

# Annotated Bibliography-Access to Justice and the Homeless

## A. Academic Articles

### Melanie B. Abbott, "Seeking Shelter under a Deconstructed Roof: Homelessness and Critical Lawyering" (1996-1997) 64 Tenn LR 269

- While the tenets of Critical Legal Studies ("CLS") are appealing because they acknowledge the many inherent biases of the legal system and deconstruct the myths of law, the refusal of many CLS advocates to settle for anything less than the complete restructuring of society can leave those trying to help the disenfranchised with a profound sense of dissatisfaction.
  - The ideas of post-CLS theorists, also fail, in varying degrees, to provide the sort of motivation needed by lawyers who are working to end homelessness.
- William L.F. Felstiner, Richard L. Abel and Austin Sarat stated the process by which injuries become legal disputes:
  - naming, by which a person admits to himself that some experience has been injurious;
  - blaming, when the injured person attributes the injury to the fault of a person or a social entity; and
  - claiming, when the injured person confronts the one responsible for the injury and seeks a remedy.
- A homeless person may require an advocate's assistance at the preliminary stage of identifying the nature of his or her difficulties and in recognizing that the legal system may be of help in solving those problems.
- Problems of identifying the legal issues confronting the homeless may arise at all three stages of a legal dispute:
  - The homeless often feel a sense of alienation from the society. To name a claim, the homeless must stop taking the situation for granted and name the conditions responsible for his homelessness. This may prove to be a substantial hurdle;
  - The homeless may then find it difficult to attribute specific blame for his homelessness. Deep-rooted poverty and social problems provide a complex of causative factors that need to be properly comprehended;
  - Even the homeless who is able to attribute blame is likely to find the process of confronting the alleged responsible party and making a claim an insurmountable burden.
- The particular characteristics of homelessness present significant problems in applying critical lawyering theories that encourage lawyers to go beyond rights-based theories and assist the client in becoming a fully empowered partner in remedying the problem.
- Litigation, lobbying for legislative change, using administrative procedures, education and media campaigns and institution-building are some of the tools available to those wishing to use CLS to address the problem of homelessness.

## Catherine Boies Parker, “Update on Section 7: How the Other Half is Fighting to Stay Warm” (2010) 23 Can J Admin L & Prac 165

This article reviews recent *Charter* section 7 jurisprudence to examine the challenges faced by homeless public interest litigation, and the strategies used to circumvent these obstacles. The author examined these challenges and strategies by reference to two British Columbia decisions dealing with homeless rights: *Victoria (City) v Adams* 2009 BCCA 563 (a decision about the right of homeless persons to erect shelters at night) and *PHS Community Services Society v Canada (Attorney General)* 2011 3 SCR 134 (a decision about closing safe injection sights).

The author noted that earlier section 7 *Charter* litigation helped both cases. In particular, both decisions drew on *Chaoulli v Quebec (Attorney General)* 2005 SCC 35 to circumvent government challenges about standing and justiciability:

- Controversy: Just because a decision is controversial and/or has political components, it does not preclude a Court from determining its constitutionality.
- Contingency: A decision must be rendered on the facts as they presently exist, not as they may be in the future.
- Public Interest Litigation: given the marginalization and/or vulnerability of potential plaintiffs, and the systemic nature of many *Charter* challenges, some actions are best brought by way of public interest litigation. Using section 7 as a tool for systemic litigation is critical in ensuring that section 7 is effective at protecting marginalized rights.

In addition, *R v Morgentaler*, [1988] 1 SCR 30 helped define section 7 as encompassing a broader notion of personal autonomy – one that includes a right to control one’s bodily integrity. Both *PHS* and *Adams* espoused this broader understanding of the liberty interest: they were decided based on an act of government that removed the ability of a person to make an intimate choice of fundamental personal importance.

The author also emphasized the critical role of evidence in each decision. The social science, expert, and affidavit evidence demonstrated the impact of government action on marginalized populations. Gathering evidence from marginalized populations can be difficult, and is particularly difficult when dealing with homeless populations. *PHS* and *Adams* provide insight into how Courts can gather and use evidence in the context of a section 7 claim.

## Suzanne Bouclin, “Regulated out of Existence: A Case Study of Ottawa’s Ticket Defence Program” (2014) 11 JL & Equality 35

- The purpose of *Access to Justice Act*, SO 2006, c. 21, which empowered the Law Society of Upper Canada (the “LSUC”) to regulate paralegals, is to “increase access to justice by providing consumers a choice in qualified legal services, while at the same time protecting people who get advice from non-lawyers”:
  - The LSUC has deployed its regulatory powers in a manner that go against these purposes in at least one case.

- The Ticket Defence Program (“TDP”), an Ottawa-based collective of volunteers, provide vital (unmet) and effective legal assistance to street-involved people charged with minor provincial or municipal offences.
- The TDP’s work resembled those of paralegals but its members are not licensed to provide legal services in Ontario. Some of the barriers to access to justice for the homeless, which the TDP helped them overcome, include:
  - the difficulty of physically attending court several kilometres from downtown for street-involved people with limited mobility or who cannot afford the bus fare;
  - lack of the knowledge or the wherewithal to pursue their rights because of mental health issues or addictions (that often arise from stresses caused by homelessness);
  - the feeling of intimidation by the system or by not understanding the charges against them;
  - negative self-assessment of the ability to acquire the appropriate dress for attending court;
  - lack of legal literacy and the confidence to navigate the system;
  - fear of harassment or retaliation by police officers; and
  - the desire to avoid negative interactions with formal justice apparatuses or relive traumatic experience.
- The TDP sought exemption from licensing requirements from the LSUC twice and was denied an exemption on both occasions due in part to the fact that, with an annual budget of approximately \$200, it could not afford to pay the paralegal licensing exam fee of \$1,075, annual insurance of \$300 and administrative fee of \$250 for each of its volunteers. The TDP subsequently disbanded.
- The case of TDP is unfortunate given the apparent paradigm shift towards affordable, responsive, client-centred, and community-anchored access to justice.
  - The LSUC supports conservative view that, while access to justice is a guiding principle of paralegal regulation, affordable access to justice is not a right.

**Sarah Buhler, “Cardboard Boxes and Invisible Fences: Homelessness and Public Space in *City of Victoria v Adams*” (2009) 27 Windsor YB Access Just 209**

This article praises the *City of Victoria v Adams* decision for challenging the dominant discourse on homelessness and how the homeless are viewed by the public. The Court did not rely on “law and economics” theories which tend to view homelessness as a choice. The decision is not, however, perfect. The Court did not take the opportunity to change the dominant discourse on *Charter* s. 7. Section 7 is still conceived of as a shield rather than a sword. Only rights that can be characterized as “negative” can be read into s. 7.

The author drew on three tensions and themes developed in the *Adams* decision to illustrate her thesis.

1. Are homeless people colonizers of community space or community members?

Do homeless people stand in opposition to the community, or are they part of the community? The decision rejected the government’s characterization of homeless persons as interlopers on public space.

The homeless are part of our community, and are equally entitled to use public space as any other community member.

## 2. Homelessness as an issue of Choice and Economy

Counsel for the City argued that homeless people chose “urban camping” as a lifestyle despite the existence of beds and the bylaw. These theories do not account for the pre-existing power imbalances in society. Therefore, this so-called choice is a mirage.

However, the author also finds it problematic to assume that homeless people have no agency or ability to improve their circumstances. It may, therefore, be better to characterize sleeping outside rather than in a shelter as a choice, but one made among a series of unacceptable options. In this case, this issue was avoided because, in fact, there were not enough shelter beds to accommodate the homeless population of the City.

## 3. Bodily Integrity and Treatment of the “Homeless Body”

The City attempted to characterize homeless bodies as threatening or centres of disease and discomfort. The Court did not adopt this model, focusing on the dignity of homeless bodies and the importance of rudimentary shelters as protection and necessary for physical wellbeing. Her reading of s. 7 seems to import a notion of human dignity and the need to protect one’s body.

However, the decision also reinforced a view of s. 7 as a “negative” right, creating no affirmative right to state-provided shelter. The decision failed to expand the traditional conception of s. 7 rights.

### **Stephen Gaetz, *Street Justice: Homeless Youth and Access to Justice (Toronto: Justice for Children and Youth, 2002)***

The author conducted a research study focused on the Toronto homeless youth population. The findings produced in this report are the product of interviews and surveys performed with 208 homeless youth.

The author provided a picture of who street youth actually are. Street youth are difficult to generalize, because they are not a uniform group. Males typically outnumber females. There is a disproportionately high percentage of LGBT persons as compared to the general population. Aboriginal and black persons are also disproportionately represented.

While people become street youth for many reasons, most interviewees left home because of abuse issues (physical, mental, sexual and/or drug abuse). Nearly half of the interviewees had a history in foster homes and/or group homes.

Street youth face a number of different legal issues. The report considered 6 large areas where youth encounter legal and justice issues:

### 1. Housing and Evictions

Homeless youth have problems with their landlords. It is difficult for them to find affordable housing in Toronto – when they do, it is often with unscrupulous and exploitive landlords.

Homeless youth typically have a history of evictions, both legal and illegal. In terms of illegal evictions, homeless youth are often given massive rental increases or are evicted after receiving minimal noise complaints. Even when an eviction is for proper reasons, often homeless youth report having their damage deposit or property illegally restrained.

Youth often do not pursue these issues through formal complaints. There is a general belief that pursuing such options will not accomplish anything.

## 2. Employment

20% of homeless youth are employed. They face considerable disadvantage in trying to get a job: often they have little education or employable skills. In addition, things like resume building, job interviewing and personal hygiene do not come easy to them. Not having a fixed address or phone number is also a significant burden.

Given these circumstances, their employment is often transient “under the table” work on the fringes of the formal economy. They are often paid in cash and have no formal rights. These casual employers often exploit the youth and refuse to pay them for the work done. This leads many homeless youth into illegal or quasi-legal ways to make money (drug dealing, squeegeeing etc)

## 3. Family law

Many homeless youth come from a history of involvement with Children’s Aid/foster homes and other family law issues. Many of these youth become young parents who re-engage with these same services and face apprehension proceedings.

Less than half of the interviewees who were parents had custody of their children. These people need advice, information and legal representation. While 66% of them had retained a lawyer at one point, most did not currently have any legal representation.

These people often lead chaotic lives focused on eating and shelter. This prevents them from devoting time to launching proper advocacy and engagement with Children’s Aid or other services.

## 4. Immigration

There has been a disturbing growth in the number of homeless youth who are either immigrants or recent refugees. These people have very specialized challenges and legal needs.

Information is disseminated to these youth through homeless outreach centres. Anyone of these youth who had a lawyer obtained it through one of these agencies.

## 5. Criminal Law

While homeless youth are most often portrayed as perpetrators of crime, much more often they are the victims of crime. Homeless youth are much more likely to be perpetrators and victims of crime than the general population.

81% of homeless youth reported being a victim of crime in the past year (as compared to 25% of overall population). They report a high incidence of theft and property crime. When they are employed, they are often paid in cash – this makes them more likely to be targeted by other homeless persons or criminals. There are also high rates of assault. Given that they are generally not allowed to hang out in public spaces, they are forced to stay in more isolated and vulnerable spots. The interviewees reported being victimized by other homeless persons, the mentally ill, and total strangers.

There is a very strong correlation between homeless persons committing crimes and the need for money. The author expressed concern that laws outlawing activities like panhandling and squeegeeing force people into more criminalized or deviant behaviours in order to survive.

#### Police/Courts and the Justice System

Street youth feel profoundly alienated by the police. Their encounters are almost entirely focused on them as perpetrators of crime, as opposed to victims of crime. 73% of the interviewees reported having an engagement with police in the last 12 months.

Homeless youth live much of their lives in public. They feel continually harassed and “shuffled away” by the police because their status as homeless is undesirable to see. Some reported being harassed, or their property being confiscated by police. They often receive “annoyance charges”: police using discretionary power to harass street youth and ticket them for things like littering, jay walking, spitting in public, or other infractions not issued to the general public.

Street youth do not issue complaints against the police who harass them. They often feel like it would do no good, and cause them more problems down the road. As is the case with other types of victimization they experience, many street youth feel that they profoundly lack access to justice.

**Sarah Gerry, “*Jones v City of Los Angeles: A Moral Response to One City’s Attempt to Criminalize, Rather than Confront, Its Homelessness Crisis*” (2007), 42 Harv. C.R.-C.L. L. Rev 239.**

This article summarizes the US decision *Jones v City of Los Angeles*, 444 F.3d 1118 (9<sup>th</sup> Cir. 2006) [*Jones*]. In *Jones*, the 9<sup>th</sup> Circuit Court of Appeal held that enforcing a municipal bylaw that banned sitting, laying or sleeping on the street at night violated the 8<sup>th</sup> amendment’s ban on cruel and unusual punishment. Given that Los Angeles had a significant shortage of homeless shelter beds, the homeless population on Los Angeles’ skid row had no choice but to sleep or sit outside. Criminalizing this behaviour was tantamount to criminalizing their status as homeless, and thus unconstitutional cruel and unusual punishment. As the author put it, “the ordinance unconstitutionally criminalized conduct that, due to the city’s shortage of housing for the homeless, was an unavoidable outgrowth of the state of homelessness” (at pg 240).

The author was skeptical as to whether or not the decision would survive an appeal, given alternate approaches from other circuit courts. Nonetheless, she saw the decision as an important one. The decision sends a message to cities that they cannot just criminalize homelessness and make the problem disappear. In addition, given that this decision hinged on the fact that there were inadequate homeless shelters, it forces cities to consider the impact of their policy decisions about the homeless.

**Sarah Hamill, “Private Property Rights and Public Responsibility: Leaving Room for the Homeless” (2011) 30 Windsor Rev Leg & Soc Issues 91**

In this article, the author considers how Canadian courts treat property. Specifically, courts tend to view public property as something that exists as a comparator, or limited version of private property. The author argues that this comparative approach diminishes the protections of publicly available property. It leaves no room for the development of rights for people who have no property. This argument is developed through reference to the *Victoria (City) v Adams* decision.

**Jennifer Koshan and Jonnette Watson Hamilton, “The Continual Reinvention of Section 15 of the Charter” (2013), 64 UNB LJ 19**

This article reviews the Supreme Court of Canada’s approach to jurisprudence under section 15 of the *Canadian Charter of Rights and Freedoms*, and the changes that have occurred in its reasoning over the last 30 years.

The seminal decision on equality and section 15 jurisprudence is *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143. That case emphasized that a finding of discrimination is intricately linked to the creation of disadvantage by perpetuating prejudice or stereotyping.

A later decision -- *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 -- shifted the focus regarding discrimination. Under *Law*, discrimination was focused on human dignity. The most recent articulation of section 15 was espoused in *R v Kapp* 2008 SCC 41. *Kapp* moved away from the dignity focus, and returned to a focus on perpetuating prejudice or stereotyping. The authors argue that the characterization is the most restrictive interpretation given to section 15 yet.

This restrictive interpretation may impact the equality legislation moving through the Courts right now regarding the rights of the homeless. *Tanudjaja v Canada (Attorney General) and Ontario (Attorney General)*, 2014 ONCA 852 is one such case. If it is heard on its merits, it will be interesting to see how the Court treats this relatively novel section 15 claim.

Since *Andrews* the Supreme Court of Canada disallowed a disproportionate number of section 15 cases. Disturbingly, the cases that did succeed were ones where the recognition of rights would impose a relatively small expense on the government. Cases where the recognition of rights would have resulted in significant government expenses failed.

**Linda McKay-Panos and Kristyn Stevens, No Place to Sleep: The Right to Housing in Canada, 2<sup>nd</sup> ed (Calgary: Alberta Civil Liberties Research Centre, 2013)**

This report explains the current status of the right to housing in Canada. It explains how Courts have been used, and may be used in the future, to advance a right to housing. The report describes the prominent arguments that have been advanced to claim that housing is a human right at both the domestic and international levels. It details the hurdles faced by proponents of this right, and possible ways forward.

Internationally, the report discusses the International Covenant on Economic, Social and Cultural Rights (ICESCR) and its right to housing. The report explains how international law principles in treaties such as the ICESCR are implemented, interpreted, and treated by domestic Courts. Domestic courts have been hesitant to recognize and enforce economic, social and cultural rights because they are viewed as fundamentally different from traditional civil and political rights. Economic, social, and cultural rights are

often viewed as non-justiciable and outside the jurisdiction of the Courts. While this hesitancy has been slowly changing in some jurisdictions, Canada has remained quite traditional and narrow in its interpretation of government obligations.

There are two avenues by which a right to housing have been launched in Canada: section 7 (right to life, liberty and security of the person) and section 15 (equality) of the *Charter*. For the most part (but not entirely) these challenges have been unsuccessful. Significant hurdles exist to establish a claim under both sections.

The general argument under section 7 is as follows: certain government policies that restrict housing infringe on life, liberty and security of the person in a way that is arbitrary or grossly disproportionate. There are several sticking points that hinder this argument. Most significantly, section 7 is a “negative right” not a “positive right”. In other words, section 7 protects person from government intervention, it does not give them a right to positive obligations on the state. Section 7 arguments interpreted as alleging a “positive” right (creating an obligation on the government to act, rather than refrain from acting) are rejected under section 7.

There are many problems with this positive vs negative right dichotomy. Many authors have launched convincing arguments that the difference is largely illusory, but nonetheless, Canadian courts are thus far unwilling to view section 7 as creating positive rights. This is a significant hurdle in launching an argument regarding the right to housing. In order to advance a right to housing, plaintiffs must allege that the government is obligated to create policies and provide housing, rather than refrain from acting.

Section 15 arguments also face the positive vs negative right problem (section 15 has been described as a “hybrid” right), but it also must deal with different troubles. Section 15 jurisprudence is very confused in Canada – the appropriate test to apply is unsettled and the proper case to advance is a moving target. In addition, historically plaintiffs have had mixed success establishing “poverty” or “homelessness” as an analogous ground of discrimination.

The report offers alternative ways forward in advancing a right to housing. It chronicles the *Tanudjaja, Arsenault, Mahmood, Dubourdieu and the Centre for Equality Rights in Accommodation v Canada (Attorney General) and Ontario (Attorney General)*, 2014 ONCA 852 decision (summarized below) and its potential if accepted. Secondly, it expands the conversation outside the courtroom. Some of the problems alleged may be addressed through political movements and law reform.

### **Lorne Sossin, “The Criminalization and Administration of the Homeless: Notes on the Possibilities and Limits of Bureaucratic Engagement” (1996-1997) NYU Rev L & Soc Change 263**

- Successfully addressing social problems such as homelessness requires that the vast often hidden discretion afforded public officials be exposed, rehabilitated and expanded. A more proactive bureaucratic role in implementing social welfare legislation ought to be tied to explicit normative underpinnings:
  - State intervention to eliminate homelessness will only succeed if its goals are clear, if adequate resources are dedicated to the task, and if the public officials responsible for undertaking the intervention are empowered and directed to exercise their authority purposefully as advocates on behalf of the homeless.

- Homelessness encompasses grinding poverty (which is common among recipients of welfare and other government entitlements) and a detachment from society as symbolized by the absence of even a fixed address (which distinguishes the homeless from other vulnerable members of the society).
- Making the administration process part of the solution to homelessness requires engaging the homeless in the process of discretionary decision-making:
  - Discretion, if exercised within a framework of engagement, would allow public officials to reach out to the communities subjected to their authority and foster relationships of autonomy and interdependence which neither legislatures nor courts are able to sustain.
- Because the homeless inhabit public spaces and rely on public resources for many of their basic needs, the discretionary choices having an impact on their status and welfare necessarily involve assumptions about what is or is not in the public interest:
  - Whether homelessness is viewed as a crime-control problem, a housing problem, or a health and welfare problem dictates the basis for exercising discretionary authority over the homeless.
- Advocates for the homeless have used litigation strategy to address the challenges facing the homeless in New York State since the late 1970s. However, a litigation-based strategy suffers from one-dimensional reliance on rights, without reference to the needs of the homeless, or the duties of responsible public officials.
- A framework of engagement that is responsive to the needs of and engages the homeless while demanding accountability from public officials tasked with the issue of homelessness is key to addressing the crisis of homelessness.

### **Jeremy Waldron, "Homelessness and Community" (2000), 50 U Toronto LJ 371**

In this article, Waldron responds to popular arguments made in favour of using bylaws to restrict behaviours characteristic of urban homeless populations. Many academics/policy makers who support anti-poverty bylaws use a "law and economics" cost-benefit (or harm-benefit) rationale to bolster their claims. In this article, Waldron disputes this approach.

Waldron argues that we should not treat our encounters with homeless populations and their behaviours (urinating/sleeping/begging) as *harm* at all. While the conduct of others may distress some people, that distress is not harm. This type of encounter is essential for a vibrant debate on public policy. To explain his point, Waldron argues that a conservative person may be distressed at seeing two men kissing, but this distress should not be treated as harm weighing against the action's legality. Distresses like this should be seen as a social good, because it is important for people to be confronted with ideas and ways of life that challenge their preconceptions.

Waldron argues that it is important for members of a community to have an accurate reflection of the true state of affairs in their society. A truly democratic and well-ordered society values transparency. It is deeply flawed to adopt a social theory that panders to people's desire not to have their illusions about their society dispelled.

Waldron further argues that society must be confronted with the lived reality of the homeless, because it has decided that it is not willing to provide adequate facilities for homeless people to perform basic

living necessities. Given that we have made this decision, it is unfair for our society complain about the result of that decision, and treat those consequences as justification for further restrictions.

People with homes want to live in a community where public space is treated as a complement to private space. However, we cannot treat public space this way in a society that permits a large number of homeless people. As such, public places must be regulated in light of the recognition that some people have no private space to use. Fairness demands that public spaces be regulated in light of the recognition that large numbers of people must live all their lives in public.

While the issue of homelessness may not necessarily be a constitutional matter, it is certainly as a matter of justice. The less a society provides in the way of public assistance, the more unfair it is to enforce norms about public places that depend on circumstances that do not apply to many community members. Unless we are going to fund places for people without homes to fulfill their basic needs, we cannot guarantee that public space is allocated only for activities that people who have home would approve of. A society is not entitled to insist that the homeless follow community norms if those norms are premised on the idea that denies, in effect, that homelessness exists.

### **Jeremy Waldron, "Homelessness and the Issue of Freedom", (1992) 39 UCLA L Rev 295**

Waldron argues that homelessness is a deprivation of liberty, and we should think of homelessness the same way as we think of other human rights violations. We typically think of freedom as a right to do something. In order to do something, however, a person must physically be somewhere. Increasing regulation in public spaces has left the homeless with no place they are legally allowed to be. Without this fundamental protection, they are not free to do anything, because they are not free to be anywhere. If we value autonomy, we should regard the satisfaction of its preconditions as a matter of importance.

In a world where most people have private homes, public spaces are the only spaces for the homeless to perform basic human functions. Our society saves the homeless of having nowhere to exist by virtue of having some property held collectively and made available for common use – public property. Placing restrictions on one's ability to perform basic needs in public space, however, leaves the homeless with nowhere to perform these tasks. In other words, a rule against a performing an act in a public place amounts to a comprehensive ban on that action insofar as the homeless are concerned.

It is a well-documented fact that there are not enough homeless facilities to deal with the entire homeless population. Even if there were, these places are incredibly dangerous. Given this state of affairs, if you have no place to exercise your fundamental and basic necessities of life, you are not free to perform them anywhere, and are not free to exercise any other rights without this basic need provided. In order to perform basic human necessities, you must break the law.

- Excerpt at 320: [T]hough we say there is nothing particularly dignified about sleeping or urinating, there is certainly something deeply and inherently undignified about being prevented from doing so. Every torturer knows this: to break the human spirit, focus the mind of the victim through petty restrictions pitilessly imposed on the banal necessities of human life. We should be ashamed that we have allowed our laws of public and private property to reduce a million or more citizens to something approaching this level of degradation.

**Yelida Zalik, “Where There is no Lawyer: Developing Legal Services for Street Youth” (2000)  
18 Windsor YB Access Just 153**

- This study sought to identify the access to justice barriers facing street youth, considers how legal services should be provided to street youth and argues that legal services should be designed to meet the expressed needs of the recipient of such services.
- The “new poverty law scholarship” explores the dynamics of the lawyer-client relationship and holds that the current dynamics of the lawyer-client relationship disempower the client.
- The study participants connect their legal problems explicitly to issues of homelessness, which is not unexpected given that homelessness is a full time occupation with multiple challenges:
  - Homeless youth are also transitory and it is difficult for them to keep appointments relating to their legal and other needs.
  - Homeless youth also face discrimination, tend to be more visible than other poor people and “inhabit space that is ‘ecologically contaminated ... in the sense of being characterized by crime and a disproportionate police presence”.

Delivery can play a major role in determining the success of services for homeless consumers and interviews with study participants indicate that the delivery of legal services poses a significant problem.

- There seems to be a need for literacy among the study participants at two levels: basic literacy (reading and writing) and legal literacy (understanding of the law and an ability to navigate the legal system):
  - In addition to making it more difficult for street youth to go through the legal process, lack of legal literacy may lead street youth to opt out of the process altogether.
- When professionals working with vulnerable groups monopolize knowledge of what the group needs, it prevents group members from exploring the meaning of their needs and evaluating the role of the political/social system in their lives.
- Lawyers who serve vulnerable groups should listen for the expressed needs of group members:
  - Otherwise, the lawyer will be creating a power imbalance under which lawyers make decisions for clients rather than present clients with options from which to choose.
  - Instead of helping the client understand the legal puzzle, such an approach takes the puzzle out of the client’s hands leaving the client still uninformed about the legal system or even the legal issue in question.

## **B. Governmental Reports/Materials**

**Alberta, Homeless Initiatives Program Policy, *ID for the Homeless Training Manual*  
(Integrating Branch, Ministry of Human Services, September 2014)**

This manual was developed as a result of an Alberta initiative to end homelessness by 2019. That initiative had 17 strategies for eliminating homelessness, one of which pertained to the identification needs for persons who are homeless. Homeless persons often encounter significant difficulty accessing government identification. This limits their ability to access government services and acts as a barrier to justice.

This manual explains a new procedure that was developed to assist homeless persons access government identification. It is also a “how-to” guide for the entities that will assist the homeless persons in accessing this identification.

To get identification in Alberta, a person needs two things:

- address authorization; and
- identity authorization.

Both branches pose problems for homeless persons. The new program seeks alternative measures for homeless persons to meet these criteria.

In terms of address authorization, the new system the new program permits a homeless person to use a shelter’s address (provided certain criteria are met).

In terms of identity certification, expired and photo-copied documents can now be accepted as part of the verification process. In addition, a broader range of documents can be used to verify a person’s identity (for example, hospital records or records of incarceration). And lastly, alternative channels can be used to fact check someone’s identity through a trusted record or authority figure.

These amendments have not removed all the barriers to obtaining identification. In particular:

- There are still fees for obtaining identification (\$51.45 for 5 year ID).
- Homeless persons must be able to prove they lived in Alberta for more than 90 days before they will be issued an Alberta ID.
- There is a \$115.00 fine imposed if a person fails to change their identification within 14 days of moving (which is difficult if a homeless person is living at different shelters).
- Persons under 18 must have a parent or guardian’s consent to get an ID. This poses barriers for homeless youth.
- Persons who are subject to suspension, outstanding fines or the maintenance enforcement restrictions have additional hoops to jump through if they want to get an ID.

**[Final Report of the Justice Sector Constellation of the Calgary Poverty Reduction Initiative, Intervening at the Intersection of Poverty and the Legal System, March 19, 2013 <http://www.enoughforall.ca/wp-content/uploads/2013/03/Justice-Sector-Constellation-Final-Report.pdf>](http://www.enoughforall.ca/wp-content/uploads/2013/03/Justice-Sector-Constellation-Final-Report.pdf)**

This article examines the issues that arise where poverty and access to justice meet. Sixteen Calgary organizations are working together on poverty-reduction initiatives, and in so doing, identified six access to justice barriers for low income persons. Using these key issues, it developed a list of goals and recommendations to increase access to justice.

Legal problems occur more often in low income people, these issues tend to cluster and often can create or exacerbate other problems. These people are often unable to understand the legal system or access adequate legal advice. They require a more holistic approach to their problems.

Barrier 1: The clustering of legal issues. Legal issues generally do not occur in isolation – other legal and social issues develop from a single legal source.

Barrier 2: People lack knowledge about legal issues and where to find legal information – There is a lack of public understanding about the nature of legal problems. There is no central organization for providing legal information. There is a lack of understanding about what legal providers can do. Most legal problems do not go to court, but the services focus on court.

Barrier 3: Lack of confidence in the justice system: Albertans have one of the lowest levels of confidence in the justice system.

Barrier 4: The legal system is complex and difficult to access to some. The system has been designed to speak a specific language and work for lawyers and judges. It is very difficult for an untrained person to understand or access this system. Unrepresented litigants are thus creating real delays.

Barrier 5: Legal Advice is Difficult to Access for some. Only lawyers can give legal advice. Many people cannot afford lawyers, and there are not enough lawyers working in areas that focus on the poor.

Barrier 6: The Cost of Legal Services: Legal aid funding has been depleted. At the same time, legal fees have been increasing. Justice service providers are examining alternative options for providing legal services (unbundling, legal expense insurance etc.) are now being examined.

The Constellation developed a series of goals and vision statements for the justice system: Diversity and Community Integration; Education; Valuing the community; integrated community-based services; and opportunity creations. It's recommendations fell within three broad headings: Education, Service Enhancement, and systemic change.

- With regards to education, we need to enhance public legal education, increase awareness among sectors (for example, social service providers on what legal options exist) and within the justice sector (for example, on resources available to the public).
- With regards to service enhancement: we need to enhance form literacy, facilitate court navigation, enhance access to legal services, accommodate diverse populations, facilitate reintegration for those convicted of offences, maximize utilization of existing resources and services, and coordinate services.
- In terms of systemic change, we need to promote legal health and prevention, make the justice system more accessible, expand options available in the justice sector, expand services to those with low income, expand services to individuals with complex needs (more holistic services), expand options in the criminal justice system and enhance program delivery.

### **C. Case law**

#### ***Canada (Attorney General) v PHS Community Services Society, 2011 3 SCR 134***

Vancouver's downtown eastside (VDTES) had an injection drug use crisis in the early 1990s. VDTES declared a public health emergency in September 1997. Since the population of VDTES was marginalized, with complex health needs, public health authorities recognized that creative solutions must be put in place. Years of research planning and intergovernmental cooperation resulted in the development of a proposal involving care for drug users that would help them at all stages of treatment

of their disease, not simply when they quit using drugs permanently. The proposed scheme included supervised drug consumption facilities.

The Controlled Drug and Substances act section 56, permits exemptions, for medical or scientific purposes, from the prohibition on possession and trafficking of controlled substances, at the discretion of the Minister of Health. Insite received a conditional exemption in September 2003, and soon opened. Evidence accepted by the Court demonstrated that Insite is a strictly regulated health facility, which its personnel being guided by strict policies and procedures. Insite does not provide drugs to the clients, who are required to check in, sign a waiver, and who are closely monitored during and after injection. Clients are provided with health care information, counselling, and referrals to service providers, including an on-site on-demand detoxification centre. The evidence also indicated that Insite has saved lives and improved health without increasing the incidence of drug use and crime in the surrounding areas. The Vancouver police, the city and provincial governments support Insite's program

Before the initial exemption had expired, Insite formally applied in 2008 for an exemption. The Minister had granted temporary extensions in 2006 and 2007, but indicated that he had decided to deny the formal application. Insite supporters commenced legal action in an effort to keep it open. The Vancouver Area Network of Drug Users cross-appealed, asking for the exemption from application of section 4.1 of the CDSA to all addicted persons, not merely those who sought treatment at supervised injection sites.

Decision:

The Supreme Court upheld the constitutionality of the federal legislation, but also ordered that, based on a violation of *Charter* section 7, the Minister of Health grant an exemption forthwith to Insite under s. 56 of the CDSA.

The Minister's discretion to grant an exemption was not absolute – it must be exercised in accordance with the *Charter*. The federal government argued that it had not yet made decision about whether to grant the extension to Insite's exemption, but the SCC found that the Minister had effectively refused it. When analyzing the grounds for the minister's refusal, the SCC noted that it was not acceptable for the Minister to "simply deny an application for a section 56 exemption on the basis of policy *simpliciter*". The Minister had to make a decision in accordance with the principles of fundamental justice because the individuals' *Charter* section 7 rights were at stake.

Laws that are arbitrary are recognized as being contrary to the principles of fundamental justice, although there is some dispute in case law as to the correct meaning of arbitrary. The alternative approaches to arbitrariness include whether the impugned measure is necessary to or inconsistent with the state objectives underlying the legislation. The SCC found that the Minister's refusal to grant the exemption was arbitrary, no matter which of the terms was used. The refusal to grant the exemption undermined the CDSA's objectives of public health and safety. The SCC also found that the effects of the Minister's refusal and the corresponding denial of services to Insite clients to be "grossly disproportionate to any benefit that Canada might derive from presenting a uniform stance on the possession of narcotics." The court noted that its findings that the actions were arbitrary and their effects grossly disproportionate to the benefits, resulted in the application fo the law being contrary to the principles of fundamental justice under *Charter* section 7.

If a section 1 analysis were required, the *Charter* violation would not be saved by section 1.

The Court upheld the constitutionality of section 4(1) of the CDSA. Section 4(1) directly engages the liberty interests of health professionals who provide services at Insite (they face imprisonment) and the law engages the right to life, liberty and security of the person of the Insite clients. However, because the Minister has the power to grant exemptions from section 4(1) for medical, scientific or public interest reasons, the engagement of these *Charter* section 7 rights is done in accordance with the principles of fundamental justice. The SCC noted that the exemption “acts as a safety valve that prevents the CDSA from applying where it would be arbitrary, overbroad or grossly disproportionate in effects.”

### *Gosselin v Quebec (Attorney General)*, 2002 SCC 84

Louise Gosselin and others challenged the Province of Quebec’s social assistance law enacted in 1984. It set rates for social assistance for persons under thirty who were deemed fit to work at about one-third the rate for persons over thirty. Those recipients under thirty could increase the amount of their payments by participating in education or work experience programs designed to help them become financially self-sufficient. The Act was amended in 1989 to end the age differential, but Gosselin brought a class action against the province on behalf of those persons who were affected by the difference in rates between 1984 and 1989. She argued that the age threshold was a violation of equality rights and security of the person under the *Charter*.

Her appeal was viewed as a test case for the notion that there should be a guaranteed minimum level of social assistance available to Canadians as a human right. Because of this, several other provincial governments were interveners in the hearing.

The Court applied the four factors set out in *Law v Canada* and concluded that there was no discrimination and rejected the claim. The court provided the analysis as follows:

1. Members of the complaint group did not suffer from a pre-existing disadvantage or stigmatization on the basis of age. The Court said that age-based distinction are a common and necessary way of ordering society.
2. There was no lack of correspondence between the welfare scheme and the actual circumstances of the recipients. The purpose of the distinction, far from being stereotypical or arbitrary, corresponded to the actual need and circumstances of individuals under thirty.
3. The social assistance scheme was ‘ameliorative’ in that it aimed to improve the situation of persons in this group.
4. The findings of the trial judge and the evidence did not support the view that the overall impact on individuals undermined their human dignity and their right to be recognized as fully participating members of society notwithstanding their membership in the class affected by the distinction.

The Court in *Gosselin* was split, five to four, on this section 15 question. The court applied the *Law* decision and found that Gosselin had “not demonstrated that the government treated her as less worthy than older welfare recipients simply because it conditioned increased welfare payments on her participation in programs designed specifically to integrate her into the workforce and to promote her long-term self-sufficiency” (at para 19). In the majority’s opinion, these young adults do not suffer from pre-existing social disadvantage. An incentive had been created by training programs to force young adults to achieve their potential in terms of employability. There was also no evidence of adverse effects or that any recipient under thirty who wanted to be participate in employability programs was refused.

The same argument was made with respect to section 7. Given the compensatory ‘workfare’ programs, the evidence was not sufficient to establish actual hardship.

Justice Arbour wrote one dissent. She argued that the “right to life” in *Charter* section 7 includes the right to a minimum level of social assistance. She also held that section 7 first protects the right to life, liberty and security of the person, and second, it protects the right not to be deprived of life, liberty and security of the person except in accordance with the principles of fundamental justice. She would have found that the Quebec regulation was in violation of *Charter* section 7. With respect to the analysis regarding *Charter* section 15(1), at that time, the *Law* contextual analysis applied. Justices Bastarache and Arbour found that all three contextual factors from *Law* applied to create discrimination. The adverse effect of the government’s welfare scheme was a priority of the minority’s analysis.

***Tanudjaja, Arsenault, Mahmood, Dubourdieu and the Centre for Equality Rights in Accommodation v Canada (Attorney General) and Ontario (Attorney General), 2014 ONCA 852***

Facts: Four homeless and/or borderline homeless individuals and one non-profit organization alleged that Canada and Ontario’s overall approach to low-income housing violated sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*. Each of the individual plaintiffs/appellants had been on waiting list for low-income housing for several years. They argued that Canada and Ontario’s changes to legislation, policies, programs, and services created and sustained in homelessness and inadequate housing. The claim did not allege that one piece of legislation was unconstitutional. It was based on an overall approach to homelessness, which included positive and negative government duties.

Ontario and Canada brought a motion to strike the claim for failing to disclose a reasonable cause of action.

Decision: Motion to strike granted; the claim is not justiciable

Majority Reasons: The Majority of the Court of Appeal held that the claim must fail for several reasons. First, the appellants were not challenging any specific legislation. Without a specific law or state action to challenge, there was no sufficient legal component engaged to make the issue justiciable. The case has an insufficient legal component to anchor any analysis.

Moreover, while a challenge based on a network of constitutional violations may be possible in the future this particular claim was unsuitable for *Charter* scrutiny for several reasons:

- the claim asserted a freestanding right to adequate housing, a claim that is exceedingly doubtful;
- Without any impugned law leaves no basis for a s. 1 analysis; and
- There is no judicially discoverable standard for assessing the adequacy of a housing policy. The applicants were seeking something more akin to a public inquiry, which is well beyond the Court’s institutional capacity.

Dissent: In dissent, Feldman JA held that it was premature to dismiss the claim. While the *Charter* claim was admittedly novel, it was not plain or obvious that it is doomed to fail, especially in light of the *Charter*’s development to date. Novelty alone is not a reason to strike a claim. In rejecting the applicant’s claim, the motions judge defined the parameters of s. 7 law, as if those parameters were settled. They are not. Moreover, the motion judge mischaracterized the applicants’ claim in an overly broad way.

Follow up: Leave to appeal to the Supreme Court of Canada sought: 2015 CarswellOnt 2562

### *Victoria (City) v Adams, 2009 BCCA 563*

Facts: The City of Victoria passed a bylaw that prohibited the erection of overhead protection or temporary shelters overnight parks. Evidence was adduced demonstrating that the city did not have enough beds for the entire homeless population to access shelters. The Respondents (9 homeless individuals) argued that forcing a homeless person to sleep outside without shelter unjustifiably infringed s. 7 of the *Charter* because it was arbitrary (there was no evidence of a real connection between societal interests advanced and the prohibition) and overbroad (less invasive options would be available to accomplish its societal interests).

Judgment: The bylaw violated s. 7 of the *Charter*, and the violation was not saved by s. 1. The Court of Appeal considered and rejected the City's three primary arguments: justiciability, the boundaries of s. 7 rights, and compliance with the principles of fundamental justice.

The issue was clearly justiciable. Just because a matter engages complex policy decisions and the allocation of scarce resources, it does not immunize that legislation from review. The Chambers judge did not inappropriately intrude into the legislative sphere. "The respondents were not asking the court to adjudicate the wisdom of the policy decision. The question is whether the bylaws violate s. 7 of the *Charter*, in situations where there are insufficient alternative shelter provided in the city" (at para 68).

There was sufficient state action to engage s. 7. While the bylaw did not cause the homeless persons' state of homelessness, it was a direct cause of a s. 7 violation because it impaired the ability of homeless to address their need for adequate shelter.

The Chambers decision did not inappropriately create a positive obligation on the City. The decision merely restricted the City from legislating in a manner that interferes with s. 7 rights of the homeless. The claim was not one seeking property rights. Rather, the case was about a right to be free from a state imposed prohibition on an activity, which prohibition causes significant health risks on one of the City's most vulnerable populations.

The bylaw breached the principles of fundamental justice because it was overbroad: it failed to consider less intrusive means. The bylaw was not arbitrary – it had a broad objective that sought to maintain the environmental, recreational and social benefits of urban parks. Restrictions on use are connected to that objective.

Intervenors argued that the chamber's judge's declaration of invalidity was inappropriate, and that rather, an individual exemption would have been more suitable. The Court of Appeal noted that a s. 24 constitutional exemption was not appropriate because the challenge was made to the law, which is typically addressed through s. 52 declarations of invalidity.