NO PLACE TO SLEEP: The Right to Housing in Canada

THIRD EDITION

No Place to Sleep: The Right to Housing in Canada, Third Edition

by the
Alberta Civil Liberties Research Centre

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Civil Liberties Research Centre

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DEDICATION
This project is dedicated to the memory of Linda McKay-Panos, B.Ed., J.D., LL.M., Executive Director (1992-2024), whose vision, dedication, and contributions were integral to this report.

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Foreword

Article 11(1) of the *International Covenant on Economic, Social and Cultural Rights* says:

> The States Parties to the present Convention recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realisation of this right, recognising to this effect the essential importance of international co-operation based on free consent.

This Article seems clear: everyone has the right to adequate housing. However, what does this right mean for us in Canada?

My family volunteered at a program offered by several Calgary churches, synagogues and other organizations—Inn From the Cold. These agencies host overnight guests from the homeless population in Calgary. The priority is families. On the day we volunteered, there were twenty overnight guests. Over half of the guests were young children. One guest was a very pregnant woman, and another was a six-month-old infant. Several of the guests appeared to be New Canadians and some of the adults had jobs. While I was impressed with the assistance these people received, I was angered that in an affluent city and province, Calgary, Alberta, there were many people not living in adequate housing.

The international community recognizes the right to housing as a basic human right. Even though Canada prides itself as a leader in human rights, there are many people not enjoying this right in Canada.

This paper seeks to examine our human rights to adequate housing. First, we examine "human rights". Second, we look at the approach under international law to the question of whether there is a human right to adequate housing. Third, we examine the constitutional issues around housing. Fourth, we look at the way that courts apply international law principles and whether we can argue for a right to adequate housing under the *Canadian Charter of Rights and Freedoms.* Finally, we provide a conclusion and recommendations on the issue.

Linda McKay-Panos
Executive Director,
July 2021

Executive Summary

Poverty and homelessness are significant problems in Canada. Even though Canada prides itself as a leader in human rights, there are many people in Canada who are not enjoying the internationally recognized right to adequate housing. Often the most vulnerable in our society face homelessness: people living with physical and mental disabilities; single mothers and fathers; Indigenous Peoples (including First Nations, Métis, and Inuit peoples); racialized families, in particular racialized women; and elderly single individuals and seniors. The Alberta Point-in-Time Homeless Count (Alberta PiT Count), a provincially coordinated biennial count across seven Alberta cities, highlights that thousands of people experience homelessness in Calgary at any given moment.[1]

There have been several municipal and provincial policy initiatives. In 2018, the federal government enacted the *National Housing Strategy Act (NHSA),*[2] recognizing for the first time under Canadian law that housing rights are human rights. This Act is, for the most part, consistent with Canada's obligations under international human rights law. However, it does not enshrine an individual right to housing but rather provides for systemic issues of inadequate housing to be dealt with under the Act. A review done by the Federal Housing Advocate showed that the National Housing Strategy Act has not actively been working to eliminate issues of homelessness and the housing crisis. Especially with the rise of encampments during the pandemic, there have been several questions as to the effectiveness of the *NHSA*.

Many rights that Canadians may consider to be human rights, including the right to adequate housing, are not explicitly recognized in Canadian law and the *Canadian Charter of Rights and Freedoms* (*Charter*)[3] . While some people distinguish economic, social and cultural rights from civil and political rights, others argue that this distinction has created barriers in the implementation and protection of economic, social and cultural rights. Some scholars argue that the international human rights documents that Canada has ratified are recognized as part of Canada's law through the *Charter* or provincial human rights statutes, yet courts have been very reluctant to interpret these laws as

[1] Calgary Homeless Foundation, *Point-in-Time Count* (2024) [Calgary Homeless Foundation].
[2] *National Housing Strategy Act*, SC 2019, c 29, s 313 [*NHSA*].
[3] *Canadian Charter of Rights and Freedoms,* Part I of the Constitution Act, 1982, Schedule B to the Canada Act, 1982 (UK), 1982, c 11 [Charter or Charter of Rights and Freedoms].

creating a positive obligation on the government to provide housing or other resources to meet minimum economic standards. This exclusion from our domestic legal framework leads to increased marginalization of poor people in Canada.

While a number of barriers currently prevent a conclusion that Canadians clearly have a right to adequate housing under our laws, there are a number of potential arguments or bases for making a claim to a right to adequate housing. First, one could argue that international instruments (to which Canada is a party) clearly provide for a right to adequate housing. This factor should therefore require Canada to implement this right into our domestic law. A number of options are possible. Canada could implement social and economic rights through a constitutional amendment that provides for the right to housing (e.g., as exists in South Africa's Constitution) or through passing an intergovernmental agreement like the Social Union or an Alternative Social *Charter*.

Second, Canada or the provinces could pass legislation in the form of quasi-constitutional instruments that incorporate the right to housing. For example, on December 13, 2002, the National Assembly of Quebec unanimously adopted a law to "combat poverty and social exclusion."[4] But such options do not constitutionally protect the rights of individuals – they are subject to the will of the legislature. In addition, they are local and could be said to undermine a national ideology. Likewise, including social and economic rights in human rights legislation is an option, but the concerns remain the same. Certainly, the inclusion of social condition as a prohibited ground of discrimination in federal or provincial human rights legislation is a positive step. But, still, this is an attempt to deal with the condition and certainly is not a remedy for the root problem.

Third, existing *Charter* sections could be interpreted in light of international law principles so as to provide a right to adequate housing. There is certainly legal precedent to support this approach, but it remains to be seen whether one will be successful. Courts have shown reluctance to compel the government to spend its resources in order to protect people's *Charter* rights.

Fourth, the use of the *Charter* to provide protection from the adverse consequences of government actions and laws is promising, but it does not address directly the right to housing.

Without a *Charter* amendment explicitly covering social and economic rights, the most viable option appears to be interpreting the *Charter* through international law principles to include a right to

[4] Alain, Noel, "A Law Against Poverty: Quebec's New Approach to Combating Poverty and Social Exclusion" (2002), *Policy Research Networks* Inc.

adequate housing.

Although the *Charter* primarily emphasizes civil and political rights, it offers limited protection for those who are ill, hungry, or homeless. Meanwhile, Canadians must rely on policy decisions made by various levels of government to provide social housing, decisions that can change at the government's discretion.

I. Introduction

While many people in Alberta enjoy prosperity, there are significant numbers of people in crisis because they are either homeless or at risk of becoming homeless.[5] Many rental units have been converted into condominiums, and renters are being faced with unaffordable rent increases. This is the situation in several large cities across Canada—such as Toronto, Ottawa, and Vancouver—and in smaller centers in Alberta such as Fort McMurray and Grande Prairie. It is often the most vulnerable in our society who face homelessness: senior citizens, mentally ill persons, abused women and children, immigrants and refugees, and Indigenous persons. Currently, many of the homeless are working poor with families—living on the streets, in cars, in shelters, or in other temporary accommodations. Many of those living in shelters are working at jobs that do not pay well enough for them to afford proper housing. Consequently, the housing situation in Canada is said by many to have reached a state of crisis.

There are many statistics that back up these assertions. In Fort McMurray, it was estimated that in 2024, there were as many as 152 homeless people.[6] 50% of these people were in emergency shelters. In Ottawa, the number of available shelter and transitional housing beds increased from 962 in 2022 to 1,960 in 2024.[7] The City of Calgary also has a substantial homeless population, which the city has tracked in biennial counts of homeless persons. Calgary's reports on these counts distinguish between *absolute homelessness* and *relative homelessness*. Absolute homelessness refers to "individuals living on the street with no physical shelter of their own, including those who spend their nights in emergency shelters." Relative homelessness refers to "people living in spaces that do not meet the basic health and safety standards," which could include the lack of protection from the elements, access to safe drinking water, and sanitary living conditions.[8] The City's biennial counts only include those who are *absolutely* homeless.

Calgary's October 2024 count revealed that 3,121 people were homeless.[9] The results also

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[5] Linda McKay-Panos & K. Stevens, "Is there a Right to a Roof?" (2007) 31(6) *LawNow* at pp 28-32.
[6] Regional Municipality of Wood Buff, *2024 Point-in-Time Homeless Count* (October 2024).
[7] Paula Tran, "Homeless in Ottawa has reached a record high. What can be done about it?", *The Ottawa Citizen* (29 June 2025), online: <https://ottawacitizen.com/news/local-news/ottawa-affordable-housing-homelessness>.
[8] The City of Calgary, "Frequently Asked Questions about the City of Calgary's Biennial Count of Homeless Persons" (July 2006).
[9] Calgary Homeless Foundation.

revealed that more males than females were homeless males represented 60% of those counted.[10] Individuals aged 25 to 64 accounted for 63% of the total people counted. Indigenous people were over-represented in the count relative to the total number of Indigenous people in Calgary.[11] In addition, the proportion of individuals who hold some form of immigration status and experienced homelessness has risen from 10% to 16% since 2022.[12]

Homelessness also adversely affects children. The Government of Canada found that between 2020-2022, more than 3,000 youth aged 13 to 24 were identified as experiencing homelessness among 26,000 people surveyed across 87 communities and regions in Canada. Those who are affected by mental disorders are also overrepresented in the homeless population. In April 2024, University of Calgary researchers found that 67% of people experiencing homelessness had a current mental health disorder while the lifetime prevalence of mental health disorders was higher among people experiencing homelessness.[13]

The Canadian Homeless Research Network released a definition of homelessness in 2012:[14]

> Homelessness describes the situation of an individual or family without stable, permanent, appropriate housing, or the immediate prospect, means and ability of acquiring it. It is the result of systemic or societal barriers, a lack of affordable and appropriate housing, the individual/household's financial, mental, cognitive, behavioural or physical challenges, and/or racism and discrimination. Most people do not choose to be homeless, and the experience is generally negative, unpleasant, stressful and distressing.

In *The State of Homelessness in Canada, 2013,* Stephen Gaetz, Jesse Donaldson, Tim Richter and Tanya Gulliver describe the causes of homelessness as:[15]

> [A]n intricate interplay between structural factors (poverty, lack of affordable housing), systems failures (people being discharged from mental health facilities, corrections or child protection services into homelessness) and individual

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[10] Calgary Homeless Foundation.
[11] Calgary Homeless Foundation.
[12] Calgary Homeless Foundation.
[13] Rebecca Barry, Jennifer Anderson, Lan Tran, et al, "Prevalence of Mental Health Disorders Among Individuals Experiencing Homelessness: A Systematic Review and Meta-Analysis", JAMA Psychiatry", online: Jama Network < https://jamanetwork.com/journals/jamapsychiatry/fullarticle/2817602?guestAccessKey=2db223cc-6123-4ad8-95d5-f85149ce0f7f&utm_source=For_The_Media&utm_medium=referral&utm_campaign=ftm_links&utm_content=tfl&utm_term=041724>.
[14] Canadian Homelessness Research Network (2012) *The Canadian Definition of Homelessness*. Canadian Homelessness Research Network (at 1) in Stephen Gaetz, Jesse Donaldson, Tim Richter, & Tanya Gulliver (2013): *The State of Homelessness in Canada 2013* (Toronto: Canadian Homelessness Research Network Press) at p 4 [Gaetz et al, 2013].
[15] Gaetz et al, 2013 at p 4.

circumstances (family conflict and violence, mental health and addictions). Homelessness is usually the result of the cumulative impact of these factors.

Gaetz et al also assert that the homelessness crisis was created from drastic reductions in affordable and social housing since the 1990s, changes in income supports and the concurrent decline in spending power held by almost half of Canada's population.[16]

The situation of homeless people in Canada appears not to have gone entirely unnoticed by community members or government legislators. In 2008, the Province of Alberta announced that they would be launching an initiative to end homelessness in 10 years. Calgary's response to the initiative was to release Calgary's 10 Year Plan to End Homelessness in January 2008. Several governmental, community, non-governmental agencies and individuals joined together to develop a plan to eliminate homelessness.[17] The 10 year plan was key for the homeless Hub to innovate and transform the city's Homeless-serving system of care. Instead of monitoring individual organizations or programs, they manage and map the performance and interactions of different service providers in the city, so that resources can be delivered effectively and efficiently to those who need them most.

The federal government signed affordable housing agreements with a number of territories and provinces promising to provide funding to help increase the supply of affordable housing.[18] The 2024 federal budget included several housing commitments such as $6 billion for a new Canada Housing Infrastructure Fund and $1.5 billion for a new Canada Rental Protection Fund for non-profits to acquire and protect low-end of market rentals.

Gaetz et al note that while all levels of government (federal, provincial, territorial and municipal) need to be involved in addressing homelessness, some of the local efforts to address homelessness indicate progress. In particular, the Housing First programs in some Canadian cities, and some of the provincial programs, have resulted in reductions in homelessness. For example, several cities in Alberta - Edmonton, Calgary, Lethbridge, Medicine Hat and the Regional Municipality of Wood Buffalo - have seen considerable reduction in their homeless population by investing in affordable

[16] Gaetz et al, 2013 at 4.
[17] Canadian Alliance to End Homelessness, "Ten Year Plan to end Homelessness" [Canadian Alliance to End Homelessness].
[18] CMCH, "Bilateral IAH agreements and public reporting", online: <https://www.cmhc-schl.gc.ca/professionals/industry-innovation-and-leadership/industry-expertise/affordable-housing/provincial-territorial-agreements/investment-in-affordable-housing-bilateral-agreements-and-public-reportinghttps://www.cmhc-schl.gc.ca/professionals/industry-innovation-and-leadership/industry-expertise/affordable-housing/provincial-territorial-agreements/investment-in-affordable-housing-bilateral-agreements-and-public-reporting>.

housing and emphasizing Housing First. Gaetz et al conclude that a focus on Housing First, early intervention and the development of affordable housing are all keys to moving away from crises and towards a long-term solution. In addition, ending homelessness is the ultimate goal for both financial and moral reasons.[140] The question remains, are there any legal reasons for ending homelessness?

Several private members' bills were introduced in Parliament that seek to include a right to housing. Bill 152, Housing is a Human Right Act, was enacted in 2021 and provides that in interpreting all Acts, regulations and policies, the Government of Ontario shall be guided by the principle that housing is a human right.

The proposed legislation referred to a right to "adequate housing". What is considered to be adequate housing in Canada? The Caledon Institute of Social Policy provides definitions of the terms *affordable*, *suitable*, and *adequate* housing. As set out in Steve Pomeroy's October 2001 article "Toward a Comprehensive Affordable Housing Strategy for Canada," the Caledon Institute defines these terms as follows:

- affordable: the household is not paying more than 30 percent of its income for housing;
- suitable: the household has a sufficient number of bedrooms based on the family composition; and
- adequate: the household is safe, has basic plumbing, and is in a reasonable, habitable state of repair.[19]

These criteria seem reasonable in light of Canada's standard of living and our climate. The Caledon Institute found that affordability of housing was the greatest problem in Canada. It suggests that the causes are incomes that are too low and rents that are too high.[20]

Canada's Senate Sub-Committee on Cities produced a report in 2009 that made a number of recommendations with respect to housing and homelessness.[21] The sub- committee indicated that international human rights norms should be incorporated into housing and other anti-poverty

[19] Steve Pomeroy, "Toward a Comprehensive Affordable Housing Strategy for Canada" (October 2001), Online: <http://www.caledoninst.org/Publications/PDF/1%2D894598%2D94%2D6%2Epdf>.
[20] Pomeroy.
[21] Senate of Canada, Subcommittee on Cities of the Standing Committee on Social Affairs, Science and Technology, *In from the Margins: A Call to Action on Poverty, Housing and Homelessness* (December 2009) (Chair Honourable Art Eggleton, PC) Online: <http://www.parl.gc.ca/Content/SEN/Committee/402/citi/rep/rep02dec09-e.pdf>.

strategies of the government.[22]

The lack of affordable housing is one of the main factors leading to homelessness, both absolute and relative. The final report of the Alberta Affordable Housing Review Panel indicated that nearly 500,000 Albertans are spending more than 30% of their household income on housing costs and 164,275 households are in core housing needs. More than 110,000 Albertans are in subsidized housing and 19,000 people are on the waitlist for subsidized housing. The affordable Housing Review Panel made recommendations such as developing a strategic plan for housing with short- and long-term objectives and engaging and facilitating collaboration among housing management bodies, non-profit organization, private industries and Indigenous organizations/governments for increased capacity.[23]

Despite these changes, it is feared that not enough has been done to address the issue of affordable housing, and loopholes in the legislation may even make the situation worse. Although one year's notice is required to convert a rental unit to a condominium, there is no rent control. Thus, landlords can increase the rent as much as they want (as long as it is done only once per year), effectively forcing tenants to leave. If this happens, they do not need to give any notice about condominium conversion. In sum, as noted by Gordon Laird in a 2007 report for the Sheldon Chumir Foundation for Ethics in Leadership, poverty is the main cause of homelessness, not addiction or mental illness.[24] Lack of affordable housing is directly related to an increase in homelessness across Canada.

Although governments (and individuals) appear to be making efforts to address the issue of homelessness, it may appear somewhat ironic that several municipalities across Canada have passed by-laws that adversely affect homeless people. In recognition of the severity of the homelessness problem, many people would like to be able to point to legislation or court rulings as support for the assertion that we have the right to adequate housing in Canada. Later in this paper, we discuss whether the *Charter of Rights* may be used to argue for a right to adequate housing (e.g., under sections 15(1) or 7).

The individuals and coalitions (e.g., Centre for Equality Rights in Accommodation) who were

[22] Senate at 16.
[23] SHS Consulting, "Final Report of the Alberta Affordable Housing Review Panel", (2020).
[24] Kelly Cryderman, "Calgary leads in rent increases", *Calgary Herald*, February 13, 2007.

applicants in the *Tanudjaja*[25] case applied to the Ontario Superior Court of Justice for a declaration that beginning in the 1990s and continuing to the present, the governments of Ontario and Canada have made decisions which have eroded the access to affordable housing, and this is contrary to *Charter* sections 7 and 15(1). This is described as a "systemic or transformative social rights claim" because it seeks to remedy the failures in the entitlements systems that involve complex interactions between social programs, the private sector, income support, budgets, zoning and other policies.[26]

What are our human rights to affordable, sufficient, and adequate housing? This paper seeks to look at this issue. First, we examine "human rights": What do these entail? Second, we look at the approach under international law to the question of whether there is a human right to adequate housing. This discussion will also examine the way Canadian courts and legislators interpret and apply international law on the right to housing. Third, we examine the constitutional issues around housing. Fourth, we look at whether there is room to argue for a right to adequate housing under the *Charter*. Finally, we provide a conclusion and some recommendations on the issue.

II. The Right to Housing in International Law

A. The Public International Law System

Public international law can be defined as the rules and principles that govern the relationship between nation-states, as well as the right and obligations states have vis-à-vis non-states actors, such as individuals and organizations. In other words, international law can be understood as a body of law that governs state behavior.[27] Unlike domestic law, there is no central governing body with exclusive law-making authority in the international sphere. Rather, international law comes from several decentralized processes.

One of the most important sources of international law is the treaty, also known as a covenant,

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[25] *Tanudjaja v. Attorney General (Canada)* 2013 ONSC 1878 (CanLII); *Tanudjaja v Canada (Attorney General),* 2014 ONCA 852 (CanLII).
[26] Bruce Porter, Social Rights Advocacy Centre "In Defense of 'Soft' Remedies (Sometimes): Enforcing Principled Remedies to Systemic Social Rights Claims in Canada" (Paper delivered at the International Symposium on Enforcement of ESCR Judgments, Bogota, Columbia, (6-7 May 2010).
[27] John H Currie et al, *International Law: Doctrine, Practice and Theory*, 2d ed (Toronto: Irwin Law, 2014) at p 12-14.

protocol, or agreement. Treaties can be considered akin to international “contracts,” in which binding states are bound to agreed-upon rules that govern them. These agreements can be between two countries, known as bilateral treaties, or between multiple countries, known as multilateral treaties.[28]

The *Vienna Convention on the Law of Treaties*, 1969[29] outlines the process by which treaties are created.[30] In this process, state parties must express their consent to be bound by the agreement. This often involves a signature, or a two-step process, requiring a preliminary signature of approval and later ratification by the state.[31] Treaties typically contain information on when they will come into force. Once parties have expressed their consent to be bound and the treaty has come into force; it becomes legally binding as a matter of international law.[32]

In Canada, the executive branch of the federal government is the consenting authority to be bound by a treaty. The executive branch is separate from the law-making legislative branch. Surprisingly, there is no legal requirement for Parliament or the provincial legislatures to approve a treaty before the executive binds Canada to its obligations.[33] In addition, different areas of law may fall under federal or provincial heads of power. As a result, some treaty obligations depend on action from provincial governments.[34] This creates an interesting set of issues, which will be addressed further below.

B. What are human rights?

The term “human rights” carries different meanings for different people. According to Brian Orend:

> A human right is a high-priority claim, or authoritative entitlement, justified by sufficient reasons, to a set of objects that are owed to each human person as a matter of minimally decent treatment. Such objects include vitally needed material goods, personal freedoms, and secure protections. In general, the objects of human rights are those fundamental benefits that every human being can reasonably claim from other people, and from social institutions, as a matter of justice.[35]

[28] Currie et al at p 47-48.
[29] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, Can TS 1980 No 37 (entered into force 27 January 1980).
[30] Currie et al, at 54-55.
[31] Currie et al, at 62-63.
[32] Currie et al, at 68-69.
[33] Currie et al, at 63.
[34] Currie et al, at 86.
[35] Brian Orend, *Human Rights: Concept and Context* (Peterborough: Broadview Press, 2002), at p 33-34.

The United Nations describes human rights as universal, inalienable, and indivisible. They are rights that all human beings are entitled to without discrimination. In this regard, they are *universal*. States have an obligation to protect all human rights, independently of their political, economic, and cultural systems. Human rights are *inalienable*, meaning they cannot be taken away, except in accordance with due process. Finally, human rights are interrelated, interdependent, and *indivisible*: the fulfillment of one right supports achievement of the others, while denial of one right negatively impacts the others.[36]

According to the UN, human rights give rise to both rights and obligations. States have a responsibility to respect, protect, and fulfil human rights. The obligation to *respect* requires states to abstain from any behavior that hinders or interferes with the attainment of human rights. The obligation to *protect* means that states must protect individuals against violations of human rights. Finally, the obligation to *fulfil* requires states to take positive action to promote the achievement of human rights.[37]

Historically, international law considered the treatment of individuals within a state's territory as a domestic matter. Though protection for certain groups have long existed, these were rather specific and limited. The universal human rights movement, which extended rights to all individuals, emerged largely as a response to the injustices and abuses of the second world war.[38] The adoption of the *Charter of the United Nations*[39] in 1945 founded the UN and tasked it with promoting human rights for all. Though it did not define the term "human rights", it emphasised non-discrimination.[40] In 1948, the UN General Assembly adopted the *Universal Declaration of Human Rights*.[41] Because it is a declaratory text brought to life by way of a UN resolution; it is not legally binding. However, it proved influential to the global community serving as a precursor to binding international human rights treaties.[42]

The two most important multilateral human right treaties are the *International Covenant on*

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[36] "What are human rights?", *United Nations Office of the High Commissioner* [What are human Rights].
[37] "What are human rights?"
[38] Currie et al, at p 585.
[39] *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7.
[40] Currie et al, at p 599.
[41] *Universal Declaration of Human Rights*, GA Res 217(III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810, (1948) 71.
[42] Currie et al, at p 600-601.

Civil and Political Rights (ICCPR),[43] and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).[44] Together with the Universal Declaration, the three documents form the "international bill of human rights."[45] Both the ICCPR and ICESCR were created in 1966 and came into force in Canada in 1976. (Canada acceded to both agreements in 1976.) Since then, the idea of human rights has gained ever-increasing global recognition, resulting in a number of other international agreements explicitly securing human rights for a variety of marginalized groups.

As the names imply, civil and political rights are protected by the *International Covenant on Civil and Political Rights*,[46] while economic and social rights are protected by the *International Covenant on Economic, Social and Cultural Rights.*[47] However, some economic and social rights are contemplated in the ICCPR, such as the right to life (article 6). A distinction is often drawn between civil and political rights, compared to economic and social rights. Civil and political rights include rights such as freedom of personal conscience and expression, freedom of movement and association, freedom to vote and run for public office, reliable legal protection against violence, and rights to due process. They are frequently referred to as "first generation" human rights.[48] On the other hand, economic, social and cultural rights, "second generation" human rights, include rights such as subsistence levels of income, basic levels of education and health care, clean air and water, and equal opportunity at work.[49] Orend also articulates a "third generation" of human rights, which includes national self-determination, economic development, a clean environment, affirmative action programs, language, parental leave benefits, and various minority group rights.[50]

Is this a useful way to look at human rights? Does distinguishing economic, social and cultural rights from "first generation" civil and political rights give them less importance in international and domestic law? It has been suggested that making a distinction has created barriers in implementing and protecting these "second generation" rights. Louise Arbour, former United Nations High Commissioner for Human Rights and former Justice of the Supreme Court of

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[43] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47, 6 ILM 368 (entered into force 23 March 1976, accession by Canada 19 May 1976) [*ICCPR*].
[44] *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 999 UNTS 3, Can TS 1976 No 46, 6 ILM 360 (entered into force 3 January 1976, accession by Canada 19 May 1976) [*ICESCR*].
[45] Currie et al, at p 601-602.
[46] ICCPR.
[47] ICESCR.
[48] Orend, at p 30.
[49] Orend, at p 30.
[50] Orend, at p 110.

Canada, stated that:

> A renewed focus on economic, social and cultural rights is crucial … In spite of the constant reaffirmation of the interdependence of all human rights, many of our strategies are still based on an unhelpful categorization of rights—between civil and political on the one hand and economic, social and cultural on the other. This categorization of rights has skewed the implementation of human rights, to the detriment of those rights labelled economic, social and cultural and to the wider development and security agendas. The reaffirmation of economic, social and cultural rights as human rights … will help to redress the unbalanced approach of the past … providing an opportunity to move beyond simplistic categorization of rights towards an understanding of human rights that focuses on people—their security and development—and their capacity to claim the totality of their rights.[51]

In addition to the generational categorization of human rights, civil and political rights are often considered more enforceable than socio-economic rights. A mechanism under the ICCPR allows individuals to submit complaints directly to the United Nations Human Rights Committee. The Committee reviews these complaints and issues statements identifying states that are in violation of their human rights obligations. In contrast, until recently, the ICESCR lacked a comparable mechanism, the closest alternative was a review committee that reviewed states' compliance every few years.

C. Enforcement and Compliance

International human rights law is unique because the beneficiaries of human rights agreements are not other states but individuals within the states' jurisdiction. The *Vienna Convention on the Law of Treaties* provides that treaty obligations must be performed in good faith. This rule is also globally recognized by governments and international lawyers. In cases where the domestic laws of a state party conflict with agreement obligations, treaty law clarifies that this is no excuse for failure to perform those obligations. This can pose issues for countries where the authority to make treaties belongs to a different branch of government, than the authority to enforce them through

[51] Statement by Ms Louise Arbour, High Commissioner for Human Rights to the third session of the Open-Ended WG OP ICESCR, online: United Nations High Commissioner for Human Rights, online: <https://www.ohchr.org/en/statements-and-speeches/2009/10/statement-ms-louise-arbour-high-commissioner-human-rights-open-0#:~:text=Of%20course%2C%20the%20final%20decisions,public%20life%20and%20to%20justice>.

domestic legislation, this is the case for Canada.[52]

The rules of international law are mute on how states should implement their international obligations domestically. Unless a treaty contains express instructions to the contrary, this decision is left to individual parties. Common measures include legislative changes, policies, educational initiatives, and administrative actions. However, there is an obligation for states to provide effective remedies to those whose civil and political rights have been violated, although such remedies need not be judicial.[53]As mentioned above, there is no central governing body in the international sphere with the authority to legislate or oversee state behaviour. Rather, international law and treaty compliance is enforced through several processes. The UN plays an important role in encouraging states' compliance with human right treaties. One such mechanism is the use of treaty monitoring bodies. Each major human rights treaty developed under the UN has an equivalent body responsible for evaluating the performance of state parties and making recommendations. For example, the Human Rights Committee monitors compliance with the ICCPR and the Committee on Social, Economic, and Cultural Rights is responsible for monitoring compliance with the ICESCR.[54]

The UN human rights bodies carry out several functions relating to monitoring parties' compliance with their treaty obligations. As part of the monitoring process, there is a mandatory reporting system whereby states must submit periodic reports detailing the measures they have put in place to meet their commitments. The monitoring bodies' functions include reviewing the periodic reports submitted by states, investigating violations, making recommendations, and reviewing petitions made against a state by other states or individuals.[55] Reports and recommendations are publicly available online on the UN bodies' respective websites. There are ten UN human rights treaty monitoring bodies in existence.[56] Canada is committed to seven UN human rights treaties and must submit periodic reports to the seven accompanying bodies.[57]

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[52] Currie et al, at pp 85-86.
[53] Currie et al, at p 654-655.
[54] Currie et al, at p 655.
[55] Mark Freeman & Gibran van Ert, *International Human Rights Law* (Toronto: Irwin Law, 2004) at p 385-386.
[56] "Human Rights Bodies", online: *United Nations Human Rights Office of the High Commissioner* <www.ohchr.org/en/hrbodies/Pages/HumanRightsBodies.aspx>.
[57] "Reports on United Nations human rights treaties" online: *Government of Canada* < *https://www.canada.ca/en/canadian-heritage/services/canada-united-nations-system/reports-united-nations-treaties.html*>.

In addition to the treaty monitoring bodies, there are other institutions, arising from the UN *Charter*, that help promote adherence to human rights treaties. One such institution is the Human Rights Council, a body of the UN General Assembly. With 47 member states,[58] it is recognized as the primary intergovernmental institution responsible both for promoting the respect of human rights internationally, and for coordinating efforts to that end within the UN. Among its numerous functions, the council is responsible for conducting Universal Periodic Reviews of all UN member states on their performance vis-à-vis their human rights obligations.[59] These reviews are conducted on a four-and-a-half-year cycle.[60] The UN may also appoint Special Rapporteurs to report on important topics, including economic and social issues (such as adequate housing.)

Finally, outside of the UN framework, there are other regional human rights bodies. Such as the Organization of American States (OAS), the Inter-American Court of Human Rights and the associated Inter-American Commission of Human Rights. Although Canada is not a signatory to the *American Convention on Human Rights*,[61] it has accepted the right of individual petition before the commission.[62]

D. The International Covenant on Economic, Social and Cultural Rights

The *International Covenant on Economic, Social and Cultural Rights* (ICESCR) is the main international instrument protecting economic and social rights, including the right to housing. However, socio-economic rights are found in more than one agreement and the right to housing is established in several treaties. For example, article 28 of the *Convention on the Rights of Persons with Disabilities*,[63] article 27 of the *Convention on the Rights of the Child*,[64] article 14 of the

[58] "Membership of the Human Rights Council" online: *United Nations Human Rights Council* <https://www.ohchr.org/EN/HRBodies/HRC/Pages/Membership.aspx>.
[59] Currie et al, at p 663-64.
[60] "Cycles of the Universal Periodic Review" (2019), online: *United Nations Human Rights Council* <https://www.ohchr.org/EN/HRBodies/UPR/Pages/CyclesUPR.aspx>
[61] "American Convention of Human Rights 'Pact of San Jose, Costa Rica' (b-32) – Signatories and Ratification" online: Organization of American States https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e748#:~:text=4%20As%20of%20March%202024,ACHR%20(Treaties%2C%20Withdrawal)>.
[62] Currie et al, at p 676.
[63] *Convention on the Rights of Persons with Disabilities*, 13 December 2006, 2515 UNTS 3 art 28 (entered into force 3 May 2008).
[64] *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 art 27 (entered into force 2 September 1990).

Convention on the Elimination of All Forms of Discrimination Against Women,[65] and article 5 of the *Convention on the Elimination of All Forms of Racial Discrimination*[66] all protect a right to housing. The right to housing is also acknowledged in non-binding international declarations, such as the *Universal Declaration of Human Rights*,[67] (article 25), and the *United Nations Declaration on the Rights of Indigenous Peoples*,[68] (article 21).

1. The Right to Adequate Housing

The human right to adequate housing, which is thus derived from the right to an adequate standard of living, is of central importance for the enjoyment of all economic, social and cultural rights.[69] Article 11(1) of the ICESR is the key provision protecting a right to housing:

> The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.[70]

Once a country has ratified the convention, the government must respect, protect and fulfill all rights contained within the ICESCR. Article 2(1) requires all levels of government to use the maximum of their available resources to progressively realize the rights contained in the agreement "by all appropriate means including particularly the adoption of legislative measures.[71]

As noted above, compliance with international human rights laws is monitored by treaty bodies that conduct regular reviews. The Committee on Economic, Social and Cultural Rights (CESCR) oversees the implementation of the ICESCR. In addition, to date as of 2022 the CESCR has adopted

[65] *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 UNTS 13 art 14 (entered into force 3 September 1981).
[66] *Convention on the Elimination of All Forms of Racial Discrimination*, 7 March 1966, 660 UNTS 195 art 5 (entered into force 4 January 1969).
[67] *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71 art 25.
[68] *United Nations Declaration on the Rights of Indigenous Peoples*, Ga Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/Res/61/295 (2007) 1 art 21.
[69] Committee on Economic, Social and Cultural Rights, *Report on the Sixth Session*, UNOHCHR, 1992, Supp No 3, UN Doc E/1992/23, 114 at 114.
[70] *ICESCR*, art 11(1).
[71] *ICESCR*, art 2(1).

26 General Comments to assist states in interpreting the legal obligations set out in the Covenant.[72] Notably, General Comment 4, which addresses the right to adequate housing,[73] and General Comment 7, which addresses forced evictions,[74] help define the nature of the right to housing. In General Comment 4, the CESCR emphasizes that "article 11 (1) must be read as referring not just to housing but to adequate housing."[75] By drawing this distinction, the Committee makes it clear that mere shelter will not suffice to meet the right to housing set out in the Covenant. But what constitutes adequate housing?

> [T]he right to housing should not be interpreted in a narrow or restrictive sense which equates it with … the shelter provided by merely having a roof over one's head … Rather it should be seen as the right to live somewhere in security, peace and dignity.[76]

The CESCR explains that the specific requirements to meet the right to adequate housing vary depending on "social, economic, cultural, climatic, ecological and other factors"[77] of each state. However, seven basic requirements are identified as key:

1. Legal Security of tenure: regardless of the type of housing or tenure, every individual should have legal protection from forced eviction or other threats that could jeopardize their access to adequate housing.
2. Availability of services, materials, facilities and infrastructure: adequate housing must possess facilities for "health, security, comfort and nutrition."[78] In addition, access to basic resources such as "safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services"[79]should be readily available.
3. Affordability: the cost of adequate housing should not be so high as to compromise any person's ability to attain other basic needs. This includes protection from

[72] Committee on Economic, Social and Cultural Rights, Report on the Sixth Session, UNOHCHR, 1992, Supp No 3, UN Doc E/1992/23 [*CESCR*].
[73] *CESCR*, 114.
[74] *CESCR*, 113.
[75] *CESCR*, 114 at p 115.
[76] *CESCR*, 114 at p 115.
[77] *CESCR*, 114 at p 115.
[78] *CESCR*, 114 at p 116.
[79] *CESCR*, 114 at p 116.

unreasonable rent increases.

4. Habitability: adequate housing must be structurally sound and have enough space to accommodate its inhabitants. It must also offer sufficient protection from the elements, and other risks to heath.
5. Accessibility: adequate housing should be easily accessible, with particular attention to disadvantaged groups and those with special needs. States should also work towards increasing access to land.
6. Location: adequate housing must be located so that "employment options, health-care services, schools, childcare centres and other social facilities"[80] are accessible. Further, housing should not be close to polluted areas.
7. Cultural Adequacy: housing should be built to allow for the expression of cultural identity. Modernization and the use of new technologies should not sacrifice the cultural integrity of housing.[81]

By defining adequate housing as distinct to mere shelter, the committee provides greater insight into the content of the right to housing and the state parties' obligations. Apart from the *National Housing Strategy Act*, Canada has implemented the ICESCR through policies rather than legislation. Three key principles – indivisibility, justiciability, and progressive realization - illustrate some of the practical and legal implications of Canada's international obligations. The following sections explore these concepts, their application in Canada and their impact on the right to housing.

2. Indivisibility

Human rights are described as interrelated, interdependent, and *indivisible.* Fulfilling one right helps achieve other rights, while denying a right negatively impacts the fulfillment of other rights. In this regard, economic, social and cultural rights are intended to be indivisible from civil and political rights. However, civil and political rights in Canada have consistently been prioritized over economic and social rights. This has created a hierarchy of rights. With the right to housing often treated as secondary to other human rights.

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[80] *CESCR*, 114 at p 116.
[81] *CESCR*, 114 at pp 115-17.

The *Universal Declaration of Human Rights* (UDHR) together with the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and the *International Covenant on Civil and Political Rights* (ICCPR) were intended to form an International Bill of Rights that would form the basis of freedom, justice and world peace following the second world war.[82] This Bill of Rights was intended to create a new world order based on indivisible human rights: Articles 22 to 27 of the UDHR represents the economic, social and cultural rights components of the Declaration.[83] Article 22 is clear that everyone:

> As a member of society, has the right to social security and is entitled to realization, through natural effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.[84]

This includes the right to work, free choice of employment, just and favourable conditions for work, protection against unemployment, rest and leisure, reasonable limitations of working hours, periodic holidays with pay, and the right to form and join trade unions. It also includes the right to an adequate standard of living, including food, clothing, *housing*, necessary social services, free and compulsory education, enjoyment of the arts, and security in the event of unemployment, sickness, disability, widowhood, old age, or lack of livelihood.[85] The right to life (Article 30) and the right to property (Article 17) arising from the UDHR are interpreted to form a part of the social and economic rights found in the ICESCR.[86] In addition, economic, social and cultural rights must be provided to children, as set out in the *Convention on the Rights of the Child*, articles 24 to 28.

During the drafting of the UDHR, Canada was openly opposed to the inclusion of economic, social and cultural rights. Its position was based on the idea that this moved the Declaration beyond human rights to defining governmental responsibilities.[87] With this mindset, Canada joined such western powers as the United States, the United Kingdom and France in their opposition to the ideological stance of the Soviet bloc, other socialist states, and various third world nations. As a result, the concept of indivisibility as originally envisioned was compromised and two covenants

[82] See ICESCR, UDHR and ICCPR.
[83] UDHR at Articles 22-27.
[84] UDHR at Article 22.
[85] Art 23 UDHR.
[86] UDHR at Articles 17 & 30.
[87] William Schabas, “Freedom from Want: How Can We Make Indivisibility More Than a Mere Slogan?” (1999- 2000) 11 National Journal of Constitutional Law 189 [Schabas 2000] at 194.

were created: one addressing civil and political rights and the other economic, social and cultural rights.[88] In short, civil and political rights became more important and needed to be implemented immediately. Whereas, economic, social and cultural rights appeared to have weaker requirements. The concept of divisibility has had a lasting impact and continues to guide the implementation of economic, social and cultural rights in Canada.

3. Justiciability

The concept of *justiciability* refers to whether an issue is capable of being decided before the courts. An important factor that impacts justiciability is whether it is more appropriate for the issue in question to be decided by judges, who belong to the judicial branch of government, or by elected politicians, who make up the executive branch of government. This distinction has impacted the right to housing in Canada.

In addition to the hierarchy of, rights can be divided into positive and negative obligations. Negative rights require states to refrain from actions that would interfere with those rights. For example, the right to liberty and security of the person requires governments to avoid imprisoning individuals without due process. Conversely, positive rights require that state action be taken to fulfill them. For example, the right to housing may require that governments supply subsidized housing and emergency shelters or enact laws to reduce homelessness.

Civil and political rights are often understood as negative rights whereas social and economic rights are often seen as positive rights. Positive rights frequently require government allocation of public funds, linking these rights closely to government spending decisions. However, decisions about state expenditures fall under the authority of the executive branch, not the judiciary. As a result, economic and social rights are often viewed as matters best handled by elected officials rather than judges.

Many scholars, however, reject the idea that economic and social rights are distinguishable from civil and political rights based on considerations of spending and justiciability. Scholar William

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[88] See Schabas 2000, and Audrey Chapman and Sage Russell (eds) *Core Obligations: Building a Framework for Economic, Social and* Cultural Rights (New York: Intersentia, 2002) 185 – 214 [Chapman and Russell] and Matthew Craven, International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development (Oxford: Claredon Press, 1995).

Schabas is clear:

> Even such a basic 'civil' right as the right to a fair trial, and one that nobody would claim is unenforceable before the courts because it is not justiciable, may require that the State spend money – on legal aid attorneys, on interpreters, on translators, even on judicial salaries. Moreover, there are several rights in the Economic and Social Covenant that, according to the *Committee on Economic, Social and Cultural Rights,* can be invoked directly before the Court and are fully justiciable. [89]

On the other hand, Scholar Barbara Arneil thinks that the cost of implementing economic and social rights is significant. She states:

> The fact is that the difference in the size of expenditures of implementing the economic/social set of rights versus implementing the political/legal set of rights is enormous. If you take the federal and provincial governments' expenditures on health, education, housing, pensions, and social assistance and services together (all of which contribute to upholding the social and economic rights of the Declaration), you have the bulk of public expenditures. [90]

Not only are Canadian courts reluctant to decide on matters relating to public spending, but the international accountability mechanism overseen by UN treaty bodies also faces justiciability issues in Canadian courts. State parties must report to the UN Committee on Economic, Social and Cultural Rights every five years; however, this is a review process and not a legal requirement. In fact, until 1993 the reporting process was very one-sided with only states reporting to the Committee. Starting in 1993, with the filing of Canada's Second Periodic Report, the UN also gave Non-Governmental Organizations an opportunity to provide submissions which could potentially challenge the states' reports.[91] Nevertheless, this process only enables the Committee to make non-binding recommendations.

As discussed above, the UN Human Rights Council developed the Universal Periodic Review (UPR) process. Canada has appeared at least four times before the UN Human Rights Council's Review Working Group to be evaluated by other member states on the fulfillment of its human rights obligations. Several economic issues, such as addressing poverty and homelessness, have been brought to Canada's attention. Under the UPR process, Canada must provide a written report

[89] Schabas, 2000 at p 202.
[90] Barbara Arneil, "The Politics of Human Rights" (1999) 11 National Journal of Constitutional Law 213 at 218.
[91] Porter, 2000 at p 124.

indicating which recommendations it accepts and which it does not.[92] As with the treaty bodies' recommendations, there are few legally enforceable results from this largely political process.

In its most recent review in 2023, Canada received 14 recommendations aimed at improving the government's implementation of the right to housing.[93] These included calls to adopt legislation recognizing the right to housing and to increase funding for housing programs.[94] In 2024, the Government of Canada accepted six of these recommendations related to the right to housing.[95]

To address issues of justiciability, the idea of a petition process for individual and state complaints under the ICESCR was endorsed at the Vienna Conference on Human Rights in 1993. Further, the Vienna Declaration and Programme of Action, the 2005 World Summit Outcome and General Assembly resolution 60/251 establishing the Human Rights Council unanimously affirmed that all human rights are universal, indivisible, interrelated, interdependent, mutually reinforcing, and must be treated equally.

In 2008, the ICESCR added the *Optional Protocol to the Covenant on Economic, Social and Cultural Rights*. This new protocol contains an adjudicative mechanism which allows individuals to submit communications regarding countries' violations of the Covenant.[96] Despite having the option to sign, Canada has continually refused to do so.[97] As a result, Canadians are unable to access the mechanism to address economic, social and cultural rights issues.[98] On February 6, 1988, Canada expressed its views to the Secretary-General of the United Nations on a previous proposed optional protocol. Schabas identified Canada's three primary concerns:

- the core requirements of the rights need to be defined with precision because, unlike civil and political rights, they are not certain;
- the progressive realization of Article 2 is problematic because it is not a

[92] Canadian Heritage, *Canada's Second Universal Periodic Review,* online: < https://www.canada.ca/en/canadian-heritage/services/canada-united-nations-system/universal-periodic-review.html#a3c >.
[93] National Right to Housing Network, "Embracing Human Rights in Housing: Recommendations from Canada's 4th Universal Periodic Review", (8 February 2023), online : <https://housingrights.ca/embracing-human-rights-in-housing-reccomendations-from-canadas-fourth-upr/> [National Right to Housing Network]; *Report of the Working Group on the Universal Periodic Review,* UNGA, 55 Sess, UN Doc A/HRC/55/12 (2024), online: <https://docs.un.org/en/A/HRC/55/12/Add.1> [UN Doc A/HRC/55/12].
[94] National Right to Housing Network UN Doc A/HRC/55/12 at p 15 and 16.
[95] UN Doc A/HRC/55/12 at p 5.
[96] Resolution 8/2 Online:< http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_2.pdf>.
[97] Doc A/HRC/55/12 art 37.36 at p 8.
[98] United Nations Treaty Service, "Parties to the *Optional Protocol to the Covenant on Economic, Social and Cultural Rights*", online: United Nations < https://indicators.ohchr.org/>.

concept that easily lends itself to adjudication; and

- the requirement that each state take steps to the 'maximum of its available resources' leads to questions of: who determines whether Article 2 is being followed and how is the maximum assessed?[99]

Canada raised some significant concerns. Different systems of government have radically different approaches to resource allocation and the management of their economies, which would make it difficult to apply a common standard. For example, Canada asked whether the right to work in Article 6 of the ICESCR obliges states to eliminate all unemployment. In other words, would the Committee find a violation whenever unemployment exists, or would the Committee be prepared to tell an individual complainant that his or her inability to obtain a job is consistent with the Covenant?[100]

More recently, Canada remained one of the strongest opponents of the comprehensive 2008 Optional Protocol, and made the following statement at the Third Committee when the Optional Protocol was adopted there without Canada's vote:

> The representative of Canada said that, as a State party to the two international covenants on human rights, she was committed to the progressive realization of economic, social and cultural rights, as well as civil and political rights. While recognizing that all human rights were universal, individual, interdependent and interrelated, her Government had consistently raised concerns regarding a proposed communications procedure under the Covenant on Economic, Social and Cultural rights. The Optional Protocol did not take into account the deference accorded to States when assessing policy choices and how to allocate resources. Moreover, some rights contained in the Covenant were defined in a broad manner and could not be subjected easily to quasi-legal assessments.[101]

The events surrounding Canada's concerns about the Optional Protocol and its reluctance to sign it may be indicative of the attitude that a right to housing (and perhaps other socio-economic rights) may not be considered justiciable by our government to be and thus should be left up to the politicians rather than the courts. Nevertheless, despite its opposition to the

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[99] Schabas, 2000 at p 208.
[100] Schabas 2000 at 208.
[101] United Nations General Assembly, "Third Committee Recommends General Assembly Adoption of Optional Protocol to *International Convention on Economic, Social and Cultural Rights*" GA/SHC/3938, online: United Nations <http://www.un.org/News/Press/docs/2008/gashc3938.doc.htm>.

ICESCR's Optional Protocol, Canada has ratified other Optional Protocols to international conventions that allow for individual complaints concerning rights that include elements of the right to housing.[102]

4. Progressive Realization

As a signatory to the ICESCR, Canada is obligated to take steps toward the progressive realization of the rights recognized in the Covenant.[103] Audrey Chapman suggests that there is a need for a paradigm shift for evaluating compliance with the norms established in the ICESCR.[104] In 1997, international experts considered the violations approach for monitoring economic, social and cultural rights at the Maastricht University in the Netherlands. The result was the *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*.[105] The failure of a state to respect, to protect, or to fulfill an enumerated right constitutes a violation. In respecting, a state is not to interfere with the enjoyment of the right. In protecting, a state is to prevent the violation of the right by third parties. In fulfilling, a state is to take appropriate legislative, administrative, budgetary, judicial and other resources toward the full realization of the rights. The burden is on the state to demonstrate inability as opposed to unwillingness.

Chapman and Russell note that advocates have criticized the violations approach for three reasons. First, it concentrates on the most serious abuses and may undermine the full implementation of the rights over time. Second, it is risky to ask governments to account for violations. Third, it is difficult to determine if there is a violation if the right has not been clearly defined. Also, the concept of progressive realization is extremely imprecise. It is even difficult for the countries that have ratified the Covenant to assess their own performance as it is far too reliant upon extensive and comparable good quality statistical data.[106]

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[102] Federal Housing Advocate: International Jurisprudence: Security of Tenure in Canada, (Ottawa: Canadian Centre for Housing Rights, Canadian Human Rights Commission, 2022) at p 8 [Security of Tenure in Canada].

[103] Alexandra Flynn, Heidi Kiiwetinepinesiik Stark, Estair Van Wagner, Encampments and legal obligations: Evolving rights and relationships (Ottawa: Office of the Federal Housing Advocate; Canadian Human Rights Commission, 2024) at p 6 [Flynn et al.].

[104] Audrey Chapman, "A 'Violations Approach' for Monitoring the International Covenant on Economic, Social, and Cultural Rights" (1996) 18(1) Human Rights Quarterly 23 at p 23.

[105] Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, reprinted in (1998) 20 Human Rights Quarterly 691.

[106] Chapman and Russell at pp 7-8.

Chapman and Russell attempt to clarify the meaning and implications of progressive realization.[107] The obligations in the ICESCR are not uniform or universal. Rather, they are relative to levels of development and available resources.[108] Further, there is no guidance for judging adequacy or sufficiency of steps taken or for determining maximum available resources. The consequences necessitate the development of many performance standards for each right in relationship to the various development contexts of differing countries. There also exists the large loophole allowing states to nullify the many covenant guarantees by claiming insufficient resources to meet their obligations. In addition, few states are willing to supply the detailed data to a United Nations supervisory body. It is a huge investment even if they can provide it.[109]

In 2024, Canada's Federal Housing (FHA) provided a more concrete definition of progressive realization framing it as a commitment to preventing homelessness by ensuring adequate housing, prohibiting forced evictions, and addressing housing discrimination with a focus on vulnerable groups.[110] The FHA further outlined a framework for progressive realization, which includes government action to redress systemic housing discrimination by targeting investments toward communities disproportionately affected by housing injustices, and ensuring the meaningful participation of rightsholders in housing program development.[111]

It is important to note that until 1990, the interpretation of the ICESCR had received little to no attention. The *Committee on Economic, Social and Cultural Rights* offers some insight in *General Comment No. 3: The Nature of State Parties Obligations.* In this Comment, the Committee identified two obligations.[112] First, State parties have an immediate obligation to not discriminate: "without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".[113] These obligations are not subject to progressive realization. As such, States must have measures in place to prevent discrimination including compensation for past discrimination. The second obligation established a minimum core

[107] Chapman and Russell at p 5.
[108] Chapman and Russell at p 5.
[109] Chapman and Russell at 5.
[110] *CESCR* General Comment No. 4: The Right to Adequate Housing Art. 11 (1), UNESCOR, 6th Sess, UN Doc E/1992/23 (1991); Flynn et al, at pp 6 and 7.
[111] Flynn et al, at p 7.
[112] Committee on Economic, Social and Cultural Rights, *General Comment No 3: The Nature of States Parties Obligations*, 5th Session, 1990, reprinted in Compilation of General Comments, UN Doc HRI\Gen\Rev1 at p 45 (1994) [General Comment 3].
[113] General Comment 3.

content (explained below) that obligated all parties. However, the Committee did not clearly define the scope in its Comment adopted in 1991.[114]

5. Core Minimum Approach

Economic, social and cultural rights have limited jurisprudence, as they are often categorized as second generation or positive rights. The concept of a "minimum core" forms a central approach to advancing these obligations.[115] Chapman and Russell define the "minimum core content" as the nature or essence of a right, the fundamental elements without which it loses its substantive significance as a human right. In the absence of these elements, a State party may be considered to be in violation of its international obligations.[116] The core minimum thus serves as both a legal and moral baseline, reinforcing ESCRs by making clear the obligations States must meet immediately, even as broader fulfillment is pursued progressively. For progressive realization to be meaningful, States must uphold their domestic and international duties with respect to these core obligations.[117]

The question is: When a state ratifies the Covenant, what things must it do immediately to realise the right? The Committee on Economic, Social and Cultural Rights provides some examples.[118] The Committee is clear that if a state fails to provide a significant number of individuals with basic food, health care, shelter and education, then there would be a breach. Without these basics, there is no covenant. The only exception would be a state lacking available resources. In such a case, a state must demonstrate that every effort has been made to use all resources that are at its disposition to satisfy, as a matter of priority, those minimum obligations. For some, the requirement under this approach that a significant number of individuals must be deprived is problematic. Rolf Kunnemann expresses a concern: "Numbers are not very important in human rights. The presence of one single malnourished person in the world may indicate a

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[114] General Comment 3.
[115] Lisa Forman, et al., "Conceptualizing minimum core obligations under the right to health: How should we define and implement the 'morality of the depths'" (2016) 10:47 Intl J of Human Rights at 5 [Forman et al].
[116] Chapman and Russell at p 9.
[117] Forman et al, at pp 1 and 5.
[118] General Comment 3.

violation of the right to food."[119]

Although the Committee on Economic, Social and Cultural Rights has produced general comments on the right to adequate food (1999), the right to education (1999), and the right to the highest attainable standard of health (2000), among others, the precise nature of the obligations progressively realized is still uncertain.[120]

It is therefore important that states with resources, like Canada, work with their people to determine the nature of the values laden in the interpretation of the rights realized. The identification of minimum core obligations is only a beginning; not the final vision. For example, the right to adequate food is viewed by Kunnemann as a right to feed oneself.[121] In his view, like Sen and others, the goal is about self-determination. Article 1 of the ICESCR specifies such a right, where all peoples have the right of self-determination.[122] By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development. This is more complex than just the simple right to feed oneself. It may involve developing the self, employment opportunities and even a commitment to the sustainability of a healthy environment. Education can also be viewed as an empowerment right.[123] Chapman and Russell say that "if human rights are on a rising floor, education is a powerful engine pushing the floor upward."[124]

The provisions of the ICESCR are far from clearly defined. Although there is an existing reporting process and a new individual petition process, it is currently difficult, if not impossible, to monitor the Covenant. Even if the individual petition process were realized in Canada, all domestic remedies need to be exhausted before the United Nations will accept a petition. As such, it is important to examine the remedies now available in Canada, even though the *Charter* does not

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[119] Rolf Kunnemann, "The Right to Adequate Food: Violations Related To Its Minimum Core Content" in Chapman and Russell at 163 [Kunnemann 2002].
[120] See Committee on Economic, Social and Cultural Rights, *General Comment No 12: The Right to Adequate Food*, UN Doc E/C.12/1999/5, Committee on Economic, Social and Cultural Rights. *General Comment No. 13: The Right to Education (art. 13),* 21st Session, 1999, UN Doc HRI/GEN/1/Rev. 5, 26 April 2001 and Committee on Economic, Social and Cultural Rights, *General Comment No 14: The Right to the Highest Attainable Standard of Health*, UN Doc E/C12/2000/4. A thorough discussion of the ICESCR and the specific rights it grants can be found in the *Research handbook on economic, social and cultural rights as human rights*, eds Jackie Dugard, Bruce Porter, Daniela Ikawa and Lilian Chenwi, Cheltenham: Edgar Elgar Publishing, 2020, online: <https://doi.org/10.4337/9781788974172>.
[121] Kunnemann, 2002 at p 163.
[122] See ICESCR at Article 1.
[123] Fons Coomans, "In Search of the Core Content of the Right to Education" in Chapman and Russell at pp 217- 245.
[124] Chapman and Russell at p 16.

specifically identify protection for economic, social and cultural rights. South Africa, however, does provide an example of a state that has adopted and adapted the provisions of the ICESCR in its 1996 Constitution. There are some legal decisions in which the South African Constitutional Court has dealt with the right to housing.

6. The Grootboom Case: Recognition of Economic, Social and Cultural Rights in a Constitution

The *Constitution of the Republic of South Africa 1996* explicitly contains many of the rights of the ICESCR in its Bill of Rights.[125] Although the rights have been interpreted to be of a lesser standard, they are nonetheless domestically justiciable.[126] Further, the Constitution directs the courts to consider international law in interpreting its provisions.

What is remarkable about this Constitution is that it provides constitutional protection for socio-economic rights and so breaks the notion that positive rights are not justiciable. Further, the Constitutional Court of South Africa recognized that civil and political rights, as well as social and economic rights, bear costs. This dismisses the illusion that civil and political rights come without a financial burden. Cass Sustein comments:[127]

> In the *Grootboom* decision, the Court sets out a novel and promising approach to judicial protection of socio-economic rights. This approach requires close attention to the human interests at stake, and sensible priority- setting, but without mandating protection for each person who socio- economic needs are at risk. The distinctive virtue of the Court's approach is that it is respectful of democratic prerogatives and of the limited nature of public resources, while also requiring special deliberative attention to those whose minimal needs are not being met.

In this way, the Court captured the transformative nature of the Constitution. One of the primary goals of the South African Constitution was to ensure that future governments do not fall prey to the evils of the apartheid era again. Since the apartheid system could not be separated from the problem of persistent social and economic deprivation, there was necessarily a commitment to

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[125] See Constitution of the Republic of South Africa 1996, Act 108 of 1996.

[126] Other jurisdictions that have determined that social and economic rights are justiciable include: Bangladesh, Columbia, Finland, Kenya, Hungary, Latvia, the Philippines, Switzerland, Venezuela, Ireland, India, Argentina and the USA. See: Bruce Porter "Justiciability of ESC Rights and the Right to Effective Remedies: Historic Challenges and New Opportunities" March 31, 2008 Beijing online: <http://www.socialrights.ca/documents/beijing%20paper.pdf> at 4, footnote 15 [Porter, 2008].

[127] Cass R Sunstein, "Social and Economic Rights? Lessons From South Africa." (2001) *University of Chicago Law School, Public Law and Legal Theory Working Paper No. 12* at p 1 [Sunstein].

social and economic rights.[128]

The *Grootboom* case addresses the right to shelter.[129] It is important to note that the system of apartheid is, at least in part, responsible for the housing shortage experienced in this case. This case was brought by 900 plaintiffs of whom 510 were children. Irene Grootboom, one of the plaintiffs, lived with her family and her sister's family in a shack of about twenty square meters in a squatter settlement. There was no water, sewage or removal services and only about five percent of the shacks had electricity. Many of the plaintiffs had applied for low-cost housing to the municipality but were placed on a waiting list. In late 1998, these people moved to vacant land that was privately owned and marked for low-cost housing but after a few months were ejected by order. Grootboom and others refused to leave their shacks but their homes were bulldozed and burned along with their possessions. At the time of the claim, the plaintiffs were living under temporary structures consisting of plastic sheets on a sports field.

The two Constitutional provisions under consideration were:[130]

> 26(1) Everyone has the right to have access to adequate housing.
> (2) The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of the right.
> (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions
> and
> 28 Every child has the right -…
> (b) to family care or parental care, or to appropriate alternative care when removed from the family environment:
> (c) to basic nutrition, shelter, basic healthcare services and social services.

The Constitutional Court found that section 26 imposes a judicially enforceable duty on the government that must be reasonable. In *Grootboom,* the plaintiffs' constitutional rights had been violated. There was no program in place that provided 'temporary relief' to those who had no shelter even though there was a long-term plan. To be reasonable, the government needed to exercise sensible priority-setting, especially with respect to the needs of vulnerable individuals.

[128] Sunstein.
[129] *Government of the Republic of South Africa v Grootboom*, 920010 910 South Africa 46 (Constitutional Court) [*Grootboom*].
[130] See *Constitution of the Republic of South Africa* 1996, Act 108 of 1996 at Articles 26 and 28.

Grootboom has become the leading case on the issue of the right to housing in South Africa.[131]

E. Canada's Right to Adequate Housing

Canada does not have social and economic rights explicitly enshrined in its Constitution, apart from minority language education rights under *Charter* section 23 and *Constitution Act,* 1982 section 36 (discussed below). Thus far, other social and economic rights have not been clearly found to exist in the *Charter.* Much of the implementation of the ICESCR has been by way of social policy and even then the Committee on Economic, Social and Cultural Rights has expressed concerns. Canada has submitted a total of six periodic reports to the Committee (the last one was submitted in 2012). The Committee responds to the reports in public documents referred to as "concluding observations".

After reading the Committee's 1998 concluding observations, some argue that the theme should be 'retrogressive measures'.[132] After five years of economic growth, the problems had grown considerably worse and Canada had accomplished this through predictable and deliberate legislative and policy measures. There were dramatic cuts to social programs severely impacting vulnerable groups – especially women. The federal government had revoked the *Canada Assistance Plan (CAP)* and replaced it with the *Canada Health and Social Transfer.* Many held that *CAP* protected rights to an adequate standard of living especially from provincial governments. Under *CAP,* the federal government transferred cash to the provinces for social assistance and such programs. In exchange, the provinces were required to comply with national standards for social welfare which included the right to an adequate standard of living and freely chosen work by recipients. The impact of the decision to revoke the *CAP* continues today. Some provinces cut social assistance rates, resulting in increased hunger and homelessness. The mayors of Canada's ten largest cities declared homelessness to be a national disaster. The Committee noted other

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[131] See also*: Jaftha v Schoeman and Others; Van Rooyen v Stoltz and* Others (CCT74/03) [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC) (8 October 2004); *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* (24/07) [2008] ZACC 1 (19 February 2008); *Port Elizabeth Municipality v Various Occupiers* (CCT 53/03) [2004] ZACC 7 (1 October 2004); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*, [2009] ZACC 15.

[132] United Nations Economic and Social Council, "Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada" *Consideration of Reports Submitted By States Parties Under Articles 16 and 17 of the Covenant (1998)* [ICESCR 1998 Report].

problems. The social and economic deprivation of Indigenous peoples continued. Refugees were still denied access to social programs. Generally, the theme of the review was the failure of Canada to make measurable progress in alleviating poverty among vulnerable groups.[133]

The Committee's most recent observations of Canada's compliance with the ICESCR (March 2016) contain continued concerns with Canada's enforcement of economic, social and cultural rights. The Committee notes there is insufficient social assistance and minimum wage requirements to ensure an adequate standard of living for all.[134] The Committee also expressed concern about the number of people living in poverty, and about the fact that vulnerable people, such as people with disabilities, indigenous people, single mothers and other minority groups, experience higher rates of poverty.[135] Given Canada's enviable situation with respect to resources, the persistence of poverty is alarming. Gwen Brodsky commented on the Committee's 2006 continuing observations:[136]

> Viewed as a whole, the 2006 Concluding Observations of the CESCR underscore that point that it is time for governments in Canada to take seriously their obligations to provide accountability mechanisms for the enforcement of rights to social program, in other words to fill the human rights accountability gap.

Another theme found in all Concluding Observations concerned the role of the Canadian judiciary. In court decisions as well as constitutional discussions, social and economic rights are described as policy objectives instead of fundamental human rights. In 1998, evidence was received by the Committee that some provincial governments appear to take the position in the courts that the rights in Article 11 of the Covenant are not protected, or only minimally protected, by the *Charter*.[137] In 2006, the Committee encouraged courts to take Covenant rights into account and cited the Supreme Court of Canada decision in *Chaoulli v Quebec (Attorney General)*[138] as an

[133] Porter, 2000.
[134] United Nations Economic and Social Council Committee on Economic, Social and Cultural Rights, "Concluding Observations on the Sixth Periodic Report of Canada" (2016) [E/C.12/CAN/CO/6] at pp 5 and 6.
[135] United Nations Economic and Social Council Committee on Economic, Social and Cultural Rights, "Concluding Observations on the Sixth Periodic Report of Canada" (2016) [E/C.12/CAN/CO/6] at p 7.
[136] Gwen Brodsky, "Human Rights and Poverty: A Twenty-First Century Tribute to J.S. Woodsworth and Call for Human Rights" in J Pulkington (ed), *Human Rights, Human Welfare and Social Activism: Rethinking the Legacy of JS Woodsworth* (Toronto: University of Toronto Press, 2010) at 147 [Brodsky 2010].
[137] *ICECSR* 1998 report.
[138] 2005 SCC 35.

example.[139]

In 2007, the United Nations sent a Special Rapporteur on Adequate Housing, Miloon Kothari, to Canada to investigate housing rights here. After travelling throughout Canada, he noted that Canada is one of the few countries in the world without a national housing strategy. Rather, government and civil society organizations have introduced a series of one- time, short-term funding initiatives. The Special Rapporteur made a number of recommendations, including that Canada adopt a comprehensive, and coordinated national housing policy based on indivisibility of human rights and the protection of the most vulnerable. In order to design efficient policies and programmes, governments must collaborate and coordinate to commit stable and long-term funding to a comprehensive housing strategy.[140]

Likewise, the 2013 *Universal Periodic Review* included a recommendation from Egypt, Malaysia, the Russian Federation and Sri Lanka that Canada establish a national plan to address homelessness.[141] In the 2016 concluding observations, the Committee expressed concern that economic, social and cultural rights remain largely non-justiciable in Canada, and recommended that the country take the legislative steps necessary to foster the justiciability of these rights.[142]

1. The Constitution and the Challenge of Federalism

It can be difficult to adhere to international human rights standards where the jurisdiction to pass laws is divided between two levels of government. Canada is a federal state with its constitution dividing legislative making authority between the federal government of Canada and the provincial governments. It is the federal government of Canada that ratifies the International Covenants; yet the implementation of the commitments can turn on whether the federal government or the provincial governments have been allocated the authority to deal with the matter under the *Constitution Act, 1867*.[143] Craig Scott submits, however, that the internal

[139] *ICESCR* 2006 report at Art 36.
[140] United Nations, Office of the High Commissioner on Human Rights, *United Nations Expert of Adequate Housing Calls for Immediate Attention to Tackle Housing Crisis in Canada* November 1, 2007, online: United Nations < http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=4822&LangID=E >.
[141] *Draft Report of the Working Group on the Universal Periodic Review, Canada* April 13, 2013, online: < http://www.upr-info.org/IMG/pdf/a_hrc_wg.6_16_l.9_canada.pdf>.
[142] United Nations Economic and Social Council Committee on Economic, Social and Cultural Rights, “Concluding Observations on the Sixth Periodic Report of Canada” (2016) [E/C.12/CAN/CO/6] at p 2.
[143] *Constitution Act 1867* (UK), 30 & 31 Vict c 3 reprinted in RSC 1985, App II, No 5 [*Constitution Act 1867*].

organization of a domestic state is not a defence to the breach of international treaty law.[144]

Dividing legislative authority fragments political power. As a result, it can be difficult to ensure national social policy. Provincial government jurisdiction with respect to health, education and welfare promotes policy responses that are local and diverse.

The federal government of Canada, however, holds the federal spending power. It is not a power explicitly mentioned in the list of federal powers under section 91 of the *Constitution Act, 1867*.[145] Rather, the spending power has emerged as an important mechanism through which the federal government can exercise leadership in the establishment of national programs and standards that can fulfill international human rights obligations. The federal government of Canada does this through its power to tax and spend. However, the federal government continues to need the consent and cooperation of the provincial government when establishing national programs and standards. These difficulties of divided jurisdiction were overcome, to a certain extent, through intergovernmental cooperation in the Social Union.

However, there are some challenges as to whether the federal government has authority to control how the provinces implement programs that are funded by the federal government under the Social Union.[146] If there is any authority at all, it would likely fall under the federal authority to make laws for the peace, order and good government of Canada. For certain, the federal government would have the authority to exercise this jurisdiction with respect to First Nations people under section 91(24) of the *Constitution Act, 1867 – Indians and Lands Reserved for Indians*.[147] But even enforcement of this jurisdiction is sensitive. The Assembly of First Nations is clear that it, (like other Indigenous groups in Canada including the Inuit Tapiriit Kanatami, the Congress of Aboriginal Peoples, the Métis National Council, and the Native Women's Association of Canada) seeks to be actively involved in the social policy development process with respect to Indigenous peoples.[148]

Essentially, it is under the federal power to spend monies collected through taxation that the

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[144] Craig M Scott, "Covenant Constitutionalism and the Canada Assistance Plan" (1995) Constitutional Forum at p 82.
[145] Constitution Act, 1867 at Section 91.
[146] Barbara Cameron, "Accounting for Rights and Money under the Canadian Social Union" in Margot Young et al, eds, Poverty: Rights, Social Citizenship, Legal Activism, (Vancouver: UBC Press, 2007) at 167 et seq [Cameron, 2007].
[147] Constitution Act, 1867 at section 91(24).
[148] Assembly of First Nations, First Nations and the Social Union Framework Agreement: Analysis and Recommendations (2002) Ottawa, online: Assembly of First Nations <http://www.afn.ca>.

federal government has established national social programs ordinarily falling within provincial jurisdiction. In this way, monies are transferred to individuals or provincial governments with the attachment of certain standards set by law or agreement.

The matter of housing is not explicitly mentioned in the *Constitution Act 1867*, and it is therefore unclear as to whether the matter falls within federal or provincial jurisdiction.[149] Under the *Constitution Act* provinces have jurisdiction over municipal governance and social services that are critical to addressing homelessness.[150] Since these services rely on funding from the federal government, the federal government also has a part in addressing homelessness.[151] Therefore, advancing the rights to housing for Canadians is a shared responsibility.

2. The Social Union

The Social Union consists of a number of intergovernmental agreements made between the executive branches of the federal and provincial governments, together with supporting institutions and procedures.[152] The *Social Union Framework Agreement* was established in February 1999 between the Federal Government of Canada and all of the provinces except Quebec.[153] This Agreement committed governments to monitor and measure outcomes of social programs, share information with the public, and use third parties, where appropriate, to assist in assessing programs on social priorities. In this way, the Government of Canada was able to assess social programs in the provinces to determine if they honoured international commitments.

This Agreement acknowledged the validity of the federal spending power or the ability of the federal government to spend money in an area of provincial jurisdiction. In brief, by way of this Agreement, the federal government committed to consult with the provinces in the development of any new Canada-wide spending initiatives. Further, the federal government undertook not to introduce new programs without the agreement of the majority of the provinces. In accepting the federal monetary transfers, the provinces agreed to satisfy the national objectives and

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[149] Flynn et al, at p 17.
[150] Flynn et al, at p 26.
[151] Canadian Human Rights Commission, “Housing as a human right” (12 July 2025), online: <https://www. chrc-ccdp.gc.ca/individuals/right-housing/housing-human-right#role>.
[152] Cameron, 2007 at p 162.
[153] Framework to Improve the Social Union for Canadians – An Agreement Between the Government of Canada and the Governments of the Provinces and Territories 4 February 1999. The Agreement is reproduced in the Appendix.

accountability mechanisms. The federal government of Canada further agreed to consult with the provinces before directing money to individuals or organizations other than the provinces.

According to Barbara Cameron, one problem with the *Social Union Framework Agreement* was its inadequate reporting mechanism to Parliament and the legislatures. It is Cameron's contention that there was a need for an auditing mechanism which would require information collected by way of audit to be tabled with Parliament and the legislatures. This process was believed to cause governments who had not lived up to international human rights commitments to do so because of the public record. If a *Charter* Challenges type program were funded, as suggested by the UN Committee on Economic, Social and Cultural Rights, then the reports would establish a record.[154]

A three year Review of the *Social Union Framework Agreement* was due in the early part of 2002 but was not completed until 2003, with very little attention given to the recommendations.[155] Johanne Poirier believes that a formal review was not conducted at that time because of a profound disagreement on the meaning of the *Social Union* and the lack of political salience of the *Social Union Framework Agreement*.[156]

Johanne Poirier notes that even though debate raged over the Framework Agreement and the ground rules for the *Social Union*, some co-operative programs were developed in the context of what has been called the sectoral approach to the *Social Union*.[157] These programs are the National Child Benefit and the Children's Agenda, the Labour-Market Agreements, and the Homeless Initiative.

The National Child Benefit Program is depicted as a prime example of a working *Social Union* even though this program was discussed by the Ministerial Council on Social Policy Reform in December of 1995 – two years before the term *Social Union* was even used. The purpose of the National Child Benefit and the Children's Agenda was to reduce child poverty, which is shamefully high in Canada. Both levels of government in Canada set out to better co-ordinate their

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[154] Barbara Cameron, "The Social Union: A Framework for Conflict Management" (1999) Constitutional Forum [Cameron, 1999].

[155] For information on the three-year review of the Social Union, see: Sarah Fortin, Alain Nöel and France St- Hilaire, *Forging the Canadian Social Union: SUFA and Beyond* (Canada: Institute for Research on Public Policy, 2003) [Fortin, et al].

[156] Johanne Poirier, "Federalism, Social Policy and Competing Visions of the Canadian Social Union" (2001) 13 National Journal of Constitutional Law at p 404 [Poirier].

[157] Poirier, at p 404.

intervention with families, particularly low-income families. The National Child Benefit was complimented by a series of other federal/provincial initiatives to meet a variety of children's needs in matters of social protection, education and justice. The main objective of the National Children's Agenda was to set common priorities and to coordinate actions by all orders of government together with community actors.

Various labour-market agreements[158] have been signed between the federal government and the provinces and territories since the end of 1996. The agreements coordinated the efforts of the various governments. The federal government had been taking measures in training to end unemployment while the provinces had been doing the same for people on social assistance.

In December 1999, the federal Minister of Labour and the Minister responsible for Canada Mortgage and Housing Corporation announced an initiative to tackle the problem of homelessness in major Canadian cities. It was to be a co-operative initiative between the federal, provincial, and municipal orders of government. The federal government agreed to spend $750 million over three years to cover fifty percent of the cost of community projects. What remained would have to be funded by other orders of government or the private sector.[159] This initiative closed in 2007 and was replaced with the Homeless Partnering Strategy (discussed below).

In the constitutional sense, housing is a provincial matter. In that regard, the initiative had a major flaw. Article 5 of the *Social Union Framework Agreement* required that the federal government give a three-month formal notice prior to making a direct financial transfer to individuals or organizations in areas of provincial responsibility.[160] While there had apparently been prior consultations with provincial authorities concerning this initiative, it is alleged that the formal warning which provinces were given ranged from none to three days.

In April 2007, the federal government launched the Homeless Partnering Strategy ("HPS"). The HPS is a "community-based program aimed at preventing and reducing homelessness by providing direct support and funding to communities across Canada." In September 2008, the Government committed more than $1.9 billion to housing and homelessness over five years. This

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[158] For example, the *Canada-Ontario Labour Market Agreement*, online: <http://www.hrsdc.gc.ca/eng/employment/partnerships/lma/ontario/on_lma.shtml >.
[159] Ralph Smith, "Lessons from the National Homeless Initiative" (2004) Canada School of Public Service, Government of Canada at p 5.
[160] See Cameron, 1999.

included a two-year renewal of the HPS and a commitment to maintain annual funding for housing and homelessness until March 2014.[161] In March 2012, the Homeless Partnering Strategy was renewed for five years by the government of Canada, committing $119 million (which represents a drop in annual expenditures).[162] However, the program has also shifted priority to the Housing First approach (where housing stability is necessary before other interventions such as education, life skills, mental health support or substance abuse).[163]

There were problems with implementation and enforcement of the *Social Union Framework Agreement*. For example, there was no dispute resolution mechanism that could be used by affected individuals to challenge decisions of administrators or the failure of governments to meet statutory obligations.[164] However, after the demise of the *Charlottetown Accord* in 1992, this non-legal intergovernmental agreement (and the others outlined above) remain to address social issues. It seems that currently while there is little emphasis on or reference to the *Social Union Framework Agreement*, it is clear that the notion that some sort of inter-governmental collaboration to address social concerns is useful in Canada.[165] The non-legal approach to social issues in Canada indicates that constitutional law historically played a limited role in the politics of social policy.

3. Attempted Constitutional Amendment

Sujit Choudhry terms the replacement of constitutional provisions with policy instruments as "the flight from constitutional legalism."[166] In the first stage of this flight, there was a failed attempt to insert section 106A into the *Constitution Act, 1867.*[167] This was the plan for both the Meech Lake and the Charlottetown Accords. The proposed 106A would have established constitutional restraints, enforceable by the courts, that would have restrained the exercise of the

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[161] Canada. Human Resources and Skills Development Canada "Homeless Strategy", Online: Human Resources and Skills Development Canada < http://www.hrsdc.gc.ca/eng/communities/homelessness/index.shtml >.
[162] Gaetz et al, 2013 at p 34.
[163] Gaetz et al, 2013 at p 34.
[164] Cameron, 2007 at p 177.
[165] Fortin et al, at p 18.
[166] Sujit Choudhry, "Beyond the Flight From Constitutional Legalism: Rethinking the Politics of Social Policy Post-Charlottetown" (2003) 12 Constitutional Forum 3 (Winter) at 77 [Choudhry].
[167] Choudhry, at 77.

federal spending power in the area of provincial jurisdiction.[168] Under 106A, provinces would have been able to opt out of the shared cost programs that had arisen after the provision came into force provided that these provinces provided a program that was compatible with national objectives. Section 106A, as proposed, was criticized because it did not allow for a strong presence of the federal government in social policy.[169]

Sujit Choudhry believes that "the legal implications of mega-constitutional politics have effectively shut the door on comprehensive constitutional change in Canada."[170] In both the Meech Lake and Charlottetown Accords, a large number of amendments failed at the same time. As a result, the intergovernmental agreement, which is legally enforceable according to *Reference Re Canada Assistance Plan,* is used to achieve the federal and provincial goals of the Accords.[171] It is also clear that the *Social Union Framework Agreement* emphasized process.

Article 5 of the *Social Union Framework Agreement* was the equivalent of the 106A amendment with some differences that are highlighted by Choudhry.[172] Article 5 addressed the creation of shared cost programs.[173] The right to opt out with compensation was created for provinces and territories. The Canada-wide objectives that the provinces and territories must comply with, however, were to be set by the federal government in collaboration with the provinces and territories. Other articles in the *Social Union Framework Agreement* also spoke to process. Article 5 required the consent of the majority of the provincial governments respecting new shared cost programs.[174] Prior to the introduction of new programs involving direct federal spending, the federal government was to give provincial and territorial governments three months' notice and offer to consult with them. *Working in Partnership for Canadians,* in Article 4, committed governments to undertake joint planning and to collaborate. Article 6 required the mechanisms for dispute resolution to be "simple, timely, efficient, and transparent".[175]

Since 1995, the collaborative efforts of the provincial and federal governments have been

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[168] Choudhry, at 77.
[169] Choudhry, at p 78.
[170] Choudhry, at p 78.
[171] Reference re Canada Assistance Plan (BC), [1991] 2 SCR 525.
[172] Choudhry, at p 79.
[173] Choudhry, at p 79.
[174] Choudhry, at p 79.
[175] Choudhry, at p 79.

difficult. At that time, the *Canada Health and Social Transfer*[176] altered both the federal funding formula and the levels of federal support for health care and social assistance. Sujit Choudhry describes the legacy:[177]

> At that time, provinces accused the federal government of having acted without prior notice or consultation, let alone provincial consent, effectively shifting both the financial and political costs of federal deficit reduction onto provincial governments. Although the provinces did receive a *quid pro quo,* in the form of the elimination of all national standards for social assistance except the prohibition on minimum residency requirements, provincial bitterness remained, and placed in jeopardy the success of future federal policy activism. Moreover, by reducing the level of federal transfers, the *CHST* reduced the federal government's financial leverage and political capital, thereby diminishing its capacity for unilateralism going forward. The resistance of several provincial governments toward federal proposals for increased accountability for health care transfers is a recent and highly visible reflection of this legacy.

Without a constitutional amendment, politics has played a central role in the arena of social policy. The federal government of Canada ratified the ICESCR; yet the provinces play a large role in the implementation of its contents. The situation may have been different had the welfare state been in the contemplation of the framers of the *Constitution Act, 1867.* Early judgments have established the legal framework in which social policy politics take place. Jurisdiction over health insurance fell to the provinces in 1937 as a result of the Privy Council decision in *Unemployment Reference.*[178] In 1938, the *Reference Re Adoption Act* (*Adoption Reference*) found that direct social service provision also lies within provincial jurisdiction.[179] In any event, Meech Lake and Charlottetown offered no clarification of the jurisdictional issues.

It is the opinion of Sujit Choudhry that there is a need to create "an institutional architecture to manage intergovernmental relations in the social policy arena".[180] From a human rights perspective, such an overseer could ensure compliance with the international covenant. Colleen Flood and Sujit Choudhry (2002) proposed a Medicare Commission in the Romanow Report to address health care issues.[181] Or perhaps, Choudhry suggests, the courts could supervise "the

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[176] Canada Health and Social Transfer. Introduced through the Budget Implementation Act, 1995, SC 1995, c 17.
[177] Choudhry, at p 79.
[178] Canada (AG) v Ontario (AG) (Unemployment Insurance), [1937] AC 355.
[179] Reference Re Adoption Act (Ontario), [1938] SCR 398.
[180] Choudhry, at p 82.
[181] Colleen Flood & S Choudhry, "Strengthening the Foundations: Modernizing the Canada Health Act" (2002) In Canada,

procedural norms of the Social Union, while leaving the determination of policy outcomes to governments."[182]

4. An Alternative Social Charter

Jennifer Nedelsky is in favour of the *Alternative Social Charter* put forward by a coalition of anti-poverty groups during Charlottetown.[183] In order to achieve this, there may again be a need for a constitutional amendment and all of the complication that entails. It would be separate from the *Charter* but would be interpreted in ways that were consistent with it.[184] For Nedelsky, the *Alternative Social Charter* is a vision of all members of Canadian society being treated as full, equal and dignified participants. She puts it this way: "I think that ASC grows out of an awareness of the way relations of disadvantage in Canada currently preclude that full equality. Conventional rights theory can blind one to the impact of disadvantage. Rights as relationship brings it to the forefront of our attention."[185]

What is the importance of reconceiving rights as relationship? First, the Committee on Economic, Social and Cultural Rights has acknowledged that Canada's complex federal system creates obstacles to implementing the Covenant. Second, although the *Charter* binds both levels of government equally, it is difficult to read social and economic rights into the existing *Charter* provisions. Third, the *Committee on Economic, Social and Cultural Rights* has asked Canada to consider the establishment of a public body responsible for overseeing the implementation of the Covenant and for reporting any deficiencies. This has been an arduous task for Canada given that it does not want to interfere with the duty of Parliament and the legislatures to make social policy and assign monies to that task. This, after all, is a grounding factor of Anglo-American liberalism and its stance concerning rights. Rights can be barriers designed to protect individuals from other individuals or the State.[186]

Nedelsky sees a need to confront the history of rights:[187]

Royal Commission on the Future of Health Care in Canada, Discussion Paper No 13.

[182] Choudhry, at p 83.

[183] Jennifer Nedelsky, "Reconceiving Rights As Relationship" (1993) 1 Review of Constitutional Studies No 1 [Nedelsky].

[184] Nedelsky at 2 *et seq*.

[185] Nedelsky, at p 24.

[186] Nedelsky, at pp 7-8.

[187] Nedelsky, at p 3.

> A workable conception of rights needs to take account of the depth of the ongoing disagreement in Canadian society about, for example, the meaning of equality and how it is to fit with our contemporary – and contested – understanding of the market economy and its legal foundations, property and contract.

Autonomy, according to Nedelsky, needs to be viewed as a relationship. Currently, it is viewed as an independence which requires protection and separation from others.[188] Nedelsky hopes that the notion of rights can be "rescued from its historical association with individualistic theory and practice."[189] She notes that "[h]uman beings are both essentially individual and social creatures."[190]

Rights create relationships of power, of responsibility, of trust and of obligation.[191] Nedelsky believes that this understanding must be in the conscious minds of people as choices are made about rights.[192] Perhaps then, barriers between people may be eliminated. Nedelsky claims: "And I think we are likely to experience our responsibilities differently as we recognize that our 'private rights' always have social consequences."[193] To illustrate this, Nedelsky uses the example of homeless people on the street. In her opinion, our regime of property rights is, at least in part, responsible for this plight. Nedelsky explains: "We do not bring to consciousness what we in fact take for granted: our sense of property rights in our homes permits us to exclude the homeless persons. Indeed, our sense that we have not done anything wrong, that we have not violated the homeless person's rights, helps us to distance ourselves from their plight. The dominant conception of rights helps us to feel that we are not responsible."[194]

The problem is that the current conception of rights finds its roots in conceptions of property. But property no longer fits here. As Nedelsky explains, "It is, at least in the sorts of market economies we are familiar with, the primary source of inequality."[195] It is this root that has determined that rights separate us from others. It is based on a premise that everyone who has

[188] Nedelsky, at pp 7-8.
[189] Nedelsky, at p 13.
[190] Nedelsky, at p 13.
[191] Nedelsky, at p 13.
[192] Nedelsky, at p 13.
[193] Nedelsky, at p 17.
[194] Nedelsky, at p 13.
[195] Nedelsky, at p 21.

property has the same rights to it.

Nedelsky holds that there is a need to change liberal thinking wherein "people are to be conceived of as rights-bearing individuals, who are equal precisely in their role as rights- bearers, abstracted from any of the concrete particulars, such as gender, age, class, abilities which rend them unequal."[196] Equality, for Nedelsky needs to be reconceived to mean:[197]

> [The] equal moral worth *given* the reality that in almost every conceivable concrete way we are not equal, but vastly different and vastly unequal in our needs and abilities. The object is not to make these differences disappear when we talk about equal rights, but to ask how we can structure relations of equality among people with many different concrete inequalities.

It is Nedelsky's opinion that equal constitutional rights should structure relationships that require people to treat each other with basic respect and acknowledge and foster each other's dignity at the same time that they acknowledge and respect differences.[198] It is her opinion that the *Alternative Social Charter* accomplishes this reconception of rights.[199]

Jennifer Nedelsky describes the tribunal that would hear complaints alleging infringements of social and economic rights.[200] The tribunal would be outside the court system so that courts would not have to enforce rights that involve commitments to public funds.[201] There would be authority to review federal and provincial legislation, regulations and policies. The tribunal could order a government to take appropriate measures or ask a government to report back with measures taken or proposed. An order of the *Alternative Social Charter* tribunal, however, would not come into effect until the House of Commons or the relevant legislature had sat for at least five weeks.[202] During that time, a decision could be overridden by a majority vote of the legislature or Parliament. In this way, Parliament or the legislatures would still be making decisions about public funds but there would be an enforcement mechanism. The tribunal would be an alternative to the courts in that it would act as a mechanism to maintain a dialogue for democratic accountability.[203] For Nedelsky, this would make democratic decision-making accountable to the basic value of

[196] Nedelsky, at p 20.
[197] Nedelsky, at p 20-1.
[198] Nedelsky, at p 21.
[199] Nedelsky, at pp 24-26.
[200] Nedelsky, at pp 24-5.
[201] Nedelsky, at p 25.
[202] Nedelsky, at p 25.
[203] Nedelsky, at p 25.

equality.[204]

The tribunal would be appointed by the Senate.[205] Its composition would be one- third federal, one-third provincial and one-third non-governmental organizations that would represent vulnerable and disadvantaged groups.[206] It would not require a change in the current legal system but rather an addition to it. Constitutional entrenchment of this alternative was suggested, however, there may be another way. It would not interfere with liberal theory and its application to the *Charter* as the *Charter* would continue to protect individuals from other individuals and the state. It would provide a way in which to enforce implementation of social and economic rights in Canada. If social and economic rights were found to exist in the *Charter* or were to be added, the courts could put out decisions like the *Grootboom* decision in South Africa. Nonetheless, the *Alternative Social Charter* tribunal is probably preferable because it would ensure a dialogue continued with government. In a federal state, like Canada, it may be a viable alternative.

Jennifer Nedelsky is succinct in her summation:[207]

> The ASC thus provides an institutional structure that recognizes rights as entailing an ongoing process of definition. It creates a democratic mechanism for that process, without simply giving democratic priority over rights. At the same time, it provides a means of ensuring that democratic decisions are accountable to basic values without treating rights as trumps. In short, the ASC provides us with an outline of a workable model of constitutionalism as a dialogue of democratic accountability, where the rights to be protected derive from the inquiry into what it would take to create the relationships necessary for a free and democratic society.

The idea of providing some type of body to review and adjudicate social and economic rights claims is not unheard of in other jurisdictions. For example, the Council of Europe adopted an updated and revised *European Social Charter,* which includes the right to decent housing and the right to protection against poverty; it also provides for a complaints procedure.[208]

5. Constitution Act, 1982 Section 36

It is important to mention section 36 of the *Constitution Act,* 1982. This section does have implications for Canada's social and economic rights under international human rights

[204] Nedelsky, at p 25.
[205] Nedelsky, at p 25.
[206] Nedelsky, at p 25.
[207] Nedelsky, at p 25.
[208] *European Social Charter (Revised),* 3 May 1996, ETS No 163 (entered into force 1 July 1999).

law.[209] Section 36(1) provides:

> **36.** (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to
> (a) promoting equal opportunities for the well-being of Canadians;
> (b) furthering economic development to reduce disparity in opportunities; and
> (c) providing essential public services of reasonable quality to all Canadians.

After this section was passed, the Secretary General of the United Nations asked Canada to submit a report that, among other things, outlined the implementation of international human rights treaty obligations into Canada's domestic law, and the government described section 36 as being "particularly relevant in regard to …the protection of economic, social and cultural rights."[210]

There is a debate as to whether section 36 is justiciable (it can be enforced by the courts). While the justiciability of section 36 has not yet been determined by a court,[211] several scholars indicate that there is a good argument that at least some of the provisions in section 36 are framed in a manner that could be adjudicated by courts.[212]

Nader highlights the contrast between the compulsory language used in section 36(1)(c) and the softer language found in sections 36(1)(a) and (b), suggesting that section 36(1)(c) may be subject to judicial review.[213] In *Cape Breton (Regional Municipality) v Nova Scotia*, the court held that the province's failure to allocate equalization payments from the federal government in a way that reduces regional economic disparity violated Nova Scotia's obligations under section 36(1).[214] However, this case also clarified that the inclusion of section 36 in the Constitution Act, 1982 does not confer legally binding status of the provision.[215]

Jackman and Porter argue that since the United Nations has adopted the *Optional Protocol* to

[209] Aymen Nader, "Providing Essential Services: Canada's Constitutional Commitment under Section 36" (1996) 19(2) Dalhousie Law Journal 306 [Nader].
[210] Canadian Heritage, *Core Document forming part of the Reports of States Parties: Canada* (October 1997).
[211] See, for example *Canadian Bar Association v British Columbia*, 2008 BCCA 92 at para 53, 290 DLR (4th) 617.
[212] Michel Robert, "Challenges and Choices: Implications for Fiscal Federation" in TJ Courchene, DW Conklin & GCA Cook, eds *Ottawa and the Provinces: The Distribution of Money and Power* (Toronto: Ontario Economic Council, 1985) at 28; Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Scarborough, Ont: Carswell, 1999) at 19.
[213] Nader, at p 357.
[214] *Cape Breton (Regional Municipality) v Nova Scotia (Attorney General)*, 2008 NSSC 111 [*Cape Breton*].
[215] *Cape Breton,* at para 53.

the ICESCR*,* Canada's commitment to provide public services of a "reasonable quality" allows section 36 to be interpreted in a manner that gives effect to our governments' obligations to adopt 'reasonable measures' to realize the right to an adequate standard of living as guaranteed under the ICESCR.[216] They note that both federal and provincial/territorial governments play a critical role in housing programs and that an effective national housing strategy will require coordinated and independent initiatives by both levels of government.[217] In addition, they note that each level of government in Canada has a tendency to hide behind the failures or jurisdictional responsibilities of the other.[218] Jackman and Porter posit that section 36 provides constitutional authority for rights claimants to argue that their rights should not be compromised simply because there is an overlap or ambiguity about which level has jurisdiction over poverty and housing.[219]

In Canada, the economic, social and cultural right to housing as provided in international law has not been directly recognized in our legislation, including the *Charter*. While there have been attempts to pass legislation (as noted in the introduction and above) to directly implement and legally recognize a right to housing, to date, these efforts have not been particularly fruitful. The question we must then ask is whether the right to housing may be inferred into the *Charter* or whether international law can be used by the courts to help interpret the *Charter* to provide for such a right.

6. Federal National Housing Strategy Act

In 2019, Canada enacted the *National Housing Strategy Act (NHSA)*, formally recognizing for the first time its commitment to the right to housing as expressed in the ICESCR.[220] The NHSA Has been recognized as the most important legal framework regarding the right to adequate housing in

[216] Martha Jackman & Bruce Porter, International Human Rights and Strategies to Address Homelessness and Poverty in Canada: Making the Connection Working Paper (Huntsville, ON: Social Rights Advocacy Centre, September 2011) [Making the Connection] at 41-45.
[217] Martha Jackman & Bruce Porter, *Rights-Based Strategies to Address Homelessness and Poverty in Canada: The Constitutional Framework Reconceiving Human Rights Practice Project*, November 1, 2012 at 14-15 [Rights- Based Strategies].
[218] *Rights-Based Strategies* at 15; citing Alex Neve, Secretary General, Amnesty International Canada (23 February 2009) Letter to Prime Minister Stephen Harper online: >
[219] Rights-Based Strategies at p 16.
[220] Canadian Centre for Housing Rights, *International Jurisprudence:* Security of Tenure in Canada (Ottawa: Office of the Federal Housing Advocate, Canadian Human rights Commission, 2022) at p 8 [*Security of Tenure in Canada*].

Canada[221] by committing the federal government to develop and maintain a National Housing Strategy that accounts for human rights obligations under ICESCR.[222] The Act recognizes that "the right to adequate housing is a fundamental human right…essential to the inherent dignity and well-being of the person and to building sustainable and inclusive communities" and commits the government of Canada to the progressive realization of the right to housing as guaranteed in international human rights law ratified by Canada.

It stops short of subjecting the government to legally binding court or tribunal decisions. Claims of non-compliance with the government's commitments under the Act are rather to be submitted to the Housing Advocate for investigation and recommendations. Rights holders also have rights to accessible hearings into key systemic issues, before a panel with expertise in human rights and housing with at least one representative of affected communities. Findings and recommendations from the Housing Advocate and the Review Panel must be responded to by the federal government in a timely manner. In particular, the *NHSA*:

- Declares that it is the housing policy of the Government of Canada to recognize housing as a fundamental human right and to progressively realize this right in accordance with international human rights law
- Requires future governments to develop and maintain a national housing strategy to further this policy commitment, considering key principles of a human rights - based approach
- Establishes a National Housing Council to further the commitment to the right to housing and advise the Minister on the effectiveness of the Housing Strategy
- Establishes a Federal Housing Advocate, supported by the Canadian Human Rights Commission to:
    - assess and advise the federal government on the implementation of its commitment to the right to housing, particularly with respect to vulnerable groups and those who are homeless
    - initiate inquiries into incidents or conditions in a community, institute,

[221] Flynn et al, at p 18.
[222] Flynn et al, at p 19; Bruce Porter, et al., "Aligning Federal Housing Policy with commitments under the National Housing Strategy Act (2019)" (Presentation delivered to the Department of Justice, 7 December 2021) [unpublished] at slide 4.

industry or economic sector

- monitor progress in meeting goals and timelines
- receive and investigate submissions on systemic issues from affected groups
- submit findings and recommended action to the designated Minister to which the Minister must respond within 120 days, and
- refer key systemic issues for accessible hearings before a Review Panel.

- Provides for a Review Panel, made up of three members appointed by the National Housing Council to hold hearings into selective systemic issues affecting the right to housing and submit its findings and recommended measures to the government through the designated federal Minister and
- Requires the Minister to respond to findings and recommendations within 120 days.

The NHAS does not address protection of individual housing rights, which still must be must asserted through the courts or tribunals.

Elizabeth McIsaac and Bruce Porter, *Housing Rights - Ottawa takes a historic step forward* comment on the impact of the NHSA:[223]

> The *National Housing Strategy Act* is a novel and creative piece of legislation. It focuses on the government's overarching obligation under the ICESCR to the 'progressive realization' of the right to housing. This is significant. But what does it actually mean?
>
> …
>
> On its own, the National Housing Strategy Act does not achieve housing as a human right. Rather, it provides a platform from which to launch a renewed commitment to a right that has been long recognized by Canada internationally but has languished at home. It provides a framework to guide policy makers toward a new approach.
>
> Whatever the outcome of the 2019 election, the new government must work to develop, maintain, and invest in policies and programs that support the right to housing. Many advocates question whether the funding commitments made by the federal government in 2017, before the passing of the act, are sufficient to make meaningful progress. Indeed, this is something that we must continue to monitor, using the Act's accountability mechanisms. Nonetheless, policy makers and civil society have a strong foundation upon which to advocate for further action and investment and for the progressive realization of our rights.

[223] Elizabeth McIsaac and Bruce Porter, *Housing Rights - Ottawa takes a historic step forward*, Literary Review Canada, November 2019, online: < https://reviewcanada.ca/magazine/2019/11/housing-rights/>.

The new legislation meets most of these criteria…

> What the legislation does not do is create a right to housing that an individual may claim before a court. Rather, it carves out a middle ground between a hard law and softer commitments. It provides access to hearings and other mechanisms to hold the government accountable for its international obligations without relying on binding court orders. This model creates a supplementary, parallel process for rights claiming and adjudication. It does not, however, replace the need for an ultimate recourse to courts, which international law obliges Canada to ensure. There's more work to be done.

The NHSA also has no requirement for provincial, territorial, or municipal governments to recommendations under the Act.[224] Any participation by these orders of government is purely voluntary.[225] As housing matters have historically been handled under provincial jurisdiction, failure to coordinate plans between provincial and federal jurisdictions has hindered progress toward housing rights.[226] It is no surprise that cooperation between the provincial and municipal governments is essential to an effective National Housing Strategy. In 2024 the Federal Housing Advocate (FHA) recommended that the federal government use its authority under the NHSA to coordinate a multijurisdictional response to tackling homelessness in Canada.[227] These recommendations include bilateral agreements with provinces and territories, coordination of project timelines, funding agreements, and adoption of parallel provincial legislation.[228] Furthermore, the federal government could use its funding authority under the NHSA to obligate the provincial governments to align their programs with core human rights values.[229]

One of the first tests of the government's commitments to addressing systemic housing issues under the *NHSA* happened in 2021. The Centre for Equality Rights in Accommodation (CERA) and National Right to Housing (NRHN) submitted a proposal to the federal government under the NHSA to address the systemic issue of unaffordable rent and accumulated arrears among

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[224] Jeff Morrison, "Right to Housing is Now Law in Canada: So Now What?" (5 July 2019), online (blog): <https:// chra-achru.ca/blog_article/right-to-housing-is-now-law-in-canada-so-now-what-2/>) [Morrison].
[225] Morrison.
[226] Office of the Federal Housing Advocate, *Towards a Stronger National Housing Strategy: Meeting Canada's Human Rights Obligations*, (Ottawa: Canadian Human Rights Commission, 2022) at p 35 [*Meeting Canada's Human Rights Obligations*].
[227]*Meeting Canada's Human Rights Obligations,* at p 35.
[228] *Meeting Canada's Human Rights Obligations,* at pp 35 to 36.
[229] Flynn et al, at p 21.

residential tenants due to the COVID-19 pandemic. The proposal was for a "Federal Government Retroactive Residential Tenant Support Benefit" for low- and moderate-income tenants who had faced heightened rent affordability challenges as a result of income loss during the pandemic.[230] The benefit was intended to provide a retroactive rent subsidy to ensure rent remained the same percentage of income in 2020 as it had been in 2019, before the pandemic.[231] While the federal government did not fully enact the proposal, elements of it, such as a one-time rental benefit payment, were reflected in subsequent legislation.[232]

A more recent test of the government's commitments under the *NHSA* occurred in 2024, when the Minister of Housing, Infrastructure and Communities addressed several recommendations by the Federal Housing Advocate's (FHA) aimed at addressing the increase in homeless encampments across Canada.[233]

In 2023, the FHA conducted its first review under the *NHSA* to hold the government accountable for meeting its human rights obligations in housing.[234] The review revealed a shortage of 4.3 million vacant affordable homes for low-income populations.[235] Of the few available, many lacked basic necessities such as running water and were plagued by rodent and bedbug infestations.[236] As a result, many individuals chose to live unsheltered rather than in inadequate housing.[237]

Surveys showed an increase in encampments during the pandemic due to decreased shelter capacity,[238] a trend that has continued post-pandemic. The FHA recognized systemic issues in the shelter system contributing to this rise, including overcrowding, violence, illness, and lack of gender-specific accommodations.[239] These issues were compounded by discrimination against

[230] Brierley et al, Addressing the Evictions and Arrears Crisis: Proposal for a Federal Government Residential Tenant Support Benefit (The Centre for Equality Rights in Accommodation, The National Right to Housing Network, 2021) at 16 [Brierley et al].
[231] Brierley et al, at p 17.
[232] *Rental Housing Benefit Act,* SC 2022, c 14, s 3.
[233] Canadian Human Rights Commission, Response from the Minister to the Advocate's report on homeless encampments, online: <https://www.chrc-ccdp.gc.ca/resources/publications/response-the-minister-the-advocates-report-homeless-encampments> [Canadian Human Rights Commission].
[234] Federal Housing Advocate's Review, at p 1.
[235] Carolyn Whitzman, *A Human Rights-Based Calculation of Canada's Housing Supply Shortages*, (Ottawa: The Office of the Federal Housing Advocate, Canadian Human Rights Commission, 2023) at p 5.
[236] Federal Housing Advocate's Review, at p 15.
[237] Federal Housing Advocate's Review, at p 15.
[238] Federal Housing Advocate's Review, at p 15.
[239] Federal Housing Advocate's Review, at pp 15 and 16.

vulnerable populations, including racialized communities, people with disabilities, youth, and 2SLGBTQQIA+ individuals[240].

The FHA criticized the lack of a coordinated governmental response to the encampment crisis and recommended several actions at all levels of government:[241]

Federal level: show leadership in multi-jurisdictional coordination and ensure adequate resource allocation.[242]

Provincial and territorial level: adopt legislation recognizing the human right to adequate housing, review human rights codes to prohibit discrimination based on social condition, and develop programs for individuals facing homelessness.[243]

Municipal level: reduce reliance on policing in response to encampment and meaningfully engage individuals with lived experience of homelessness in by-law development.[244]

In response, the Minister of Housing committed to creating priority housing for vulnerable groups, funding programs that address the root causes of homelessness, and working collaboratively with provincial, territorial, municipal, and Indigenous governments.[245] These commitments were part of a larger, human rights-based action plan under the National Housing Strategy.[246]

The FHA also cited key international instruments such as UNDRIP and ICESCR in its report, Upholding dignity and Human Rights: the Federal Housing Advocate's review of homeless encampments.[247] Among its recommendations were the implementation of Indigenous-led training programs on UNDRIP, increased investment in adequate, sustainable, and culturally appropriate housing in Indigenous communities, and prioritization of all housing-related Calls to Action from UNDRIP.[248] In response, the Housing Minister affirmed the right to adequate housing under Articles 21 and 23 of UNDRIP and pledged $918 million in 2024 toward programs aimed at closing

[240] Federal Housing Advocate's Review, at p 15.
[241] Federal Housing Advocate's Review, at p 18.
[242] Federal Housing Advocate's Review, at pp 24 and 25.
[243] Federal Housing Advocate's Review, at p 26.
[244] Federal Housing Advocate's Review, at p 26.
[245] Letter, at pp 5-11.
[246] Government of Canada, About the National Housing Strategy (6 June 2025), online: <https://housing-infrastructure.canada.ca/housing-logement/ptch-csd/about-strat-apropos-eng.html>).
[247] Federal Housing Advocate's Review, at pp 3,21, 24, and 25.
[248] Federal Housing Advocate's Review, at p 27.

infrastructure gaps in Indigenous communities.[249]

III. The Canadian *Charter* of Rights and Freedoms and the Right to Housing

A. International Law Principles and Canadian Courts

While the Canadian Courts have been reluctant to adopt the principles of the ICESCR in relation to sections 7 and 15 *Charter* applications, there has been some recognition of international human rights norms in Canadian jurisprudence. In particular, the Supreme Court of Canada has been receptive to arguments based in international human rights law in the cases *Baker v Canada* and *Suresh v Canada*.[250]

In *Baker*, the appellant, Mavis Baker, was ordered deported from Canada. She was a citizen of Jamaica who had entered Canada in 1981 as a visitor and had remained in Canada since then. She had four children while living in Canada, all of whom were Canadian citizens. After being ordered deported, Ms. Baker applied for an exemption of the requirement that an application for permanent residence be made from outside the country, based on humanitarian and compassionate grounds under subsection 114(2) of the *Immigration Act*, RSC 1985, c I-2. After a senior immigration officer dismissed her application, Ms. Baker applied to have the decision judicially reviewed. At the Supreme Court of Canada, the appeal focused on the approach to be taken by the court in a judicial review, issues of reasonable apprehension of bias, the provision of written reasons as part of the duty of fairness, and the role of children's interests in reviewing decisions under subsection 114(2). It was in discussion of the latter issue regarding children's interest that the Court discussed the application of international human rights law in Canadian domestic law.

Writing for the majority, Madam Justice L'Heureux-Dubé discussed international instruments in relation to the interest of the children in humanitarian and compassionate applications. Generally speaking, she found that international treaties and conventions are not part of Canadian law unless they have been implemented by statute.[251] However, she also held that

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[249] Letter, at pp 5 and 6.

[250] *Baker v Canada (Minister of Citizenship and Immigration*), [1999] 2 SCR 817 [B*aker*]; *Suresh v Canada* (*Minister of Citizenship and Immigration),* [2002] 1 SCR 3 [Suresh].

[251] *Baker,* at para 69.

even if a specific treaty has not been officially ratified in Canadian law, the values reflected in such treaties such as international human rights treaties, may help to inform the contextual approach to statutory interpretation and judicial review.[252]

In *Suresh*, the appellant was a Convention refugee from Sri Lanka who applied for landed immigration status in 1991. In 1995, he was detained and proceedings for deportation were started against him on grounds that he was a member and fundraiser for the Liberation Tigers of Tamil Eelam, an alleged terrorist organization acting in Sri Lanka. Suresh challenged the deportation order on various grounds. One of the issues discussed by the Supreme Court of Canada was regarding the threat of torture if Suresh was deported and returned back to Sri Lanka, and how the Court should apply international treaties prohibiting torture and deportation to torture.

As in *Baker*, the Court stated that international treaty norms are not strictly binding in Canada unless they have been enacted into Canadian law.[253] However, the Court went on to state that in interpreting the meaning of the Canadian Constitution, the courts may be informed by international law. In interpreting the principles of fundamental justice, the Court considered that the prohibition against torture was a peremptory norm of customary international law meaning that all members of the international community accept it as law and it is thus binding. In 1993, in its *Concluding Observations on Canada,* the *Committee on Economic, Social and Cultural Rights* assessed Canada's progress. The UN commented on cases discussing the equality rights provision of the *Charter* – section 15 – including *Schachter v Canada* and *Slaight Communications v Davidson*, both Supreme Court of Canada decisions.[254] *Schachter* stands for the principle that adequate maternity and parental benefits should be provided without discrimination. In *Slaight Communications,* the majority of the court invoked the right to work as an aid to interpreting the *Charter,* citing Dickson C.J. in *Reference re Public Service Employee Relations Act (Alta.)*[255]: "the *Charter* should generally, be presumed to provide protection at least as great as that afforded by similar provisions in international rights documents which Canada has ratified."[256]

In the 40 years since the *Charter* was adopted, the implementation of socio-economic rights

[252] *Baker,* at para 70.
[253] *Suresh,* at para 60.
[254] *Schachter v Canada,* [1992] 2 SCR 679 [*Schachter]* and *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038 [*Slaight Communications*].
[255] Reference re Public Service Employee Relations Act (Alta), [1987] 1 SCR 313.
[256] Slaight Communications, at para 23.

has remained dependent on a progressive interpretation of constitutionally enshrined civil and political rights, with sections 7 and 15 being the closest thing to a guarantee of social and economic rights.[257] In the 2016 *Concluding Observations on Canada,* the CESCR stated that it had the following concerns with respect to the *Charter* and economic, social and cultural rights:[258]

> The Committee recommends that the State party implement its commitment to review its litigation strategies in order to foster the justiciability of the economic, social and cultural rights. The State party should engage civil society and organizations of indigenous peoples in that revision, with a view to broadening the interpretation of the Canadian *Charter* of Rights and Freedoms, notably sections 7, 12 and 15, to include economic social and cultural rights, and thus ensure the justiciability of Covenant rights.

In *R v Hape*,[259] the Supreme Court of Canada discussed the idea of conformity with international law as an interpretive principle of domestic law. The court noted that courts will strive to avoid constructions of domestic law that would lead to the state being in violation of its international obligations.[260] Further, the court will look to international law to assist in interpreting the scope and content of rights under the *Charter*. Justice LeBel states: "In interpreting the scope of application of the *Charter,* the courts should seek to ensure compliance with Canada's binding obligations under international law <u>where the express words are capable of supporting such a construction"</u> (emphasis added). [261]

Other Supreme Court of Canada cases indicate that the *Charter* is extremely important for implementing Canada's international human rights obligations. In *Health Services and Support — Facilities Subsector Bargaining Assn. v British Columbia*[262] the Supreme Court of Canada reaffirmed that the *Charter* should be presumed to implement protection that is at least as great as that found in similar provisions in international human rights treaties that Canada has ratified. Similarly, in *United States of America v Anekwu*,[263] the Supreme Court of Canada indicated that in interpreting domestic legislation, courts should arrive at a construction that conforms with Canada's treaty obligations.

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[257] Mirja Trilsch, "The Charter at 40 – Who's still afraid of social rights?", (22 June 2022), online: <https://www.mcgill.ca/humanrights/article/charter-40-whos-still-afraid-social-rights#[4]>.
[258] United Nations Economic and Social Council Committee on Economic, Social and Cultural Rights, "Concluding Observations on the Sixth Periodic Report of Canada" (2016) [E/C.12/CAN/CO/6] at pp 5, 6 and 7 [ICESCR 2016 Report].
[259] 2007 SCC 26, [2007] 2 SCR 292 [*Hape*].
[260] *Hape,* at para 53.
[261] *Hape,* at para 56.
[262] [2007] 2 SCR 391 at para 70.89.
[263] 2009 SCC 41, [2009] 3 SCR 3 at para 25.

Based on the Supreme Court of Canada's analysis in these cases, it could be argued that international treaties signed on to by Canada should be considered when interpreting Canadian legislation. While economic and social rights such as rights to housing have not been directly enacted into the *Charter*, there may be some room in the future to argue that such rights are widely recognized and Canadian laws (including the *Charter*) should be interpreted to recognize this. However, neither *Charter* section 7 nor section 15(1) contain "express words" that are similar to international treaty language, such as Article 11.1 ["right to adequate food, clothing and housing"] of the ICESCR. This will provide a challenge in future *Charter* litigation if the narrower approach (requiring express words) to the use of international principles to *Charter* interpretation is implemented by our courts.

Bruce Porter notes that *Baker* is an example of a case where the values of international human rights law must inform the understanding of what is a "reasonable" exercise of discretion.[264]

Reem Bahdi believes that as a result of *Gosselin, infra,* and other cases addressing questions of social and economic rights, we may be at a tipping point with respect to social and economic rights advocacy in Canada. In her opinion, "international human rights law can act as a *tipping factor* or force that consolidates a shift in jurisprudence." [265]

In that regard, Bahdi notes that the Supreme Court of Canada has been receptive to arguments based in international law in cases like *Baker* and *Suresh*. She analyzes the five ways in which judges apply international human rights law in their decisions. Before looking at these situations, Bahdi notes some overriding principles concerning the domestic use of international law in Canadian courts.[266] *Baker* established that international treaties have no direct effect in Canadian law. Judges do not enforce the provisions. According to public international law, international treaties only bind those states that have consented to be bound through ratification. *Francis v The Queen*[267] established that international treaties do not form part of Canadian law unless incorporated by a legislative act. This is because the treaty-making function falls to the executive and is independent of legislative approval.

[264] Porter, 2008 at p 16.
[265] Reem Bahdi, "Litigating Social and Economic Rights in Canada in Light of International Human Rights Law: What Difference Can It Make?" (2002) 14(1) Canadian Journal of Women and the Law 158 at 176 [Bahdi].
[266] Bahdi, at p 165.
[267] *Francis v The Queen*, [1956] SCR 618.

> Bahdi points out that the five rationales tend to redefine these principles:[268]Collectively, these rationales mitigate the claim that only ratified treaties incorporated by the legislature are legally relevant in Canada and reinforce the conclusion that Canadian and international law share a multi-faceted relationship evident of the growing interdependence between the national and international legal orders.

The first rationale is *the Rule of Law Imperative.* The rule of law speaks to a need to create binding rules that apply to the governors and the governed. Citizens should be able to structure their lives with some degree of certainty. Therefore, to the greatest extent possible, treaties ratified by Canada should be applied domestically.[269] The Supreme Court of Canada has invoked this rationale in *R v Ewanchuk, Slaight Communications,* and *United States v Burns*.[270]

Another feature of the rule of law is concerned that the executive's treaty ratification function will turn into a law-making function. Bahdi uses the dissent of the Court of Appeal in *Gosselin, infra* to illustrate an override of this concern: "Quebec clearly demonstrated its intention that its legislation be, or be made to be, in conformity with the Covenant [on Economic, Social and Cultural Rights]."[271]

The second rationale is *the Universalist Impulse.* There is a judicial mandate to promote the inherent dignity and worth of all individuals. *Suresh* is cited by Reem Bahdi to set this understanding: "Ratification proves irrelevant under this rationale because international law is regarded as a statement of universal norms that define the essence of humanity."[272] In analyzing the Court of Appeal decision in *Gosselin, infra,* Bahdi recognizes that the Court did not consider the effect of Quebec's social welfare regulation on Gosselin and the others with respect to a right to human dignity. Rather, the analysis focused on whether Quebec's legislature had adopted a reasonable welfare scheme at the time of its enactment. Bahdi, while recognizing that this kind of judging is not prevalent in Canada, concludes: "The universalist impulse rationale implies that the judicial role extends beyond devising the will of the legislature and entails securing a set of values that are logically and morally superior to the legislative will."[273]

The third rationale is *the Introspection Rationale.* Here, international law helps a judge to

[268] Bahdi, at p 166.
[269] Bahdi, at p 166.
[270] *R v Ewanchuk* [1999] 1 SCR 330 and *United States v Burns* [2001] 1 SCR 283.
[271] Bahdi, at p 167.
[272] Bahdi, at p 171.
[273] Bahdi, at p 174.

find the values of the nation. Very simply, Bahdi explains, ratification of a treaty by Canada suggests that it adheres to those values.[274] *Baker* illustrates this rationale. Two competing values were examined. The test in Canada was the 'best interests of the child' while in international law, the deportation of a parent did not engage the rights of the child. Here, international law prevailed.

The fourth rationale is *Judicial World Travelling*. Judges look at the decisions of other courts in other states to justify their own use of international norms. Bahdi suggests that the use of the South African *Grootboom* case concerning social and economic rights might be an example.[275] Of course, the decisions of other states will be rejected if they are inconsistent with Canada's unique values.

The fifth rationale is *Globalized Self-Awareness.* Instead of Big Brother watching, the world is watching. Courts will make certain decisions to avoid shame before the international community. Bahdi notes that this rationale remains on the fringes of judicial decision-making. Sometimes, judges will meet informally with their international equals to discuss issues that transcend national boundaries.[276] This is known as *trans-judicialism,* coined by Ann-Marie Slaughter.[277]

Reem Bahdi believes that regional human rights organizations will potentially become important with respect to social and economic claims, especially since Canada is a member (as of January 8, 1990[278]) of the *Organization of American States (OAS)* and hence subject to the *American Declaration of the Rights and Duties of Man.* Each treaty contains important provisions respecting social and economic rights. The *OAS Charter* stresses that governments exist in large part to combat poverty. Article 3(f) provides that "[t]he elimination of extreme poverty is an essential part of the promotion and consolidation of representative democracy and is the common and shared responsibility of the American states."[279] Expanding the *OAS Charter,* the *American Declaration* recognizes a right to health, food, clothing, housing, medical care and social security.[280]

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[274] Bahdi, at p 175.
[275] Bahdi, at p 178.
[276] Bahdi, at p 179.
[277] Ann–Marie Slaughter, "A Typology of Transjudicial Communication" (1994) 29 University of Richmond Law Review 99.
[278] Government of Canada, "Canada and the Organization of American States", online: < https://www.international.gc.ca/world-monde/international_relations-relations_internationales/oas-oea/index.aspx?lang=eng>.
[279] OAS, General Assembly, *Charter of the Organization of American States*, OAS, Treaty Series Nos 1-C & 61 (1951) at Article 3(f).
[280] *American Declaration on the Rights and Duties of Man,* OAS Res XXX, adopted by the ninth International Conference of American States (1948).

Although rarely used, except for immigration issues, individuals and organizations within Canada can bring petitions before the Inter-American Commission on Human Rights. The Commission can conduct site visits and prepare reports. Anti-poverty organizations have begun to consider the options available under human rights mechanisms. At the very least, such international scrutiny might keep the Canadian judiciary and politicians on their toes. Porter and Jackson assert that there is growing attention to social and economic rights as claimable rights. They support the calls for a rights-based approach to housing and poverty issues.[281] They note that the United Nations Office of the High Commissioner for Human Rights developed guidelines for the integration of human rights into poverty reduction strategies.[282] Further, the recommendations of the United Nations underscore the need for rights-based accountability and judicial and quasi-judicial rights claiming and enforcement processes.[283] Finally, they assert that the fact that adequate housing is not explicitly recognized as a constitutional right in Canada does not mean that there is no domestic constitutional framework to protect this right.[284] They point to the interpretation of *Constitution Act, 1982* section 36, and *Charter* sections 7 and 15(1) in a manner that is consistent with Canada's international human rights obligations in order to provide an effective remedy when our governments do not honour these constitutional commitments.[285]

B. Economic, Social and Cultural Rights in the *Charter*

As already noted above, the *Charter* does not explicitly mention a right to housing. Since the right to housing is considered an economic, social or cultural right, the issue is whether the *Charter* may be interpreted to include this right—either under section 7 or section 15, or in some other manner. Louise Arbour, then United Nations High Commissioner on Human Rights, reviewed how Canadian courts have applied *Charter* section 7 to issues of poverty and homelessness, indicated that: "The first two decades of *Charter* litigation testify to a certain timidity—both on the part of litigants and the courts— to tackle, head on, the claims emerging from the right to be free from want."[286] While it

[281] Making the Connection, at p 7.
[282] Making the Connection, at p 8.
[283] Making the Connection, at p 12.
[284] Rights-Based Strategies, at p 70.
[285] Rights-Based Strategies, at p 70.
[286] Louise Arbour, "'Freedom from want' –from charity to entitlement" (LaFontaine-Baldwin Lecture, delivered at the Institute for Canadian Citizenship, Quebec City, 3 March 2005).

continues to appear that *Charter* section 7 litigation is less than promising for making the argument that it requires governments to take positive measures to address homelessness, the Supreme Court has continued to express its willingness to entertain such *Charter* claims, and has left open the possibility that *Charter* section 7 protects socio-economic rights.[287]

Opponents of legally protected economic and social rights often cite three main problems with claiming economic and social rights under the *Charter*. First, it is argued that economic and social rights are non-justiciable, and "beyond the competence of the courts".[288] While civil and political rights bear minimum costs, it is argued that economic and social rights involve carefully allocating state resources and should be left to policy-makers, not judges. Second, economic and social rights are positive rights, and judges have been reluctant to state that the *Charter* imposes positive obligations on the state. Finally, both sections 7 and 15 have been interpreted as providing protection against government *action* or laws that specifically violate these rights. It is less clear whether these sections provide a remedy for government *inaction*.

1. Justiciability of Social and Economic Rights

John Richards and Martha Jackman respond to Schabas' article "Freedom From Want: How Can We Make Indivisibility More Than a Mere Slogan."[289] In essence, Richards and Jackman debate whether or not social and economic rights should be justiciable.[290] Two opposing views are presented to the issue: Given that civil and political rights and social and economic rights are indivisible, should courts read social and economic rights into the *Charter*?

Richards warns of the dangers of judicial activism.[291] Why has judicial activism played a minor role in the building of the welfare state? Social programs cost money.[292] Politicians are also required to deliver services. He argues that the courts should not be able to force citizens to pay

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[287] See: *Irwin Toy Ltd v Quebec (A-G)* (1989), 5 DLR (4th) 577 (SCC) [*Irwin Toy*].

[288] Justice LaForest, *Andrews v Law Society of British Columbia* (1989), 56 DLR (4th) 1 at 38 [*Andrews*]. Note: Justice LaForest seems to change his mind in *Eldridge*.

[289] Schabas, 2000.

[290] John Richards "William Schabas v Cordelia" (2000) 11 National Journal of Constitutional Law 247-260 [Richards] and Martha Jackman, "What's Wrong With Social and Economic Rights?" (2000) 11 National Journal of Constitutional Law 235 [Jackman 2000].

[291] Richards, at p 249.

[292] Richards, at p 249.

taxes to support these programs. Political agreement is needed.[293]

It is for this reason that Canada has respected the rights of states to Parliamentary supremacy and judicial restraint.[294] Richards explains that "all societies choose to draw a line between on the one hand, those aspects of public life subject to predefined rights that, in some measure, are enforceable by tribunal and, on the other hand, those aspects of public life to be decided by the contemporary will of the majority, as represented through legislatures."[295] In his opinion, Canada has drawn that line in the sand, and rightly so by ranking civil and political rights as justiciable. According to Richards, civil and political rights are straightforward and enforceable, whereas there is no such analogous agreement on the meaning of social and economic rights.[296]

In fact, for Richards, taxation for social programs, without the consent of the people's assembled representatives, is an unwarranted infringement on property rights.[297] John Locke's defence of property as a fundamental right is cited to affirm that individual property rights have historically been the policy cornerstone for market-based scholars who want a minimal state that does not redistribute.[298] Richards concludes by asking Schabas where government will get the resources for generous and universal health programs 'which in the average OECD [Organization for Economic Co-operation and Development] country cost eight per cent of the GDP' if this money is not extracted from the labourers and owners of property?[299]

On the other hand, Jackman asks: "What is Wrong With Social and Economic Rights?" In its 1993 *Concluding Observations on Canada,* the *Committee on Economic, Social and Cultural Rights* urged judges 'to accept a broad and purposive approach to the *Charter,* to provide appropriate remedies against social and economic right violations'.[300] Jackman argues that the criticisms raised against the judicial recognition of social and economic rights in Canada create a false distinction between social and economic rights and the more *classical* human rights; exaggerate the problems

[293] Richards, at p 249.
[294] Richards, at p 250.
[295] Richards, at p 253.
[296] Richards, at p 254.
[297] Richards, at p 257.
[298] Richards, at p 257-8.
[299] Richards, at p 258.
[300] Committee on Economic, Social and Cultural Rights. *Concluding Observations on Canada,* UN Doc E1/C12/1993/5, Article 30.

of judicial competence; and create a false dichotomy between individual rights and democracy.[301]

Jackman addresses the negative/positive rights distinction.[302] Seeing that economic and social rights are contingent, there is a fear that judges will substitute their values for those democratically elected and accountable to the legislatures.[303] This will erode public confidence in the independence and integrity of the judiciary.[304] Further, citizens will become apathetic as government abdicates its responsibility to the courts.[305] Surely this is inconsistent with basic democratic principles.[306] Porter also notes whether a person is homeless because of state action (e.g., being evicted) or because of state inaction (e.g., state failure to provide housing) is of little consequence to the person who is homeless, because the effect of homelessness on personal dignity is the same.[307] He also notes that the rights holders who need the state to take positive action to protect their fundamental rights "tend to be the most disadvantaged and marginalized groups with the greatest need for access to the courts for protection of their human rights."[308]

Jackman further develops the argument. In addition to the argument that courts lack the competence to deal with social, political and resource allocation issues, the poor cannot really access this process.[309] Judicial procedures are complex. Judicial language is incomprehensible. And it is all so costly. Moreover, judges do not understand the plight of the poor because of their narrow socio-economic, racial and cultural backgrounds combined with their specialized education, training and expertise.[310] In addition, unlike government, courts are limited to individual disputes, within the restrictive bounds of judicial procedure. Martha Jackman clarifies the argument:[311]

> These limitations are particularly relevant in relation to social and economic rights, since by definition they must be interpreted and applied in a very contextual way. Courts must have access to the information necessary for them to decide what the scope and content of a given social or economic right should be. In remedying social or economic rights violations, courts will potentially be obliged to tell governments what benefits or services they must provide, and in

[301] Jackman, 2000 at p 237.
[302] Jackman, 2000 at p 238.
[303] Jackman, 2000 at p 239.
[304] Jackman, 2000 at p 239.
[305] Jackman, 2000 at p 239.
[306] Jackman, 2000 at p 239.
[307] Porter, 2008 at p 7.
[308] Porter, 2008 at p 7.
[309] Jackman, 2000 at p 241.
[310] Jackman, 2000 at p 240.
[311] Jackman, 2000 at 240 and footnote 13.

> what quality or quantity. Such determinations require a thorough grasp of social and economic conditions in society, as well as of public perceptions of the community's needs and means. Legislatures, it is argued, and not the courts, are in the best position to make the complex judgments which these questions demand.

In a recent article, Jackman agrees that the Supreme Court of Canada, under Chief Justice McLachlin, has focused on protecting traditional negative rights and traditional rights-holders, while excluding the most pressing positive rights claims of the poor, such as the right to health care, social assistance or legal aid—all of which depend on legislation to give them effect.[312] This all takes place even though a recent report of the International Commission on Jurists found that the distinction between positive and negative rights has been "entirely discredited under international human rights law and is increasingly rejected by courts in other constitutional democracies."[313]

In yet another article, Jackman emphasizes that the traditional distinction between positive and negative rights has been discredited under international human rights law and replaced by the notion that all human rights are indivisible and interdependent, with the governments having equal duties to respect and protect socio-economic and civil and political rights.[314]

The final argument against the adjudication of social and economic rights that Jackman postulates is the position that the pursuit of legal rights through the courts cannot affect lasting social change. She puts it this way: "Rights, it is claimed, operate instead to perpetuate existing power structures in society, and to channel potentially radical demands for change into legal claims, which, by definition, will not be disruptive of the social and economic *status quo*."[315]

Martha Jackman rejects these arguments. The so-called classical rights do have a corresponding obligation to act, and it costs.[316] Moreover, classical rights are not determinate and universal. Jackman notes: "To say that a classical right, such as freedom of expression or the right to a fair trial, is universal surely means no more than it is recognized in many societies and not that its

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[312] Martha Jackman "Constitutional Castaways: Poverty and the McLachlin Court" (2010) 50 Supreme Court Law Review (2d) 297 at p 311 [Jackman, 2010].
[313] Jackman, 2010 at p 311.
[314] Martha Jackman, "Charter Remedies for Socio-economic Rights Violations: Sleeping Under a Box?" [Jackman 2010] in Kent Roach and Robert J Sharpe, eds *Taking Remedies Seriously* (Montreal: Canadian Institute for the Administration of Justice, 2010) 280 at p 284.
[315] Jackman, 2000 at p 241.
[316] Jackman, 2000 at p 242.

content is static across cultures and across time."[317]

In Jackman's opinion, the willingness to adjudicate civil and political rights and not social and economic rights is a form of discrimination against the poor:[318]

> It requires little imagination to question the value and meaning of a right to freedom of conscience and opinion without adequate food; to freedom of expression without adequate education; to security of the person without adequate shelter and health care. In each case, there exists a fundamental interdependence between the classical right, which is constitutionally recognized, and the underlying social or economic right which is assumed to be a matter, not for the state, but for the market, for individual initiative, or even for nature.

What of judicial competence? Courts continually address problems, both in private and public law, which have policy consequences.[319] Judges assess evidence, use experts and determine procedure. In fact, Jackman retorts, in a constitutional democracy, courts play a legitimate and democratically sanctioned role in reviewing the conduct of other branches of government.[320] Judicial intervention is important, as it protects the violation of the rights of minorities from the actions of elected majorities.[321]

Further, realistically, many decisions concerning the poor are made by government departments and administrative agencies. Parliament exercises little control over these actors.[322] Indeed, Canada professes a relationship between the individual, the community and the state. In that sense, the inclusion of the courts in the determination of social and economic rights can only operate to enhance democratic decision-making by elected governments and other public institutions.[323]

Finally, for the poor, the judiciary can only contribute to social change. After all, their plight is "socially constituted and controlled".[324] The court can be used as a tool to influence legislative and policy processes and to call legislatures to account for decisions.[325] The legislatures and

[317] Jackman, 2000 at p 243.
[318] Jackman, 2000 at p 243.
[319] Jackman, 2000 at p 244.
[320] Jackman, 2000 at p 244.
[321] Jackman, 2000 at p 244.
[322] Jackman, 2000 at p 244.
[323] Jackman, 2000 at p 244.
[324] Jackman, 2000 at p 245.
[325] Jackman, 2000 at p 244.

Parliament are representative of the majority and not the minority.[326]

Martha Jackman concludes by making a statement that goes to the heart of the Canadian state:[327]

> There is further reason for insisting that fundamental social and economic rights be justiciable in the same way as the more traditional civil and political rights already contained in the *Charter.* As many have argued, a Constitution is more than a legal document. It is a highly symbolic and ideologically significant one – reflecting both who we are as a society, and who we would like to be. Inclusion of certain rights and principles in the Constitution say a great deal about their stature and importance; omission of others has the same effect.

2. Social and Economic Rights Jurisprudence

Many anti-poverty advocates and academics believe that a strong argument can be made for an interpretation of *Charter* sections 7 and 15(1) that would provide for a right to housing.[328] However, despite the *Charter* section 7 guarantee of "life, liberty and security of the person", and section 15's guarantee of "the right to the equal protection and equal benefit of the law without discrimination", and despite case law which has expressed the value of international human rights law in interpreting Canadian legislation and the *Charter*[329] Canadian Courts have been hesitant to read social and economic rights into these sections of the *Charter*. The cases decided prior to the Supreme Court of Canada's decision in *Gosselin v Quebec (Attorney General),* for the most part, are very careful not to interfere with government's democratic prerogatives, the distribution of public funds and the historical interpretation given to these provisions. In fact, the International Commission of Jurists reviewed socio-economic rights cases from several countries, and its report

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[326] Jackman, 2000 at p 244.
[327] Jackman, 2000 at p 246.
[328] For example, Centre for Equality Rights in Accommodation (http://www.equalityrights.org/cera/); Canada Without Poverty (http://www.cwp-csp.ca/); Canadian Homeless Research Network http://homelessresearch.net/); Social Rights Advocacy Centre (http://www.socialrights.ca/), Amnesty International (http://www.amnesty.ca/); International Network for Economic, Social and Cultural Rights (http://www.escr-net.org/); David Asper Centre for Constitutional Rights (http://www.aspercentre.ca/); Poverty and Human Rights Centre (http://povertyandhumanrights.org/); Charter Committee on Poverty Issues (http://www.povertyissues.org/); Pivot Legal Society (http://www.pivotlegal.org/); Income Security Advocacy Centre (http://www.incomesecurity.org/index.html); Advocacy Centre for Tenants Ontario (http://www.acto.ca/en/cases/right-to-housing.html).
[329] Baker at para 70; Ewanchuk at para 73; R v Keegstra, [1990] 3 SCR 697, at para 66; Slaight Communications at para 23.

emphasizes that Canadian courts and tribunals continue to be conservative with respect to the recognition of social and economic rights set out in the ICESCR.[330]

In addition, for both *Charter* sections 7 and 15(1), Canadian courts have been reluctant to impose specific obligations on government, despite the recognition that positive government action may be required to give effect to *Charter* rights and freedoms.[331] This can pose a problematic distinction (between negative and positive rights) for those who seek to argue for a right to housing, despite the fact that this is actually a right that falls on the spectrum between strictly positive or negative rights.[332] The reluctance to impose positive Obligations on government in section 7 cases[333] may be compared to some of the section 7 claims that have been upheld concerning negative rights.[334] This illustrates that the result is largely dependent on whether the court chooses to defer to government decisions and priorities in allocating resources.[335] As will be shown below, this approach affects the interpretation of both *Charter* sections 7 and 15(1).

Gwen Brodsky argues that because the governments have significant influence over the development of constitutional rights, it is useful to note the usual arguments made by government lawyers in litigating *Charter* cases involving poverty:[336]

- The right to equality does not impose any positive obligation on governments to redress social inequality or to alleviate poverty. Equality rights require only that governments refrain from exclusionary stereotyping. The *Charter* restrains state action but does not compel it.
- Rights have no economic content. Thus, neither section 7 nor section 15 protect against economic inequality or economic deprivation.
- Rights under international treaties are not real rights but only policy objectives and, as such, are not enforceable by the courts.
- Governmental choices regarding issues such as social welfare are beyond the competence of the courts, and, therefore, claims relating to such choices should be regarded as non-justiciable. Alternatively, governmental

[330] International Commission of Jurists Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability (Geneva: International Commission of Jurists, 2008).
[331] Cara Wilkie and Meryl Zisman Gary, "Positive and Negative Rights Under the Charter" Closing the Divide to Advance Equality" (2011) 30 Windsor Rev Legal & Soc Issues 37 [Wilkie and Gary].
[332] Wilkie and Gary, at p 38.
[333] Gosselin v Quebec (Attorney General), [2002] 4 SCR 429 [Gosselin].
[334] Chaoulli v Quebec (Attorney General), 2005 SCC 35, [2005] 1 SCR 791 [Chaoulli]; Victoria (City) v Adams 2008 BCSC 1363, affirmed Victoria (City) v Adams, 2009 BCCA 563.
[335] Wilkie and Gary, at p 45.
[336] Gwen Brodsky, "The Subversion of Human Rights by Governments in Canada" in Margot Young, Susan B Boyd, Gwen Brodsky and Shelagh Day (eds) *Poverty: Rights, Social Citizenship, and Legal Activism* (Vancouver: UBC Press, 2007) [Poverty 2007] 355 at p 362.

justifications offered for such choices should be accorded an extraordinarily high level of judicial deference.

a. Charter, section 7

i. Life, Liberty and Security of the Person

Charter section 7, which states that "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"[337], is included under "Legal Rights" in the *Charter*. For this reason, it is often invoked in the criminal justice context. For example, it would include the right not to be arbitrarily detained. While section 7 is not only restricted to the criminal law context—the Supreme Court of Canada has applied it in other situations such as the right to be provided state-funded counsel in child custody proceedings[338]—the Court has been reluctant to express that "security of the person" can be extended to guarantee a bare minimum of living standards, or a right to housing.

In the civil context, the Supreme Court of Canada has been "cautious and incremental" in its interpretation. For example, in the dissenting judgment in *Gosselin* (discussed below), Justice Arbour referred to the courts' cautious interpretations as "firewalls that are said to exist around s. 7".[339] One of these firewalls is the idea that economic liberty (as opposed to personal liberty) is not covered by section 7.[340]

In the early Supreme Court of Canada decision of *Irwin Toy Ltd v Quebec (Attorney-General),*[341] the court stated it would be "precipitous" to exclude "at this early moment in the history of *Charter* interpretation, such economic rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter." The Manitoba Court of Appeal in *Fernandes v Director of Social Services (Winnipeg Central)*[342] was not so positive.

[337] Charter of Rights and Freedoms, section 7.
[338] New Brunswick (Minister of Health and Community Services) v G(J), (1997), 187 NBR (2d) 81; overturned in New Brunswick (Minister of Health and Community Services) v G(J), [1999] 3 SCR 46 [G(J)].
[339] *Gosselin*, at para 309.
[340] Rollie Thompson, "Rounding up the Usual Criminal Suspects, and a Few More Civil Ones: Section 7 after Chaoulli" (2007) 20 National Journal of Constitutional Law 129 at pp 138-39 [Thompson].
[341] *Irwin Toy*, at p 633.
[342] *Fernandes v Manitoba* (Director of Social Services, Winnipeg Central) (1992), 78 Man R (2d) 172 (CA), leave to appeal to SCC refused (1992), 78 Man R (2d) 172 (note) [Fernandes].

In this case, a permanently disabled man suffering from muscular atrophy with progressive respiratory failure had appealed a denial of special assistance from social services to cover the cost of necessary attendant care. Without it, he would be forced to leave his home and live in the hospital permanently. He argued that *Charter* sections 7 and 15 should be interpreted in conjunction with the international human rights obligations to ensure an adequate standard of living. It was found that section 7 does not protect economic rights nor the desire to live in a particular setting.[343] Further, section 15 applied to discriminatory government action and not to disadvantage that existed independently of government action.

Similarly, in a case considered by the Nova Scotia Court of Appeal, *Conrad v County of Halifax,*[344] a single mother was denied interim assistance to cover basic necessities pending an appeal of termination of assistance. The court found that *Charter* section 7 confers no right to be "free from poverty and the physical, emotional and social consequences of that condition."[345]

Masse v Ontario (Ministry of Community and Social Services)[346] was a decision of the Ontario (Gen Div) Court. Twelve Ontario social assistance recipients, including seven sole support mothers, asked to strike down a twenty-one per cent cut in provincial social assistance rates. It was argued that the cuts would lead to significant increases in homelessness. It was found that *Charter* section 7 contained no right to social assistance or a minimum standard of living. The plight of the recipients, although urgent and serious, related to their inability to provide for themselves. The effect of provincial welfare legislation and its regulations was to alleviate the problems and financial burdens of those in need by providing 'last resort' benefits. The court in *Masse* acknowledged the severe consequences: low birth weight, poor nutrition, inadequate housing, ill health and stress, and poor cognitive and psycho-social development of children. However, the Legislature had the right to repeal statutes. The court held that it had no jurisdiction to second guess policy, as this was a political decision.

One of the main problems with making a section 7 claim for economic rights, or more specifically affordable housing rights, is that section 7 is normally restricted to government

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343 *Fernandes* at para 37.

344 *Conrad v Halifax (County)* (1993), 124 NSR (2d) 251 (SC); affirmed (1994), 130 NSR (2d) 305 (CA); leave to appeal to SCC refused (1994), 145 NSR (2d) 319 (note) [*Conrad*].

345 *Conrad,* at para 56.

346 *Masse v Ontario (Ministry of Community and Social Services)* (1996), 134 DLR (4th) 20 (Ont Gen Div), leave to appeal to Ont CA dismissed (1996), 89 OAC 81 (note), and leave to appeal to SCC refused (1996), 207 NR 78 (note) [*Masse*].

action.[347] A claimant would have to shape his legal argument in a way that showed a specific government action had deprived him of his right to "life, liberty and security of the person". In *G (J),* the court rejected an exclusive negative rights orientation to section 7. The Supreme Court of Canada held that this section (as well as section 15) places positive as well as negative obligations on the state. The Court of Appeal had dismissed a section 7 challenge to the denial of funding for legal aid in child custody (e.g., government) proceedings. It held that it was not the responsibility of the courts to effectively create programs designed to further social justice and equality. The Supreme Court disagreed.

There are positive constitutional obligations on government to provide counsel in those cases when it is necessary to ensure a fair hearing. The financial issues were addressed under section 1 of the *Charter*: the estimated cost of less than 100,000 dollars to provide state-funded counsel, in these circumstances "is insufficient to constitute a justification within the meaning of section 1."[348]

In *Chaoulli,* a majority of the Supreme Court of Canada held that the province's failure to ensure access to health care of a reasonable quality within a reasonable time engaged the right to life and security of the person and thus triggered the application of *Charter* section 7 (and the equivalent guarantee in Quebec's *Charter of Rights and Freedoms*).[349] While the dissenting justices agreed that there could be a risk to life and security of the person in some cases, they disagreed with the majority that the province's ban on private health insurance was arbitrary.[350] Despite the fact that *Chaoulli* might be interpreted as mandating a minimum standard of basic health care (arguably a positive right), Ontario appellate courts seem to have limited these types of cases to those where a person wants to spend his or her own money rather than those that would mandate the state to pay for educational or health services.[351]

A 2011 Supreme Court of Canada decision (not on poverty or economic issues, but on social issues) illustrates the court's current method of analysis with respect to a *Charter* section 7 issue. In

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[347] *Gosselin,* at para 81.
[348] *G(J),* at para 100.
[349] *Chaoulli,* at para 200.
[350] *Chaoulli,* at para 256.
[351] See: *Wynberg v Ontario* (2006), 82 OR (3d) 561 (CA), leave to appeal to SCC dismissed on April 12, 2007 [2006] SCCA No 441; *Flora v Ontario Health Insurance Plan* (2007), OJ No 91, affirmed (2008) 295 DLR (4th) 309 (CA).

Canada (Attorney General) v PHS Community Services Society,[352] Vancouver's downtown eastside (VDTES) had an injection drug use crisis in the early 1990s. HIV/AIDS and hepatitis C epidemics followed, and VDTES declared a public health emergency in September 1997. Since the population of the VDTES was marginalized, with complex mental, physical and emotional 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, which were controversial in North America, but had been used successfully in Europe and Australia.

The *Controlled Drug and Substances Act* ("*CDSA*") section 56, permits exemptions, for medical or scientific purposes, from the prohibitions of 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. It was North America's first government sanctioned safe-injection facility, and it operated continuously since. Evidence accepted by the court indicated that Insite is a strictly regulated health facility, with 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.[353]

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.[354] Insite supporters (PHS Community Services Society, Dean Edward Wilson, Shelly Tomic, the Attorney General of British Columbia and others) commenced legal action in an effort to keep it open. The Vancouver Area Network of Drug Users

[352] [2011] 3 SCR 134 [*Insite*].
[353] *Insite,* at paras 1 to 19.
[354] *Insite,* at para 121.

(VANDU) 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.

The Supreme Court of Canada (SCC) (per Justice McLachlin C.J., concurred with by Justices Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell) 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 Supreme Court of Canada (SCC) 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 under sections 4(3) and 4(6) of the *CDSA*), and the right to life, liberty and security of the person of the clients of Insite. 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."[355]

In addition, the SCC held that the prohibition against trafficking under section 5(1) of *CDSA* would not constitute a limitation on the claimants' section 7 rights because trafficking charges would not apply to the Insite staff.[356] The Court's analysis on the issue of fundamental justice will be discussed more thoroughly immediately below.

Rollie Thompson posits that after *Chaoulli,* it would appear possible to argue that deprivations of basic human services (e.g., eviction from public housing) could be addressed by an interpretation of *Charter* section 7 that would hold that if a government puts in place a scheme to provide housing, the scheme must comply with the *Charter*.[357] In the context of rights to housing, unless a claimant is evicted because of government action or actually restricted from finding housing because of a government action, it will be difficult to make out a section 7 claim. The Ontario Court of Appeal ruling in the *Tanudjaja* case demonstrates this. In addition to concluding that the right to housing should be determined by the legislature as opposed to the courts, the

[355] *Insite,* at para 113.
[356] *Insite,* at paras 95-96.
[357] Thompson at 150-51. See also: Margot Young, "Section 7 and the Politics of Social Justice" (2005) 38 UBCLR 539-560.

Ontario Court of Appeal also upheld the finding that section 7 of the *Charter* does not contain a fundamental right to housing.[358] Nevertheless, as indicated by *G(J),* the door is not shut on future cases in which the Court may interpret section 7 to include positive obligations on the government. Further, the *Charter* has been successfully used to defend against government action in circumstances faced by homeless people (e.g., persons charged with camping in parks), as will be discussed below.

Further, it appears that making a successful claim related to homelessness and *Charter* section 7 is going to require evidence of the circumstances of those living without shelter, and how their choices go to their dignity, autonomy and independence.[359]

Some of the claimants in the *Tanudjaja* case argued, to no avail, that a judicial interpretation that *Charter* section 7's guarantee of life, liberty and security of the person that does not include the harm and indignity of those who are deprived of access to adequate housing "may itself constitute a form of social exclusion and marginalization, with consequences that will outlast the social and economic policy of any particular government."[360]

ii. Principles of Fundamental Justice

The second part of a *Charter* section 7 analysis requires that a person cannot be deprived of life, liberty and security of the person except in accordance with the principles of fundamental justice. Consequently, even if it were established that the right to housing was covered by section 7 ("life, liberty and security of the person"), people can be deprived of this right if it is deprived in accordance with the principles of fundamental justice.

Canadian caselaw has indicated that "fundamental justice" is not the same as "natural justice" and the principles of fundamental justice are not just limited to procedural guarantees.[361] An infringement of section 7 will offend the principles of fundamental justice if it violates the "basic tenets of our legal system."[362] Deprivations of the right to life, liberty and security of the

[358] *Tanudjaja v Canada (Attorney General*), 2014 ONCA 852, at para 30.
[359] Catherine Boies Parker, "Update on Section 7: How the Other Half is Fighting to Stay Warm" (2010) 23 Can J Admin L and Prac 165.
[360] *Tanudjaja v Canada (Attorney General)* (Factum of the Intervenor Charter Committee Coalition on the Motion to dismiss the Amended Notice of Application at para 9 April 2013), citing Arbour at 9-10 and 14.
[361] Ref Re s 94(2) of Motor Vehicle Act (BC), [1985] 2 SCR 486.
[362] *R v S(RJ)*, [1995] 1 SCR 451 at 488.

persons "must be 'fundamentally just' not only in terms of the process by which they are carried out but also in terms of the ends they seek to achieve."[363]

The principles of fundamental justice include: 1) the law or scheme is not arbitrary: does the legislative scheme infringe a particular person's protected interests (to life, liberty and security of the person) in a way that cannot be justified having regard to the objective of the scheme?[364] 2) the law or scheme is not overbroad or too vague: is the law expressed in a way that is too unclear for a person to reasonably know whether or not the conduct falls within the law, and then are the law's effects far broader than intended or permitted by the *Constitution*?[365] and 3) the law or scheme is not so extreme as to be disproportionate to any legitimate government interest: would the effect of denying the impugned scheme or benefit to those who need it be grossly disproportionate to any benefit that Canada might derive from having a uniform stance with respect to the activity?[366]

In *Insite, supra*, the Supreme Court of Canada (SCC) discussed the constitutionality of the Minister's exercise of discretion in his application of the law. The SCC said that the Minister's discretion to grant an exemption was not absolute, and had to be exercised in conformity with the *Charter*.[367] The federal government argued that it had not yet made a decision about whether to grant the extension to Insite's exemption, but the SCC found that the Minister had effectively refused it.[368] 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*" (simply on the basis of policy, without any condition).[369] The Minister had to make a decision in accordance with the principles of fundamental justice because 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 caselaw as to the correct meaning of arbitrary. The alternative approaches to arbitrariness include whether the impugned measure (e.g., the failure to provide an exemption to enable the provision of the services) is

[363] *Godbout v Longeueil (City),* [1997] 3 SCR 844 at para 74.
[364] *Rodriguez v British Columbia (Attorney General),* [1993] 3 SCR 519, 107 DLR (4th) 342.
[365] *Canadian Foundation for Children, Youth & the Law v Canada (Attorney General*), [2004] 1 SCR 76 at para 16.
[366] *Insite*, at para 143.
[367] *Insite,* at para 117.
[368] *Insite,* at paras 119-125.
[369] *Insite,* at para 128.

necessary to or inconsistent with the state objectives underlying the legislation.[370] The SCC found that the Minister's refusal to grant the exemption was arbitrary, no matter which meaning of the term was used.[371] The refusal to grant the exemption undermined the *CDSA*'s objectives of public health and safety.[372] 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."[373] The court noted that its findings that the actions were arbitrary and their effects grossly disproportionate to the benefits, resulted in the application of the law being contrary to the principles of fundamental justice under *Charter* section 7.[374]

The SCC also said that if the *Charter* section 1 analysis were required, the *Charter* violation could not be saved by s. 1.

With regard to the fundamental justice aspect of the right to adequate housing under *Charter* section 7, the argument would be that the governments' actions and failure to provide adequate housing deprive the claimants' life and security of the person in a manner that is arbitrary and disproportionate to any governmental interest, and thus not in accordance with the principles of fundamental justice. In the *Tanudjaja* case, the claimants argued that the government inaction (with regard to failing to implement effective strategies for reducing homelessness) was arbitrary and disproportionate to any government interest.[375] The respondent governments of Ontario and Canada responded that the applicants had not established a violation of the principles of fundamental justice because the challenged state action was far from the traditional adjudicative context with which the courts are familiar and is also more about ethics and morals (policy) than state action causing a deprivation.[376]

[370] *Insite,* at paras 130-132.
[371] *Insite,* at para 132.
[372] *Insite,* at para 132.
[373] *Insite,* at para 133.
[374] *Insite,* at para 136.
[375] *Tanudjaja v Canada (Attorney General)* (Amended Notice of Application November 15, 2011) at para 34.
[376] *Tanudjaja v Canada (Attorney General)* (Factum of the Respondent (Moving Party) May 14, 2013) at para 89.

b. Charter section 15(1)

i. Section 15(1)

Section 15 is another alternative which litigants may use to make a claim to a right to adequate housing under the *Charter*. Section 15(1) states that:

Every individual is equal before the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[377]

Section 15(2) affirms that:

> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The history of the judicial interpretation of *Charter* section 15(1) indicates that the Supreme Court of Canada finds equality to be an "elusive concept."[378] The legal requirements for making out a case of discrimination and the interpretation of section 15(1) have been the subject of numerous academic articles and legal cases. In *Andrews v Law Society of British Columbia,* the Supreme Court of Canada discussed what factors will amount to a violation of section 15(1). These factors were summarized in a later case, *R v Kapp* at para 17:[379]

> The template in *Andrews*, as further developed in a series of cases culminating in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, established in essence a two-part test for showing discrimination under s. 15(1): (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? These were divided, in *Law*, into three steps, but in our view the test is, in substance, the same.

[377] *Charter of Rights and Freedoms*, section 15(1).
[378] Justice McIntyre in Andrews.
[379] 2008 SCC 41 [*Kapp*].

In *Andrews,* according to *Kapp*, discrimination is defined as (para 18):

> (1) the perpetuation of prejudice or disadvantage to members of a group on the basis of personal characteristics identified in the enumerated and analogous grounds; and (2) stereotyping on the basis of these grounds that results in a decision that does not correspond to a claimant's or group's actual circumstances and characteristics.

After *Andrews*, the Supreme Court of Canada case *Law v Canada (Minister of Employment and Immigration)*[380] set out a three-part test for a claimant to make a section 15(1) claim. Justice Iacobucci, speaking for the Court, described the general approach to the analysis.[381] Subsequently, in *Kapp,* the Supreme Court of Canada indicated that the leading case on section 15(1) is *Andrews.* Its decision in *Law* was relegated to a supporting one. The Supreme Court of Canada indicated that *Andrews* "set the template for this Court's commitment to substantive equality."[382]

In *Ermineskin Indian Band and Nation v Canada,*[383] in its section 15(1) analysis, the Supreme Court of Canada relied on the test of discrimination provided in *Andrews* and in *R v Turpin.*[384] Further, *Ermineskin* provided that the "broader context of a distinction"[385] is to be examined when determining whether the distinction creates a disadvantage by perpetuating prejudice or stereotyping. This approach has been criticized because it fails to recognize the broader range of additional harms that can flow from discrimination, such as "vulnerability, powerlessness, oppression, stigmatization, marginalization, devaluation and disadvantage more broadly."[386]

Under the *Law* test, discrimination was defined in terms of the impact of the law or program on "human dignity", having regard to four contextual factors:[387]

> (1) pre-existing disadvantage, if any, of the claimant group; (2) degree of correspondence between the differential treatment and the claimant group's reality; (3) whether the law or program has an ameliorative purpose or effect; and (4) the nature of the interest affected.

[380] [1999] 1 SCR 497 [*Law*].
[381] Whether a law imposes differential treatment between the claimants and others, in purpose or effect; whether one or more enumerated or analogous grounds of discrimination are the basis for the differential treatment; and whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee. See *Law* at para 88.
[382] *Kapp*, para 17.
[383] 2009 SCC 9 [*Ermineskin*].
[384] [1989] 1 SCR 1296.
[385] *Ermineskin,* at para 193.
[386] J Koshan and J Watson-Hamilton, "The End of Law: A New Framework for Analyzing Section 15(1) Charter Challenges" ABlawg, Online: < https://ablawg.ca/2009/02/20/the-end-of-law-a-new-framework-for-analyzing-section-151-charter-challenges/> [Koshan and Watson-Hamilton].
[387] As summarized in *Kapp* at para 19.

Justice Iacobucci in *Law* describes the purpose of section 15 as being the prevention of:

> …the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.[388]

There have been a number of articles and opinions written about the difficulties the court has faced in understanding the concept of "dignity" and its role in *Charter* section 15(1).[389] In *Kapp,* the court acknowledged the difficulties created in *Law* by the "attempt in *Law* to employ human dignity *as a legal test*"[390] (emphasis in original). Human dignity, while still an "essential value" underlying section 15(1), is "an abstract and subjective notion" that is "confusing and difficulty to apply" and "an additional burden" on equality claimants.[391] Thus, although dignity had a large role in *Law,* its role after *Kapp* in section 15(1) jurisprudence was left unsettled in *Kapp*.[392] However, as noted by J. Koshan and J. Watson- Hamilton, "the phrase 'human dignity' is never mentioned in *Ermineskin*."[393] Further, none of the four contextual factors from *Law* are used.

In *Withler v Canada (Attorney General),*[394] the Supreme Court followed *Kapp* and indicated that the governing test for section 15 is:

(1) Does the law create a distinction based on an enumerated or analogous ground?

(2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?[395]

The *Withler* case provides guidance on comparator groups; who is the group to which we compare the treatment, to create a distinction? Originally, the comparator group was one that "mirrors the characteristics of the claimant (or claimant group) relevant to the benefit or advantage

[388] *Law* at para 51.
[389] See, for example Denise Réaume, "Discrimination and Dignity" (2004) 63 Louisiana Law Review 1; Christopher Essert, "Dignity and Membership, Equality and Egalitarianism: Economic Rights and Section 15" (2006) 19 Canadian Journal of Law and Jurisprudence 407.
[390] *Kapp* at para 19.
[391] *Kapp* at paras 21-22.
[392] For an overview of the *Kapp* decision, see Sophia Moreau "R v Kapp: New Directions for Section 15" (2008- 9) 40 Ottawa Law Review 283.
[393] Koshan and Watson-Hamilton.
[394] 2011 SCC 12 [*Withler*].
[395] *Kapp,* at para 17 and *Withler,* at para 30.

sought" except for the personal characteristic on which the claim was based.[396] In *Withler*, the court expressed a number of concerns with respect to the "mirror comparator group" approach and concluded the important aspects with respect to comparison do not require a claimant to:[397]

> [p]inpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground the discrimination. Provided that the claimant establishes a distinction based on one or more enumerated or analogous grounds, the claim should proceed to the second step of the analysis.

Thus, the key to the first step of the discrimination test is to establish that there has been a distinction resulting in the denial of a benefit that others are granted or a burden that others do not have by reason of a personal characteristic that falls within the enumerated (listed) or analogous grounds in *Charter* section 15(1).

A 2013 decision of the Supreme Court of Canada (SCC) *Quebec (Attorney General) v A*,[398] seems to have divided the court on the issue of discrimination and equality in a manner somewhat reminiscent of the fractured court of the mid 1990's.[399] The *Quebec v A* decision is 450 paragraphs long. To understand the legal reasoning behind the outcome (as was the case in the 1990's) one might have to draw a detailed chart. Lawyers, courts and the public are going to find it difficult to follow the principles set down in the case. The equality issue was whether excluding *de facto* (common law) spouses from the *Civil Code of Quebec* provisions that mandate property sharing and spousal support when either a marriage or civil union breaks down, violates section 15(1) of the *Charter*. The court then had to decide whether the violations were saved by *Charter* s 1.

Justice Abella (writing for herself), concurred with by Justice Deschamps (also writing for Justices Cromwell and Karakatsanis), and Chief Justice McLachlin (writing for herself) all agreed that there was a violation of *Charter* section 15(1). Justice LeBel (also writing for Justices Fish, Rothstein and Moldhaver), wrote the dissenting judgment, holding that there was no discrimination.

On the second issue of whether the violation of *Charter* section 15(1) could be saved by *Charter* s 1, Justice McLachlin held that it was saved. Thus, the final outcome of the case was that

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[396] *Hodge v Canada (Minister of Human Resources Development*, [2004] 3 SCR 357 at para 23.
[397] *Withler,* at para 62.
[398] 2013 SCC 5 [*A*].
[399] See the "equality trilogy": *Miron v Trudel*, [1995] 2 SCR 418 [*Miron v Trudel*]; *Egan and Nesbit v Canada*, [1995] 2 SCR 513 [*Egan*]; and *Thibaudeau v Canada*, [1995] 2 SCR 627.

there was no discrimination.

The challenge for students of equality rights in this case were the factors in the test for a violation of equality/discrimination in section 15(1) that were the focus of the majority and minority judgments in the case. Chief Justice McLachlin and Justice Abella both confirmed that the test for discrimination as outlined in *Kapp*, should be followed to determine whether section 15(1) is violated. The Court's reference to "prejudice" and "stereotyping" in *Kapp* raised concerns because it implies that other ways that people experience disadvantage may not be recognized in this test. For example, sometimes the adverse effects of a law or government action are based on harms other than prejudice or stereotyping—these could include oppression or denial of basic goods.

Justice Abella held that the exclusion of *de facto* spouses from the legal protections for support and property that are given to spouses in formal unions violates *Charter* section 15(1). She noted that many *de facto* spouses share the same characteristics that led to the protections for spouses in formal relationships. For example, they form long-standing unions, they divide household responsibilities and develop a high degree of interdependence. Finally, the economically dependent spouse is faced with the same disadvantages when the relationship dissolves. Yet, the *de facto* spouses in Quebec have no right to claim support or right to divide family property and are not governed by any matrimonial regime. Justice Abella also noted that in some cases that the decision to live together unmarried is no choice at all, which addressed the minority assertion that individuals have chosen to live in *de facto* relationships, when they could choose marriage and the benefits that adhere to that choice. Justice Abella noted that the SCC's reference in *Kapp* to "prejudice and stereotyping" was not intended to "create a new section 15 test" nor to impose any "additional requirements" on those claiming equality.[400] Instead, stereotyping and prejudice are merely two indicators that are relevant to deciding whether substantive equality (e.g., adverse effects discrimination) is violated. This analysis acknowledges that the court is not going to focus merely on direct discrimination. It is also prepared to examine laws that are neutral on their face, but have an adverse effect on a particular group. On the other hand, the minority, led by Justice LeBel, indicated that prejudice and stereotyping were "crucial factors" in the identification of

[400] *A,* at paras 325 and 327.

discrimination, although they did note that they are not the only factors.[401]

Justice Deschamps, agreeing with Justice Abella that there was discrimination, noted that while society's perception of *de facto* spouses has changed in recent decades and there is no indication that the Quebec legislature intended to stigmatize them, the denial of the benefits had the effect of perpetuating the historical disadvantage experienced by *de facto* spouses.[402]

Justice McLachlin held that although "prejudice and stereotyping" are useful guides to determine discrimination, one must perform a contextual analysis, taking into account pre-existing disadvantage of the claimant group, the degree of correspondence between the differential treatment and the claimant's group reality, the ameliorative impact or purpose of the law and the nature of the interests affected. These are contextual factors that were introduced to the legal test for substantive equality in *Law.* She agreed that the Quebec law is discriminatory.[403] However, she also held that the law was saved by *Charter* section 1 ("reasonable and justifiable in a free and democratic society").

Justice LeBel held that the regime in Quebec dealing with support and property division is available only to those who consent to it by getting married or entering into a civil union. While Justice LeBel was prepared to find that the law created a distinction based on marital status, he held that the distinction was not discriminatory because it does not create a disadvantage by expressing or perpetuating prejudice or by stereotyping. Although *de facto* spouses were historically the subject of hostility and social ostracism, nowadays they are respected and accepted. If partners participate in marriage or civil unions, they are consenting to the obligations of support and property division. The fact that there are different frameworks for private relationships between partners does not indicate the expression or perpetuation of prejudice but instead demonstrates respect for the various types of relationships.[404] Thus, while there are still some aspects of the test for discrimination under *Charter* section 15 that are less than certain, based on the caselaw to date, the important elements of the section 15(1) test are:

- it is a *law or government action* that imposes differential treatment,[405]

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[401] *A,* at paras 169 and 185.
[402] *A,* at para 385.
[403] *A,* at para 423.
[404] *A,* at para 216.
[405] *R v Turpin,* [1989] 1 SCR 1296 at 1329 [*Turpin*]; *Auton (Guardian ad litem of) v British Columbia (Attorney General),* [2004] 3 SCR 657 at para 27 [*Auton*].

- the distinction is based on an enumerated or analogous ground, and
- the distinction creates a disadvantage by perpetuating prejudice or stereotyping.[406]

Based on these legal principles of interpretation regarding discrimination, could *Charter* section 15(1) be used to make a claim for recognition of the right to housing? We next examine each of the three aspects set out above to see if this is feasible.

ii. Government Action: Is the Positive versus Negative Obligations Under Charter section 15(1) a False Dichotomy?

One rationale for arguing that the *Charter* section 15(1) (or any other section of the *Charter*, for that matter) cannot provide a right to housing or other protections from poverty is that the *Charter* cannot be used to require the government to act in situations where it has not. However, the right to equality has been described as a "hybrid" right: it is neither purely positive nor negative.[407] This is because it not only requires governments to refrain from discriminating against protected groups but also may require governments to adopt positive measures to ensure equality or positive measures to ensure protection from discrimination by others.[408]

There are legal decisions that deal with the government's failure to act and the *Charter*. Cases involving the government's positive duty to act usually involve *Charter* section 15(1). For example, in *Vriend,* the Supreme Court of Canada held that Alberta's *Individual's Rights Protection Act* violated *Charter* section 15(1) because it did not include "sexual orientation" as a ground for protection under this human rights legislation. In *Eldridge v British Columbia (Attorney General),*[409] the government's failure to provide sign language interpretation for hearing-impaired patients was held to violate their *Charter* section 15(1) rights.

In *Dunmore,*[410] the Supreme Court of Canada dealt with the issue of whether excluding agricultural workers from the labour relations scheme infringed their rights under *Charter* section

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[406] *Kapp,* at para 17 and *Withler* at para 30.

[407] Martha Jackman & Bruce Porter, "Socio-Economic Rights Under the Canadian Charter" in M Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, 2000) 209 at p 221 [Jackman and Porter 2000].

[408] Jackman and Porter, 2000 at p 221.

[409] [1997] 3 SCR 624 [*Eldridge*].

[410] [2001] 3 SCR 1016 [*Dunmore*].

2(d) (freedom of association). The Supreme Court (per Bastarache J et al) noted that ordinarily the *Charter* does not oblige the state to take affirmative action to safeguard or facilitate the exercise of fundamental freedoms.[411] The Supreme Court stressed that it is more usual for cases dealing with under-inclusion to be examined under *Charter* section 15(1).[412] However, where history has shown that the posture of government restraint will expose people to harm (e.g., unfair labour practices), the *Charter* may impose a positive obligation on the state to extend protective legislation to unprotected groups.[413] Thus, excluding individuals from a protective regime may contribute substantially to the violation of protected freedoms. The Supreme Court grounded the claim in fundamental *Charter* freedoms rather than in access to a particular statutory regime.[414] The Court also noted that the doctrine expressed in the case does not, on its own, oblige the government to act where it has not already legislated in a particular area.[415] To be clear, if the state chooses to legislate in a particular area, it must do so in a way that is consistent with the *Charter* section 15(1), and this would mean that unprotected groups should be included. Bruce Porter notes that in both *Vriend* and *Eldridge,* at issue was the under- inclusiveness of existing government legislation or practice rather than the lack of legislation.[416] This was also the case in *Dunmore.* Similarly, in 2003, in *Nova Scotia (Worker's Compensation Board) v Martin and Laseur,*[417] the Supreme Court of Canada ruled that the worker's compensation policy of excluding those with chronic pain from the scheme violated *Charter* section 15(1).

However, Porter also notes that the Supreme Court of Canada's finding in *Vriend* was justified by the disproportionate impact of the exclusion of sexual orientation as a substantive equality issue. Thus, if the lack of a government action has a disproportionate impact on a disadvantaged group, *Charter* section 15(1) could be breached. Further, Justice Cory held in *Vriend* that "Dianne Pothier has correctly observed that [*Charter*] section 32 is 'worded broadly enough to cover positive obligations on a legislature such that the *Charter* will be engaged even if the

[411] *Dunmore* at para 19.
[412] *Dunmore* at para 28.
[413] *Dunmore* at para 20.
[414] *Dunmore* at para 24.
[415] *Dunmore* at paras 28-29.
[416] Bruce Porter, "Beyond Andrews: Substantive Equality and Positive Obligations after Eldridge and Vriend" (1998) 9(3) Const Forum 71 at pp 78-9 [Porter, 1998].
[417] *Nova Scotia (Workers' Compensation Board) v Martin and Nova Scotia (Workers' Compensation Board) v Laseur* 2003 SCC 54 [*Martin*].

legislature refuses to exercise its authority.'"[418] Porter also argues that the majority decision in *Vriend* makes it clear that section 15(1) obligates the government to protect and promote equality in all areas under its jurisdiction.[419] He goes on to state that legislative inaction is not neutral; one must analyze the effects of inaction to determine if it is inconsistent with *Charter* section 15(1).[420]

Timothy Macklem argues that the decision in *Vriend* coupled with the decision in *R v Morgentaler*,[421] illustrate that the *Charter* can be used to protect minorities from the consequences of the "absence of will on the part of the majority."[422] However, he also expresses some reservations about the conclusion that the *Charter* imposes positive duties on the government. Rather, he would prefer to find that some omissions on the part of the government are actually actions, which can be the subject of a *Charter* challenge.[423]

However, it could also be argued that the heretofore flawed comparator analysis (under the analogous grounds issue) is actually to blame for the failure to recognize the positive rights dimension to the right to equality.[424] For example, in *Auton v (Guardian ad litem of) v British Columbia (Attorney General)*,[425] a group of parents argued that the government's refusal to fund a particular program for their preschool-aged children with autism constituted discrimination on the basis of disability. They argued that the government discriminated against their autistic children because it provided non-autistic children with medically necessary services. The SCC rejected the claimants' proposed comparator groups—children without disabilities and adults with mental illness—and found that the correct comparator groups were persons without disabilities or persons suffering from a disability other than a mental disability, seeking or receiving funding for non-therapy that was important for their present and future health and which was emergent and only recently recognized as medically necessary. This application of the comparator analysis posed a significant obstacle for the claimants as it implicitly affirmed the formal equality and similarly situated analysis, which is not currently preferred. This formalistic approach effectively prevents

[418] *Vriend,* at para 60.
[419] Porter, 1998 at p 79.
[420] Porter, 1998 at p 79.
[421] *R v Morgentaler* (1988), 44 DLR 4th 385 (SCC).
[422] Timothy Macklem," Vriend v. Alberta: Making the Private Public" (1999) 44 McGill Law Journal 197 at para 3 [Macklem].
[423] Macklem at paras 26 to 39.
[424] Wilkie and Gary at p 47.
[425] 2004 SCC 78 [*Auton*].

the imposition of positive obligations on government, because with a substantive equality approach one can recognize the importance of positive action for accommodating the different needs of people with disabilities.[426] Hopefully, the SCC's statement about comparator groups in the recent decision of *Withler*, will serve to lessen the use of comparator groups to avoid applying a positive obligation on the government.

Thus, while recognizing the right to housing under *Charter* section 15(1) may be interpreted as placing a positive obligation on the government, it could also be interpreted that by choosing not to recognize and protect this right, the government is actively infringing the substantive equality rights of minority groups (e.g., women, Indigenous people, people with disabilities, as discussed below). In addition, it may be argued that any government cost issues would better be addressed under a *Charter* section 1 analysis.

iii. Analogous Grounds under Charter s 15(1)

The second stage for a *Charter* section 15(1) analysis is whether the distinction is based on an enumerated or analogous ground. With respect to the question of what enumerated or analogous ground would be covered in a *Charter* section 15(1) housing case, perhaps "homelessness" or "poverty" or "social condition" could be argued as analogous grounds. For example, the Supreme Court of Canada has recognized several grounds for protection under *Charter* section 15(1) even though they are not listed, including: citizenship or non-citizenship;[427] sexual orientation;[428] marital status[429] and being a status Indian who is not living on a reserve.[430]

Civil society organizations, parliamentary committees and international human rights bodies have emphasized that this equality rights framework should inform strategies to address poverty and homelessness.[431] Thus, the current emphasis in the equality jurisprudence could be on the stigmatization and marginalization of homeless or poor people.[432] Thus, poverty and homelessness

[426] Wilkie and Gary, at pp 49-50.
[427] *Andrews*.
[428] *Egan*.
[429] *Miron v Trudel*.
[430] *Corbiere v Canada* (Minister of Indian and Northern Affairs), [1999] 2 SCR 203 [*Corbiere*].
[431] Making the Connection.
[432] Rights-Based Strategies at p 35.

would be recognized as analogous grounds of discrimination under *Charter* section 15(1).

The Supreme Court of Canada has indicated that an analogous grounds inquiry must be conducted in a purposive and contextual manner, in which the "nature and situation of the individual or group" are considered; are persons with the characteristics at issue lacking political power, experiencing disadvantage, or vulnerable to having their interests overlooked?.[433] In *Miron v Trudel* the SCC identified a number a factors to assist in determining whether an analogous ground (such as poverty or homelessness) should be recognized under section 15(1). These include whether:[434]

- the proposed ground may serve as a basis for unequal treatment based on stereotypical attributes;
- it is a source of historical social, political and economic disadvantage;
- it is a 'personal characteristic';
- it is similar to one of the enumerated grounds;
- the proposed ground has been recognized by legislatures and the courts as linked to discrimination;
- the group experiencing discrimination on the proposed ground constitutes a discrete and insular minority; and
- the proposed ground is similar to other prohibited grounds of discrimination in human rights codes.

The Court also noted that while discriminatory group markers often involve personal characteristics that are immutable, they do not necessarily have to.[435] In *Corbiere,* the Court further developed the "immutability" discussion by stating that analogous grounds must either be "actually immutable, like race, or constructively immutable like religion."[436] The Court explained that the government has no legitimate interest in getting us to change constructively immutable characteristics in order to receive equal treatment."[437] If a personal characteristic is essential to a person's identity, it is constructively immutable and thus recognizable (as a ground).

Are poverty and homelessness analogous grounds under *Charter* section 15(1)? Jackman and Porter assert that the economic aspects of these circumstances must be distinguished from "social condition", or "source of income" which are currently recognized grounds of discrimination under

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[433] Law at paras 29, 93.
[434] *Miron v Trudel,* at paras 144-155.
[435] *Miron v Trudel*, at para 149.
[436] *Corbiere*, at para 5.
[437] *Corbiere*, at para 13.

several provincial and territorial human rights codes.[438] Poverty and homelessness do have a social dimension, such as exclusion, stigmatization and other discrimination-related consequences.[439] Thus, homelessness and poverty have both economic and social consequences.

The international community recognizes that poverty and homeless can result in discrimination. The Committee on Economic, Social and Cultural Rights recognizes that an economic and social situation may "result in pervasive discrimination, stigmatization and negative stereotyping."[440] While the Supreme Court of Canada has yet to consider whether the social conditions of homelessness and poverty are analogous grounds under *Charter* section 15(1), some lower courts have considered grounds of "poverty" and "recipients of social assistance" with mixed success. The Nova Scotia Court of Appeal in *Dartmouth/Halifax County Regional Housing Authority v Sparks*[441] held that there was recognition of the security of tenure to residents of public housing without discrimination. The Ontario Court of Appeal in *Falkiner v Ontario (Ministry of Community and Social Services)*[442] recognized "receipt of social assistance" as a prohibited ground of discrimination and found that there was discrimination on the combined grounds of sex, marital status and the receipt of social assistance. However, other recent cases have not followed this approach. In 2009, the Federal Court in *Toussaint v Canada (Minister of Citizenship and Immigration)*[443] rejected poverty and the receipt of social assistance as grounds of discrimination under the *Charter*, stating that financial circumstances can change and that people move in and out of poverty (e.g., it is not immutable). Further, the government does have a legitimate interest in eradicating poverty, so it is not the kind of personal characteristic that the government has no interest in changing. The Federal Court of Appeal agreed with the Federal Court on the *Charter* issues, but disagreed on the interpretation of the *Immigration and Refugee Protection Act* section 25.[444]

One of the arguments of the applicants in the *Tanudjaja* case was that failure to provide

[438] *Rights-Based Strategies* at 43. See also: Lynn Iding, "In A Poor State: The Long Road to Human Rights Protection on the Basis of Social Condition" (2003) 41 Alberta Law Review 513.
[439] Rights-Based Strategies at p 43.
[440] United Nations Committee on Economic, Social and Cultural Rights, *General Comment 20: Non- Discrimination in economic, social and cultural rights (art 2 para 2*), UNCESCROR, 42d Sess, UN Doc E/C. 12/GC/20, (2009), at para 35.
[441] Dartmouth/Halifax County Regional Housing Authority v Sparks (1993), 101 DLR (4th) 224 (NSCA).
[442] (2002), 59 OR (3d) 481 (CA), at para 78.
[443] 2009 FC 873, at paras 75-77.
[444] *Toussaint v Canada (Minister of Immigration)* 2011 FCA 146, at para 59; application for leave to appeal to SCC dismissed November 3, 2011 (Case No 34336).

adequate housing discriminates against homeless people.[445] It is clear from the ruling that the Ontario Court was not convinced that homelessness is an analogous ground. The governments of Ontario and Canada argued that establishing homelessness as an analogous ground would not assist the applicants, because their overall *Charter* section 15(1) claim was flawed.[446] They pointed to the unsuccessful history of similar cases and to the fact that economic hardship was consistently rejected by the courts as an analogous ground.[447] In addition, they argued that just because the governments of Ontario and Canada had implemented programs to address adequacy and affordability of housing, did not mean the governments were subject to a positive constitutional requirement to provide new housing benefits in areas that have never been addressed.[448] The respondents argued that imposing such a positive obligation on the governments would have a "chilling effect on the development of public policy"[449] and would serve to inhibit the government from developing legislative initiatives in complex social and economic areas because it would make them vulnerable to *Charter* challenges based on underinclusiveness.[450] These two facta (briefs) demonstrate some of the arguments with respect to whether homelessness could be an analogous ground.

iv. Section 15(1) and Substantive Equality

The third step in the analysis is whether the distinction creates a disadvantage by perpetuating prejudice or stereotyping. As noted above in *A*, there is some debate about whether direct discrimination illustrated by prejudice and stereotyping (usually direct discrimination) will be required for a violation of *Charter* section 15(1), or whether other effects of discrimination, such as adverse effects, will also be considered to be creating a distinction that is discriminatory. It is possible under *Charter* section 15(1) to argue that housing is a substantive equality issue rather than an economic one. If we recall *who is poor*—Indigenous people, people with disabilities, children, new immigrants, and women—could it be argued that poverty (and the right to housing) is an equality issue? Gwen Brodsky and Shelagh Day are especially concerned about women, but

[445] *Tanudjaja v Canada (Attorney General)* (Factum of the Applicants (Respondents on the Motion) May 27, 2013),at para 89.
[446] *Tanudjaja v Canada (Attorney General)* (Factum of the Respondent (Moving Party) the Attorney General of Ontario May 14, 2013), at para 23 [Moving party].
[447] Moving Party, at para 25.
[448] Moving Party, at para 15.
[449] Moving Party, at para 16.
[450] Moving Party, at para 16.

appreciate that the other groups face similar problems. For them, there is a need to appreciate poverty as an equality issue and not simply as a social/economic rights and civil/political rights debate. To do so ignores women's pre-existing economic and social inequality and causes gender-specific harms. Brodsky and Day clarify this position:[451]

> Such an approach overlooks the fact that poverty is socially and legislatively created and that, for the groups predominantly affected by it, it is a result of systemic discrimination. It also overlooks the fact that poverty intensifies the effects of sexist, racist, and other discriminatory social practices. Although it is theoretically possible to interpret *Charter* rights to include subsistence rights without talking about how particular groups are affected by poverty, conceptually 'delinking' poverty from its discriminatory roots, and from the reality of its particular and disproportionate effects on women and other systemically disadvantaged groups, narrows our understanding of poverty and deprives both section 7 and 15 of important interpretive content.

In addition, Martha Jackman and Bruce Porter emphasize that governments are dissuaded from addressing the needs of homeless people because of stereotypical views of homeless peoples' moral unworthiness and laziness, coupled with the assumption that the more homeless peoples' needs are met, the more of a "problem" they will become.[452] Thus, the stereotyping and prejudice experienced by homeless people can result in negative effects.

Brodsky and Day, therefore, call for a right to substantive equality which includes a right to basic economic security. To nullify such an argument, courts must not only deny the justiciability of ICESCR rights but also women's equality rights, together with the rights of other groups. Section 15(1) needs to be used to take apart legislative, regulatory, and policy regimes that perpetuate economic inequality and poverty.

The recognition of the indivisibility of social and economic rights and civil and political rights is crucial.[453] Civil and political rights on their own can be meaningless to the poor. Surely, equality rights for women are intended to be justiciable. Brodsky and Day argue this in the context of the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW):[454]

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[451] Gwen Brodsky & Shelagh Day, "Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty" (2002) 14(1) Canadian Journal of Women and the Law 185 at p 188 [Brodsky and Day 2002].
[452] Rights-Based Strategies, at p 51.
[453] Brodsky and Day 2002, at p 201.
[454] Brodsky and Day, 2002 at p 203.

> The CEDAW contains an express provision committing signatories to establish mechanisms for the enforcement of CEDAW rights. It is also a settled principle of human rights law that equality rights create obligations of immediacy, as distinct from social and economic rights which may be progressively realized in poorer countries where resources are not available to realize them immediately. As an interpretive aid to section 15 equality rights, the CEDAW reinforces a view of section 15 as requiring all levels of government in Canada to take positive steps to ameliorate women's poverty. The integrated content of the CEDAW makes the continuing marginalization of social and economic security interests seem all the more inappropriate. It is surely contradictory to argue that social and economic rights are non-justiciable, when similar kinds of rights that logically flow out of the CEDAW are clearly intended to be justiciable.

In the opinion of Brodsky and Day, classic constitutionalism does not support substantive equality.[455] Classic constitutionalism supports a rights regime that could be complete without any public social and economic entitlements. Here, public redistributive legislation is seen as an interference with the market and a threat to individual liberty.

Rooted in 19th Century liberal ideology, it is not an adequate theory of constitutional interpretation in Canada today. In fact, for Brodsky and Day, the history of Canadian political institutions demands a different theory. Canada has been providing social benefits and remedying inequalities between groups. Since World War II, it has created a social safety net; it has ratified ICESCR and CEDAW; it has enacted human rights legislation and it has developed a wide variety of regulatory bodies (from the environment to worker's compensation).

Formal equality or the 'similarly situated test' which, for example, finds women to be equal to men, does not acknowledge equality of results. More and different measures may be needed. Substantive equality calls government to address the material conditions of inequality, including disproportionate poverty. Moreover, Brodsky and Day argue that "in constitutional law, formal equality is also steeped in the classical constitutional view of government as always a threat to individual flourishing, rather than a potential enhancer of it." [456]

Brodsky and Day highlight the movement of the courts in this direction.[457] Chief Justice Beverley McLachlin in *Andrews* said that the purpose of the *Charter* guarantee of equality is 'to

[455] Brodsky and Day, 2002 at p 204.
[456] Brodsky and Day, 2002 at p 206.
[457] Brodsky and Day, 2002 at p 207.

better the situation of members of groups which had traditionally been subordinated and disadvantaged'. In *Schachter* the court coined the phrase 'equality with a vengeance' – 'nullification of benefits of single mothers does not sit well with the overall purpose of section 15 of the *Charter* and for section 15 to have such a result clearly amounts to equality with a vengeance'. In *McKinney,* Justice Bertha Wilson commented that government does play a role in the preservation and creation of a just society, including health care, access to education, and a minimum level of financial security.[458] The Justice noted: "It is, in my view untenable to suggest that freedom is coextensive with the absence of government. Experience shows the contrary, that freedom has often required the intervention and protection of government against private action."[459] In *Schachter,* the court explicitly characterized the equality guarantee as neither positive nor negative but rather as a hybrid. In some cases, it will be proper to characterize section 15 as providing positive rights. In *Eldridge*, the court recognized that section 15 is applicable not only when harmful effects are caused by legislation but also when legislation excludes a group from enjoying a benefit. In *Ermineskin,* the Supreme Court of Canada says that its "statement in *Turpin* signals the importance of addressing the broader context of a distinction in a substantive equality analysis." The Supreme Court of Canada in *G (J)* noted that "autonomy and security are central elements of women's equality and therefore must be understood as central to what section 15 is about."[460]

Errol Mendes discusses the serious systemic equality implications of welfare and pension laws and on women. He states:[461]

> There have been instances of workfare programs that systemically penalize single mothers who are attempting to educate themselves out of poverty. Such programs can force such women to give up their education, if they are receiving welfare, and force them to enter workfare programs, which will not provide a lifeline out of grinding poverty. Such penalizing and non-inclusive welfare schemes are profoundly in violation of the concept of equal human dignity and also rob a society of their full human potential, not only of the women involved, but also their families.

Mendes also points to the feminization of poverty among the elderly. Tax and pension systems provide rewards to those who work. Thus, looking after children can translate into poverty. If

[458] *Mckinney v University of Guelph*, [1990] 3 SCR 229, 76 DLR (4th) 545 (SCC) [*McKinney*].
[459] *Mckinney,* at 582 (DLR).
[460] *G(J).*
[461] Errol Mendes, "Taking Equality Into the 21st Century: Establishing the Concept of Equal Human Dignity" (2000) 12 National Journal of Constitutional Law 3 at 11 [Mendes].

pension systems are for all citizens, then there is no equality for these women.

Errol Mendes maintains that there will be no change for, at least, these vulnerable parts of Canadian society until the concept of equal human dignity is incorporated into the jurisprudence of the Supreme Court. Following a review of Supreme Court decisions addressing the concept of equality, *Andrews, Turpin, Eldridge, Vriend, Law, M v H, Corbiere* and *Winko*,[462] Mendes concludes that the Supreme Court is not finished its business of 'sculpting the statue of equality in Canada'. He believes, however, that the Court's preliminary work will back lead to 'the concept of equal human dignity' applicable to all individuals and groups in society as intentioned by international covenants.

Thus, it is possible that a substantive equality analysis of *Charter* section 15(1) might provide some support for the notion that in order to achieve true equality, various minority groups might require the right to housing. Consequently, the failure to address homelessness disproportionately affects racial minorities, the elderly, youths, single-parent families and women, who are on average more likely to experience homelessness. Similar claims of discrimination have been successful under provincial human rights codes.[463] However, this argument has not yet been successfully made in the Supreme Court of Canada.

Further, like the case law regarding section 7 of the *Charter*, the case law regarding section 15 of the *Charter* suggests that making a claim for economic rights may be difficult. Commenting on the protection of social and economic rights under section 15, Justice LaForest in *Andrews* stated that "Much economic and social policy-making is simply beyond the institutional competence of the courts…"[464] Writing for the Court in *Eldridge*, a case regarding the failure of the British Columbia government to provide sign language interpreters as an insured benefit under the Medical Services Plan, Justice LaForest did not go as far as he did in *Andrews*, but was still reluctant to address the issue of whether section 15(1) of the *Charter* obliges the government to take positive actions to ameliorate conditions of systemic or general inequality.[465]

[462] *Andrews, Turpin, Eldridge, Vriend v Alberta*, [1998] 1 SCR 493 [*Vriend*], *Law, M v H* [1999] 2 SCR 3, *Corbiere v Canada, [*1999] 2 SCR 203, *Winko v British Columbia (Forensic Psychiatric Institute),* [1999] 2 SCR 625.
[463] *Québec (Comm des droits de la personne) v Whittom* (1993), 20 CHRR D/349, affirmed (1997), 29 CHRR D/1 (Que CA); *Kearney v Bramalea Ltd (sub nom. Shelter Corporation v Ontario (Human Rights* Commission)) (1998), 34 CHRR D/1 (Ont Div Ct), reversed by (2001) 143 OAC 54; *Sinclair v Morris A Hunter Investments Ltd* (2001), 41 CHRR D/98 (Ont Bd Inq); *Ahmed v 177061 Canada Ltd* (2002), 43 CHRR D/379 (Ont Bd Inq).
[464] *Andrews,* at p 38.
[465] *Eldridge,* at para 73.

Once again, in the *Tanudjaja* case, the applicants made the substantive equality argument that the governments' laws, policies and activities with regard to housing failed to take into account how these affect people who are homeless or those who are at risk for homelessness. They argued that homeless people experience an unequal burden, when one takes into account pre-existing disadvantage of homeless people, the needs, capacities and circumstances of homeless people and, in particular, the nature of the interest that is affected.[466] The applicants identified that the impugned laws and policies have an adverse effect on:[467]

- women trying to escape domestic violence;
- those living with disabilities, as deinstitutionalization in the absence of supports for community living results in thousands of persons with psycho-social and developmental disabilities becoming homeless;
- single mothers who risk losing custody of their children once they are homeless; and
- those with physical disabilities because of the failure to take the needs, capacities and circumstances of this group into account, resulting in individuals and families waiting for ten years or longer to be housed in facilities that are accessible to persons with disabilities.

The applicants also asserted that the issue of whether the laws, policies and activities have a discriminatory impact can only be assessed on the basis of a full evidentiary record and not in the abstract.[468]

The governments, in response, argued that the mere fact that the governments have implemented programs addressing adequacy and affordability of housing did not impose a positive constitutional requirement to provide new housing benefits in areas that had never been addressed.[469] Furthermore, imposing positive obligations under the *Charter* would have a chilling effect on the development of public policy.[470] Indeed, the litigation in this case does not pertain to an underinclusive scheme, but rather the absence of a scheme, thus distinguishing it from the principles in *Eldridge* and

[466] *Tanudjaja v Canada (Attorney General)* (Factum of the Applicants (Respondents on the Motion) May 27, 2013), at para 108 [*Tanudjaja v Canada (Attorney General)].*
[467] *Tanudjaja v Canada (Attorney General)* at para 122.
[468] *Tanudjaja v Canada (Attorney General)* at para 115. See also: *Tanudjaja v Canada (Attorney General)* (Factum of the Intervenor Charter Committee Coalition on the Motion to dismiss the Amended Notice of Application April 15, 2013), at para 38.
[469] *Tanudjaja v Canada (Attorney General)* at para 15.
[470] *Tanudjaja v Canada (Attorney General)* at para 16.

Vriend.[471] The arguments do not, however, address any discriminatory impact of the current laws, policies and activities of the government. Thus, argued the applicants, the government failed to appreciate the impact of policies on those who are homeless or at risk of being homeless and therefore exacerbated any pre-existing disadvantages, marginalization, exclusion and deprivation.[472]

In addition, any issue of the costs of addressing homelessness, may be best left out of the *Charter* section 15(1) analysis, and placed under the justification analysis of *Charter* section 1.

v. Charter Section 1 and Justifiable Limits on Socio-Economic Rights

Once a claimant has established a violation of his or her *Charter* rights, the government may justify the violation under *Charter* section 1. *Charter* section 1 reads:

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

Charter section 1 allows collective goals to justify infringement of an individual's rights and freedoms. All limits under section 1 must be "prescribed by law" and they must be "reasonable and justifiable in a free and democratic society." To be "prescribed by law" the law in question must be accessible and must be precise enough (i.e., not too vague) for individuals to be able to regulate their conduct. The second stage is the justification stage. The leading case with respect to "reasonable and justifiable in a free and democratic society" is *R v Oakes*.[473] The Supreme Court of Canada developed a two-part test for this aspect of *Charter* section 1. First, the legislation must address a pressing and substantial objective: the subject matter of the legislation must be of "sufficient importance to warrant overriding a constitutionally protected right."[474] Second, there must be a rational connection between the government's objective and the legislation. Proving there is a rational connection involves a three-stage proportionality test. The section one analysis has been supplemented by caselaw since *Oakes*. The four steps generally followed in the second stage of analysis are:

[471] *Tanudjaja v Canada (Attorney General)* at paras 17 to 21.
[472] *Tanudjaja v Canada (Attorney General)* at paras 115 to 116.
[473] [1986] 1 SCR 103 [*Oakes*].
[474] *Oakes,* at para 69.

1) Pressing and Substantial Objective: is the government's objective in limiting the right a pressing and substantial objective according to the values of a free and democratic society?
2) Rational Connection: does the legislation's limitation of a *Charter* right have a rational connection to Parliament's objective?
3) Least Drastic Means: do the means to achieve the objective impair the right as little as possible?
4) Proportionality: to determine whether there is a rational connection, a three-part proportionality test must be satisfied:

i. the measures in question must be carefully designed to achieve the objective in question and they must not be unfair or biased;
ii. the measures should impair as little as possible the right in question; and
iii. there must be a proportionality between the benefits of the limit and its deleterious effects.

In *Slaight Communications*, Chief Justice Dickson identified the values that must guide the *Charter* section 1 analysis as: social justice and equality, enhanced participation of individuals and groups in society, and Canada's international human rights obligations.[475] In *Irwin Toy,* the Supreme Court showed that in interpreting and applying section 1, the government is obliged to protect the rights of vulnerable groups.[476]

It is under the second or justification stage of the *Charter* section 1 test that courts are deferential to government arguments regarding limited funding. An example of the justification of limited funding occurred in *Cameron v Nova Scotia (Attorney General)*[477] where a married couple argued that the failure of Nova Scotia's health insurance plan to provide coverage for infertility treatments violated their *Charter* section 15 right to equality on the basis of disability. The Court of Appeal agreed that there was discrimination but said that it was justified under *Charter* section 1

[475] *Slaight Communications*, at [SCR] 1056-1057.
[476] At 999.
[477] [1999] NSJ No 297, leave to appeal to SCC refused, [1999] SCCA No 53.

because the provincial health insurance plan needed to exclude coverage of some procedures in order to provide the best possible health care coverage in the context of limited financial resources. Likewise, in *Newfoundland (Treasury Board) v NAPE,*[478] the Supreme Court of Canada upheld wage discrimination on the basis of gender, holding it was justified under *Charter* section 1 because of a severe fiscal crisis being faced by the government.

Angus Gibbon notes that there is a deferential standard of review for justification under *Charter* section 1, when the challenged law is in the area of social and economic policy. He states: "Parliament is best viewed as having to choose between different groups' competing demands, and in those cases the court should adopt a deferential review standard."[479] However, he also observes that there are a significant number of cases involving social and economic claims that have been denied at the rights stage, thus insulating the government from any *Charter* section 1 justification analysis.[480] Further, institutional incapacity of the courts often arises during the interpretation of a particular section of the *Charter* to determine whether it protects the right being claimed, rather than under *Charter* section 1.[481] When the matter does reach the *Charter* section 1 stage, Gibbon states that judges expressly recognize that if they find there is a constitutional obligation to fund a particular need, money will have to be drawn from other budgetary priorities.[482] However, he also indicates that judges do not have the adequate means to assess the entire body of decisions that results in a government's budget, and thus cannot estimate the value of saving resources that would otherwise be allocated to the social right that is being claimed.[483] This, in turn, leads to the conclusion that legislatures are in a better position to resolve questions of allocation.[484] Thus, the conclusion of some judges is that the *Oakes* test (set out above) may not be suitable to apply in social rights cases.[485] In sum, courts are functionally limited in the area of social rights because they lack the evidentiary context that is needed to assess the weight of the governments' claim that they lack resources.[486]

[478] 2004 SCC 66, [2004] 3 SCR 381.
[479] Angus Gibbon, "Social Rights, Money Matters and Institutional Capacity" (2002-3) 14 National Journal of Constitutional Law 353 at 379 [Gibbon].
[480] Gibbon, at p 379.
[481] Gibbon, at p 383.
[482] Gibbon, at p 384.
[483] Gibbon, at p 385.
[484] Gibbon, at p 385.
[485] Gibbon, at pp 386-7.
[486] Gibbon, at p 388.

Angus Gibbon provides suggested two possible approaches to the cost justification analysis in *Charter* section 1. First, he points to the decision in *Singh v Canada (Minister of Employment & Immigration*),[487] wherein the court held that mere cost cannot justify failing to respect a *Charter* right. In *Schachter*, Chief Justice Lamer ruled that cost was an appropriate consideration when deciding the correct remedy for a *Charter* violation. However, the government did not even attempt to justify the equality rights infringement under section 1. Second, in *Eldridge*, Justice LaForest concluded that the government had failed to demonstrate that a total denial of medical interpretation services for hearing impaired persons constituted a minimal impairment of their rights.[488] So, it appears that in some cases the door is open on the possibility that cost justifications could be successful but would at least have to be proven with more than merely "impressionistic evidence of increased expense."[489] Gibbon asserts that these two approaches are preferable to the claim that social and economic rights cases are non-justiciable.

Wilkie and Gary argue that courts may be more willing to recognize negative rights claims (over positive ones) because they do not affect government allocation of resources, and are wary of positive rights claims because they might directly affect government distribution of resources.[490] They argue that litigation is not the only method for imposing positive obligations on the government in order to achieve substantive equality.[491] Law reform initiatives and legislative approaches that promote inclusion and participation, and policy positions taken by human rights commissions (e.g., that transit services for disabled persons are accommodations that allow access to services) also promote the idea that the government has positive obligations to provide resources to marginalized persons.[492]

David Wiseman argues that the caselaw on the court competence concerns cannot be used to justify placing relatively greater limits on the availability of *Charter* protection for anti-poverty claims than for other types of claims. Rather, courts should pursue responses that manage these concerns or improve their competence so that there is equal protection for those marginalized

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487 [1985] 1 SCR 177 [*Singh*].
488 *Eldridge,* at para 87.
489 *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights),* [1999] 3 SCR 868, at para 41.
490 Wilkie and Gary, at p 55.
491 Wilkie and Gary, at p 58. See also, Brodsky 2010 at pp 150-2.
492 Wilkie and Gary, at p 59-60.

groups making anti-poverty claims.[493]

Jackman and Porter assert that *Charter* section 1 can be useful as a source for Canada's obligation under international law to adopt reasonable measures to address economic and social rights, commensurate with available resources and in light of competing needs.[494] This is because *Charter* section 1 serves as a guarantee "that laws, policies, government programs, and administrative decision-makers will limit rights and balance competing societal interests in a 'reasonable' manner."[495]

Jackman and Porter also argue that it will be difficult for Canadian governments to argue that their refusal to adopt measures to address increasing poverty and homelessness in an affluent country constitutes a reasonable limit under *Charter* section 1.[496] They also note that there is substantial evidence that governments are wasting a great deal of money by not adopting anti-poverty and housing strategies.[497] Thus, the "reasonable limits" standard in section 1 if properly applied in a manner that is consistent with Canada's international human rights obligations, would actually improve government accountability in the issue of adequate housing.[498]

vi- Charter Remedies

If a claimant made a successful *Charter* claim under sections 7 or 15(1) [or any other section] and the government is not able to justify the rights violation under *Charter* section 1, what constitutional remedies can the court provide? There are two pertinent provisions: *Charter* section 24(1) and *Constitution Act, 1982*, section 52. The main difference between these two sections is that section 52 pertains to laws that are of no force or effect to the extent they are inconsistent with the *Constitution*; alternatively, *Charter* section 24(1) provides a broad range of remedies for individuals whose rights have been infringed by actions of public officials (government) who are acting outside of the constitutional scope of their authority. Remedies under *Constitution Act*, 1982, section 52 can include declaring a law invalid, severing the offending part of the law, reading

[493] David Wiseman, "Competence Concerns in Charter Adjudication: Countering the Anti-Poverty Incompetence Argument" (2006) 51 McGill Law Journal 503 at p 545.
[494] Rights-Based Strategies at p 53.
[495] Rights-Based Strategies at p 53.
[496] Rights-Based Strategies at p 60.
[497] Rights-Based Strategies at pp 60-1.
[498] Rights-Based Strategies at p 62.

down a particular law so that it is constitutional, reading in words so that it is constitutional and temporarily suspending the declaration of invalidity to give Parliament or the legislature time to revise the offending law. In rare cases, courts can issue a constitutional exemption to prevent the application of a particular law to a party.[499] Under *Charter* section 24(1) remedies available include awarding damages, ordering the government to take positive remedial action, and issuing supervisory orders and maintaining jurisdiction over the implementation of remedies that may take time to accomplish, where this is deemed appropriate and just.[500] The choice of whether to apply *Constitution Act, 1982* section 52 or *Charter* section 24 depends on the type of violation and the context of the specific legislation under consideration.[501]

When dealing with socio-economic policy choices, the Supreme Court of Canada has indicated that deference to legislative choices will be taken into account both under *Charter* section 1, and again when determining the appropriate remedy for a breach of the *Charter*.[502] One of the favoured approaches when some kind of policy or remedial action is required of the government is to suspend the declaration of the law's invalidity to allow the government the opportunity to choose from available approaches to remedy the situation[503] or to consult with affected minorities.[504] In some other socio-economic rights cases, the court has determined that "reading in" is the most appropriate remedy, where it is most consistent with the nature of the right, the context of the legislation and the purposes of the *Charter*.[505] In *Doucet-Boudreau*, the Supreme Court of Canada determined that an order involving ongoing court supervision of the obligation to provide for French language secondary school education was just and appropriate in the circumstances.[506] The SCC indicated that an appropriate and just remedy "is one that meaningfully vindicates the rights and freedoms of the claimant," "take[s] account of the nature of the right that has been violated" and is "relevant to the experience of the claimant."[507] David Wiseman argues that the novelty of the remedy in *Doucet-Boudreau* demonstrates that it is

[499] *R v Ferguson*, [2008] 1 SCR 96.
[500] *Doucet-Boudreau v Nova Scotia (Minister of Education)*, [2003] 3 SCR 3 [*Doucet-Boudreau*].
[501] *Schachter,* at 1381 [SCR].
[502] *Vriend,* at para 54.
[503] *Eldridge,* at para 85.
[504] *Eldridge,* at para 96.
[505] *Vriend,* at paras 175-9.
[506] *Doucet-Boudreau,* at paras 66-70.
[507] *Doucet-Boudreau,* at paras 54-9.

possible that the courts are competent to provide *Charter* remedies in anti-poverty cases.[508]

In the *Tanudjaja* case, the applicants asked for an order that both Canada and Ontario implement effective national and provincial strategies to reduce and eliminate homelessness and inadequate housing. They asked that the strategies be developed in consultation with those who were affected, and that they include accountability features and complaints mechanisms. Further, they asked for the court to retain supervisory jurisdiction with respect to the implementation of the order.[509] The governments argued that, given their motion to strike the claim, it was not appropriate to determine whether the remedy was appropriate and just in the circumstances, but they also noted that the relief sought was beyond the competence of the court. They further noted that supervisory orders are rare and are ordered where there is a noted history of non-compliance by the government. Ultimately, the entire claim was not justiciable and the relief requested demonstrates that further.[510]

3. *Gosselin v Quebec (Attorney-General)*

Because it deals with both *Charter* section 7 and 15(1) and social and economic rights, this case is discussed separately. The patchwork of decisions respecting social and economic rights and justiciability offers little clarity. Even the comments of other decisions like *Reference Re Lands Protection Act,*[511] where the court spoke in favour of a right to adequate food, shelter, and physical survival under section 7, offer only possibility. They do, however, suggest an evolution toward the justiciablity of social and economic rights in Canada. The Supreme Court of Canada's 2002 decision in *Gosselin v Quebec (Attorney- General)* offers some hope.[512]

The written decision is very long. The Supreme Court of Canada was clearly split, a five to four decision, narrowly rejecting Ms. Gosselin's claim. 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 of the rate for persons over

[508] *Wiseman,* at p 544.
[509] *Tanudjaja v Canada (Attorney General)* (Amended Notice of Application November 15, 2011).
[510] *Tanudjaja v Canada (Attorney General)*(Reply Factum of the Respondent The Attorney General of Ontario May 27, 2013) at paras 29 to 38.
[511] *Reference Re Lands Protection Act* (1987), 64 Nfld & PEIR 249 at p 262.
[512] *Gosselin v Quebec (Attorney General),* 2002 SCC 84 [*Gosselin*].

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 guaranteed minimum level of social assistance available to Canadians as a human right. Because of this, several other provincial governments were interveners at the hearing.

The Court applied the four factors set out in *Law* 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 distinctions 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 needs 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.

In her commentary, Gwen Brodsky points out that even though this was the first poverty case under the *Charter* to reach the Supreme Court of Canada, it is probably insignificant as precedent. The case essentially turns on the majority decision that the evidence was insufficient.[513] Several others point out that the insufficiency of evidence was a significant factor in the majority

[513] See, for example: Lukasz Petrykowski, "Sisyphean Labours in Canadian Poverty Law: Gosselin v Quebec (Attorney General" (November 2003) 16 Windsor Review of Legal and Social Issues (at 7); Jane Matthews Glenn "Enforceability of Economic and Social Rights in the Wake of *Gosselin*: Room for Cautious Optimism" (2004) 83 Canadian Bar Review 929 (at 943); Natasha Kim and Tina Piper, "Gosselin v Quebec: Back to the Poorhouse…" (2003) 48 McGill Law Journal 749; Jackman, 2000 at 312.

decision.[604]

Once again, Gwen Brodsky opines that the Court has failed to shift its equality rights analysis away from questions of sameness and difference.[514] Since the 1980s, courts have found it reasonable for a government to treat a group differently if that group is perceived by government to be differently situated. This is the case in *Gosselin.* The poor young adults were 'not similarly situated'. In fact, the government was trying to promote their autonomy. Brodsky wants to shift this section 15 analysis so that the goal of section 15 is to ameliorate group disadvantage.

The Court in *Gosselin* was split, five to four, on this section 15 question. The court applied the *Law* decision. 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."[515] 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 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.

Of course, it is arguable that the Court was operating in agreement with a *value* that was obviously being promoted by the legislature – *individual work ethic.* This is certainly an income-based approach to poverty and does not move beyond to a human-based approach to poverty. This would require the development of capabilities beyond employability training.

From the evidentiary assessment in *Gosselin*, Brodsky concludes that *Gosselin* is suggesting that government is entitled to attach reasonable conditions to the receipt of welfare.[516] The determination of reasonable, however, will necessitate a 'highly fact-specific inquiry'. Further, there is nothing in the judgment to suggest that legal challenges should not be brought to extreme assaults on the social safety net and justice system. There is only a warning that the evidence needs to be solid.

[514] Brodsky, 2003 at p 195.
[515] Brodsky, 2003 at 198, quoting from *Gosselin* at para 19.
[516] Brodsky, 2003 at 199.

Justice Louise Arbour wrote one dissent in *Gosselin.*[517] She argued that the "right to life" contained 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 Québec 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 in the minority's analysis.

Sheila McIntyre criticizes the majority in *Gosselin* for not keeping the *Charter* section 15(1) analysis analytically distinct from the *Charter* section 1 analysis.[518] Then, the government would have had the burden of proving that deference (to its budgetary decisions) was warranted. As it was, the section 15(1) analysis allowed the majority to use "common sense" and general assumptions to avoid the many gaps in the government's case.[519]

Since *Gosselin,* a social benefit scheme has successfully been challenged. The Supreme Court of Canada distinguished *Gosselin* in *Martin,* where it ruled the worker's compensation policy of excluding those with chronic pain from the scheme violated *Charter* section 15(1).

In the *Adams* case, the British Columbia Court of Appeal recognized that *Charter* section 7 supports a right to at least minimal shelter from the elements.[520] This could be used to argue that there have been at least incremental developments in recognizing that section 7 could be interpreted to protect adequate housing if sufficient evidence were provided. On the other hand, the government may assert that there have been none of the "incremental change", "unforeseen issues", or "special circumstances" that need to be in place before *Charter* section 7 could be interpreted as imposing any obligations on the state[521] in order to change the majority holding in *Gosselin*. Further, the government argued in *Tanudjaja* that *Adams* does not represent even a small

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[517] For an interesting analysis of Justice Arbour's judgment, see Michael Plaxton, "Foucault, Agamben and Arbour J's Dissent in Gosselin" (2008) 21 Canadian Journal of Law and Jurisprudence 411.

[518] This was a recognized problem with the analysis in the *Law* case, which was applied in *Gosselin*.

[519] Sheila McIntyre, "Constitutionalism and Political Morality: A Tribute to John D. Whyte. The Supreme Court and Section 15: A Thin and Impoverished Notion of Judicial Review" (2006) 31 Queen's Law Journal 731.

[520] *Adams*, at para 75.

[521] *Gosselin,* at paras 79 and 83.

measure of incremental change towards the interpretation of *Charter* section 7 to impose positive obligations on the state.[522]

In discussing *Charter* section 7 in the *Gosselin* case, Gwen Brodsky notes some interesting comments of the Court.[523] The *living tree doctrine* is recognized as a tool for *Charter* interpretation. *Blencoe v British Columbia (Human Rights Commission)*[524] is cited. In *Gosselin*, McLachlin C.J. emphasized that, as with section 15, the dispute on the Court was not based on theoretical approach but rather, on the assessment of the evidence. She said:[525]

> The question, therefore, is not whether section 7 has ever been – or will ever be – recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of section 7 as the basis for a positive state obligation to guarantee adequate living standards. I conclude that they do not. With due respect for the views of my colleague Arbour J., I do not believe that there is sufficient evidence in this case to support the proposed interpretation of section 7. I leave open the possibility that a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances. However, this is not such a case. The impugned program contained compensatory 'workfare' provisions, and the evidence of actual hardship is wanting. The frail platform provided by the facts of this case cannot support the weight of a positive state obligation of citizen support.'

Accordingly, section 7 is not *frozen*. One day, section 7 may be interpreted to include positive obligations. In *Gosselin,* eight out of the nine justices were receptive to future section 7 claims. In that respect, the dissenting opinions of Justices Arbour and L'Heureux- Dubé are interesting. For these justices, section 7 did impose a positive obligation on governments to offer basic protections for life, liberty and security of its citizens. The exclusion of the applicants from the full benefits of the Quebec social assistance scheme was a violation of the right to security of the person and perhaps even the right to life.

Finally, Brodsky believes that the young men and women in the 1980s were not lacking job motivation or training but jobs: "The claimants in *Gosselin* were viewed by the majority as resilient but lazy young adults with enormous, but untapped, human potential, who needed some tough

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[522] *Tanudjaja v Canada (Attorney General)* (Factum of the Attorney General of Canada in reply to the Applicants Parties and in Response to the Intervenors May 14, 2013) at para 28.
[523] Brodsky, 2003 at p 200.
[524] *Blencoe v British Columbia (Human Rights Commission),* [2000] 2 SCR 307.
[525] *Gosselin,* at paras 82-84.

love."[526] However, the tough love resulted in some terrible conditions for Louise Gosselin. Gwen Brodsky and Shelagh Day describe her circumstances:[527]

> Louise Gosselin's circumstances fit the pattern. She engaged in prostitution in order to obtain money to buy clothes so that she could look for work. The trial judge found that when she could not afford housing, she agreed to be the companion of an individual for whom she had no affection, but who, in exchange for her sexual availability, offered her shelter and food. She also survived an attempted rape. Access to safe housing was a particular problem. When Louise Gosselin rented a room in a boarding house, she was sexually harassed. At times, she was homeless and slept in shelters. It is a fact that, for women, homelessness and life in boarding houses and shelters increases the risk of sexual assault and sexual harassment. Louise Gosselin testified that when she turned thirty and qualified for the regular rate of welfare, she felt as though she had won a victory simply by managing to stay alive.

Thus, we can conclude from the *Gosselin* case (and the others discussed above) that at the moment it is difficult to use either *Charter* section 15 or section 7 to argue for a right to housing. This may change in the future as jurisprudence develops. The *Gosselin* case implies that if the evidence in a given case compels the court to conclude that people have been subjected to an actual deprivation of the necessities of life, the case could be successful.

C. The *Charter*'s Protection of People from the Adverse Consequences of Homelessness

Although Canadian jurisprudence has not yet explicitly recognized a right to housing under the *Charter*, there has been at least one notable case in which the *Charter* successfully protected homeless individuals from the adverse effects of certain municipal by-laws. In these instances, the *Charter* has served as a shield for homeless people penalized for conduct directly linked to their housing status. Anti-poverty advocates argue that such by-laws create a hierarchy of rights in which public order—such as the safe and efficient movement of pedestrians—takes precedence over the basic survival needs of panhandlers and unhoused individuals in public spaces.[528]

For example, Calgary's *Public Behaviour By-law* imposes fines ranging from $50 to $10,000

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[526] Brodsky, 2003 at p 207.
[527] Brodsky and Day, 2002.
[528] Raewyn Brewer "Deconstructing the Panhandling Norms: Federated Anti-Poverty Groups of BC v Vancouver (City) and Western Print Media" (2005 10 Appeal 25).

for actions such as spitting, urinating, defecating, loitering, or possessing a visible knife in public. If a person cannot pay the fine, they may face imprisonment for up to six months. Similarly, Calgary's *Parks and Pathways By-law* imposes fines between $25 and $1,000 for remaining in a park after 11 p.m., or for camping or lighting fires outside designated times or areas..[529]

In contrast, attempts to challenge similar by-laws in Ontario have been unsuccessful. In *R v Banks*,[530] the Ontario Court of Appeal dealt with a constitutional challenge to the Ontario *Safe Streets Act*[531], which prohibited aggressive panhandling and solicitation of a captive audience. In concluding that the *Charter* section 7 argument had no merit, the court said that while the provisions of the Act engaged liberty interests because of the possibility of imprisonment, the claimants failed to establish that this is not in accordance with the principles of fundamental justice, as the provisions are neither vague nor overbroad.[532]

1. ***Encampments and Charter Protections***

Encampments serve as emergency shelter solutions established by those experiencing homelessness. While they have long existed, their prevalence grew significantly during the COVID-19 pandemic.[533] Between 2020 and 2022, Canada saw a 20% increase in overall homelessness and an 88% increase in unsheltered homelessness compared to 2018. [534] The typical governmental response to encampments has included ticketing, arrests, forced evictions, and the destruction of personal belongings, including tents.[535]

Encampments raise critical questions about whether Canadian laws, including the *Charter*, adequately protect unsheltered individuals. According to the Federal Housing Advocate, encampments represent attempts by unhoused people to assert their human rights and meet basic survival needs.[536]

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[529] Public Behaviour By-law.
[530] 2007 ONCA 19, application for leave to appeal to SCC dismissed 23 August 2007, 2007 CanLII 37182 (SCC)
[531] 1999 SO 1999 c8.
[532] Banks at para 88.
[533] Flynn et al, at p 2.
[534] Government of Canada, Everyone Counts 2020-2022 – Results from the Third Nationally Coordinated Point-in Time Counts of Homelessness in Canada, (2023), Online: <https://housing-infrastructure.canada.ca/homelessness-sans-abri/reports-rapports/pit-counts-dp-2020-2022-results-resultats-eng.html>.
[535] Flynn et al, at p 7.
[536] Federal Housing Advocate's Review, at p 5.

For Indigenous people, they may also be an assertion of land rights.[537] However, encampments do not qualify as adequate housing due to unsafe conditions and a lack of access to basic services such as food, sanitation, and healthcare.

The impact on Indigenous communities is particularly stark. In 2021, Point-in-Time counts of homelessness revealed that 35% of unhoused respondents identified as Indigenous, despite the fact that Indigenous people comprise only 5% of the overall Canadian population.[538] Although encampments are often formed due to a lack of accessible or affordable housing, governments have been criticized not only for failing to address these housing gaps but also for exacerbating the poor conditions within encampments. [539]

In February 2023, the Federal Housing Advocate launched its first review under the 2019 NHSA to document the lived experiences of encampment residents. The review found that these individuals are at severe risk of harm and that encampments exist primarily due to systemic failures to uphold the human right to adequate housing.[540] While the NHSA acknowledges this right, it does not impose immediate obligations to address the conditions in encampments or require governments to fully utilize available resources to respond to homelessness.[541]

The Advocate raised specific concerns about the government's failure to meet obligations under:

- The right to life and dignity, as protected by the ICCPR and the *Charter*,
- The rights of Indigenous Peoples, as articulated in UNDRIP,
- The right to equality, both formal and substantive, under the ICCPR, ICESCR, and other international treaties, and
- The right to adequate housing, under the *NHSA*.

Most legal challenges related to encampments are decided at the injunction stage, often before courts even address *Charter* claims.[542] Nevertheless, Sections 7 and 15 of the *Charter* which protect the rights to life, liberty, and security of the person, and equality, respectively, remain the most commonly cited in attempts to advance constitutional protections for people living in encampments.

[537] Federal Housing Advocate's Review, at p 11.
[538] Federal Housing Advocate's Review, at p 16.
[539] Flynn et al, at p 13.
[540] Federal Housing Advocate's Review, at p 7.
[541] Federal Housing Advocate's Review, at p 24.
[542] Flynn et al, at p 9.

2. *Victoria (City) v Adams*

Victoria (city) v Adams was a landmark decision in Canadian encampment case law. Unlike earlier cases that arose through injunctions, this case directly engaged with *Charter* rights. Justice Ross of the British Columbia Supreme Court struck down parts of Victoria's bylaws[543] that prohibited homeless individuals from erecting temporary shelters in public parks.

The decision was grounded in key facts: Victoria had over 1,000 homeless residents but only 141 shelter beds for most of the year, increasing to 326 in extreme weather.[544] Justice Ross found that many people had no choice but to sleep outside, and that the overhead protection banned by the bylaws was essential for safeguarding against serious health risks, including hypothermia, respiratory infections, and skin diseases."[545] Demographic evidence showed a disproportionate impact on vulnerable populations: 40% of the homeless were mentally ill, 50% struggled with substance use, and 25% experienced both.[546] Indigenous youth were overrepresented.[547]

Justice Ross also decided that the bylaws violated section 7 of the *Charter*, which protects the rights to life, liberty, and security of the person. She concluded that forcing individuals to choose between violating the law or facing life-threatening conditions amounted to a deprivation of their *Charter* rights. [548] The City argued that the by-laws did not cause homelessness, but Justice Ross rejected this, emphasizing that the state's prohibitions and penalties were the source of the harm.[549] On the issue of whether the deprivation was in accordance with the principles of fundamental justice, Justice Ross found the bylaws to be both arbitrary and overbroad. [550] There was no evidence that banning temporary shelter promoted the City's stated goals, such as preserving park use, preventing damage, or protecting public health. [551] Moreover, there were less restrictive alternatives available, like allowing shelter overnight with conditions on removal or designated no-camping zones. As such, the

[543] The Parks Regulation Bylaw No. 07-0597 and the Streets and Traffic Bylaw No. 92-84. 8.
[544] *Adams,* 2008 at para 4.
[545] *Adams,* 2008 at paras 5, 58.
[546] Adams, 2008 at para 44.
[547] Adams, 2008 at para 60.
[548] [1993] 3 SCR 519 [*Rodriguez*].
[549] *Adams,* 2008 at para 81.
[550] *Adams,* 2008, citing *R v Heywood*, [1994] 3 SCR 761; *R v Malmo-Levine*; *R v Caine*, [2003] 3 SCR 71; *Chaoulli v Quebec (Attorney General)*, [2005] 1 SCR 791; and *Rodriguez*.
[551] *Adams,* 2008 at para 172.

bylaws failed to meet the standards of fundamental justice under section 7. [552]

Furthermore, the Court stated that the violation could not be justified under section 1 of the *Charter*. While protecting parks was a valid legislative goal, the by-laws were not minimally impairing and thus did not meet the proportionality test outlined in *R v Oakes*. [553] Consequently, Justice Ross struck down the bylaws, declaring them invalid to the extent that they prevented homeless individuals from erecting temporary shelter. [554]

In response, the City of Victoria amended its regulations, limiting overnight camping to between 7 pm and 7 am, and prohibiting camping in specific areas like playgrounds and sports fields. The City appealed the decision in 2009.

The British Columbia Court of Appeal upheld the lower court's ruling but framed the issue more narrowly. It confirmed that there was sufficient state action to engage section 7, and that the deprivation of rights was caused by the bylaws. While the Court of Appeal disagreed that the bylaws were arbitrary, it agreed they were overbroad, thus breaching the principles of fundamental justice. [555] The Court of Appeal also reaffirmed that this case did not establish a positive right to housing, as the violation stemmed from state interference rather than failure to act.

The Court of Appeal modified the remedy, declaring the relevant bylaw provisions inoperative only when the number of homeless people exceeds available shelter beds. It also permitted the City to apply for termination of the declaration if it could later demonstrate *Charter* compliance.

3. Recent Challenges: The Edmonton Encampment Case (2023)

While some encampment related cases have successfully advanced *Charter* arguments, others have not. In 2023, the Coalition for Justice and Human Rights, a non-profit organization, filed a claim on behalf of Edmonton's encampment residents, alleging violations of *Charter* sections 2, 7, 8, 12, and 15 due to the City's forced evictions and displacements. Although the case was dismissed early in the proceedings, the Coalition outlined the *Charter* grounds it would have pursued.

A section 7 claim focused on the rising number of encampment-related deaths and the psychological harm caused by repeated evictions, which left people stressed, humiliated, and without

[552] *Adams,* 2008 at para 185.
[553] [1986] 1 SCR 103.
[554] *Adams,* 2008 at para 237.
[555] *Adams,* 2009 at para 124.

safe alternatives. Section 15 was engaged due to the disproportionate impact on marginalized groups, particularly Indigenous people, [556]who made up 55–57% of Edmonton's homeless population despite being only 6% of the general population.

Other vulnerable groups included women, people with disabilities, and LGBTQ+ individuals, often with overlapping identities. Section 2 rights, including freedom of assembly and association, were also implicated, as many residents felt safer living in encampments due to established social ties and collective security. Section 8 concerns arose from the seizure of personal property during evictions, often without proper notice or regard for residents' belongings. [557]

Residents described the experience of being forcibly displaced as dehumanizing and degrading, thus implicating section 12 protections against cruel and unusual treatment. [558] While cases like *Victoria v Adams* have provided a successful framework for challenging anti-encampment laws under the *Charter*, the Edmonton case highlights ongoing challenges. Many encampment cases are dismissed at early injunction stages, where *Charter* analysis is limited to whether a serious issue is to be tried, and some cases do not proceed at all. In the wake of the COVID-19 pandemic and the rise in homelessness, developing a full and substantive *Charter* analysis remains critical to ensuring the rights of unhoused people are properly recognized and protected.

[556] Lund, at p 255.
[557] Lund, at p 252.
[558] Lund, at p 254.

IV. Conclusion

This paper set out to discuss whether a right to adequate housing could be supported under Canadian law. The larger question that was posed was whether social and economic rights, as clearly recognized in international law, are protected by Canadian law— in particular under the *Charter*.

While a number of barriers currently prevent a conclusion that Canadians clearly have a right to adequate housing under our laws, there are a number of potential arguments or bases for making a claim to a right to adequate housing.

First, one could argue that international instruments (to which Canada is a party) clearly provide for a right to adequate housing. This factor should therefore require Canada to implement this right into our domestic law. A number of options are possible. Canada could implement social and economic rights through a constitutional amendment that provides for the right to housing (e.g., as exists in South Africa's Constitution) or through passing an intergovernmental agreement like the Social Union or an Alternative Social *Charter*. Unfortunately, Canada's track record in passing Constitutional amendments is spotty.

Second, Canada or the provinces could pass legislation that may even be in the form of quasi-constitutional instruments that incorporate the right to housing. For example, on December 13, 2002, the National Assembly of Quebec unanimously adopted a law to "combat poverty and social exclusion."[559] But such options do not constitutionally protect the rights of individuals – they are subject to the will of the legislature. In addition, they are local and could be said to undermine a national ideology. Likewise, including social and economic rights in human rights legislation is an option, but the concerns remain the same. Certainly, the inclusion of social condition as a prohibited ground of discrimination in federal or provincial human rights legislation is a positive step. But, still, this is an attempt to deal with the condition and certainly is not a remedy for the root problem.

Third, the existing *Charter* sections could be interpreted in light of international law principles

[559] Alain Noel, A Law Against Poverty: Quebec's New Approach to Combating Poverty and Social Exclusion (2002) CPRN Background Paper – Family Network. Ottawa: Canadian Policy Research Networks Inc.

so as to provide a right to adequate housing. There is certainly a legal precedent to support this approach, but it remains to be seen whether one will be successful.

Fourth, the use of the *Charter* to provide protection from the adverse consequences of government actions and laws as indicated in the *Adams* case is promising, but, of course, this does not address directly the right to housing.

Barring an amendment to the *Charter* to directly address social and economic rights, it would appear that the next best approach would be to use international law principles to interpret the *Charter* to include a right to adequate housing. While the *Charter* is heavily weighted on civil and political rights, there is a common sense argument that one cannot enjoy one's civil and political rights if one is ill, hungry and homeless.

In the meantime, Canadians are left with mere policy decisions of various levels of government to provide social housing. The international community recognizes the right to housing as a basic human right. Even though Canada prides itself as a leader in human rights, and regularly reports to the international community that it is fulfilling its obligations under the *International Covenant on Economic, Social and Cultural Rights*, there are many Canadians not enjoying the right to adequate housing in Canada.

Unfortunately, government efforts have failed to uphold housing as a human right. In The Federal Housing advocate's review of encampments pursuant to the National Housing Strategy Act, they made several recommendations that the government must carry out in order to fulfill their human rights responsibilities:[560]

1. The Federal Government must lead the development of a human rights based National Encampments Response Plan in cooperation and consultation with all other governments.
2. Commit to a human rights-based approach to address the needs of encampment residents.
3. Respect inherent rights of Indigenous peoples
4. Take immediate action to protect the right to life and dignity of all people living in

[560] The Office of the Federal Housing Advocate, Upholding dignity and human rights: the Federal Housing Advocate's review of homeless encampments – Interim Report, (2023).

encampments, reduce the risks that they face, and help them stabilize their situation

5. Implement immediate measures to address the root causes of encampments and provide access to adequate housing
6. Ensure government accountability and that people experiencing homelessness have access to justice

The international community recognizes the right to housing as a basic human right. Even though Canada prides itself as a leader in human rights and regularly reports to the international community that is fulfilling its obligations under the International Covenant on Economic, Social and Cultural Rights, there are many Canadians not enjoying the right to adequate housing in Canada

Appendix

A Framework to Improve the Social Union for Canadians
An Agreement between the Government of Canada and the Governments of the Provinces and Territories
February 4, 1999

The following agreement is based upon a mutual respect between orders of government and a willingness to work more closely together to meet the needs of Canadians.

1. Principles

Canada's social union should reflect and give expression to the fundamental values of Canadians - equality, respect for diversity, fairness, individual dignity and responsibility, and mutual aid and our responsibilities for one another.

Within their respective constitutional jurisdictions and powers, governments commit to the following principles:

All Canadians are equal

- Treat all Canadians with fairness and equity
- Promote equality of opportunity for all Canadians
- Respect the equality, rights and dignity of all Canadian women and men and their diverse needs

Meeting the needs of Canadians

- Ensure access for all Canadians, wherever they live or move in Canada, to essential social programs and services of reasonably comparable quality
- Provide appropriate assistance to those in need
- Respect the principles of Medicare: comprehensiveness, universality, portability, public administration and accessibility
- Promote the full and active participation of all Canadians in Canada's social and economic life
- Work in partnership with individuals, families, communities, voluntary organizations, business and labour, and ensure appropriate opportunities for Canadians to have meaningful input into social policies and programs

Sustaining social programs and services

- Ensure adequate, affordable, stable and sustainable funding for social programs

Aboriginal peoples of Canada

- For greater certainty, nothing in this agreement abrogates or derogates from any Aboriginal, treaty or other rights of Aboriginal peoples including self- government

2. Mobility within Canada

All governments believe that the freedom of movement of Canadians to pursue opportunities anywhere in Canada is an essential element of Canadian citizenship.

Governments will ensure that no new barriers to mobility are created in new social policy initiatives.

Governments will eliminate, within three years, any residency- based policies or practices which constrain access to post- secondary education, training, health and social services and social assistance unless they can be demonstrated to be reasonable and consistent with the principles of the Social Union Framework.

Accordingly, sector Ministers will submit annual reports to the Ministerial Council identifying residency-based barriers to access and providing action plans to eliminate them.

Governments are also committed to ensure, by July 1, 2001, full compliance with the mobility provisions of the Agreement on Internal Trade by all entities subject to those provisions, including the requirements for mutual recognition of occupational qualifications and for eliminating residency requirements for access to employment opportunities.

3. Informing Canadians - Public Accountability and Transparency

Canada's Social Union can be strengthened by enhancing each government's transparency and accountability to its constituents. Each government therefore agrees to:

Achieving and Measuring Results

- Monitor and measure outcomes of its social programs and report regularly to its constituents on the performance of these programs
- Share information and best practices to support the development of outcome measures, and work with other governments to develop, over time, comparable indicators to measure progress on agreed objectives
- Publicly recognize and explain the respective roles and contributions of governments
- Use funds transferred from another order of government for the purposes agreed and pass on increases to its residents
- Use third parties, as appropriate, to assist in assessing progress on social priorities

Involvement of Canadians

- Ensure effective mechanisms for Canadians to participate in developing social priorities and reviewing outcomes

Ensuring fair and transparent practices

- Make eligibility criteria and service commitments for social programs publicly available
- Have in place appropriate mechanisms for citizens to appeal unfair

administrative practices and bring complaints about access and service
- Report publicly on citizen's appeals and complaints, ensuring that confidentiality requirements are met

4. Working in partnership for Canadians

Joint Planning and Collaboration

The Ministerial Council has demonstrated the benefits of joint planning and mutual help through which governments share knowledge and learn from each other.

Governments therefore agree to

- Undertake joint planning to share information on social trends, problems and priorities and to work together to identify priorities for collaborative action
- Collaborate on implementation of joint priorities when this would result in more effective and efficient service to Canadians, including as appropriate joint development of objectives and principles, clarification of roles and responsibilities, and flexible implementation to respect diverse needs and circumstances, complement existing measures and avoid duplication

Reciprocal Notice and Consultation

The actions of one government or order of government often have significant effects on other governments. In a manner consistent with the principles of our system of parliamentary government and the budget-making process, governments therefore agree to:

- Give one another advance notice prior to implementation of a major change in a social policy or program which will likely substantially affect another government
- Offer to consult prior to implementing new social policies and programs that are likely to substantially affect other governments or the social union more generally. Governments participating in these consultations will have the opportunity to identify potential duplication and to propose alternative approaches to achieve flexible and effective implementation

Equitable Treatment

For any new Canada-wide social initiatives, arrangements made with one province/territory will be made available to all provinces/territories in a manner consistent with their diverse circumstances.

Aboriginal Peoples

Governments will work with the Aboriginal peoples of Canada to find practical solutions to address their pressing needs.

4. **The federal spending power - Improving social programs for Canadians**
5.

Social transfers to provinces and territories

The use of the federal spending power under the Constitution has been essential to the development of Canada's social union. An important use of the spending power by the Government of Canada has been to transfer money to the provincial and territorial governments. These transfers support the delivery of social programs and services by provinces and territories in order to promote equality of opportunity and mobility for all Canadians and to pursue Canada-wide objectives.

Conditional social transfers have enabled governments to introduce new and innovative social programs, such as Medicare, and to ensure that they are available to all Canadians. When the federal government uses such conditional transfers, whether cost-shared or block-funded, it should proceed in a cooperative manner that is respectful of the provincial and territorial governments and their priorities.

Funding predictability

The Government of Canada will consult with provincial and territorial governments at least one year prior to renewal or significant funding changes in existing social transfers to provinces/territories, unless otherwise agreed, and will build due notice provisions into any new social transfers to provincial/territorial governments.

New Canada-wide initiatives supported by transfers to Provinces and Territories

With respect to any new Canada-wide initiatives in health care, post- secondary education, social assistance and social services that are funded through intergovernmental transfers, whether block-funded or cost-shared, the Government of Canada will:

- Work collaboratively with all provincial and territorial governments to identify Canada-wide priorities and objectives
- Not introduce such new initiatives without the agreement of a majority of provincial governments

Each provincial and territorial government will determine the detailed program design and mix best suited to its own needs and circumstances to meet the agreed objectives.
A provincial/territorial government which, because of its existing programming, does not require the total transfer to fulfill the agreed objectives would be able to reinvest any funds not required for those objectives in the same or a related priority area.

The Government of Canada and the provincial/territorial governments will agree on an accountability framework for such new social initiatives and investments.

All provincial and territorial governments that meet or commit to meet the agreed Canada-wide objectives and agree to respect the accountability framework will receive their share of available funding.

Direct federal spending

Another use of the federal spending power is making transfers to individuals and to organizations in order to promote equality of opportunity, mobility, and other Canada-wide

objectives.

When the federal government introduces new Canada-wide initiatives funded through direct transfers to individuals or organizations for health care, post-secondary education, social assistance and social services, it will, prior to implementation, give at least three months' notice and offer to consult. Governments participating in these consultations will have the opportunity to identify potential duplication and to propose alternative approaches to achieve flexible and effective implementation.

6. Dispute Avoidance and Resolution

Governments are committed to working collaboratively to avoid and resolve intergovernmental disputes.

Respecting existing legislative provisions, mechanisms to avoid and resolve disputes should:

- Be simple, timely, efficient, effective and transparent
- Allow maximum flexibility for governments to resolve disputes in a non-adversarial way
- Ensure that sectors design processes appropriate to their needs
- Provide for appropriate use of third parties for expert assistance and advice while ensuring democratic accountability by elected officials

Dispute avoidance and resolution will apply to commitments on mobility, intergovernmental transfers, interpretation of the Canada Health Act principles, and, as appropriate, on any new joint initiative.

Sector Ministers should be guided by the following process, as appropriate:

Dispute Avoidance

- Governments are committed to working together and avoiding disputes through information-sharing, joint planning, collaboration, advance notice and early consultation, and flexibility in implementation
- Sector negotiations
- Sector negotiations to resolve disputes will be based on joint fact-finding
- A written joint fact-finding report will be submitted to governments involved, who will have the opportunity to comment on the report before its completion
- Governments involved may seek assistance of a third party for fact-finding, advice, or mediation
- At the request of either party in a dispute, fact-finding or mediation reports will be made public

Review provisions

- Any government can require a review of a decision or action one year after it enters into effect or when changing circumstances justify

Each government involved in a dispute may consult and seek advice from third parties, including interested or knowledgeable persons or groups, at all stages of the process. Governments will report

publicly on an annual basis on the nature of intergovernmental disputes and their resolution.

Role of the Ministerial Council

The Ministerial Council will support sector Ministers by collecting information on effective ways of implementing the agreement and avoiding disputes and receiving reports from jurisdictions on progress on commitments under the Social Union Framework Agreement.

7. Review of the Social Union Framework Agreement

By the end of the third year of the Framework Agreement, governments will jointly undertake a full review of the Agreement and its implementation and make appropriate adjustments to the Framework as required. This review will ensure significant opportunities for input and feed-back from Canadians and all interested parties, including social policy experts, private sector and voluntary organizations.

Quebec is not a signatory to the Social Union Framework Agreement.

Draft Canadian Social *Charter*, 1992*

Part 1

Social and Economic Rights.

1. In light of Canada's international and domestic commitments to respect, protect and promote the human rights of all members of Canadian society, and, in particular, members of the most vulnerable and disadvantaged groups, everyone has an equal right to well-being, including a right to:

(a) a standard of living that ensures adequate food, clothing, housing, child care, support services and other requirements for security and dignity of the person and for full social and economic participation in their communities and in Canadian society;
(b) health care that is comprehensive, universal, portable, accessible, and publicly administered, including community-based non-profit delivery of services;
(c) public primary and secondary education, accessible post-secondary and vocational education, and publicly-funded education for those with special needs arising from disabilities;
(d) access to employment opportunities; and
(e) just and favourable conditions of work, including the right of workers to organize and bargain collectively.

2. The Canadian *Charter* of Rights and Freedoms shall be interpreted in a manner consistent with the rights in section 1 and the fundamental value of alleviating and eliminating social and economic disadvantage.

3. Nothing contained in section 1 diminishes or limits the rights contained in the Canadian *Charter* of Rights and Freedoms.

4. Governments have obligations to improve the conditions of life of children, youth and to take positive measures to ameliorate the historical and social disadvantage of groups facing discrimination.

5. Statutes, regulations, policy, practice and the common law shall be interpreted and applied in a manner consistent with the rights in section 1 and the fundamental value of alleviating and eliminating social and economic disadvantage.

6. Any legislation and federal-provincial agreements related to fulfillment of the rights in section 1 through national shared cost programs shall have the force of law, shall not be altered except in accordance with their terms and shall be enforceable at the instance of any party or of any person adversely affected upon application to a court of competent jurisdiction.

7. (1) The federal government has a special role and responsibility to fund federal- provincial shared cost programs with a view to the achievement of a comparable level and quality of services through the federation, in accordance with section 36.
(2) Accordingly, federal funding shall reflect the relative cost and capacity of delivering such programs in the various provinces with equalization payments where required.
(3) The federal government and provincial governments shall conduct taxation and other fiscal policies in a manner consistent with these responsibilities and with their obligations under shared cost programs.

8. The provisions of sections 1 to 7 shall apply to territorial governments where appropriate.

Part 2

Social Rights Council

9. (1) By [a specified date], there shall be established by the [reformed] Senate of Canada the Social Rights Council (the Council) to evaluate the extent to which federal and provincial law and practice is in compliance with the rights contained in section 1.

(2) In evaluating compliance the Council shall:
(a) establish and revise standards according to which compliance with the rights in section 1 can be evaluated;
(b) compile information and statistics on the social and economic circumstances of individuals with respect to the rights in section 1, especially those who are members of vulnerable and disadvantaged groups;
(c) assess the level of compliance of federal and provincial law and practice with respect to the rights in section 1;

(d) educate the public and appropriate government officials;
(e) submit recommendations to appropriate governments and legislative bodies;
(f) encourage governments to engage in active and meaningful consultations with non-governmental organizations which are representative or vulnerable and disadvantaged members of society; and
(g) carry out any other task that is necessary or appropriate for the purpose.

(3) In evaluating compliance with Part 1 the Council shall have the power to:

(a) hold inquires and require attendance by individuals, groups or appropriate government officials;
(b) require that necessary and relevant information, including documents, reports and other materials, be provided by governments; and
(c) require any government to report on matters relevant to compliance.

(4) The government or legislative body to which recommendations in section 9(2)(e) are addressed has an obligation to respond in writing to the Council within three months.
(5) With respect to Canada's obligations under international reporting procedures that relate to the rights in section 1, the Council shall:

(d) assist in the preparation of Canada's reports under such procedures;
(e) actively consult with non-governmental organizations representative of vulnerable and disadvantaged groups, and encourage governments to engage in similar consultations;
(f) have the right to append separate opinions to the final versions of such reports before or after they are submitted to the appropriate international body; and
(g) make available a representative of the Council to provide any information requested by the appropriate international body.

(6) The Council shall respond to any request for information or invitation to intervene from the Tribunal established under section 10 and the Council shall have the right to intervene in any proceedings before the Tribunal.
(7) The Council shall be independent and shall be guaranteed public funding through Parliament sufficient for it to carry out its functions.
(8) Persons appointed to the Council shall have demonstrated experience in the area of social and economic rights and a commitment to the objectives of the Social *Charter*.
(9) (a) All appointments to the Council shall be made by

(b) One-third of the appointments shall be from nominations

from each of the following sectors:

(i) the federal government
(ii) the provincial and territorial governments; and
(iii) non-governmental organizations representing vulnerable and disadvantaged groups.

(10)[self-governing aboriginal communities]

Part 3

Social Rights Tribunal

10. (1) By [a specified date], there shall be established by the [reformed] Senate of Canada the Social Rights Tribunal of the Federation (the Tribunal) which shall receive and consider petitions from individuals and groups alleging infringements of rights under section 1.
(2) The Tribunal shall have as its main purpose the consideration of selected petitions alleging infringements that are systemic or that have significant impact on vulnerable or disadvantaged groups and their members.
(3) The Tribunal shall have the power to consider and review federal and provincial legislation, regulations, programs, policies or practices, including obligations under federal-provincial agreements.
(4) Where warranted by the purpose set out in section 10(2), the Tribunal shall:

(a) hold hearings into allegations of infringements of any right under section 1; and
(b) issue decisions as to whether a right has been infringed.

(5) Where the Tribunal decides that a right has been infringed it shall:
(a) hear submissions from petitioners and governments as to the measures that are required to achieve compliance with the rights in section 1 and as to time required to carry out such measures; and
(b) order that measures be taken by the appropriate government(s) within a specified period of time.
(6) (a) In lieu of issuing an order under section 10(5)(b), the Tribunal shall, where appropriate, order that the appropriate government report back by a specified date on measures taken or proposed to be taken which will achieve compliance with the rights in section 1.

(b) Upon receiving a report under section 10(6)(a), the Tribunal may issue another order under section 10(6)(a) or issue an order under section 10(5)(b).

(7) (a) An order of the Tribunal for measures under section 10(5)(b) shall not come into effect until the House of Commons or the relevant legislature has sat for at least five weeks, during which time the decision may be

overridden by a simple majority vote of that legislature or Parliament.
(b) The relevant government may indicate its acceptance of the terms of an order of the Tribunal under section 10(5)(b) prior to the expiry of the period specified in 10(6)(a).

(8) Tribunal decisions and orders shall be subject to judicial review only by the Supreme Court of Canada and only for manifest error of jurisdiction.
(9) The Tribunal may, at any stage, request information from, request investigation by, or invite the intervention of the Social Rights Council.
(10) The tribunal shall be made accessible to members of disadvantaged groups and their representatives by all reasonable means, including the provisions of necessary funding by appropriate governments.
(11) The tribunal shall be independent and shall be guaranteed public funding through parliament sufficient for it to carry out its functions.
(12) (a) All appointments to the Tribunal shall be made by the [reformed] Senate of Canada.
(b) One-third of the appointments shall be from each of the following sectors:
(i) the federal government;
(ii) provincial and territorial governments; and
(iii) non-governmental orgnizations representing vulnerable and disadvantaged groups.
(13)[The Province of Quebec] [Any province] may exclude the competence of the Tribunal with respect to matters within its jurisdiction by establishing a comparable tribunal or conferring competence on an existing tribunal.
(14) [Self-governing aboriginal communities]

Part 4

Environmental Rights

11. In view of the fundamental importance of the natural environment and the necessity for ecological integrity,
(a) everyone has a right:
(i) to a healthful environment;
(ii) to redress and remedy for those who have suffered or will suffer environmental harm;
(iii) to participate in decision making with respect to activities likely to have a significant effect on the environment.
(b) all governments are trustees of public lands, waters and resources for present and future generations.

*As released March 27, 1992 by the *Charter* Committee on Poverty Issues, the Centre For Equality Rights in Accommodation and the National Anti-Poverty Organization on behalf of a broad coalition of concerned citizens, organizations and constitutional experts from St John's to Vancouver, for consideration in the constitutional negotiations that were underway at that

time.

Literature Review

Right to Housing in Canada

I. Canada's International Obligations

A. Economic, Social and Cultural Rights

Article 11 of the *International Covenant on Economic, Social and Cultural Rights*, obligates Canada to progressively realize the right of everyone to an adequate standard of living including adequate food, clothing, and housing. Canada acceded to this treaty in 1976. The *Universal Declaration of Human Rights* (UDHR), recognizes the inherent dignity and inalienable rights of all members of the human family, such as freedom, justice, and peace. These rights, the UDHR posits, must be enjoyed without distinction as to sexual orientation, race, color, language, place of origin, creed, age, political opinion, social origin and nationality. Further, the fundamental principles of equality and dignity enshrined in the International Bill of Rights form the bases of human rights legislation in Canada. Human rights are an effective means of evaluating the performance of governments in areas such as housing, health, education, and income security.

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B. Right to Housing

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3. The right to housing must emphasize women’s right to equal treatment. It must also include the right to be free from forced eviction as articulated in the General Comments 4 and 7 adopted by the United Nations Committee on Economic, Social, and Cultural Rights (CESCR). Equality and non-discrimination must also be incorporated into the right to housing if it must be responsive to women’s experience in that regard. The United Nations in its recent review of Canada’s compliance with the ICESCR unequivocally described the housing situation in Canada as a “National Emergency,” while the United Nation’s special rapporteur called it a “National Crisis.”

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A. Interpretation of sections 7, 15(1) and 1

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B. Using the *Charter* to Shield from Laws and Government Actions that Adversely Affect Homeless People

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