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# Homelessness and the Right to Shelter: A View from Parkdale

Parkdale Community Legal Services

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# HOMELESSNESS AND THE RIGHT TO SHELTER: A VIEW FROM PARKDALE

Parkdale Community Legal Services

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# HOMELESSNESS AND THE RIGHT TO SHELTER: A VIEW FROM PARKDALE

Parkdale Community Legal Services\*

*"Do people have a right to life simply by reason of their humanity or citizenship? Put another way, shall we permit people to freeze to death in the winter, to starve, to die from the effects of preventable disease, merely because they are poor, insane, or addicted to drugs? In the long run, the ways in which our society responds to that fundamental question will determine far more than the plight of the homeless. It will define our civilization."*<sup>1</sup>

## I. INTRODUCTION

This paper represents the joint efforts of the law students and legal staff at Parkdale Community Legal Services (PCLS). We are a community-based legal aid clinic funded by the Ontario Legal Aid Plan and Osgoode Hall Law School of York University. Since 1971, PCLS has

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\* Copyright © 1988 Parkdale Community Legal Services (P.C.L.S.). P.C.L.S. is a non profit community legal clinic in Toronto. This paper was originally prepared for the Canadian Conference to Observe the International Year of Shelter for the Homeless, Ottawa, Ontario, September 13-16, 1987, and was revised in June of 1988. A bibliography is available from P.C.L.S. but could not be reprinted here due to space restrictions. P.C.L.S. acknowledges with thanks the contribution to the research and writing of this paper by the following Parkdale students: John Adams, Nancy Bullard, Tracy Houlding, Lori Pope, Barbara Wohl, and Brendan Morgan. Thanks also to Sharyn Langdon who contributed to part D of the "Shelter as a Legal Right" section of this paper. Part C of that section formed part of the Clinic's submission to the Social Assistance Review Committee, February 1987. Many thanks to Georges Gonsalves, Guadalupe Herrera, Judith Jefferies and Nadia Toskifor their hard work and technical assistance in the preparation of this paper. P.C.L.S. gratefully acknowledges the financial support provided for this project by the International Year of Shelter for the Homeless (IYSH) Secretariat of the Ontario Ministry of Housing.

<sup>1</sup> Blasi, "Litigation on Behalf of the Homeless: Systematic Approaches" (1987) 31 Washington University Journal of Urban and Contemporary Law 137 at 137.

provided legal services to the low-income residents of Parkdale<sup>2</sup> (located in the west end of Toronto, Ontario) in a wide variety of subject areas including social assistance, workers' compensation, landlord and tenant, immigration, refugee, mental health, child welfare and family matters. Services are provided by six lawyers, six community legal workers, two articling students, twenty-one law students and seven support staff.

Since our doors first opened, PCLS has represented tenants in landlord-tenant cases and has organized around housing issues. It would be misleading, however, to convey the impression that housing issues are of concern only to tenants. Housing and homelessness are, unfortunately, of vital concern to many of those we serve. Battered women who realize that what they once considered a home has become instead a site of danger and violence are assisted in obtaining protection from their spouse, space in a shelter, public housing, and the income assistance and counselling they need to make a new home for themselves and their children. Ex-psychiatric patients living in rooming and boarding houses without the support services needed for them to feel at home in the community have been helped to organize around the issue of their living conditions. Injured and unemployed workers come to PCLS for representation in their efforts to obtain the income assistance they are due and which they need to continue to provide for themselves and their families. Perhaps the most homeless of all are the refugees who have fled persecution in a home they can never return to and seek our help to be allowed to stay in Canada and to build a new home here.

We have identified four major housing issues for the general purposes of setting our priorities and strategies in both our casework and organizing activities: affordability; quality; supply; and security of tenure.

In our work, not only do we represent the homeless in any one of their many faces, we often provide, (wittingly or otherwise) a form of temporary shelter for the homeless. Every day, for instance, in front of the Clinic, or on the loading dock at the back of the building, we see Oliver. He has lived on the streets and alleys in Parkdale as long as anyone can remember. He wears the same winter coat every day of the year. For a time in late August of 1987, he had only one shoe. As this is being written, he is sitting on the front steps of the Clinic wearing a pair of rubber boots (it is a sunny day) and his winter coat. One winter

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2 Parkdale is Ward 2 in the City of Toronto. It is bounded by Bloor Street on the north, Lake Ontario on the south, Ossington Avenue on the east and Parkside Drive on the west.

he spent every working day in our reception area; if our garage door were not locked each night, he or someone else would make a home within.

It is in fact possible to see a number of people in the streets of Parkdale who are variously described as "street people", "vagrants", "bag ladies", or most often, "the homeless." As well as people who are without shelter entirely, there are those who are constructively homeless in that the conditions in which they live simply could not be termed "homes". For these individuals, being homeless means living in hostels, emergency shelters or transition houses, sleeping on friends' floors, or living in insecure and substandard private rental accommodation.

In this paper we first examine the dimensions and nature of homelessness in Toronto, with specific reference to the Parkdale community where appropriate, and identify some of the causes of homelessness as well as the demographic composition of those in need of shelter. Next, we argue that a right to shelter exists and may be found in Canadian law. Reference will be made to pertinent international law, as well as American jurisprudence. Finally, the effectiveness of litigation as a method of advocacy for the homeless will be critically assessed.

## II. WHO ARE THE HOMELESS?

The current phenomenon of widespread homelessness has not been seen in North America since the Great Depression.<sup>3</sup> Estimates of the number of homeless people vary greatly, but recent reports estimate that there are between 10,000 and 25,000 homeless individuals in Toronto alone.<sup>4</sup> Although gathering information about the homeless is difficult, some statistics have been gathered by surveying people in hostels. One Toronto study found that 50% of hostel users previously lived in rental units which were lost due to eviction or rent increases; the largest increases in hostel users over the past few years have been among youth, women, ex-psychiatric patients, and unemployed, willing-to-work persons; and 90% of hostels users have no income or receive welfare.<sup>5</sup>

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3 See Lorne Brown, *When Freedom Was Lost* (Montreal: Black Rose Books, 1987) for an account of the response to homelessness and unemployment in the depression relief camps.

4 City of Toronto, *Living Room II* (October 1986), p. 27.

5 City of Toronto, Department of Public Health, *Housing and Health* (October 1984), at 23 [hereafter cited as Dept. of Public Health, *Housing*].

The most distinctive feature of the homeless population has been said by Madeleine Stoner to be its "heterogeneity and its variety".<sup>6</sup> She points out, as have other commentators,<sup>7</sup> that the homeless of the 1980s are not simply alcoholic men and bag ladies. They also include low income families who have been evicted for non-payment of rent; people who have been displaced by urban renewal and gentrification, mentally ill, who have been left to fend for themselves as a result of deinstitutionalization, the unemployed, people who receive social assistance, individuals and families who cannot find affordable housing, and women, either alone or with children, who have been forced to leave their homes to escape domestic violence.

### III. WHY ARE THEY HOMELESS?

There are doubtless many social factors behind the growing number of homeless people. The literature emphasizes three causes in particular: large-scale deinstitutionalization of psychiatric patients; persistent unemployment and consequent poverty; and the decreasing availability of low cost housing.<sup>8</sup> There are, as well, other factors which are appropriate to note here given our work at PCLS, namely systemic gender inequality and the needs of refugees.

Contrary to the view expressed by the current American President,<sup>9</sup> very few people choose to be without a permanent home. Those who

6 Stoner, "An Analysis of Public and Private Sector Provisions for Homeless People" (1984) 17 *Urban and Social Change Review* 3 at 3.

7 Ontario Task Force on Roomers, Boarders and Lodgers, *A Place to Call Home: Housing Solutions for Low Income Singles in Ontario*, (Toronto: December 1986) at 22 and 55; Langdon and Kass, "Homelessness in America: Looking for the Right to Shelter" (1985) 19 *Columbia J.L. and Soc. Probs.* 305 at 308; Nichols and Finlayson, "The Search for a Future" (16 February 1987) *MacLeans* at 34; Taylor, "City's Homeless Don't Neatly Fit Image of Skid Row," *The [Toronto] Globe and Mail* (23 October 1985); Harvey, "Hostel Dwellers in Metro Dream of Own Homes" *The Toronto Star* (21 April 1986).

8 See, eg. Strauss and Tomback, "Homelessness: Halting the Race to the Bottom" (1985) 3 *Yale & Policy Review* 551 at 552; McLaughlin, "Homelessness in Canada" (1987) 10 *Perception* 24. McLaughlin, *Homelessness in Canada: The Report of the National Inquiry* (Ottawa: CCSD, 1987) [hereinafter *National Inquiry*]. Hoombs and Snider, *Homelessness in America: A Forced March to Nowhere* (Washington, D.C.: Community for Creative Non-Violence, 1983); "Report of the Inquiry into the Effects of Homelessness on Health" (Toronto: Toronto Union of Unemployed Workers, March 1987) [unpublished]; Watson and Austerberry *Housing and Homelessness: A Feminist Perspective* (London: Routledge & Kegan Paul, 1986).

9 Ronald Reagan, President of the United States, cited by Strauss and Tomback, *id.*

have recently become homeless have a host of profound stresses to deal with whether they sleep in a hostel or on the street. These stresses include: disruption of social environment; lack of privacy; lack of control over noise; uncertainty and lack of control in fulfilling basic needs; and ineligibility for welfare due to lack of a permanent address.<sup>10</sup>

### A. DEINSTITUTIONALIZATION

Since the early 1960's, Canadian mental health institutions have adopted a model of deinstitutionalized care. The process of deinstitutionalization was intended to be a human reform of the institutionalized forms of treatment that had previously characterized mental health care. In addition, the discovery of psychotropic drugs raised the hope that properly medicated patients could be stabilized and released into the community. The discharge of patients from the institutions would be combined with a corresponding increase in community support mechanisms.

Throughout Canada, the number of psychiatric hospitals decreased by one third between 1970 and 1978. The length of stay for affective and psychotic illnesses also decreased by one third. In 1960, 50% of the 75,000 Canadians in mental institutions had been hospitalized for more than 7 years; today, nine out of ten patients are hospitalized for less than one month.<sup>11</sup> A 1984 study found that in Toronto alone, there were 7,000 discharges every six months.<sup>12</sup>

As we have noted above, implicit in a policy of deinstitutionalization is a recognition that community support mechanisms must be available. Today, it appears that such support for discharged patients is virtually non-existent.<sup>13</sup> Not all ex-psychiatric patients discharged to the community become homeless; however, recent reports indicate that a growing number do end up on the streets.<sup>14</sup> A recent estimate in the

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10 Dept. of Public Health, *Housing, supra*, note 5 at 24.

11 Dr. Reva Gerstein, *The Final Report of the Mayor's Action Task Force on Discharged Psychiatric Patients (The Gerstein Report)*. (Toronto: City of Toronto, 1984) at 40.

12 *Ibid.* at 39.

13 *Id.*

14 Hope and Young, "From Back Wards to Back Alleys: Deinstitutionalization and the Homeless" (1984) 17 *Urban and Social Change Review* 7; Nichols and



Canadian press has suggested that deinstitutionalization accounts for 30-40% of the homeless population.<sup>15</sup>

The admission figures for Queen Street Mental Health Centre (QSMHC) in Parkdale illustrate the need for more community support mechanisms: 67% of the admissions in 1981-82 were readmissions.<sup>16</sup> A major component of community after-care is supportive housing, which is required by 53-60% of patients. The lack of such housing has been identified by hospital staff as a significant factor causing patients to seek readmission.<sup>17</sup>

It is clear that many discharged psychiatric patients were not able to establish a "permanent residence in community". A 1982 survey of hostels indicated that 17% of adults on a particular night had psychiatric histories and 68% of persons barred from hostels were so barred for psychiatric reasons.<sup>18</sup>

The "snapshot survey" of agencies providing emergency or temporary shelter conducted by the Canadian Council on Social Development found that 20.1% of those in shelters on 22 January 1987 were current or ex-psychiatric patients.<sup>19</sup>

In its *Report on Deinstitutionalization*, the Association of Municipalities of Ontario called for the provision of vacancy allowances to those people who require short-term admission to general or psychiatric hospitals. Such an allowance would permit a person to continue to pay rent so that she or he will not be homeless after being discharged from the hospital.<sup>20</sup>

Finlayson, *supra*, note 7 at 41; Baxter and Hopper, "The New Mendicancy: Homelessness in New York City" (1982) *American Journal of Orthopsychiatry* 393; Furstero, "Home on the Street" *Psychology Today* (February 1984) 56 at 58; *No Place to Go - A Study of Homelessness in Metropolitan Toronto: Characteristics, Trends and Political Solutions* (Toronto: City of Toronto, January, 1983) at 14.

15 Nichols and Finlayson, *ibid.* at 41; see also Furstero, *ibid.* at 58.

16 *The Gerstein Report, supra*, note 11 at 41.

17 Jeffrey and Montagnes, *The Housing Gap* (Toronto: City of Toronto, 1982) at 26.

18 *Ibid.* at 18.

19 McLaughlin, *National Inquiry, supra*, note 8, Table 3 at 5. McLaughlin also notes (at 11) that "[b]ecause many shelters don't ask questions, the actual proportion could be double that."

20 *Report on Deinstitutionalization AMO Report 86-13*. (The Association of Municipalities of Ontario, September, 1986) [unpublished].

The combination of deinstitutionalization policies, the dearth of affordable housing, and the lack of community after-care support mechanisms has led to many patients becoming caught in the "revolving door syndrome" of discharge, readmittance, discharge...<sup>21</sup> Many of those who are discharged more than once during the year or who lack the resources to find permanent housing on a severely restricted budget, will become homeless.

The problems associated with deinstitutionalization are not cited here to provide a justification for the return to institutions of ex-psychiatric patients. Rather, it is to condemn the failure of the government to provide the support services necessary to permit those discharged from mental health centres to live independently in the community. Carla McKague, staff lawyer at the Advocacy Resource Centre for the Handicapped, represented People First<sup>22</sup> at an inquest into the death of John Dimun, a developmentally handicapped man who lived in the Channon Court boarding house in Parkdale. In her address to the coroner's jury Ms. McKague argued:

"It would be easy for you to conclude that the answer is for us, as a society, to put people back in institutions where they will be safe, or give them guardians to protect them. I submit to you that this is not the answer. The answer is contained in a number of recommendations which have been made to you by participants in this inquest. They have told you that what is needed is a massive increase in community supports – in the *provision of decent, affordable housing*, (emphasis added) availability of advocates to fight *beside* handicapped people for their rights, in opportunities for people to learn how to live in a community, and in the provision of enough money to provide a realistic chance for a life of dignity. Moreover, these supports must be tailored to the individual."<sup>23</sup>

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21 Province of Ontario Task Force on Roomers, Boarders and Lodgers, *Housing for Roomers, Boarders and Lodgers: The State of Knowledge*, (16 May 1986) at 14 [unpublished]; Nicholls and Finlayson, *supra*, note 7 at 41; Collin, "Homelessness: The Policy and the Law" (1984), 16 *Urban Lawyer* 317 at 320.

22 People First is "[a] self-help group of adults labelled developmentally handicapped". See "ARCH Participates in Inquest into Death of Developmentally Handicapped Man", (1986) 6 *Archtype* 11 at 14.

23 *Ibid.* at 12-13.

She concluded:

"Do not limit the freedom of the victims by asking for incarceration, for controls, for guardians. Instead, limit the freedom of the rest of us to oppress by providing the victims with effective and dedicated help, and by removing the threats to their safety. Let the John Dimuns decide where they want to live and how they want to run their lives..."<sup>24</sup>

The choices they are presented with must be real choices however, not merely a choice among the "dreary depressing overcrowded"<sup>25</sup> Channon Court, a mental health centre and the street.

## B. LACK OF SECURITY OF TENURE

The plight of Parkdale's homeless is further exacerbated by a legal system which has systematically discriminated against a particular segment of those who have found accommodation in the private residential rental market. Ontario has 184,000 roomers and boarders,<sup>26</sup> who until June 30, 1987 lacked the basic rights and protections extended to other tenants through the *Landlord and Tenant Act*.<sup>27</sup> While roomers and boarders were not explicitly denied the protections created in Part IV<sup>28</sup> of the *Act*, the courts had interpreted their non-inclusion in the *Act's* definition of "tenant" as a signal from the legislature that roomers, boarders and lodgers were to be treated differently from ordinary tenants.<sup>29</sup>

With the passage of Bill 10 on June 30, 1987, certain categories of roomers and boarders were brought within the protection of the *Landlord and Tenant Act*.<sup>30</sup> The amendments to Bill 10 contained in Attorney

24 *Ibid.* at 13.

25 *Ibid.* at 11.

26 Province of Ontario Task Force on Roomers, Boarders and Lodgers, *A Place to Call Home*, *supra*, note 7.

27 *Landlord and Tenant Act*, R.S.O. 1980, c. 232.

28 *Ibid.*, Part IV regulates relationships between residential tenants and their landlords.

29 *Ibid.*, Part I, defines a "tenant."

30 *Landlord and Tenant Act*, R.S.O. 1980, c.232, s. 12. For several years, a number of groups had been politically active, pressuring for amendments to the *Landlord and Tenant Act*. Central to this activity has been such organizations as the Coalition for the Protection of Roomers and Boarders, the Roomers' Association, and the Parkdale Roomers and Boarders Association.

General Ian Scott's Bill 87, which was passed at the same time, contain exemptions which will leave some tenants without security of tenure. Perhaps most significantly, roomers and boarders who share bathroom or kitchen facilities with the owner of the house are denied the protection of the *Act*. In at least this situation the cycle of summary eviction-hostel-homeless is likely to reappear.

There are other barriers facing roomers and boarders, even those now protected by Part IV of the *Landlord and Tenant Act*. Real estate speculation and "gentrification" substantially reduced the number of units available to roomers and boarders prior to their inclusion under the *Act*, from 206,165 units in 1971 to approximately 61,000 today.<sup>31</sup> Subsistence living leaves little time for roomers and boarders to learn, never mind enforce, what few rights they now have. It is already clear that some landlords intend to ignore the new legislation and to use the desperate shortage of rooming and boarding house accommodation as a lever to discourage their tenants from asserting their rights. While certain categories of roomers and boarders are now covered by the *Act*, harrasment, intimidation and even violence are commonly used to deter them from legal or political action. The Community Legal Workers at PCLS have worked with roomers and boarders whose belongings have been illegally distrained, who are poorly fed by the boarding house operator and whose mail is collected by the landlord who then presents welfare cheques to them for endorsement (face down so they do not see the full amount) and keep more money than they are entitled to for room and board.

In a recent case at Parkdale Community Legal Services, an illegally evicted roomer was successful in obtaining an injunction placing him back in his room. However, it seemed a hollow victory when we learned that the room had already been re-rented. Fortunately, the new tenant decided to leave almost immediately. Had he chosen not to do so, our client would have had the paper on which the Court's Order was made, and little more.<sup>32</sup>

Clearly, the long-term goal of eliminating homelessness in Ontario cannot be achieved simply by adjusting the legal definition of "roomers and boarders" and thus providing them with the protection and rights that they deserve. This goal can only be attained when the root

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31 Spiers "What About the Real Homeless?" *The [Toronto] Globe and Mail* (1 June 1988).

32 P.C.L.S. file #046178.

causes of the problem are addressed. The extension of the security of tenure provisions to all roomers and boarders will, however, assist that community in forcing landlords to bring their residences up to standard. It might also reduce the number of arbitrary evictions that so greatly contribute to the number of actual homeless that we have in our community. It may be only a starting point, but an important one nonetheless.

### C. UNEMPLOYMENT

For many, unemployment leads to homelessness. Individuals who earn low wages and those who receive social assistance are seriously affected by high levels of unemployment.<sup>33</sup> They are forced to compete for the few positions that are available in the work force. When they can obtain employment at all, they "...usually get work which provides low wages, inadequate fringe benefits and poor job security. Thus, they tend to be the last hired and the first fired".<sup>34</sup> Persistent unemployment becomes a way of life.

Individuals who must rely on inadequate welfare cheques<sup>35</sup> are often forced to choose between food and shelter. In a memo to the Community Services and Housing Committee of Metropolitan Toronto, the Commissioner of Community Services reported that, while recipients of General Welfare Allowance (G.W.A.) living in subsidized public housing spent approximately one-third of their incomes on shelter, those renting from the private, for profit sector (the majority of G.W.A. recipients<sup>36</sup>) spent more than two-thirds of their incomes on shelter.<sup>37</sup>

"...[T]he corollary of disproportionately high shelter costs is a lower than expected ordinary needs budget...to meet ordi-

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33 Social Planning Council of Metropolitan Toronto, *Living on the Margin: Welfare Reform for the Next Decade*, (Toronto: October 1986) at 17-20.

34 *Id.*

35 The maximum benefits payable under the *General Welfare Assistance Act*, R.S.O. 1980, c. 188 for a single person, for example, is \$467.00 per month (early 1988). The maximum benefits for a family of four is \$1043.00 per month. Of these amounts, no more than 65% can be applied to pay rent.

36 Memo to Community Services and Housing Committee, Metropolitan Community Services Department, Toronto, Re: Adequacy of General Welfare Assistance (17 March 1988) at 3.

37 *Ibid.* at 4.

nary non-shelter needs such as food, clothing, transportation, groceries, non-prescription pharmaceuticals and so on.

The examination of the January 1988 active G.W.A. caseload suggests that welfare rates continue to be inadequate to cover the basic food, clothing and shelter needs of recipients. Despite the rate increases during the previous two years, in January 1988 the true cost of shelter was still not reflected in the shelter subsidy ceilings.<sup>38</sup>

If people do not have enough money for food even after going to a food bank,<sup>39</sup> feeding sugar water to the baby<sup>40</sup> or giving milk to the three year old instead of his pregnant mother<sup>41</sup>, the rent money must be used for food. When they are unable to pay the rent, they face eviction.<sup>42</sup> Once evicted, unemployed individuals may find it difficult to secure new accommodation because they cannot afford to pay first and last months' rent.<sup>43</sup> Thus, they are forced to live in shelters. Furthermore, the prospect of employment diminishes because they are regarded as unstable by employers (i.e., having no fixed address or because they are on welfare).<sup>44</sup> For many unemployed, a cycle of homelessness begins.

#### D. SHORTAGE OF AFFORDABLE HOUSING

It is almost impossible to secure affordable housing in Toronto's rental market. The rental apartment vacancy rate in Metropolitan Toronto is

38 *Ibid.* at 5.

39 69% of the people who receive food aid from Metropolitan Toronto's 165 food banks and soup kitchens are social assistance recipients: *A Guide to the Real Toronto "Food"* subsection (BASIC Poverty Action Group, 1988) [unpublished].

40 Callwood "Poor Huddle Together in City-Within-A-City" *The [Toronto] Globe and Mail* (14 November 1987).

41 Callwood "Unaffordable Rents Keep Poor Moving" *The [Toronto] Globe and Mail* (19 November 1987).

42 City of Toronto, *No Place to Go*, *supra*, note 14 at 12.

43 Welfare officials generally will not provide the first and last month's rent for a welfare recipient more than once in a year. If a person or family is evicted by a landlord, even if this is done illegally, there is no required "safety net" to provide first and last month's rent until a year after this was last paid by welfare funds. Such a decision is made entirely at the discretion of the welfare official.

44 Ontario Task Force on Roomers, Boarders and Lodgers, *supra*, note 7 at 65; Stoner, *supra*, note 6 at 4.

0.1%, its lowest in over twenty years.<sup>45</sup> Since April 1986, the number of available rental units has declined sharply from 0.3%. In October 1985, the vacancy rate was 0.4%.<sup>46</sup> It must be remembered that, although the overall vacancy rate for rental units is 0.1%, those units which are within the financial means of low wage earners and welfare recipients comprise only a fraction of the total number of available units.<sup>47</sup> A major factor in the shortage of affordable housing is the phenomenon of "gentrification", which has resulted in the elimination of thousands of units of affordable residential rental units.

Few major urban centres have avoided the gentrification of their downtown residential core over the past twenty to thirty years. In fact, many cities, including Toronto, have devised and encouraged development policies that seek to attract the professional, middle-class residents back to the core area from the suburbs or outlying areas. These policies have succeeded, but at a considerable price to the residents of the downtown area who have been thus displaced.

The underlying theme of gentrification has been described as:

"the inherent optimism (by urban developers) and the belief that squalor is being expunged and the city is being reclaimed for the respectable classes."<sup>48</sup>

In Paris, for example, the gentrification process that took place between 1970 and 1973 claimed 117,000 units that were previously

45 Canada Mortgage and Housing Corporation (CMHC), *Rental Market Survey, Toronto Census Metropolitan Area*, (October, 1987) at 2. (Note that this survey excludes rooming houses).

46 *Id.*

47 As of October 1987, the average monthly rent for a bachelor apartment in Toronto was \$381.00. For a one-bedroom apartment, the average monthly rent was \$472.00 and two-, three-, and four-bedroom apartments' average monthly rents were, respectively \$569.00, \$700.00, and \$1027.00. The average monthly rent of *vacant* apartments was much higher: bachelor - \$621.00; one-bedroom - \$850.00; two-bedroom - \$1005.00; and three-bedroom - \$1059.00. *Ibid.* p.6 Compare these average rents to the G.W.A. rates *supra*, note 35. Only 27% of the available one bedroom units in Toronto rent for less than \$500.00 per month. Only 19% of the available two bedroom units rent for under \$500.00 per month, and a mere 5% of the available three bedroom units rent for below \$500.00 per month; Canada Mortgage and Housing Corporation (CMHC), *Rental Apartment Vacancy Survey, Toronto Census Metropolitan Area* (October 1987) at 9; see the General Welfare Assistance rates, *supra*, note 35.

48 Smith and Williams, *Gentrification of the City* (Boston: Allen and Unwin, 1986) at 17.

either rent-controlled or geared towards moderate income earners.<sup>49</sup> Comparable losses of affordable housing stock occurred in London, New York, Philadelphia and Vancouver during this period.<sup>50</sup>

From 1975 to 1979 the average annual ratio of dwelling completions to population growth in Ontario was 1:1; in other words the growth in population was matched by the number of dwellings created. From 1980 to 1985 the average annual ratio of dwelling completions to population growth was just over 0.5:1.<sup>51</sup> The population was growing twice as quickly as the number of new dwellings. During the latter period, the proportion of single-detached dwellings of the largest size constructed rose from 20.3% in 1980 to 25.2% in 1985.<sup>52</sup> Clearly the housing market was not responding to the need of low income persons for affordable available housing. Rather, Toronto has lost an average of 2,000 rooms and affordable apartments in each of the last ten years.<sup>53</sup> In 1987, it was estimated that Toronto lost nine units every day to rehabilitation or re-development.<sup>54</sup>

The period of loss of affordable housing corresponds to the Provincial government's much reduced commitment to building low-income units since the late 1960's.<sup>55</sup> Since 1978, subsidized housing programmes have been designed to serve a variety of income groups. Only one third of the units created through the major programmes have been directed at low-income households.<sup>56</sup> The provincial government's funding methods, which require that programme criteria be met within a certain time frame by those providing the housing forced two Metropolitan Toronto housing agencies to reduce their construction programmes from

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49 London and Pallen, eds., *Gentrification, Displacement and Neighbourhood Revitalization* (Albany: State University of New York Press, 1982) at 223.

50 *Smith and Williams, supra*, note 48, at 60, 78, 92, 124.

51 Ontario Task Force on Roomers, Boarders and Lodgers, *supra*, note 7 at 166.

52 *Ibid.* at 146.

53 Report on the Inquiry into the Effects of Homelessness on Health, *supra*, note 8 at 8.

54 Roomers' Association of Toronto, "Brief to the Inquiry on Homelessness and Health," March 1987.

55 Report on the Inquiry into the Effects of Homelessness on Health, *supra*, note 8 at 8.

56 McLaughlin National Inquiry, *supra*, note 8 at 3.



963 units to 445 units in 1987. This left a surplus of \$50 million in the provincial housing budget.<sup>57</sup>

This failure of both the housing market and the provincial government to create a supply of affordable housing at a pace corresponding to the demand for such accommodation has thus led to an actual net decrease in the number of rental units that are available on the public/private market today.

Another unfortunate result of Toronto's boom in the sale of private residential premises has been the arrival of real estate speculation. In Parkdale, we often encounter cases where tenants have been evicted by speculators to permit the conversion of the premises to luxury units or to ensure prospective purchasers that the building will be sold with vacant possession. Although the *Rental Housing Protection Act*<sup>58</sup> was enacted to prevent such widespread demolition or conversion, it has become clear that the profits obtained by the owners in these situations far outweigh any potential fine that could be levied on them by the court for violation of the *Act's* provisions. Hence the protection provided by the *Act* is undermined by the failure of its penalties to deter conversions and demolitions.

The costs of displacement to the community have been quite high. The affordable housing stock that existed prior to gentrification provided low-income earners with a buffer between a "home" and the hostel or the street. While the affordable housing stock has disappeared, the former residents have not. Many remain in the area,<sup>59</sup> either moving from friend to friend or moving from hostel to street and back to hostel again.

Hostel staff report that they are working at full capacity every evening. It has been well-documented that in Toronto's Seaton House (the largest hostel for men in North America) the dormitories are overcrowded and the living conditions are extremely unhealthy.<sup>60</sup> Many of those who come through the clinic's doors are left with no alternative

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57 Flavelle, "Homeless 'Tragic' Hosek Says" *Toronto Star* (21 November 1987).

58 *Rental Housing Protection Act*, R.S.O. 1986, c. 164.

59 A study of the homeless in Great Britain illustrated that, of those living in major urban centres, ninety percent had always resided in the area in which they were now resident. Greve, Page, and Greve, *Homelessness in London* (Edinburgh: Scottish Academic Press, 1971).

60 Ontario Task Force on Roomers, Boarders and Lodgers, *supra*, note 7.

but to seek accommodation at a hostel, since neither the political nor judicial system can provide a satisfactory remedy to their problem. As one deputant to the Inquiry on Housing and Homelessness stated, "today's kind of solutions – hostels, temporary shelters, food banks – are reflections of a society whose priorities have gone askew".<sup>61</sup>

### E. SYSTEMIC GENDER INEQUALITY

Our homeless population consists of a higher number of women than ever before. Women are especially vulnerable to homelessness because of their poor economic position, their responsibility for their children and their susceptibility to discrimination and abuse. Further, once women have had to resort to shelters and hostels they are denied the same minimum treatment as is provided to men. On average, women earn 62% of what men earn.<sup>62</sup> More than half of all low-income Canadians are female.<sup>63</sup> Single women are nearly twice as likely as men to have incomes below the poverty line.<sup>64</sup> Forty per cent of families led by women live on incomes below the poverty line.<sup>65</sup> Women who head households are over twice as likely as men to rent their homes.<sup>66</sup> Women heads of households are also twice as likely to live in accommodation that is considered "low-rent"<sup>67</sup> This is more likely to be a matter of necessity than choice. In 1980, for example, 64.4 per cent of women renting accommodation had annual incomes below \$12,000 (compared to 26 per cent for men). Over 80 per cent of the women in this category considered their accommodation to be inadequate in terms of size and common amenities.<sup>68</sup>

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61 *Ibid.* at 7.

62 Doyle Farge, "Position Paper on Women and Housing" National Action Committee on the Status of Women (May 1986) at 2 [unpublished].

63 "Progress Against Poverty" Rev. (Ottawa: National Council of Welfare, April 1987) at 7.

64 *Ibid.* Table 4 at 12. The National Council of Welfare uses Statistics Canada's "Low income cutoffs" as a poverty line. People who spend more than 58.5% (20% more than average) on necessities are deemed to have an income below the poverty line. 1987 *Poverty Lines: Estimates by the National Council of Welfare* (Ottawa: March 1987) at 1-3.

65 Doyle Farge, *supra*, note 62 at 2.

66 *Id.*

67 *Id.* In 1980 "low rent" was considered to be less than \$450.00/month.

68 *Id.*

When the disadvantaged economic position of women is juxtaposed with the limited availability of low-rent accommodation<sup>69</sup> it is clear that the general problem of lack of affordable housing has a disproportionate effect on women. This is borne out by the fact that 86.9% of single tenants and 96.4% of single parents in public housing and non-profit and co-operative housing programmes are women.<sup>70</sup> Women on the waiting lists for public housing who face the choice between food and accommodation may be forced onto the streets if they do not have friends or family who are able to take them in.

Women may also find themselves homeless after leaving an abusive husband or boyfriend.<sup>71</sup> While some women may have the personal or financial resources to find alternative accommodation, many (as noted in the previous paragraph) have no such options and are therefore not able to find accommodation in the private market. A married woman leaving a battering husband may have recourse to the courts to obtain exclusive possession of the family home;<sup>72</sup> this remedy is, in most circumstances, unavailable to the battered woman who was not married to the man with whom she lived.<sup>73</sup> Further, "the remedy is generally ineffective in providing relief to those on a low income" because of the court costs involved, the time necessary to obtain a court order, the spouse's default on mortgage or rent payments and the reluctance of judges to make an order for exclusive possession where the spouses' incomes may not permit them to maintain two households.<sup>74</sup>

69 See *supra*, note 47 re: availability of low rent accommodation. On average, 64% of welfare recipients' income is spent on housing costs. Almost ninety percent of single welfare recipients who live in private rental accommodation spend over fifty percent of their incomes on housing: Mayor's Task Force on the Homeless, *Final Report of the Sub-committee on the Housing Needs of the Homeless Population* (Toronto: City of Toronto, January 1986).

70 Doyle Farge, *supra*, note 62 at 3.

71 Watson and Austerberry, *supra*, note 8 at 21. It is arguable that women who remain in abusive domestic situations are also homeless because they lack safety where they live.

72 Orlando, "Exclusive Possession of the Family Home: The Plight of Battered Cohabitees" (1987) 6 R.F.L. (3d) 82 at 83. *The Family Law Act S.O. 1986 c.4 s.24 (3)(f)* requires judges to consider the factor of family violence in awarding exclusive possession of the matrimonial home.

73 *Id.*

74 *Ibid.* at 100. For a discussion of the protection provided by the British *Domestic Violence and Matrimonial Proceedings Act* and its erosion through magistrates' intransigence, see McCann, "Battered Women and the Law: the Limits of Legislation" in Smith and Brophy eds., *Women in Law* (London: Routledge &

Whether on a low income or not, a woman may be reluctant to continue to live in the family home because her spouse will therefore know where she is and the violence against her and her children may continue. A London, Ontario study found that two thirds of the divorced women who used the city's Battered Women's Advocacy Clinic had been divorced for six to ten years and continued to be battered by their ex-husbands.<sup>75</sup> If the legal system is unable to protect these women, it becomes necessary for them to find somewhere to live where their ex-husbands cannot find them.

Battered women in Ontario are currently given priority on the waiting list for public housing.<sup>76</sup> This solution is limited by the inadequate supply of available units. Applicants for the priority list must show their intention to permanently separate from their spouse in order to be placed on the list. There is currently a six to twelve week wait for housing after being accepted.<sup>77</sup> Women who have been economically dependent on their spouses must often rely on social assistance, which makes it difficult for them to compete for affordable accommodation in the private market. If their health, skills and child care arrangements permit them to work and they succeed in finding employment, the statistics quoted at the beginning of this section suggest that these women will be among the working poor and thus will have difficulty finding affordable accommodation despite the fact they are employed. Because women in emergency shelters have difficulty finding affordable housing, temporary shelters have become semi-permanent housing for many women.<sup>78</sup> This has resulted in situations where women in crisis have nowhere to go. P.C.L.S. staff have, on occasion, called shelters to "book ahead" for women who will then remain at home or stay with friends until a place in a shelter is available.

Where single women without children are less likely to be accepted into public housing or to receive the better paying Family Benefits

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Kegan Paul, 1985) 71; and Orlando, *supra*, note 72 at 102.

75 Cited by MacLeod, *Battered But Not Beaten...Preventing Wife Battering in Canada* (Ottawa: Canadian Advisory Council on the Status of Women, 1987) at 44.

76 *Assaulted Women: A Manual for Advocates* A Preliminary Edition for the Conference on Family Violence, June 2 and 3, 1988 (Toronto: Community Legal Education Ontario, May 1988).

77 This has been the experience of P.C.L.S. clients.

78 Steed, "A Haven From Harm" *The [Toronto] Globe and Mail* (25 June 1988). The largest shelter in Toronto, North York Women's Shelter, had to turn away 32 women and children in a day. Women stay at the shelter for six months to a year because they are unable to find housing.

(rather than General Welfare Assistance) than women with dependents, the latter are more likely to experience problems of discrimination by landlords who do not want children as tenants. The repeal of section 20(4) of the Ontario *Human Rights Code, 1981*<sup>79</sup> should have resulted in the banning of adult only apartments and condominiums. Some District Court judges have, however, ruled that since the *Code* defines age to be eighteen years of age or over, adult only apartments which restrict occupancy to those sixteen years or over do not violate the *Code*.<sup>80</sup> The decision in one of these cases is being appealed,<sup>81</sup> however, the time and expense involved in a court action no doubt deters many from diverting the resources necessary to find and pay for accommodation in order to enforce rights through litigation.

Women with and without dependents are subject to discrimination because of income. Apartment units available only to those meeting minimum income requirements discriminate against all welfare recipients and low-income earners; however, because of women's disadvantaged economic position, such requirements have a disproportionate effect on women.

Women are not only subject to sexual harassment by landlords and victimized by inadequate security systems but "as single parents, low income individuals, members of racial or ethnic minorities, disabled or elderly, the discrimination [they face] is often compounded".<sup>82</sup> Once women are rendered homeless they must turn to hostels and shelters for accommodation. Currently there are approximately 550 beds in Toronto shelters to accommodate homeless women and their children. About 250 beds are for single women and the remaining are for mother-led families. There are over 1350 beds for men in Toronto shelters.<sup>83</sup> Recently the Ontario Human Rights Commission initiated a complaint against the Ontario Ministry of Housing, the Department of Social

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79 Until its repeal in December 1986 s. 20(4) of the *Code* permitted discrimination on the basis of family status in apartment buildings and sections of apartment buildings, whether rental or condominiums.

80 Centre for Equality Rights in Accommodation, "Interpreting the *Code* on Discrimination in Housing" (Toronto: 1988).

81 *Metropolitan Toronto Condominium Corporation #624 v. George Ramdial et al.*

82 Whelton, "The Right to Shelter" (paper prepared for the National Association of Women and the Law September, 1987) at 7 [unpublished].

83 Memo to Community and Housing Committee [sic], Metropolitan Community Services Department, Toronto Re: Emergency Shelters for the Homeless (September 25, 1987) Appendix A.

and Community Services, and the Ottawa-Carleton Regional Government alleging discrimination against homeless women.<sup>84</sup> The basis of the complaint is the governments' failure to provide the same services as the three shelters for homeless men and two shelters for homeless families. Not only do women face special difficulties with availability and affordability of accommodation, their difficulties extend to finding places in shelters and obtaining the services they need and which are available to other homeless people.

## F. REFUGEES

Housing for refugees presents a special problem in the Parkdale community. Many newly-arrived refugee claimants live in the streets, sleep in hostels, and generally lead a hand-to-mouth existence during their first few months in Canada until they are eligible for a work authorization. Political and public attitudes have combined of late to create a climate of hostility towards the refugee.<sup>85</sup> Refugees are unwanted; until eligible to work they require government assistance and compete for scarce affordable rental accommodation.

Government-sponsored refugees are selected abroad by the Canadian government and receive assistance with language training and other aspects of resettlement once they arrive in Canada. It is expected that 2,700 government-sponsored refugees will come to Toronto in 1988.<sup>86</sup> The federal government pays their housing costs for up to one year after their arrival in Canada. The amounts paid by government for rent<sup>87</sup>

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84 "Service Equity at Heart of Homeless Women Case" (1988) 4 Canadian Human Rights Advocate No. 3 at 7.

85 Current government policies in Canada are anti-immigration, and proposed amendments to the *Immigration Act* promise to diminish even further the numbers of refugees who are allowed to enter Canada: V. Malarek, "New Regulations are Stemming Flow of Refugee Claimants, Weiner Says," *The [Toronto] Globe and Mail* (11 April 1987).

86 Interview with Elizabeth Gryte, Canada Employment and Immigration Commission, Programme Specialist, Settlement Branch of the Ontario Region, June 1988.

87 Government-sponsored refugees who are single are allocated \$330.00 per month for rent in the expectation that they will live in a flat or a room with kitchen and bathroom facilities available. Families receive \$560.00/month for a one bedroom apartment, \$650.00/month for a two bedroom apartment, and \$720.00/month for a three bedroom apartment. These amounts have increased by approximately 15% in the last year and represent a "base price" provided by the government. (ie: the allowance may be increased slightly at the discretion of the Settlement and Reception Branch worker): interview with Ken Allen,

are barely adequate in light of the rental market reality in Toronto. Refugees' problems in finding elusive rental accommodation are exacerbated by their lack of familiarity with Canadian culture, language difficulties, limited finances, and the fact that many are members of visible minority groups and thus subject to discrimination. In contrast to sponsored refugees, the federal government does not provide services for refugee claimants who travel to Canada on their own and make their claims to refugee status from inside Canada.<sup>88</sup> While refugee claimants are eligible for welfare, the province does not provide them with temporary accommodations;<sup>89</sup> however, they may stay in municipally-funded hostels.<sup>90</sup> The Hostel Operation Services Department of Metropolitan Toronto Community Services has implemented several special measures which deal specifically with the influx of refugee claimants who have arrived in Toronto since 1986.<sup>91</sup> The adequacy of this accommodation is invariably substandard.

The homeless and homelessness have become an everyday feature within our modern urban society. The old stereotype of the homeless, that of an older eccentric alcoholic man, is of little value to those who work with the homeless community today. Today's homeless descend from every stratum of society; they are quite often very young and have arrived at their situation through varying series of events. They form the sub-class of the dispossessed; they trouble many, but in fact directly threaten few. Long term solutions appear elusive when, night after night, one's attention is focussed on obtaining shelter. The question that we at Parkdale Community Legal Services now raise is whether there exists in Canada a legally enforceable right to shelter.

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Canada Employment and Immigration Commission, Supervisor of Immigrant Settlement and Reception for Toronto Area, June 1988.

88 Refugee claimants not sponsored by the government have their immigration status determined after an oral hearing ("examination under oath") (*Immigration Act, 1976*, S.C. C. 52 1976-77 section 45 (1)). They are not given authorization to work until after the examination under oath.

89 Interview with Robert Armstrong, York Community Legal Services, President of Refugee Housing Resource Group, Toronto, April 14, 1987.

90 *Id.*

91 These special measures include:

- (i) use of the Canadian National Exhibition cattlemen's quarters as a dormitory to temporarily house refugees;
- (ii) use of the Salvation Army winter hostel during the summer months for refugees in Toronto;
- (iii) use of the Toronto International Hostel during the winter, since it operates

## IV. SHELTER AS A LEGAL RIGHT

### A. INTERNATIONAL LAW

The right to housing is enshrined in general terms in the *Universal Declaration of Human Rights*, which was adopted by the United Nations General Assembly on December 10, 1948 "as a common standard of achievement for all peoples and all nations".<sup>92</sup> Article 25(1) provides:

"Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."<sup>93</sup>

This general right to housing is incorporated in a binding treaty form in the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*<sup>94</sup> which by Article 11 recognizes

"...the right of everyone to an adequate standard of living for himself and his family, including, adequate food, clothing, housing, and to the continuous improvement of living conditions."<sup>95</sup>

The states which are parties to the Covenant agree to take appropriate steps to ensure the realization of this right. Canada, for instance, periodically provides a large and detailed document outlining its efforts and progress for scrutiny by specialized agencies and, since 1985, by a special committee of the Economic and Social Council of the

at only 40-50% of its capacity at that time of the year;  
 (iv) the Y.W.C.A. provides seven beds year-round for single, female refugees;  
 (v) church-provided transitional housing for refugees may be provided.  
 Interview with John Jagt, Metropolitan Toronto Community Services, Hostel Operation Services Department, Director, April 1987.

92 *The Universal Declaration of Human Rights*, G.A. Res. 217 (III), U.N. Doc. A/810 (1984).

93 *Id.*

94 *International Covenant on Economic, Social and Cultural Rights*, adopted Dec. 19, 1966, entered into force Jan. 3, 1976, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No.16) 49, U.N. Doc. A/6316 (1966).

95 *Id.*



United Nations.<sup>96</sup> Noting that under Canada's Constitution, responsibility for housing is shared by the federal and provincial governments, the 1982 Canadian Report documented the principal legislative initiatives designed to promote housing (e.g. *National Housing Act* (R.S.C. 1970, c. N10); *Canadian Human Rights Act* (S.C. 197677, c. 33)) as well as the principal administrative agencies (e.g. Canada Mortgage and Housing Corporation) and main programmes (home ownership loans and loan insurance, home improvement loans, insured loans for rental housing, interest writedown for nonprofit and cooperative housing projects, public housing assistance and so on) which have been developed "to expand housing construction and meet the housing needs of the population, particularly low income families..."<sup>97</sup> However, taken as a whole, the stated commitment to low income housing seems dwarfed by the programmes designed to promote ownership of homes and financial assistance to rental housing projects and *owners* of rental accommodation.

The ICESCR is supervised in two ways: first, through one of the specialized agencies of the UN (e.g. UNESCO; ILO; WHO); and secondly (perhaps more importantly), through the periodic reporting requirement referred to above.

Accordingly, a significant means of enforcing the right to housing elaborated in the Covenant would be to lobby both the specialized agencies of the UN and the supervisory body to raise questions of the Canadian "progress" reports, and to press for more vigorous programmes for the poor.

Secondly, although there is no *individual* legal remedy for the abridgement in Canada of the economic rights in the Covenant,<sup>98</sup> the Covenant can have an impact upon the right to shelter for Canadians. Notwithstanding that the International rights may not be *directly* enforceable in Canadian courts, a canon of interpretation requires that domestic law be interpreted in conformity with international treaties

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96 *International Covenant on Economic, Social and Cultural Rights: Report of Canada on the Implementation of the Provisions of Articles 10 to 12 of the Covenant* (Ottawa: Department of the Secretary of State, 1982) at 49-66. Article 17(1) of the International Covenant on Economic, Social and Cultural Rights.

97 *Id.* at 49.

98 Province of Ontario, Ministry of the Attorney General, *Sources for the Interpretation of the Equality Rights Under the Charter* (Toronto: 1985) at 58 [unpublished].

unless the contrary intent is expressed.<sup>99</sup> While Canadian legislation must be ambiguous before the relevant international treaty may be used as a guide to interpretation,<sup>100</sup> in such cases it will be presumed that the legislatures did not intend to violate Canada's international obligations and hence the interpretation that is consistent with these obligations will be preferred.<sup>101</sup>

Finally, it can be argued with force that international human rights law was a significant influence in the drafting of the *Canadian Charter of Rights and Freedoms*.<sup>102</sup>

Although the *Charter* does not expressly incorporate nor refer to the international covenants, its terms are general. Because of the similarities in wording between the *Charter* and the international human rights instruments, it is arguable that s. 15, for instance, may be construed as "implementing" legislation, "...whose purpose is to fulfil Canada's international obligations under a particular convention".<sup>103</sup> Further, the recent history of both ICESCR and the *Charter of Rights* coupled with the similarity of subject matter and language support the presumption that the Canadian Parliament did not intend to deviate from Canada's international legal obligations.

Still and yet, it may be that to give full force and effect to the broad economic rights protected by the Covenant, the Canadian judiciary will have to be persuaded to take an expansive view of the rights delineated in the *Charter*.

## B. AMERICAN JURISPRUDENCE: THE NEW YORK EXPERIENCE

The problem of homelessness in some parts of the United States is as serious, or more serious, than in Canada. It is estimated that in New York City alone there are 36,000 homeless individuals.<sup>104</sup> As in

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99 Hathaway, "Legal Challenges to the Proposed Refugee Determination System" (paper presented to Canadian Bar Association, June 18, 1987) [unpublished].

100 Cohen and Bayefsky, "The Canadian Charter of Rights and Freedoms and Public International Law" (1983) 61 Can. Bar Rev. 265 at 277.

101 *Id.*

102 *Id.*: see also, Claydon, "International Human Rights Law and the Interpretation of the Canadian Charter of Rights and Freedoms" (1982), 4 Sup. Ct. L. Rev. 287 at 295.

103 Cohen and Bayefsky, *supra*, note 100 at 303.

104 Langdon and Kass, *supra*, note 7 at 322.

Canada, the causes of the problem have been identified as deinstitutionalization, unemployment, the lack of affordable housing, and the reduction of aid to the poor.<sup>105</sup>

In most states, to receive any kind of social assistance a person must have some form of residence. Federal statutes and regulations mandate that any residency requirement for state welfare assistance be defined in terms of current residence and intent to remain in that community. However, states have designed eligibility qualifications that deny assistance to otherwise qualified residents. For example, the Food Stamps Program requires that recipients be members of a "household". Although "household" is not clearly defined, and shelters could arguably constitute a "household", residents of these institutions are denied food stamp benefits.<sup>106</sup>

Residency requirements are not the only basis on which the homeless are denied assistance. Other statutory provisions emphasize the necessity of a *bona fide* residence. For example, a mailing address is necessary to receive medicaid or medicare, and visits to a child's home by social service officials can be an important factor in determining whether the child will qualify for AFDC relief (Aid to Families with Dependent Children).<sup>107</sup>

In *Pitts v. Black*,<sup>108</sup> a New York State District Court held that the requirements of a *bona fide* residence completely disenfranchised the homeless and was unconstitutional as applied. The court adopted a new test of residency that required the homeless to identify "a specific location within a political community which they consider their 'home base', to which they return regularly, manifest an intent to remain for the present, and a place from which they can receive messages and be contacted..."<sup>109</sup>

Ciampi submits that the residence test adopted in *Pitts v. Black* will serve two purposes. First, it will act as a model for the redefinition of *bona fide* residence requirements in other contexts, such as social assist-

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105 Mort, "Establishing a Right to Shelter for the Homeless" (1984) 50 Brooklyn Law Rev. 939; see also Strauss and Tomback, *supra*, note 8.

106 Ciampi, "Rights of the Homeless" (1985) 59 St. John's L.R. 530 at 535.

107 *Ibid.* at 538.

108 *Pitts v. Black* (10 October 1984), No. 84 Civ. 5270 (S.D.N.Y.) [unreported], referred to in Ciampi, *supra*, note 106 at 550.

109 Ciampi, *ibid.* at 552.

ance. Second, it will guarantee the homeless a political voice with which they can challenge the denial of welfare assistance and demand a statutory right to shelter.<sup>110</sup>

Certainly, the utilization of the *Pitts* definition of residence would be a step toward improving the situation of the homeless. However, the necessity of registering park benches, street corners, heating grates, and local shelters as homes underscores a more fundamental problem that must be addressed: the lack of a right to shelter. Ciampi asserts that if the homeless become enfranchised they will gain a political voice and the influence needed to establish this right. The view that the right to vote equals empowerment cannot be maintained in light of political reality. Most poor people do have the right to vote, however they often do not exercise that right for a number of reasons. To an even greater extent than poor people who do have homes, the homeless have been politically passive and poorly organized. Because of the instability of their lives and the constant effort required to fulfill subsistence needs, the homeless are an extremely difficult (but not impossible) group to bring together for political action.

Because other methods of influencing government policy in this area show little potential for success, litigation, in spite of its drawbacks,<sup>111</sup> has become the preferred tool of many American advocacy groups. A series of legal actions has been initiated which have sought to establish a legal right to shelter. The most successful case to date is *Callahan v. Carey*.<sup>112</sup>

In 1979, an action was commenced on behalf of six homeless men who claimed that they had a right to receive safe and decent shelter in accessible locations from the State of New York and New York City governments. In granting the plaintiff's motion for a preliminary injunction, the court held that the New York Constitution, the New York *Social Services Law*, and the New York City *Administrative Code* entitled the plaintiffs to "board and lodging" and required "those public officials responsible for caring for the needy to find such lodgings."<sup>113</sup>

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110 *Id.*

111 See *infra*, Part V, for a discussion of some of the limitations on litigations.

112 *Callahan v. Carey* (1979), No. 79-42582 (Sup. Ct. N.Y.) [unreported].

113 Malone, "Homelessness" (1982) 10 *Fordham Urban L.J.* 749 at 769.

A consent decree was entered into a year and a half later which required that the city provide shelter and board to every homeless man who applied for it.<sup>114</sup> The decree required the establishment of intake centres to accept applicants for shelter and provided for either direct transportation or adequate fare to the shelter. The City must also provide, at all shelters, information concerning additional benefits to which homeless persons may be entitled.<sup>115</sup>

The plaintiffs' arguments in *Callahan v. Carey* were based on the texts of the above-mentioned legislation. Article XVII, section 1 of the New York State Constitution provides that "(t)he aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner as the legislature may from time to time determine."<sup>116</sup>

Section 62(1) of the *Social Services Law* provides that, "...each public welfare district shall be responsible for the assistance and care of any person who resides or is found in its territory and who is in need of public assistance and care which he is unable to provide for himself".<sup>117</sup>

Finally, section 6041.0(b) of the New York City *Administrative Code* provides:

"It shall be the duty of the commissioner of or of the superintendent of any municipal lodging house acting under him, to provide for any applicants for shelter who, in his judgment, may properly be received, plain and wholesome food and lodging for a night, free of charge, and also to cause such applicants to be bathed on admission and their clothing to be steamed and disinfected."<sup>118</sup>

The plaintiffs also claimed that under the equal protection clause of the New York Constitution, the defendants could not, without a rational basis, provide assistance to poor persons who have homes while denying relief to those even poorer persons who lack an address.<sup>119</sup>

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114 *Ibid.* at 769, n. 97.

115 *Ibid.* at 770.

116 New York Constitution, Art. XVIII, 1.

117 Social Services Law, s. 62(1) (McKinney, 1983).

118 New York N.Y., Administrative Code, 6041.0(b), 1978.

119 Langdon and Kass, *supra*, note 7.

*Callahan v. Carey* was a significant victory for the homeless in its affirmation of a positive duty to care. The standards for men's shelters established in *Callahan v. Carey* were subsequently applied to women's shelters in *Eldredge v. Koch*.<sup>120</sup> In 1986, the courts ruled against New York City's practice of denying emergency housing to families with children in *McCain v. Koch*.<sup>121</sup> Unfortunately, it has merely led to the creation of more hostels, so it is questionable whether or not the situation of New York's homeless has been appreciably improved by this litigation.<sup>122</sup> "The reputation of the shelters as crime-ridden, inhospitable, uninhabitable institutions which lack basic hygienic necessities, deters many potential applicants."<sup>123</sup>

Despite the success of the *Callahan* litigation, there are limitations to this approach that may suggest inapplicability on a wider scale. Not all states have statutes which could be interpreted to create a duty to provide for the homeless, and judges in other jurisdictions may be reluctant to interpret general statutory language to imply an enforceable right to shelter.<sup>124</sup> Further limitations on the effectiveness of litigation include the shortage of legal service resources, the barrier of justiciability, the time required to litigate an issue, and the difficulties faced in implementing and enforcing a remedy.<sup>125</sup>

In the *Callahan* litigation, the parties negotiated a settlement. In many cases, however, lengthy litigation may endanger cooperative efforts. Moreover, the responsibility for administering and regulating social services is often so fragmented among various agencies that no single defendant is capable of effectuating the relief.<sup>126</sup>

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120 *Eldredge v. Koch* (1982), 98 A.D. 2d 675 (1st Dept.).

121 *McCain v. Koch* (1986), 117 A.D. 2d 198 (1st Dept.).

122 Langdon and Kass, *supra*, note 7. While Langdon and Kass state that the shelters are generally conceded to provide minimally safe and decent lodging facilities, contrast this view with that of Mort, *supra*, note 105. Langdon and Kass also assert that the city has developed a number of additional programs including the renovation of vacant apartments to provide long term residences for some members of the homeless population. They note, however, that the City only provides approximately 7000 beds for the 36,000 homeless.

123 Malone, *supra*, note 113 at 773.

124 Mort, *supra*, note 105 at 946.

125 Langdon and Kass, *supra*, note 7 at 344.

126 *Ibid.* at 348.

Other litigation strategies in the U.S. have been related to mental health laws and adult protective services.<sup>127</sup> These strategies affect only the mentally ill and deinstitutionalized persons but are likely to be important because of the belief that the need of the general homeless population for shelter and the need of expsychiatric patients for community-based aftercare are so integrated that progress in one area would surely lead to substantial gains in the other.<sup>128</sup>

### C. CANADIAN LEGISLATION: THE ONTARIO SITUATION

*Callahan v. Carey* established that New York legislation created a responsibility for the state to provide shelter for the homeless. Unlike New York and many other American states, Canadian provinces do not have provincial constitutions. There are other statutes, however, which could be used to establish a right to assistance, and thus perhaps a right to shelter.

#### 1. The General Welfare Assistance Act (GWAA), R.S.O. 1980, c.188

There are no provisions in the GWAA or the Regulations which explicitly state that homeless people should not receive assistance. In fact, section 7(1) states,

"7(1) A municipality shall provide assistance in accordance with the regulations to any person in need who resides in the municipality and who is eligible for assistance."

Section 1(4) of Regulation 441 states,

"(4) Subject to subsection (5), an applicant or recipient shall be deemed for the purposes of the Act and this Regulation to reside or to have resided in the municipality, the territory without municipal organization or on the reserve, as the case may be, where he is or was ordinarily resident at the date of his application, so long as he remains in the municipality, territory or reserve, but where the applicant or recipient is a resident,

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127 See Rapson, "Right to Community Treatment", 16 Colum. J.L. & Soc. Prob. 193. For a conflicting view of the legitimacy of these means see: Ciampi, *supra*, note 106 at 540-544. Ciampi sees the use of protective services to get people off the streets as yet another infringement of their liberties, when a positive legislation creating rights to shelter would be more appropriate.

128 Mort, *supra*, note 105 at 949.

- (a) in a nursing home; or
  - (b) where the Director approves, in a hostel,
- the applicant or recipient shall be deemed to reside or have resided in the municipality, territory without municipal organization or on the reserve, as the case may be, where he is or was ordinarily resident other than in an institution, immediately before his admission to the nursing home or to the hostel.
- (5) For the purpose of subsection (4), a transient or homeless person shall be deemed to reside or have resided in the municipality, territory without municipal organization, or on the reserve, as the case may be, in which he applies for assistance."

These subsections indicate that there is not a required period of residency in the municipality which must be fulfilled in order to be eligible for assistance. This is consistent with Section 6(2)(d) of the *Canada Assistance Plan* which stipulates that provincial assistance plans which receive federal funding cannot require a period of residence in the province as a condition of eligibility.

These provisions make it clear that "transients and homeless persons" are eligible for assistance. Furthermore, in the GWAA Policy Manual, it is clearly stated that being transient does not render one ineligible: "Assistance to a transient or homeless person can not be refused on the basis that they do not have proper residence in the municipality" (emphasis added).<sup>129</sup> However, it is common in the Municipality of Metropolitan Toronto and a number of other municipalities for a homeless person to be denied ongoing welfare assistance because she or he does not have a permanent address. Someone without a permanent address may obtain emergency welfare no more than twice; ongoing emergency welfare or regular welfare is not available to homeless people. Applicants are expected to find a place to live and, if necessary, apply for regular welfare benefits.

Although denying homeless people assistance is contrary to the *Act* and Regulations, the practice is defended on the basis of the home visit requirement found in Regulation 441 at Section 8, subsection (9):

"(9) In determining the eligibility of an applicant who applies for assistance under subsection (1), the welfare administrator shall,

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129 General Welfare Assistance Policy Manual (Ministry of Community and Social Services, Toronto).



(a) make or cause to be made a visit to the home of the applicant for the purpose of enquiring into the living conditions and financial and other circumstances of the applicant ...unless the visit is dispensed with by the Director..."

In most cases involving an applicant who does not have a home, welfare authorities take the position that if a home visit cannot be done, the applicant cannot receive welfare. A question often raised by welfare workers when challenged on this policy is, "Where would we send the cheque if we didn't have an address?" or, "If we didn't require an address, how could we ensure that the recipient isn't getting welfare from another municipality?" Computer lists of welfare recipients should allow workers to deal with the latter concern.

The current practice is contrary to the law. In reading the *Act* and Regulations, welfare workers are giving s. 9(a) of Regulation 441 predominance over other sections of the *Act* and Regulations. Clearly the Regulations should be interpreted in a way that is consistent with, and gives effect to, the overall purpose of the *Act*. The purpose of the *GWAA* is to provide assistance to persons in need, and homeless persons are clearly among those contemplated by the legislative mandate.

The policy of denying assistance to homeless people could potentially be challenged through litigation. There are, however, numerous difficulties involved in undertaking litigation on behalf of a homeless person. The difficulties are largely related to the length of time involved in any litigation. It is difficult to encourage a client to remain without housing in order to pursue the litigation. Most clients will obtain some address and thereby become eligible for assistance. While it would still be possible to litigate regarding the assistance deemed before the client found housing, the time and energy required to follow through with the litigation may discourage many people from pursuing this option. Further, if the individual client's situation is resolved by settlement, no useful precedent will have been established for others.

## 2. Canada Assistance Plan (CAP) R.S.C. 196667, C. 45

The *CAP* states that the Federal government will enter into an agreement with any province to ensure that every person in need will be provided with adequate assistance. The agreements shall provide that the province will provide financial aid or other assistance to any person in need in an amount that takes into account his or her basic needs, budgetary requirements, and available resources, and will not

require a period of residence in the province as a condition of eligibility.<sup>130</sup> Budgetary requirements are defined in s. 2(a) as food, shelter, clothing, fuel, utilities, household supplies, and personal requirements.

Arguably, when provincial regulations contain eligibility criteria that prevent homeless people from receiving assistance when they are otherwise in need, the province is violating the terms of the CAP agreement.<sup>131</sup> Alternatively, it could be argued that the Federal Government is making payments unlawfully. This was the position taken by the plaintiff in *Finlay v. Minister of Finance*.<sup>132</sup>

Finlay is seeking a declaration that certain payments under the *Canada Assistance Plan* by the Minister of Finance to the Province of Manitoba were illegal. He alleges that the payments lacked statutory authority because the Province of Manitoba was not providing the standard of social assistance to poor persons that was required by the CAP.

The Federal Government sought to have Mr. Finlay's statement of claim struck on two grounds: first, that he did not have legal standing to pursue the case; secondly, that his claim disclosed no reasonable cause of action. The Supreme Court of Canada rejected both of these arguments.<sup>133</sup>

Speaking for a unanimous court, Mr. Justice LeDain held that a private citizen does have standing to sue for a declaration that social assistance payments made from the Consolidated Revenue Fund are illegal on the ground that they are not made in accordance with statutory authority. In order to establish standing, a person need only show that he or she has a genuine interest in the issue, that the issue is a serious one and that there is no other way to bring the matter to court.<sup>134</sup>

Patrick S. Riley, Mr. Finlay's lawyer, asserts that the case will probably have a direct impact on Canada's social assistance programmes. Coupled with the *Charter*, it provides the means to create national

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130 *Canada Assistance Plan Act*, S.C. 1966-67, c. 45.

131 "Laws are Clear but People are Left Cold, Hungry" (November 1986) *Canadian Human Rights Advocate*.

132 *Finlay v. Minister of Finance* (1983), 48 N.R. 126, per Thurlow J.

133 *Finlay v. Minister of Finance* [1986] 2 S.C.R. 607.

134 Philip Cramer, "Citizen May Try to Enforce Federal-Provincial Agreement", *The Lawyers Weekly*.

standards for welfare assistance.<sup>135</sup> While advocates of federal involvement want the federal government to "take a leadership role in developing social policy initiatives, to deal with regional disparities, and to set national standards which will limit the powers of the provinces (in practice, although not constitutionally) to establish programmes different from the national models",<sup>136</sup> their opponents may gain support from the 1987 Constitutional Accord (the "Meech Lake/Langevin Block agreement"). Section 106a of the Accord will allow provinces to not participate in federally established national cost-sharing programs without loss of federal funding as long as the corresponding provincial program is "compatible with the national objectives".<sup>137</sup> Despite the provision in s.106(a)(2) stating that this section does not extend the legislative powers of either level of government, "most commentators have viewed the intent as a limiting of the federal role in social policy and related fields previously achieved through spending powers".<sup>138</sup>

The *Finlay* decision may initiate closer scrutiny of provincial spending of federal funds between different municipalities and prevent the shuttling of homeless people from one municipality to another. On the other hand, the Meech Lake agreement may permit provinces to provide different standards of assistance as long as "national objectives" are met.<sup>139</sup> Comprehensive federal legislation is being called for in the United States on the basis that the problem of homelessness is well suited to a solution at the federal level because the problem is national in scope. "Its roots are linked to national phenomena which stretch beyond the borders of one state or one region of the country."<sup>140</sup> It remains to be seen whether or not the federal government's responsibility over "peace, order, and good government" will prevent the ero-

135 Riley, "Welfare Recipients Handed a Big Stick" *The Lawyers Weekly*, Vol. 6, No. 35, (23 January 1987) at 24.

136 Beatty, "Federal Provincial Fiscal Arrangements: Their Impact on Social Policy and Current Prospects for Reform" (1988) 3 J.L. & Social Pol'y 36 at 61.

137 *Constitutional Amendment*, 1987, s. 7.

138 Beatty, *supra*, note 136 at 63.

139 For example, provinces may adopt different definitions of "homelessness" or "employable" which would have an impact on the amount of benefits provided while not necessarily deviating from the national objective of income support to those in need.

140 Langdon and Kass, *supra*, note 7, p. 349. See also Strauss and Tomack, *supra*, note 8 at 551.

sion of its ability to set national standards for social assistance programmes in the face of the Meech Lake Agreement.

#### D. THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

By means of its protection of equality rights and the right to life, liberty and the security of the person, the *Charter* may be a means to construct a right to shelter for the homeless. While no right to shelter has been found within the Constitution of United States,<sup>141</sup> significant differences between the *Charter* and the American *Bill of Rights* and the judicial history of the two countries means that the *Charter's* potential to assert rights for the homeless may not be limited to the American experience.<sup>142</sup> The following section discusses potential *Charter* litigation on behalf of the homeless under sections 12, 15, and 7.

##### 1. Section 12 – Cruel and Unusual Punishment

This section, preventing cruel and unusual treatment or punishment provides a potentially innovative strategy for combatting overcrowding and other adverse conditions in shelters. In Toronto, deplorable conditions in shelters are driving people onto the streets. The Inquiry into Health and Homelessness reported a number of serious deficiencies in hostel cleanliness, food quality, safety, space as well as suggestions of staff arbitrariness, abuse and intimidation.<sup>143</sup>

The majority of cases under s. 12 have been decided in the context of prison situations. However, some general principles could be useful in trying to improve hostel conditions through *Charter* litigation. One case holds that "treatment" must be in accordance with standards of public decency and applied according to "ascertainable" standards.<sup>144</sup>

While there is no American precedent for this approach, it should be noted that in New York, the Callahan decision mandated a right to shelter and the establishment of minimum standards that "would at

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141 See *Williams v. Barry*, (1983), 708 F. (2d) 789, 792 (D.C. Cir.). Judge Bork, concurring in the decision noted that "(n)o one has plausibly maintained that there is a constitutional or other legal right to city provided shelter." See also: *Mort*, *supra*, note 105 at 943-944.

142 *Id.* at 1.

143 "Report of the Inquiry into the Effects of Homelessness on Health", *supra*, note 8 at 12.

144 *Re Soenen and Thomas* (1983), 8 C.C.C. (3d) 224 (Alta. Q.B.) at 235. See also *Weatherall v. A.G.* (9 June 1987), (F.C.T.D.) [unreported] (Strayer J.).

least make shelters a cut-above living on the streets",<sup>145</sup> as one American advocate put it.

## 2. Section 15

"s. 15 (1) Every individual is equal before and under the law and has the right to the equal protection and benefit of the law without discrimination and, in particular, discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

The main issues in the interpretation of this section in the context of equality rights for the homelessness are: whether s. 15 guarantees a basic level of economic equality; the requirements s. 15 imposes regarding the distribution of government benefits; and how the "equal protection" component may assist the homeless.

### (a) s. 15 and Economic Equality

Whether the equality provisions in the *Charter* should extend to provide everyone with a level of basic economic security has been a question of considerable debate. The language of s. 15 is broad and malleable enough to support a number of interpretations.<sup>146</sup> The traditional approach would require only procedural equality, ensuring everyone "equality of opportunity" and political rights rather than economic substantive rights. The American Fourteenth Amendment has been interpreted in this way so that systemic economic inequalities do not abridge the right to equal protection.<sup>147</sup>

One key factor in s. 15 litigation to date has been the definition of equality adopted by the courts: treating likes alike.<sup>148</sup> To benefit from s. 15's protection the affected person must establish that she or he is

145 Robert Hayes, "Litigating on Behalf of Shelter for the Poor" (1987) 22 *Harvard Civil Rights Civil Liberties Law Review* 79. Hayes outlines standards that are now in place, like three feet between beds, and a shower for every fifteen residents.

146 N. Colleen Sheppard, "Equality, Ideology and Oppression; Women and the Canadian Charter of Rights and Freedoms" in Boyle et al., eds., *Charterwatch: Reflections on Equality*, (Toronto: 1986) at 223.

147 James Hathaway, "Poverty Law and Equality Rights" (1985), 1 *J.L. & Social Pol'y* 1 at 7-10.

148 See for example *Re McDonald and The Queen* (1985), 21 D.L.R. (4th) 497 (Ont. C.A.) (leave to appeal to S.C.C. refused); *Re Andrews and Law Society of British Columbia* (1986), 27 D.L.R. (4th) 600 (B.C.C.A.); *Bregman v. Attorney General of Canada* (1986) 57 O.R. (2d) 409 (C.A.).

similarly situated to the group receiving the benefit. The benefit may be a monetary benefit such as a veteran's allowance,<sup>149</sup> the right to practice a profession,<sup>150</sup> or the grounds for discharge of a criminal offence.<sup>151</sup> Lawyers litigating on behalf of the homeless should meet with success in cases involving equality between homeless persons (for example homeless women and homeless men, homeless youths and homeless adults) especially where the difference between the two groups is one of the enumerated grounds under s. 15.

Difficulties will arise, however, where the success of the case depends on the acceptance of a homeless person as being similarly situated to a person with accommodation. Not only is homelessness not a protected ground under s. 15, but the fact of homelessness itself may be sufficient to distinguish the two groups in the minds of the courts, notwithstanding the fact that it is the disputed issue. Further, equality in itself does not necessarily imply a specific standard of services or treatment. For example, treating homeless men and women equally may be achieved both by opening more shelters for women and by closing some of the shelters for men.<sup>152</sup>

In a discussion of s. 15 in terms of its impact on social assistance, Sandra Wain states:

"The equality guaranteed by section 15 (and by the *Human Rights Code*) appears to be a modified form of equality of opportunity. Although it does permit some check on prevailing values, its main purpose is to permit individuals to compete on a more equal basis within existing value structures. The government is authorized to do more in the name of equality under s. 15(2) but is not required to do so."<sup>153</sup>

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149 Bregman, *ibid.*

150 Andrews, *supra*, note 148.

151 *R. v. Hamilton* (1986), 17 O.A.C. 241 (leave to appeal to S.C.C. refused).

152 See for example the B.C. government's response to the result in *Silano v. R.* (1987), 16 B.C.L.R. (2d) 113 (S.C.). After the court struck down a distinction based on age, the government raised the level of welfare payments to those under 26 and decreased the payments to those over 26 so that both groups would receive the same amount. The court upheld a distinction based on a definition of employability of the recipient as defined by the government.

153 Wain, "The Impact of the Charter of Rights on Social Assistance" (paper prepared for the Social Assistance Review Committee, Report Document #RD 28, May 1988) [unpublished] at 86. Note: s. 15(2) is the "affirmative action"

A potential test case regarding the right to shelter might therefore focus on the denial of equality of opportunity to those who are homeless. Health problems,<sup>154</sup> lack of employment opportunities<sup>155</sup> and children's learning difficulties<sup>156</sup> are directly related to homelessness and thus deny homeless people the equality of opportunity protected by s. 15 of the *Charter*. Although such litigation, if successful, would not necessarily establish a right to shelter *per se*, it could have that indirect result because the provision of shelter would remedy the problem noted above.

In Canada it has been argued that analysis of equality under the *Charter* requires a purposive or equality-promoting approach to ensure substantive equality, or equality of outcome, for "the powerless, excluded and disadvantaged."<sup>157</sup> In the poverty law context this might be characterized as an ironclad government assurance that everyone is entitled to a subsistence level of economic security or the right to adequate shelter.<sup>158</sup>

A number of arguments can be put forward in support of the view that s. 15 does establish a right to some degree of economic equality. The *Charter* guarantees equality before the law, equality under the law and equal benefit of the law in addition to equal protection which is the sole guarantee under the Fourteenth Amendment. Our courts thus need not be constrained by American precedent. It has also been asserted that "a more progressive interpretation of the equality rights

clause which permits different treatment where needed to ameliorate the conditions of disadvantaged groups.

154 "Report of the Inquiry into the Effects of Homelessness on Health", *supra*, note 8.

155 "Say you're staying at the Salvation Army and you apply for a job,...As soon as you give that address, they won't even look at you." Nichols and Finlayson, *supra*, note 7 at 39.

156 "Report of the Inquiry into the Effects of Homelessness on Health", *supra*, note 8 at 5.

157 Factum of the Women's Legal Education and Action Fund for *Andrews v. Law Society of British Columbia* (S.C.C) (on appeal from the Court of Appeal for the Province of British Columbia) at 13.

158 Charter of Rights Educational Fund, "Report on the Statute Audit Project" (manuscript, Toronto, 1985) [unpublished] at 6.7. The Report suggests an alternate approach to finding economic rights in s. 7 - the "relative equity approach" whereby there would be a right to full equity in society's income and resources.

provision would be in line with the international tendency to define the principle of nondiscrimination in both political and economic terms".<sup>159</sup> The assumption underlying the substantive view is that political rights such as free speech are meaningless to a person without any economic security who is struggling for basic survival.

Will this "post-liberal"<sup>160</sup> vision of equality be embraced by Canadian courts? Although economic rights have been discussed under s. 7, it appears that no court has yet grappled with the profound issue of economic equality under s. 15. There are many reasons to doubt that courts will recognize such rights. The implications of finding such a right are both far-reaching and threatening to those who benefit most from current socio-economic arrangements.<sup>161</sup> The Ontario government has already indicated that it would argue stridently against a constitutional right to demand government benefits if the government does not offer them.<sup>162</sup> Furthermore, even if a court was willing to recognize the right to economic subsistence, s. 1 may well be used to justify a government's failure to provide for basic needs. As one commentator notes, "it may logically be argued that a right to economic equality is fundamentally inconsistent with the values of a free and democratic society".<sup>163</sup>

While the "post-liberal" interpretation of s. 15 is at least conceptually possible, perhaps these practical obstacles have discouraged poverty lawyers from raising it. However, at a time when courts are still considering equality theories, it is important for advocates to persistently urge courts to accept the concept of a *Charter* guarantee of economic equality. Two proponents of this approach both conclude that if advocates insist on substantive interpretations of equality provisions, the courts will be forced to confront fundamental socio-economic structures.<sup>164</sup> Also, by repudiating classic liberal notions of equality, advocates will sensitize and educate others, particularly judges, about the root causes of inequality.<sup>165</sup>

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159 Linda Gehrke, "The Charter and Publicly Assisted Housing" (1985) *J.L. & Social Pol'y* 17 at 18.

160 Sheppard, *supra*, note 146 at 196.

161 Hathaway, *supra*, note 147 at 6. The author raises the theory that lawyers themselves have a stake in the continuation of the socio-economic status quo.

162 Province of Ontario, Ministry of the Attorney General, *supra*, note 98.

163 Hathaway, *supra*, note 147 at 14.

164 *Ibid.* at 15; Sheppard, *supra*, note 146 at 223.

165 Hathaway, *supra*, note 147 at 15.



Advocates for the homeless should be encouraged, then, to consider framing the question in an action on behalf of the homeless both as one of equality of opportunity and as one of economic equality, given that homelessness is arguably the most dramatic evidence that our conventional views of equality are increasingly and literally leaving people in the cold.

#### **(b) s. 15 and Distribution of Government Benefits**

Asserting a positive right to a government benefit may be a tough task. Once the government has offered a benefit, what does s. 15 mandate? It is clearly established that "equal benefit of the law" requires that once government offers a benefit, that benefit must be assigned fairly, in accordance with s. 15.<sup>166</sup> Therefore, everyone is entitled to equal benefit of the law without discrimination on enumerated grounds such as sex, national origin, etc. and arguably also on non-enumerated grounds such as homelessness or poverty.

##### **(i) Challenging Discrimination in Government Benefits on Enumerated Grounds**

Several government programs are open to s. 15 challenge if they discriminate on the basis of an enumerated ground such as sex, or mental or physical disability. This section discusses discrimination on these grounds in the funding of emergency shelter and subsidized housing.

#### **Government Funding of Emergency Shelter**

Despite increased government funding for battered women's shelters, governments at all levels are blatantly discriminating against women in the funding of general emergency shelter. One vivid example occurred in Ottawa just before Christmas, 1987.<sup>167</sup> The provincial government funded two downtown men's shelters to stay open 24 hours a day, 7 days a week. There was no similar provision for women's shelters. Consequently, women in emergency shelter were forced onto the streets by day and on weekends, when shelters closed. Fortunately, intense political pressure forced the municipal government to give

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166 Province of Ontario, Ministry of the Attorney General, *supra*, note 98 and *Catherine Paul and David Wright v. The Registrar General, Vital Statistics Act and the Minister of Consumer and Commercial Relations*, (9 December 1985), Judgment without written reasons, Toronto #2618/85 (Ont. S.C.) [unreported], a decision extending the right of married women to give a baby a mother's surname.

167 See *supra*, note 84.

money to one women's shelter to extend its hours. The government stated "it did not know women were desperate."<sup>168</sup>

Reports from other cities document that the "lion's share" of public funding is going to emergency shelter for men. A 1987 study shows that, in Montreal, men had access to 625 beds in shelters, while women had only 77 beds at their disposal.<sup>169</sup> The study noted that "there is a lack of resources and that men in the same circumstances have received more attention from decision-makers."<sup>170</sup>

It is doubtful that women in Toronto are faring any better. Seaton House, an all-male hostel in Toronto, can accommodate 800 men. This is 300 more than the *total* number of shelter beds available for women in this city.<sup>171</sup>

The shocking disparity in funding may not be intentional discrimination. It probably reflects the widely-held stereotype of the homeless as the single male "the skid-row alcoholic, the hobo riding the rails, the transient labourer".<sup>172</sup> Yet, as outlined earlier, women are particularly vulnerable to homelessness. Consequently, the gap in funding for women's shelters could be the basis of a compelling *Charter* challenge. In fact, it is arguable that s. 15 (2), allowing "any law, program or activity that has its object the amelioration of conditions of disadvantaged individuals or groups..." gives constitutional approval for greater funding for the benefit of women.

Furthermore, government-funded shelters which have seemingly "open" admission policies may also be exposed to a s. 15 challenge on the basis of sex, if the *effect* is to deny women access. Shelters which do not allow children or shelters which require women to undergo gynecological examinations (the latter is apparently occurring in the United States<sup>173</sup>) fall into this category.

168 "National Report on Welfare" (January 1988) IV Canadian Human Rights Reporter at 8.

169 Canadian Advisory Council on the Status of Women, *Housing for Canadian Women: An Everyday Concern* (March 1987) [unpublished] at 11.

170 *Ibid.*

171 Nicols and Finlayson, *supra*, note 7 at 43.

172 Patricia Siebert, "Homeless People: Establishing Rights to Shelters" (1986) 4 *Law and Inequality* 393 at 394.

173 This practice was outlined in an article by F. Werner, "On the Streets: Homelessness Causes and Solutions" (1984) 18 *Clearinghouse Review* 14.

Similar s. 15 challenges can be waged on behalf of other protected groups. One glaring example is that almost none of the shelters in Toronto are accessible to people in wheelchairs,<sup>174</sup> and thereby may be in violation of s. 15. Mentally disabled people in dire need of shelter are also being excluded from publicly-funded beds. Because they lack facilities and staff, many shelters have policies of barring "difficult" people.<sup>175</sup> The tragic vulnerability of people denied use of shelter facilities was dramatized by the recent case of Drina Joubert who froze to death in the back of an abandoned truck. She had been "black-listed" by every shelter in Toronto. The Report of the Ontario Task Force on Roomers, Boarders and Lodgers pointed to Drina Joubert's death as an indication that the "bureaucracy designed to help the most disadvantaged among us has become unresponsive to the people it was created to serve", and recommended a "first worst" policy of helping those in greatest need.<sup>176</sup> Clearly, a *Charter* challenge to this unresponsiveness would help to move toward this objective.

### Housing Policy

An in-depth analysis of complex provincial and federal housing policies goes beyond the scope of this paper. However, this section outlines a number of potential *Charter* challenges which may warrant further study.

### Federal Programs

The Canada Mortgage and Housing Corporation (CMHC) changed its policies in 1985 to "target social housing to the core needy",<sup>177</sup> yet most housing advocates feel that the new eligibility requirements severely limit access to subsidized housing for the people who need it most.<sup>178</sup> Under CMHC, individuals must

- 1) meet income limits set by CMHC and
- 2) pay 30% or more of their income for adequate housing or pay less

174 Interview with Gina Bryant, Intake Worker, Advocacy and Resource Centre for the Handicapped (ARCH), Toronto, March 21, 1988.

175 Ontario Task Force on Roomers, Boarders and Lodgers, *supra* note 7 at 53.

176 *Ibid.* at 55.

177 Bob Warne, Vice President CMHC, "The New Federal Programs and their Application", (1986 87) 5 *Canadian Housing* 23.

178 Canadian Advisory Council on the Status of Women, *supra*, note 169 at 27.

than 30% but live in inadequate housing for the appropriate rent levels.<sup>179</sup>

The Canadian Advisory Council on the Status of Women reports that these eligibility requirements exclude substantial numbers of needy people whose incomes are too high to qualify for assistance, but too low to afford to spend less than 30% of their income on housing.<sup>180</sup> The Advisory Council also notes that the CMHC does not consider the average cost of rental units, vacancy rates or quality of available units in determining eligibility in a given region. Also, the CMHC takes into account the number of individuals in a unit, but not the social makeup, age, sex or relationship of the occupants. Furthermore, only 10% of CHMC units have been committed to "special needs" groups, including battered women.<sup>181</sup>

It is essential that the impact of CHMC policies be closely documented. It may well be that certain groups, such as women and the elderly are being disproportionately excluded from CMHC programmes.

### Ontario Housing

As of January, 1988, Ontario Housing Corporation (OHC) expanded its eligibility to single persons (with or without dependent children)<sup>182</sup> and to persons 16 to 18 years old.<sup>183</sup> Battered women with children have been recognized as a group needing top priority (although the requirements for proving battery are onerous.)<sup>184</sup>

Despite these long-awaited changes, many OHC policies effectively discriminate against certain groups and may be in violation of s. 15. Briefly, here are examples:

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179 *Ibid.* at 27.

180 *Ibid.* at 28.

181 *Ibid.*

182 Ontario Housing Corp. Circular Letter No. 88-1, (4 March 1988) (updating the Field Manual).

183 *Ibid.*, Circular Letter No. 86-10, (19 October 1987).

184 *Ibid.* Circular Letter No. 86-8, (5 September 1987). That policy circular states that in order to get "top priority" a battered woman must provide OHC with a verification letter from "someone working with her in a professional capacity" and a lawyer's letter indicating that she has an interest in separating permanently (through the institution of Court proceedings and the opinion of the lawyer regarding the seriousness of the woman's intent).

1. Sponsored immigrants are eligible only if they are in receipt of guaranteed income from any source, which at least equal benefits under GWA or FBA.<sup>185</sup> This might be challenged as discriminatory on the basis of national origin.
2. Transfer policies include "transportation problems" as a basis for transfer. However, inaccessibility to day care is not considered a transportation problem.<sup>186</sup> Obviously, this has an adverse impact on women.
3. When allocating units, housing authorities are given discretion to deny housing if a person was previously evicted from any rental accommodation because of "anti-social" behaviour.<sup>187</sup> This could potentially exclude mentally ill applicants.
4. OHC practice, although contrary to its own policy, is not to renovate units to accommodate handicapped persons.<sup>188</sup>
5. OHC will not provide units to persons who have outstanding arrears for previous rent-geared-to-income housing.<sup>189</sup>
6. An OHC directive states that even though battered women with children are to get "top priority" status, the worker should wait 3-4 weeks from the time they receive the woman's initial application before offering a unit in order to allow additional time to be sure of her intent to separate permanently.<sup>190</sup> This "delay" factor is not applied to males and should be challenged under s. 15 as sexual discrimination. OHC should consider that the delay itself is forcing women back into abusive situations.

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185 *Ibid.*, Circular Letter No. 86-9, (10 October 1986).

186 *Ibid.*, Field Manual No. 1, "Transfer Policies, 1983".

187 *Ibid.*, Circular Letter No. 86-11, 1986.

188 Interview with Gina Bryant, *supra*, note 174. ARCH has been pressuring OHC to follow through on its policy to renovate, after a recent coroner's inquest into the death of a wheelchair-bound OHC resident through infection. She repeatedly fell in her apartment and acquired a fatal infection. The lack of "grab bars" in the apartment was one of the reasons the Coroner stated that the woman's environment did not allow her to live to its fullest capacity.

189 Ontario Housing Corp. Circular Letter No. 86-11, 1986.

190 *Ibid.*, Circular Letter No. 86-8, (5 September 1986). OHC justifies this policy by stating that it "is estimated that processing will take that long anyway."

*Charter* litigation on such issues may help to challenge OHC policies which inadvertently exacerbate homelessness.

### (ii) Discrimination in Government Benefits on the Basis of Non-enumerated Grounds

Homelessness, unlike sex or mental disability, is not an enumerated ground under s. 15. In order to fight discrimination based solely on a person's condition of homelessness, advocates will have to show that it should be an included ground.

American courts have flatly rejected poverty or wealth as a basis of analysis under the Fourteenth Amendment.<sup>191</sup> An American commentator speculates that homeless people stand little chance of inclusion in the Fourteenth Amendment since they are not a homogeneous group.<sup>192</sup>

Canadian courts have not yet been asked to consider homelessness as a protected ground. However, the wording of s. 15 clearly intends that the list of enumerated grounds not be exhaustive. Further, even though the homeless originate from diverse backgrounds, homelessness is akin to presently protected grounds, in terms of stigmatization, prejudice, disadvantage and powerlessness.<sup>193</sup> The following section discusses discrimination on the basis of homelessness in subsidized housing and municipal laws.

### Housing Discrimination Against the Homeless

With homelessness recognized as a ground under s. 15, the *Charter* would be valuable in striking down OHC policy which treats homeless applicants unfairly. Specifically, in ranking applicants according to need, OHC creates an anomalous and unfair situation of giving a person a higher ranking if they apply from a hostel, compared to if they applied directly from the streets.<sup>194</sup> The assessment is also done on the

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191 Inez Smith Reid, "Law, Politics and the Homeless" (1986) 89 West Virginia Law Review 115 at 135-139.

192 *Ibid.* at 139.

193 Callwood "No Regional Boundaries For Poor" *The [Toronto] Globe and Mail* (21 November 1987). "Whatever else may unify a nation of such disparate pieces as this one, it is clear from a journey across the country that the poor have no regional boundaries. They occupy one country, poverty, and wherever they may happen to live, whatever their age, or the language they speak, the similarities in their skewed lives unite them and make them one country, indivisible."

194 Province of Ontario Task Force on Roomers, Boarders and Lodgers, *supra*, note 7 at 139.

basis of a home visit which could be used to exclude the homeless, in a similar manner as previously described regarding GWA benefits.

### Municipal Treatment of the Homeless

In the United States, there is a frightening wave of municipal attempts to drive the homeless from some cities. In Santa Barbara, it was declared illegal for the homeless to sleep at night in a public place,<sup>195</sup> and in Phoenix, city leaders campaigned to eliminate "unacceptable behaviour" of street people by circulating an advertisement of a man sleeping on a bench with a line through it.<sup>196</sup> Similar human "sweeps" have been tried in other cities in an effort to "get the transients the hell out of town".<sup>197</sup>

In New York City, Mayor Koch's "Project Help" is intended to hospitalize and drug homeless people believed to be mentally ill. In the fall of 1987, the project's original mandate (to commit those who posed an immediate threat to themselves or others) was expanded to permit the committal of those who could become a threat in the foreseeable future.<sup>198</sup> Joyce Brown, the "first victim" of Project Help, won her release from Bellevue Hospital on January 19th, 1988, after three months of fighting city authorities.

"According to Joyce Brown, if she was crazy, Project Help had driven her crazy. She was taken in handcuffs to Metropolitan Hospital several times. They harassed her for months, keeping her under surveillance and sending people over to talk to her and pretend they wanted to be her friend."<sup>199</sup>

Richard Surles, New York State's mental health commissioner wants to "make it harder for the system to lose the Joyce Browns".<sup>200</sup> The January 25, 1988 *New York Times* reported that Surles proposes the creation of "a corp [sic] of 'case managers' to seek out desperate 'patients' wandering

195 Peter Marin "Helping and Hating the Homeless. The Struggle at the Margins of America" 274 *Harper's* 39 (January 1987) at 39. Political outrage forced Santa Barbara to withdraw these ordinances.

196 S. Strauss and A. Tomback, *supra*, note 8 at 557.

197 *Id.* a campaign promise by the Mayor of Tuscon, 1983.

198 Scott "NYC v. Joyce Brown" in (1988) 7 *Phoenix Rising* No. 4, 7 at 7-8.

199 *Ibid.* at 9.

200 *Ibid.* at 11.

the streets, follow them, persuade them to come in for 'treatment' and make sure they take medication. Each case manager could draw upon \$4,000.00 per year per 'client' in state funds."<sup>201</sup>

In Toronto, efforts were recently made to prevent street people from sleeping in Nathan Phillips Square.<sup>202</sup> Property-owners are also looking for loopholes in zoning laws to prevent the establishment of group homes, low-income housing and shelters in certain neighbourhoods.<sup>203</sup> Furthermore, municipal bylaws limit the number of unrelated persons living together in single family dwellings, in blatant disregard for a 1979 Supreme Court decision which held that such bylaws are "oppressive, unreasonable and beyond the powers of a municipality."<sup>204</sup>

If it were successfully argued that s. 15 protects homeless people, these municipal tactics would be in clear violation of the *Charter*.

### (c) Using s. 15 to Enforce Protective Legislation

Much current legislation indirectly protects people from being thrust into homelessness. The Ontario *Human Rights Code*, for example, prohibits discrimination on certain grounds with regard to rental accommodation.<sup>205</sup> The *Code* has recently been amended to prohibit discrimination by landlords against welfare recipients.<sup>206</sup> In addition, the *Code* contains specific protections against adult-only accommodation<sup>207</sup> and against sexual harassment by landlords,<sup>208</sup> both practices which contribute to women's homelessness. Other protective legislation includes tenants' rights under the *Landlord and Tenant Act* and City health and safety ordinances.

It has been observed that the police, health inspectors, and other "enforcers" turn a selective blind eye to offences under these acts.<sup>209</sup> People in poverty do not have the political clout to press for enforce-

201 *Ibid.*

202 Interview with Toronto Police bylaw officer, 52 Division, March 20, 1988.

203 Ontario Task Force on Roomers and Boarders, *supra*, note 7 at 150.

204 *Ibid.* at 50. The Municipality in question was North York.

205 Ontario *Human Rights Code* R.S.O. 1981 c. 53, s. 2.

206 R.S.O. 1981 c. 53 s. 2(1) as am. 1986 c. 64, s. 18.

207 R.S.O. 1981 c. 53, Bill 7.

208 R.S.O. 1981 c. 53, s. 6(1).

209 Province of Ontario Task Force on Roomers, Boarders and Lodgers, *supra*, note 7.



ment of their rights. Section 15, with its guarantee of "equal protection of the law", should be used as a tool to force officials to enforce such protective legislation equitably.

Similarly, advocates must consider whether institutionalization or treatment under the *Mental Health Act* is being used against people simply because they are homeless. At a recent Inquiry on Health and Homelessness, a woman without shelter stated, to resounding applause, that the homeless cannot express their frustrations for fear of being "suspect psychiatrically".<sup>210</sup> This suggestion by no means contradicts the fact that many homeless people need and want supportive mental health services, but they should have access on the basis of need, not on the basis of homelessness.

### 3. Section 7

s. 7 "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

Two possible avenues exist for asserting that Section 7 contains a right to shelter: the "entitlement" approach and the "positive duty" argument.

#### (a) The Property Rights or "Entitlement" Approach

In the United States, the constitutional protection of property rights permits advocates on behalf of the homeless to argue that denial of shelter is a denial of a property right.

The provisions of the Fifth and Fourteenth Amendments, both in part state that no person shall be "deprived of life, liberty or property without due process of law". The American Supreme Court employed the concept advanced in Charles Reich's "The New Property"<sup>211</sup> to develop a requirement of due process in the administration of welfare programmes by characterizing them as an "entitlement" or "property right". In *Goldberg v. Kelly*,<sup>212</sup> the Court held that persons who qualify for aid programmes acquire a legally protected property interest in their benefits which cannot be taken away without due process of law.

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210 "Report of the Inquiry into the Effects of Homelessness on Health", *supra*, note 8 at 6.

211 Charles A. Reich, "The New Property" (1964) 73 Yale L.J. 733.

212 *Goldberg v. Kelly* (1970), 387 U.S. 254, per Brennan, J.

In *Williams v. Barry* the court was asked to find that the plaintiff had a protected property interest in the continued occupancy of their shelter, which the city proposed to close in order to reduce expenditures. This alleged entitlement to a property interest was based on a "state-fostered expectation" derived from a "deliberate, consistent act...".<sup>213</sup>

Geoffrey Mort explains that the concept of entitlements, as interpreted by the courts, recognizes government benefits as protected interests, the expectation of which may be based upon "mutually explicit understandings" between government and the recipients of those benefits. The concept is similar to that of promissory estoppel in that it refers to an individual's expectation that a government benefit will not be discontinued because state action had led her or him to depend upon it.<sup>214</sup>

Can the entitlement theory be applied in Canada? The question turns on whether property is implicitly included in s. 7 since s. 7, unlike its American counterparts, does not specifically include property. The Canadian caselaw tends to support the view that s. 7 does not include property rights.<sup>215</sup> While Philip Augustine concludes that the Canadian caselaw provides little support for the implied inclusion of property rights under s. 7, he argues that Canada should "join the other western democracies and return to its own legal tradition by providing constitutional protection for property rights".<sup>216</sup>

Advocates for the homeless would be ill-advised to support the protection of property rights under s. 7. First, to do so would be a rather roundabout way of establishing a right to shelter. If the courts were to go against existing caselaw to include property rights under s. 7, it would still be necessary to convince the courts to accept Reich's concept

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213 *Williams v. Barry* (1983), 708 F. 2d 789. Note that the argument based on entitlement was not accepted by the Court of Appeals in this case. This is one of the cases which caused an erosion of the usefulness of the entitlement concept.

214 Mort, *supra*, note 105 at 958.

215 See for example: *Bertram S. Miller v. R.* [1986] 3 F.C. 291 (C.A.); *Becker v. Province of Alberta* (1983), 45 A.R. 36 (C.A.); *Re Workers' Compensation Board of Nova Scotia and Costal Rentals, Sales and Services Ltd.* (1983), 12 D.L.R. (4th) 564 (N.S.S.C.); *Smith, Kline & French Laboratories Ltd. v. Attorney General of Canada* (1985), 34 D.L.R. (4th) 584 (Fed. C.A.), (leave to appeal to S.C.C. refused April 9, 1987).

216 Philip Augustine, "Protection of the Right to Property under the Charter of Rights and Freedoms" (1986) 18 *Ottawa Law Review* 55 at 70.

and therefore rule that the expectation of shelter constitutes a property right. This will be particularly difficult given the fact that Canadians lack the factor which has been a key element of the success in the New York litigation on behalf of the homeless: a provision in the state constitution which reads "the aid, care, and support of the needy, is a public obligation".<sup>217</sup> The remarks of Robert Hayes, founder and counsel for the National Coalition for the Homeless, reveal that the result in the landmark case *Callahan v. Carey*<sup>218</sup> was by no means a foregone conclusion. Although the constitutional duty quoted above had been part of the state constitution since 1938, the right to shelter was not recognized by New York State Supreme Court until 1979. Further, as Hayes states, "the entire legal analysis buttressing the decision is contained in a single sentence in the footnotes, and...the enlightened jurist who found this right to shelter referred to our homeless clients in the same opinion as 'flotsam and jetsam'".<sup>219</sup>

The second difficulty with an attempt to follow the American example is the potential problem that the protection of property rights could create for homeless (and potentially homeless) people. Tenants could lose their homes if the legislation limiting property owners' ability to evict tenants, raise rent, and convert property were struck down as offensive to constitutionally protected rights.

Attempting to establish a right to shelter by means of entrenching property rights in the *Charter* is thus an unacceptable approach for advocates for the homeless. Not only is it an indirect approach with a significant possibility of failure, but it could lay the foundation to vastly increase the numbers of homeless people. While the protection of property rights may mean that such people will then have a right to shelter, it will have been necessary to assert that right only because property owners' assertion of property rights has deprived them of their homes.

#### **(b) s. 7 and the Positive Duty of Government to Provide Shelter**

Intuitively, s. 7 appears promising for the establishment of a *Charter* right to shelter. In many ways, homeless people are marginalized to such an extent that they have been deprived of the essentials for

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217 Hayes, *supra*, note 145 at 79.

218 *Supra*, note 112.

219 Hayes, *supra*, note 145 at 81.

"life, liberty and the security of the person". As one youth without shelter aptly stated, "this isn't living; this is surviving".<sup>220</sup>

**(i) Shelter and Security of the Person**

In the recent Supreme Court of Canada decision, *R. v. Morgentaler*,<sup>221</sup> Dickson C.J.C. examined the meaning of "security of the person" as it relates to the protection of s. 7. The Court had previously held that the "loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work..." caused by a pending criminal accusation was covered by the phrase "security of the person" with regard to the right of a person charged with a criminal offence to be tried within a reasonable time.<sup>222</sup> Dickson C.J.C. expressed the opinion that such "state-imposed psychological trauma" was relevant to s. 7.<sup>223</sup>

The Ontario Court of Appeal decision in *R. v. Morgentaler*<sup>224</sup> was more specific in its discussion of s. 7:

"The right to choose one's partner in marriage, and the decision whether or not to have children, would fall in this category, as would the right to physical control of one's person, such as the right to clothe oneself, take medical advice and decide whether or not to act on that advice."<sup>225</sup>

In *R. v. Beare*,<sup>226</sup> Bayda C.J.S. held that "security of the person" involves "more than the integrity of an individual's body and its parts".<sup>227</sup> Security of the body and the mind involve "the dignity and worth of the human person".<sup>228</sup>

220 Chris, "Covenant House Report" CITY TV, Toronto, March 21, 1988.

221 *R. v. Morgentaler* [1988] 1 S.C.R. 30; 44 D.L.R. (4th) 385 [cited to D.L.R. ].

222 *Mills v. R.* quoted in *Morgentaler*, *ibid.* at 400.

223 *Ibid.* at 401.

224 *R. v. Morgentaler, Smoling and Scott* (1985), 6 O.A.C. 53, 22 D.L.R. (4th) 641 [cited to D.L.R. ].

225 *Ibid.* at 665.

226 *R. v. Beare* (1987), 56 Sask. R. 173 (C.A.).

227 *Ibid.* at 180.

228 *Ibid.* at 180-181.

While the above statements were made in the context of criminal trials, they find support in the noncriminal context in the judgment of Wilson J. in *Re Singh and Minister of Employment and Immigration*.<sup>229</sup> In that judgment Wilson J. stated that "the phrase 'security of the person' is capable of a broad range of meaning".<sup>230</sup> She quoted from the Law Reform Commission that "[t]he right to security of the person means not only protection of one's physical integrity, but the provision of necessities for its support"<sup>231</sup> and noted that the Commission adopted the first paragraph of article 25 of the Universal Declaration of Human Rights,<sup>232</sup> which includes housing, as its definition of "necessaries".<sup>233</sup> While Wilson J. refrained from concluding that the security of the person protected by s. 7 is necessarily as broad as the Law Reform Commission definition, she stated that, at the least, security of the person "must encompass freedom from the threat of physical punishment or suffering..."<sup>234</sup> She concluded by noting with approval a lower court decision which held that the likelihood that a person's health would be impaired was sufficient to constitute an infringement of his rights under s. 7.<sup>235</sup>

Advocates for the homeless must argue for the broadest possible definition of "security of the person". If the Universal Declaration of Human Rights were accepted as the definition of "security of the person", that right would automatically include a right to housing. Failing this, the right to shelter will have to be implied as a necessary precondition to the fulfillment of the rights already found to be included under s. 7.

The "loss of privacy, stress and anxiety" which Dickson C.J.C. included within the protection of s. 7 in *R. v. Morgentaler* is definitely one of the results of homelessness.<sup>236</sup>

229 *Re Singh and Minister of Employment and Immigration* [1985] 1 S.C.R. 177; 17 D.L.R. (4th) 422 [cited to D.L.R.].

230 *Ibid.* at 459.

231 *Ibid.* at 459-460.

232 See *supra*, note 93.

233 *Singh, supra*, note 229 at 460.

234 *Ibid.*

235 *Ibid.* at 460-461.

236 See section on "Chronic Stress" in "Report of the Inquiry into the Effects of Homelessness on Health" *supra*, note 8 at 5-6.

People who live on the street are constructively denied at least one of the rights listed by the Ontario Court of Appeal in *R. v. Morgentaler*: the right to take medical advice and to decide whether or not to act on the advice. Homeless people find Ontario's system of delivery of medical services virtually inaccessible. Many are unable to obtain an O.H.I.P. card for lack of identification and, once obtained, the cards are easily lost or frequently stolen along with other pieces of identification. They find it difficult to make appointments with physicians by telephone, can't wait for long periods in emergency (or they will miss meals at the city's soup kitchens), and are frequently unable to follow through with the treatment prescribed by the doctor because they lack the necessary facilities or access to transportation.<sup>237</sup>

The "dignity and worth" of the homeless person is under continual attack by the attitudes of hostel, hospital and social agency staff.<sup>238</sup> Loss of self-esteem is a common phenomenon among the homeless.<sup>239</sup>

The threat to health as a direct result of homelessness is well-documented. Homeless people suffer from a disproportionately high incidence of the following illnesses: cold injury (at times causing death); cardio-respiratory disease; tuberculosis; skin problems; nutritional disorders; sleep deprivation; and infectious diseases, especially diarrheal illnesses.<sup>240</sup>

Evidence such as that provided by the "Report of the Inquiry into the Effects of Homelessness on Health" will be a vital component of any action to establish a right to shelter. In *Operation Dismantle Inc. v. R.*<sup>241</sup> the plaintiffs failed to establish a causal link between the actions of the Canadian government and the alleged violation of their s. 7 rights. In his judgment, Dickson C.J.C. stated that a duty on the government to refrain from a particular action arises only where "a deprivation of life and security of the person could be proven to result

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237 For example: soaking one's foot three times a day to treat an infection or travelling to the pharmacy authorized by welfare officials to purchase medication: Interview with Dilin Baker, nurse, Streehealth, Toronto, June 1988.

238 "Report of the Inquiry into the Effects of Homelessness on Health" *supra*, note 8 at 6.

239 *Ibid.* at 5.

240 *Ibid.* at 3-4.

241 *Operation Dismantle Inc. v. R.* [1985] 1 S.C.R. 441; 18 D.L.R. (4th) 481 [cited to D.L.R.] at 488.

from the impugned government act".<sup>242</sup> Conclusive evidence is available to link homelessness with many of the kinds of violations of s. 7's "security of the person" already enumerated by the courts.<sup>243</sup>

**(ii) Homelessness and Government Action**

A critical task for the advocates of the homeless will be to characterize what many people would call "government inaction" as "government action". Beetz J. in *R. v. Morgentaler* states that "[t]here must be state intervention for 'security of the person' in s. 7 to be violated."<sup>244</sup> This requirement may be responded to in two ways: the portrayal of the government's "inaction" as "action" and an argument that such a requirement ignores the reality of modern Canadian society.

Rather than regarding the government's withdrawal from the task of providing affordable housing as inaction (i.e. failure to directly provide affordable housing), one may view its withdrawal as a positive action. This action was "the policy change on the part of senior levels of government, beginning in the 1970's, from directly providing low-cost public housing to encouraging the provision of low-cost housing through funding the private non-profit sector".<sup>245</sup> "[D]uring the 1960's government built four to five times more low income housing (during the direct funding policy) in six to seven years than has been built in the last fifteen years."<sup>246</sup> Given its historical context, the decision to alter the nature of its commitment to the task of providing affordable housing should be considered an act, not a failure to act.

This interpretation finds support in a report on the Charter's impact on social assistance by Sandra Wain.

[The Charter] "...is meant to regulate relations between the citizen and the state. The problem is that we live in a twen-

242 *Ibid.* at 491.

243 See also Whyte's argument for the inclusion of a right to shelter or a minimum standard of living in "Fundamental Justice: The Scope and Application of Section 7 of the Charter" in Canadian Institute for the Administration of Justice, *The Canadian Charter of Rights and Freedoms* (Montreal: Les Éditions Yvon Blais Inc., 1984) 21 at 40.

244 *R. v. Morgentaler*, *supra*, note 224 at 428, and Dickson C.J.C.'s comments at 400.

245 "Report of the Inquiry into the Effects of Homelessness on Health", *supra*, note 8 at 2.

246 Report, *ibid.* at 2.

tieth century activist and intervening state, not the limited state of eighteenth-century human rights. It is simply not clear why the state's failure to act should, in a modern state, be so sharply distinguished from positive action. Given the extent to which the government *does* act in matters affecting the social and economic welfare of individuals, there is no general expectation of non-action by government..."<sup>247</sup>

In *Singh*, Wilson J. questioned the acceptability of a division between rights and privileges such as that which reduced the scope of application of the *Canadian Bill of Rights*.<sup>248</sup> She refers with approval to the dissenting judgment of Laskin C.J.C. in *Mitchell v. R.* in which the Chief Justice concluded that, although the plaintiff had no absolute right to parole, parole could not be characterized as "mere privilege" because of its important consequences for the parolee.<sup>249</sup> The same argument could be made on behalf of a person living in a campground or moving around between friends' homes who is on the waiting list for public housing. Status on the waiting list is proof of qualification for public housing; it is only the failure of the government to provide a sufficient number of rental units which gives the denial adequate affordable housing the appearance of a privilege rather than a right.

In his dissenting judgment in the *Alberta Labour Reference*<sup>250</sup> Dickson C.J.C., whose judgment was concurred in by Wilson J., questioned the conceptual distinction between "rights" and "freedoms".

"This conceptual approach to the nature of "freedoms" may be too narrow since it fails to acknowledge situations where the absence of government intervention may in effect substantially impede the enjoyment of fundamental freedoms..."<sup>251</sup>

While Dickson C.J.C. was referring to s. 2 of the *Charter* in the above passage, his comments nonetheless indicate a broadening of the definition of government action required for the application of the *Charter*, a

247 Wain, *supra*, note 153 at 39.

248 *Singh, supra*, note 230 at 461-462.

249 *Ibid.* at 462.

250 *Reference re Public Service Employee Relations Act, Labour Relations Act and Police Officers Collective Bargaining Act* [1987] 1 S.C.R. 313, 38 D.L.R. (4th) 161 [cited to D.L.R. ].

251 *Ibid.* at 194.



direction in which advocates on behalf of the homeless must encourage the courts to travel.

### (iii) Fundamental Justice

In the Supreme Court of Canada's judgment in *Reference re Section 94(2) of the Motor Vehicle Act*,<sup>252</sup> Lamer J., for the majority, held that the meaning of the concept "fundamental justice" goes beyond that of "natural justice".<sup>253</sup>

While the Supreme Court did not discuss the meaning of fundamental justice in the *Operation Dismantle* case, the Federal Court of Appeal did and held that s. 7 provides protection from government actions which are "arbitrary, despotic or that conflict with the general sense of fair play, justice and equity."<sup>254</sup>

Homeless people in Ontario cannot vote in municipal, provincial or federal elections because they do not have a residence.<sup>255</sup> Courts have held that a minimum residency requirement of up to twelve months does not offend s. 3 of the *Charter* (which guarantees citizens the right to vote) because such a requirement ensures a "real nexus" to the community.<sup>256</sup> Arguably, however, homeless people do have a "real nexus" to their community despite the fact they lack a fixed address. In Toronto, for example, many homeless people live in the Dundas-Sherbourne area where there are a variety of services and centres which they use regularly.<sup>257</sup>

Homeless people are denied a political voice because they are disenfranchised. They do not possess one of the most basic rights of a citi-

252 *Reference re Section 94(2) of the Motor Vehicle Act* [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536 [cited to D.L.R. ].

253 *Ibid.*, at 548.

254 *R. v. Operation Dismantle Inc.* (1983), 3 D.L.R. (4th) 193, 1 F.C. 745, Aff'd 18 D.L.R. (4th) 481 (S.C.C.)

255 Sanger "No Vote for City's Homeless" *NOW Magazine* (24 September 1987). See residence requirements in the *Canada Elections Act* S.C. 1969-70 c. 14, s. 17(14); the *Election Act* R.S.O. 1980 c. 133 s. 1(1); the *Municipal Election Act* R.S.O. 1980, c. 308, s. 1(34).

256 See *Arnold v. A.G. of Ontario* (4 September 1987), (O.H.C.J.) [unreported] (Sutherland, J.); *Reference Re Yukon Elections Residency Requirements* (1986), 27 D.L.R. (4th) 146, (1986) 4 W.W.R. 79 (Y.T.C.A.) in which a 12-month residency was upheld.

257 Interview with Dilin Baker, Streethealth, Toronto, June 1988.

zen, a right that is protected in the *Charter*. A. Alan Borovoy, general counsel to the Canadian Civil Liberties Association, writes that the right to vote is one of the factors "preventing our representatives from enacting unreasonable restrictions or establishing arbitrary powers..."<sup>258</sup> "Ultimately,...we the people, may approve or reject the decisions of our representatives by voting for them or for their opponents in...elections."<sup>259</sup>

Homeless people are made or kept homeless by government policies limiting the supply of affordable housing yet they have no say in the elections which choose the members of the government. They have no say because they are homeless. What the government has done is to deprive these people of one right, the right to security of the person, and then use the identifying feature of that deprivation (homelessness) as an excuse to deprive them of another right. This is clearly in conflict with the general sense of fair play, justice and equity and thus, as referred to above, in violation of the principles of fundamental justice.

#### 4. Section 1 . . .

S. 1 "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

Once an infringement of a *Charter* right has been found by the courts, the onus shifts to the party seeking to limit the right.<sup>260</sup> Advocates for the homeless must be prepared to counter arguments that the deprivation of shelter relates to a "pressing and substantial" objective and that the means of limiting the right to shelter are reasonable and demonstrably justified.<sup>261</sup> To be "reasonable and demonstrably justified", the limitation must be rationally connected to the objective, must impair the right as little as possible, and there must be a proportionality between the purpose and effects of the limit imposed.

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258 Borovoy, *The Fundamentals of our Fundamental Freedoms – A Primer on Civil Liberties and Democracy* (Canadian Labour Congress, November 1978) at 9.

259 *Id.*

260 *R. v. Oakes* [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200 [cited to D.L.R. ] at 225.

261 *Ibid.* at 227.

Presumably the government will seek to justify its withdrawal from the provision of affordable housing as a budgetary necessity. Assuming that the courts accept this objective as sufficiently important, advocates on behalf of the homeless will have to counter this argument with figures on non-profit housing expenditures, shelter expenditures, other government expenditures<sup>262</sup> and information about the inadequacy of the government's "solution" of encouraging the private sector to provide affordable housing. Comparisons between housing and shelter expenditures and the provincial deficit and their percentage of budget will be useful evidence regarding the "rational connection" and "proportionality" tests. The latter will also require evidence about the effects of homelessness on mental and physical health to show that any potential "economies" of the government's failure to provide affordable housing are vastly outweighed by the medical, social services and human costs it causes.

##### 5. Section 24(1)

s. 24(1) "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."

While s. 24(1) has been called "a call for judicial ingenuity or, if you will, an open door to activism",<sup>263</sup> the courts are much more likely to provide a defensive remedy (such as the exclusion of evidence or a stay in the proceedings) as a response to a contravention of the *Charter*<sup>264</sup> than damages,<sup>265</sup> and they are more likely to order damages than injunctive relief.<sup>266</sup>

262 Everybody needs a home,  
But instead we get a Dome,  
Politicians bring the home-runs in,  
The homeless just struck out again.

– song by mothers of the Common Ground drop-in centre. In Stefaniuk "Homeless Demand Help, Understanding" *Toronto Star* (29 March 1987).

263 Kaufman J.A. quoted in Morgan, "Charter Remedies: The Civil Side After the First Five Years" (Law Society of Upper Canada Conference, 26 November 1987) [publication by Carswell forthcoming] at 3.

264 *Ibid.* at 5-8.

265 *Ibid.* at 8.

266 *Ibid.* at 16.

Nonetheless advocates of the homeless should seek an injunctive remedy in order to remedy the breach of the right to shelter. Although such an active role for the courts is uncommon, it is not entirely without precedent. In *Marchand v. Simcoe County Board of Education*<sup>267</sup> the Board was ordered to provide French language instruction to the plaintiff and those he represented. In his discussion of this case, Brian Morgan explains that the remedy of a mandatory order "should be available whenever the right is in effect a right to receive a benefit under the law..."<sup>268</sup>

In *Attorney General of Nova Scotia v. Phillips*, the Nova Scotia Supreme Court granted a declaration stating that a section of the *Family Benefits Act* was invalid and thus of no force or effect<sup>269</sup> because it denied single fathers benefits that single mothers were entitled to. It did so in spite of the fact that, until the Legislature dealt with the problem, there would be no authorization to pay benefits to those whose income depended on family benefits. It limited the relief granted because it was reluctant to assume a legislative role.<sup>270</sup> Such a remedy hardly seems "appropriate and just in the circumstances" given the consequences to those deprived of their income until the Legislature addressed the problem.

A recent decision by Strayer J. of the Federal Court is a sign that courts may become less reluctant to grant positive remedies in *Charter* cases. In *Schacter v. Canada Employment and Immigration Commission*,<sup>271</sup> Strayer J. ruled that biological parents are entitled to the same unemployment insurance benefits as adoptive parents. He ruled that "it would not be 'appropriate and just' under s. 24(1) of the *Charter* to take away the UI benefits of adoptive parents in order to remedy the discrimination against natural parents".<sup>272</sup> Counsel for the plaintiff commented:

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267 *Marchand v. Simcoe County Board of Education* (1986), 55 O.R. (2d) 638.

268 Morgan, *supra*, note 263 at 21.

269 *Attorney-General of Nova Scotia et al. v. Phillips* (1986), 34 D.L.R. (4th) 633.

270 *Ibid.* at 635.

271 *Schacter v. Canada Employment and Immigration Commission* (June 1988) (F.C.)[unreported]. This as yet unreported decision was handed down in June 1988 and is discussed in Schmitz "Charter Can Extend UI Benefits to Natural Parents, Fed. Court Holds" 8 *The Lawyers Weekly* No. 9, (24 June 1988) at 24.

272 *Ibid.* at 24.

"...There's been some discussion as to whether Canadian courts are willing to take as active, or as positive, a role as some American courts have done in compelling the Legislature to positively pay out benefits, and this is [the first] case where it has been shown that they will do so."<sup>273</sup>

In the expectation that the courts will accept that government policies and actions have deprived homeless people of their right to security of the person, advocates for the homeless should propose a remedy to the courts. In an equality rights action, the remedy sought would presumably be the extension of the benefit enjoyed by one group (e.g. men, adults) to the group denied the benefit (e.g. women, youth). A more complex remedy would be the goal in an action alleging a violation of the plaintiff's right to security of the person under s. 7. In such an action a three-pronged solution, such as that advocated by Frances Werner<sup>274</sup> and MaryAnn McLaughlin,<sup>275</sup> is one possibility. It would provide for emergency shelter, food and medical services for use on a short term basis, transitional housing for periods of no longer than six months, and affordable permanent housing. To provide only shelter beds to address the need for shelter will not truly protect people's security of the person given the mental and psychological stresses described earlier in this paper. The Court could provide a schedule of dates for the progressive implementation of such a remedy, in a manner similar to the reparative injunction requiring the translation of Manitoba's English laws into French in *Reference Re Manitoba Language Rights*.<sup>276</sup>

The proposed remedy requires the court to be more proactive than Canadian courts have been in the past. As Morgan comments however:

"...the scope of section 24 is wide enough to include structural injunctions and the American experience shows that some constitutional violations demand far reaching involvement on the part of the courts... The choice in some difficult, but

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273 Brian Morgan quoted in article, *ibid*.

274 Werner, "On the Streets: Homelessness Causes and Solutions" (1984) 18 Clearinghouse Review 11 at 12.

275 McLaughlin, "Homeless in Canada" Canadian Council on Social Development, September 1986.

276 *Reference Re Language Rights Under the Manitoba Act, 1870* [1985] 1 S.C.R. 721. See discussion of this case in Morgan, *supra*, note 263 at 19-20.

extremely important cases may be between doing so and leaving the people whose rights have been violated without any meaningful remedy."<sup>277</sup>

This section has examined some of the direct and indirect ways that the *Charter* may help to secure rights for the homeless. Since homelessness represents society's failure on many counts, other areas must be considered in light of the *Charter*. For instance, how can the *Charter* be used to combat deficiencies in the child welfare system and thereby attempt to alleviate the growing incidence of "street kids"? How might the *Charter* ensure access to after care support services for deinstitutionalized people?

What clearly emerges in the foregoing analysis is the urgent need for a right to shelter, firmly stated in legislation. The *Charter* is an important tool to be used to establish the right to shelter and the availability of shelter and related services to all homeless people. Establishing these rights under s. 7 and s. 15 and enforcing them in a meaningful way is by no means a foregone conclusion. If, for example, the courts accepted the s. 7 argument outlined in this paper, governments could neutralize the fundamental justice argument by amending their Election Acts to permit homeless people to vote.<sup>278</sup> If an argument regarding the effective disenfranchisement of the homeless because of their living conditions were not accepted as a substitute, the remedy would be lost. Social action and law reform will therefore be important elements in securing a constitutionally protected right to shelter.

Since homelessness is a national issue, one target of such efforts must be the federal government. The provincial government's responsibility for housing makes it another target. The efficacy of an immediate municipal referendum or special initiative on a municipal election ballot should also be considered given the urgent housing crisis in Toronto. Until a right to shelter has been established, advocates should continue to use the *Charter* to ensure the equitable allocation, administration and enforcement of publicly funded programs which now exist.

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277 Morgan, *supra*, note 263 at 23.

278 The federal government gave first reading on 30 June 1987 to Bill C-79, *An Act to amend the Canada Elections Act and other Acts in relation thereto*. Second Session Thirty-third Parliament 35-36 Elizabeth II 1986-87. This is the only such legislative initiative to affect Ontario residents.

## V. ALTERNATIVES TO LITIGATION: SOCIAL ACTION AND LAW REFORM

Robert Hayes follows a three-part strategy for social change in his work with the Coalition for the Homeless.

First... "You have to do enough preaching for people to care." Second, "You have to get something concrete" – legislation or a court order. And third, "You have to keep at it. If they miss a deadline, you sue."<sup>279</sup>

Hayes' own experience with litigation is an indication of its limitations. The standards set for New York shelters as a result of *Callahan v. Carey*<sup>280</sup> and *Eldredge v. Koch* have continued to be violated. The "Coalition has had to go to court 'religiously and routinely' to force the city's compliance with the standards".<sup>282</sup> According to Hayes, "[t]he city has abided with the [*Callahan*] consent decree kicking and screaming".<sup>283</sup> In addition, the standards set in the consent decree are, not surprisingly, "the kinds of objective guidelines that courts can deal with",<sup>284</sup> such as the number of showers per person and the amount of space between beds. Such standards are the necessary minima; much more is needed.

A judicial solution to the housing crisis should not be the only strategy followed by advocates for the homeless. Education is necessary to build the political will to find acceptable solutions. According to Robert Hayes,

"The American people – that is fifty one percent of them – are perfectly content to let poor people suffer as long as they do not see them. But the fairly common and decent response to the picture of real, live suffering is often the only thing that keeps us going...Perhaps that means doing exactly what litigators hardly ever do – appeal not just to the very

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279 Robert Hayes quoted in Daley "Robert Hayes: Anatomy of a Crusader" *New York Times* (2 October 1987).

280 See *supra*, note 112.

281 See *supra*, note 121.

282 Cook, "A Right to a Home?" (1987) 9 *The National Law Journal* No. 36, 1 at 44.

283 Hayes quoted in article, *ibid.* at 44.

284 Hayes, *supra*, note 145 at 87.

worst in people, our typical tack in life, but sometimes to the very best."<sup>285</sup>

Education is itself a tool to be used in the pursuit of law reform. While litigation can play a role in drawing public attention to the issues surrounding a particular case, the public support necessary to press for legislative improvements must be rooted in a commitment which is sufficiently strong so as not to wane when the media's attention moves elsewhere. Advances made in this way are less likely to involve "kicking and screaming" and may not require constant recourse to the courts to enforce. In any case, a well informed and committed public is a formidable watchdog.

Community organizing is another vital component to the fight against homelessness. Many organizations have established permanent housing for the homeless without resorting to the courts. In this brief section, the paper will review on the successes and failures of direct political action that focussed on the need of the homeless for housing.

#### A. NEW YORK CITY

For the past decade, the City of New York has attempted to confront the three related issues of homelessness, absentee landlords and vacant properties. Faced with a vacancy rate of less than 0.1% in the majority of New York's boroughs, Mayor Edward Koch attempted to alleviate the housing crisis in the city by implementing a policy whereby the city would either substantially raise the property taxes on vacant rental accommodation or purchase the vacant building and then lease or sell the premises to those in need of housing.

The "homesteading" program, as it has come to be known, was enacted with the intent that the vacant properties would be rehabilitated and then rented to those with moderate income levels. In its continuing attempt to reduce its debt load, the City of New York was seeking a way to cut its expenditures on "welfare hotels".<sup>286</sup>

The "homesteading" policy has succeeded in that it has forced slum and absentee landlords to pay a very high price, via the tax system,

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285 *Ibid.* at 89.

286 The policy of the New York municipal government has been to house the homeless and dispossessed on several floors of Manhattan's luxury hotels. The cost to the City has been estimated at between \$1.2 and \$1.6 million per month. See "Draining the Bucket Dry", *New York Times*, (6 April 1987), at 12-19.



for their indifference to their property. It has also enabled the City to procure prime residential property for far less than actual market value. It is in the allocation of these acquired units that the policy can be said to have failed.

Organized squatting began in New York City in 1984 in response to that failure. In the summer of 1985 the Association for Community Organizations for Reform Now (ACORN) helped squatters move into three dozen buildings.<sup>287</sup> Despite legal action taken against ACORN, the City government was unable to remove the squatters from the buildings they had occupied. After they had been in possession for ten days they could be removed only by eviction, which required resort to the courts.<sup>288</sup> The time and expense associated with this effort, as well as the potential political damage to city politicians,<sup>289</sup> resulted in no eviction proceedings being instituted. The squatters remained for over two years and in October 1987, ACORN and New York City reached an agreement through which the squatters were organized into the Mutual Housing Association of New York. The City granted them 58 buildings and gave grants and loans to the Association so it could make improvements to the properties. The Association also provided money for repairs as well as the necessary labour. The former squatters had their rights to sell the property restricted and ACORN promised not to organize further squats.<sup>290</sup>

A similar cycle beginning with the organized occupation of vacant city property and resulting in an agreement to "legitimize" the squatters and provide them with money for the rehabilitation of the property took place in Philadelphia in the late 1970's.<sup>291</sup> In both New York and Philadelphia, organized squats involved relatively few people and were undertaken primarily to pressure government into distributing vacant housing to those in need.

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287 "Squatters and City Battle for Abandoned Buildings" *New York Times* (2 August 1985).

288 *Id.*

289 It is interesting to note that an election campaign for the mayoralty was taking place when the ACORN squatters moved into the buildings that summer. "Bellamy Defends Brooklyn Squatters" *New York Times* (10 August 1985).

290 "New York Turns Squatters into Homeowners" *New York Times* (12 October 1987).

291 Borgos "The ACORN Squatters' Campaign" (1984) 15 *Social Policy* No. 1, 17.

## B. WESTERN EUROPE

Squatting and "people's expropriation" have become the methods by which the homeless have attempted to house themselves throughout Western Europe. On the continent, actions such as squatting or reclamation have been met by an angry state response. In Amsterdam and Berlin, where one in five homes is illegally occupied,<sup>292</sup> there were significant clashes between the police and the homeless in the late 1970's and early 1980's as the number of public housing starts each year declined drastically while the demand for housing remained high.<sup>293</sup> In both situations, it was a clash between city officials, who sought to reclaim and convert derelict housing to commercial properties, and the homeless, who had moved into and established a home within these districts. In Berlin, negotiations for the rehabilitation and continued occupation of the buildings collapsed when the Chief of Internal Security ordered the eviction of squatters living in two buildings two days before the contract passing twenty-six properties to the squatters' organization was due to be signed. The squatters abandoned the negotiations and resumed their "self-help" efforts to acquire and renovate the housing they needed.<sup>294</sup>

Despite long waiting lists for public housing in England, there was a substantial amount of vacant housing during the 1970's.<sup>295</sup> Squatting began in London in 1968 as a political protest against British housing policy's failure to deal with the housing problem and subsequently developed into a way in which to acquire housing. By the end of the 1970's, attitudes toward squatters had changed so much that some councils preferred occupancy of council houses by squatters rather than by tenants. This was largely because of the financial advantage to local councils resulting from the squatters' assumption of the costs of maintenance. By 1981 all inner London councils were licensing squats for a nominal 'licensing' fee. This involved government recognition of the

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292 *The [Toronto] Globe and Mail*, March 1978 – October 1983, various articles about civil disobedience in Berlin and Amsterdam.

293 Anderiesen "Tanks in the Streets: The Growing Conflict Over Housing in Amsterdam" (1981) 5 *International Journal of Urban and Regional Research* No. 1, 83 at 94.

294 Mayer and Katz "Gimme Shelter: Self-Help Housing Struggles Within and Against the State in New York City and West Berlin" (1985) 9 *International Journal of Urban and Regional Research* No.1, 15 at 35-36.

295 Kearns "'Urban Squatting' Increases as Londoners' Solution to Non-availability of Housing" (1981) 37 *Journal of Housing* No. 5, 250 at 251.

legality of the squatters' occupation in return for the squatters taking responsibility for repairing and managing the property. Some of the larger squatting communities have become registered housing co-operatives, which allows their members to apply for government subsidies to lease or purchase the property.<sup>296</sup>

### C. TORONTO

Toronto lacks a substantial supply of empty housing, a vital prerequisite for the organization of a squatting movement. More importantly, there is a lack of empty publicly-owned property in Toronto, which means that squatters will have less success in using squatting as a means to acquire affordable housing.

Although it has worked with some success elsewhere, squatting may not be the most desirable solution to the problem of homelessness in Canada. Not only do we lack the necessary vacant property, but squatters generally lack the legal protection of tenure available to tenants. Further, squatting only helps those who are able to help themselves.

Not all of the homeless people in Canada have the skills or resources to make repairs to buildings that landlords would ordinarily be responsible for. This leads to the final point, that squatting's self-help approach to the problem of homelessness results in the victims of the failure of government housing policies providing the remedy for that failure.

According to Robert Collin and Daniel Barry, the economic/political/social system within which some are very wealthy while others live in extreme poverty is the product of a partly-explicit, partly-implicit pact. It is only with the tacit approval of all members that the system can operate, producing massive wealth. They argue that, given the requirement of co-operation of all, "the means necessary for full participation in society should be available to all. Thus a system which creates unemployment for some in order that the whole shall be greater cannot justly deprive the forcibly unemployed of participation in the fundamental activities of society."<sup>297</sup> The state should not be permitted to leave the disadvantaged to solve a systemic problem through resort to self-help.

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296 Kearns "Urban Squatters Strategies" (1981) 10 *Urban Life* No. 2, 123 at 142-144.

297 Collin and Barry "Homelessness: A Post-Industrial Society Faces a Legislative Dilemma" (1987) 20 *Akron Law Review* No. 3, 409 at 430.

The self-help aspect of squatting has been incorporated into right-wing political dialogue in the United States and West Germany.<sup>298</sup> In a special report on homelessness for *Fortune*, Myron Magnet wrote:

"The underclass's entrenched culture of dependence, its inability from one generation to another to participate in the larger society, the stunted development of its human potentialities – all this was fostered by the welfare system and the War on Poverty."<sup>299</sup>

While Magnet does not address the question of squatting, his recommendation that governments transfer responsibility for shelters to the private sector to reverse the slide of hostel users into "permanent dependency" on the government<sup>300</sup> is reason to believe that he too would favour the self-help approach.

Mary McIntosh argues that services we expect to be provided by the government, such as daycare, refuges for battered women, welfare rights advice, and health care, are "either not available or, when they are, are inadequate and unfeminist in their approach. Setting up services like this is a way both of meeting women's needs and also of developing public awareness of the effects of women's oppression, and providing a base for feminist analysis and agitation around the issue."<sup>301</sup> This argument may be more applicable to the delivery of services than to the provision of goods, especially where the commodity is one such as housing which is required on a very large scale.

This is not to say that squatting should not be considered at all in Toronto. In fact, organized squats could prove to be an important political tactic in the struggle for affordable and habitable housing. To adapt Mary McIntosh's comments, squatting could develop awareness of the plight of the homeless and provide a base for analysis and agitation around the issue. While it would not solve the problem of all of those who are without shelter, it may provide examples of some of the options available to government in the reformulation of its housing policy.

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298 Mayer, *supra*, note 294 at 41 and Borgos, *supra*, note 292 at 25.

299 Magnet, "The Homeless" *Fortune*, (23 November 1987) 170 at 188.

300 *Ibid.* at 189-190.

301 McIntosh, "Feminism and Social Policy" (1981) 1 *Critical Social Policy* 32 at 34. McIntosh herself nevertheless expresses reservations as to the efficacy of feminist self-help services.

## VI. CONCLUSION

"It is not a question whether we shall pay or shall not pay. It is a question whether we shall pay blindly or intelligently, whether we shall pay for better housing or for the damage done by that which is worse. Let us make no mistake about that. It is only a question whether we should house them in hospitals, mental institutions, reformatories and jails; or whether we shall house them in cleanly, [sic] light and sanitary surroundings where both body and soul will have a chance. Which shall it be?"<sup>302</sup>

The quotation above appeared in the *Report of the Lieutenant Governor's Committee on Housing Conditions in Toronto*. The report identified Parkdale as one of the areas with a housing problem.<sup>303</sup> It reviewed the effects of bad housing on health, including the particular problems of tuberculosis and stress.<sup>304</sup> The report concluded that the reasons people are underhoused include low income (including that related to unemployment)<sup>305</sup> and expensive rents resulting from land speculation and building costs.<sup>306</sup>

This information may not strike a reader as novel or surprising, and that is the tragedy of it. The report providing this information was published in 1934 and the quotation originally appeared in a study of housing in Halifax published two years previously. While the causes of inadequate housing have been identified for over fifty years, the question whether we shall pay blindly or intelligently is obviously not one that we ask ourselves as often as is necessary.

Advocates on behalf of the homeless have a number of tasks before them. The policies and regulations of income security programmes must be examined for discrimination against the homeless and such discrimination must be eliminated. Services and shelter currently available to some sectors of the homeless population must be extended to all. A pos-

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302 1932 *Report of the Citizens Committee on Housing in Halifax, N.S.* quoted in the *Report of the Lieutenant-Governor's Committee on Housing Conditions in Toronto* (Toronto: Press of the Hunter Rose Company, 1934) at 54.

303 *Ibid.* at 23.

304 *Ibid.* at 41-50.

305 *Ibid.* at 55-58.

306 *Ibid.* at 65.

itive right to shelter must be created through litigation, community organizing, law reform or some combination thereof. The provision of housing is not the responsibility of an individual, it is the responsibility of society.

We must not ignore the question posed in the report of the Lieutenant Governor's Committee. A long-term, intelligent solution to the problem of homelessness must be found. "The homeless will not go away...they have no place to go."<sup>307</sup>

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307 Langdon and Kass, *supra*, note 7 at 329.