[41] The CESCR has expressed concern about governments such as Ontario "urging upon their courts an interpretation of the Canadian Charter of Rights and Freedoms denying protection of Covenant rights" and repeatedly recommended "federal, provincial and territorial governments promote interpretations of the Canadian Charter of Rights and other domestic law in a way consistent with the Covenant."

Recommendation # 1: Affirming the Interpretive Presumption: Ontario should declare, either through introducing framework or implementing legislation for social rights, that Ontario recognizes the right to an adequate standard of living, including the right to adequate

[41] The most recent example of this practice is the Attorney General of Ontario's Motion to Strike in the case of *Tanudjaja v Canada*, Ont Sup Ct File no CV-10-403688 (2011). The Attorney General of Ontario is seeking to deny applicants a hearing into whether the sections 7 and 15 of the Charter have been breached but governments' failures to implement an effective housing strategy, arguing that the Charter provides no protection of the right to housing.

food and the right to adequate housing as contained in article 11 of the ICESCR. The Act should declare that Ontario expects all provincial statutes to be interpreted consistently with Ontario's commitments to respect, protect, and fulfill the right to an adequate standard of living. The Act should also declare that Ontario views these rights as component of the rights to life, liberty and security of the person, and the right to equality in sections 7 and 15 of the *Charter*. The Attorney General should henceforth take the position that the *Charter* can and should be interpreted so as to provide effective remedies to violations of rights to an adequate standard of living.

Recommendation # 2: The *Long Term Affordable Housing Act* should be amended to include recognition of the right to adequate housing as guaranteed in the ICESCR and other human rights treaties. Recognition of the right to adequate housing should be identified as a "provincial interest", thus requiring all municipalities' housing and homelessness plans to recognize the right to adequate housing.

2) Statutory Interpretation, Reasonableness and Administrative Discretion

A corollary of the interpretive presumption with respect to the *Charter* and international human rights law is that all legislation should be interpreted and applied consistently with both sources of law.[42] In the seminal case of *Baker v Canada (Minister of Citizenship and Immigration),* L'Heureux-Dubé J found for the majority of the Supreme Court of Canada that the values reflected in international human rights should inform how statutes are interpreted.[43] She cited Ruth Sullivan's *Driedger on the Construction of Statutes* in support of this interpretive principle:

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42 Jackman & Porter, *Constitutional Framework*, above note 2 at 7-9.

43 *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 69-71 [*Baker*].

> [T]he legislature is presumed to respect the values and principles enshrined 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. [44]

The impact of this interpretive principle extends well beyond the role that courts can play in interpreting and applying domestic law. Its application to administrative decision-making by anyone exercising conferred authority, administering public benefits or adjudicating claims before administrative tribunals is equally critical. In *Baker*, the Supreme Court found that the exercise of conferred ministerial discretion failed to meet a standard of reasonableness because the immigration officer did not consider the best interests of the child – a principle that is well recognized in international human rights law ratified by Canada.[45] As explained in *The Constitutional Framework*, the Supreme Court has recently found that the standard of "reasonableness" in administrative decision-making should now be a "robust" standard that is capable of promoting and protecting the rights and values in the *Charter*.[46] The Court has held that "If, in exercising its statutory discretion, the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives, the decision will be found to be reasonable."[47] This robust standard of reasonableness provides a critical lever for addressing the need for a new framework of decision-making across a range of policies, programs and administrative officials and tribunals.

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44 *Ibid* at para 70, citing Ruth Sullivan, *Driedger on the Construction of Statutes*, 3d ed (Markham, Ont: Butterworths, 1994) at 330.

45 *Baker*, above note 43 at paras 64-71.

46 Jackman & Porter, *Constitutional Framework*, above note 2 at 62.

47 *Doré v Barreau du Québec*, 2012 SCC 12 at paras 56-58.

Recommendation #3: Ontario should affirm in the *Social Rights Implementation Act* that all decision-makers operating under provincial statutes should consider the right to an adequate standard of living and the right to adequate housing both as fundamental values to be considered and applied in the exercise of decision-making authority, and also as components of *Charter* rights. Direction should be given to courts, tribunals, delegated decision-makers, municipalities, and private actors that commitments to international human rights and constitutional obligations to ensure the right to adequate housing, food, and an adequate standard of living are henceforth to be considered fundamental rights and fully respected as such.

Recommendation # 4: The Government of Ontario should establish by legislation an independent Social Rights Commission with the authority to monitor compliance in regards to the rights to an adequate standard of living and adequate housing, and assess progress in implementing social rights. The Commission should be authorized to institute a complaints procedure through which it may receive complaints of violations of social rights and, where it believes it to be in the public interest, hold hearings and issue recommendations as to appropriate remedies in the circumstances. A Committee of the Legislature should be given responsibility for receiving recommendations made by the Social Rights Commission and, where appropriate, sending recommendations to the appropriate Minister.

In addition, the Social Rights Commission will be responsible for following up on concluding observations from all human rights treaties that are relevant to Ontario. Follow-up may entail holding public hearings.

F. Conclusion

The central change necessary to transform Ontario's current anti-poverty and housing strategies into rights-based strategies, conforming to the new social rights paradigm described in the two previous papers, is simply to make the rights to an adequate standard of living and to adequate housing legally binding rights in Ontario. Ontario can additionally declare these rights paramount over other statutes, in the same way that previously recognized human rights are held to be paramount. Additionally, the principles and values that have no 'teeth' under the current strategies will be transformed into principles of a rights-based approach consistent with recommendations made by UN human rights bodies, the Commons HUMA Committee, Special Rapporteurs and many other experts.

Additional modest institutional reforms have been proposed to comply with recommendations for external monitoring and a complaints procedure. These would create a space for constructive dialogue between rights-claimants, democratic institutions, and policy-makers, and allay any fear that excessive reliance has been placed on courts. The recommendation for a Social Rights Commission is simply one approach. Another approach would be to invest the Ontario Human Rights Commission with the authority to provide external monitoring and allow the Ontario Human Rights Tribunal to hear complaints of violations of social rights. As noted above, the most important systemic change would not occur as a direct result of individual cases adjudicated under the *Charter*, properly informed by Ontario's commitments under international human rights law, or heard by a Social Rights Commission. The changes in the adjudication of rights in Ontario will only have the desired systemic effect if they ripple out to the myriad of decisions by other bodies and administrators that determine how Ontario's 'entitlement' system interacts with homelessness and poverty.

Whether it is the executive branch exercising its regulation-making powers, program administrators exercising conferred discretion, or administrative tribunals making decisions about benefits or evictions, a rigorous adherence to the requirement that statutory authority be exercised in a manner consistent with the protection and fulfillment of the rights to housing and an adequate standard of living, and with the right to a hearing of those whose rights are at stake, is where the truly transformative effect of the new social rights paradigm will be found. To a large extent, therefore, new rights-based strategies can rely on existing institutions and decision-making bodies to provide adjudicative space for social rights.

It is hoped that within a reasonable period of time, decisions that would reasonably be expected to cause homelessness, hunger or other deprivations, will no longer be made – at least not without more angst than is currently the case. Whether it is an executive decision to set the shelter component of social assistance at a rate that is known to be unmanageable in today's rental market, or a Residential Tenancy Board member's decision to evict a family into homelessness when they owe only a month's rent, such decisions will soon seem unreasonable (and therefore challengeable on the basis of judicial review) under a new standard of reasonableness that is may begin as a legal standard but soon become a moral one. Before too long, decisions which create homelessness or hunger in the mids of affluence will be viewed as intolerable.

Will it be difficult to gain acceptance for the idea that the rights to adequate housing and an adequate standard of living should be taken seriously in this way? Perhaps. Over the course of thirty years, since Canada ratified the ICESCR in 1976, we have become used to food banks, homeless families, and other violations of social rights that would not have been imagined when Canada ratified the *ICESCR*. We have become accustomed to hearing Canada oppose all of the

developments at the UN that ushered in the new paradigm of social rights at the UN. We have gotten used to Attorney Generals using all of their resources to fight against any attempt by people living in poverty or homelessness to claim social rights under the *Charter*.

The perspective of international human rights, with which the first research paper began, is critically important if we are to challenge the current widespread complacency. It is sometimes only with the benefit of some reflective distance that we are able to see the absurdity or the injustice of aspects of our society to which we have become accustomed. When NGOs travel to Geneva for reviews of human rights in Canada, we often find ourselves haunted by the questions from UN Committee members, particularly the experts from relatively poor countries. These members are particularly incredulous at the specter of homelessness, hunger, shelters and food banks in so affluent a country with so rich a history of human rights.

Why have recent Canadian governments been more determined than most other governments at the United Nations to refuse to accept that the right to housing, or food, or water should be given the status of legal rights and made subject to claims and adjudication? Why has Ontario, with its rich history of leadership in the field of human rights, now adopted anti-poverty and housing strategies which have no reference at all to the fact that adequate food and housing are recognized by Canada and by Ontario as human rights? Canada and Ontario are perfectly situated to become world leaders in fully protecting and ensuring the right to adequate food, housing and a life of dignity for all. It is time to retrieve and reaffirm the fundamental human rights values that define us in the context of housing and anti-poverty strategies in Ontario.

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