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COMMENTS ON HOMELESSNESS AND THE RIGHT TO SHELTER

Allan Moscovitch*

I. POSTULATED REASONS FOR HOMELESSNESS

In this contribution to the struggle for better conditions for the homeless, the staff of Parkdale Community Legal Services (PCLS) view first the who and the why of the homeless and homelessness, before moving on to examine whether existing law and legal conventions could be a fertile source for establishing a right to housing.

The PCLS staff point to three political and social factors from their experience which are key to the increase in the numbers of people who are permanently housed. Deinstitutionalization in Ontario in recent years has meant the displacing of mentally disabled people from institutions. Without the availability of sufficient community facilities and support services what would otherwise be applauded as a significant move towards normalization has become a nightmare. An increasing number of the deinstitutionalized, lacking resources and support, have become part of the roomer population, and with the upgrading or demolition of rooming houses, they have become homeless. Prolonged unemployment, and the decline of the traditional nuclear family have also led to declining incomes and more homelessness. These are important observations about the growth of homelessness but they do not constitute an explanation.

Most contemporary studies of homelessness or of the poorly housed deny that there is a housing problem. A review of historical data on housing makes clear that there is more housing available and it is in better condition with more facilities than ever before. These studies suggest that the problem is not housing, it is income. Housing they explain is much like other commodities available: it is purchased or

* Copyright © 1988 Allan Moscovitch. Allan Moscovitch is an associate professor at the School of Social Work, Carleton University. These comments were initially presented at The Canadian Conference to Observe the International Year of Shelter for the Homeless, Ottawa, September 13-16, 1987.

rented by those who can afford to do so. Those who are ill-housed are so either because:

(1) they like living in the housing they are in in order to spend more on something else. In other words horizontal equity does not demand that everyone have the same housing standard, only that they have free choice. If they are in poor housing or no housing then this is what they have chosen; or

(2) they do not have sufficient income. The answer then, like the answer to all problems of economic and social insecurity in society, is the Guaranteed Annual Income or some such arrangement.

Free choice demands free markets for housing. Consequently it follows that:

(3) Subsidies to rent, rental or shelter allowance, public housing and other forms of state subsidy which are intended for the individual are inferior forms of subsidy since they interrupt free choice.

(4) Rent controls, land and housing bylaws, controls on planning and investment, all inhibit production. These regulations are the real culprits – the cause of homelessness.

The *conclusion* is that if people are poor give them a guaranteed annual income. With additional income they can buy or rent their own housing. The market will adapt to produce just the housing needed and everything will be fine. Government policy doesn't look quite like that but this is the metaphor of the free market on which many recent changes in policy contemplated or attempted have been based. These changes have *greatly exaggerated* the problem of homelessness.

Why has the metaphor of the market, always influential, become of such singular importance in the last 12 years in the making of government policy and in Canadian politics generally? The answer is complex and has been the subject of a literature of considerable proportions. Briefly, the deepening of economic recession after 1973 and the failure of traditional Keynesian formulations of government policy created a situation in which the simple solutions of an earlier period (free markets, supply-led economic recovery, monetary control, lower taxes, lower wages,) could become popular particularly with small enterprise, finance and some sectors of big business. In particular, the metaphor of free markets is dearest to the hearts of those big players

in the development industry. The Fraser Institute, Canada's pre-eminent exponent of this metaphor is strongly financed by corporations in energy and development and it has devoted much of its funds to publishing free enterprise oriented studies of housing.

In the metaphor, all companies are run by mom and pop, they are small, flexible little players in an enormously big game. In reality several big players and a larger number of middle rank players control much of the development business. And hiding just behind them are the finance institutions which determine the size, scope and timing of development.

II. WHY ARE PEOPLE HOMELESS?

Two principle reasons appear most important in explaining the growth in numbers of homeless people in recent years.

(1) Economic recession, coupled with high interest (mortgage) rates in the 1980-1983 period has led to a dramatic decline in the production of housing. The accompanying Table 1 shows that, for example, housing starts per year have fallen from a peak of 263,203 in 1976 to 125,860 in 1982. In fact housing starts have been below 200,000 per year since 1979. With relatively constant birth and death rates, and despite declining immigration since 1980, net household formation averaged 197,800 per year over the period 1981-1986. With the disappearance of inventories built up in the late 1970s and with demolitions, there have simply been too many households chasing too few houses. Not surprisingly prices and rents have risen rapidly over the same period in cities like Toronto.

(2) The market cannot produce housing for people who are relatively poor. Public policy acknowledgement of this was contained in changes to the *National Housing Act* in 1964 to create support for public housing. In the period from 1965 to 1977 growing numbers of low income families were housed in the rapidly expanding public housing sector, and from 1973 to 1977 in the expanding nonprofit sector. Since 1978, public housing construction has ceased and new nonprofit housing has declined rapidly. (Table 2)

To these two factors might be added the declining income of many households due to deinstitutionalization, family breakdown, and

Table I
HOUSING STARTS FOR CANADA

<i>Year</i>	<i>Number</i>
1973	268,529
1974	222,123
1975	231,456
1976	273,203
1977	245,724
1978	227,667
1979	197,049
1980	158,601
1981	177,973
1982	125,860
1983	162,645
1984	134,900
1985	165,826

Source: C.M.H.C., *Canadian Housing Statistics*, Table 1, 1985.

Table II
HOUSING STARTS UNDER SELECTED N.H.A. PROGRAMMES

<i>Year</i>	<i>Section 40 Fed/Prov Housing</i>	<i>Section 43 Public Housing</i>	<i>Section 15.1 Non-Profit Corporations</i>
1973	2,898	13,269	462
1974	1,382	9,124	3,259
1975	2,864	10,376	2,336
1976	3,017	10,061	4,443
1977	2,417	7,790	5,660
1978	2,857	6,349	3,279
1979	2,345	-	6,986
1980	2,018	-	1,505
1981	1,984	-	-
1982	1,434	-	-
1983	916	-	-
1984	1,904	-	-
1985	690	-	-

Source: C.M.H.C., *Statistical Handbook*, various years.

unemployment as the PCLS paper suggests, and the decline in social assistance rates which have failed to keep pace with inflation. The result is more homelessness than has been seen in Canada since the 1930s.

III. WHAT CAN BE DONE ABOUT HOMELESSNESS?

Much of the PCLS paper is concerned with what can be done about homelessness? In particular the PCLS staff examine

- (1) the possibility of establishing shelter as a legal right in existing Canadian law;
- (2) the existence of homesteading and squatting in other countries and the applicability of these alternatives to a legal right to shelter.

A. SHELTER AND THE LAW

The purpose of the PCLS paper is to search existing Canadian law, which nowhere provides a direct right to shelter, for the possibility that such an interpretation could be made of an existing indirect reference. For example the right to shelter is part of the U.N. *Universal Declaration of Human Rights*, (1948) and in the *International Covenant on Economic, Social and Cultural Rights*. Canada is a signatory to both. While International Treaties cannot be directly enforced it could be argued that domestic law should not conflict with it.

The precedent for such an approach was established in the 1930s debate on the 1935 *Unemployment Insurance Bill*. The government of R.B. Bennett argued that it was carrying out its treaty obligations by proposing such legislation. The courts rejected such an interpretation – on the grounds that social security was a provincial matter, and the Canadian division of powers could not be overridden by international treaties. There is no question that land and housing are deemed to be provincial responsibility still – any attempt to establish a Federal responsibility for housing on the basis of international treaties is not likely to be successful.

Could such a right be established under the *Charter*? The parallels to the 1930s debate are strong. Could Section 15 be used to override the divisions of powers of the state between the federal government and the provinces? Such a result would appear unlikely.

Residency requirements were used to deny the homeless social benefits in the State of New York. Such requirements are specifically prohib-

ited under *The Canada Assistance Plan Act (CAP)* as is noted here. In fact the *CAP* has few requirements; this is one of the few. Consequently any province with residence requirements violates the conditions under which it receives funds under The Act for social assistance. In the *Findlay*¹ case, this issue is raised.

The only basis for litigation on residence can be the requirements of the *CAP* which prohibits provinces from receiving federal funds under *CAP* unless, under Section 6.4, they exclude residence in determining eligibility for social assistance.

Consequently the denial of social assistance on the basis of lack of residence appears to be in contravention of *The Canada Assistance Plan Act* as the PCLS paper notes. However, it is not clear how the *Findlay* case could be used to create "new" national standards. If a precedent is set to ensure that homeless people are not denied assistance, enforcement in the many thousands of administrative jurisdictions across Canada remains a real issue.

Why is a case like the *Findlay* case necessary when *CAP* already requires each province to have an appeal system? Unfortunately some provinces have only relatively recently complied. In addition many appeal tribunals are inaccessible and subject to the most blatant of patronage in appointments. Pressure to create real decentralized tribunals with more informed and impartial adjudicators could also be of help in preventing the enforcement of residency requirements.

B. ALTERNATIVES TO LITIGATION

The PCLS staff paper discusses two alternatives to litigation. These are homesteading, particularly in New York State and squatting in European cities. Both depend on the existence of a significant stock of housing vacant and not part of the market. Statistics Canada, for the 1986 Census, attempted to find reasons why private dwellings suitable for year-round occupancy on census day were unoccupied. The answer to this question when available may shed some further light on whether such a stock of vacant housing is available.

1 *Finlay v. Canada (Minister of Finance)* [1986] 2 S.C.R. 607.

IV. CONCLUSION

Establishing a legal right to shelter does not appear to be a promising method of improving the housing conditions of the homeless. The right to social assistance without residence requirements does appear to be clear in law. This approach is more helpful but difficult to enforce across Canada. Homesteading and squatting hold some possibilities, as yet not very well developed in Canada. Otherwise, perhaps the most promising avenue on a broader scale is political pressure for more public housing.