

Designing and Implementing Rights-Based Provincial/Territorial Strategies to Address Homelessness and Poverty

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A number of provinces have implemented anti-poverty and housing strategies affirming commitments to improve particular program outcomes and evidence-based assessment of progress in alleviating poverty and homelessness. However, provincial/territorial strategies have continued to treat access to housing and to an adequate standard of living as aspirational goals rather than enforceable human rights and as such are outdated and inconsistent with provincial/territorial obligations under international human rights law.

The effect of recognizing rights to housing and an adequate standard of living as legal rights in provincial/territorial strategies would not be to transfer decision-making to courts but rather to infuse all decision-making and policy design with human rights norms, aligned with the obligation under international human rights to take all reasonable measures to eliminate poverty and homelessness.

Provinces and territories should establish social rights commissions to monitor the implementation of strategies, to assess compliance with rights to housing and an adequate standard of living and to receive complaints. Alternatively, or in addition, the mandate of the provincial/territorial human rights commissions and tribunals could be expanded to include these rights.

Introduction

The modern conception of social rights (such as the right to housing, food and an adequate standard of living) understands these as rights which, like civil and political rights, can be claimed and enforced and must be subject to effective remedies. This understanding provides a new paradigm for the design and implementation of housing and anti-poverty strategies that would breathe life into and enhance the effectiveness of existing poverty reduction and homelessness reduction strategies.

Rather than simply affirming commitments to improve particular program outcomes and enhanced evidence-based assessment, provincial/territorial housing and anti-poverty should be reframed as commitments to implementing fundamental human rights to an adequate standard of living, adequate food, and adequate housing. Reconstructing anti-poverty and housing strategies around international human rights and constitutional values would ensure that the strategies engage with the broad spectrum of law, policy and program administration that is involved. Aspirational commitments and targets which are too often divorced from actual decision-making would be transformed into enforceable human rights obligations that would inform decisions and policies in all relevant government activities. Under the rights-based model, accountability mechanisms would be linked to the ability of individuals and groups to claim and enforce social rights when decisions are made that affect their ability to live in dignity and security.

Affirming social rights as legal obligations does not require an excessive reliance on courts. As legally binding human rights norms have become accepted in other areas, such as those regarding disability or sexual orientation, they have only rarely relied on judicial enforcement. Courts have clarified the meaning of the legal rights, but the social transformation and policy reform necessary to give effect to these rights has occurred without extensive judicial intervention. Recognizing legally-binding social rights will similarly depend on courts only in rare cases, in order to clarify the meaning and application of these rights in particular circumstances. The courts' role will remain that of interpreting and applying rights, not designing or implementing social policy. Recognizing the right to adequate housing and an adequate standard of living as legally enforceable rights in each province and territory would, however, change the framework of values and rights that guide decision-makers and hence inform the design and administration of policies and programs. It would challenge the systemic social exclusion that lies behind homelessness and poverty in Canada by implementing decision-making that is informed by and consistent with fundamental human rights that are already binding on decision makers but are too often ignored.

While the proposed social rights-based approach requires a significant paradigm shift from current housing and poverty reduction strategies, this can be effected without major legislative change or significant institutional reform. As will be explained below, provincial/territorial statutory bodies and administrative decision-makers already have obligations to exercise their authority in a way that safeguards, wherever reasonably possible, the right to an adequate standard of living, adequate food, and adequate housing. Provincial/territorial governments need only affirm and promote their existing obligations under international human rights and domestic constitutional law. Rather than legislatively ignoring and, when challenged in court, contesting social rights to housing and an adequate standard of living as has been done in the past, provinces and territories would instead recognize and affirm their social rights commitments by framing anti-poverty and housing strategies within existing human rights frameworks.

Using Ontario's anti-poverty and housing strategies as an example, this paper will consider what is lacking from a human rights standpoint in provincial/territorial strategies and contemplate the benefits of a rights-based approach based on international and constitutional norms. It will explore whether a new rights-based framework for housing and anti-poverty strategies could be implemented in Ontario and other provinces and territories without major institutional or legislative changes, and consider what roles existing institutions and agencies might play.

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

An unprecedented 400,000 people now rely on Ontario food banks and approximately 900,000 households experience food insecurity (Food Banks Canada, 2012; Tarasuk, Mitchell & Dachner, 2013). The number of homeless families seeking emergency shelter in Toronto has sharply increased and a record number of households are now on the waiting list for subsidized housing (Housing Connection, 2014; Toronto.ca, n.d.). Behind these numbers are hundreds of thousands of personal experiences of the dire mental and physical health consequences of homelessness and poverty, broken families, violence, and prematurely ended lives.

United Nations Committees have expressed grave concern about the extent of these kinds of violations of social rights in so affluent a country as Canada. Ontario and other provinces and territories have responded to these concerns by reporting on their housing and anti-poverty strategies primarily in terms of improved outcome-focused service delivery and provision of support, with little evidence of any end in sight to serious and widespread human rights violations. Such responses to UN committees overseeing governments' compliance with international human rights do not effectively address the level of concern and shock that homelessness and poverty have been allowed to reach such critical proportions in one of the most affluent countries to appear before the CESCR (United Nations Committee on Economic, Social and Cultural Rights, 1998, 2006). There is a significant asymmetry between the CESCR's concerns about a systemic human rights crisis, and the presentation of strategies for improvements in program and service delivery and modest (continually deferred) targets such as Ontario's target of reducing child poverty by 25%.

There is certainly nothing wrong with governments making efforts to ensure improved outcomes from housing or income support programs, or commitment to making progress on addressing child poverty based on agreed measures and indicators. However, 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 is significant. Strategies for effective public management are no substitute for commitments to protect and ensure human rights to dignity, security, life and health.

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* (Government of Ontario, 2008), the *Poverty Reduction Act* (2009) or the recent *Realizing Our Potential: Ontario's Poverty Reduction Strategy: 2014-2019* (Government of Ontario, 2014). Ontario’s *Long Term Affordable Housing Strategy* (Ministry of Municipal Affairs and Housing, 2010) makes no reference to Ontario’s obligations to ensure the right to adequate housing under the ICESCR, making only passing reference to the right to equal treatment without discrimination. The *Strong Communities through Affordable Housing Act* (2011) makes no reference at all to human rights.

Existing strategies do affirm a number of principles which resonate with human rights values. The *Poverty Reduction Act* commits to such principles as the full participation of groups facing discrimination; respect for individual dignity, diversity and recognition of unique needs of particular groups; and participation of stakeholders in program design, and co-operation among various levels of government (*Poverty Reduction Act*, 2009). Ontario’s *Long Term Affordable Housing Strategy* similarly affirms that housing programs must be based on strong partnerships of all levels of government, housing providers and those in need of housing, inclusive of groups facing discrimination and providing necessary support services (Ministry of Municipal Affairs and Housing, 2010). All Ontario municipalities have been required to develop local housing and homelessness plans to address issues defined as “provincial interests.” Plans must provide measures to prevent homelessness, including eviction prevention and the provision of supports appropriate to clients’ needs; adopt a Housing First philosophy; and facilitate transitioning people from the street and shelters to safe, adequate and stable housing (Ministry of Municipal Affairs and Housing, 2011). The new *Poverty Reduction Strategy (2014-2019)* makes a firmer commitment to “end homelessness” in Ontario, though goals, timelines and evidence-based indicators of progress have yet to be developed (Government of Ontario, 2014).

Unfortunately, the “principles” of the anti-poverty strategy and “provincial interests” in the homelessness strategies do not reference 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, which are existing legal obligations under human rights legislation and the *Canadian Charter of Rights and Freedoms* are affirmed only as “principles.” There is no acknowledgement that these are human rights, and no reference to mechanisms by which they can be claimed and enforced.

The emphasis in the existing strategies on the need for evidence-based, measurable goals and on community consultation and collaboration is compatible with the rights-based approaches to housing and anti-poverty strategies recommended to Canadian governments by United Nations

bodies (United Nations Office of the High Commissioner for Human Rights, 2006). In all provincial/territorial strategies, however, indicators and targets remain aspirational, with no meaningful accountability mechanisms in place to ensure that decisions which run contrary to these commitments can be reviewed or that necessary policies and program changes will be implemented to attain the stated targets.

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 distinction has been central to UN human rights bodies' concerns about the status of social rights in Canadian provinces. In all of its periodic reviews of Canada dating back to 1993, the CESCR has stressed that the right to adequate housing, food, and an adequate standard of living must not be reduced to mere policy objectives (United Nations Committee on Economic, Social and Cultural Rights, 1998). The CESCR has that Covenant rights "be enforceable within provinces and territories through legislation or policy measures, and that independent and appropriate monitoring and adjudication mechanisms be established" (United Nations Committee on Economic, Social and Cultural Rights, 2006).

Ontario's *Poverty Reduction Strategy* has been criticized for lacking "teeth." Critics have noted that little attention has been paid to equality issues for socially marginalized groups, and that the strategy lacks independent monitoring of progress in meeting targets (Registered Nurses' Association of Ontario, 2009). Similar concerns have been expressed about the lack of a rights-based framework in the *Long Term Affordable Housing Act* (Legislative Assembly of Ontario, 2011a, 2011b). 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. In his 2009 Report, his central recommendation was to create a national rights-based housing strategy engaging both provincial and federal governments (United Nations Human Rights Council, 2008). 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 that would:

- Include firm goals and timetables for the elimination of homelessness;
- 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 (M. Kothari, personal communication, April 6, 2011)

Similar recommendations have been made by many other experts and organizations in Canada in relation to housing and anti-poverty strategies. A House of Commons Standing Committee, after holding extensive hearings, 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 governments have a duty to enforce socio-economic and civil rights” (Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities, 2010). The Ontario Human Rights Commission has recommended that Ontario pass legislation affirming a legal right to adequate housing and adopting a provincial housing strategy (Ontario Human Rights Commission, 2008).

A federal private member’s bill, Bill C-400, received support from all opposition parties but was defeated by the majority Conservative members. Bill C-400 included the following requirements:

- Engagement with: 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.

These components are consistent with the requirements of international human rights norms (Porter, 2014).

Why Do Provinces and Territories Need a Rights-Based Approach?

While rights-based approaches have been widely recommended, it is sometimes unclear to policy makers and legislators what the value-added would be of implementing a new framework based on human rights. In order to answer that question, it is important for the proponents of human rights-based solutions to explain how homelessness and poverty are in fact human rights problems that require rights-based solutions. Rights-based approaches emerge from improved understandings of the human rights dimensions of the problem housing and anti-poverty strategies seek to address.

Social rights approaches understand hunger or homelessness as resulting at least in part from “entitlement system failures” (Sen, 1988). When access to food and housing are not given the status of fundamental rights within a broader system of entitlements, these rights are not prioritized over other interests and do not properly inform decision-making. Homelessness, hunger, and poverty do not flow from a scarcity of food or affordable housing *per se*, but from

entitlement system failures tied to a broad range of policy choices, legislation, and program administration decisions in which access to adequate housing and food have not been considered as fundamental human rights.

A vast array of laws, regulations, decisions and policies create a legislative and policy framework in each province and territory that, among other things, has left certain individuals and groups homeless or otherwise living in poverty. When these decisions are made without consideration of their link to the protection of fundamental human rights of vulnerable groups, then violations of rights will invariably occur. Access to adequate housing among vulnerable groups, for example, is affected by a myriad of decisions, including the determination of the shelter component of social assistance; benefits accorded part-time workers; minimum wage; budgets for subsidized housing and rent supplements; rent regulation or conditions under which a tenancy may be terminated. Adopting a rights-based approach to housing strategies means engaging with decision-making and program design in these and other areas that affect access to housing. In order to do this, the right to adequate housing must be accorded the status of paramountcy – informing and guiding all decision-making. In other words, it must be accorded the same legal status as other human rights, such as rights to freedom from discrimination. Decisions that result in homelessness or hunger must come to be viewed in the same light as decisions that blatantly discriminate on prohibited grounds or violate other legal rights. Rather than framing strategic obligations solely as governmental aspirations or political commitments, a human rights approach therefore starts by engaging directly with the decision-making processes through which these commitments must be realized, tying rights to firm legal obligations of governments and ensuring that rights-holders have access to hearings and effective remedies where necessary.

The right to adequate housing is not to be confused with a claim to housing as a direct entitlement from government. One does not have an entitlement to be provided housing but rather to an entitlement “system” which ensures this right by entrenching it within the normative framework for decision-making in a range of policies and programs. Social rights must therefore be embedded within housing and anti-poverty strategies as fundamental rights that will inform all relevant policies and decisions. It is this all-encompassing human rights framework which transforms a system of entitlements which denies vulnerable groups access to adequate housing, food and an adequate standard of living into one which remedies these exclusions and progressively realizes substantive social rights.

Statutory Interpretation, Reasonableness and Administrative Discretion

Fortunately, there is an existing legal framework in Canada for the requirement that decisions in a range of policy and program areas must comply with the right to adequate housing and to an adequate standard of living. The Supreme Court of Canada has affirmed that all legislation

should be interpreted and applied consistently with international human rights law (Jackman & Porter, 2012). In the seminal case of *Baker v Canada (Minister of Citizenship and Immigration)*, L’Heureux-Dubé J found for the majority of the Court that the values reflected in international human rights should inform how statutes are interpreted (Baker v. Canada, 1999). She cited Ruth Sullivan’s *Driedger on the Construction of Statutes* in support of this interpretive principle:

[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 (Baker v. Canada, 1999).

The application of this interpretive principle to administrative decision-making by administrative or governmental officials exercising conferred authority is critical to implementing international human rights in Canada. Conferred decision-making must be exercised reasonably, in accordance with international human rights values, including the right to adequate housing and to an adequate standard of living. The Supreme Court has also established that the *Canadian Charter of Rights and Freedoms* should be presumed to provide human rights protections that accord with Canada’s international human rights obligations (*Slaight Communications Inc. v. Davidson*, 1989). Reasonable decisions must be consistent with the *Canadian Charter*, including Charter values such as dignity, equality and security. All decision-makers thus have an obligation to consider and apply a human rights framework that embraces both constitutional and international human rights values (*Doré v. Barreau du Québec*, 2012). The Supreme Court has also developed a new and more robust, rights-informed standard of reasonableness in the administrative law context. This provides a critical framework for ensuring that decision-making across a range of policies, programs and administrative bodies is consistent with the realization of rights to housing and an adequate standard of living. In adopting a rights-based approach based on this framework, provincial/territorial housing and anti-poverty strategies would simply implement and enforce obligations which are already binding but have been largely ignored.

Recommendations

There are a number of relatively simple ways in which a rights-based framework can be created for anti-poverty and housing strategies in each province and territory in Canada, based on existing laws and relying primarily on existing institutional structures.

Recommendation #1: Affirming International Human Rights Obligations

Each province and territory should affirm that it recognizes the right to an adequate standard of living, including the rights to adequate food and adequate housing as per article 11 of the

ICESCR. Governments should also recognize that measures to reduce and eventually eliminate poverty are required to protect the rights to life, liberty and security of the person, and the right to equality in sections 7 and 15 of the *Charter*. Provincial/territorial Attorneys General should take the position publicly and before courts that the *Charter* can and should be interpreted so as to provide effective remedies to violations of these rights caused by poverty or homelessness.

Recommendation #2 Affirming the Interpretative Presumption

Legislation should be adopted that implements housing and anti-poverty strategies and which state that all provincial or territorial statutes are to be interpreted consistently with Canadian governments' obligations under international human rights law to progressively realize the right to an adequate standard of living and the right to adequate housing. Where municipalities are delegated roles in implementing housing and anti-poverty strategies, all municipalities' should be required to recognize the right to adequate housing as a framework for local decision-making.

Recommendation #3

Every province and territory in Canada should affirm in legislation that all decision-makers operating under provincial statutes should consider the rights to an adequate standard of living and to adequate housing as fundamental values to be applied when exercising decision-making authority. Direction should be given to courts, delegated decision-makers, municipalities, and private actors that ratified international human rights to adequate housing, food, and an adequate standard of living must be fully respected as fundamental rights and as components of *Canadian Charter* rights. These initiatives would clarify and promote compliance with existing obligations international and constitutional obligations.

Recommendation #4

Each province and territory should establish by legislation an independent Social Rights Commission with the authority to monitor compliance regarding 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 social rights violations and, where it is in the public interest, hold hearings and issue recommendations as to appropriate remedies in the circumstances. A Committee of the Legislature should be responsible for receiving and ensuring follow-up to recommendations made by the Social Rights Commission.

Conclusion

The central change necessary to transform current provincial/territorial anti-poverty and housing strategies into rights-based strategies is to make the rights to an adequate standard of living and to adequate housing legally binding on all relevant decision-makers.

Additional modest institutional reforms should provide for external monitoring and a complaints procedure. Such procedures would create a quasi-judicial space for constructive dialogue between rights-claimants, democratic institutions, and policy-makers, and avoid excessive reliance on courts. The Social Rights Commission as recommended would ensure a specialized expertise in relation to social rights. If a provincial or territorial government wishes to avoid creating a new institution, an alternative possibility would be to invest provincial/territorial human rights commissions with the authority to provide external monitoring and allow human rights tribunals to hear complaints of social rights violations. As noted above, the judicial enforceability of social rights will serve primarily to clarify obligations and ensure that new status of these rights ripples out to other decision-makers.

A social rights paradigm will become truly transformative when the executive branch of government consistently exercises conferred decision-making authority in compliance with its obligations to protect the rights to housing and an adequate standard of living. 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, the important change that must occur is for such decisions to come to be considered unreasonable and unacceptable. A new legal standard of reasonableness consistent with international human rights would also become a moral one, creating a new consensus about what constitutes acceptable policy.

Since Canada ratified the *International Covenant on Economic, Social and Cultural Rights* (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 Covenant. The perspective of international human rights is critically important to challenging the current widespread complacency. It provides some reflective distance that enables us to see the absurdity and injustice of aspects of our society to which we have become accustomed. Canada, the province and territorials 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 by re-imagining provincial/territorial housing and anti-poverty strategies within the framework of fundamental human rights.

HCHR.