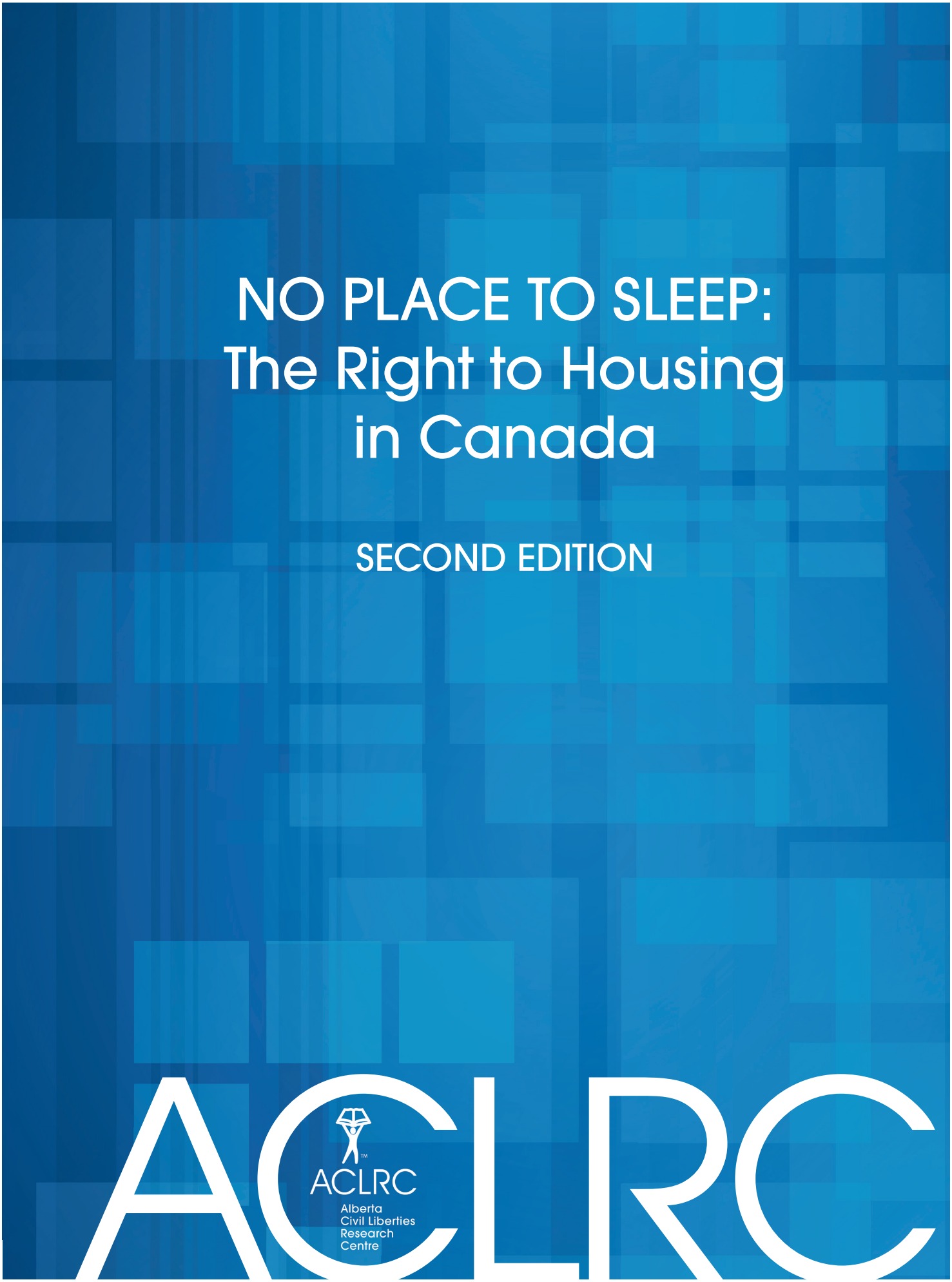
NO PLACE TO SLEEP: The Right to Housing in Canada

SECOND EDITION



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

by the

Alberta Civil Liberties Research Centre

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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 (16 pages)

Introduction

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. Many homeless people work either full-time, part-time or occasionally.

The Alberta Point-in-Time Homeless Count (Alberta PiT Count), a provincially-coordinated count of seven Alberta cities —Calgary (CHF), Edmonton (Homeward Trust), City of Grande Prairie, City of Lethbridge, Medicine Hat (Community Housing Society), City of Red Deer, and Regional Municipality of Wood Buffalo—is a biennial count of homeless persons in Alberta. Reports distinguish between absolute homelessness (individuals with no physical shelter and/or those who use emergency shelters) and relative homelessness (people living in spaces that do not meet basic health and safety standards). The biennial counts only include those who are absolutely homeless. These counts indicate that at any given moment there are thousands of homeless people in Calgary.[1]

There have been several municipal and provincial policy initiatives (e.g., Alberta's Ten Year Plan to Eliminate Homelessness initiated in 2009). In 2018, the federal government enacted the *National Housing Strategy Act*,[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

[1] Calgary Homeless Foundation, *Point-in-Time Count*, online: https://www.calgaryhomeless.com/discover-learn/research-data/data/point-in-time-count/.

[2] *National Housing Strategy Act*, SC 2019, c 29, s 313 [*NHSA*].

an individual right to housing, but rather provides for systemic issues of inadequate housing to be dealt with under the Act.

Many rights that Canadians may consider to be human rights, including the right to adequate housing, are not explicitly recognized in Canadian law. 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 *Canadian Charter of Rights and Freedoms* (*Charter*)[3] or provincial human rights statutes, yet courts have been very reluctant to interpret these laws as 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.

International Law and Economic and Social Rights

International human rights treaties and conventions, to which Canada is often a party, contain economic rights (for example, the *International Convention on Economic, Social and Cultural Rights* (ICESCR).[4] While signatories like Canada have obligations to promote and observe these rights, there are practical and legal issues that arise in relation to enforcing economic rights. While economic, social and cultural rights are intended to be *indivisible* from the civil and political rights set out in international treaties and conventions, in Canada, civil and political rights have had a place of priority. While the principle of indivisibility of rights has garnered favour over the past few decades, the practice of divisibility has had a lasting impact on the implementation of economic, social and cultural rights in Canadian domestic law.

[3] *Canadian Charter of Rights and Freedoms,* Part I of the Constitution Act, 1982 being Schedule B to the Canada Act, 1982 (UK), 1982, c 11 [Charter or Charter of Rights and Freedoms].

[4] *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*].

Likewise, the notion of a hierarchy of rights (e.g., the priority of civil and political rights over economic, social and cultural rights) has created a (false) distinction between negative and positive rights, with positive rights requiring a state to take action to provide an economic benefit. This means that the issue of a right to housing may be thought not to be *justiciable* (capable of being determined in a court of law), but rather as a political decision to allocate economic benefits, which should be left up to elected officials and not judges.

Another challenge with respect to economic rights is the notion of *progressive realization*, which addresses the idea that different states have differing abilities to deal with economic issues depending on development and other contextual realities. Thus, the fulfillment of economic rights obligations imposed on each state needs to be evaluated in relation to available resources. However, judging adequacy of resources in, or sufficiency of steps taken by, an individual state is not subject to uniform or universal standards. The United Nations has identified state obligations with respect to the *ICESCR*. All states must have measures in place to prevent discrimination and must also compensate for past discrimination. In addition, all States Parties are obligated to follow a core minimum approach that is reasonable. The Committee on Economic, Social and Cultural Rights notes that a state must provide a significant number of persons with basic food, health care, shelter and education. If a state lacks available resources, it must demonstrate that every effort has been made to use all resources at its disposal.

There are some examples of direct recognition of the right to housing in domestic constitutional law. South Africa has a relatively new *Constitution* (1996) that explicitly contains many of the rights of the *ICESCR*. These rights are domestically justiciable. A significant case from South Africa, the *Grootboom*[5] case, stands for the proposition that the right to adequate housing provided for in section 26 of the *South Africa Constitution* is a judicially enforceable duty on government that is reasonable. By way of comparison, Canada does not have the right to housing explicitly set out in our *Constitution*.

[5] *Government of the Republic of South Africa v Grootboom*, 920010 910 South Africa 46 (Constitutional Court) [*Grootboom*].

The fact that Canada's judiciary does not have the support for economic rights in our *Constitution* or under Canadian domestic laws has been recognized by the United Nations, Committee on Economic, Social and Cultural Rights. The United Nations noted that 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 *ICESCR* are unprotected, or only minimally protected, by the *Charter*. In 2006, the Committee encouraged courts to take the rights in the ICESCR into account and cited the Supreme Court of Canada decision in *Chaoulli v Quebec (Attorney General)*[6] as an example. The new United Nations Universal Periodic Review process addresses Canada's economic failings, such as poverty and homelessness. However, the outcomes from this process are more political than legal.

Domestic Implementation of Social and Economic Rights

Domestic implementation of social and economic rights in Canada can be hampered by the challenge of federalism. The jurisdiction to pass laws is divided between the federal government (Parliament) and the provincial governments (legislatures). While it is the federal government that ratifies international treaties, the implementation of the provisions in the treaties can depend on who has the authority to deal with a particular matter. Sometimes, this makes it difficult to ensure national social policy in areas such as health, education and welfare, as these are local and diverse issues. One mechanism that the federal government has—to exert some leadership in social policy—is the federal spending power—the power to tax and spend. However, the federal government needs the consent and cooperation of the provinces when establishing national programs and standards.

The *Social Union Framework Agreement* was established in 1999 between the Federal Government of Canada and all of the provinces except Quebec.[7] This Agreement committed governments to monitor and measure the outcomes of social programs. The

[6] *Chaoulli v Quebec (Attorney General),* 2005 SCC 35 [*Chaoulli].*

[7] See Appendix.

federal government committed to consult with the provinces when developing new Canada-wide spending initiatives. The federal government also agreed not to introduce new programs without the agreement of the majority of the provinces. Some scholars (e.g., Barbara Cameron) suggested that the reporting mechanism to Parliament and the legislatures was inadequate. While there were some challenges with the implementation and enforcement of the *Social Union Framework Agreement*, this type of arrangement between governments reflects the manner in which social and economic issues are largely being addressed in Canada.

Further, two attempts at amending the *Constitution Act, 1867*,[8] (e.g., to enshrine social and economic rights in law) were unsuccessful. In addition, an *Alternative Social Charter* proposed by a coalition of anti-poverty groups during the *Charlottetown Accord* was also unsuccessful.[9] Thus, the economic, cultural and social right to housing as provided for in international law has not been clearly or directly recognized in our *Constitution*. It remains to be seen whether the recognition of the right to housing as a human right under the newly enacted federal *National Housing Strategy Act* will be effective to remedy the housing crisis in Canada, particularly as its provisions do not enshrine an individual right to housing.

Can the right to housing be inferred into the *Charter,* or can international human rights law be used by Canadian courts to interpret the *Charter* in a way that would provide for such a right? The Supreme Court of Canada has been receptive to arguments based on international human rights law in cases such as *Baker v Canada*, *Suresh v Canada* and others.[10] Generally, the court has held that international treaties are not part of Canadian law unless they have been implemented by domestic statutes. However, even if a specific treaty has not been officially implemented or passed into Canadian law, the values reflected in the treaty may help to inform the court in its approach to statutory interpretation and judicial review. Reem Bahdi has argued that international human rights law may act as a

[8] *Constitution Act 1867* (UK), 30 & 31 Vict c 3 reprinted in RSC 1985, App II, No 5 [*Constitution Act 1867*].
[9] See Appendix.
[10] *Baker v Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817 [*Baker*]; *Suresh v Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 3 *[Suresh*].

"tipping factor" that will shift Canadian jurisprudence on questions of economic and social rights in Canada.[11]

Canadian Charter of Rights and Freedoms and Right to Housing

While the *Charter* does not directly state that Canadians have a right to housing, there are current and former legal decisions where it is (or has been) argued that *Charter* section 7 (right to life, liberty and security of the person) and section 15(1) (right to not be discriminated against based on listed or equivalent grounds—such as poverty or source of income), can be interpreted to include the right to housing.

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 and indicated that the first 20 years of *Charter* litigation demonstrate timidity on the part of litigants and courts when it comes to issues surrounding poverty.[12] However, 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.

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. 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*.

The weight of academic and non-governmental authority in recent times is that social and economic rights are indeed justiciable in Canada. The international community, particularly the *Committee on Economic, Social and Cultural Rights* has urged Canadian

[11] 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].
[12] Louise Arbour, "'Freedom from want' –from charity to entitlement" (LaFontaine-Baldwin Lecture, delivered at the Institute for Canadian Citizenship, Quebec City, 3 March 2005), online:< www.unhchr.ch/huricane/huricane.nsf/0/58E08B5CD49476BEC1256FBD006EC8B1?opendocument >[Arbour].

judges to accept a broad approach to *Charter* interpretation so that there may be remedies for economic and social rights violations. There remain many barriers to accessing these remedies, as court proceedings are complex and expensive.

Martha Jackman asserts that the Supreme Court of Canada, under Chief Justice McLachlin, focussed 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. 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 discredited under international human rights law and is being increasingly rejected by courts in other democracies.[13]

The issue of whether the right to adequate housing is protected under Charter sections 7 and 15 was brought before the Superior Court of Ontario in 2010 (*Tanudjaja v Attorney General (Canada)*[14]). The argument, made on behalf of homeless individuals against the federal and provincial governments, was that the governments of Ontario and Canada have made decisions which have eroded the access to affordable housing. It was argued that this is contrary to sections 7 and 15(1) of the *Charter*. In 2013, the Superior Court of Ontario granted the government's motion to strike the action. The applicants appealed the motion to the Ontario Court of Appeal but that court upheld the Superior Court's decision.[15] The courts based their decision on the notion that adequate housing was not a matter to be settled by the application of law, but through the application of legislation and policy. The applicants sought leave to appeal to the Supreme Court of Canada but this application was denied.[16]

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

[13] Martha Jackman, "What's Wrong With Social and Economic Rights?" (2000) 11 National Journal of Constitutional Law 235 [Jackman 2000].

[14] *Tanudjaja v Attorney General (Canada) (Application),* 2013 ONSC 5410 (CanLII).

[15] *Tanudjaja v Canada (Attorney General*), 2014 ONCA 852 (CanLII).

[16] *Jennifer Tanudjaja, et al. v Attorney General of Canada, et al*., 2015 CanLII 36780 (SCC).

without discrimination", and despite case law that has recognized the value of international human rights law in interpreting Canadian legislation and the *Charter,* Canadian Courts have been hesitant to read social and economic rights into these sections of the *Charter*. The cases decided prior to and including the Supreme Court of Canada's decision in *Gosselin v Quebec (Attorney General),*[17] for the most part, are very careful not to interfere with governments' democratic prerogatives, the distribution of public funds and the historical interpretation given to these provisions.

***Charter* Section 7**

Charter section 7 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." The Court has been reluctant to express that "security of the person" can be extended to guarantee a bare minimum of living standards, including a right to adequate housing. While in the Supreme Court of Canada decision in *Irwin Toy Ltd v Quebec (Attorney-General),*[18] 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", several cases in lower courts (and one in the Supreme Court of Canada that followed) do not indicate much progress in the area of *Charter* section 7 and economic rights.

One of the main problems with making a section 7 claim for economic rights, or more specifically adequate housing rights, is that section 7 is normally restricted to government *action*. A claimant would have to shape their legal argument in a way that showed that a specific government action had deprived them of their right to "life, liberty and security of the person". In *New Brunswick (Minister of Health and Community Services) v G (J) (G(J)),*[19] the court rejected an exclusive negative rights orientation to section 7. The

[17] *Gosselin v Quebec (Attorney General),* [2002] 4 SCR 429 [*Gosselin*].
[18] *Irwin Toy Ltd v Quebec (A-G)* (1989), 5 DLR (4th) 577 (SCC) [*Irwin Toy*].
[19] *New Brunswick (Minister of Health and Community Services) v G(J),* [1999] 3 SCR 46.

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 proceedings (e.g., child being removed by the state), holding it was not the responsibility of the courts to effectively create programmes designed to further social justice and equality. The Supreme Court disagreed. It ruled that 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 to provide state-funded counsel in these circumstances was found to be an insufficient justification for finding that the initiative would be too costly within the meaning of section 1.

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. Nevertheless, as indicated by *G(J),* the door is not shut on future cases in which a 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 separately.

Some of the claimants in the *Tanudjaja* case argued 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 experienced by 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."[20]

The second aspect 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 adequate

[20] *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 15, 2013) citing Arbour at 9-10 and 14.

housing was covered by section 7, 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. An infringement of section 7 will offend the principles of fundamental justice if it violates the "basic tenets of our legal system."[21] Deprivations of the right to life, liberty and security of the person "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."[22]

The principles of fundamental justice are violated if: 1) the law or scheme is arbitrary: the legislative scheme infringes 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;[23] 2) the law or scheme is overbroad or too vague: the law is expressed in a way that is too unclear for a person to reasonably know whether or not the conduct falls within the law, or, the law's effects are far broader than intended or permitted by the *Constitution*[24] and 3) the law or scheme is 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 the government might derive from having a uniform stance with respect to the activity?[25]

For the fundamental justice aspect of the right to adequate housing under *Charter* section 7 to be infringed, it must be successfully argued that government actions and failures 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.

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[21] *R v S(RJ),* [1995] 1 SCR 451 at 488.
[22] *Godbout v Longeueil (City),* [1997] 3 SCR 844 [*Godbout*] at para 74.
[23] *Rodriguez v British Columbia (Attorney General),* [1993] 3 SCR 519, 107 DLR (4th) 342 [*Rodriguez*].
[24] *Canadian Foundation for Children, Youth & the Law v Canada (Attorney General*), [2004] 1 SCR 76 at para 16.
[25] *Canada (Attorney General) v PHS Community Services Society,* 2011 SCC 34, [2011] 3 SCR 134 [*Insite*] at para 143.

***Charter* Section 15(1)**

While over time, and currently, some aspects of the test for discrimination under *Charter* section 15 are less than certain, based on the caselaw to date, the important elements of the section 15(1) test are to determine whether:

- a *law or government action* imposes differential treatment,[26]
- the distinction is based on an enumerated or analogous ground under the Charter, and
- the distinction creates a disadvantage.[27]

We examine each of the above tests to see if they can be applied to establish the basis for a right to adequate housing under *Charter* section 15.

1. A Law or Government Action Imposes Differential Treatment

One rationale for arguing that the *Charter* section 15(1) 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.[28] 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.[29]

There are legal decisions that deal with the government's failure to act and *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

[26] *R v Turpin*, [1989] 1 SCR 1296 at 1329 [*Turpin*]; A*uton (Guardian ad litem of) v British Columbia (Attorney General*), [2004] 3 SCR 657 at para 27 [*Auton*].

[27] *Fraser v Canada (Attorney General),* 2020 SCC 28 (CanLII) [*Fraser*]; see also: *R v Kapp*, 2008 SCC 41 [*Kapp*] at para 17 and *Withler v Canada (Attorney General),* 2011 SCC 12, [2011] 1 SCR 396 [*Withler*] at para 30. These two cases were divided about the role of stereotyping and prejudice; *Fraser* clarified that creating a disadvantage is sufficient.

[28] 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 221 [Jackman and Porter 2000].

[29] Jackman and Porter 2000 at 221.

"sexual orientation" as a ground for protection under this human rights legislation. In *Eldridge v British Columbia (Attorney General),*[30] the government's failure to provide sign language interpretation for hearing-impaired patients was held to violate their *Charter* section 15(1) rights.

Timothy Macklem argues that the decision in *Vriend* coupled with the decision in *R v Morgentaler*,[31] illustrate that the *Charter* can be used to protect minorities from the consequences of the "absence of will on the part of the majority."[32] 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.[33]

Thus, while recognizing that the right to adequate housing under *Charter* section 15(1) may be interpreted as placing a positive obligation on the government, it could also be argued 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 peoples, 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.

2. The Distinction is Based on an Enumerated or Analogous Ground

The second stage for a *Charter* section 15(1) analysis is whether the distinction is based on an enumerated or analogous ground. In the context of adequate housing, 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 (e.g., sexual orientation). Thus, if the current emphasis in the equality jurisprudence is on the stigmatization and

[30] [1997] 3 SCR 624 [*Eldridge*].
[31] *R v Morgentaler* (1988), 44 DLR 4th 385 (SCC) [*Morgentaler*].
[32] Timothy Macklem, "Vriend v. Alberta: Making the Private Public" (1999) 44 McGill Law Journal 197 at para 3 [Macklem].
[33] Macklem at paras 26 to 39.

marginalization of homeless or poor people, poverty and homelessness 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?.[34] In *Miron v Trudel* the SCC noted that while discriminatory group markers often involve personal characteristics that are immutable, they do not necessarily have to.[35] 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."[36] The Court explained that the government has no legitimate interest in getting us to change constructively immutable characteristics in order to receive equal treatment."[37] If a personal characteristic is essential to a person's identity, it is constructively immutable and thus recognizable (as a ground).

The international community recognizes that poverty and homelessness 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."[38]

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. In 2009, the Federal Court, in *Toussaint v Canada (Minister of Citizenship and Immigration),*[39] rejected poverty and the receipt of social assistance as

[34] *Law v Canada (Minister of Employment and Immigration),* [1999] 1 SCR 497 [*Law*] at paras 29, 93.
[35] *Miron v Trudel*, [1995] 2 SCR 418 [*Miron v Trudel*] at para 149.
[36] *Corbiere v Canada (Minister of Indian and Northern Affairs*), [1999] 2 SCR 203 [*Corbiere]* at para 5.
[37] *Corbiere* at para 13.
[38] 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.
[39] 2009 FC 873 at paras 75-77.

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.[40]

The applicants in the *Tanudjaja* case argued that failure to provide adequate housing discriminates against homeless people.[41] 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.[42] They pointed to the unsuccessful history of similar cases and to the fact that economic hardship has consistently been rejected by the courts as an analogous ground.[43] In addition, they argued that the fact that the governments of Ontario and Canada had implemented programs to address adequacy and affordability of housing, did not mean they were subject to a positive constitutional requirement to provide new housing benefits in areas that have never been addressed.[44] They argued that imposing such a positive obligation on the governments would have a "chilling effect on the development of public policy"[45] 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 under-inclusiveness.[46] These two facta (briefs) demonstrate some of the arguments through which homelessness could be argued to be an analogous ground.

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[40] *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).

[41] *Tanudjaja v Canada (Attorney General)* (Factum of the Applicants (Respondents on the Motion) May 27, 2013) at para 89.

[42] *Tanudjaja v Canada (Attorney General)* (Factum of the Respondent (Moving Party) the Attorney General of Ontario May 14, 2013) at para 23.

[43] *Tanudjaja v Canada (Attorney General)* (Factum of the Respondent (Moving Party) the Attorney General of Ontario May 14, 2013) at para 25.

[44] *Tanudjaja v Canada (Attorney General)* (Factum of the Respondent (Moving Party) the Attorney General of Ontario May 14, 2013) at para 15.

[45] *Tanudjaja v Canada (Attorney General)* (Factum of the Respondent (Moving Party) the Attorney General of Ontario May 14, 2013) at para 16.

[46] *Tanudjaja v Canada (Attorney General)* (Factum of the Respondent (Moving Party) the Attorney General of Ontario May 14, 2013) at para 16.

3. The Distinction Creates a Disadvantage

The third step in the analysis is whether the distinction creates a disadvantage. Until 2020, there was 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), but the SCC in *Fraser* clarified that 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 actually a substantive equality issue rather than an economic one. Because it affects Indigenous peoples, people with disabilities, children, new immigrants, and women—it could be argued that poverty (and the right to housing) is a substantive equality issue.

Brodsky and Day call for a right to substantive equality which includes a right to basic economic security. To reject 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 challenge legislative, regulatory, and policy regimes that perpetuate economic inequality and poverty.

Brodsky and Day highlight the movement of the courts in the direction of substantive equality.[47] Chief Justice Beverley McLachlin in *Andrews* said that the purpose of the *Charter* guarantee of equality is 'to 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 the 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.[48] The Justice noted: "It is, in my view untenable to suggest that freedom is

[47] 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 207 [Brodsky and Day 2002].
[48] *McKinney v University of Guelph*, [1990] 3 SCR 229, 76 DLR (4th) 545 (SCC) [*McKinney*].

coextensive with the absence of government. Experience shows the contrary, that freedom has often required the intervention and protection of government against private action."[49] 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 stated 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."[50]

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, youth, 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.[51] 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 caselaw 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…"[52] Writing for the Court in *Eldridge*, a case

[49] *McKinney* at 582 (DLR).

[50] *New Brunswick (Minister of Health and Community Services) v G(J*), [1999] 3 SCR 46 [G(J)].

[51] *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).

[52] *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 [*Andrews*] at 38.

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.[53]

In the *Tanudjaja* case, the applicants argued that the governments' laws, policies and activities with regard to housing where not substantively equal but rather had an adverse effect on those who are homeless or at risk for homelessness because they experience an unequal burden, when one takes into account their pre-existing disadvantage and, in particular, the nature of the interest that is affected.[54] The applicants argued that the impugned laws and policies have an adverse effect on:[55]

- 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 asserted that the issue of whether or not the government laws, policies and actions have a discriminatory impact can only be assessed on the basis of a full evidentiary record and not in the abstract.[56]

[53] *Eldridge* at para 73.
[54] *Tanudjaja v Canada (Attorney General)* (Factum of the Applicants (Respondents on the Motion)) May 27, 2013) at para 108, citing to *Law, Kapp* and *Withler*.
[55] *Tanudjaja v Canada (Attorney General)* (Factum of the Applicants (Respondents on the Motion)) May 27, 2013) at para 122.
[56] *Tanudjaja v Canada (Attorney General)* (Factum of the Applicants (Respondents on the Motion)) May 27, 2013) 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.

The governments, in response, argued that the mere fact that governments have implemented programs addressing the adequacy and affordability of housing does not impose a positive constitutional requirement on them to provide new housing benefits in areas that have never been addressed.[57] Finally, that imposing positive obligations under the *Charter* would have a chilling effect on the development of public policy.[58] They argued that the litigation did not pertain to an underinclusive scheme, but rather, the absence of a scheme, thus distinguishing it from the principles in *Eldridge* and *Vriend*.[59] The applicants argued in return that the governments' failure to appreciate the impact of its laws, policies and actions on those who are homeless or at risk of being homeless exacerbated any pre-existing disadvantages, marginalization, exclusion and deprivation.[60] They also argued that any issue of the costs of addressing homelessness, should be left out of the *Charter* section 15(1) analysis, and placed under the *Charter* section 1 analysis.

Charter Section 1 and Justifiable Limits on Socio-Economic Rights

Once a claimant has established a violation of their *Charter* rights, the government may justify the violation under *Charter* section 1. *Charter* section 1 allows collective goals to justify infringement of an individual's rights and freedoms. Under the section 1 *Charter* analysis, limits on Charter rights must be "prescribed by law" and be "reasonable and justifiable in a free and democratic society." To be "prescribed by law", they must be accessible and precise enough (i.e., not too vague) for individuals to be able to regulate their conduct. The leading case as to whether government laws, policies and actions are "reasonable and justifiable in a free and democratic society" is *R v Oakes*,[61] in which the

[57] *Tanudjaja v Canada (Attorney General) (*Reply Factum of the Respondent The Attorney General of Ontario May 27, 2013) at para 15.
[58] *Tanudjaja v Canada (Attorney General)* (Factum of the Respondent The Attorney General of Ontario May 27, 2013) at para 16.
[59] *Tanudjaja v Canada (Attorney General)* (Factum of the Respondent The Attorney General of Ontario May 27, 2013) at paras 17 to 21.
[60] *Tanudjaja v Canada (Attorney General)* (Factum of the Applicants (Respondents on the Motion) May 27, 2013) at paras 115 to 116; *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 51.
[61] [1986] 1 SCR 103 [*Oakes*].

Supreme Court of Canada developed the following two-part test. First, the government policies and actions laws, 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."[62] Second, there must be a rational connection between the government's objective and the laws, policies and actions. Proving there is a rational connection involves a three-stage proportionality test.

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)*[63] 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 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,*[64] 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."[65] 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

[62] *Oakes* at para 69.
[63] [1999] NSJ No 297, leave to appeal to SCC refused, [1999] SCCA No 53.
[64] 2004 SCC 66, [2004] 3 SCR 381 [*NAPE*].
[65] Angus Gibbon, "Social Rights, Money Matters and Institutional Capacity" (2002-3) 14 National Journal of Constitutional Law 353 at 379 [Gibbon].

insulating the government from any *Charter* section 1 justification analysis.[66] 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.[67] 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.[68] Gibbon notes that judges do not have the adequate means to assess the entire body of decisions that result 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.[69] This, in turn, leads to the conclusion that legislatures are in a better position to resolve questions of allocation.[70] Thus, the conclusion of some judges is that the *Oakes* test may not be suitable to apply in social rights cases.[71] 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.[72]

Gibbon suggests 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*),[73] 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

[66] Gibbon at 379.
[67] Gibbon at 383.
[68] Gibbon at 384.
[69] Gibbon at 385.
[70] Gibbon at 385.
[71] Gibbon at 386-7.
[72] Gibbon at 388.
[73] [1985] 1 SCR 177 [*Singh*].

persons constituted a minimal impairment of their rights.[74] 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."[75] Gibbon asserts that these two approaches are preferable to the claim that social and economic rights cases are non-justiciable.

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.[76] 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."[77] 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.[78]

Charter **Remedies**

If a claimant makes a successful *Charter* claim under sections 7 or 15(1) [or other sections] and the government is not able to justify the rights violation under *Charter* section 1, the courts can order a remedy under the *Constitution Act, 1982* section 52 or *Charter* section 24. The choice depends on the type of violation and the context of the specific legislation under consideration.[79]

Charter section 24(1) provides a broad range of remedies that the court can order to individuals whose *Charter* rights have been infringed, including damage awards, orders to

[74] *Eldridge,* at para 87.

[75] *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights*), [1999] 3 SCR 868 at para 41.

[76] 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 53 [Rights-Based Strategies].

[77] Rights-Based Strategies at 53.

[78] Rights-Based Strategies at 62.

[79] *Schachter v Canada,* [1992] 2 SCR 679 at 1381 [*Schachter*].

the government to take positive remedial action, and supervisory orders under which the court maintains jurisdiction over the implementation of remedies that may take time to accomplish.[80]

Section 52 of the *Constitution Act*, 1982 remedies include orders declaring a law invalid or temporarily suspending the declaration of invalidity to give Parliament or the legislature time to revise the law to make it constitutional; orders severing a part of the law that violates the Constitution from the remainder of the law; "reading down" a law which involves shrinking the reach of a law to remove its unconstitutional applications or effects without regard to the explicit statutory language that would be required to achieve that result; "reading words into" a law which involves interpreting the law as if it contains words that make it constitutional. In rare cases, courts can also issue a constitutional exemption to prevent the application of a particular law to a party.[81]

The Supreme Court of Canada has stated that the deference properly due to the choices made by government, both with respect to the legislation it has chosen to enact or chosen not to enact, will be taken into account in deciding whether *Charter* rights should be limited under *Charter* section 1 and again in determining the appropriate remedy for a *Charter* breach.[82] 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[83] or to consult with affected minorities.[84] In 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*.[85]

[80] *Doucet-Boudreau v Nova Scotia (Minister of Education),* [2003] 3 SCR 3 [*Doucet-Boudreau*].
[81] *R v Ferguson,* [2008] 1 SCR 96.
[82] *Vriend v Alberta*, [1998] 1 SCR 493 [*Vriend*] at para 54.
[83] *Eldridge,* at para 85.
[84] *Eldridge,* at para 96.
[85] *Vriend,* at paras 175-9.

In *Doucet-Boudreau*, the Supreme Court of Canada granted a supervisory order under which it maintained jurisdiction over the government's obligation to provide for French language secondary school education.[86] It 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."[87] David Wiseman argues that the novelty of the remedy in *Doucet-Boudreau* demonstrates that it is possible that the courts are competent to provide *Charter* remedies in anti-poverty cases.[88]

In *Tanudjaja*, the applicants requested that the court order the Canadian and Ontario governments to implement effective national and provincial strategies to reduce and eliminate homelessness and inadequate housing; that the strategies be developed in consultation with those who were affected and include accountability and complaints mechanisms; and that the court retain supervisory jurisdiction with respect to the implementation of the order.[89] The governments argued that the orders sought were beyond the competence of the court and that supervisory orders are rare and ordered only where there is a history of non-compliance by the government. The nature of the remedies to be ordered was not decided, as the court ultimately decided that, the entire claim was not justiciable.[90]

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

While the Canadian jurisprudence to date has not been particularly helpful with regard to a right to housing, *Charter* arguments have provided a shield for homeless individuals who suffer the adverse consequences of being charged with by-law infractions that result from their being homeless. Anti-poverty activists argue that these bylaws create

[86] *Doucet-Boudreau* at paras 66-70.
[87] *Doucet-Boudreau* at paras 54-9.
[88] David Wiseman, "Competence Concerns in Charter Adjudication: Countering the Anti-Poverty Incompetence Argument" (2006) 51 McGill Law Journal 503 at 544.
[89] *Tanudjaja v Canada (Attorney General)* (Amended Notice of Application November 15, 2011).
[90] *Tanudjaja v Canada (Attorney General) (*Reply Factum of the Respondent The Attorney General of Ontario May 27, 2013) at paras 29 to 38.

a hierarchy of rights whereby maintaining safe and efficient movement of pedestrians has trumped the need of panhandlers and homeless people to use public spaces for survival.[91]

In *Adams*, a group of homeless activists successfully launched a legal challenge to the City of Victoria's anti-camping by-law. The litigants argued that the by-law infringed the *Charter* section 7 right to life, liberty and security of the person, because it infringed the right of homeless people to sleep in a public space with shelter from the elements when they have no place to sleep.[92] Justice Ross noted that there were over 1,000 homeless persons living in Victoria, but only 141 shelter beds available most times of the year.[93] Although there were a small number of homeless people who chose not to use shelters, Justice Ross concluded that "a significant number of people in the City of Victoria have no choice but to sleep outside."[94] There was evidence that at least 40% of Victoria's homeless population was mentally ill; at least 50% had substance abuse problems; and 25% had both issues.[95] A disproportionate number were Indigenous peoples, particularly youth.[96] Justice Ross also accepted evidence that the kind of overhead protection that was banned by the by-law was necessary to protect people who were sleeping outside in the elements. Without that protection, they faced significant risks to life and health, such as hypothermia, skin and respiratory infections.[97]

In examining the right to life, liberty and security of the person under *Charter* section 7, Justice Ross cited a number of international human rights instruments and reports that provide for the right to adequate housing and noted that these instruments could be used as an aid to interpreting the scope of section 7 of the *Charter*. In the end, however, Justice

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[91] Raewyn Brewer, "Deconstructing the Panhandling Norms: Federated Anti-Poverty Groups of BC v Vancouver (City) and Western Print Media" (2005) 10 Appeal 25.

[92] *Victoria (City) v Adams* 2008 BCSC 1363 [*Adams* 2008] See also: Jeff Bell, "Homeless Camping Case Makes it in Court" 04 March 2008 Victoria Times Colonist online: http://www.canada.com/victoriatimescolonist/news/story.html?id=8209b51c-e197-47d6-a3ec-13cb2b4ea453&k=42288; Kendra Milne (2006) "Municipal Regulation of Public Spaces: Effects on Section 7 Charter Rights" 11 Appeal: Review of Current Law and Law Reform 1-15.

[93] *Adams* 2008 at para 4.

[94] *Adams* 2008 at paras 5, 58.

[95] *Adams* 2008 at para 44.

[96] *Adams* 2008 at para 60.

[97] *Adams* 2008 at para 67.

Ross did not make much use of these international instruments because this was a case involving government action as opposed to inaction. There was no need, therefore, to determine whether section 7 of the *Charter* imposes a positive obligation on the state to provide adequate housing, since the alleged violation in this case was the City's prohibition of certain activities and the impact of those prohibitions and their associated penalties on homeless persons in Victoria. The government's argument that "the Bylaws do not cause the Defendants to be homeless; hence, the condition in which they find themselves is not the result of state action" was rejected.[98]

Justice Ross found that the by-laws violated not only homeless persons' security of the person, but also their right to life itself by exposing them to the risk of serious health problems and death. Deprivation of bodily or psychological integrity is the very definition of security of the person under section 7 of the *Charter*.[99] Thus, "the homeless person is left to choose between a breach of the Bylaws in order to obtain adequate shelter or inadequate shelter exposing him or her to increased risks to significant health problems or even death".[100]

In addressing whether the deprivation of life and security of the person were "in accordance with the principles of fundamental justice", Justice Ross noted that laws which are overbroad or arbitrary will not be in accordance with these principles.[101] She examined the rationale offered for the by-laws, which included protecting parks from damage or harm, ensuring that parks are available for public use and enjoyment, and public health considerations.[102] Justice Ross found that these rationales were not furthered by the by-laws in question, as "[t]here is no evidence and no reason to believe that any of the damage described would be increased if homeless people were allowed to cover themselves with cardboard boxes or other forms of overhead protection while they slept."[103] Concerns about

[98] *Adams* 2008 at para 81.
[99] [1993] 3 SCR 519 [*Rodriguez*].
[100] *Adams* 2008 at para 153.
[101] *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*.
[102] *Adams* 2008 at para 172.
[103] *Adams* 2008 at para 193.

litter and drug paraphernalia were also seen to be unconnected to the ban on temporary shelters. The by-laws were therefore held to be arbitrary. Further, "there are any number of less restrictive alternatives that would further the City's concerns; for example, requiring the overhead protection to be taken down every morning, and creating certain zones in sensitive park regions where sleeping was not permitted."[104] The by-laws were therefore also held to be overbroad.

Having found a violation of the principles of fundamental justice, Justice Ross noted that only in rare or extraordinary circumstances would such a violation be justified as a reasonable limit under section 1 of the *Charter*. While finding that preservation of parks was a sufficiently important objective, the earlier findings of overbreadth and arbitrariness meant that the by-laws were not minimally impairing the rights of homeless persons, as required by *R v Oakes*.[105]

Justice Ross ruled that the by-law violated section 7 of the *Charter* and could not be justified under Charter section 1. The Court granted a declaratory order stating that the "Bylaws are of no force and effect insofar as they apply to prevent homeless people from erecting temporary shelter", giving it immediate effect.[106]

In response, the City Council of Victoria passed an amendment to its parks regulation restricting camping from 7 p.m. to 7 a.m. and forbidding camping at a number of locations, such as playgrounds, sports fields, footpaths, park roads or special event locations.

In 2009, the City of Victoria appealed this decision to the British Columbia Court of Appeal.[107] While the Court of Appeal upheld the trial court decision, it appears to have cast the issues somewhat more narrowly. The Court of Appeal upheld the trial judge's conclusion that enactment of the bylaws prohibiting erection of temporary shelters constituted government action sufficient to engage *Charter* section 7 and that the bylaws violated the respondents' section 7 rights. However, the trial court's finding that there were insufficient

[104] *Adam*s 2008 at para 185.
[105] [1986] 1 SCR 103.
[106] *Adams* 2008 at para 237.
[107] *Victoria (City) v Adams*, 2009 BCCA 563 [*Adams* 2009].

shelter spaces did not turn the claim into a claim for a right to shelter that would impose positive obligations on the City to provide adequate alternative shelter. It reversed the trial court's finding that the bylaws were arbitrary but affirmed its decision that the bylaws were overboard and therefore, that the deprivation of the respondents' section 7 rights was not in accordance with the principles of fundamental justice and could not be justified under Charter section 1.[108]

These cases are significant in that the implications of government action on homeless people were recognized as being subject to the *Charter*. However, it must be kept in mind that the interpretation of the right to security of the person was driven by a "limited negative rights framework" resulting in a narrow construction of social and economic rights that may discourage future arguments from including social and economic rights under section 7.[109]

Conclusion

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.

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[108] *Adams* 2009 at para 124.

[109] Marie-Eve Sylvestre, "The Past, Present and Future of Section 7 of the Canadian Charter of Rights and Freedoms: Marking the 25th Anniversary of Re BC Motor Vehicle Act, [1985] 2 SCR 486. The Redistributive Potential of Section 7 of the Charter: Incorporating Socio-Economic Context in Criminal Law and in the Adjudication of Rights" (2011-12) 42 Ottawa L Rev 389 at 404.

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."[110] 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 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. As demonstrated in the *Tanudjaja* case, there remains some reluctance on the part of the court to order 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 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. These can be changed at the whim of the government.

[110] 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.

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.

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.[111] Many rental units have been converted to 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 centres 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 (population 75,000), it was estimated that in 2018, there were as many as 200 homeless people.[112] The number of people who used shelters in Ottawa in 2016 was 7,170.[113] 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

[111] The material in this section is taken from Linda McKay-Panos and Kristyn Stevens, "Is there a Right to a Roof?" (2007) 31(6) LawNow 28 – 32.
[112] "Fort McMurray's Homeless Population up since 2016," July 20, 2018, Fort McMurray Today Online: https://www.fortmcmurraytoday.com/news/local-news/fort-mcmurrays-homeless-population-up-since-2016
[113] Alliance to End Homelessness Ottawa, "2016 Annual Progress Report" Online: https://static1.squarespace.com/static/5a4d46cdb1ffb6b826e6d6aa/t/5b212233352f5349c79bd8b4/1528898100771/aeho_annualreport2016-EN_rev4-13.pdf

the elements, access to safe drinking water, and sanitary living conditions.[114] The City's biennial counts only includes those who are *absolutely* homeless.

Calgary's April 2018 count revealed that 2,911 people were homeless.[115] The results also revealed that more males than females were homeless—males represented 72% of those counted.[116] Individuals aged 45 to 64 accounted for 41% of the total counted.[117] Indigenous people were over-represented in the count relative to the total number of Indigenous people in Calgary.[118] While the results indicated that the number of homeless persons in Calgary has dropped by 19% since 2008, it also clear that there is much more work to be done.

A 2002 Calgary Homelessness Survey conducted by Helen Gardiner and Kathleen Cairns also examined the demographics of the then homeless population in Calgary.[119] Twenty-six percent of all homeless individuals surveyed had a mental health problem[120] and 69% reported a history of substance abuse. Thirty-two percent of the absolute homeless individuals had been homeless for more than one year but less than five, and 8% of the absolute homeless surveyed had been continually homeless for more than five years. Among the absolute homeless, 50% were working full-time, part-time, or occasionally, while 28% of the relative homeless were working full-time, part-time, or occasionally.[121]

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[114] "Frequently Asked Questions about the City of Calgary's Biennial Count of Homeless Persons," July 2006, p. 3, The City of Calgary (online) <www.calgary.ca/docgallery/bu/cns/homelessness/faqhc_06.pdf>[FAQ].

[115] "Homelessness in Calgary dips 19% in last decade, point-in-time count suggests" July 2018, CBC News (online). https://www.cbc.ca/news/canada/calgary/calgary-homelessness-count-foundation-survey-alberta-1.4753718

[116] "2018 Calgary Point-in-Time Homeless Count at a Glance" (*2018 Calgary Homeless Count*) April 2018. Calgary Homeless Foundation (online). http://calgaryhomeless.com/content/uploads/FINAL_Calgary2pagerPITReport-1.pdf

[117] 2018 Calgary Homeless Count.

[118] 2018 Calgary Homeless Count.

[119] Helen Gardiner and Kathleen V Cairns, 2002 Calgary Homelessness Study: Final Report (October 2002). Research Report to the Calgary Homeless Foundation. Calgary: Calgary Homeless Foundation.

[120] Some estimate that as much as 60% of the homeless population in Calgary has mental health issues. See: D. Tetley, "Mental Health Centre Set for Calgary" *Calgary Herald* 01 September 2007 online: *Calgary Herald* <http://www.canada.com/calgaryherald/story.html?id=f58165be-2469-4cc5-9c3d-16c08f9d28b5&k=89129>.

[121] "Fast Facts #7: Facts and Stats on Homelessness and Affordable Housing," May 2007, at 3-4, The City of Calgary (online) <www.calgary.ca/docgallery/bu/cns/homelessness/ff-07_facts_stats_homelessness_affordable_housing.pdf>.

Homelessness also adversely affects children. In 2006, a study out of Toronto indicated that 4,000 children were homeless in that City and that this affected their education significantly.[122]

In June 2013, the University of Calgary, Faculty of Medicine released a study in the Canadian Journal of Psychiatry, which indicated that an 'astounding' 93% of homeless people in Calgary tested positive in a mental illness screening process.[123] The study interviewed 166 clients at the Calgary Drop-In and Rehab Centre.

The Canadian Homeless Research Network released a definition of homelessness in 2012:[124]

> 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:[125]

> [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 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

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122 Community Social Planning Council of Toronto, Lost in the Shuffle: The Impact of Homelessness on Children's Education in Toronto (September, 2007) at 17.

123 Aravind Ganesh, David Campbell, Jannette Hurley and Scott Patten "High Positive Psychiatric Screening Rates in an Urban Homeless Population" (2013) 58(6) Canadian Journal of Psychiatry 353.

124 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 4 [Gaetz et al, 2013].

125 Gaetz et al, 2013 at 4.

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.[126]

Gaetz et al also indicate that at least 200,000 Canadians experience homeless (as they access shelters) over a given one-year period.[127] They also estimate that this number would be much higher if it included those who stay with friends and relatives or those who do not access emergency shelters.[128] Single adult males between the ages of 25 and 55 comprise about half of the homeless population.[129] Youth make up about 20% of the homeless population and Indigenous people are overrepresented in most homeless communities in Canada. Women and families experiencing violence and poverty are apparently a growing homeless population.[130]

The situation of homeless people in Canada appears not to have gone entirely unnoticed by community members or government legislators. The Province of Alberta announced that it would be launching an initiative to end homelessness in ten years, by setting up an agency for that purpose.[131] Calgary's response to the initiative was to release *Calgary's 10 Year Plan to End Homelessness* in January 2008.[132] Several governmental, community, non-governmental agencies and individuals joined together to develop a plan to eliminate homelessness.[133] As of July 2008, two projects had been developed under this plan. Since December 2007, the *Pathways to Housing* program based at The Alex Community Health Centre enrolled 30 clients experiencing complex mental and physical health issues, addiction, and barriers to housing. In the same time period, the *CUPS Rapid Exit – Housing Families Program* successfully re-housed 51 families in the private rental

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126 Gaetz et al, 2013 at 4.
127 Gaetz et al, 2013 at 5.
128 Gaetz et al, 2013 at 5.
129 Gaetz et al, 2013 at 7.
130 Gaetz et al, 2013 at 7.
131 Jason Markusoff, "New Plan to Help Homelessness: Provincial agency to map out strategy with municipalities" *The Edmonton Journal* (30 October 2007) Online: *The Edmonton Journal* <http://www.canada.com/edmontonjournal/news/story.html?id=b509d182-5379-49f4-93d2-75e932ec6fe5)>.
132 Calgary Homeless Foundation, online: <http://newsroom.calgaryhomeless.com/News-Releases/City-of-Calgary-Committee-Endorses-Calgary's-1-(1)>.
133 Canadian Alliance to End Homelessness, "Ten Year Plan to end Homelessness" Online: Canadian Alliance to End Homelessness <http://www. http://www.endinghomelessness.ca/default.asp?FolderID=2178>.

market, effectively moving 66 adults and 106 children out of homelessness.[134] On March 16, 2009, the Alberta Secretariat for Action on Homelessness laid out a 3.3 billion dollar strategy to end homelessness by 2019.[135]

Between 2000 and 2011, 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.[136] The federal budget for 2011 indicated the government's intention to provide one billion dollars towards social housing in Canada.[137]

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 housing and emphasizing Housing First.[138] At the time of the 2016 Point in Time biennial count, homelessness in Alberta had decreased across the province by 32% since plans to end homelessness were implemented.[139] 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

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134 Karen Wyllie, "Information on programs statistics to the end of June 2008 for Pathways to Housing Personal Communication of Karen Wyllie, Community Planner, Calgary Homeless Foundation, cited in "Bi-Ennial Count of Homeless Persons in Calgary: 2008 May 14," July 2008, Online: The City of Calgary <http://www.calgary.ca/docgallery/bu/cns/homelessness/2008_count_executive_summary.pdf>.

135 Collette Derworiz, "Agencies Say Funding Crucial to Province's Homeless Initiative" 16 March 2009, The Calgary Herald B1; Canadian Press, "Uncertainty Lingers over Homeless Strategy" 16 March 2009, The *Red Deer Advocate* online: albertalocalnews.com/reddeeradvocate/news/provincial/Uncertainty_lingers_over_homeless_strategy.html.

136 See, for example "Signing an Affordable Housing Agreement with Prince Edward Island, 2011" (CMHC) Online: http://www.cmhc-schl.gc.ca/en/corp/nero/sp/2011/2011-07-13-1430.cfm.

137 MP Lee Richardson Announces $2.2 Million in Federal Funding for Social Housing in Alberta Online: <mpmedia.xpr.ca/EN/3774/124389>

138 Gaetz et al, 2013 at 9.

139 Calgary Homeless Foundation, "Management's Discussion and Analysis" 2018 (online). http://calgaryhomeless.com/content/uploads/2018.06.19-CHF-YE18-MDA.pdf

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. For example, Bill C-400, *An Act to ensure secure, adequate accessible and affordable housing for Canadians,*[141] provided*:*

> NATIONAL HOUSING STRATEGY
> **3.** (1) The Minister must, in consultation with the provincial and territorial ministers of the Crown responsible for municipal affairs and housing and with representatives of municipalities, Aboriginal communities, non-profit and private sector housing providers and civil society organizations, including those that represent groups in need of adequate housing, establish a national housing strategy designed to respect, protect, promote and fulfil the right to adequate housing as guaranteed under international human rights treaties ratified by Canada.
>
> (2) The national housing strategy must ensure that the cost of housing in Canada does not compromise an individual's ability to meet other basic needs, including food, clothing and access to health care services, education and recreational activities, and must provide financial assistance, including financing and credit without discrimination, for those who are otherwise unable to afford rental housing.
> …..

In addition, on a regular basis, private members' bills are also introduced which seek to include housing as a human right recognized in the *Canadian Bill of Rights*.[142]

The Ontario Legislature introduced Bill 47, the *Right to Housing Act, 2008*, a private member's bill which received its first reading on March 27, 2008.[143] The proposed key provisions included:

> **Preamble**
> The right to an adequate standard of living, which includes adequate food, clothing and housing, is a universal human right that is recognized by Article 11 (1) of the International Covenant on Economic, Social and Cultural Rights, as proclaimed by the United Nations.
>
> **Purpose**
> **1.** The purpose of this Act is to recognize that every person has a right to adequate housing.
>
> **Definitions**

[140] Gaetz et al, 2013 at 34.

[141] 41st Parl 1st Session, 2011-2012, Bill defeated on second reading February 27, 2013.

[142] See, for example, Bill C-241, *An Act to Amend the Canadian Bill of Rights (right to housing),* 41st Parl 1st Session, First Reading, June 21, 2011.

[143] While this Bill did not proceed to law, in 2011, Ontario passed the *Strong Communities Through Affordable Housing Act* SO 2011 c 6, which contains schedules that provide for planning and delivery of housing and homelessness services. Note: it does not address a "right to housing".

2. In this Act,
"adequate housing" means housing that is available at a reasonable cost and that provides adequate shelter, adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with respect to work and basic facilities;

"Minister" means the member of the Executive Council to whom administration for this Act is assigned under the *Executive Council Act*.

Minister's responsibility
3. The Minister is responsible for developing and implementing policies that recognize, promote and protect the right to adequate housing.

Government undertaking
4. The Government of Ontario undertakes, as far as it considers it reasonable and appropriate to do so,

(a) to ensure that adequate housing is accessible to those entitled to it;

(b) to provide protection from violations of the right to adequate housing, including forced evictions;

(c) to provide housing subsidies for those unable to obtain affordable adequate housing; and

(d) to take such other measures as it sees fit to recognize, promote and protect the right to adequate housing.

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.[144]

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.[145]

Canada's Senate Sub-Committee on Cities produced a report in 2009 that made a number of recommendations with respect to housing and homelessness.[146] The sub-committee indicated that international human rights norms should be incorporated into housing and other anti-poverty strategies of the government.[147]

The lack of affordable housing is one of the main factors leading to homelessness, both absolute and relative. In Calgary, 36% of all renters and 16% of all owners spend more than 30% of their income on shelter.[148] This puts them at an increased risk of homelessness. In 2017, the average market rent in Calgary was $1128 which is unaffordable for at-risk and vulnerable Calgarians. [149] An individual who works 40 hours per week for 52 weeks per year at Alberta's minimum wage of $15.00 per hour can only afford a monthly rent of $720 (which is 30% of their gross monthly income). Such an individual would have a difficult time finding affordable housing.[150]

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[144] Steve Pomeroy, "Toward a Comprehensive Affordable Housing Strategy for Canada" October 2001, Online: Caledonian Institute for Social Policy <http://www.caledoninst.org/Publications/PDF/1%2D894598%2D94%2D6%2Epdf> [Pomeroy].

[145] Pomeroy.

[146] 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 [Senate].

[147] Senate at 16.

[148] Statistics Canada, "Census Profile, 2016 Census" 2016 (online). https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/prof/details/page.cfm?Lang=E&Geo1=CMACA&Code1=825&Geo2=PR&Code2=48&Data=Count&SearchText=calgary&SearchType=Begins&SearchPR=01&B1=All&TABID=1

[149] Calgary Homeless Foundation, "Management's Discussion and Analysis" 2018 (online). http://calgaryhomeless.com/content/uploads/2018.06.19-CHF-YE18-MDA.pdf

[150] "Fast Facts #04: Affordable Housing and Homelessness," January 2002, p. 1, The City of Calgary (online) < http://www.calgary.ca/CSPS/CNS/Documents/homelessness/ff-04_affordable_housing_calgary.pdf?noredirect=1> . See also: Poverty Reduction Coalition, Surviving Not Thriving: The untold story of struggling Calgarians June 2007.

As the price of housing soars, the issue of rent control is under great debate in Alberta. Over the 2006-2007 year, the average rate of rent increase in Calgary was 18% — the highest in Canada.[151] Because of this, changes were made to the Alberta *Residential Tenancies Act*[152] in an attempt to address the lack of tenants' rights. Such changes include limiting rent increases to once per year, and requiring landlords to give one year's notice before converting a rental unit to a condominium.[153]

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.[154] 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. For example, in Calgary, the *Public Behaviour By-law*[155] provides for fines of between $50 and $10,000 for spitting, urinating, defecating, loitering or having a visible knife in public. If the person cannot pay the fine, they are liable to imprisonment of up to six months. The *Parks and Pathways By-law*

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[151] Kelly Cryderman, "Calgary leads in rent increases", *Calgary Herald*, February 13, 2007, Canada.com (online) http://www2.canada.com/calgaryherald/news/city/story.html?id=339764f5-8352-4cae-ab1a-0d533af4ddd4.

[152] SA 2004, c R-17.1.

[153] "Changes to landlord-tenant legislation to help stabilize rental market", May 2, 2007, Government of Alberta (online) <www.gov.ab.ca/acn/200705/213854E1A71DE-F46F-168C-6BA08DED47794A49.html>; Bill 34: "Tenancies Statutes Amendment Act, 2007" (Snelgrove), Legislative Assembly of Alberta (online) www.assembly.ab.ca/net/index.aspx?p=bills_status&selectbill=034; (*Residential Tenancies Ministerial Amendment Regulation*).

[154] Gordon Laird, *Shelter: Homelessness in a Growth Economy: Canada's 21st century paradox* (Calgary: Chumir Foundation for Ethics in Leadership, 2007) at 5.

[155] City of Calgary, By-law No 54M2006, *Public Behaviour By-law* 20 November 2006.

provides fines of between $50 and $1,000 for staying in a park after 11 p.m. or camping or having fires after 10:30 p.m. or outside of a fire pit.[156]

In Victoria, B.C., a group of homeless activists successfully launched a legal challenge to that city's anti-camping by-law. The advocates argued that the by-law infringed the *Canadian Charter of Rights and Freedoms* section 7 right to life, liberty and security of the person because homeless people should be able to sleep in a public space with shelter from the elements when they have no place to sleep.[157]

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 applicants in the *Tanudjaja*[158] 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.[159]

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[156] City of Calgary, By-law No 20M2003, *Parks and Pathways By-law* 21 June 2004. See: *The Charter Implications of Bylaw Enforcement on People with Low Incomes in Alberta* 2017 by the Alberta Civil Liberties Research Centre. This contains Appendix of Bylaws from Calgary, Edmonton and other Alberta municipalities that affect the *Charter* rights of homeless and low-income individuals.

[157] *Victoria (City) v Adams*, 2008 BCSC 1363; affirmed 2009 BCCA 563. See also: Jeff Bell, "Homeless Camping Case Makes it in Court" 04 March 2008 *Victoria Times Colonist* online: http://www.canada.com/victoriatimescolonist/news/story.html?id=8209b51c-e197-47d6-a3ec-13cb2b4ea453&k=42288

[158] *Tanudjaja v. Attorney General (Canada)* 2013 ONSC 1878 (CanLII); *Tanudjaja v Canada (Attorney General),* 2014 ONCA 852 (CanLII) [*Tanudjaja* CA], leave to appeal to SCC refused *Tanudjaja et al v Attorney General of Canada et al.*, 2015 CanLII 36780 ISCC) (June 25, 2015).

[159] 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

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[160]

Before delving into the topic of human rights, it would be useful to outline a few relevant characteristics of the public international legal system. This section will provide a brief description of international law and discuss one of the most well-known sources of international law: the treaty. In particular, it will address how treaties are created, and introduce one of the issues Canada faces when consenting to international obligations. Readers should note that the field of international law is nuanced and complex. The information provided here is meant only as a general background to some for the concepts discussed further.

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

Symposium on Enforcement of ESCR Judgments, Bogota, Columbia, 6-7 May 2010) online: http://www.escr-net.org/usr_doc/Porter_-_In_Defence_of_Soft_Remedies_%28Sometimes%29.pdf at 3.

[160] See also: Jackie Dugard, Bruce Porter, Daniela Ikawa and Lilian Chenwi, Cheltenham, eds, *Research handbook on economic, social and cultural rights as human rights*, Edgar Elgar Publishing, 2020, online: https://doi.org/10.4337/9781788974172;
University of Ottawa: http://www.socialrights.ca/2020/Research%20Handbook%20on%20ESCR.pdf.

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.[161]

Unlike domestic law, there is no central governing body in the international sphere with exclusive law-making authority. Rather, international law comes from a number of decentralized processes. One of the most important sources of international law is the treaty, also known a covenant, protocol, or agreement. As an analogy, treaties function a bit like international "contracts," binding states to agreed-upon rules that govern the way they must behave. These agreements can be between two countries, known as bilateral treaties, or between multiple countries, known as multilateral treaties.[162]

The *Vienna Convention on the Law of Treaties*, 1969[163] provides default rules outlining the process by which treaties are created.[164] As part of this process, state parties must express their consent to be bound by the agreement. This can take various forms, but the specific procedure is usually stated in the treaty itself. It often involves a one-step process, such as a signature, or a two-step process, requiring a preliminary signature of approval and later ratification by the state.[165] 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.[166]

In Canada, the power to express consent to be bound by a treaty is exercised by the executive branch of the federal government, acting on the royal prerogative over foreign affairs. The executive branch is separate from the legislative branch, responsible for law-making. Surprisingly, there is no legal requirement for Parliament or the provincial legislatures to approve a treaty before the executive binds Canada to its obligations.[167] In

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[161] John H Currie et al, *International Law: Doctrine, Practice and Theory*, 2d ed (Toronto: Irwin Law, 2014) at 12-14.
[162] Currie et al at 47-48.
[163] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, Can TS 1980 No 37 (entered into force 27 January 1980).
[164] Currie et al at 54-55.
[165] Currie et al at 62-63.
[166] Currie et al at 68-69.
[167] Currie et al at 63.

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.[168] This creates an interesting set of issues, which will be addressed further below.

B. What are human rights?

Building on the previous section, we now turn to human rights as a body of international law. This section will describe human rights and outline the key characteristics that define them. Then it will summarize the evolution of human rights and introduce some of the most important international instruments that give rise to human rights obligations. Finally, this section will examine the mechanisms that are in place for enforcing human rights treaties and remedying breaches.

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.[169]

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.[170]

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[168] Currie et al at 86.

[169] Brian Orend, *Human Rights: Concept and Context* (Peterborough: Broadview Press, 2002), at 33-34 [Orend].

[170] "What are human rights?", online: *United Nations Office of the High Commissioner* <https://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>

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.[171]

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.[172] The adoption of the *Charter of the United Nations*[173] 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.[174] In 1948, the UN General Assembly adopted the *Universal Declaration of Human Rights*.[175] Because it is a declaratory text brought to life by way of a UN resolution, it is not legally binding in itself. However, it proved influential to the global community and served as a precursor to more comprehensive, binding international human rights treaties.[176]

The two most important multilateral human right treaties are the *International Covenant on Civil and Political Rights* (ICCPR),[177] and the *International Covenant on*

[https://web.archive.org/web/20190327200448/https://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx].

171 "What are human rights?", online: *United Nations Office of the High Commissioner* <https://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx> [https://web.archive.org/web/20190327200448/https://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx].

172 Currie et al at 585.

173 *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7.

174 Currie et al, at 599.

175 *Universal Declaration of Human Rights*, GA Res 217(III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810, (1948) 71.

176 Currie et al at 600-601.

177 *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*].

Economic, Social and Cultural Rights (ICESCR).[178] Together with the Universal Declaration, the three documents form the "international bill of human rights."[179] 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*,[180] while economic and social rights are protected by the *International Covenant on Economic, Social and Cultural Rights.*[181] 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.[182] 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.[183] 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.[184]

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

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[178] *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*].
[179] Currie et al at 601-602.
[180] ICCPR.
[181] ICESCR.
[182] Orend at 30.
[183] Orend at 30.
[184] Orend at 110.

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 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.[185]

In addition to the categorization of human rights into first and second generations, civil and political rights are often considered more enforceable than their socio-economic counterpart. For example, there is a mechanism within the ICCPR that allows individuals to complain directly to the United Nations Human Rights Committee, which issues statements about states that do not respect human rights. In contrast, the ICESCR did not have such a body until very recently, but instead only had a review committee that reviewed states' compliance every few years.

C. Enforcement and Compliance

In this section we turn to the nature of state obligation to perform human rights commitments. We then examine some of the key bodies in place to monitor and encourage compliance.

[185] 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 <http://www.unhchr.ch/huricane/huricane.nsf/view01/B662E58D469FACE2C1257111003E5BC1?opendocument>.

International human rights law is unique because the beneficiaries of human rights agreements are not other states but individuals within the states' jurisdiction.[186] 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 some cases, the domestic laws of a state party may conflict with the obligations of an agreement. Treaty law makes it clear that a country's internal laws is no excuse for failure to perform obligations. This can result in issues for countries where the authority to make treaties belongs to one branch of government, while the authority to enforce them through domestic legislation belongs to a different branch, as is the case for Canada.[187]

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.[188]

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 a number of processes. The UN plays an important role in encouraging states' compliance with human right treaties. One important mechanism in place 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.[189]

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[186] Currie et al at 654-55.
[187] Currie et al at 85-86.
[188] Currie et al at 654-655.
[189] Currie et al at 655.

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.[190] Reports and recommendations are publicly available online on the UN bodies' respective websites. Currently there are ten UN human rights treaty monitoring bodies in existence.[191] At the time of writing, Canada has committed to seven UN human rights treaties and must submit periodic reports to the seven accompanying bodies.[192]

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,[193] 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.[194] These reviews are conducted on a four-and-a-half-year cycle.[195] The UN may

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190 Mark Freeman & Gibran van Ert, *International Human Rights Law* (Toronto: Irwin Law, 2004) at 385-386.

191 "Human Rights Bodies", online: *United Nations Human Rights Office of the High Commissioner* <www.ohchr.org/en/hrbodies/Pages/HumanRightsBodies.aspx> [https://web.archive.org/web/20190320162648/https://www.ohchr.org/en/hrbodies/Pages/HumanRightsBodies.aspx].

192 "Reports on United Nations human rights treaties" online: *Government of Canada* https://www.canada.ca/en/canadian-heritage/services/canada-united-nations-system/canada-performance-reporting-united-nations.html

193 "Membership of the Human Rights Council" online: *United Nations Human Rights Council* <https://www.ohchr.org/EN/HRBodies/HRC/Pages/Membership.aspx> [https://web.archive.org/web/20190326221407/https://www.ohchr.org/EN/HRBodies/HRC/Pages/Membership.aspx].

194 Currie et al at 663-64.

195 "Cycles of the Universal Periodic Review" (2019), online: *United Nations Human Rights Council* <https://www.ohchr.org/EN/HRBodies/UPR/Pages/CyclesUPR.aspx> [https://web.archive.org/web/20190425222354/https://www.ohchr.org/EN/HRBodies/UPR/Pages/CyclesUPR.aspx].

also appoint Special Rapporteurs to report on important topics, including economic and social issues (such as adequate housing.)

Finally, it is worth mentioning that outside of the UN framework, there are other regional human rights bodies. One example is found within the Organization of American States (OAS) which resulted in regional human rights treaties, as well as the Inter-American Court of Human Rights and the associated Inter-American Commission of Human Rights. While Canada is not a signatory to the *American Convention on Human Rights*,[196] it has agreed to a right of individual petition before the commission.[197]

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, as well as the right to housing. However, socio-economic rights are found in more than one agreement and the right to housing in particular is established in several treaties. For example, article 28 of the *Convention on the Rights of Persons with Disabilities*,[198] article 27 of the *Convention on the Rights of the Child*,[199] article 14 of the *Convention on the Elimination of All Forms of Discrimination Against Women*,[200] and article 5 of the *Convention on the Elimination of All Forms of Racial Discrimination*[201] all protect a right to housing. The right to housing is also acknowledged in non-binding international declarations, such as the *Universal Declaration*

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196 "American Convention of Human Rights 'Pact of San Jose, Costa Rica' (b-32) – Signatories and Ratification" online: Organization of American States <http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm> [https://web.archive.org/web/20190401194904/http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm].

197 Currie et al at 676.

198 *Convention on the Rights of Persons with Disabilities*, 13 December 2006, 2515 UNTS 3 art 28 (entered into force 3 May 2008).

199 *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 art 27 (entered into force 2 September 1990).

200 *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).

201 *Convention on the Elimination of All Forms of Racial Discrimination*, 7 March 1966, 660 UNTS 195 art 5 (entered into force 4 January 1969).

of Human Rights,[202] (article 25), and the *United Nations Declaration on the Rights of Indigenous Peoples*,[203] (article 21).

In this report, we focus primarily on the ICESCR. The following sections examine the nature of the rights that are guaranteed, focusing especially on the right to housing in international law. In particular, we consider the content of the right to adequate housing and the concept of indivisibility. Following that, we consider issues of justiciability. We then turn to the concepts of progressive realization and the core minimum approach. Finally, we look at the example of South Africa, a country with a constitutionally protected right to housing, and the resulting caselaw.

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.[204]

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.[205]

The text of the agreement makes it clear that 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

[202] *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71 art 25.
[203] *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.
[204] 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.
[205] *ICESCR*, art 11(1).

resources to progressively realize the rights contained in the agreement "by all appropriate means including particularly the adoption of legislative measures.[206]

As stated above, compliance with international human rights laws is monitored by treaty bodies that review compliance on a regular basis. The Committee on Economic, Social and Cultural Rights (CESCR) monitors compliance with the ICESCR. In addition, to date the CESCR has adopted 24 General Comments that are meant to assist states in interpreting the legal requirements of the convention. In particular, General Comment 4 on the right to adequate housing,[207] and General Comment 7 on forced evictions[208] help define the nature of the right to housing.

In General Comment 4, the CESCR states that "article 11 (1) must be read as referring not just to housing but to adequate housing."[209] 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 ICESCR. 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.[210]

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"[211] of each state. However, seven basic requirements are identified as key:

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206 *ICESCR*, art 2(1).

207 Committee on Economic, Social and Cultural Rights, *Report on the Sixth Session*, UNOHCHR, 1992, Supp No 3, UN Doc E/1992/23, 114.

208 Committee on Economic, Social and Cultural Rights, *Report on the Sixteenth and seventeenth Sessions*, UNOHCHR, 1998, Supp No 2, UN Doc E/1998/22, 113.

209 Committee on Economic, Social and Cultural Rights, *Report on the Sixth Session*, UNOHCHR, 1992, Supp No 3, UN Doc E/1992/23, 114 at 115.

210 Committee on Economic, Social and Cultural Rights, *Report on the Sixth Session*, UNOHCHR, 1992, Supp No 3, UN Doc E/1992/23, 114 at 115.

211 Committee on Economic, Social and Cultural Rights, *Report on the Sixth Session*, UNOHCHR, 1992, Supp No 3, UN Doc E/1992/23, 114 at 115.

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."[212] 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"[213] 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 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"[214] 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.[215]

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[212] Committee on Economic, Social and Cultural Rights, *Report on the Sixth Session*, UNOHCHR, 1992, Supp No 3, UN Doc E/1992/23, 114 at 116.
[213] Committee on Economic, Social and Cultural Rights, *Report on the Sixth Session*, UNOHCHR, 1992, Supp No 3, UN Doc E/1992/23, 114 at 116.
[214] Committee on Economic, Social and Cultural Rights, *Report on the Sixth Session*, UNOHCHR, 1992, Supp No 3, UN Doc E/1992/23, 114 at 116.
[215] Committee on Economic, Social and Cultural Rights, *Report on the Sixth Session*, UNOHCHR, 1992, Supp No 3, UN Doc E/1992/23, 114 at 115-17.

By defining adequate housing in opposition to mere shelter, the committee provides greater insight into the content of the right to housing and the state parties' obligations. Canada tends to implement the ICESCR through policies rather than through laws. Three principles that illustrate some of the practical and legal issues that arise in relation to Canada's international obligations are indivisibility, justiciability and progressive realization. The following sections delve deeper into these concepts, what they mean for the right to housing, and how they play out in Canada.

2. Indivisibility

As noted above, human rights are described as interrelated, interdependent, and *indivisible.* Fulfilling one right helps achieve other rights, while denying a right negatively impacts other rights. In this sense, economic, social and cultural rights are intended to be indivisible from civil and political rights. Nevertheless, in Canada civil and political rights have enjoyed a place of priority over economic and social rights. This is also known as the hierarchy of rights. As a result, the right to housing has been treated as secondary to other human rights.

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.[216] 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.[217] 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

[216] See ICESCR, UDHR and ICCPR.
[217] UDHR at Articles 22-27.

> economic, social and cultural rights indispensable for his dignity and the free development of his personality.[218]

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.[219] 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.[220] 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.[221] 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. East met the west; socialism met capitalism. As a result the concept of indivisibility as originally envisioned was compromised and two covenants were created: one addressing civil and political rights and the other economic, social and cultural rights.[222] In short, civil and political rights became more important and needed to be

[218] UDHR at Article 22.
[219] Art 23 UDHR.
[220] UDHR at Articles 17 & 30.
[221] 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.
[222] 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).

implemented immediately. On the other hand, economic, social and cultural rights appeared to have weaker requirements.

More recently, perhaps in recognition that the ideological conflict has ceased or lessened, there have been calls for the return to the concept of indivisibility of rights, such as those made at the Vienna Conference on Human Rights in 1993.[223] Nonetheless, 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 make up the judicial branch of government, or by elected politicians, who make up the executive branch of government. This section explores the concept of justiciability and how it has impacted the right to housing in Canada.

In addition to the hierarchy of rights discussed in the previous section, rights can be divided into positive and negative obligations. Negative rights are honoured when states refrain from interfering with them. For example, the right to liberty and security of the person requires governments to abstain from imprisoning individuals without due process. By contrast, positive rights require that action be taken by states to fulfill them. For example, the right to housing may require that governments supply subsidized housing and emergency shelters or enact legislation to help reduce homelessness.

Civil and political rights are often understood as negative rights whereas social and economic rights are often seen as positive rights. State intervention often requires that governments allocate public funds. This creates a link between positive rights and government expenditures. However, decisions on state spending are the purview of the

[223] *Vienna Declaration and Programme of Action,* UN Doc A/CONF.157/24 Adopted at Vienna, 14-25 June 1993, reprinted in 32 ILM 1661 (1993).

executive branch of government, not the judiciary. As such, it is often thought that matters of economic and social rights should be left to elected officials and not judges.

Many scholars reject the notion that economic and social rights are distinguishable from civil and political rights on the basis of spending and justiciability. Scholar William 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. [224]

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. [225]

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 only, and not adjudicatory in nature. 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

[224] Schabas 2000 at 202.

[225] Barbara Arneil, "The Politics of Human Rights" (1999) 11 National Journal of Constitutional Law 213 at 218.

opportunity to provide submissions which could potentially challenge the states' reports.[226] Still, this process allows for the committee to make recommendations only. There is no way for these recommendations to be enforced by external bodies or brought before Canadian courts.

As discussed above, the UN Human Rights Council also developed the Universal Periodic Review process. To date, Canada has appeared three 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 indicating which recommendations it accepts and which it does not.[227] As with the treaty bodies' recommendations, there are few legally enforceable results from this largely political process.

In an attempt to address issues of justiciability, the idea of a petitions 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 for individual communications about countries' violations of the Covenant.[228] However, Canada has refused to sign on to this Protocol, and has thus not permitted Canadians to utilize this mechanism to address economic, social and cultural rights issues. [229]

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[226] Porter, 2000 at 124.

[227] Canadian Heritage, *Canada's Second Universal Periodic Review,* online: < http://www.pch.gc.ca/pgm/pdp-hrp/inter/upr-eng.cfm >.

[228] Resolution 8/2 Online:< http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_2.pdf >.

[229] 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/>: Canada's current status re ratification of UN treaties can be accessed at https://indicators.ohchr.org/

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 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?[230]

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?[231]

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

[230] Schabas 2000 at 208.
[231] Schabas 2000 at 208.

could not be subjected easily to quasi-legal assessments. [232]

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.

4. Progressive Realization

Audrey Chapman suggests that there is a need for a paradigm shift for evaluating compliance with the norms established in the ICESCR.[233] 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*.[234] 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 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.[235]

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[232] 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>.

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

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

[235] Chapman and Russell at 7-8.

Chapman and Russell attempt to clarify the meaning and implications of progressive realization. [236] Generally speaking, the obligations in the ICESCR are not uniform or universal. Rather, they are relative to levels of development and available resources.[237] 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 are able to provide it.[238]

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 identifies two obligations.[239] 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".[240] These articles are not subject to progressive realization. As such, States must have measures in place to prevent discrimination including compensation for past discrimination. The second State obligation set out by the Committee established a minimum core content (explained below) that obligated all parties. The Committee did not clearly define the scope in its Comment adopted in 1991.[241]

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[236] Chapman and Russell at 5.
[237] Chapman and Russell at 5.
[238] Chapman and Russell at 5.
[239] 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 45 (1994) [General Comment 3].
[240] General Comment 3.
[241] General Comment 3.

5. Core Minimum Approach

Chapman and Russell define "minimum core content" as the nature or essence of the right—the essential element or elements without which it loses its substantive significance as a human right and in the absence of which a State party should be considered to be in violation of its international obligations.[242] 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.[243] 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 in an effort to satisfy, as a matter of priority, those minimum obligations. Of course, the problem with this approach is that it creates a minimum and a state may simply stop there. 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 violation of the right to food."[244]

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.[245]

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[242] Chapman and Russell at 9.

[243] General Comment 3.

[244] Rolf Kunnemann, "The Right to Adequate Food: Violations Related To Its Minimum Core Content" in Chapman and Russell at 163 [Kunnemann 2002].

[245] 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

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.[246] 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.[247] 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.[248] Chapman and Russell say that "if human rights are on a rising floor, education is a powerful engine pushing the floor upward."[249]

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, despite the fact that the *Charter* does not 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.

[246] Kunnemann 2002 at 163.
[247] See ICESCR at Article 1.
[248] Fons Coomans, "In Search of the Core Content of the Right to Education" in Chapman and Russell at 217-245.
[249] Chapman and Russell at 16.

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.[250] Although the rights have been interpreted to be of a lesser standard, they are nonetheless domestically justiciable.[251] Further, the Constitution directs the courts to take into account 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:[252]

> 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 social and economic rights.[253]

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

[251] 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].

[252] 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 1 [Sunstein].

[253] Sunstein.

The *Grootboom* case addresses the right to shelter.[254] 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:[255]
>
> 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 government that is 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 needy. In that

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

sense, the Constitution did not create a right to shelter or housing immediately upon demand. *Grootboom* has become the leading case on the issue of the right to housing in South Africa.[256]

E. Canada's Implementation of Social and Economic Rights

Canada does not have social and economic rights explicitly enshrined in its Constitution, with the exception of 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'.[257] 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

[256] 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.

[257] 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].

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 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.[258]

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.[259] 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.[260] 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: [261]

> 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

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[258] Porter, 2000.
[259] 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 pg 5 and 6.
[260] 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 pg 7.
[261] 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].

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*.[262] 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)*[263] as an example.[264]

In 2007, the United Nations sent a Special Rapportuer 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.[265]

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.[266] 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. [267]

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[262] *ICECSR* 1998 report.
[263] 2005 SCC 35.
[264] *ICESCR* 2006 report at Art 36.
[265] 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 >.
[266] *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>.
[267] 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 2.

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*.[268] Craig Scott submits, however, that the internal organization of a domestic state is not a defence to the breach of international treaty law.[269]

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*.[270] 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

[268] *Constitution Act 1867* (UK), 30 & 31 Vict c 3 reprinted in RSC 1985, App II, No 5 [*Constitution Act 1867*].
[269] Craig M Scott, "Covenant Constitutionalism and the Canada Assistance Plan" (1995) Constitutional Forum at 82.
[270] *Constitution Act, 1867* at Section 91.

government under the Social Union.[271] 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*.[272] 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.[273]

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

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.[274] The *Social Union Framework Agreement* was established in February 1999 between the Federal Government of Canada and all of the provinces except Quebec.[275] 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,

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[271] 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].

[272] *Constitution Act, 1867* at section 91(24).

[273] 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>.

[274] Cameron, 2007 at 162.

[275] 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.

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 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 as a result 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.[276]

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.[277] 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*.[278]

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

[277] 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].

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

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*.[279] 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 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[280] 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

[279] Poirier at 404.

[280] For example, the *Canada-Ontario Labour Market Agreement*, online: < http://www.hrsdc.gc.ca/eng/employment/partnerships/lma/ontario/on_lma.shtml >.

sector.[281] 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.[282] 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 included a two-year renewal of the HPS and a commitment to maintain annual funding for housing and homelessness until March 2014.[283] 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).[284] 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).[285]

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

[281] Ralph Smith, "Lessons from the National Homeless Initiative" (2004) Canada School of Public Service, Government of Canada at 5.
[282] See Cameron, 1999.
[283] 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 >.
[284] Gaetz et al, 2013 at 34.
[285] Gaetz et al, 2013 at 34.

governments to meet statutory obligations.[286] 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.[287] 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."[288] In the first stage of this flight, there was a failed attempt to insert section 106A into the *Constitution Act, 1867.*[289] 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 federal spending power in the area of provincial jurisdiction.[290] 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. [291]

Sujit Choudhry believes that "the legal implications of mega-constitutional politics have effectively shut the door on comprehensive constitutional change in Canada."[292] 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

[286] Cameron, 2007 at 177.
[287] Fortin, et al at 18.
[288] 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].
[289] Choudhry.
[290] Choudhry.
[291] Choudhry at 78.
[292] Choudhry at 78.

according to *Reference Re Canada Assistance Plan,* is used to achieve the federal and provincial goals of the Accords.[293] 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.[294] Article 5 addressed the creation of shared cost programs.[295] 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.[296] 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".[297]

Since 1995, the collaborative efforts of the provincial and federal governments have been difficult. At that time, the *Canada Health and Social Transfer*[298] altered both the federal funding formula and the levels of federal support for health care and social assistance. Sujit Choudhry describes the legacy:[299]

> 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

[293] *Reference re Canada Assistance Plan (BC),* [1991] 2 SCR 525.
[294] Choudhry at 79.
[295] Choudhry at 79.
[296] Choudhry at 79.
[297] Choudhry at 79.
[298] Canada Health And Social Transfer. Introduced through the *Budget Implementation Act, 1995*, SC 1995, c 17.
[299] Choudhry at 79.

> 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.*[300] In 1938, the *Reference Re Adoption Act* (*Adoption Reference*) found that direct social service provision also lies within provincial jurisdiction.[301] 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".[302] 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.[303] Or perhaps, Choudhry suggests, the courts could supervise "the procedural norms of the Social Union, while leaving the determination of policy outcomes to governments."[304]

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[300] *Canada (AG) v Ontario (AG) (Unemployment Insurance),* [1937] AC 355.
[301] *Reference Re Adoption Act (Ontario*), [1938] SCR 398.
[302] Choudhry at 82.
[303] Colleen Flood & S Choudhry, "Strengthening the Foundations: Modernizing the Canada Health Act" (2002) In Canada, *Royal Commission on the Future of Health Care in Canada,* Discussion Paper No 13.
[304] Choudhry at 83.

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.[305] 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.[306] 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."[307]

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.[308]

Nedelsky sees a need to confront the history of rights:[309]

> 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 –

[305] Jennifer Nedelsky, "Reconceiving Rights As Relationship" (1993) 1 Review of Constitutional Studies No 1 [Nedelsky].
[306] Nedelsky at 2 *et seq*.
[307] Nedelsky at 24.
[308] Nedelsky at 7-8.
[309] Nedelsky at 3.

> 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.[310] Nedelsky hopes that the notion of rights can be "rescued from its historical association with individualistic theory and practice."[311] She notes that "[h]uman beings are both essentially individual and social creatures."[312]

Rights create relationships of power, of responsibility, of trust and of obligation.[313] Nedelsky believes that this understanding must be in the conscious minds of people as choices are made about rights.[314] 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."[315] 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."[316]

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."[317] It is this root

[310] Nedelsky at 7-8.
[311] Nedelsky at 13.
[312] Nedelsky at 13.
[313] Nedelsky at 13.
[314] Nedelsky at 13.
[315] Nedelsky at 17.
[316] Nedelsky at 13.
[317] Nedelsky at 21.

that has determined that rights separate us from others. It is based on a premise that everyone who has 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."[318] Equality, for Nedelsky needs to be reconceived to mean:[319]

> [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.[320] It is her opinion that the *Alternative Social Charter* accomplishes this reconception of rights.[321]

Jennifer Nedelsky describes the tribunal that would hear complaints alleging infringements of social and economic rights.[322] The tribunal would be outside the court system so that courts would not have to enforce rights that involve commitments to public funds.[323] 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.[324] 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

[318] Nedelsky at 20.
[319] Nedelsky at 20-1.
[320] Nedelsky at 21.
[321] Nedelsky at 24-26.
[322] Nedelsky at 24-5.
[323] Nedelsky at 25.
[324] Nedelsky at 25

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.[325] For Nedelsky, this would make democratic decision-making accountable to the basic value of equality.[326]

The tribunal would be appointed by the Senate.[327] Its composition would be one-third federal, one-third provincial and one-third non-governmental organizations that would represent vulnerable and disadvantaged groups.[328] 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:[329]

> 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

[325] Nedelsky at 25.
[326] Nedelsky at 25.
[327] Nedelsky at 25.
[328] Nedelsky at 25.
[329] Nedelsky at 25.

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.[330]

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 law.[331] 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."[332]

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,[333] 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.[334]

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[330] *European Social Charter (Revised),* 3 May 1996, ETS No 163 (entered into force 1 July 1999).

[331] Aymen Nader, "Providing Essential Services: Canada's Constitutional Commitment under Section 36" (1996) 19(2) Dalhousie Law Journal 306 [Nader].

[332] Canadian Heritage, *Core Document forming part of the Reports of States Parties: Canada* (October 1997) online: <http://www.pch.gc.ca/progs/pdp-hrp/docs/core-eng.cfm >.

[333] See, for example *Canadian Bar Association v British Columbia*, 2008 BCCA 92 at para 53, 290 DLR (4th) 617.

[334] 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; Martha Jackman, "Women and the Canada Health and Social

Jackman and Porter argue that since the United Nations has adopted the *Optional Protocol* to 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.[335] 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.[336] 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.[337] 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.[338]

Thus, currently in Canada, it is clear that the economic, social and cultural right to housing as provided in international law has not generally 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.

Transfer: Enduring Gender Equality in Federal Welfare Reform" (1995) 8(2) Canadian Journal of Women and the Law 372 at 390; Nader at 357.

[335] 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.

[336] 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].

[337] *Rights-Based Strategies* at 15; citing Alex Neve, Secretary General, Amnesty International Canada (23 February 2009) Letter to Prime Minister Stephen Harper online: http://socialrightscura.ca/documents/UPR/Letter_to_PM_Harper%20PDF2.pdf.

[338] Rights-Based Strategies at 16.

6. Federal *National Housing Strategy Act*

In 2019, Canada enacted the *National Housing Strategy Act* recognizing for the first time in history its commitment to the right to housing. 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 *National Housing Strategy Act*:

- 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, taking into account 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, 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:[339]

> 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.

[339] Elizabeth McIsaac and Bruce Porter, *Housing Rights - Ottawa takes a historic step forward*, Literary Review Canada, November 2019, online: [https://maytree.com/publications/housing-rights-ottawa-takes-a-historic-step-forward/].

> 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.
>
> 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 Centre for Equality Rights in Accommodation (CERA) and National Right to Housing (NRHN) are currently presenting a submission to the federal government under the NHSA addressing the systemic issue of unaffordable rent and accumulated arrears or debt among residential tenants as a result of the pandemic. The proposal is for a "Federal Government Retroactive Residential Tenant Support Benefit" for low- and moderate-income tenants who have faced heightened rent affordability challenges because of income loss during the pandemic. The benefit will provide what amounts to a retroactive rent subsidy to ensure that rent would make up the same percentage of income in 2020 as in 2019, prior to the pandemic. For tenants in arrears, some or all of the benefit can be directed to their landlord. This is one of the first tests of the government's commitment to address systemic housing issues under the new Act.

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*.[340]

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.[341] However, she

[340] *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].
[341] *Baker* at para 69.

also held that 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.[342]

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.[343] 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.[344] *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.)*[345]: "the *Charter* should

[342] *Baker* at para 70.
[343] *Suresh* at para 60.
[344] *Schachter v Canada,* [1992] 2 SCR 679 [*Schachter]* and *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038 [*Slaight Communications*].
[345] *Reference re Public Service Employee Relations Act (Alta),* [1987] 1 SCR 313.

generally be presumed to provide protection at least as great as that afforded by similar provisions in international rights documents which Canada has ratified."[346]

In the 2006 *Concluding Observations on Canada,* the CESCR stated that it had the following concerns with respect to the *Charter* and economic, social and cultural rights:[347]

> (b) The lack of legal redress available to individuals when governments fail to implement the Covenant, resulting from the insufficient coverage in domestic legislation of economic, social and cultural rights, as spelled out in the Covenant; the lack of effective enforcement mechanisms for these rights; the practice of governments of urging upon their courts an interpretation of the Canadian Charter of Rights and Freedoms denying protection of Covenant rights, and the inadequate availability of civil legal aid, particularly for economic, social and cultural rights;

In *R v Hape*,[348] 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.[349] 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 where the express words are capable of supporting such a construction" (emphasis added). [350]

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*[351] 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

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[346] *Slaight Communications* at para 23.
[347] 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 (2006)* [ICESCR 2006 Report].
[348] 2007 SCC 26, [2007] 2 SCR 292 [*Hape*].
[349] *Hape* at para 53.
[350] *Hape* at para 56.
[351] [2007] 2 SCR 391 at para 70.

rights treaties that Canada has ratified. Similarly, in *United States of America v Anekwu*,[352] the Supreme Court of Canada indicated that in interpreting domestic legislation, courts should arrive at a construction that conforms with Canada's treaty obligations.

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.[353]

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." [354]

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.[355] *Baker* established that international treaties have no

[352] 2009 SCC 41, [2009] 3 SCR 3 at para 25.
[353] Porter, 2008 at 16.
[354] 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].
[355] Bahdi at 165.

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*[356] 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.

Bahdi points out that the five rationales tend to redefine these principles:[357]

> 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.[358] The Supreme Court of Canada has invoked this rationale in *R v Ewanchuk, Slaight Communications,* and *United States v Burns*.[359]

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]."[360]

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

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[356] *Francis v The Queen*, [1956] SCR 618.
[357] Bahdi at 166.
[358] Bahdi at 166.
[359] *R v Ewanchuk* [1999] 1 SCR 330 and *United States v Burns* [2001] 1 SCR 283.
[360] Bahdi at 167.

international law is regarded as a statement of universal norms that define the essence of humanity."[361] 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."[362]

The third rationale is *the Introspection Rationale.* Here, international law helps a judge to find the values of the nation. Very simply, Bahdi explains, ratification of a treaty by Canada suggests that it adheres to those values.[363] *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 to 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.[364] 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

[361] Bahdi at 171.
[362] Bahdi at 174.
[363] Bahdi at 175.
[364] Bahdi at 178.

discuss issues that transcend national boundaries.[365] This is known as *trans-judicialism,* coined by Ann-Marie Slaughter.[366]

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[367]) 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."[368] Expanding the *OAS Charter,* the *American Declaration* recognizes a right to health, food, clothing, housing, medical care and social security.[369]

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.[370] They note that the United Nations Office of the High Commissioner for Human Rights developed guidelines for the integration of human rights into poverty

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[365] Bahdi at 179.

[366] Ann–Marie Slaughter, "A Typology of Transjudicial Communication" (1994) 29 University of Richmond Law Review 99.

[367] See, Government of Canada, "Canada and the Organization of American States", online: < http://www.international.gc.ca/americas-ameriques/oas-oea/oas-oae.aspx >.

[368] OAS, General Assembly, *Charter of the Organization of American States*, OAS, Treaty Series Nos 1-C & 61 (1951) at Article 3(f).

[369] *American Declaration on the Rights and Duties of Man,* OAS Res XXX, adopted by the ninth International Conference of American States (1948).

[370] Making the Connection at 7.

reduction strategies.[371] Further, the recommendations of the United Nations underscore the need for rights-based accountability and judicial and quasi-judicial rights claiming and enforcement processes.[372] 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.[373] 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.[374]

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."[375] While it 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.[376]

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[371] Making the Connection at 8.
[372] Making the Connection at 12.
[373] Rights-Based Strategies at 70.
[374] Rights-Based Strategies at 70.
[375] Louise Arbour, "'Freedom from want' –from charity to entitlement" (LaFontaine-Baldwin Lecture, delivered at the Institute for Canadian Citizenship, Quebec City, 3 March 2005), online:< www.unhchr.ch/huricane/huricane.nsf/0/58E08B5CD49476BEC1256FBD006EC8B1?opendocument >[Arbour].
[376] See: *Irwin Toy Ltd v Quebec (A-G)* (1989), 5 DLR (4th) 577 (SCC) [*Irwin Toy*].

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".[377] 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."[378] In essence, Richards and Jackman debate whether or not social and economic rights should be justiciable.[379] 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.[380] Why has judicial activism played a minor role in the building of the welfare state? Social programs cost money.[381] Politicians are also required to deliver services. He argues that the courts should not be able to force citizens to pay taxes to support these programs. Political agreement is needed.[382]

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[377] 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*.
[378] Schabas 2000.
[379] 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].
[380] Richards at 249.
[381] Richards at 249.
[382] Richards at 249.

It is for this reason that Canada has respected the rights of states to Parliamentary supremacy and judicial restraint.[383] 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."[384] 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.[385]

In fact, for Richards, taxation for social programs, without the consent of the people's assembled representatives, is an unwarranted infringement on property rights.[386] 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.[387] 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?[388]

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,* so as to provide appropriate remedies against social and economic right violations'.[389] Jackman argues that the criticisms raised against the judicial recognition of social and

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383 Richards at 250.
384 Richards at 253.
385 Richards at 254.
386 Richards at 257.
387 Richards at 257-8.
388 Richards at 258.
389 Committee on Economic, Social and Cultural Rights. *Concluding Observations on Canada,* UN Doc E1/C12/1993/5, Article 30.

economic rights in Canada create a false distinction between social and economic rights and the more *classical* human rights; exaggerate the problems of judicial competence; and create a false dichotomy between individual rights and democracy.[390]

Jackman addresses the negative/positive rights distinction.[391] 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.[392] This will erode public confidence in the independence and integrity of the judiciary.[393] Further, citizens will become apathetic as government abdicates its responsibility to the courts.[394] Surely this is inconsistent with basic democratic principles.[395] 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.[396] 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."[397]

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.[398] 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.[399] In addition, unlike government,

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390 Jackman 2000 at 237.
391 Jackman 2000 at 238.
392 Jackman 2000 at 239.
393 Jackman 2000 at 239.
394 Jackman 2000 at 239.
395 Jackman 2000 at 239.
396 Porter, 2008 at 7.
397 Porter, 2008 at 7.
398 Jackman 2000 at 241.
399 Jackman 2000 at 240.

courts are limited to individual disputes, within the restrictive bounds of judicial procedure. Martha Jackman clarifies the argument:[400]

> 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 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 focussed 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.[401] 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."[402]

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.[403]

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400 Jackman 2000 at 240 and footnote 13.

401 Martha Jackman "Constitutional Castaways: Poverty and the McLachlin Court" (2010) 50 Supreme Court Law Review (2d) 297 at 311 [Jackman, 2010].

402 Jackman, 2010 at 311.

403 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 284.

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 effect 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*."[404]

Martha Jackman rejects these arguments. The so-called classical rights do have a corresponding obligation to act and it costs.[405] 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 content is static across cultures and across time."[406]

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:[407]

> 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.[408] 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

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404 Jackman 2000 at 241.
405 Jackman 2000 at 242.
406 Jackman 2000 at 243.
407 Jackman 2000 at 243.
408 Jackman 2000 at 244.

government.[409] Judicial intervention is important, as it protects the violation of the rights of minorities from the actions of elected majorities.[410]

Further, realistically, many decisions concerning the poor are made by government departments and administrative agencies. Parliament exercises little control over these actors.[411] 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.[412]

Finally, for the poor, the judiciary can only contribute to social change. After all, their plight is "socially constituted and controlled".[413] The court can be used as a tool to influence legislative and policy processes and to call legislatures to account for decisions.[414] The legislatures and Parliament are representative of the majority and not the minority.[415]

Martha Jackman concludes by making a statement that goes to the heart of the Canadian state:[416]

> 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

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409 Jackman 2000 at 244.
410 Jackman 2000 at 244.
411 Jackman 2000 at 244.
412 Jackman 2000 at 244.
413 Jackman 2000 at 245.
414 Jackman 2000 at 244.
415 Jackman 2000 at 244.
416 Jackman 2000 at 246.

housing.[417] 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,*[418] 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 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.[419]

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.[420]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.[421] The reluctance to impose positive

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[417] 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).

[418] *Baker* at para 70; *Ewanchuk* at para 73; *R v Keegstra,* [1990] 3 SCR 697,at para 66; *Slaight Communications* at para 23.

[419] 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).

[420] 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].

[421] Wilkie and Gary at 38.

obligations on government in section 7 cases[422] may be compared to some of the section 7 claims that have been upheld concerning negative rights.[423] This illustrates that the result is largely dependent on whether the court chooses to defer to government decisions and priorities in allocating resources.[424] 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:[425]

- 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 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

[422] Gosselin v Quebec (Attorney General), [2002] 4 SCR 429 [Gosselin].
[423] 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.
[424] Wilkie and Gary at 45.
[425] 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 362.

the principles of fundamental justice"[426], 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[427]—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".[428] One of these firewalls is the idea that economic liberty (as opposed to personal liberty) is not covered by section 7.[429]

In the early Supreme Court of Canada decision of *Irwin Toy Ltd v Quebec (Attorney-General),*[430] 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)*[431] was not so positive. 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

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[426] *Charter of Rights and Freedoms*, section 7.

[427] *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)]. However, Chief Justice Lamer (as he then was) limited the application of section 7 to actions of the government "in the course of the administration of justice" (para 65).

[428] *Gosselin* at para 309.

[429] 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 138-39 [Thompson].

[430] *Irwin Toy* at 633.

[431] *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*].

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.[432] 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,*[433] 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."[434]

Masse v Ontario (Ministry of Community and Social Services)[435] 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.

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[432] *Fernandes* at para 37.

[433] *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*].

[434] *Conrad,* NSCA, at para 56.

[435] *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*].

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 *action*.[436] 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 programmes 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."[437]

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*).[438] 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.[439] 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

[436] *Gosselin* at para 81.
[437] *G(J)* at para 100.
[438] *Chaoulli* at para 200.
[439] *Chaoulli* at para 256.

state to pay for educational or health services.[440]

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 *Canada (Attorney General) v PHS Community Services Society*,[441] 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

[440] 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).

[441] [2011] 3 SCR 134 [*Insite*].

and provincial governments support Insite's program.[442]

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.[443] 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 (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."[444]

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

[442] *Insite* at paras 1 to 19.
[443] *Insite* at para 121.
[444] *Insite* at para 113.

charges would not apply to the Insite staff.[445]

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*.[446] 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 Ontario Court of Appeal also upheld the finding that section 7 of the *Charter* does not contain a fundamental right to housing.[447] 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 particular circumstances of those living without shelter, and how their choices go to their dignity, autonomy and independence.[448]

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

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[445] *Insite* at paras 95-96.

[446] Thompson at 150-51. See also: Margot Young, "Section 7 and the Politics of Social Justice" (2005) 38 UBCLR 539-560.

[447] *Tanudjaja v Canada (Attorney General),* 2014 ONCA 852, at para 30.

[448] 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.

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."[449]

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.[450] An infringement of section 7 will offend the principles of fundamental justice if it violates the "basic tenets of our legal system."[451] Deprivations of the right to life, liberty and security of the 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."[452]

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?[453] 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*?[454] 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

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[449] *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.
[450] *Ref Re s 94(2) of Motor Vehicle Act (BC*), [1985] 2 SCR 486.
[451] *R v S(RJ),* [1995] 1 SCR 451 at 488.
[452] *Godbout v Longeueil (City),* [1997] 3 SCR 844 at para 74.
[453] *Rodriguez v British Columbia (Attorney General),* [1993] 3 SCR 519, 107 DLR (4th) 342.
[454] *Canadian Foundation for Children, Youth & the Law v Canada (Attorney General*), [2004] 1 SCR 76 at para 16.

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?[455]

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*.[456] 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.[457] 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).[458] 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 necessary to or inconsistent with the state objectives underlying the legislation.[459] The SCC found that the Minister's refusal to grant the exemption was arbitrary, no matter which meaning of the term was used.[460] The refusal to grant the exemption undermined the *CDSA*'s objectives of public health and safety.[461] 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."[462] The court noted that its findings that the actions were

[455] *Insite*, at para 143.
[456] *Insite* at para 117.
[457] *Insite* at paras 119-125.
[458] *Insite* at para 128.
[459] *Insite* at paras 130-132.
[460] *Insite* at para 132.
[461] *Insite* at para 132.
[462] *Insite* at para 133.

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.[463]

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.[464] 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.[465]

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.[466]

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[463] *Insite* at para 136.

[464] *Tanudjaja v Canada (Attorney General)* (Amended Notice of Application November 15, 2011) at para 34.

[465] *Tanudjaja v Canada (Attorney General)* (Factum of the Respondent (Moving Party) May 14, 2013) at para 89.

[466] *Charter of Rights and Freedoms*, section 15(1).

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."[467] 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:[468]

> 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.

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)*[469] 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

[467] Justice McIntyre in *Andrews*.
[468] 2008 SCC 41 [*Kapp*].
[469] [1999] 1 SCR 497 [*Law*].

analysis.[470] 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."[471]

In *Ermineskin Indian Band and Nation v Canada,*[472] 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.*[473] Further, *Ermineskin* provided that the "broader context of a distinction"[474] 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."[475]

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:[476]

> (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.

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

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[470] 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.
[471] *Kapp*, para 17.
[472] 2009 SCC 9 [*Ermineskin*].
[473] [1989] 1 SCR 1296.
[474] *Ermineskin* at para 193.
[475] J Koshan and J Watson-Hamilton, "The End of Law: A New Framework for Analyzing Section 15(1) Charter Challenges" ABlawg, Online: http://ablawg.ca/wp-content/uploads/2009/02/blog_jwh_jk_ermineskin_feb2009_final.pdf [Koshan and Watson-Hamilton].
[476] As summarized in *Kapp* at para 19.

> human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.[477]

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).[478] In *Kapp,* the court acknowledged the difficulties created in *Law* by the "attempt in *Law* to employ human dignity *as a legal test*"[479] (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.[480] Thus, although dignity had a large role in *Law,* its role after *Kapp* in section 15(1) jurisprudence was left unsettled in *Kapp*.[481] However, as noted by J. Koshan and J. Watson-Hamilton, "the phrase 'human dignity' is never mentioned in *Ermineskin*."[482] Further, none of the four contextual factors from *Law* are used.

In *Withler v Canada (Attorney General),*[483] 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?[484]

The *Withler* case provides guidance on comparator groups; who is the group to which we compare the treatment, so as 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 sought" except for the personal characteristic on which the

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[477] *Law* at para 51.
[478] 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.
[479] *Kapp* at para 19.
[480] *Kapp* at paras 21-22.
[481] 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.
[482] Koshan and Watson-Hamilton.
[483] 2011 SCC 12 [*Withler*].
[484] *Kapp* at para 17 and *Withler* at para 30.

claim was based.[485] 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:[486]

> [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*,[487] 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.[488] 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

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[485] *Hodge v Canada (Minister of Human Resources Development*, [2004] 3 SCR 357 at para 23.
[486] *Withler* at para 62.
[487] 2013 SCC 5 [*A*].
[488] 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.

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 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.[489]

[489] *A* at paras 291-311.

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.[490] 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 seems to recognize that the court is not going to focus merely on direct discrimination, but is also willing to focus on laws that are neutral on their face, but actually 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 discrimination, although they did note that they are not the only factors.[491]

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.[492]

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.[493] 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

[490] *A* at paras 325 and 327.
[491] *A* at paras 169 and 185.
[492] *A* at para 385.
[493] *A* at para 423.

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.[494]

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,[495]
- the distinction is based on an enumerated or analogous ground, and
- the distinction creates a disadvantage by perpetuating prejudice or stereotyping.[496]

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

494 *A* at para 216.
495 *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*].
496 *Kapp* at para 17 and *Withler* at para 30.

purely positive nor negative.[497] 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.[498]

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),*[499] 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,*[500] 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 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.[501] The Supreme Court stressed that it is more usual for cases dealing with under-inclusion to be examined under *Charter* section 15(1).[502] 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.[503] Thus, excluding individuals from a protective regime may contribute substantially to the violation of protected freedoms. The Supreme Court grounded the claim in fundamental

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[497] 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 221 [Jackman and Porter 2000].
[498] Jackman and Porter 2000 at 221.
[499] [1997] 3 SCR 624 [*Eldridge*].
[500] [2001] 3 SCR 1016 [*Dunmore*].
[501] *Dunmore* at para 19.
[502] *Dunmore* at para 28.
[503] *Dunmore* at para 20.

Charter freedoms rather than in access to a particular statutory regime.[504] 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.[505] 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.[506] This was also the case in *Dunmore.* Similarly, in 2003, in *Nova Scotia (Worker's Compensation Board) v Martin and Laseur,*[507] 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 legislature refuses to exercise its authority.'"[508] 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.[509] 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).[510]

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[504] *Dunmore* at para 24.
[505] *Dunmore* at paras 28-29.
[506] Bruce Porter, "Beyond Andrews: Substantive Equality and Positive Obligations after Eldridge and Vriend" (1998) 9(3) Const Forum 71 at 78-9 [Porter, 1998].
[507] *Nova Scotia (Workers' Compensation Board) v Martin and Nova Scotia (Workers' Compensation Board) v Laseur* 2003 SCC 54 [*Martin*].
[508] *Vriend* at para 60.
[509] Porter, 1998 at 79.
[510] Porter, 1998 at 79.

Timothy Macklem argues that the decision in *Vriend* coupled with the decision in *R v Morgentaler*,[511] illustrate that the *Charter* can be used to protect minorities from the consequences of the "absence of will on the part of the majority."[512] 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.[513]

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.[514] For example, in *Auton v (Guardian ad litem of) v British Columbia (Attorney General)*,[515] 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 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.[516] Hopefully, the SCC's

[511] *R v Morgentaler* (1988), 44 DLR 4th 385 (SCC).
[512] Timothy Macklem, "Vriend v. Alberta: Making the Private Public" (1999) 44 McGill Law Journal 197 at para 3 [Macklem].
[513] Macklem at paras 26 to 39.
[514] Wilkie and Gary at 47.
[515] 2004 SCC 78 [*Auton*].
[516] Wilkie and Gary at 49-50.

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;[517] sexual orientation;[518] marital status[519] and being a status Indian who is not living on a reserve.[520]

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.[521] Thus, the current emphasis in the equality jurisprudence could be on the stigmatization and marginalization of homeless or poor people.[522] Thus, poverty and homelessness would be recognized as analogous grounds of discrimination under *Charter* section 15(1).

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[517] *Andrews*.
[518] *Egan*.
[519] *Miron v Trudel.*
[520] *Corbiere v Canada (Minister of Indian and Northern Affairs),* [1999] 2 SCR 203 [*Corbiere*].
[521] Making the Connection.
[522] Rights-Based Strategies at 35.

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?.[523] 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:[524]

- 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.[525]

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."[526] The Court explained that the government has no legitimate interest in getting us to change constructively immutable characteristics in order to receive equal treatment."[527] 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

[523] *Law* at paras 29, 93.
[524] At paras 144-155.
[525] *Miron v Trudel*, at para 149.
[526] *Corbiere*, at para 5.
[527] *Corbiere*, at para 13.

distinguished from "social condition", or "source of income" which are currently recognized grounds of discrimination under several provincial and territorial human rights codes.[528] Poverty and homelessness do have a social dimension, such as exclusion, stigmatization and other discrimination-related consequences.[529] 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."[530]

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*[531] 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)*[532] 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)*[533] 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

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528 *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.
529 Rights-Based Strategies at 43.
530 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.
531 *Dartmouth/Halifax County Regional Housing Authority v Sparks* (1993), 101 DLR (4th) 224 (NSCA).
532 (2002), 59 OR (3d) 481 (CA), at para 78.
533 2009 FC 873, at paras 75-77.

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.[534]

One of the arguments of the applicants in the *Tanudjaja* case was that failure to provide adequate housing discriminates against homeless people.[535] 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.[536] 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.[537] 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.[538] The respondents argued that imposing such a positive obligation on the governments would have a "chilling effect on the development of public policy"[539] 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.[540] These two

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[534] *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).
[535] *Tanudjaja v Canada (Attorney General)* (Factum of the Applicants (Respondents on the Motion) May 27, 2013),at para 89.
[536] *Tanudjaja v Canada (Attorney General)* (Factum of the Respondent (Moving Party) the Attorney General of Ontario May 14, 2013), at para 23.
[537] *Tanudjaja v Canada (Attorney General)* (Factum of the Respondent (Moving Party) the Attorney General of Ontario May 14, 2013), at para 25.
[538] *Tanudjaja v Canada (Attorney General)* (Factum of the Respondent (Moving Party) the Attorney General of Ontario May 14, 2013), at para 15.
[539] *Tanudjaja v Canada (Attorney General)* (Factum of the Respondent (Moving Party) the Attorney General of Ontario May 14, 2013), at para 16.
[540] *Tanudjaja v Canada (Attorney General)* (Factum of the Respondent (Moving Party) the Attorney General of Ontario May 14, 2013), at para 16.

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 actually 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 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:[541]

> 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.

[541] 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 188 [Brodsky and Day 2002].

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.[542] 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.[543] 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):[544]

> 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.

[542] Rights-Based Strategies at 51.
[543] Brodsky and Day 2002 at 201.
[544] Brodsky and Day 2002 at 203.

In the opinion of Brodsky and Day, classic constitutionalism does not support substantive equality.[545] 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." [546]

Brodsky and Day highlight the movement of the courts in this direction.[547] Chief Justice Beverley McLachlin in *Andrews* said that the purpose of the *Charter* guarantee of equality is 'to 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

[545] Brodsky and Day 2002 at 204.
[546] Brodsky and Day 2002 at 206.
[547] Brodsky and Day 2002 at 207.

health care, access to education, and a minimum level of financial security.[548] 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."[549] 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."[550]

Errol Mendes discusses the serious systemic equality implications of welfare and pension laws and on women. He states:[551]

> 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

[548] *Mckinney v University of Guelph*, [1990] 3 SCR 229, 76 DLR (4th) 545 (SCC) [*McKinney*].
[549] *Mckinney,* at 582 (DLR).
[550] G(J).
[551] 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].

translate into poverty. If 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*,[552] 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.[553] 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…"[554] Writing for the Court in *Eldridge*, a case regarding the failure of the British Columbia government to provide sign language

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[552] *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.
[553] *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).
[554] *Andrews,* at 38.

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.[555]

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.[556] The applicants identified that the impugned laws and policies have an adverse effect on:[557]

- 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 or not 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.[558]

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[555] *Eldridge,* at para 73.

[556] *Tanudjaja v Canada (Attorney General)* (Factum of the Applicants (Respondents on the Motion) May 27, 2013), at para 108, citing to *Law, Kapp* and *Withler*.

[557] *Tanudjaja v Canada (Attorney General)* (Factum of the Applicants (Respondents on the Motion) May 27, 2013), at para 122.

[558] *Tanudjaja v Canada (Attorney General)* (Factum of the Applicants (Respondents on the Motion) May 27, 2013) 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.

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.[559] Furthermore, imposing positive obligations under the *Charter* would have a chilling effect on the development of public policy.[560] 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 *Vriend*.[561] 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.[562]

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.

d. *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"

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[559] *Tanudjaja v Canada (Attorney General) (*Reply Factum of the Respondent The Attorney General of Ontario May 27, 2013), at para 15.

[560] *Tanudjaja v Canada (Attorney General)* (Factum of the Respondent The Attorney General of Ontario May 27, 2013), at para 16.

[561] *Tanudjaja v Canada (Attorney General)* (Factum of the Respondent The Attorney General of Ontario May 27, 2013), at paras 17 to 21.

[562] *Tanudjaja v Canada (Attorney General)* (Factum of the Applicants (Respondents on the Motion) May 27, 2013) at paras 115 to 116; *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 51.

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*.[563] 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."[564] 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:

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.

[563] [1986] 1 SCR 103 [*Oakes*].

[564] *Oakes,* at para 69.

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.[565] 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.[566]

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)*[567] 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 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,*[568] 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."[569] 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.[570] Further,

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[565] *Slaight Communications*, at [SCR] 1056-1057.
[566] At 999.
[567] [1999] NSJ No 297, leave to appeal to SCC refused, [1999] SCCA No 53.
[568] 2004 SCC 66, [2004] 3 SCR 381.
[569] Angus Gibbon, "Social Rights, Money Matters and Institutional Capacity" (2002-3) 14 National Journal of Constitutional Law 353 at 379 [Gibbon].
[570] Gibbon at 379.

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.[571] 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.[572] 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.[573] This, in turn, leads to the conclusion that legislatures are in a better position to resolve questions of allocation.[574] Thus, the conclusion of some judges is that the *Oakes* test (set out above) may not be suitable to apply in social rights cases.[575] 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.[576]

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*),[577] 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.[578] So, it appears that in some cases the door is open on the possibility that cost justifications could be successful but

[571] Gibbon at 383.
[572] Gibbon at 384.
[573] Gibbon at 385.
[574] Gibbon at 385.
[575] Gibbon at 386-7.
[576] Gibbon at 388.
[577] [1985] 1 SCR 177 [*Singh*].
[578] *Eldridge,* at para 87.

would at least have to be proven with more than merely "impressionistic evidence of increased expense."[579] 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.[580] They argue that litigation is not the only method for imposing positive obligations on the government in order to achieve substantive equality.[581] 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.[582]

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 groups making anti-poverty claims.[583]

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.[584] 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."[585]

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[579] *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights),* [1999] 3 SCR 868, at para 41.
[580] Wilkie and Gary at 55.
[581] Wilkie and Gary at 58. See also, Brodsky 2010 at 150-2.
[582] Wilkie and Gary at 59-60.
[583] David Wiseman, "Competence Concerns in Charter Adjudication: Countering the Anti-Poverty Incompetence Argument" (2006) 51 McGill Law Journal 503 at 545.
[584] Rights-Based Strategies at 53.
[585] Rights-Based Strategies at 53.

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.[586] 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.[587] 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.[588]

e. *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 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.[589] 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

[586] Rights-Based Strategies at 60.
[587] Rights-Based Strategies at 60-1.
[588] Rights-Based Strategies at 62.
[589] *R v Ferguson*, [2008] 1 SCR 96.

to accomplish, where this is deemed appropriate and just.[590] 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.[591]

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*.[592] 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[593] or to consult with affected minorities.[594] 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*.[595] 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.[596] 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."[597] David Wiseman argues that the novelty of the remedy in *Doucet-Boudreau* demonstrates that it is possible that the courts are competent to provide *Charter* remedies in anti-poverty cases.[598]

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

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590 *Doucet-Boudreau v Nova Scotia (Minister of Education*), [2003] 3 SCR 3 [*Doucet-Boudreau*].
591 *Schachter* at 1381 [SCR].
592 *Vriend* at para 54.
593 *Eldridge* at para 85.
594 *Eldridge* at para 96.
595 *Vriend* at paras 175-9.
596 *Doucet-Boudreau* at paras 66-70.
597 Doucet-Boudreau at paras 54-9.
598 Wiseman at 544.

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.[599] 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.[600]

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,*[601] 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.[602]

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 thirty. Those recipients under thirty could increase the amount of their payments by participating in education or work experience programs designed to help

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

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.[603] Several others point out that the insufficiency of evidence was a significant factor in the majority 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.[605] 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."[606] 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

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[603] Gwen Brodsky, "Gosselin v. Quebec (Attorney General): Autonomy with a Vengeance" (2003) 15(1) Canadian Journal of Women and the Law 194 [Brodsky 2003]. See also: Margot Young, "Why Rights Now? Law and Desperation" in *Poverty 2007* at 317-335; Gwen Brodsky, "The Subversion of Human Rights by Governments in Canada" in *Poverty 2007* at 355-372.

[604] 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.

[605] Brodsky 2003 at 195.

[606] Brodsky 2003 at 198, quoting from *Gosselin* at para 19.

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.[607] 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.

Justice Louise Arbour wrote one dissent in *Gosselin.*[608] 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.[609] 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

[607] Brodsky 2003 at 199.

[608] 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.

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

"common sense" and general assumptions to avoid the many gaps in the government's case.[610]

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.[611] 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[612] in order to change the majority holding in *Gosselin*. Further, the government argued in *Tanudjaja* that *Adams* does not represent even a small measure of incremental change towards the interpretation of *Charter* section 7 to impose positive obligations on the state.[613]

In discussing *Charter* section 7 in the *Gosselin* case, Gwen Brodsky notes some interesting comments of the Court.[614] The *living tree doctrine* is recognized as a tool for *Charter* interpretation. *Blencoe v British Columbia (Human Rights Commission)*[615] 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:[616]

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[610] 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.
[611] *Adams*, BCCA at para 75.
[612] *Gosselin* at paras 79 and 83.
[613] *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.
[614] Brodsky 2003 at 200.
[615] *Blencoe v British Columbia (Human Rights Commission),* [2000] 2 SCR 307.
[616] *Gosselin* at paras 82-84.

> 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 love."[617] However, the tough love resulted in some terrible conditions for Louise Gosselin. Gwen Brodsky and Shelagh Day describe her circumstances:[618]

> 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

[617] Brodsky 2003 at 207.

[618] Brodsky and Day 2002.

> 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

While the Canadian jurisprudence to date has not been particularly helpful with regard to a right to housing, there has been a successful case involving by-laws that have an adverse effect on homeless people. That is, the *Charter* has been successful in providing a shield for homeless individuals who suffer the adverse consequences of being charged with by-law infractions that result from their being homeless. Anti-poverty activists argue that these bylaws create a hierarchy of rights whereby maintaining safe and efficient movement of pedestrians trumps the need of panhandlers and homeless people to use public spaces for survival.[619]

For example, in Calgary, the *Public Behaviour By-law*[620] provides for fines of between $50 and $10,000 for spitting, urinating, defecating, loitering or having a visible knife in public. If the person cannot pay the fine, they are liable to imprisonment of up to six months. The *Parks and Pathways By-law* provides fines of between $25 and $1,000 for staying in park after 11 p.m. or camping or having fires after 10:30 p.m. or outside of a fire

[619] Raewyn Brewer "Deconstructing the Panhandling Norms: *Federated Anti-Poverty Groups of BC v Vancouver (City)* and Western Print Media" (2005 10 Appeal 25.

[620] City of Calgary, By-law No. 54M2006, *Public Behaviour By-law* November 20, 2006.

pit.[621]

Similar bylaws were challenged unsuccessfully in Ontario. In *R v Banks*,[622] the Ontario Court of Appeal dealt with a constitutional challenge to the Ontario *Safe Streets Act,* [623] 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.[624]

In Victoria, B.C., a group of homeless activists successfully launched a legal challenge to that city's anti-camping by-law. The litigants took a different approach to the *Charter* challenge than those in *Banks*. The advocates argued that the by-law infringed the *Charter* section 7 right to life, liberty and security of the person, because homeless people should be able to sleep in a public space with shelter from the elements when they have no place to sleep.[625]

In *Adams*, Justice Ross relied on several important facts in order to prepare her decision. First, there are over 1,000 homeless persons living in Victoria, but there are only 141 shelter beds available most times of the year (with an increase to 326 beds in extreme conditions).[626] Although there is a small number of homeless people who choose not to use shelters, Justice Ross concluded that "a significant number of people in the City of Victoria have no choice but to sleep outside."[627] There was evidence about the demographics of homeless people in Victoria: at least 40% of Victoria's homeless are mentally ill, at least 50%

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[621] City of Calgary, By-law No. 20M2003, *Parks and Pathways By-law* June 21, 2004.
[622] 2007 ONCA 19, application for leave to appeal to SCC dismissed 23 August 2007, 2007 CanLII 37182 (SCC) [*Banks*].
[623] 1999 SO 1999 c8.
[624] *Banks* at para 88. Arguments based on *Charter* sections 2(a) and 15 were also ultimately unsuccessful.
[625] *Victoria (City) v Adams* 2008 BCSC 1363 [*Adams* 2008] See also: Jeff Bell, "Homeless Camping Case Makes it in Court" 04 March 2008 Victoria Times Colonist online: http://www.canada.com/victoriatimescolonist/news/story.html?id=8209b51c-e197-47d6-a3ec-13cb2b4ea453&k=42288; Kendra Milne (2006) "Municipal Regulation of Public Spaces: Effects on Section 7 Charter Rights" 11 Appeal: Review of Current Law and Law Reform 1-15.
[626] *Adams* 2008 at para 4.
[627] *Adams* 2008 at paras 5, 58.

have substance abuse problems and 25% have both issues.[628] A disproportionate number of homeless people in Victoria are Indigenous, particularly youth.[629] Justice Ross also accepted evidence that the kind of overhead protection that was banned by the by-law was necessary to protect people who were sleeping outside from the elements. Without that protection they faced significant risks to life and health, such as hypothermia, skin and respiratory infections.[630]

Justice Ross noted that in order to prove a violation of *Charter* section 7, claimants must show:

> (1) a deprivation of the right to life, liberty or security of the person, and
> (2) that the deprivation violated the principles of fundamental justice.[631]

In examining the right to life, liberty and security of the person under *Charter* section 7, Justice Ross cited a number of international human rights instruments and reports that provide for the right to adequate housing (e.g., UDHR, Article 25(1); ICESCR, Article 11.1), and noted that these instruments could be used as an aid to interpreting the scope of section 7 of the *Charter*, relying on a number of Supreme Court of Canada decisions to this effect (e.g., *Baker*; *Burns*). In the end, however, Justice Ross did not make much use of these international instruments because this was a case involving government action as opposed to inaction. There was no need, therefore, to determine whether section 7 of the *Charter* imposes a positive obligation on the state to provide adequate housing, since the alleged violation in this case was the City's prohibition of certain activities and the impact of those prohibitions and their associated penalties on homeless persons in Victoria. The government's argument that "the Bylaws do not cause the Defendants to be homeless; hence, the condition in which they find themselves is not the result of state action" was therefore rejected.[632]

Justice Ross found that the by-laws violated not only security of the person, but also

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[628] *Adams* 2008 at para 44.
[629] *Adams* 2008 at para 60.
[630] *Adams* 2008 at para 67.
[631] *Adams* 2008 at para 76.
[632] *Adams* 2008 at para 81.

the right to life itself by exposing homeless persons to the risk of serious health problems and death. Deprivation of bodily or psychological integrity is the very definition of security of the person under section 7 of the *Charter* (e.g., *Morgentaler, Rodriguez v. British Columbia (Attorney General).*[633] Thus, "the homeless person is left to choose between a breach of the Bylaws in order to obtain adequate shelter or inadequate shelter exposing him or her to increased risks to significant health problems or even death".[634] The first requirement under section 7 of the *Charter* was made out.

In addressing whether the second requirement was met ("in accordance with the principles of fundamental justice"), Justice Ross noted that laws which are overbroad or arbitrary will not be in accordance with these principles.[635] She examined the rationale offered for the by-laws, which included protecting parks from damage or harm, ensuring that parks are available for public use and enjoyment, and public health considerations.[636] Justice Ross found that these rationales were not furthered by the by-laws in question, as "[t]here is no evidence and no reason to believe that any of the damage described would be increased if homeless people were allowed to cover themselves with cardboard boxes or other forms of overhead protection while they slept."[637] Concerns about litter and drug paraphernalia were also seen to be unconnected to the ban on temporary shelters. The by-laws were therefore held to be arbitrary. Further, "there are any number of less restrictive alternatives that would further the City's concerns; for example, requiring the overhead protection to be taken down every morning, and creating certain zones in sensitive park regions where sleeping was not permitted."[638] The by-laws were also held to be overbroad.

Having found a violation of the principles of fundamental justice, Justice Ross noted that only in rare or extraordinary circumstances would such a violation be justified as a reasonable limit under section 1 of the *Charter*. While finding that preservation of parks was

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[633] [1993] 3 SCR 519 [*Rodriguez*].
[634] *Adams* 2008 at para 153.
[635] 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.
[636] *Adams* 2008 at para 172.
[637] *Adams* 2008 at para 193.
[638] *Adams* 2008 at para 185.

a sufficiently important objective, the earlier findings of overbreadth and arbitrariness meant that the by-laws were not minimally impairing of the rights of homeless persons, as required by *R v Oakes*.[639]

In the end, Justice Ross found there was a violation of section 7 of the *Charter* that could not be justified by the City. She granted a declaration "that the Bylaws are of no force and effect insofar as they apply to prevent homeless people from erecting temporary shelter" and declined to suspend this remedy, giving it immediate effect.[640]

In response to this case, the City Council of Victoria passed an amendment to its parks regulation restricting camping in its parts form 7 p.m. to 7 a.m. In addition, the amended by-law forbids camping at a number of locations, such as playgrounds, sports fields, footpaths, park roads or special event locations.

In 2009, the City of Victoria appealed this decision to the British Columbia Court of Appeal.[641] While the Court of Appeal upheld the trial court decision, it appears to have cast the issues somewhat more narrowly. The Court of Appeal states the issues to be:

> Issues on Appeal
> [58] Based on all of these submissions, the issues in this appeal may be summarized as follows:
>
> (a) Is the decision of the trial judge an improper intrusion into the policy decisions of elected officials?
> (b) Did the trial judge err in finding that the Bylaw provisions in question violate s. 7 of the Charter?
>
> (i) Is there sufficient state action to engage s. 7 of the Charter?
> (ii) Is the state action the cause of the deprivation?
> (iii) Does the order grant a positive benefit to the respondents?
> (iv) Is the claim about property rights?
> (v) Is there an interference with life, liberty and security of the person?
> (vi) Did the trial judge err in the interpretation and application of the principles of arbitrariness and overbreadth?

[639] [1986] 1 SCR 103.
[640] *Adams* 2008 at para 237.
[641] *Victoria (City) v Adams,* 2009 BCCA 563 [Adams 2009].

> (c) Did the trial judge err by failing to hold that the Bylaws are saved by s. 1 as they are a reasonable limit that is demonstrably justified in a free and democratic society?
> (d) Did the trial judge err in ordering the remedy she did?

The Court of Appeal upheld the trial judge's conclusion that there was sufficient state action to engage *Charter* section 7. Further, the trial judge was correct in concluding that the bylaws were the cause of the deprivation suffered by Adams and the rest of the respondents. The Trial Judge's factual finding that there were insufficient shelter spaces did not turn the claim into that of a right to shelter that would impose positive obligations on the City to provide adequate alternative shelter. The Court agreed that the bylaw prohibiting erection of temporary shelters violated the right to life, liberty and security of the person under *Charter* section 7. In the result, the court held that while the trial judge had erred in concluding that the bylaws were arbitrary, there were indeed overboard and thus the deprivation of the respondents' rights was not in accordance with the principles of fundamental justice. Thus, *Charter* section 7 was breached.[642] Further, the bylaws were not saved by *Charter* section 1.

The Court of Appeal ordered that the final remedy be varied as follows:[643]

> (a) Sections 14(1)(d) and 16(1) of the Parks Regulation Bylaw No. 07-059 violate s. 7 of the Canadian Charter of Rights and Freedoms in that they deprive homeless people of life, liberty and security of the person in a manner not in accordance with the principles of fundamental justice, and are not saved by s. 1 of the Charter.
> (b) Sections 14(1)(d) and 16(1) of the Parks Regulation Bylaw No. 07-059 are inoperative insofar and only insofar as they apply to prevent homeless people from erecting temporary overnight shelter in parks when the number of homeless people exceeds the number of available shelter beds in the City of Victoria.
> (c) The Supreme Court of British Columbia may terminate this declaration on the application of the City of Victoria, upon being satisfied that sections 14(1)(d) and 16(1) no longer violate s. 7 of the Canadian Charter of Rights and Freedoms.

[642] *Adams* 2009 at para 124.
[643] *Adams* 2009 at para 166.

These cases are significant in that the implications of government action on homeless people were recognized as being subject to the *Charter*. However, it must be kept in mind that the interpretation of the right to security of the person in them was driven by a "limited negative rights framework" resulting in a narrow construction of social and economic rights that may discourage future arguments from including social economic rights under section 7.[644] Likewise, Martha Jackman has criticized this case as reinforcing rather than challenging the traditional positive/negative rights framework.[645]

[644] Marie-Eve Sylvestre, "The Past, Present and Future of Section 7 of the Canadian Charter of Rights and Freedoms: Marking the 25th Anniversary of *Re BC Motor Vehicle Act*, [1985] 2 SCR 486. The Redistributive Potential of Section 7 of the Charter: Incorporating Socio-Economic Context in Criminal Law and in the Adjudication of Rights" (2011-12) 42 Ottawa L Rev 389 at 404.
[645] Jackman 2010 at 291.

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."[646] 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.

[646] 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.

Third, the 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.

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. These can be changed at the whim of the government.

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.

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.

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

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 II

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:

(a) assist in the preparation of Canada's reports under such procedures;
(b) actively consult with non-governmental organizations representative of vulnerable and disadvantaged groups, and encourage governments to engage in similar consultations;
(c) 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
(d) 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 III

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 section 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 representative organizations 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 organizations 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 IV

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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This Handbook is highly recommended source to be read in its entirety. It was published in 2020 and co-authored by Bruce Porter, Executive Director of the Social Rights Advocacy Centre, and a leading Canadian and international expert on the right to housing. It provides an overview of the economic, social and cultural rights systems, cases and challenges around the world, including:

> Part I of the Handbook discusses and analyzes THE HUMAN RIGHTS FRAMEWORK FOR ESCR, in particular: the international human rights system (Chapter 1); the International Covenant on Economic, Social and Cultural Rights (ICESCR) and its Optional Protocol (Chapter 2); the African system (Chapter 3); the European system (Chapter 4); and the Inter-American System (Chapter 5).
> Part II of the Handbook discusses the content of each of the rights granted under the ICESCR, including the Right to Adequate Housing (Chapter 10).
> Part III of the Handbook discusses the ICESCR minimum core and reasonableness standards (Chapter 13); ICESCR Progressive realization using maximum available resources: the accountability challenge (Chapter 14); the Interdependence of human rights (Chapter 15); Advancing economic and social

rights through national human rights institutions (Chapter 16); Economic policy and human rights (Chapter 17); The 2030 Agenda for Sustainable Development: opportunity or threat for economic, social and cultural rights? (Chapter 18); The climate crisis: litigation and economic, social and cultural rights (Chapter 19).

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B. Right to Housing

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II. Canadian Charter of Rights and Freedoms

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

Sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* give life to Canada's international human rights obligations and provide for their enforceability by Canadian courts. Unfortunately, Canadian courts have been reluctant to interpret these sections as providing for a right to housing.

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

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