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PROGRESSIVE REALIZATION OF THE RIGHT TO ADEQUATE HOUSING: A LITERATURE REVIEW

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THE NATIONAL
RIGHT TO HOUSING
NETWORK

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Executive Summary

In 2019, the Government of Canada passed its first right to adequate housing legislation establishing a National Housing Council, review panels, and Federal Housing Advocate. The legislation, entitled the *National Housing Strategy Act* (NHTA), invokes Canada's commitment to the International Covenant on Economic, Social, and Cultural Rights and presents a transformative paradigm shift in which the experiences and voices of rights-holders are centred in the development of Canada's housing and homelessness laws, policies, and programs.

This paper has been commissioned by the National Housing Council to review relevant research on the progressive realization of the right to adequate housing, with particular attention paid to implementation and avenues to progressively realize this right within the Canadian context. Recognizing that this is an evolving area of research—particularly when it comes to applying the right to adequate housing—the authors of this literature review draw from academic analyses, international human rights monitoring bodies and recommendations, and transnational best practices. They also draw from a meeting they convened in July 2021, where international and domestic housing and human rights experts—alongside members of the National Housing Council's Working Group on Progressive Realization of the Right to

Adequate Housing—explored key research questions and resources.

What is the right to adequate housing?

The right to adequate housing as articulated in the NHTA is presented as a mechanism by which the *International Covenant on Economic, Social, and Cultural Rights* (ICESCR) is implemented domestically. General Comment No. 4, developed by the Committee on Economic, Social and Cultural Rights, provides a framework of the seven essential features of the right, including:

- (i) legal security of tenure (which means legal protection of tenants from things like eviction)
- (ii) availability of services and materials
- (iii) affordability
- (iv) habitability
- (v) accessibility
- (vi) location
- (vii) cultural adequacy.¹

In fact, countries like Scotland and New Zealand have already used these elements to review the effectiveness of their housing strategies—but critically, the right to adequate housing has evolved beyond the 7 components and is now understood

¹ Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4: The right to adequate housing (Art. 11 (1) of the Covenant)* (13 December 1991) E/1992/23, Online at:

<<https://www.refworld.org/docid/47a7079a1.html>>, at para 7 [General Comment No. 4].

more broadly as the **right to live in security, peace, and dignity**. The right to adequate housing goes beyond ensuring that people have access to four walls and a roof and is grounded in the concept of dignity as experienced by rights-claimants. It requires legal protections and addresses larger financial systems, taxation measures, and regulation of financial actors.

At the core of the literature on the right to adequate housing is the key concept of a **dialogic and participatory approach** which requires governments to genuinely engage with affected communities and draw on commentary and recommendations from international human rights bodies (like UN treaty bodies and Special Rapporteurs). In practical application, this means centring rights-claimants in participatory processes throughout decision- and policy-making; for example, the Council could urgently recommend a process where all levels of government come together to discuss implementation of a certain housing remedy with rights-claimants.

Intersections of the right to adequate housing with Canada's other international commitments

Canada has ratified a number of human rights conventions including the *UN Convention on the Rights of the Child* (CRC), *Convention on the Elimination of All forms of Racism* (CERD), *Convention for the Elimination of Discrimination Against Women* (CEDAW), *Convention on the Rights of Persons with Disabilities* (CRPD),

and *UN Declaration on the Rights of Indigenous Peoples* (the Declaration)—all of which also include a commitment to the right to adequate housing. Canada has also ratified three optional protocols which provide Inquiry and Complaints procedures for the *Convention on the Rights of Persons with Disabilities*, the *Convention on the Elimination of Discrimination Against Women*, and the *Convention on Civil and Political Rights*. Importantly, recommendations through these intersecting treaties and optional protocols have been, and will continue to be, made to Canada that are critical for the Council, including the Cecilia Kell v. Canada² case about access to housing for Indigenous women in Northern Canada.

Moreover, while Canada has not ratified the Optional Protocol for the *Convention on Economic, Social, and Cultural Rights*, literature suggests that Canada can still look to the complaints and decisions of other countries to understand how the *International Covenant on Economic, Social, and Cultural Rights* could be applied under the *National Housing Strategy Act*.

Intersecting Indigenous rights

Given that the authors of this paper are all settlers, we encourage readers to engage with the complimentary research conducted by Indigenous authors (and commissioned by the National Housing Council's Progressive Realization Working Group) on the intersections of housing rights and Indigenous rights. This work will be critically important as First Nations,

² Jessie Hohmann, Lolita Buckner Inniss, and Enzamaría Tramontana, "Cecilia Kell v Canada" in

Loveday Hodson and Troy Lavers (eds.), *Feminist Judgments in International Law* (Hart 2019).

Métis, and Inuit persons disproportionately bear the brunt of Canada's housing crisis. Métis, Inuit, and many First Nations peoples do not live on reserve, but instead in large and small urban, rural, northern, and/or remote areas. The result is that many Indigenous peoples are not covered or addressed by treaty and legal processes—including those that may protect the right to adequate housing.

There is a gap in literature on the right to adequate housing and its intersections with Indigenous rights in Canada, though the work of the Council in this area is anticipated to be heavily influenced by Bill C-15 on implementing the UN Declaration on the Rights of Indigenous Peoples. In the meantime, we can also look to authoritative guidance in: the UN Special Rapporteur on the right to adequate housing's thematic report on the right to housing and Indigenous Peoples,³ the [National Inquiry into Missing and Murdered Indigenous Women and Girls'](#) final report and Calls to Justice, and the [Truth and Reconciliation Commission of Canada's reports](#) and 94 Calls to Action.

Applying the right to adequate housing: How Canada is doing to meet international human rights law

There is a wealth of recommendations from UN authorities, including UN treaty bodies and Special Rapporteurs on

measures required to bring Canadian law, policies, and programs in line with the right to adequate housing. For example, the UN Committee on Economic, Social, and Cultural Rights (CESCR, or Committee on ESC Rights) has commented on taxation and financialization of housing, and recommended that Canada, “ensure the mobilization of resources sufficient for implementing economic, social and cultural rights, with special attention paid to disadvantaged and marginalized individuals and groups.”⁴ Other key recommendations have been to address the lack of social housing units developed through Canada's National Housing Strategy, and to remedy Canada's failure to address widespread homelessness as an urgent violation of the right to life and health as well as the human right to adequate housing.

The National Housing Council, review panels, and Federal Housing Advocate will have the new role of hearing from rights-claimants, assessing whether or not the Government of Canada has violated the right to adequate housing, and identifying measures necessary to address systemic barriers (via recommendations to the relevant Minister). The standards that will be invoked to do this include **a standard of reasonableness** for assessing compliance with progressive realization under the ICESCR (best defined in a seminal South African case called *Grootboom*⁵). This requires that housing

³ UN General Assembly, Report of the Special Rapporteur on adequate housing (17 July 2019) A/74/183, Online at: <<https://undocs.org/A/74/183>> [UN Special Rapporteur Report on the Right to Housing of Indigenous Peoples].

⁴ Committee on Economic, Social and Cultural Rights (CESCR), *Concluding observations on the sixth periodic report of Canada* (23 March 2016)

E/C.12/CAN/CO/6, Online at: <<https://undocs.org/E/C.12/CAN/CO/6>>

⁵ *Grootboom and Others v Government of the Republic of South Africa and Others* - Constitutional Court Order (CCT38/00), 2000 ZACC 14.

policies: respond to the circumstances of the claimants and ensure their human dignity; target and prioritize those in greatest need; address underlying systemic racism, colonization and socioeconomic inequality; adopt a comprehensive approach, so as to meet a diversity of needs; ensure participation and meaningful engagement with rights-holders; and ensure cooperation and coordination among all orders of government.

Another key standard for consideration is that of a **maximum of available resources**, which looks at whether Canada’s budgeting, programming, taxation measures, goals, and targets measure up to its international and domestic commitments to eliminate homelessness and realize the right to adequate housing within the shortest possible time based on available resources. This standard, alongside relevant recommendations from UN agencies, organizations, and experts—and especially rights-holders—will be particularly important for the National Housing Council to consider as it reviews Canada’s National Housing Strategy.

Metrics and best practices in measuring the right to adequate housing

Two key models to measure the right to adequate housing include the OPERA method—to analyze the outcomes, policy efforts, resources, and assessment of government efforts alongside human rights obligations—and the “process”,

“structural”, and “outcomes” indicators approach. Both methodologies look not only at numbers, but also lived experience and access to justice—i.e., whether rights claimants are genuinely able to exercise their human right to adequate housing and hold governments to account. As outlined in the literature review, many human rights investigations in other countries have been undertaken using the OPERA method.

Federal, provincial, and territorial partnerships

Across the literature is evidence that the biggest barrier to implementation of the right to adequate housing in Canada is its jurisdictional divides. These are often used as a shield or defence—by various levels of government—to prevent the meaningful implementation of the right to adequate housing. Instead, however, the right to adequate housing can be used as a framework through which responsibilities can be clearly allocated, and the right realized through cooperation among different levels of government.

Collaboration can be ensured, for example, through methods like inter-ministerial meetings on human rights, reviews of provincial and territorial action plans to progressively realize the right to adequate housing, and collaboration with municipal governments. In fact, it is a fundamental requirement of international human rights law that a State does not invoke domestic jurisdictional restrictions to justify non-performance of treaty obligations.⁶

⁶ *Vienna Convention on the Law of Treaties* (23 May 1969), Article 27.

Though many aspects of compliance with the right to adequate housing involve overlapping jurisdiction, federal spending power and its capacity to coordinate actions among different orders of government means that the federal government may almost always take action to ensure compliance with international human rights obligations. Such action may include making such compliance and collaboration a condition of receiving transfer payments. Thus, while the lack of jurisdictional coordination across levels of government to progressively realize the right to adequate housing is a major barrier to implementation, the right to adequate housing itself provides a unique framework to encourage interjurisdictional collaboration.

Government responsibilities

As novel legislation, the NHSA offers a unique opportunity to end the housing and homelessness crisis in Canada by applying the progressive realization of the right to adequate housing. The right to adequate housing transforms the relationship between rights holders and governments and requires Canada to:

- Start with **meaningfully engaging** with claimant community about their circumstances and dignity interests.
- Identify and **prioritize** those in the most extreme or vulnerable circumstances.
- **Engage in good faith** with treaty body recommendations.

- Address **systemic discrimination and socioeconomic inequality**, with particular attention paid to the rights of Indigenous peoples, women, persons with disabilities, persons relying on social assistance, racialized groups, and persons experiencing homelessness.
- Ensure a **“comprehensive” approach** by hearing from diverse perspectives.
- Exercise national leadership to allocate responsibilities and ensure co-operation of **all orders of government**, including through funding and inter-governmental agreements.
- Ensure **appropriate budgeting and resource allocation** based on "maximum of available resources" standard including all appropriate taxation measures.
- Ensure **access to justice** and accountability for the right to adequate housing and within all housing programs and areas of governance affecting the right to adequate housing.
- Ensure **independent monitoring** and assessment of progress.
- Use **all appropriate means**, including regulatory and legislative measures, to ensure that investment and actions of private and non-governmental actors contribute to and do not undermine progressive realization of the right to adequate housing (e.g., **regulate private actors** to address financialization of housing).

- Incorporate a "transformative" dimension to all legislation, regulation, planning, and decision-making to ensure the progressive realization of the right to adequate housing within **the shortest possible time**. This involves ensuring that housing policies (particularly national strategies on housing and homelessness) have goals grounded in, and consistent with international human rights law.
- **Avoid any retrogressive measures**, except where absolutely necessary and in times of crisis, with provisions to ensure that vulnerable groups are not affected.

The National Housing Council has a challenging task: alongside the Federal Housing Advocate and rights-claimants, members will make Canada's new and transformative approach to the right to adequate housing live. This important task is one that could genuinely end Canada's housing and homelessness crisis if the NHTA's core commitments to the right to adequate housing as recognized under international human rights law are treated, as proposed by the Supreme Court of Canada, not as "theoretical aspirations or legal luxuries, but moral imperatives and legal necessities."⁷

⁷ *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 para 1.

1

Introduction

This paper has been prepared for the National Housing Council with the objective of providing literature review of current and relevant research on the progressive realization of the right to adequate housing.

The National Housing Council has a critical role to play in the implementation of Canada's first right to adequate housing legislation. It is mandated to further the progressive realization of the right to adequate housing (often referred to as "the right to housing") by providing advice to the Minister of Housing and Diversity and Inclusion. In addition, the Council will establish review panels, made up of three of its members, to hold hearings into systemic issues referred to it by the

Federal Housing Advocate. The review panels will report to the Minister on their opinions, findings, and recommended measures. Both of these mandates are anchored in the federal government's historic recognition of the right to adequate housing as a fundamental human right in the *National Housing Strategy Act* (NHSA), and its commitment to its progressive realization, as recognized in the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).

The NHSA is Canada's first legislation to recognize and commit to the progressive realization of an economic, social, and cultural (ESC) right in the ICESCR (to which Canada is a "State party", i.e., it has formally

agreed to be bound by the treaty) and to establish participatory mechanisms and hearings for rights-claimants to play a central role in its implementation. While the adoption of a National Housing Strategy through a public policy document in 2017 indicated a new commitment to a rights-based approach to housing, the NHSA passed by Parliament in 2019—with several critical amendments at third reading—went much further. The legislation as adopted (with these critical amendments) recognized the right to adequate housing and provided what the government described as “robust accountability and reporting mechanisms” to ensure that Canada fulfills its “responsibility to meet one of the covenant’s core commitments: to progressively realize the right to adequate housing as part of an adequate standard of living for our citizens.”⁸

Guided by the legislative mandate of the National Housing Council, this research paper will draw on the most helpful and authoritative sources on the meaning and content of the obligation to progressively realize the right to adequate housing under international human rights law and how this applies in the Canadian context, focusing on the responsibilities and jurisdiction of the federal government.

Given that all authors of this paper are settlers, however, the National Housing Council also has commissioned Indigenous experts to explore implications of the right to adequate housing and implementation for First Nations, Métis, and Inuit populations. The authors encourage readers to review that publication and intend to complement the recommendations and analysis provided therein.

⁸ House of Commons Debates, Volume 148, Number 424, 1st Session, 42nd Parliament Official Report (Hansard), (May 31, 2019).

2

Overview, definitions, and authorities on the progressive realization of the right to adequate housing under the ICESCR



DEFINITIONS OF A FEW KEY TERMS FROM THE NHSA

The International Covenant on Economic, Social and Cultural Rights (ICESCR): A human rights treaty that was ratified by Canada in 1976 and is therefore binding under international law (but not directly enforceable as domestic law). The ICESCR is the primary (but certainly not the only) source of the right to adequate housing in international law.

Progressive Realization: Refers to the obligation in article 2(1) of the ICESCR requiring States “to take steps ... to the **maximum of its available resources**, with a view to achieving progressively **the full realization** of the rights recognized in the present Covenant **by all appropriate means, including** particularly the adoption of **legislative measures.**”



KEY INTERNATIONAL HUMAN RIGHTS AUTHORITIES

The UN Committee on Economic, Social and Cultural Rights (i.e., Committee on ESC Rights): A body of 18 independent experts established in 1985 to oversee the implementation of the ICESCR. The Committee is considered the most authoritative source for interpreting and applying the rights in the ICESCR. The Committee:

- Conducts periodic reviews of states that have ratified the Covenant and issues “concluding observations” identifying concerns and recommendations
- Adopts general comments to clarify States obligations under the Covenant
- Considers individual cases from countries that have ratified the Optional Protocol to the ICESCR and issues decisions (i.e., “views”)

The observations, general comments, and views of UN treaty monitoring bodies are not binding, but they are considered authoritative interpretations of binding human rights treaties and are frequently relied on by Canadian courts.

The Special Rapporteur on the right to adequate housing (i.e., the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context):

- An independent experts appointed by the UN Human Rights Council for a six-year term
- Advises and reports on human rights issues or country situations
- Presents thematic reports to the UN
- Undertakes country visits
- Sends communications to States and others regarding concerns of human rights violations⁹

2.1 The right to adequate housing as a fundamental human right affirmed in international human rights law

The *National Housing Strategy Act* (NHTSA) recognizes the right to adequate housing as a **“fundamental human right affirmed in international human rights law.”** It commits to “further the progressive realization of the right to adequate housing **as recognized in the International Covenant on Economic, Social and Cultural Rights.**” Rather than defining new statutory rights and commitments, the NHTSA relies on international human rights law to define the right to adequate housing and legislative commitments in line with existing obligations under international law.

The NHTSA draws its text directly from the language of the *Universal Declaration of Human Rights* (UDHR)¹⁰ to affirm that “housing is essential to the inherent dignity and well-being of the person and

⁹ OHCHR, *Special Procedures of the Human Rights Council*, Online at: <<https://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx>>

¹⁰ UN General Assembly, *Universal Declaration of Human Rights* (10 December 1948) 217 A (III), Online at: <<https://www.un.org/en/about-us/universal-declaration-of-human-rights>> [UDHR].

to building sustainable and inclusive communities.¹¹ The UDHR, the founding document of international human rights law, is premised on the recognition of the “**inherent dignity** and of the equal and inalienable rights of all members of the human family” and “faith **in fundamental human rights**, in the dignity and worth of the human person.”¹² It recognizes housing as a component of the right to an adequate standard of living “essential for the health and **well-being** of oneself and one’s family.”¹³

The right to adequate housing is about more than four walls and a roof.

As Jessie Hohmann notes, the clear link that the UDHR draws between the material benefit of the right to adequate housing and core human rights values such as dignity and equality is widely accepted among scholars and authorities as central to the meaning of the right to adequate housing.¹⁴

The UN Special Rapporteur on the right to adequate housing has emphasized that housing strategies must recognize the critical link between the right to adequate housing and the right to dignity:

*The lived experience of homelessness and inadequate housing challenges the very core of what it means to be human, assaulting dignity and threatening life itself. It is these experiences that make homelessness and inadequate housing violations of human rights and not merely programme failures.*¹⁵

Rights claimants and lived experts similarly emphasize the link between dignity and the right to adequate housing. As Emily Paradis notes, homelessness is the result of systemic failures of Canada’s social security systems, “but it also constitutes a betrayal of Canada’s espoused values of rights and human dignity.” She documents how people facing homelessness and their allies have long called for Canada to address inadequate housing and homelessness as a matter of human rights. “The provision of material supports such as housing and income is not sufficient, if these are provided in a way that violates human dignity and undermines the inherent worth of recipients.”¹⁶

In its engagement with communities regarding the implementation of the right to adequate housing in Canada, the NRHN has heard from claimant communities that advocacy should affirm the right to a home in which to live in dignity. In a

¹¹ *National Housing Strategy Act*, SC 2019, c 29, s 4.

¹² See UDHR, *supra* note 10, Preface.

¹³ *Ibid*, article 25 (pronouns corrected).

¹⁴ Jessie Hohmann, *The right to housing: Law, concepts, possibilities* (Oxford, United Kingdom; Portland, Oregon: Hart Publishing, 2013) at 16; Bullen, Darcel Bullen, “A Road to Home: The Right to Housing In Canada and Around the World.” *JL & Soc. Pol’y* 24 (2015) at 1–9.

¹⁵ UN General Assembly, *Report of the Special Rapporteur on adequate housing* (26 December

2019) A/HRC/43/43, Online at: <<https://undocs.org/A/HRC/43/43>> [UN Special Rapporteur Report in Guidelines to Implement the Right to Housing].

¹⁶ Emily Paradis, *If you build it, they will claim: Rights-based participation and accountability in Canada’s National Housing Strategy* (1 June 2018), Online at: <<https://maytree.com/wp-content/uploads/Paradis-submission-Rights-based-participation-and-accountability-1-June-2018.pdf>>.

workshop held by the NRHN on International Human Rights Day 2020, panelist Victoria Levack, a claimant in a major systemic case before the Nova Scotia Court of Appeal on the right to supported housing for persons with disabilities,¹⁷ was asked what her claim meant to her:

*It's about dignity...I don't think my government looks at me as a human being. I think they look at me as a problem. As something to be fixed. And that's not the case... I just want my humanity please. And I want a home.*¹⁸

Hohman has noted that in most jurisdictions that recognize the right to adequate housing, a connection is drawn not only to the ICESCR, but also to the more unified conception of human rights in the UDHR:

*There is no distinction drawn between economic, social and cultural rights or civil and political rights in the UDHR, and the impetus behind the inclusion of the right to an adequate standard of living reflects the drafters' recognition that the fulfilment of basic material needs is a precondition of a life lived in dignity and freedom.*¹⁹

Porter also emphasizes the importance of the NHSA's grounding in the unified structure of the UDHR, which affirms that all "fundamental rights" recognized in law must be subject to effective remedies.²⁰

He explains that the NHSA represents a significant rejection of the idea that ESC rights are mere policy aspirations and do not require access to justice and effective remedies. By affirming the right to adequate housing as a fundamental right linked to dignity and requiring accountability mechanisms, hearings, and effective remedies, the NHSA is transformative in the Canadian context. Porter argues that dominant legal culture in Canada has failed to recognize those who are homeless or living without adequate housing as "equal in dignity and rights" by denying them access to justice. The NHSA affirms a new, more inclusive, understanding of human rights based on a more unified conception that is now embraced within international human rights law, in which all human rights must be subject to access to justice and effective remedies.²¹

2.2 Accountability, participation, and dialogue with rights holders

The NHSA recognizes homelessness and inadequate housing in so affluent a country as Canada as a human rights problem, rooted not only in policy failures but in systemic failures to recognize some members of society as equal in dignity and rights. As with other human rights issues like systemic racism or colonization, the first step in addressing them is to recognize them as human rights issues

¹⁷ NSCA Case No. 486952. *Disability Rights Coalition, Beth Maclean, Olga Cain on behalf of Sheila Livingstone, Tammy Delaney on behalf of Joseph Delaney v. The Attorney General of Nova Scotia.*

¹⁸ NRHN, *Claiming the Right to Housing and the Rights of Persons with Disabilities to Community Inclusion* (14 December 2020), Online at: <<https://youtu.be/ijDv5zv2hNs>>.

¹⁹ See Jessie Hohmann, *supra* note 14, at 16.

²⁰ See UDHR, *supra* note 10, article 8.

²¹ Bruce Porter, *Implementing the right to adequate housing under the National Housing Strategy Act: The international human rights framework* (March 2021), Online at: <<http://www.socialrights.ca/2021/Porter%20-%20NHSA%20&%20IHRL.pdf>>.

and empower rights holders to claim their rights, ensuring meaningful accountability, and participation in decision-making.

As affirmed by the UN Special Rapporteur on adequate housing: “Participation is central to human rights-based housing strategies because it challenges exclusion and silencing. Strategies must recognize that violations of the right to adequate housing and other human rights emanate from failures of democratic accountability to people.”²²

The NHTSA therefore requires that the National Housing Strategy take into account “key principles of a human rights-based approach to housing” and “provide for participatory processes to ensure the ongoing inclusion and engagement of civil society, stakeholders, vulnerable groups and persons with lived experience of housing need, as well as those with lived experience of homelessness.”²³ It implements the principles of a rights-based approach laid out in the UN Special Rapporteur’s 2018 Report on rights-based housing strategies.²⁴

As described in the Special Rapporteur’s report, rights-based national housing strategies must ensure access to justice through effective claiming mechanisms to ensure that housing systems operate inclusively and effectively. Marginalized

persons must be empowered through access to justice to: draw attention to circumstances that have been neglected or ignored, identify laws or policies that are preventing them from realizing their right to adequate housing, and advance appropriate remedies or solutions to their housing problems.²⁵

The NHTSA was designed to provide all of these mechanisms but does not create a judicially enforceable right to adequate housing.²⁶ As described by Porter, the NHTSA represents a radical departure from the traditional adversarial legal system, which focuses on individual rights and enforceable court orders. He notes that the new system created by the NHTSA is “dialogic” rather than adversarial—a form of what has been labelled “democratic experimentalism”—which institutes a process in which the right to adequate housing is clarified and realized through an ongoing process rather than through a one-time court order. Rather than resolving individualized allegations of rights violations, the NHTSA mechanisms apply human rights norms to systemic issues.

Porter emphasizes, however, that this new dialogic approach will only work if it is based on a renewed commitment to international human rights norms as recently described by the Supreme Court

²² UN Human Rights Council, *Report of the Special Rapporteur on adequate housing* (January 15, 2018) A/HRC/37/53, Online at: <<https://undocs.org/A/HRC/37/53>>.

²³ NHTSA, s.5.

²⁴ UN Human Rights Council, *Report of the Special Rapporteur on adequate housing* (January 15, 2018) A/HRC/37/53, Online at: <<https://undocs.org/A/HRC/37/53>>. The Report describes the benefits of a rights-based approach in paras 9–15. For an assessment of the 2017 National Housing Strategy based on these principles, see Biss

and Raza, *Implementing the right to housing in Canada: Expanding the National Housing Strategy* (March 2021).

²⁵ *Ibid*, para 110.

²⁶ Michelle Oren, Rachele Alterman, and Yaffa Zilbershatz, “Housing rights in constitutional legislation: A conceptual classification” in Padraic Kenna (ed.), *Contemporary housing issues in a globalized world* (Routledge, 2016); Jessie Hohmann, “The right to housing,” in M Moos (ed.), *A Research Agenda for Housing* (Edward Elgar Publishing, 2019).

of Canada: “the phoenix that rose from the ashes of World War II ... These norms were not meant to be theoretical aspirations or legal luxuries but moral imperatives and legal necessities.”²⁷

Sandra Liebenberg has emphasized that a commitment to a rights-based dialogic and participatory approach as adopted by the NHSA should not be confused with mere consultation or other participatory processes. A rights-based approach relies on an equally strong commitment to legal norms that define the content of fundamental human rights.²⁸ This means that the authoritative commentary and jurisprudence from UN human rights bodies will be particularly important to understanding the nature of the “moral imperatives and legal necessities”²⁹ to which the federal government is committed under the NHSA. The point is not to enter into dialogue about the best policy but rather to clarify what the right to adequate housing requires in particular circumstances, through meaningful engagement with rights-claiming communities.

Sarah Hamill points to concerns that failing to provide for judicial enforcement of the right to adequate housing in Canada as in many other constitutional democracies may be misunderstood within Canadian legal culture as denying it the status of a fundamental human right,

caught between “deference and indifference.” This is a concern shared among all commentators on the NHSA. However, commentators agree that there is also a significant opportunity in the dialogic approach to ensure effective remedies to systemic issues that the judicial system has failed to provide.

As Hamill notes, the challenge advanced by claimants of the right to adequate housing in Canada “is really to an entire way of thinking, to a particular kind of legal culture.”³⁰ She suggests that the “future-oriented language” of progressive realization may combat the idea that the right to adequate housing is a private right to property, recognizing that “whether it is privately-owned, privately-rented, or public housing, the ideal form of housing is adequate housing.”³¹

The dialogic accountability mechanisms in the NHSA are modelled on similar processes at the UN which civil society organizations have relied on when they have been denied a place to claim their right to adequate housing at home.³² These processes have proved empowering, produced important recommendations, and given rise to a vibrant social movement in Canada for the right to adequate housing. However, concerns and recommendations from UN treaty bodies have been largely ignored by Canadian governments in the past.

²⁷ *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 para 1.

²⁸ Sandra Liebenberg, “Participatory justice in social rights adjudication” (2018) *Human Rights L. Rev.* at 623–649.

²⁹ *Nevsun*, *supra* note 27.

³⁰ Sarah Hamill, “Caught between deference and indifference: The right to housing in Canada” (2018) 7:1 *Can J Hum Rts* 67, Online at: <[https://cjhr.ca/caught-](https://cjhr.ca/caught-between-deference-and-indifference-the-right-to-housing-in-canada/)

[between-deference-and-indifference-the-right-to-housing-in-canada/](https://cjhr.ca/caught-between-deference-and-indifference-the-right-to-housing-in-canada/)>, at 91.

³¹ *Ibid*, at 91.

³² Emily Paradis, *If you build it, they will claim: Rights-based participation and accountability in Canada's National Housing Strategy* (1 June 2018), Online at: <<https://maytree.com/wp-content/uploads/Paradis-submission-Rights-based-participation-and-accountability-1-June-2018.pdf>>.

Commentators agree that it will be important for the National Housing Council to insist that the federal government implement its new legislative commitment to the right to adequate housing in good faith. International human rights norms that have been ignored in the past must be brought to life through the new processes and mechanisms under the NHTA. Concretely, this means that the application of the right to adequate housing under the NHTA will be constantly evolving and responding to processes put in place for continued discourse and participatory exchanges with rights-claimants.

FOCUSING ON SYSTEMIC ISSUES

Commentators agree that it will be important to the success of the dialogic approach in the NHTA to properly focus on systemic issues rather than on the kinds of individual claims that are better taken to courts and tribunals.

The Office of the High Commissioner on Human Rights has noted that systemic issues require a different understanding of obligations and responsibilities and more transformative remedies:

Violations of human rights can be either individually based or system based. The two types of violation require different remedial approaches. An individual violation affects one person or a small number of persons and is often perpetrated by one or a small number of individuals. Economic, social, and cultural rights are generally

more often the subject of systemic violations. Systemic violations have broad causes and effects, often arising from the ways in which society is organized politically, socially, and economically. It is often difficult to identify individual perpetrators who bear individual responsibility for systemic violations. The State as a whole will be responsible.³³

Porter argues that the dialogic approach in the NHTA provides a unique opportunity to develop effective remedial responses to systemic issues as defined by the OHCHR, engaging a “whole of government” approach that focuses on the need to transform a housing system that currently creates and sustains homelessness and inequality into one that realizes the right to adequate housing for all, through sustainable and inclusive communities.

2.3 The International Covenant on Economic, Social, and Cultural Rights and the commentary of the UN Committee on Economic, Social and Cultural Rights

The *International Covenant on Economic, Social and Cultural Rights* (ICESCR), like the UDHR, affirms in its preamble that economic and social rights “derive from the inherent dignity of the human person” and recognizes the right to adequate housing as a **component of the right to an adequate standard of living**. As stated in Article 11:

³³ OHCHR, *Economic, Social and Cultural Rights: Handbook for National Human Rights Institutions*.

*The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for [themselves and their] 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.*³⁴

Although the text of the ICESCR recognizes adequate housing as a component of the right to an adequate standard of living, the right to adequate housing is now universally recognized as an independent human right that is interdependent with the right to an adequate standard of living and other human rights. With the emergence of widespread homelessness in the 1980's, the UN General Assembly declared 1987 as the International Year of Shelter for the Homeless and adopted a resolution stating that “special attention [must be paid] to the question of the realization of the right to adequate housing.”³⁵

2.4 Defining the right to adequate housing: The right to a home in which to live in peace, security, and dignity

The Committee on Economic, Social and Cultural Rights (Committee on ESC Rights)—a body of 18 independent experts

established in 1985 to oversee the implementation of the ICESCR—is considered the most authoritative source for the interpretation and application of the rights in the ICESCR. It conducts periodic reviews of states that have ratified the Covenant and issues “concluding observations” which identify concerns and recommendations. Another critical function of treaty bodies such as the Committee on ESC Rights is to adopt General Comments to clarify States’ obligations under the human rights treaty they are charged with overseeing.

The Committee on ESC Rights’ General Comment No. 4, adopted in 1991, remains the single most authoritative interpretation of the right to adequate housing under the ICESCR. While the right to adequate housing has evolved in response to emerging issues (as clarified below), General Comment 4 is still considered foundational in laying out the definition of and key obligations associated with the right to adequate housing under the ICESCR. Scott Leckie’s 2000 assessment of the impact of General Comment 4 is arguably still true: that it is “the single most authoritative legal interpretation of what the right to adequate housing actually means in legal terms under international law and is certainly the most widely cited statement on the contents of the right.”³⁶

The Committee on ESC Rights’ succinct definition of the right to adequate housing

³⁴ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights* (16 December 1966) (entered into force 3 January 1976), Online at: <<https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>> [ICESCR].

³⁵ UN General Assembly (41st Session), *Realization of the right to adequate housing* (1987) A/RES/41/146, Online at: <<https://undocs.org/A/RES/41/146>>, at 198.

³⁶ Scott Leckie, *Legal resources for housing rights: International and national standards* (Centre on Housing Rights and Evictions, 2000) at 73.

affirms the link to dignity and security described above:

*In the Committee's view, the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity. Rather it should be seen as **the right to live somewhere in security, peace and dignity.***³⁷

Like the NHSA, General Comment 4 affirms that “the right to housing is integrally linked to other human rights and to the fundamental principles upon which the Covenant is premised.” The “inherent dignity of the human person” from which the rights in the Covenant are said to derive requires that the term “housing” be interpreted so as to account for a variety of other considerations, most importantly that the right to adequate housing should be ensured to all persons irrespective of income or access to economic resources.³⁸

The UN Special Rapporteur on the right to adequate housing has explained that the recognition of the intricate link between access to adequate housing and the enjoyment of all other rights, including the right to life, has been central to developments in many jurisdictions that have ensured access to justice for the right

to adequate housing as a component of the right to a dignified life.³⁹ The UN Human Rights Committee has recognized that homelessness in Canada has serious health consequences and may even lead to death; thus Canada must “take positive measures required by Article 6 [the right to life] to address this serious problem.”⁴⁰ In its General Comment 36 on the right to life, the Human Rights Committee established that States must “take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity,” including measures to address homelessness and maintain social housing programs.⁴¹

The right to a dignified life (*vida digna*, in Spanish) has been widely applied within the Inter-American human rights system in the context of housing and homelessness.⁴²

2.5 What is progressive realization?

Article 2(1) of the ICESCR includes key concepts—or standards—related to the progressive realization of the right to adequate housing:

³⁷ CESCR, *supra* note 1.

³⁸ *Ibid.*

³⁹ UN General Assembly, *Report of the Special Rapporteur on adequate housing* (8 August 2016) A/71/310, Online at: <<https://undocs.org/A/71/310>>.

⁴⁰ UN Human Rights Committee, *Concluding Observations: Canada* (7 April 1999) CCPR/C/79/Add.105, Online at: <<https://undocs.org/CCPR/C/79/Add.105>> at para 12.

⁴¹ UN Human Rights Committee, *General Comment No. 36, Article 6 (Right to Life)* (3 September 2019) CCPR/C/GC/35, Online at: <<https://undocs.org/CCPR/C/GC/36>>, at para 26.

⁴² OHCHR, *Statement to the General Assembly, presenting the report on "Right to life & right to housing: interconnected and indivisible"* (25 October 2016), Online at: <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20851&LangID=E>>.

*“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the **maximum of its available resources**, with a view to achieving progressively the **full realization** of the rights recognized in the present Covenant **by all appropriate means**, including particularly the **adoption of legislative measures**” (emphasis added).*⁴³

In earlier years, progressive realization was misunderstood as suggesting that States must simply make progress in realizing the right to adequate housing. Developed countries were seen to be in greater compliance with the right to adequate housing than less developed countries that had not progressed as far.

This misunderstanding ignored the critical requirements that States apply “the maximum of available resources” and “all appropriate means” to realize the right to adequate housing. General Comment 4, adopted by the Committee on ESC Rights in 1991, better established a framework for understanding what the commitment to the progressive realization of the right to adequate housing means.

The Committee on ESC Rights noted in General Comment 4 that while lack of adequate housing is a particular problem in countries with major resource and other constraints, “significant problems of

homelessness and inadequate housing also exist in some of the most economically developed societies.”⁴⁴

In fact, the prevalence of homelessness in an affluent country such as Canada is a particularly egregious violation of the right to adequate housing because it is not a result of scarce resources but rather of policy choices and a failure to allocate available resources to realize a fundamental human right.

As pointed out by Craig Scott, Canadian governments have often invoked averages and medians as evidence of compliance with the obligation to progressively realize ESC rights. However, **“that Canadians on average are not homeless... or can raise the children in a dignified way, says nothing about whose rights are being respected and whose are not.”**⁴⁵

General Comment 4 emphasized that the obligation of progressive realization should not be understood as an excuse to put off implementation of necessary measures to the future. Some obligations for the realization of the right to adequate housing are immediate while others may take some time and resources and require a plan or strategy and allocation of necessary resources. The extent to which a State is required to ensure access for all to adequate housing is commensurate with its capacity to do so.

The Committee summarized the obligation in General Comment 4 as follows: “In essence, the obligation is to demonstrate that, in aggregate, the

⁴³ See ICESCR, *supra* note 34.

⁴⁴ See General Comment No. 4, *supra* note 1.

⁴⁵ Craig Scott, Canada’s international human rights obligations and disadvantaged members of society: Finally into the spotlight? (1 January 1999) 10.4 Centre for Constitutional Studies at 105.

measures being taken are sufficient to realize the right for every individual in the shortest possible time in accordance with the maximum of available resources.”⁴⁶

In General Comment 4, the Committee also identified a number of immediate obligations for all States. The Committee emphasized that States require a housing strategy to ensure the progressive realization of the right to adequate housing based on **“extensive genuine consultation with, and participation by, all of those affected, including the homeless, the inadequately housed and their representatives.”**⁴⁷ This strategy should define objectives, goals, and timelines, identify available resources, measure progress through monitoring mechanisms, and establish responsibilities of relevant actors, ministries, and orders of government.⁴⁸

General Comment 4 also clarified that progressive realization of the right to adequate housing is not just about governments providing or funding housing directly. It requires governments to **use “all appropriate means, including legislation” to regulate housing markets and private actors** to ensure that investment and rental practices are consistent with the right to adequate housing.⁴⁹

States have immediate obligations to provide and ensure legal protections for housing rights, access to legal remedies for discrimination, protection from eviction

and unreasonable rent increases, standards for health and safety, etc.

Immediate obligations with respect to protections from eviction were further clarified in the Committee’s subsequent General Comment 7 on forced evictions. Importantly, the Committee established in that General Comment that:

*[Eviction] should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.*⁵⁰

General Comment 4 also identifies seven essential features of the right to adequate housing:

- (i) legal security of tenure,
- (ii) availability of services and materials,
- (iii) affordability,
- (iv) habitability,
- (v) accessibility,
- (vi) location, and
- (vii) cultural adequacy.”⁵¹

⁴⁶ See General Comment No. 4, *supra* note 1, para 14.

⁴⁷ See General Comment No. 4, *supra* note 1.

⁴⁸ *Ibid*, para 12.

⁴⁹ *Ibid*, para 14.

⁵⁰ CESCR, *General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions* (20 May 1997) E/1998/22, Online at: <<https://undocs.org/E/1998/22>>.

⁵¹ *Ibid*.

This list has been widely applied as a key set of indicators for assessing the adequacy of housing. It has been used effectively in Scotland⁵² and New Zealand,⁵³ for example, to assess compliance with the right to adequate housing.

2.6 Reports of the UN Special Rapporteur on the right to adequate housing

In addition to treaty monitoring bodies such as the UN Committee on Economic, Social and Cultural Rights, the UN human rights system also appoints independent experts or Special Rapporteurs to advise and report on certain human rights issues or country situations. Such experts are authorized to undertake country visits, to act on reported violations and concerns by sending communications to States and others, and to prepare and present two thematic reports each year. They help to clarify and develop international human rights norms and standards, raise public awareness, provide advice, and advocate

for greater compliance with international human rights.⁵⁴

The mandate of the UN Special Rapporteur on the right to adequate housing, created in 2000, was one of the earliest Special Rapporteur mandates to be established.⁵⁵ Since that time, Special Rapporteurs fulfilling that role have conducted country visits—including one to Canada in 2008—to meet with civil society representatives and government authorities and produce reports on the country's compliance with the Covenant. For example, in his report on his Mission to Canada, the UN Special Rapporteur expressed concern that the widely used measure of “core housing need” in Canada does not include several key elements of adequacy listed in General Comment 4, such as cultural adequacy.⁵⁶

Special Rapporteurs have written extensively on the interpretation of the right to adequate housing in thematic reports including reports on women and housing,⁵⁷ homelessness as a global human rights crisis,⁵⁸ the right to housing

⁵² Scottish Human Rights Commission, *Housing rights in practice: Lessons learned from Leith* (May 2020), Online at:

<<https://www.scottishhumanrights.com/media/2029/housin-project-report-vfinal-may-2020.pdf>>.

⁵³ Te Kāhui Tika Tangata Human Rights Commission, *Framework Guidelines on the right to a decent home in Aotearoa* (August 2021), Online at:

<https://www.hrc.co.nz/files/7416/2784/4778/Framework_Guidelines_on_the_Right_to_a_Decent_Home_in_Aotearoa_FINAL.pdf> and “Right to housing” (2010), Online at:

<https://www.hrc.co.nz/files/9214/2388/0508/HRNZ_10_right_to_housing.pdf>, at 205.

⁵⁴ OHCHR, *Special Procedures of the Human Rights Council*, Online at:

<<https://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx>>

⁵⁵ Office of the High Commissioner for Human Rights, *Commission on Human Rights Resolution 2000/9* (17 April 2000). Online at

<http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2000-9.doc>.

⁵⁶ UN Human Rights Council, *Report of the Special Rapporteur on adequate housing* (17 February 2009) A/HRC/10/7/Add.3, Online at:

<https://www.undocs.org/A/HRC/10/7/Add.3> [UN Special Rapporteur on his Mission to Canada].

⁵⁷ UN Human Rights Council, *Report of the Special Rapporteur on adequate housing* (26 December 2011) HRC/19/53, Online at:

<<https://www.undocs.org/A/HRC/19/53>> [UN Special Rapporteur Report on Women and the Right to Housing].

⁵⁸ UN Human Rights Council, *Report of the Special Rapporteur on adequate housing* (30 December 2015) A/HRC/31/54, Online at:

<https://undocs.org/A/HRC/31/54> [UN Special Rapporteur Report on Homelessness and Right to Life].

of persons with disabilities,⁵⁹ the components of human rights-based housing strategies,⁶⁰ the right to housing for persons in informal settlements and encampments,⁶¹ financialization of housing,⁶² access to justice for the right to housing,⁶³ the right to housing for Indigenous peoples,⁶⁴ and COVID-19 and the right to housing.⁶⁵ Three sets of “guidelines” have also been produced: the *Principles and guidelines on development based evictions and displacement*⁶⁶, *Guiding principles on security of tenure for the urban poor*⁶⁷, and *Guidelines for the*

implementation of the right to adequate housing.⁶⁸ The *Guidelines for the implementation of the right to adequate housing* and the report on rights-based housing strategies will be particularly helpful to the Council in providing advice on the National Housing Strategy. Moreover, the thematic report on access to justice for the right to adequate housing will be of particular relevance to review panels holding hearings, releasing findings and opinions, and recommending measures to address systemic housing issues.

⁵⁹ UN General Assembly, *Report of the Special Rapporteur on adequate housing* (12 July 2017) A/72/128, Online at: <<https://undocs.org/A/72/128>> [UN Special Rapporteur Report on the Right to Housing and Persons with Disabilities].

⁶⁰ UN Human Rights Council, *Report of the Special Rapporteur on adequate housing* (15 January 2018) A/HRC/37/53, Online at <<https://undocs.org/A/HRC/37/53>> [UN Special Rapporteur Report on the Right to Housing and on Human Rights Based Housing Strategies].

⁶¹ UN General Assembly, *Report of the Special Rapporteur on adequate housing* (19 September 2018) A/73/310/Rev.1, Online at: <<https://undocs.org/A/73/310/Rev.1>> [UN Special Rapporteur Report on Informal Settlements].

⁶² UN Human Rights Council, *Report of the Special Rapporteur on adequate housing* (18 January 2017) A/HRC/34/51, Online at: <<https://undocs.org/A/HRC/34/51>> [UN Special Rapporteur Report on Financialization of Housing].

⁶³ UN Human Rights Council, *Report of the Special Rapporteur on adequate housing* (15 January 2019) A/HRC/40/61, Online at: <<https://undocs.org/A/HRC/40/61>> [UN Special Rapporteur Report on Access to Justice].

⁶⁴ UN General Assembly, *Report of the Special Rapporteur on adequate housing* (17 July 2019) A/74/183, Online at: <<https://undocs.org/A/74/183>> [UN Special Rapporteur Report on the Right to Adequate Housing of Indigenous Peoples].

⁶⁵ UN General Assembly, *Report of the Special Rapporteur on adequate housing* (27 July 2020) A/75/148, Online at: <<https://www.undocs.org/A/75/148>> [UN Special Rapporteur Report on COVID-19 and the Right to Housing].

⁶⁶ UN General Assembly, *Basic principles and guidelines on development-based evictions and displacement* (2007) A/HRC/4/18, Online at: <https://www.ohchr.org/documents/issues/housing/guidelines_en.pdf>

⁶⁷ UN Human Rights Council, *Report of the Special Rapporteur on adequate housing* (30 December 2013) (A/HRC/25/54, Online at <<https://undocs.org/A/HRC/25/54>>.

⁶⁸ UN Human Rights Council, *Report of the Special Rapporteur on adequate housing* (26 December 2019) A/HRC/43/43, Online at: <<https://undocs.org/A/HRC/43/43>> [UN Special Rapporteur Report on Guidelines to Implement the Right to Housing].

KEY RESOURCES FROM THIS CHAPTER:

- General Comment No. 4 (which holds the elements and definition of the right to adequate housing): <https://www.refworld.org/docid/47a7079a1.html>
- UN Special Rapporteur report on guidelines for the implementation of the right to adequate housing: <https://undocs.org/A/HRC/43/43>
- UN Special Rapporteur report on rights-based housing strategies (which can be applied to Canada's National Housing Strategy): <https://undocs.org/A/HRC/37/53>
- UN Special Rapporteur report on access to justice for the right to adequate housing (which is particularly relevant for review panels): <https://undocs.org/A/HRC/40/61>

MODELS OF IMPLEMENTING THE RIGHT TO ADEQUATE HOUSING:

The methods by which Scotland⁶⁹ and New Zealand⁷⁰ have reflected the seven principles of the right to adequate housing in housing policy (as articulated in General Comment No. 4), provides interesting context to complement an assessment of Canada's National Housing Strategy and other housing policies—alongside an analysis of access to justice, financialization, and other key elements of the right to adequate housing as identified in General Comment No. 4.

⁶⁹ See Scottish Human Rights Commission, *supra* note 52.

⁷⁰ See Te Kāhui Tika Tangata Human Rights Commission, *supra* note 53.

CHAPTER SUMMARY

WHAT IS THE RIGHT TO ADEQUATE HOUSING?

A) The right to adequate housing under the NHSA relies on international human rights norms and standards which date back to the 1948 *Universal Declaration of Human Rights* and became a binding obligation when Canada ratified the *International Covenant on Economic, Social and Cultural Rights* in 1976. **Obligations are clarified and interpreted by human rights authorities** who issue commentary and findings which are not formally binding but considered authoritative and therefore essential to understanding State obligations. These authorities include:

- **The Committee on Economic, Social, and Cultural Rights (CESCR)**, which is mandated to clarify the content and meaning of international human rights law under the treaty they oversee (ICESCR), and the corresponding obligations of governments. They do this through: Concluding observations, General comments, and Views on individual petitions (see Chapter 6).
- **The Special Rapporteur on the right to adequate housing**, mandated to issue guidelines, thematic reports, country-specific reports, and communications to States to clarify issues, gaps, standards, norms, best practices, and more.

B) The **seven essential features** to the right to adequate housing include:

- i. **Legal security of tenure**
- ii. **Availability of services and materials**

- iii. **Affordability**
- iv. **Habitability**
- v. **Accessibility**
- vi. **Location**
- vii. **Cultural adequacy**

These elements are important and in fact have been used by other countries to measure success of housing strategies—but they must be understood in the larger context of dignity, access to justice, and financial systems.

C) The right to adequate housing is defined as **the equal right of all people to live somewhere in security, peace, and dignity**. It is integrally linked to the enjoyment of other fundamental human rights including the right to a dignified life and the right to equality.

As such, **it is essential to engage with rights-claimants**—or people facing housing need and homelessness—to determine what the right to adequate housing means in different circumstances and derive policy from the dignity issues they bring forth through a constantly evolving and participatory process.

Canada's *National Housing Strategy Act* (NHSA) affirms this inclusive rights-based approach to housing based on the *Universal Declaration of Human Rights* and the principle that rights claimants must have **access to justice and effective remedies**. It requires consultations and hearings with rights-claimants and recognizes that adequate housing is more than a material need—it includes fundamental human rights values and principles like dignity, justice, and equality.

3

The right to adequate housing of groups facing systemic discrimination

The right to non-discrimination and equality under the *International Covenant on Economic, Social, and Cultural Rights (ICESCR)* and the right to equal enjoyment of that right, is a key element of progressive realization of the right to adequate housing, as recognized in Article 2 of the Covenant, and cited in the context of many of Canada’s other ratified Covenants related to the right to adequate housing, as noted below. As demonstrated throughout the literature,

the right to adequate housing is different for Indigenous peoples, persons with disabilities, children, women, and gender-diverse persons, and other marginalized populations. Margot Young points out the need for creativity in approaching the right to adequate housing, indicating “desired housing outcomes must be appropriately and variously nuanced to the populations most vulnerable to housing insecurity.”⁷¹ Literature in Canada⁷² and

⁷¹ Margot Young, “Charter eviction: Litigating out of house and home” (2015) 24:1 *Journal of Law and Social Policy* 46–67 at 52.

⁷² Pierre Bosset, “Les droits économiques et sociaux: parents pauvres de la charte québécoise?” (1996) 75:4

from United Nations authorities⁷³ has further dictated that homelessness or social profiling, is, on its own, a ground of discrimination.

The right to adequate housing for children

is a feature of both the ICESCR and the *UN Convention on the Rights of the Child (CRC)*⁷⁴, to which Canada is a party. This Convention guarantees the right of every child to “a standard of living adequate for the child’s physical, mental, spiritual, moral and social development.” States in accordance with national conditions and within their means, “shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.”⁷⁵ The CRC also requires that “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”⁷⁶ This requirement is of particular importance to the administration of housing programs or to decisions related to the eviction of households with children in Canada, because the Supreme Court of Canada has

found that such decision-makers must consider the best interests of children as guaranteed under the CRC in order to ensure that their decisions are consistent with Canada’s commitments to international human rights.⁷⁷

The Committee for the Rights of Children (CRC Committee) has expressed concern about the extent of homelessness among families with children and about the circumstances of “street children” in Canada, noting that many are Indigenous.⁷⁸ Children’s right to adequate housing is also protected via Article 10 of the ICESCR: “[s]pecial protection should be accorded to mothers during a reasonable period before and after childbirth.” This includes a provision that “[s]pecial measures of protection and assistance should be taken on behalf of all children and young persons.”

These obligations have been affirmed by the Committee on ESC Rights in relation to protecting children from the effects of evictions. In such cases, “State obligations with regard to the right to adequate housing should be interpreted together with all other human rights obligations and, in particular, in the context of eviction, with the obligation to provide the family

1, Online at: <https://cbr.cba.org/index.php/cbr/article/view/3726>, at 592.

⁷³ UN General Assembly, *Report of the Special Rapporteur on extreme poverty and human rights* (4 August 2011) A/66/265, Online at: <https://www.undocs.org/A/66/265>, at para 82; CESCR, General Comment 20 (2009), Online at: <https://digitallibrary.un.org/record/659980?ln=en>.

⁷⁴ UN General Assembly, *Convention on the Rights of the Child* (20 November 1989), Online at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx> [CRC].

⁷⁵ *Ibid*, Article 27.

⁷⁶ *Ibid*, Article 3.1.

⁷⁷ *Baker v. Canada* (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817 paras 70-71; *Canada* (Minister of Citizenship and Immigration) v. *Vavilov*, 2019 SCC 65 at para 114.

⁷⁸ UN Committee on the Rights of the Child (CRC), *Concluding Observations: Canada* (27 October 2003) CRC/C/15/Add.215, Online at: <https://undocs.org/CRC/C/15/Add.215>, at paras 40, 42, 54, 55.

with the widest possible protection (art. 10 (1) of the Covenant).”⁷⁹

The CRC Committee has also commented on the right to adequate housing as it applies in both developed and less developed economies. In its General Comment No. 21, the CRC Committee observed that state actors must develop comprehensive, long-term national strategies on children living on the street using a holistic, child rights approach and addressing both prevention and responses in line with the Convention.⁸⁰

The right to adequate housing for racialized persons is similarly relevant to the ICESCR, as well as the *Convention on the Elimination of All forms of Racism (CERD)*⁸¹, which is also ratified by Canada. CERD guarantees the right to non-discrimination in access to housing and also affirms a substantive right to the equal enjoyment of the right to adequate housing and other ESC rights.⁸² The CERD Committee has recommended that greater attention be given to the right to adequate housing and other ESC rights of

Indigenous peoples and to poor quality housing as a root cause of child displacement.⁸³ It has not yet addressed in any focused way the significant issues of racial segregation and discrimination in housing in Canada, but its reviews of the United States provide authoritative sources about the nature of obligations on governments in Canada to address systemic inequality and discrimination in housing.⁸⁴ As Daniella Ikawa has stated, it is important for advocates of anti-discrimination doctrines in the international context to recognize that “[t]hose affected by violations of social rights are usually members of the most vulnerable groups in society. Poverty overlaps with discrimination, aggravating particular situations of vulnerability.”⁸⁵

The right to adequate housing for persons with disabilities is further identified in the ICESCR,⁸⁶ as well as the Articles 9, 19 and 28 of the *Convention on the Rights of Persons with Disabilities*

⁷⁹ CESCR, *Ben Djazia et al v Spain* E/C.12/61/D/5/2015 (*Djazia*) at para 15.4. See also the discussion of children’s right to housing in Sandra Liebenberg, “Taking stock: The jurisprudence on children’s socio-economic rights and its implications for government policy” (2004) 5:4 *ESR Review*.

⁸⁰ UN Committee on the Rights of the Child (CRC), General comment No. 17 (2013) on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (art. 31) (17 April 2013), Online at: <<https://www.refworld.org/docid/51ef9bcc4.html>>, at 1.

⁸¹ UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination* (21 December 1965), Online at: <<https://ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>> [ICERD].

⁸² *Ibid.*

⁸³ UN Committee on the Elimination of Racial Discrimination, *Concluding observations: Canada*, (4 April 2012) CERD/C/CAN/CO/19-20 at para 19; and

Concluding Observations: Canada (13 September 2017) CERD/C/CAN/CO/21-23 at para 28.

⁸⁴ UN Committee on the Elimination of Racial Discrimination (CERD), *Concluding observations: United States of America* (8 May 2008) CERD/C/USA/CO/6 at paras 16, 31; and *Concluding observations on the combined seventh to ninth periodic reports of the United States of America* (25 September 2014) C/USA/CO/7-9 at para 13.

⁸⁵ Daniela Ikawa, “The role of civil society organizations in the protection of social rights” (2020) *Research handbook on international law and social rights* (Binder, Hofbauer, Piovesan, Úbeda de Torres eds.), Online at: <https://www.academia.edu/44263474/The_role_of_civil_society_organizations_in_the_protection_of_social_rights>, at 304.

⁸⁶ CESCR, *General Comment No. 5: Persons with Disabilities* (9 December 1994), Online at: <<https://www.refworld.org/docid/4538838f0.html>>.

(CRPD),⁸⁷ and is also ratified by Canada. Critically, Article 19 of the CRPD requires that persons with disabilities have the opportunity to choose where and with whom they live and have access to a range of community support services to facilitate inclusion in the community and prevent isolation or segregation. States must adopt “effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right.”⁸⁸

In 2018, the Government of Canada acceded to the **Optional Protocol** to the *United Nations Convention on the Rights of Persons with Disabilities*,⁸⁹ meaning that the persons can submit complaints to the UN Committee on the Rights of Persons with Disabilities when their rights have been violated and they have not been able to secure an effective remedy under Canadian law.⁹⁰ As will be discussed below in Chapter 6, it is hoped that as the Committee on the Rights of Persons with Disabilities engages with systemic issues such as homelessness. The reasonableness standard applied under the Optional Protocol to the CRPD will provide authoritative guidance on the measures

required under the NHTSA for the federal government to implement its commitment to the progressive realization of the right to adequate housing of persons with disabilities.

Canada has also ratified the “inquiries procedure” under the CRPD which permits the Committee to inquire into “serious, grave or systematic violations” of the rights of persons with disabilities.⁹¹ The CRPD Committee has conducted an inquiry into alleged systematic violations of the right to adequate housing of persons with disabilities in the United Kingdom, which is instructive in understanding Canada’s obligations to address systemic housing issues. The Committee found that changes in housing benefits, social housing welfare payments, and housing allowances for private-sector tenants curtailed the right of persons with disabilities to choose a place of residence in accordance with the right to live independently in the community, guaranteed in Article 19 of the CRPD.⁹²

The findings of the CRPD in this inquiry make it clear that there is significant overlap between the obligation to

⁸⁷ United Nations, *Convention on the Rights of Persons with Disabilities* (adopted 13 December 2006, entered into force 3 May 2008), Online at: <<https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>> [CRPD].

⁸⁸ *Ibid.*, Article 19.

⁸⁹ Employment and Social Development Canada, *Canada accedes to the Optional Protocol to the United Nations Convention on the Rights of Persons with Disabilities*. (3 December 2018). Online at: <<https://www.newswire.ca/news-releases/canada-accedes-to-the-optional-protocol-to-the-united-nations-convention-on-the-rights-of-persons-with-disabilities-701804101.html>>.

⁹⁰ Optional Protocols are United Nations instruments that “provide for procedures with regard to the treaty or address a substantive area related to the treaty,” see UN Women, *What is an Optional Protocol?*

(2009), Online at: <<https://www.un.org/womenwatch/daw/cedaw/protocol/whatis.htm>>. While Canada has not ratified the Optional Protocol to the ICESCR, it has ratified the OP-ICEDAW, OP-ICRPD and others which implicate the right to housing.

⁹¹ Committee on the Rights of Persons with Disabilities, *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, Online at: <<https://www.ohchr.org/EN/HRBodies/CRPD/Pages/OptionalProtocolRightsPersonsWithDisabilities.aspx#6>>, at Article 6.

⁹² Committee on the Rights of Persons with Disabilities, *Inquiry concerning the United Kingdom of Great Britain and Northern Ireland carried out by the Committee under article 6 of the Optional Protocol to the Convention: Report of the Committee* (6 October 2016).

reasonably accommodate the unique needs of persons with disabilities and the obligation to take reasonable measures for the progressive realization of the right to adequate housing, which is also guaranteed to persons with disabilities in the CRPD.⁹³ This analysis is similarly bolstered in the recent Nova Scotia Court of Appeal case *Disability Rights Coalition v. Nova Scotia* (Attorney General), 2021 NSCA 70,⁹⁴ which recognized systemic discrimination in the denial of adequate assistance to ensure support and housing in a community, and cited Article 19 of the CRPD while awarding a remedy consistent with the right to adequate housing.

WHAT IS AN OPTIONAL PROTOCOL?

"Optional Protocols" either offer procedures or address a substantive area related to the treaty they are associated with. They are treaties in their own right, and are open to signature, accession, or ratification by countries who are party to the main treaty.

Optional Protocols can include:

- **A Communications (Complaints) Procedure:** Gives individuals and

groups the right to petition or complain to the relevant UN Committee about violations of the Convention (in writing).

- **An Inquiry Procedure:** Enables the Committee to conduct inquiries into grave or systematic issues and abuses to a right. It is useful where individual communications fail to reflect the systemic nature of widespread violations of the right within a State party, and gives the Committee an opportunity to make recommendations regarding the structural causes of violations.⁹⁵

The right to adequate housing for women, girls, and gender-diverse

persons is protected in both the ICESCR⁹⁶ and Articles 1, 3, and 14, the *Convention for the Elimination of Discrimination Against Women (CEDAW)*, to which Canada is a party.⁹⁷ As with the CRPD, Canada has acceded to the Optional Protocol to CEDAW (OP-CEDAW).

A Canadian case of particular note is *Cecelia Kell v Canada*.⁹⁸ Cecelia Kell, an Indigenous woman, was evicted from her

⁹³Population Health Improvement Research Network, *International human rights, health and strategies to address homelessness and poverty in Ontario a making the connection* (Ottawa, ON: Population Health Improvement Research Network, 2012), at 24.

⁹⁴ Nova Scotia Court of Appeal case *Disability Rights Coalition v. Nova Scotia* (Attorney General), 2021 NSCA 70

⁹⁵ Un Women, *What is an options protocol?* (2009), Online at: <<https://www.un.org/womenwatch/daw/cedaw/protocol/whatis.htm>>

⁹⁶ The right to housing in relationship to women, and girls is further outlined by the CESCR, General Comment No. 16: The equal right of men and women to the enjoyment of all economic, social and cultural

rights (Article 3) (2005), Online at: <<https://undocs.org/E/C.12/2005/4>>.

⁹⁷ For additional context on the right to housing as it applies to women, girls, and gender-diverse persons, see Kaitlin Schwan, Alicia Versteegh, Melissa Perri, Rachel Caplan, Khulud Baig, Erin Dej, Jesse Jenkinson, Hannah Brais, Faith Eiboff, & Tina Pahlevan Chaleshtari, *The State of Women's Housing Need & Homelessness in Canada: A Literature Review* (Toronto, ON: Canadian Observatory on Homelessness Press, 2020), Online at: <https://www.homelesshub.ca/sites/default/files/attachments/state_womens_homelessness_10072020.pdf>

⁹⁸ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Communication No. 19/2008* (26 April 2012), Online at: <<https://undocs.org/CEDAW/C/51/D/19/2008>>.

home by a violent spouse and deprived of housing designated for Indigenous households by the local housing authority, on which her abusive spouse was a board member. After a prolonged attempt to secure a remedy in Canadian courts, she filed a complaint under the OP-CEDAW. The CEDAW Committee upheld the complaint and recommended both individual and systemic remedies that called on Canada to recruit and train more Indigenous women to provide legal aid (including for property rights and for domestic violence) and review its legal aid system to ensure Indigenous women have adequate representation. The decision in the *Kell* case has been welcomed as an advance in the recognition of Indigenous women's right to adequate housing, and Cecilia Kell herself felt vindicated after such a long struggle.⁹⁹

The CEDAW Committee has also been deeply engaged in the investigation of missing and murdered Indigenous women and girls in Canada and the intersections of human rights failures relating to the right to adequate housing. Their findings, rather disturbingly, uncovered a number of violations under the Convention including the obligation to remove discriminatory barriers against women; the right to equal protection under domestic law and access to justice; the duty on state actors to eliminate racial stereotypes especially those that impact treaty rights negatively; and the right of Indigenous women to enjoy adequate housing on and off reserves.¹⁰⁰ The intersection of the right to adequate housing with others rights under CEDAW are further explored in the recommendations of *The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*.¹⁰¹

⁹⁹ However, as pointed out by Lolita Buckner Inniss, Jessie Hohmann, and Enzamaría Tramontana, this did not adequately address the way in which the Canadian legal system “had not treated Kell as a subject of rights and as having full capacity as a legal actor” and failed to engage effectively with Ms. Kell's experience as an Indigenous woman. See Jessie Hohmann, Lolita Buckner Inniss, and Enzamaría Tramontana, “Cecilia Kell v Canada” in Loveday Hodson and Troy Lavers (eds.), *Feminist Judgments in International Law* (Hart 2019).

¹⁰⁰ CEDAW, Report of the inquiry concerning Canada of the Committee of the Elimination of

Discrimination against Women under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (30 March 2015), Online at: <<https://digitallibrary.un.org/record/836103>>, at 1-2.

¹⁰¹ National Inquiry into Missing and Murdered Indigenous Women, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, Volume 1a* (2019), Online at: <https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf>, at 188.

CHAPTER SUMMARY

WHAT HAS BEEN COMMITTED TO THUS FAR BY THE FEDERAL, PROVINCIAL, AND TERRITORIAL GOVERNMENTS AROUND THE RIGHT TO ADEQUATE HOUSING? WHAT ARE THE DUTIES AND RESPONSIBILITIES ATTACHED TO THESE COMMITMENTS?

The following chart provides a summary of the relevant international covenants which have been ratified by Canada, alongside a sample of Concluding Observations outlining how treaty bodies have interpreted their application to laws, policies, and programs. This list is non-

exhaustive, and should be analyzed alongside recommendations from other authorities, including relevant UN Special Rapporteurs, General Comments, and recommendations from Canada's recent Universal Periodic Review.

COVENANT	STATUS	KEY RECOMMENDATIONS FROM UN BODIES
CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACISM (CERD)	Ratified, 1970	<ul style="list-style-type: none"> “Address the root causes of displacement, such as poverty and poor housing, that disproportionately drive [Indigenous] children into foster care.”¹⁰²
INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS (ICESCR)	Ratified, 1976	<p>In the Concluding Observations from Canada's 2016 review, the Committee on ESC Rights recommends that Canada:</p> <ul style="list-style-type: none"> Develop and effectively implement a human-rights based national strategy on housing; Take concrete steps within federal government to ensure the right to adequate housing is enforceable within provinces and territories, with independent and appropriate monitoring and adjudication mechanisms; Increase national spending to guarantee Covenant rights so as to achieve the progressive realization of economic, social and cultural rights; Adopt and implement a tax policy that is adequate and socially equitable and improves tax collection;

¹⁰² CEDAW, Concluding Observations: Canada (18 November 2016), Online at: <<https://digitallibrary.un.org/record/3802136?ln=en>>, para. 28, 40, 44, 46.

		<ul style="list-style-type: none"> • Increase resources to reinforce housing subsidies in social assistance benefits • Take effective measures to increase availability of social and affordable housing units; • Regulate rental arrangements in a manner that ensures tenants are not vulnerable to homelessness or forced evictions; • Ensure legislation on forced evictions is compatible with international norms – and particularly that no person finds themselves homeless due to evictions; • Ensure disaggregated data is collected as part of a national strategy on homelessness; • Ensure that adequate emergency shelters are available; • Repeal provincial bylaws that penalize persons experiencing homelessness from finding solutions necessary for survival and well-being; • Increase shelter allowances and social assistance rates to realistic levels and provide adequate support services for persons with disabilities; • Intensify efforts to address Indigenous people’s housing crisis in consultation with Indigenous governments and organizations; and • Ensure a disability perspective is integrated in all housing plans and policies – and increase availability of affordable and social housing for persons with psychosocial and intellectual disabilities.¹⁰³
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¹⁰³ See CESCR, Concluding observations, *supra* note 4, para. 10, 39–45.

<p>INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)</p>	<p>Ratified, 1976</p> <p>Optional Protocol to the ICCPR also ratified</p>	<ul style="list-style-type: none"> • "Homelessness has led to serious health problems and even to death. The Committee recommends that the State party [Canada] take positive measures required by article 6 to address this serious problem."¹⁰⁴ • Take appropriate measures to address homelessness and provide adequate social housing to ensure a life with dignity.¹⁰⁵
<p>CONVENTION FOR THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN (CEDAW)</p>	<p>Ratified, 1981</p> <p>Optional Protocol to the CEDAW also ratified</p>	<ul style="list-style-type: none"> • Step up efforts to ensure a sufficient number of affordable and adequate housing options, including in Indigenous communities, with priority to low-income women who are particularly disadvantaged; • Develop an integrated plan of the conditions facing Indigenous work including poverty, poor health, employment, and housing; and • Take steps to address separation of Indigenous children from parents including poverty, violence, and housing.¹⁰⁶ • As noted above, the Cecilia Kell v. Canada case through the CEDAW Optional Protocol has important implications for Canada's obligations.
<p>CONVENTION ON THE RIGHTS OF THE CHILD (CRC)</p>	<p>Ratified, 1991</p>	<ul style="list-style-type: none"> • Develop and implement a national strategy to eliminate child poverty; • Assess impact of tax benefits and social transfer to ensure prioritization of most vulnerable children; • Ensure funding provided to Indigenous, African-Canadian, and other minority children is comparable in quality to other children and is adequate to meet needs; and • Adequately prepare and support young people prior to leaving care in planning

¹⁰⁴ UN Human Rights Committee, *Concluding Observations: Canada* (7 April 1999) CCPR/C/79/Add.105, Online at: <<https://undocs.org/CCPR/C/79/Add.105>>

¹⁰⁵ UN Human Rights Committee, *supra* note 41.

¹⁰⁶ CEDAW, *supra* note **Error! Bookmark not defined.**102, para. 40, 44, 46.

		and transition – and making assistance available after departure. ¹⁰⁷
UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (THE DECLARATION)	Officially Adopted, 2007	<ul style="list-style-type: none"> • This is a Declaration but has been afforded similar status to a treaty and will require accountability mechanisms under Canada’s UN Declaration on the Rights of Indigenous Peoples Act (Bill C-15), which cements a commitment to implementing the Declaration in domestic law; • Accountability mechanisms should emphasize the rights of Indigenous peoples to live in dignity, to maintain and strengthen their own institutions, cultures and traditions, and to pursue their self-determined development, in keeping with their own needs and aspirations;¹⁰⁸ • Concluding observations come from treaty obligations (e.g., CRC, CEDAW, CERD, etc.).
CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (CRPD)	Ratified, 2010 Optional Protocol to the CRPD also ratified	<ul style="list-style-type: none"> • Collect disaggregated data and statistics on persons with disabilities – including data on their type of housing or institution; • Adopt a human rights-based approach to disability in all housing plans and policies at all levels; • Make available affordable and accessible housing units for persons with psychosocial and intellectual disabilities as well as support services; and • Ensure that accessibility legislation, plans, and programs facilitate the inclusion of persons with disabilities in the community and prevent isolation and institutionalization.¹⁰⁹

¹⁰⁷ UN Committee on the Rights of the Child (CRC), *Concluding Observations: Canada* (5 October 2012) CRC/C/CAN/CO/3-4, Online at: <<https://undocs.org/CRC/C/CAN/CO/3-4>>.

¹⁰⁸ UN Department of Economic and Social Affairs, *United Nations Declaration on the Rights of Indigenous Peoples*, Online at: <<https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>>

¹⁰⁹ CRPD, *Concluding Observations: Canada* (8 May 2017) CRPD/C/CAN/CO/1, Online at: <<https://undocs.org/CRPD/C/CAN/CO/1>>, para. 38, 54.

4

Indigenous rights and progressive realization of the right to adequate housing

The intersection of Indigenous rights, including treaty rights, with the right to adequate housing is of critical importance for the implementation of the *National Housing Strategy Act* (NHSA). We are pleased that the Council has taken up the recommendation that Indigenous experts be commissioned and compensated to fully develop research in this area.

It should be noted that the majority of First Nations peoples as well as Métis and Inuit peoples do not live on reserve, but instead in large and small urban, rural, northern, and/or remote areas. The result is that many Indigenous peoples are not covered or addressed by treaty and legal processes—including those that may protect the right to adequate housing.

There are significant gaps in the Canadian literature in this area, though the larger context of the right to adequate housing and Indigenous rights internationally has been explored at length. It is anticipated that once systemic claims come forward to the Federal Housing Advocate and review panels, there will be more literature on how the right to adequate housing intersects with Indigenous treaty rights in Canada.

A review of literature does, however, reveal the intersections between the Indigenous-led recommendations from both the Truth and Reconciliation Commission Calls to

Action¹¹⁰ and the Missing and Murdered Indigenous Women and Girls Inquiry (as discussed in Chapter 3, in the context of CEDAW) with the progressive realization of the right to adequate housing in Canada.

4.1 UN Declaration on the Rights of Indigenous Peoples

Canada officially adopted the UN Declaration on the Rights of Indigenous Peoples (the UN Declaration, or UNDRIP) in 2016, and in June 2021, Bill C-15, the *United Nations Declaration on the Rights of Indigenous Peoples Act* received Royal Assent. Similar to the NHSA, the purpose of the UNDRIP Act is to “affirm the Declaration as a universal international human rights instrument with application in Canadian law.”¹¹¹ This Act requires an action plan with measures to address injustice, combat prejudice, eliminate all forms of violence, racism, and discrimination, and promote mutual respect—with monitoring, oversight, recourse or remedy, or other accountability measures to ensure the meaningful implementation of the UN Declaration.

The implementation of the UN Declaration through this legislation will be an important consideration for members of

the National Housing Council in fulfilling their mandate with respect to the implementation of the right to adequate housing under international human rights law. As James (Sa'ke'j) Youngblood Henderson has noted, implementing the human rights of Indigenous peoples into national law is “an important, pressing, and daunting challenge” that will require new and creative approaches to human rights implementation. He further writes that “[w]ith the successful creation of a global consensus on inherent human rights of peoples, we have to find a way of braiding or implementing human rights of Indigenous peoples into national law of the states. The braiding will be more like contrapuntal music, rather than architectural blueprints.”¹¹²

The UN Declaration recognizes the dignity of rights claimants in a manner similar to the NHSA, recognizing that Indigenous peoples “have the right to the dignity and diversity of their cultures, traditions, histories and aspirations” constituting “the minimum standards for the survival, dignity and well-being of the Indigenous peoples of the world.”¹¹³ The purpose of the UN Declaration Act is to affirm the Declaration as a universal international human rights instrument with application in Canadian law and to provide a framework for the Government of

¹¹⁰ UN Committee on the Elimination of All Form of Discrimination against Women (CEDAW), *Concluding Observations: Canada* (7 November 2008), Online at: <<https://undocs.org/CEDAW/C/CAN/CO/7>>.

¹¹¹ Parliament of Canada. *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples* (21 June 2021), Online at: <<https://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=11007812>>.

¹¹² James (Sa'ke'j) Youngblood Henderson, “The Art of Braiding Indigenous Peoples’ Inherent Human Rights into the Law of Nation-States” in *UNDRIP*

Implementation Braiding International, Domestic and Indigenous Laws (Centre for International Governance Innovation, 2017), Online at: <<https://www.cigionline.org/static/documents/documents/UNDRIP%20Implementation%20Special%20Report%20WEB.pdf>>, at 10.

¹¹³ UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: Resolution adopted by the General Assembly* (2 October 2007) A/RES/61/295, Articles 21, 23, Online at: <<https://www.undocs.org/A/RES/61/295>>.

Canada's implementation of the Declaration. There is therefore considerable convergence or overlap between the implementation of the right to adequate housing of Indigenous persons as affirmed in the ICESCR and other international human rights law in the NHSA, and the implementation of the UN Declaration under the UNDRIP Act. Indigenous legal and constitutional scholar John Burrows wrote that the "UN Declaration builds from other human rights treaties and is grounded in a broader context of self-determination than is found in other human rights agreements, recognizing a wealth of political, social, economic, cultural and environmental rights of Indigenous peoples."¹¹⁴ The UN Declaration affirms the right of Indigenous Peoples to the improvement of housing conditions of without discrimination, to active involvement in developing and determining housing and other economic and social programmes affecting them, and, as far as possible, to administer such programmes through their own institutions.¹¹⁵

Feminist Indigenous legal scholar Brenda L. Gunn notes that jurisprudence in Canadian courts must now be developed in accordance with the UN Declaration and other international human rights

norms around socioeconomic rights, including the right to adequate housing.¹¹⁶ Only by applying a non-hierarchical and intersectional approach (in this case, the lenses of gender and indigeneity) can jurists in Canada hope to achieve the spirit of UNDRIP and fulfill their international human rights obligations under the UN Declaration.

A gendered analysis also requires implementing economic, social, and cultural rights with the same priority as civil and political rights. This means that Canada must stop thinking about education, social housing, health care, and so on as strictly policy issues and must start with a rights-based approach.¹¹⁷

This is evident in the decision of the Canadian Human Rights Tribunal when it ruled in favour of the plaintiff in *First Nations Child and Family Caring Society of Canada v Canada (AG)*,¹¹⁸ a foundational human rights case analyzing the Government of Canada's obligations to ensure substantive equality for First Nations children in which the right to equality clearly intersected with the right to adequate housing, understood as a right to a home in which to live in peace security and dignity and the protection of the family.

¹¹⁴ John Borrows, "Braiding legal orders: implementing the United Nations Declaration on the rights of indigenous peoples" in *UNDRIP Implementation Braiding International, Domestic and Indigenous Laws* (Centre for International Governance Innovation, 2017), Online at: <<https://www.cigionline.org/static/documents/documents/UNDRIP%20Implementation%20Special%20Report%20WEB.pdf>>, at 20.

¹¹⁵ See UN General Assembly, *supra* note 113.

¹¹⁶ Standing Committee of Indigenous and Northern Affairs, *Evidence* (11 March 2021), Online at:

<<https://www.ourcommons.ca/DocumentViewer/en/43-2/INAN/meeting-22/evidence>>

¹¹⁷ Brenda L. Gunn, *Bringing a Gendered Lens to Implementing the UN Declaration on the Rights of Indigenous Peoples* in Borrows, John, et al "Braiding legal orders: implementing the United Nations Declaration on the rights of indigenous peoples" in *UNDRIP Implementation Braiding International, Domestic and Indigenous Laws* at 60.

¹¹⁸ *First Nations Child and Family Caring Society of Canada v Canada (Minister of Indian Affairs and Northern Development)*, 2016 CHRD No 2 at para 452.

4.2 UN Special Rapporteur's report on the Right to Adequate Housing and Indigenous Peoples

In 2019, the UN Special Rapporteur on the right to adequate housing conducted an in-depth consultation with Indigenous experts around the world to form the seminal thematic report on the Right to Adequate Housing and the Rights of Indigenous Peoples.¹¹⁹ The Rapporteur wrote about the interdependence of the UN Declaration with Article 11 of the ICESCR stating that:

*The right to adequate housing can be enjoyed by indigenous peoples only if its articulation under article 11 (1) of the International Covenant on Economic, Social and Cultural Rights is understood as interdependent with and indivisible from the rights and legal principles set out in the United Nations Declaration on the Rights of Indigenous Peoples.*¹²⁰

The report outlines critical considerations for the right to adequate housing as it applies to Indigenous peoples including the principles of non-discrimination and equality; cultural adequacy as outlined in GC4¹²¹; the principle of maximum of available resources; and access to justice and effective remedies, including for past

violations of the right to home and the protection of the family. The UN Special Rapporteur's report outlines that the "meaning and application of the right to adequate housing must therefore integrate the right to self-determination, the principle of free, prior and informed consent, the right to land, territories and resources, and access to justice."¹²²

4.3 Intersections with the call to action for an Urban, Rural and Northern Indigenous Housing Strategy

A concrete example of exercising the right to adequate housing as it relates to Indigenous rights is the call to action for an Urban, Rural and Northern Indigenous Housing Strategy as explored in the recent report commissioned by the National Housing Council entitled *National Urban, Rural, and Northern Indigenous Housing & Homelessness: A Case for Support and Conceptual Model*.¹²³ A further example of how this call to action enacts the right to adequate housing as articulated in international human rights law can be found in commentary such as the 2019 *Statement on National Urban Indigenous Housing Strategy* issued by a coalition of Indigenous advocates.¹²⁴

¹¹⁹ See UN General Assembly, *supra* note 64.

¹²⁰ *Ibid.*

¹²¹ The UN Special Rapporteur Report on the Right to Housing of Indigenous Peoples cites the GC4 requirement that "States and indigenous authorities must allow indigenous peoples to construct their own housing and must respect their traditional knowledge, designs, materials and architecture."

¹²² *Ibid.*

¹²³ Dr. Dave Baspaly, Cheryl Hogg, Dr. Patrick Stewart, Marcel Lawson Swain, & Dr. Omeasoo Wahpasiw, *National urban, rural & northern Indigenous housing*

& homelessness: A case for support and conceptual model (National Housing Council, 2021), Online at: <<https://assets.cmhc-schl.gc.ca/sites/place-to-call-home/pdfs/urban-rural-northern-housing-report-en.pdf?rev=aflaa8b3-2b07-403e-9ae8-b646ab5526ca>>.

¹²⁴ Sylvia Maracle, Justin Marchand, Margaret Pfoh, Marc Maracle, Tanya Sirois, Marcel Lawson Swain, Patrick Stewart, Pamela Glode Desrochers, Damon Johnston, & Leilani Farha. *Statement on National Urban Indigenous Housing Strategy* (11 December

KEY RESOURCES FOR THIS CHAPTER:

- United Nations Declaration on the Rights of Indigenous Peoples Act.: <https://www.parl.ca/LegisInfo/en/bill/43-2/C-15>
- UN Special Rapporteur’s report on The Right to Adequate Housing of Indigenous Peoples: <https://undocs.org/A/74/183>.
- Truth and Reconciliation Calls to Action: <https://www.rcaanc-cirnac.gc.ca/eng/1524494530110/1557511412801>
- Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls: https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf

5

Application of the right to adequate housing under international law to Canada

As detailed above, United Nations authorities—including human rights treaty bodies like the Committee on Economic, Social, and Cultural Rights and UN Special Rapporteurs on the right to adequate housing—have written important reports and recommendations to Canada, analyzing the country’s progress in implementing the right to adequate housing and identifying measures necessary for compliance with international human rights law. The

following is a summary of some of the key multijurisdictional and federal issues and recommendations advanced in Concluding Observations, Special Rapporteur recommendations, and other authoritative literature.¹²⁵ This summary illuminates what Canada is and is not doing to address international recommendations and realize the right to adequate housing.

¹²⁵ For further context on the application of the NHTA and Canada’s international human rights obligations to law, policy, and programs in Canada, see Kaitlin Schwan, Mary-Elizabeth Vaccaro, Luke Reid, and Nadia Ali, *Implementation of the Right to Housing for Women, Girls, and Gender Diverse People in Canada* (October 2021), Online at <https://housingrights.ca/wp-content/uploads/CHRC->

[WNHHN-Schwan-4-May-2021.pdf](https://housingrights.ca/wp-content/uploads/WNHHN-Schwan-4-May-2021.pdf)> and Michèle Biss and Sahar Raza, *Implementing the Right to Housing in Canada: Expanding the National Housing Strategy* (October 2021), Online at: <https://housingrights.ca/wp-content/uploads/NRHN-OFHA-Expanding-the-NHS-2021.pdf>>

EVICCTIONS AND THE OBLIGATIONS OF PRIVATE ACTORS:

Concluding observations from the Committee on ESC Rights (aligned with General Comment No. 7 of the CESCR¹²⁶) have criticized Canada's lack of action to ensure domestic legislation on evictions is compatible with international norms—particularly to ensure that no persons find themselves homeless due to evictions, and that compensation or alternative accommodation is provided.¹²⁷

As noted above, General Comment 4 recognized that where States rely on a mix of public and private housing, governments are required to regulate private actors through legislative protections of security of tenure,¹²⁸ affordability and protection from unreasonable rent increases, maintenance, health and safety standards, etc., and to ensure access to effective legal remedies.¹²⁹ The Committee on ESC Rights has raised repeated concerns about inadequate regulation of private landlords and investors in Canada.

These concerns have been supported by human rights scholarship in Canada. For example, Lorne Sossin and Colleen Flood have commented on the need for the

regulatory powers of administrative tribunals, such as the Ontario Board of Landlords and Tenants, to apply international legal norms against unlawful evictions. “It could be argued on the basis of Article 11 of the *International Covenant on Economic, Social, and Cultural Rights* (ICESCR) as interpreted by the Committee, that the risk of homelessness should be a mandatory relevant consideration... whether or not to grant an application for eviction.”¹³⁰

International comparisons are illuminating when it comes to eviction. In the Netherlands, for example, the Dutch Supreme Court has held that evictions are considered a severe interference with the right to inviolability of the home, and that everyone at risk of eviction must be able to have the impact of the eviction determined by an independent court before it occurs.¹³¹ Additionally, in Germany, under some regulatory laws, municipalities are entitled to order that a tenant remain in their dwelling if they are at risk of homelessness, despite termination of their tenancy.¹³²

While subnational governments hold significant jurisdictional power on regulating evictions, there are critical

¹²⁶ See CESCR, *supra* note 50.

¹²⁷ See CESCR, *supra* note 4; CESCR, *Concluding Observations: Canada* (22 May 2006) E/C.12/CAN/CO/4; E/C.12/CAN/CO/5, Online at: <<https://undocs.org/E/C.12/CAN/CO/4>>

¹²⁸ The former UN Special Rapporteur, Miloon Kothari, issued a report to Canada following a country visit in 2009 highlighting concerns with security of tenure and vacancy control as a factor for increased evictions. See UN Human Rights Council, *supra* note 39.

¹²⁹ *Ibid*, at para 14.

¹³⁰ Lorne Mitchell Sossin & Colleen M Flood, *Administrative law in context* (Toronto: Emond Montgomery Publications, 2008) at 503.

¹³¹ Erna Dyah Kusumawati and Michael Vols, “The International Right to Housing, Evictions and the Obligation to Provide Alternative Accommodation,” *Asia-Pacific Journal of Human Rights and the Law* (2020): 261 Online at: <<https://doi.org/10.1163/15718158-21020003>>.

¹³² Julia Cornelius and Joanna Rzeznik . “National Report for Germany.” TENLAW: Tenancy Law and Housing Policy in Multi-level Europe . European Union’s Seventh Framework Programme for research, technological development and demonstration , 2014. <http://www.iut.nu/wp-content/uploads/2017/03/National-Report-for-Germany.pdf>.

actions that the federal government could be taking. Actions taken for commercial tenants could be replicated for residential tenants, for example, by creating a retroactive residential support benefit in the context of COVID-19, as recommended by civil society.¹³³ Offering protection against eviction of informal settlements or encampments has also been central to recommendations from UN authorities to Canada.¹³⁴

Homelessness touches all three levels of government in Canada and, significantly, involves overlapping legal and regulatory jurisdictions. As Doberstein notes: “While the *Constitution Act 1982* fails to provide a clear demarcation of legal jurisdiction for homelessness, many of the constituent elements of the issue are divided among the federal and provincial—and by extension, local—governments.”¹³⁵ This is even more true in the context of the ongoing COVID-19 pandemic, during which the federal government is able to invoke emergency measures.

As Margot Young has documented, inadequate protection from forced evictions in Canada is directly linked to courts’ refusal to engage with the human rights claims linked to the right to

adequate housing—sometimes at the urging of the Government of Canada.¹³⁶ As Farha and Schwan have observed with respect to the often-rough treatment of homeless encampments in Canada, evictions that result in homelessness are violations of international law ratified by Canada, and while municipal governments are often left to engage with encampments, they receive little (if any) support from federal, provincial, or territorial governments. The federal government received and responded to an allegation letter from a number of UN Special Rapporteurs with respect to encampments in British Columbia, in which it was noted that homelessness could be directly linked to a number of federal policies and failures to act.¹³⁷

As noted above, the Committee on ESC Rights has expressed concern on several occasions that landlord and tenant legislation in Canada does not provide adequate protection from evictions, including for small amounts of arrears.¹³⁸ Sarah Buhler has recently documented the vast number of evictions in

¹³³ Centre for Equality Rights and Accommodation (CERA) and the National Right to Housing Network (NRHN), *Addressing the evictions and arrears crisis: Proposal for a federal government residential tenant support benefit* (18 February 2021), Online at: <<https://www.equalityrights.org/reports/rights-based-proposal-to-address-arrears-and-evictions-crisis>>.

¹³⁴ Leilani Farha and Kaitlin Schwan, *A national protocol for homeless encampments in Canada* (30 April 2020), Online at: <<https://www.make-the-shift.org/wp-content/uploads/2020/04/A-National-Protocol-for-Homeless-Encampments-in-Canada.pdf>>.

¹³⁵ Carey Doberstein, *Building a collaborative advantage: Network governance and homelessness policy-making in Canada* (UBC Press, 2016) at 50.

¹³⁶ Margot Young, *supra* note 71, at 46–67.

¹³⁷ Office of the High Commissioner on Human Rights (OHCHR), Mandates of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context; the Special Rapporteur on the rights of indigenous peoples; and the Special Rapporteur on extreme poverty and human rights (16 May 2017) AL CAN 1/2017.

¹³⁸ See, for example, CESCR, Concluding Observations, Canada (22 May 2006), E/C.12/CAN/CO/4; E/C.12/CAN/CO/5 at para 29.

Saskatchewan, in the context of the pandemic, for minor amounts of arrears.¹³⁹

The Committee on ESC rights has clarified in recent cases considered under the Optional Protocol that States must ensure not only that households threatened with eviction have access to a tribunal or court to contest the eviction, but also that the tribunal or court must be authorized to consider the **proportionality** of ordering an eviction in the circumstances. This must include an assessment of whether there are other means of resolving arrears issues, including through government assistance. On the other hand, in circumstances where tenant behaviour results in the violation of human rights of others, eviction may be considered a necessary and proportional response, as long as measures are taken to ensure that it does not result in homelessness or other violations of human rights.¹⁴⁰

INADEQUATE FUNDING FOR SOCIAL HOUSING: Concern over the number of available social housing units has been raised in concluding observations by the CESCR, most recently in 2016 in the context of the lack of a national housing

strategy (remedied in 2017 by the Government of Canada), and the shortage of social housing units¹⁴¹ for persons with disabilities.¹⁴² These recommendations were similarly echoed by the UN Special Rapporteur in his report on his mission to Canada in 2009, which expressed concern that Canada only allocates 5% of its overall housing stock to social housing.¹⁴³ **The latest data from the Organisation for Economic Co-operation and Development (OECD) shows that this has only worsened over time, with Canada's social housing stock now at 4%**, which is below the average for OECD countries (7%) and far behind the Netherlands (34%) and United Kingdom (17%).¹⁴⁴ The losses in social housing continue despite the Government of Canada introducing the National Housing Strategy in 2017, which included investments in community housing options such as cooperative, non-profit, and social housing.¹⁴⁵ Publications from Quebec civil society outline concerns

¹³⁹ Pandemic evictions: An analysis of the 2020 eviction decisions of Saskatchewan's Office of Residential Tenancies (2021) *Journal of Law and Social Policy* 35 at 68-99, Online at: <<https://digitalcommons.osgoode.yorku.ca/jlsp/vol35/iss1/4>>.

¹⁴⁰ These criteria have been applied in the cases of *Soraya Moreno Romero and Children v Spain*, Online at: <<https://undocs.org/E/C.12/69/D/48/2018>>

¹⁴¹ This recommendation is echoed in CESCR, *Concluding Observations: Canada* (22 May 2006) E/C.12/CAN/CO/4; E/C.12/CAN/CO/5, Online at: <<https://undocs.org/E/C.12/CAN/CO/4>>; and CESCR, *Concluding Observations: Canada* (10 December 1998), E/C.12/1/Add.31, Online at: <<https://undocs.org/E/C.12/1/Add.31>>.

¹⁴² CESCR, *Concluding observations on the sixth periodic report of Canada*, (23 March 2016)

E/C.12/CAN/CO/6, Online at: <<https://undocs.org/E/C.12/CAN/CO/6>>

¹⁴³ UN General Assembly, *supra* note 39.

¹⁴⁴ Organisation for Economic Co-operation and Development (OECD), *Public policies towards affordable housing*, Online at: <<https://www.oecd.org/housing/data/affordable-housing-database/housing-policies.htm>>.

¹⁴⁵ The Parliamentary Budget Officers report further outlines concerns with adequacy of spending in the 2017 National Housing Strategy. See Office of the Parliamentary Budget Officer, *Federal Program Spending on Housing Affordability* (18 June 2019), Online at: <https://publications.gc.ca/collections/collection_2019/dpb-pbo/YN5-191-2019-eng.pdf>.

regarding Canada's steps to invest in social housing.¹⁴⁶

Gregory Suttor's comprehensive history of social housing policy in Canada also documents the need for a greater investment in social housing by state actors, coupled with economic and social supports in public policies on housing and homelessness.¹⁴⁷ David Hulchanski has similarly analyzed the persistent decline in affordable housing in most of Canada's cities, especially Toronto, and the sometimes-devastating effects for Canadians living in poverty, those that are racialized, immigrants, and women.¹⁴⁸

WHAT WOULD IT TAKE TO CLOSE CANADA'S ADEQUATE HOUSING GAP?

A significant amount of literature has been developed by civil society experts to analyze the number of affordable housing units that would be needed to address housing shortages. A report from Scotiabank shows that this may be between 100 thousand to 2 million units.¹⁴⁹ A consensus across the housing sector is that a focus must be made on not just stock, but on housing that is affordable to

low-income housing and on the financialization of housing that is eroding existing affordable housing stock. Between 2011 and 2016 over 320,000 units renting below \$750 were lost—primary due to speculation by Real Estate Investment Trusts and other investors.¹⁵⁰ Others have called for 300,000 units of deeply affordable non-market, cooperative, and non-profit housing be built and acquired over 10 years alongside 50,000 supportive housing units.¹⁵¹ At the community level, for example in Kelowna, experts have been developing critical research to assess housing need.¹⁵²

TAXATION AND FINANCIALIZATION OF HOUSING: The Committee on ESC Rights has expressed concern about the effect of low corporate tax rates in Canada on available resources for the realization of economic, social, and cultural rights and called on Canada to develop socially equitable tax policies that “ensure the mobilization of resources sufficient for implementing economic, social and cultural rights, with special attention paid

¹⁴⁶ François Saillant, *Evolution Des Interventions Federales En Logement*, (April 2021), Online at: <<https://www.frapru.qc.ca/wp-content/uploads/2021/06/BrochureOttawaLogement-2021.pdf>>.

¹⁴⁷ Gregory F. L. Suttor, *Still renovating: a history of Canadian social housing policy* (2016).

¹⁴⁸ John David Hulchanski, *The three cities within Toronto: income polarization among Toronto's neighbourhoods, 1970-2005* (Toronto, Ont.: Cities Centre, University of Toronto, 2011), Online at: <<http://www.urbancentre.utoronto.ca/pdfs/curp/tnrn/Three-Cities-Within-Toronto-2010-Final.pdf>>

¹⁴⁹ Jean-François Perrault, *Estimating the Structural Housing Shortage in Canada: Are We 100 Thousand or Nearly 2 Million Units Short?* (12 May 2021), Online at :

<<https://www.scotiabank.com/ca/en/about/economics/economics-publications/post.other-publications.housing.housing-note.housing-note--may-12-2021-.html>>.

¹⁵⁰ Steve Pomeroy, *Recovery for All*, (July 2020), Online: <<https://caeh.ca/wp-content/uploads/Recovery-for-All-Report-July-16-2020.pdf>>.

¹⁵¹ Vote Housing, *Our 2021 Federal Election Platform*, Online at: <<https://www.votehousing.ca/platform>>

¹⁵² C. Whitzman, P. Gurstein, C. E. Jones, A. Flynn, M. Sawada, R. Stevers, M. Tinsley, Vancouver: University of British Columbia Housing Research Collaborative, (2021), *Housing Assessment Resource Tools for Canada: Prototype - City of Kelowna and Findings of a National Survey*, Online at: <<https://housingresearchcollaborative.scarp.ubc.ca/files/2021/09/HART-First-stage-Final-Sep-20-21.pdf>>.

to disadvantaged and marginalized individuals and groups.”¹⁵³

The UN Special Rapporteur for the right to adequate housing, Leilani Farha, also warned of the financialization and commodification of housing on the global market and explained the interconnections between taxation policies and the shortage of affordable housing. In her 2017 report, the Special Rapporteur documented State complicity in the housing crisis:

*States have facilitated and encouraged the change in the role of the private sector in housing. They have provided tax breaks to real estate speculators, tax advantages for homeowners and “golden visas” to foreign investors. They have deregulated rental markets and encouraged development that primarily produces housing for the wealthy. Through legislative measures, policies and programmes, many States have treated housing as a commodity for trading and speculation, rather than as a social good and a human right.*¹⁵⁴

In 2019 the Special Rapporteur submitted an allegation letter to Canada outlining information about the effects of a particular real estate investor, Akelius Canada, on the right to adequate housing

and asking that Canada provide information on “any legislative measure, including with respect to tax laws, or laws governing companies that operate through tax havens or any other measures taken by the Government to prevent the negative human rights impact of the financialization of housing.”¹⁵⁵ Canada’s response reported on the Reaching Home program as well as the adoption of the NHTA. **It noted that the NHTA established a National Housing Council and Federal Housing Advocate “as measures for accountability and inclusion.”**¹⁵⁶ Canada further described corporate taxation at a rate of 25% and special funding provided to the Canada Revenue Agency to address tax evasion and avoidance but did not describe any further measures contemplated to address financialization.¹⁵⁷

Financialization also has implications on the rising net worth of homeowners. In fact, many homeowners in Canada experienced an increase during the recent COVID-19 pandemic. This increase for homeowners is dangerously juxtaposed with those experiencing homelessness or renters facing repossessions driven by financialization, which only drives inequality and moves Canada further away from realizing the right to adequate housing. Importantly, analysis of the human right to adequate housing

¹⁵³ See CESCR, *supra* note 4, at paras 9-10.

¹⁵⁴ UN Human Rights Council, *Report of the Special Rapporteur on adequate housing* (26 December 2019) A/HRC/43/43, Online at: <<https://undocs.org/A/HRC/43/43>>, at para 66 [UN Special Rapporteur Report in Guidelines to Implement the Right to Housing]; See also Leilani Farha and Kaitlin Schwan. “The human right to housing in the age of financialization” in M. Davis, M. Kjaerum and A. Vons (Eds.), *Research Handbook on*

Human Rights and Poverty (Edward Elgar Publishing, 2021).

¹⁵⁵ OHCHR, Mandate of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context (27 April 2020) AL CAN 1/2020, Online at: <<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25201>>, at 4.

¹⁵⁶ *Ibid*, at para 22.

¹⁵⁷ *Ibid*, at paras 84–86.

includes both the rental market and the ownership market (especially for those in rural and remote areas). In fact, in her 2013 report on security of tenure, Raquel Rolnik recommends that possession rights, use rights, rental, freehold, and collective arrangements all be promoted, strengthened, and protected, as appropriate in the given context.¹⁵⁸

FAILURE TO IMPLEMENT THE RIGHT TO ADEQUATE HOUSING IN INTERGOVERNMENTAL AGREEMENTS:

The Committee on ESC Rights has recommended that to address jurisdictional barriers, economic, social, and cultural rights should be incorporated into intergovernmental agreements, enabling legislation, and transfer payments.¹⁵⁹ This is particularly relevant to the federal government's bilateral agreements with provinces and territories discussed in Chapter 7 of this paper.

FAILURE TO ADDRESS HOMELESSNESS AS A HUMAN RIGHTS CRISIS: In all of its reviews of Canada, the Committee on ESC Rights has expressed concern about Canada's failures to address widespread homelessness as well as to protect those who are homeless from discrimination. The Government of Canada has a

significant portfolio on homelessness through the Reaching Home program,¹⁶⁰ as outlined in the 2017 National Housing Strategy and administered through Employment and Social Development Canada to provide funding and support in 64 Designated Communities.¹⁶¹ This program aims to achieve the federal goal of reducing chronic homelessness by 50%,¹⁶² and now eliminate chronic homelessness (as per the 2020 Throne Speech)—but civil society advocates have critiqued that chronic homelessness addresses only a small proportion of the population experiencing homelessness.¹⁶³ Still, the Reaching Home program has been recognized by authorities such as the Parliamentary Budget Officer as making some progress in meeting targets—especially in comparison to capital housing programs in Canada's National Housing Strategy.¹⁶⁴

There is a growing body of literature in Canada related to the intersection between homelessness and human rights violations. Sylvestre and Bellot have documented the extent of stigmatization and criminalization of homeless persons, all of which contributes to the extreme vulnerability of this segment of the population. They argue that this form of discrimination should be recognized as a prohibited ground of discrimination under

¹⁵⁸ UN Special Rapporteur on the Right to Housing (30 December 2013), *Guiding Principles on Security of Tenure*, Online at: <<https://undocs.org/A/HRC/25/54>>

¹⁵⁹ See CESCR, *supra* note 4.

¹⁶⁰ Prior to the Reaching Home program was the National Homelessness Initiative introduced in 1999, followed by the Homelessness Partnering Strategy in 2007.

¹⁶¹ Government of Canada, *About Reaching Home: Canada's Homelessness Strategy* (2020), Online at: <<https://www.canada.ca/en/employment-social-development/programs/homelessness.html>>

¹⁶² *Ibid.*

¹⁶³ Canadian Alliance to End Homelessness, *CAEH releases discussion paper on the right to housing* (26 April 2018), Online at: <<https://caeh.ca/caeh-releases-discussion-paper-on-the-right-to-housing/>>.

¹⁶⁴ Office of the Parliamentary Budget Officer, *Federal Program Spending on Housing Affordability in 2021* (10 August 2021), Online at: <<https://www.pbo-dpb.gc.ca/en/blog/news/RP-2122-014-S--federal-program-spending-housing-affordability-in-2021--depenses-federales-programmes-consacrees-abordabilite-logement-2021>>

section 15 of the *Canadian Charter*.¹⁶⁵ Calls for the recognition of “social condition” as a prohibited ground of discrimination in the *Canadian Human Rights Act*, as recommended by the CESCR, date back to the 2000 *Report of the Canadian Human Rights Act Review Panel* chaired by former Justice of the Supreme Court of Canada, Gérard LaForest.¹⁶⁶ Yet discrimination and stigmatization of those who are homeless persists in Canada and remains largely unchallenged.

Damian Collins and Jalene Anderson Barron have examined barriers to housing and have identified that many barriers to accessibility for certain marginalized populations, particularly homeless persons, seniors, and persons with impaired mobility or mental health challenges.¹⁶⁷

RECOGNIZING THE INTERDEPENDENCE OF THE RIGHT TO LIFE AND EQUALITY WITH THE RIGHT TO ADEQUATE HOUSING:

As noted, the Committee on ESC Rights and other human rights bodies have emphasized the importance of recognizing the right to adequate housing as interdependent with other human rights, particularly with the right to life. In

its concluding observations on Canada, the Committee on ESC Rights has urged Canadian governments to promote and adopt interpretations of the rights to life, security of the person and equality under the Canadian Charter that would ensure the equal protection of these rights for those who are homeless or inadequately housed, and consistent with Canada’s commitment to the right to adequate housing under the ICESCR and the right to life under the ICCPR. Such positions would be in accordance with the Supreme Court of Canada’s jurisprudence establishing that the rights in the Canadian Charter should be interpreted in light of Canada’s international human rights obligations, including the ICESCR.¹⁶⁸ Yet the Attorney General of Canada has resisted Charter claims advanced by those who are homeless and has failed to recognize the promotion of international human rights values as a factor to consider in Charter litigation.¹⁶⁹ The positions taken by the Government of Canada in Charter cases involving homelessness and the decision of courts in some of these cases have been the subject of criticism not only by the Committee on ESC Rights but also by many legal scholars in Canada.¹⁷⁰

¹⁶⁵ Marie-Eve Sylvestre and Céline Bellot, “Discriminatory punitive responses to homelessness and social rights litigation under section 15 of the Charter” in Martha Jackman and Bruce Porter (eds.) *Advancing social rights in Canada* (Toronto: Irwin Law, 2014).

¹⁶⁶ Canadian Human Rights Act Review Panel. “Promoting equality, a new vision” (The Panel, 2000), Online at <<https://publications.gc.ca/collections/Collection/J2-168-2000E.pdf>>.

¹⁶⁷ Jalene T. Anderson-Baron & Damian Collins, “‘Take whatever you can get’: practicing Housing First in Alberta” (2019) 34:8 *Housing Studies* at 1286–1306.

¹⁶⁸ *Slaight Communications Inc. v. Davidson*, 1989 S.C.R. 1038.

¹⁶⁹ Canada Department of Justice, *Principles guiding the Attorney General of Canada in Charter litigation* (2017), Online at: <<https://www.justice.gc.ca/eng/csj-sjc/principles2-principes2.html>>.

¹⁷⁰ See, for example, Margot Young, “Temerity and Timidity: Lessons from *Tanudjaja v. Attorney General (Canada)*” (2020) 61.2 *Les Cahiers de droit* at 469-493; Scott McAlpine, “More than Wishful Thinking: Recent Developments in Recognizing the Right to Housing under S 7 of the Charter” (2017) 38 *Windsor Rev. Legal & Soc. Issues* at 1; Martha Jackman & Bruce Porter, “Social and Economic Rights” in Peter Oliver, Patrick Maklem & Nathalie DesRosiers (eds.) *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017) at 843-861.

FAILURE TO ADDRESS SYSTEMIC DISCRIMINATION EXPERIENCED BY PERSONS WITH DISABILITIES: Alongside concluding observations from the CESCR,¹⁷¹ the Committee on the Rights of Persons with Disabilities has recommended that, in accordance with Article 19 of the CRPD, Canada adopt a national guideline on the right to live independently and be included in the community; that it adopt a human-rights based approach to disability in all housing plans; ensure that provinces and territories establish a timeframe for closing institutions and create a comprehensive system of support for community living; ensure that accessibility legislation facilitates inclusion in the community; and implement appropriate service provision within First Nation communities.¹⁷² The question of the right to accessible housing—one of the seven elements identified by the Committee on ESC Rights in GC4—and the right to adequate housing for people in Canada with disabilities are inextricably linked. The UN Special Rapporteur on the right to adequate housing has called for the incorporation of a “disability human rights paradigm” affirmed in the CRPD in order to breathe new life into the right to adequate housing, based on the fundamental principles of a human rights-

based approach to disability, emphasizing dignity, substantive equality, accessibility and participation, as well as the overriding obligation to realize the right to adequate housing to the maximum of available resources.¹⁷³

COVID-19 AND THE RIGHT TO ADEQUATE HOUSING: Since the pandemic was declared in 2020, Canada has undergone few UN review processes. However, mass evictions during the pandemic and debt accrued by tenants as a result of the pandemic have come to the attention of the current UN Special Rapporteur, Balakrishnan Rajagopal.¹⁷⁴ In the Canadian context, a review of evictions data in Saskatchewan has revealed that in 2020 landlords were successful in receiving eviction orders 90% of the time, in many cases for minimal arrears.¹⁷⁵ The Special Rapporteur’s 2020 Report examining the intersection of homelessness, evictions, and the COVID-19 outbreak acknowledges that forced evictions threaten to aggravate an already dire public health situation by contributing to the rising homeless population.¹⁷⁶ A submission under the NHSA was also filed in February 2020 by the Centre for Equality Rights in Accommodation and National Right to Housing Network on Canada’s evictions and arrears crisis in the context of

¹⁷¹ See CESCR, *supra* note 4 and 127.

¹⁷² Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Canada* (8 May 2017) CRPD/C/CAN/CO/1, Online at: <<http://cad.ca/wp-content/uploads/2017/04/CRPD-Concluding-Observations-on-the-initial-report-of-Canada.pdf>>

¹⁷³ UN General Assembly, *supra* note 59.

¹⁷⁴ OHCHR, “Ban evictions during COVID-19 pandemic, UN expert urges” (18 August 2020), Online at: <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26170&LangID=E>>.

¹⁷⁵ Sarah Buhler, *Pandemic evictions: An analysis of the 2020 eviction decisions of Saskatchewan’s Office of Residential Tenancies* (2021) *Journal of Law and Social Policy* 35 at 68-99, Online at: <<https://digitalcommons.osgoode.yorku.ca/jlsp/vol35/iss1/4>>.

¹⁷⁶ UN General Assembly, *Report of the Special Rapporteur on adequate housing: COVID-19 and the right to housing: impacts and way forward* (27 July 2020), Online at: <<https://www.undocs.org/A/75/148>>, at 2.

COVID-19.¹⁷⁷ No response was received from the Minister of Families, Children, and Social Development, the new Minister of Housing, Diversity and Inclusion, or other government authorities.

FAILURE TO ADDRESS THE NEEDS OF NORTHERN AND REMOTE

COMMUNITIES: Northern and remote communities experience unique challenges related to the right to adequate housing that have often been ignored. UN Special Rapporteur Leilani Farha has expressed the need for a specific national

housing strategy that ensures a greater investment in both remote northern and Indigenous communities. Her 2018 report on the subject addresses questions of location and cultural adequacy, and policies aimed at providing housing to Indigenous peoples living in Canada.¹⁷⁸

Rebecca Schiff and Fern Brunger have also examined the experiences of a housing and homelessness network in the north to suggest collaborative, local strategies to implement programs that address homelessness in northern and remote communities.¹⁷⁹

KEY RESOURCES FOR THIS CHAPTER:

- The International Covenant on Economic, Social, and Cultural Rights: <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>
- 2016 Concluding Observations for Canada from the Committee on ESC Rights: <https://undocs.org/E/C.12/CAN/CO/6>
- Guidelines for the Implementation of the Right to Adequate Housing: http://www.unhousingrapp.org/user/pages/04.resources/A_HRC_43_43_E-2.pdf

MODELS OF IMPLEMENTING THE RIGHT TO ADEQUATE HOUSING

It is recommended that further research be undertaken to examine how other countries have responded to concluding observations and recommendations from other human rights authorities with legal, regulatory, and policy responses. For example, as discussed above in the context of efforts by the Netherlands¹⁸⁰ and Germany¹⁸¹ to intervene for persons facing homelessness due to evictions.

¹⁷⁷ See CERA and NRHN, *supra* note 133.

¹⁷⁸ UN General Assembly, *supra* note 64.

¹⁷⁹ Rebecca Schiff & Fern Brunger, "Northern housing networks: Building collaborative efforts to address housing and homelessness in remote Canadian aboriginal communities in the context of rapid economic change" (2015) *Journal of Rural and Community Development* 10.1.

¹⁸⁰ Erna Dyah Kusumawati and Michael Vols, "The International Right to Housing, Evictions and the Obligation to Provide Alternative Accommodation,"

Asia-Pacific Journal of Human Rights and the Law (2020): 261. Online at: <<https://doi.org/10.1163/15718158-21020003>>

¹⁸¹ Julia Cornelius and Joanna Rzeznik. "National Report for Germany." TENLAW: Tenancy Law and Housing Policy in Multi-level Europe. European Union's Seventh Framework Programme for research, technological development and demonstration (2014). Online at:

CHAPTER SUMMARY

WHAT HAS THE GOVERNMENT ACCOMPLISHED AND WHAT ARE THE STEPS THE GOVERNMENT IS CURRENTLY TAKING TO PROGRESSIVELY REALIZE THE RIGHT TO ADEQUATE HOUSING?

As noted throughout this paper, Canada has enormous human rights implementation gaps to overcome to genuinely make progress in realizing the right to adequate housing. However, Canada has taken some critical steps consistent with the right. For example, it:

- **Sept 2015:** Committed to implementing the Sustainable Development Goals
- **Nov 2017:** Developed a National Housing Strategy which includes programs like Reaching Home which have met some targets in reducing homelessness¹⁸²
- **2018—2019:** Developed bilateral housing agreements with subnational governments which include commitments to develop action plans to realize the right to adequate housing
- **Jun 2019:** Passed the *National Housing Strategy Act*
- **Sept 2020:** Set a goal to eliminate chronic homelessness by 2030¹⁸³
- **Nov 2020:** Appointed the National Housing Council
- **Jun 2021:** Passed the United Nations Declaration on the Rights of Indigenous Peoples Act (Bill C-15)
- **Dec 2021:** Committed to appointing a Federal Housing Advocate in the Minister of Housing’s mandate letter
- **Dec 2021:** Committed to co-develop an Urban, Northern, and Rural Indigenous Housing Strategy with Indigenous partners
- **2018—Present:** Created housing programs, such as the Rapid Housing Initiative, which are expected to reduce core housing need and homelessness

It is critical to consider the above progress of the federal government when assessing progressive realization of the right to adequate housing in Canada—but as demonstrated throughout this paper, this must be balanced with an analysis of the severity of violations faced by rights-holders bearing the brunt of Canada’s housing crisis and the consequences they face in having their rights unmet as a direct result of Canada dismissing and failing to prioritize the right to adequate housing. The National Housing Council has an incredible opportunity to uphold the *National Housing Strategy Act* and right to adequate housing by working directly

<<http://www.iut.nu/wp-content/uploads/2017/03/National-Report-for-Germany.pdf>>.

¹⁸² Literature analyzed in this paper suggests that significantly more work must be undertaken to make the National Housing Strategy a genuinely rights-based strategy.

¹⁸³ Researchers have critiqued the exclusion of some groups from the government’s definition of “chronic homelessness,” particularly women and gender-diverse persons who are more likely to experience hidden homelessness. See, Schwan et al., *supra* note 97.

with rights-claimants and building remedies—based on a dialogic approach—

to close Canada’s long-standing implementation gap.

6

Assessing compliance with progressive realization of the right to adequate housing and the reasonableness standard

6.1 Adjudicating progressive realization based on the “reasonableness of steps taken”

One of the most important developments in modern international human rights law has been the recognition that **if ESC rights are to be placed on an equal footing with civil and political rights and if those who are homeless or living in poverty are to be recognized as “equal in dignity and rights,” then they must have access to justice effective remedies.** During the 1990s, an increasing

number of countries chose to include ESC rights in their constitutions as fundamental human rights. At the UN, civil society and human rights experts began to pressure for the adoption of a complaints procedure under the ICESCR that would allow ESC rights claims to be considered in the same way that civil and political rights claims had been considered since 1976, when the *International Covenant on Civil and Political Rights* and

its accompanying Optional Protocol came into force.¹⁸⁴

Ensuring access to justice for ESC rights such as the right to adequate housing, however, raised a particular challenge: how to assess compliance with the obligation described in Article 2(1) of the ICESCR to realize ESC rights “by all appropriate means” and to “the maximum of available resources”, “with a view to achieving progressively the full realization of the rights.” **How do courts, human rights bodies, or review panels determine whether governments have met their obligation at a particular point in time, or determine what measures must be implemented in the present?**

And how much should decisions impacting the right to adequate housing simply be left up to governments in the first place?

The case which had the most significant influence on resolving this question was the case of *Irene Grootboom and others v South Africa*, the first case in which the Constitutional Court of South Africa considered the right to adequate housing under its new constitution. The case was brought by Irene Grootboom and other families who were living on a sports field, under plastic sheets or other cover, without access to clean water or sanitation.¹⁸⁵ The case is particularly relevant to the NHTSA because rather than

ordering individual remedies, the Constitutional Court considered the systemic issues, assessing obligations of multiple orders of government and the required leadership from the national level to respond to the circumstances of families living in desperate conditions.¹⁸⁶

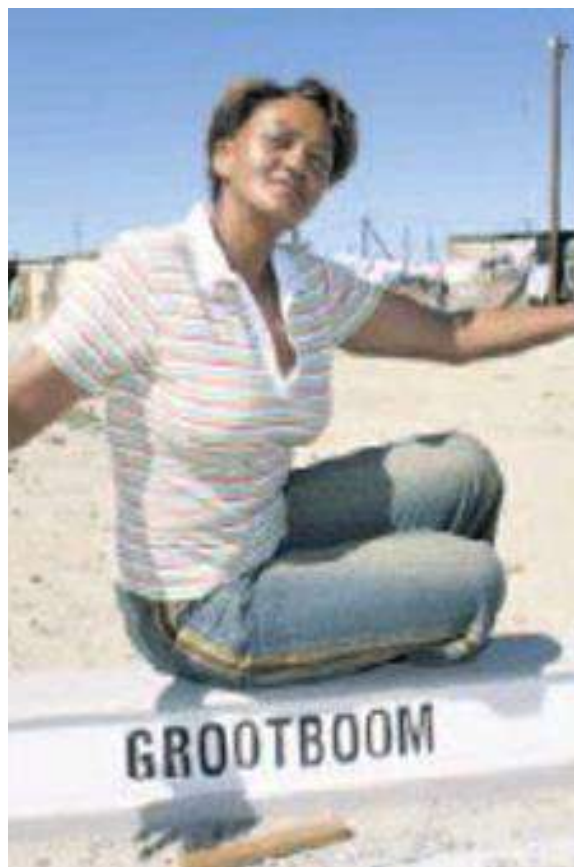


Image of Irene Grootboom from *Sunday Times, South Africa* (18 August 2008), [Online at PressReader](#).

In order to assess whether the policy responses by governments were in accordance with the constitutional

¹⁸⁴ For a description of the advocacy for the Optional Protocol, see Malcolm Langford, Bruce Porter, Rebecca Brown, & Julieta Rossi, *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (PULP, 2016), Online at: https://privpapers.ssrn.com/sol3/papers.cfm?abstract_id=2789733.

¹⁸⁵ *Grootboom and Others v Government of the Republic of South Africa and Others - Constitutional Court Order* (CCT38/00), 2000 ZACC 14 at para 41.

¹⁸⁶ This aspect of the decision has been criticized by some, conferring a right to a reasonable policy rather than an individual right to a house. For a discussion of the remedial issues in this case, see Lilian Chenwi, "Implementation of housing rights in South Africa: Approaches and strategies" (2015) *JL & Soc. Pol'y* 24.

obligation to progressively realize the right to adequate housing, the Court adopted a standard of **“reasonableness.”** This standard was subsequently incorporated into the text of the Optional Protocol to the ICESCR (OP-ICESCR) to provide guidance to the Committee on ESC Rights on how to assess compliance.¹⁸⁷ The same standard was subsequently included in the Optional Protocol establishing a complaints procedure for the *Convention on the Rights of the Child*, and it has been widely applied in domestic courts.¹⁸⁸

A number of important principles emerge from the *Grootboom* case that have since been applied by the Committee on ESC rights, both in the context of individual cases under the OP-ICESCR and in periodic reviews.

The basic principles of the reasonableness standard, as it applies to the right to adequate housing, can be summarized as follows. Reasonable housing policies must:

- I) **RESPOND TO THE CIRCUMSTANCES OF THE CLAIMANTS AND ENSURE THEIR HUMAN DIGNITY.** The Court in *Grootboom* held that the claimants “have a right to reasonable action by the State

¹⁸⁷ On the reasonableness standard in the Optional Protocol, see Brian Griffey, “The ‘reasonableness’ test: Assessing violations of state obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights” (2011) 11.2 Human Rights L. Rev. at 275-327; Lisa Forman, “Can minimum core obligations survive a reasonableness standard of review under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights” (2015) 47 Ottawa L. Rev. at 561; Bruce Porter, “Reasonableness in the Optional Protocol to the ICESCR.” In *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary* (2016); Sandra

in all circumstances and with particular regard to human dignity.¹⁸⁹

- II) **PRIORITIZE THOSE IN GREATEST NEED.** “If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.”¹⁹⁰
- III) **ADDRESS UNDERLYING SYSTEMIC RACISM, COLONIALISM, AND SOCIO-ECONOMIC INEQUALITY.** In the Canadian context, this means addressing ongoing settler-colonialism, systemic racism, and other systemic factors leading to the unequal enjoyment of the right to adequate housing.
- IV) **ADOPT A COMPREHENSIVE APPROACH, SO AS TO MEET A DIVERSITY OF NEEDS.** This means hearing from and responding to diverse communities and circumstances, not applying a one-size-fits-all approach.
- V) **ENSURE PARTICIPATION AND MEANINGFUL ENGAGEMENT WITH RIGHTS-HOLDERS** so that they participate

Liebenberg, “Between sovereignty and accountability: The emerging jurisprudence of the United Nations Committee on Economic, Social and Cultural rights under the Optional Protocol” (2020) 42.1 Human Rights Quarterly at 48-84.

¹⁸⁸ UN General Assembly, *Optional Protocol to the Convention on the Rights of the Child on a communications procedure* (19 December 2011) A/RES/66/138 article 10(4).

¹⁸⁹ See *Grootboom*, *supra* note 5, at para 83.

¹⁹⁰ *Ibid*, at para 44.

meaningfully in decisions affecting them.

VI) ENSURE CO-OPERATION AND CO-ORDINATION AMONG ALL ORDERS OF GOVERNMENT, with leadership from the national government.

The Committee on ESC Rights has identified a number of factors to consider in assessing whether governments have adopted reasonable measures, including whether the measures are “deliberate, concrete and targeted towards the fulfilment of the right”; are “in accordance with international human rights standards”; are implemented within a reasonable time frame; address the precarious situation of disadvantaged and marginalized individuals or groups; prioritize grave situations or situations of risk” and have been developed through “transparent and participatory decision-making.”¹⁹¹

Article 8(4) of the OP-ICESCR, as adopted by the UN General Assembly, now represents the accepted standard in international law for assessing compliance with progressive realization:

*When examining communications under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with Part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights.*¹⁹²

Since the OP-ICESCR has come into force, the majority of cases considered by the Committee on ESC Rights have involved the right to adequate housing and provide an important source for understanding of obligations under the ICESCR with respect to the right to adequate housing. While the individual findings and required remedies in these cases only apply to the State involved, the Committee invariably also clarifies systemic obligations that apply to all States. As Sandra Liebenberg has explained, the Views on individual cases by UN human rights treaty bodies “represent authoritative determinations by independent supervisory organs of the obligations imposed by the relevant treaty.”¹⁹³ The Committee’s jurisprudence under the OP-ICESCR thus provides an invaluable guide for the consideration of systemic issues under the NHSA.¹⁹⁴

¹⁹¹ CESCR, An evaluation of the obligation to take steps to the “Maximum of available resources” under an Optional Protocol to the Covenant (2007) E/C.12/2007/1 at para 3.

¹⁹² UN General Assembly, *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (10 December 2008) A/RES/63/117, Online at: <<https://undocs.org/A/RES/63/117>>

¹⁹³ Sandra Liebenberg, “Between Sovereignty and Accountability: The Emerging Jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights Under the Optional Protocol” (2020) 42:1 *Human Rights Quarterly* at 48–84.

¹⁹⁴ Under the previous government led by Prime Minister Stephen Harper, Canada expressed concerns about the OP-ICESCR. When the UN General Assembly adopted this historic document on December 10, 2008, affirming the equal importance of access to justice for economic, social, and cultural rights as for civil and political rights to ensure “freedom from fear and freedom from want,” Canada expressed its concern about subjecting governments’ policy choices and resource allocation decisions to “quasi-legal assessments” based on ESC rights. Similar views were expressed by some members of the Conservative Party when amendments to the

6.2 Maximum available resources

The “maximum of available resources” standard within the obligation of progressive realization has become the subject of increasing attention by human rights bodies, organizations, and scholars in recent years.¹⁹⁵ In its periodic reviews of the implementation of ESC rights, the Committee on ESC Rights has drawn on a wide range of sources to assess whether budgetary allocations have been commensurate with the circumstances of claimant groups and with the obligation to realize ESC rights. The Committee has considered goals and targets to which the state has committed in international agreements or in national plans; recommendations from UN agencies, organizations or experts; targets

advocated by civil society groups, affected communities and other rights holders; and comparisons of data from other countries.¹⁹⁶

Recent years have also seen a number of more general research initiatives to provide comparative assessments of the realization of the right to adequate housing¹⁹⁷ and other ESC rights in relation to available resources. These include the Human Rights Measurement Initiative¹⁹⁸ and the OPERA framework.¹⁹⁹ The Committee on ESC Rights has made it clear that “available resources” include resources that could be made available by changes in the tax system, so comparisons are generally based on general indicators of capacity, such as per capita gross domestic product, rather than on the actual budgetary expenditures of

NHSA to create “robust accountability mechanisms” for the right to housing were introduced by the Liberal Government.

It is important to note, however, that whether or not a particular government in power supports an optional complaints procedure does not alter that State’s obligations under the treaty. Those obligations still include ensuring access to justice and effective remedies under domestic law.

The NHSA represents a significant rejection of positions adopted by previous governments of Canada that were not supportive of access to justice for ESC rights. Canada has taken the critical step of acting in accordance with its obligations under the Covenant to ensure access to justice here at home. In adopting the OP-CRPD, Canada has also agreed to the consideration of complaints regarding the right to housing of persons with disabilities under the CRPD. It is hoped that Canada will also consider ratifying the OP-ICESCR, but such ratification would no alter the commitments under the ICESCR to which Canada is committed under the NHSA.

¹⁹⁵ See, for example, OHCHR and the International Budget Partnership, *Realizing Human Rights through Government Budgets* (OHCHR, 2017); Allison Corkery and Ignacio Saiz, “Progressive realization using maximum available resources: the accountability” in Jackie Dugard et al (eds.) *Research Handbook on economic, social and cultural rights as human rights* (Cheltenham, UK: Edward Elgar Publishing, 2020); Aoife Nolan, “Putting ESR-based

Budget Analysis into Practice: Addressing the Conceptual Challenges” in A. Nolan, R. O’Connell and C. Harvey (eds.) *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (2013) at 41–57; Olivier de Schutter, “Public Budget Analysis for the Realization of Economic, Social and Cultural Rights: Conceptual Framework and Practical Implementation” in K.G. Young (ed.) *The Future of Economic and Social Rights* (2019) at 527–623; Rodrigo Uprimny, Sergio Chaparro Hernández & A. Araújo, “Bridging the Gap: The Evolving Doctrine on ESCR and ‘Maximum Available Resources’” in K.G. Young (ed.) *The Future of Economic and Social Rights* (2019) at 624–653.

¹⁹⁶ Allison Corkery and Ignacio Saiz, “Progressive realization using maximum available resources: the accountability” in Jackie Dugard et al (eds.) *Research handbook on economic, social and cultural rights as human rights* (Cheltenham, UK: Edward Elgar Publishing, 2020).

¹⁹⁷ Indicators to measure will be discussed further in detail below

¹⁹⁸ Human Rights Measurement Initiative, Online at: <<https://humanrightsmeasurement.org/>> and <<https://rightstracker.org/en/page/about?as=hi>>

¹⁹⁹ Center on Economic and Social Rights (CESR), *The OPERA Framework: Assessing Compliance with the Obligation to Fulfill Economic and Social Rights* (2012), Online at: <https://www.cesr.org/sites/default/files/the.opera_framework.pdf>.

governments.²⁰⁰ The Human Rights Measurement Initiative calculates “achievement possibilities frontier” based on per capita GDP and assessments of what has been achieved by other countries.²⁰¹ For example, when assessing whether Canada has met the standard of a maximum of available resources, **National Housing Council members may consider wait times for social housing, the number of people paying more than 30% of income on housing costs, the percentage of social spending as compared to GDP,²⁰² the gap between rent increases and wage increases**, or a number of other factors presented by academics, rights-claimants, and other members of civil society.

6.3 The UN Sustainable Development Goals

The UN Special Rapporteur on the right to adequate housing and others have noted with concern the absence of any reference to homelessness or the right to adequate housing in the United Nations Sustainable Development Goals (SDGs).²⁰³ Nevertheless, as Kate Donald has noted,

“The breadth and scope of the 2030 Agenda, and its incorporation of truly core human rights issues such as equality, non-discrimination, social protection, universal access to public services, participation and access to justice, mean that there is unquestionably more than enough in there for ESCR advocates to work with.”²⁰⁴ The NHSA establishes a link between a commitment to the realization of the right to adequate housing and Canada’s commitment in Goal 11 of the 2030 Agenda: “To make cities and human settlements inclusive, safe, resilient and sustainable.”²⁰⁵ Target 11.1 of the commits States to ensure access for all to adequate, safe and affordable housing and basic services and upgrading slums by 2030. Measuring and committing to reduce and eliminate homelessness with clear benchmarks and timelines will be critical to the successful realization of this target.²⁰⁶

The Committee on ESC Rights has stated that the commitment to the progressive realization of ESC rights such as the right to adequate housing is critical to meeting the commitments in the 2030 SDG goals. “By creating legally binding human rights

²⁰⁰ CESCR, General Comment No. 24: State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities (23 June 2017) E/C.12/CG/24 at paras 15, 23, 37.

²⁰¹ Human Rights Measurement Initiative, *Methodology Handbook* (26 March 2018), Online at <<https://humanrightsmasurement.org/wp-content/uploads/2018/03/HRMI-Methodology-Note-2018.pdf>>, at 57-59.

²⁰² For example, in 2016, the Committee on ESC Rights used Canada’s social spending as a percentage of GDP (projected by civil society experts to decline to 12.8% of GDP – as compared to 15% between 1950 and 2007), in order to determine in concluding observations that Canada was not meeting the threshold of the ICESCR.

²⁰³ UN General Assembly, Report of the Special Rapporteur on the right to housing (4 August, 2015) A/70/270 at para 33.

²⁰⁴ Kate Donald, “The 2030 Agenda for Sustainable Development: Opportunity or threat for economic, social and cultural rights?” in Jackie Dugard et al (eds.) *Research Handbook on Economic, Social and Cultural Rights as Human Rights* (Cheltenham, UK: Edward Elgar Publishing, 2020) at 366-385.

²⁰⁵ UN Department of Economic and Social Affairs, *Transforming our world: The 2030 Agenda for Sustainable Development* A/RES/70/1. Online at: <<https://sdgs.un.org/2030agenda>>, at para 4.

²⁰⁶ UN General Assembly, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living: Note* (2015) A/70/270, Online at: <<https://undocs.org/A/70/270>>, at para 65.

obligations for States Parties, the Covenant requires that those left behind have access to legal remedies and redress mechanisms at both national and international levels. This flows from the basic principle that to be meaningful, a legal right must be accompanied by effective, accessible remedies.²⁰⁷ The Committee urges that “States should adopt a participatory, all-inclusive, transparent national strategy and plan of action to advance the full realisation of Covenant rights. This strategy and plan should be adequately resourced, include indicators and benchmarks by which progress can be closely monitored, and pay particular attention to the barriers faced by disadvantaged or marginalized groups in enjoying Covenant rights.”²⁰⁸ Clearly the NHSA provides exactly what the Committee on ESC Rights recommends as the means for Canada to meet the commitment to ensure adequate housing for all by 2030.

Human rights organizations remain concerned that the global indicators for housing and other human rights may not be adequate. The accepted indicators for

Goal 11 do not even include the number of people who are homeless.²⁰⁹ Canada has used core housing need as a relatively close proxy and yardstick for the Global indicator.²¹⁰ However, as pointed out by the Special Rapporteur on the right to adequate housing in the 2008 Report on his Mission to Canada, core housing need does not include all of the elements of adequate housing identified in General Comment No. 4.²¹¹ This does not mean, however, that the commitment to ensuring access for all to adequate housing by 2030 in Goal 11.1 cannot be made meaningful in the Canadian context; it simply needs to be assessed on the basis of more refined, human rights-based indicators under the NHSA, as proposed in the National Right to Housing Network’s paper.²¹²

Canada has reported on progress in meeting the SDGs by developing a National Strategy to move forward on the 2030 Agenda,²¹³ Federal Implementation Plan (including an SDG Unit in Employment and Social Development Canada),²¹⁴ creating a funding program,²¹⁵

²⁰⁷ CESCR, The pledge to “leave no one behind”: The International Covenant on Economic, Social and Cultural Rights and the 2030 Agenda for Sustainable Development (8 March 2019) E/C.12/2019/1 at paras 9–10.

²⁰⁸ *Ibid*, at para 12 (c).

²⁰⁹ UN Human Settlements Programme, Indicator 11.1.1: Proportion of urban population living in slums, informal settlements or inadequate housing Institutional information (2020), Online at: <<https://unstats.un.org/sdgs/metadata/files/Metadata-11-01-01.pdf>>.

²⁰⁰ Government of Canada, *Goal 11: Sustainable cities and communities* (2020), Online at: <<https://www144.statcan.gc.ca/sdg-odd/goal-objectif11-eng.htm#fn1>>.

²¹¹ Human Rights Council, *Report of the Special Rapporteur on adequate housing* (28 February 2008) A/HRC/7/16/Add.4, Online at: <<https://undocs.org/en/A/HRC/7/16/Add.4>>.

²¹² Biss and Raza, *Implementing the right to housing in Canada: Expanding the National Housing Strategy* (March 2021), Online at: <<https://housingrights.ca/wp-content/uploads/NRHN-OFHA-Expanding-the-NHS-2021.pdf>>.

²¹³ Government of Canada, *Moving forward together: Canada’s 2030 Agenda National Strategy*, Online at: <<https://www.canada.ca/en/employment-social-development/programs/agenda-2030/moving-forward.html>>

²¹⁴ Government of Canada, *Canada’s Federal Implementation Plan for the 2030 Agenda*, Online at: <<https://www.canada.ca/en/employment-social-development/programs/agenda-2030/federal-implementation-plan.html>>

²¹⁵ Government of Canada, *About the Sustainable Development Goals Funding Program*, Online at: <<https://www.canada.ca/en/employment-social-development/programs/sustainable-development-goals.html>>

and developing a Data Hub to monitor progress.²¹⁶

The NHTA provides the ideal mechanism for Canada to implement a rights-based approach. There may be an important alignment with efforts to implement the SDGs alongside the NHTA.

6.4 Minimum core and retrogressive measures

Two other concepts that are frequently referred to in the literature on progressive realization are the concept of **“minimum core” and of retrogressive measures.**

These concepts, according to the CESCR, describe prima facie violations of Article 2(1) that can only be justified in exceptional circumstances.

The Committee on ESC Rights stated in General Comment No. 3 that states have “a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights.”²¹⁷ Where a state has failed to satisfy such a minimum requirement, such as where a significant number of people are deprived of basic shelter or housing, “it 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.”²¹⁸ The Committee has never suggested that an affluent state such as

Canada could successfully justify such deprivations.

In the *Grootboom* case, the Constitutional Court rejected the idea that a minimum content of the right to adequate housing can be determined.²¹⁹ It noted that housing needs are diverse and would require different definitions for different groups. The Court concluded that the question for the purposes of the Constitution is not whether the government has met some hypothetical minimum, but “whether the measures taken by the state to realise the right afforded by section 26 are reasonable.”²²⁰

In addition to the obvious challenges and pitfalls of attempting to identify a “one size fits all” minimum requirement of the right to adequate housing, there are serious risks involved in relying on the concept, particularly in an affluent country such as Canada. The progressive realization and reasonableness standard rejects the idea that compliance with the right to adequate housing in Canada can be measured by the same standards as in impoverished countries. Yet the minimum core concept may suggest a kind of universal floor. In the Canadian context, the caution voiced by the Committee on ESC Rights in General Comment No. 4 is particularly applicable: “the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one’s head or

²¹⁶ Government of Canada, *Canada takes action on the 2030 Agenda and the Sustainable Development Goals*, Online at: <<https://www.canada.ca/en/employment-social-development/programs/agenda-2030.html>>

²¹⁷ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature

of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant) (14 December 1990) E/1991/23.

²¹⁸ *Ibid.*

²¹⁹ See *Grootboom*, *supra* note 5, at para 33.

²²⁰ *Ibid.*

views shelter exclusively as a commodity.”²²¹ Most commentators have reached the conclusion that the concept of a minimum core as it is articulated in General Comment 3 can be understood as a component of a reasonableness standard, requiring that priority be given to those most in need, such that a more stringent standard of justification would be required for failures to address homelessness or institutionalization of persons with disabilities than might be applied to failures to realize other aspects of housing adequacy. That application of the minimum core approach can be incorporated into reasonableness analysis, to require urgent action to address those in the most desperate circumstances.

The other circumstance which the Committee has identified as a *prima facie* violation requiring a more rigorous justification by the state is referred to in the Committee’s general comments as “deliberately retrogressive measures” or

“non-retrogression.” This concept refers to a reduction in the enjoyment of the right to adequate housing through austerity measures or the removal or weakening of legislative or programmatic protections. Such measures can only be justified in exceptional circumstances, where the backsliding is required to satisfy other human rights, based on all available resources. In times of severe economic and financial crisis, all budgetary adjustments affecting policies must be temporary, necessary, proportional, and non-discriminatory.²²²

The Committee on ESC Rights identified a deliberately retrogressive measure in its 1998 review of Canada in the revoking of the *Canada Assistance Plan Act*, which eliminated the requirement of provinces to provide social assistance at a level that would provide for basic requirements (including housing), alongside social housing programs.²²³

KEY RESOURCES:

- Sandra Liebenberg, “Between Sovereignty and Accountability: The Emerging Jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights Under the Optional Protocol” (2020) 42:1 Human Rights Quarterly at 48–84.

²²¹ See CESCR, *supra* note 1 at para 7.

²²² See Djazia, *supra* note 7979 at para 17.6.

²²³ CESCR, *Concluding observations: Canada* (10 December 1998) E/C.12/1/Add.31. Online at: <<https://undocs.org/E/C.12/1/Add.31>>, at para 19.

CHAPTER SUMMARY

WHAT MECHANISMS ARE IN PLACE TO PROTECT THE RIGHT TO ADEQUATE HOUSING IN CANADA, AND WHAT ARE THEIR STRENGTHS AND WEAKNESSES? WHAT IS MISSING AS COMPARED TO OTHER INTERNATIONAL MODELS?

- Canada has **committed to multiple UN human rights treaties and the 2030 SDGs**, and therefore has existing obligations to fulfill the right to adequate housing, with accompanying mechanisms for monitoring, reviewing, and accountability
- Every few years, Canada **must engage in a review process** before the Committee on ESC Rights on its implementation of the right to adequate housing. It must also engage in similar reviews under other human rights treaties, many of which also invoke the right to adequate housing.
- Canada also undergoes a **universal periodic review (UPR)** at the UN Human Rights Council every four years.
- The federal government has recently **adopted a Protocol for Follow-up to Recommendations from International Human Rights Bodies** to ensure federal, provincial, and territorial collaboration and effective implementation of international human rights obligations.
- Canada has **committed to conducting national reviews and progress reports under the 2030 SDGs**.
- Canada has even **committed to ensuring access to justice and effective remedies** for any violations of international human right obligations.
- **Canada has a long history of ignoring international human rights in domestic policy and legislation, however, which does not match up with its rhetoric internationally.** Government lawyers, for example, have taken aggressive litigation stances that reject even the discussion of economic and social rights in the courts, even though the Supreme Court of Canada has dictated that international human rights obligations must inform our interpretation of Canada's constitution.
- The reality is that prior to 2019, the right to adequate housing was prominent in Canada's international commitments but entirely absent from domestic legislation. This is very different from many other countries with similar constitutional and jurisdictional divisions and histories where the right to adequate housing has been accorded constitutional or legislative recognition. **With aggressive litigation strategies aimed at keeping legal claims out of courts, a legal culture of resistance to ESC rights accountability, and government disregard for treaty body recommendations, the right to adequate housing has been non-existent in Canada;** it has been treated as rhetoric without any substance, government accountability, or application to the lived experiences of rights-holders.

- **The *National Housing Strategy Act* marks a new beginning.** As emphasized by many experts, it brings the commitment to the right to adequate housing home to Canada through a new commitment to access to justice based on a dialogic and participatory process.
- Ultimately, it is for the Council, review panels, Federal Housing Advocate, and governments to provide means for rights holders to exercise their human right to adequate housing under the

NHSA. **The principles of reasonableness, maximum of available resources, all appropriate means, and other human rights standards** that have long been applied by the Committee on ESC Rights and other human rights authorities in interpreting the right to adequate housing will be critical to apply and give effect to the right and forge a new path.

7

Shared responsibilities of federal, provincial, and territorial governments

7.1 The right to adequate housing under international human rights law and federalism

The right to adequate housing in Canada under the *International Covenant on Economic, Social, and Cultural Rights* (ICESCR) is binding on all orders of government: federal, provincial/territorial, and municipal. **However, perhaps the biggest barrier to implementation of the right is Canada’s jurisdictional divide—this is often used as a shield that prevents the meaningful implementation of the right to adequate housing, rather than using**

the right to adequate housing as a framework through which responsibilities can be clearly allocated, and the right to adequate housing realized through cooperation between different levels of government.

It is a fundamental requirement of international human right law that a state may not invoke domestic jurisdictional restrictions to justify non-performance of treaty obligations.²²⁴ This is also explicit in the text of the ICESCR, which affirms in article 28 that the provisions of the Covenant “shall extend to all parts of federal States without any limitations or

²²⁴ *Vienna Convention on the Law of Treaties* (23 May 1969), Article 27.

exceptions.” Thus, all levels of government, not simply the executive branch which signed the treaty, must do their utmost to uphold treaty obligations, including the duty to progressively realize the right to adequate housing.²²⁵

In Canada this means that all levels of government and their statutory bodies must be held accountable for the aspects of the implementation of the right to adequate housing that fall within their jurisdiction or allocated responsibilities, from the federal Canadian Mortgage and Housing Corporation to the local band council running a housing department on reserve.

Many aspects of compliance with the right to adequate housing involve overlapping jurisdiction, and the federal spending power means that the federal government may almost always take action to ensure compliance with international human rights obligations by making such compliance a condition of the receipt of transfer payments. As noted above, the Committee on ESC Rights has proposed that this mechanism be better utilized by the federal government, and this has been

supported by many authorities within Canada. In a 2008 Report, the Senate Subcommittee on Cities of the Standing Senate Committee on Social Affairs, Science and Technology, suggested that the federal governments should use the mechanism of conditions attached to transfer payments to the provinces and territories to guarantee compliance of different orders of government with Canada’s international human rights commitments.²²⁶

Many provincial and territorial and even municipal administrative bodies and human rights tribunals have acknowledged their obligation to reflect international legal norms related to the right to adequate housing in their decisions. To cite but one example, Quebec’s *Commission des droits de la personne et des droits de la jeunesse*, has stated numerous times that the right to adequate housing under international law, particularly the norms of the ICESCR which have been ratified by Quebec’s National Assembly²²⁷, ought to be enforceable in Quebec’s legal system:

²²⁵ Armand de Mestral & Evan Fox-Decent, “Rethinking the relationship between international and domestic law” (2008) 53 McGill L J at 582.

²²⁶ See in particular Option 74 which calls for the embedding of international human rights obligations in all Federal/Provincial/Territorial social programs and agreements: Senate of Canada Subcommittee on Cities of the Standing Senate Committee on Social Affairs, Science and Technology, *Poverty, housing and homelessness: Issues and options* (Chair: Art Eggleton, June 2008) at 55.

²²⁷ On April 21, 1976, by Order-in-Council (1438-76), Quebec “ratified” the ICESCR, signed it and transmitted a signed copy of the treaty to the Federal Government. The Order-in-Council reads as follows: « Que le gouvernement du Québec ratifie le Pacte international relatif aux droits économiques, sociaux et culturels, le Pacte international relatif aux droits civils et politiques, le Protocole facultative se

rapportant au Pacte international relatif aux droits civils et politiques; Que le texte officiel des modalités et du mécanisme de participation des provinces à la mise en oeuvre de ces instruments internationaux soit signé par le ministre des Affaires intergouvernementales et par le ministre de la Justice; Que le ministre des Affaires intergouvernementales soit chargé de transmettre aux autorités fédérales cette ratification et le texte signé de l’entente; Que cette ratification et cette entente entrent en vigueur à partir du moment où elles auront été communiqués au gouvernement fédéral.” (for full-text see: Arrêté en Conseil Chambre du Conseil Exécutif, *Recueil des ententes internationales du Québec (1984-1989)* (21 April 1976), Online at: <<http://www.socialrightscura.ca/documents/Quebec%20Order%20in%20Council.pdf>>

The right to housing is implicitly part of the right to social and financial measures that can ensure the "decent standard of living" referred to in Article 45 of the Charter. This is evident from the relevant provisions of the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights.²²⁸
[translated from French]

7.2 Multijurisdictional accountability and opportunities for co-operation and collaboration

Though in practice, a lack of jurisdictional coordination across levels of government to progressively realize the right to adequate housing often acts as a major barrier to implementation, the right to adequate housing should actually provide a unique platform for collaboration.

Because international obligations in federal states such as Canada are shared among different orders of government, the obligations of national level governments are not restricted to areas that fall within their formal jurisdiction. Compliance with international human rights in federal states require national level governments to exercise leadership and to co-ordinate the implementation of human rights within all jurisdictions. Thus, the restriction of review panels to areas of federal jurisdiction under the NHSA would

not preclude panels from making recommendations to the federal government to exercise leadership and co-ordinate provincial/territorial and municipal implementation of the right to adequate housing. Following the dialogic and comprehensive model of implementation outlined in the literature, the application of the right to adequate housing could include, for example, recommendations that the federal government initiate or coordinate federal/provincial/territorial meetings alongside rights-claimants and civil society to address identified systemic issues and coordinate human rights-based responses. In fact, the federal government has assumed such roles and may simply need to utilize existing mechanisms to better implement the right to adequate housing. For example:

THE INTERMINISTERIAL MEETING ON HUMAN RIGHTS ORGANIZED BY THE CONTINUING COMMITTEE OF OFFICIALS ON HUMAN RIGHTS (CCOHR).

The department of Canadian Heritage holds the primary responsibility of monitoring and coordinating responses to United Nations human rights bodies on the domestic implementation of international human rights. Provincial and territorial governments are integrated into this process and report alongside the federal government.²²⁹ The Continuing Committee of Officials on Human Rights (CCOHR) has overseen this work in the

²²⁸ Québec (Province), Ministère de la santé et des services sociaux, & Bibliothèque numérique canadienne (Firme), *Ensemble pour éviter la rue et en sortir: politique nationale de lutte à l'itinérance* (2014) at 23.

²²⁹ Government of Canada, *Protocol for follow-up to recommendations from international human rights*

bodies (2020), Online at: <https://www.canada.ca/en/canadian-heritage/services/about-human-rights/protocol-follow-up-recommendations.html>.

past, but is now guided by the Senior Officials Committee Responsible for Human Rights (SOCHR) composed of federal, provincial, and territorial Assistant Deputy Ministers.²³⁰

In civil society literature, however, organizations have raised significant concerns regarding the effectiveness of these bodies as they currently operate.²³¹ A dominant concern has been that community members and civil society organizations are not meaningfully engaged or integrated into any of the implementation and follow-up procedures.

To implement the commitments of the federal government under the NHTA, it will be important to improve current processes within the CCOHR and the SOCHR to ensure more effective community engagement, coordination, and follow-up to concerns and recommendations from UN treaty bodies. It will also be critical to ensure cooperation among all levels of government in implementing recommendations from review panels under the NHTA.

BILATERAL AGREEMENTS. To deliver on housing programs provinces and

territories have signed bilateral agreements with the federal government alongside a multilateral Housing Partnership Framework²³² which outlines “a shared vision for housing and sets the foundation for bilateral agreements on the delivery of key National Housing Strategy initiatives.”²³³ Under the bilateral agreements, all provinces and territories with the exception of Quebec, have agreed to implement Action Plans to “complement the NHTA goal of helping advance the progressive realization of Canada’s obligations in relation to housing under the International Covenant on Economic, Social, and Cultural Rights (ICESCR).”²³⁴ Action Plans have been developed by 11 provinces and territories which include targets and outcomes.²³⁵ A review of Action Plans under the right to adequate housing could be an important opportunity for the Council to encourage the shared commitment to the progressive realization of the right to adequate housing under the ICESCR.

MUNICIPAL IMPLEMENTATION OF THE RIGHT TO ADEQUATE HOUSING: THE CITY OF TORONTO’S HOUSING AND HOMELESSNESS STRATEGY. One of the important benefits of the NHTA is that it

²³⁰ *Ibid.*

²³¹ Feminist Alliance for International Action (FAFIA), *Letter to Prime Minister Trudeau and Ministers Freeland, Joly, and Monsef* (25 January 2017), Online at: <<http://fafia-afai.org/wp-content/uploads/2017/01/CEDAWletterENGFINAL.pdf>>

²³² Canadian Intergovernmental Conference Secretariat, *News Release – Federal, Provincial and Territorial Ministers Endorse New Housing Partnership Framework* (9 April 2018), Online at: <<https://scics.ca/en/product-produit/news-release-federal-provincial-and-territorial-ministers-endorse-new-housing-partnership-framework/>>.

²³³ CMHC, *Federal/Provincial/Territorial housing agreements* (2021), Online at: <<https://www.cmhc-schl.gc.ca/en/nhs/federal-provincial-territorial-housing-agreements>>.

²³⁴ CMHC – Ontario, *Bilateral Agreement under the 2017 National Housing Strategy* (1 April 2018), Online at: <<https://eppdscrmssa01.blob.core.windows.net/cmhc-prodcontainer/sf/project/nhs/home/cmhc-ontario-bilateral-agreement-en.pdf>>.

²³⁵ Government of Canada, *Progress on the National Housing Strategy*, Online at: <<https://www.placetocallhome.ca/progress-on-the-national-housing-strategy>> (see tab entitled Federal/Provincial/Territorial NHS Investments)

provides a model for implementing the right to adequate housing that can be largely duplicated by provincial/territorial or municipal governments. Following the passing of the NHTA, in December 2019, the City of Toronto passed *the City of Toronto Housing TO 2020-2030 Action Plan*.²³⁶ The Action Plan as adopted includes a revised *Toronto Housing Charter* which commits the city to “Develop and maintain a housing strategy to further the progressive realization of the right to adequate housing, through all appropriate means, including creating and maintaining affordable housing, planning, zoning, licensing, regulation, enforcement, taxation and other measures within its authority.”²³⁷ The Charter also commits to review the establishment of a Housing Commissioner to monitor the implementation of the right to adequate housing. Though the Commissioner has not yet been appointed as of December 2021, grey literature resources produced by civil society have applied the right to adequate housing under the *Toronto Housing Charter* to shelters²³⁸, evictions²³⁹, and encampments²⁴⁰—issues which the Commissioner will be expected to address using a human rights-based approach, once appointed.

Internationally, human rights initiatives to implement the right to adequate housing at a local level are prevalent in many countries. For example, in 2021, Seoul, in the Republic of Korea named itself a human rights city and developed an ombudsperson to ensure access to remedies. Madison County in Wisconsin, United States of America, adopted a resolution in 2011 recognizing the human right to adequate housing—and referring to the *International Convention on Civil and Political Rights*, alongside the *Convention on the Elimination of Racial Discrimination*. In 2012 Buenos Aires adopted a law on fair access to habitat, which articulates a right to the city and democratic decision-making.²⁴¹

In Canada, a group of elected officials and city staff have come together to form the country’s first Right to Home Municipal Working Group, convened by the Shift and Canadian Urban Institute, which issued an urgent call to action in September 2020. There may be a critical opportunity for the Council to collaborate with local governments committed to the right to adequate housing by engaging in dialogue through a rights-based approach.²⁴²

²³⁶ City of Toronto, *Housing TO 2020-2030 Action Plan* (December 2019), Online at: <<https://www.toronto.ca/wp-content/uploads/2020/04/94f0-housing-to-2020-2030-action-plan-housing-secretariat.pdf>>.

²³⁷ *Ibid*, at 20.

²³⁸ Right to Housing in Toronto, *Shelter Rights Review* (2021), Online at: <<https://right2housingto.ca/wp-content/uploads/2021/04/Shelter-Rights-Review-R2HTO-April-2021.pdf>>.

²³⁹ Right to Housing in Toronto, *Evictions Rights Review* (2020), Online at: <<https://right2housingto.ca/wp-content/uploads/2020/12/Evictions-Rights-Review-R2HTO.pdf>>.

²⁴⁰ Right to Housing in Toronto, *Encampments Rights Review: Report on encampments in Toronto during COVID-19* (2020), Online at <<https://right2housingto.ca/wp-content/uploads/2020/09/R2HTO-Encampments-Rights-Review-final.pdf>>.

²⁴¹ UN General Assembly, *Report of the Special Rapporteur on adequate housing*, (22 December 2014) A/HRC/28/62, Online at: <<https://undocs.org/A/HRC/28/62>>

²⁴² The Shift, *Right to Home: A Municipal Call to Action*, (September 2020) Online at: <<https://www.make-the-shift.org/righttohome/>>

CHAPTER SUMMARY

WHAT ARE FEDERAL, PROVINCIAL, TERRITORIAL PARTNERSHIPS WITH RESPECT TO THE RIGHT TO ADEQUATE HOUSING AND HOW CAN THE FEDERAL GOVERNMENT ENSURE THIS RIGHT IS BEING PROGRESSIVELY REALIZED AT ALL LEVELS?

Canada's constitutional division of powers is one of the most significant barriers to the implementation of the right to adequate housing—particularly in implementing laws, policies, and programs that progressively realize the right. However, Canada is not unique in its jurisdictional divides, and in fact the right to adequate housing framework can assist with building cooperation between levels of government, based on their shared responsibility under international law for implementing the right to adequate housing (given that all levels of government are responsible).

Practically, the federal government can utilize the NHTA to urge collaboration between levels of government by: hosting **interministerial meetings** on the right to adequate housing and requiring all levels of government, including provinces and territories, to ensure that their action plans support the progressive realization and implementation of the right to adequate housing as required in their bilateral agreements. They can also **collaborate with municipalities and other subnational governments** who have similarly committed to the right to adequate housing.

8

Human rights indicators and metrics to assess compliance and determine reasonable measures

8.1 Human rights indicators

The article by Lillian Chenwi entitled “Unpacking ‘progressive realisation’, its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance”²⁴³ provides a succinct outline of human rights indicators to be

implemented in assessing progressive realization. In Chenwi’s analysis, she identifies frameworks for indicators including the “three-step methodological framework,” the basic framework²⁴⁴ proposed by Felner, the Index of Social and Economic Rights Fulfillment (SERF index)²⁴⁵ developed by Randolph, and the OPERA (Outcomes, Policy Efforts,

²⁴³ Lillian Chenwi, “Unpacking ‘progressive realisation’, its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance” (2013) DEJURE 39, Online at: http://www.saflii.org/za/journals/DEJURE/2013/39.html#_ftnref124

²⁴⁴ Chenwi describes the basic framework as requiring a comparison of social indicators with gross

domestic product alongside an analysis using quantitative tools of resource allocations.

²⁴⁵ Chenwi describes the SERF Index as a technical tool making use of indicators and benchmarks based on the extent to which economic and social rights are enjoyed, and the extent to which the state is obligated to realize rights. A gap in this tool is that it does not measure participation, non-discrimination, and accountability.

Resources, and Assessment) framework developed by the Centre for Economic and Social Rights.²⁴⁶

Chenwi notes that the OPERA framework was developed with a rationale that “existing frameworks have developed in isolation and in a fragmented way,” and that it “proposes a human rights-based analysis” by identifying in each step “relevant human rights standards and principles, including various procedural rights that should be taken into account in monitoring the fulfilment of socio-economic rights as well as the tools and techniques to be used.”²⁴⁷

WHAT IS THE OPERA MODEL?

The OPERA model was developed by the Centre for Economic and Social Right to determine whether or not a government is meeting its human rights obligations using a holistic approach. As the Centre describes, it analyzes:

- **Outcomes:** the level of realization of the right by asking, “from the rights holders’ perspective, what is the problem? In doing so, it considers minimum core obligations, non-discrimination and progressive realization.”²⁴⁸
- **Policy Efforts:** assessing the level of efforts by examining “whether the government is complying with the duty to take steps that are deliberate, concrete and targeted

and whether steps taken are increasing the availability, accessibility, acceptability, and quality of infrastructure, goods, and services on the ground. It also scrutinizes whether the formulation and implementation of policies are participatory, transparent, and accountable.”²⁴⁹

- **Resources:** assessing whether adequate resources have been devoted to the right, by looking at maximum of available resources by “assessing how government resources are raised, allocated and spent. This step also examines the budget cycle from the perspective of participation, transparency and accountability.”²⁵⁰
- **Assessment:** understanding constraints and identifying “broader social, economic, political or cultural factors that prevent people from enjoying their rights, as well as limitations on the government’s ability to enact policies and allocate resources to fulfill rights. It then facilitates a holistic assessment of the government’s compliance with its economic and social rights obligations.”

²⁴⁶ OPERA (Outcomes, Policy Efforts, Resources, and Assessment) reviews indicators to collect data, legal and policy commitments, planned and actual resource expenditure, and contextual factors that may limit the enjoyment of rights.

²⁴⁷ *Ibid.*

²⁴⁸ Centre for Economic, Social Rights, *OPERA in detail*, Online at: <<https://www.cesr.org/opera-detail>>.

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid.*

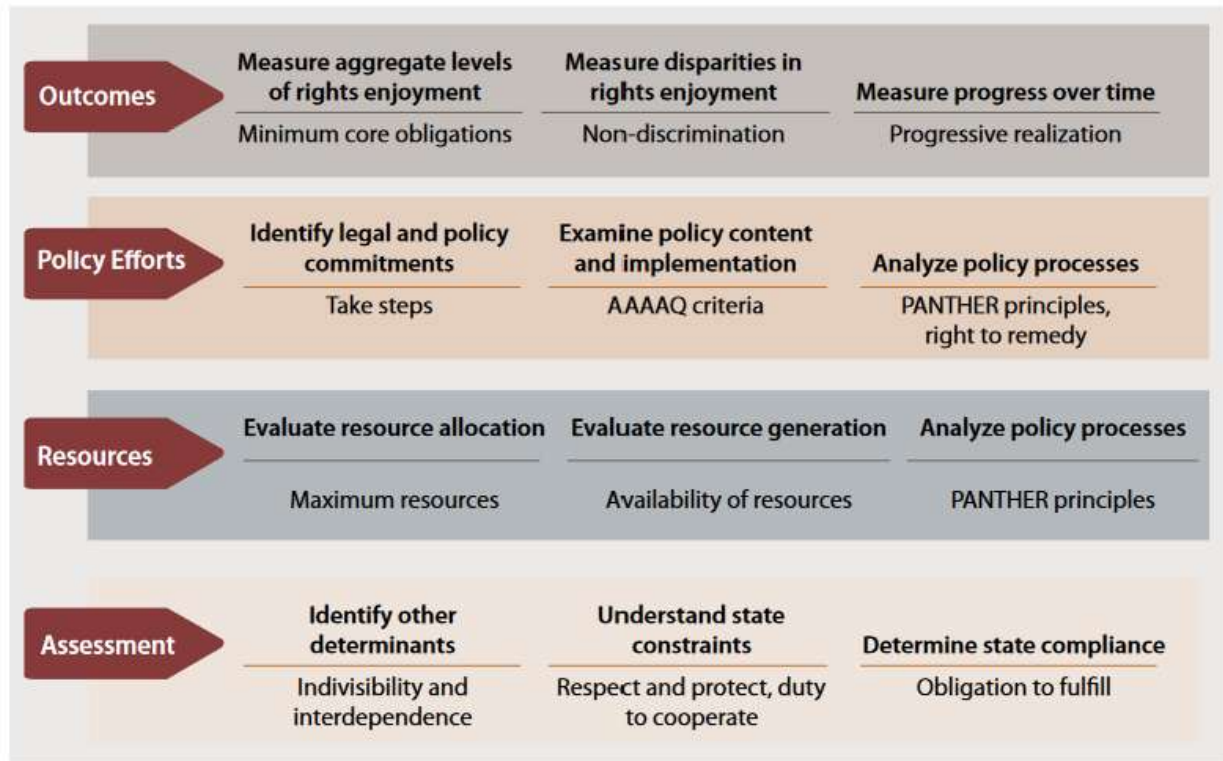


Image from Centre for Economic and Social Rights, “The OPERA Framework: Assessing Compliance with the Obligation to Fulfill Economic, Social, and Cultural Rights”.²⁵¹

The OPERA model has been used to facilitate human rights investigations across the world, for example in Kenya, Ireland, Angola, and Egypt. It has also been used to examine implementation of court orders in South Africa, and the right to food, health, and education in Guatemala.²⁵² In Scotland, the OPERA method was used recently to frame an

examination of social security reform by the Scottish Human Rights Commission and has similarly been used to examine compliance of states by human rights institutions in Malaysia, New Zealand, and Palestine.²⁵³ The publication, *Defending Dignity: A Manual for National Human Rights Institutions on Monitoring Economic, Social, and Cultural Rights*, provides detailed context for monitoring compliance with human rights using the OPERA model.²⁵⁴

²⁵¹ Centre for Economic and Social Rights, *The OPERA Framework: Assessing Compliance with the Obligation to Fulfill Economic, Social, and Cultural Rights*, Online at: <https://www.cesr.org/sites/default/files/the.opera_framework.pdf>

²⁵² Centre for Economic and Social Rights, *OPERA in Practice: case studies applying CESCR's Monitoring Framework*, Online at: <<https://www.cesr.org/opera-practice-case-studies-applying-cescrs-monitoring-framework>>

²⁵³ Centre for Economic and Social Rights, “OPERATIONALIZING” rights in Scotland’s new social security law, (27 September 2017), Online at: <<https://www.cesr.org/opera-tionalizing-rights-scotlands-new-social-security-law>>

²⁵⁴ Asia Pacific Forum of National Human Rights Institutions and the Center for Economic and Social Rights, *Defending Dignity: A Manual for National Human Rights Institutions on Monitoring Economic, Social, and Cultural Rights* (January 2015), Online at:

Similar to the OPERA model is the “process”, “structural”, and “outcomes” indicator methodology introduced by the Office of the United Nations High Commissioner for Human Rights,²⁵⁵ which is further implemented by the former UN Special Rapporteur on the right to adequate housing in her thematic report on national housing strategies.²⁵⁶ This methodology relies on:

- **“Process indicators”** which measure whether states have reported on a program deliverable to meet progressive realization within a prescribed time frame

- **“Outcome indicators”** which include qualitative and quantitative data measuring the experiences of rights holders
- **“Structural indicators”** assessing the extent to which legal protections and effective remedies are accessible to marginalized groups²⁵⁷

A unique aspect of this methodology is that, similar to the OPERA framework, it relies on a holistic human rights approach to assess whether states are meeting human rights obligations.

KEY RESOURCES:

- Lillian Chenwi, “Unpacking ‘progressive realisation’, its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance,” Online at: http://www.saflii.org/za/journals/DEJURE/2013/39.html#_ftnref124
- Centre for Economic and Social Rights, “The OPERA Framework,” Online at: <https://www.cesr.org/opera-framework>

MODELS OF IMPLEMENTING THE RIGHT TO ADEQUATE HOUSING:

The OPERA framework has been implemented by various human rights institutions in Malaysia, New Zealand, and Palestine—as well as by investigators in countries such as Kenya, Ireland, Angola, and Egypt.²⁵⁸ This could be a useful model to explore in a similar manner in the Canadian context.

<<https://www.ohchr.org/Documents/Issues/IEDebt/impactassessments/AsiaPacificForumNHRICenterEconomicSocialRights.pdf>>

²⁵⁵ OHCHR, *Human rights indicators: A guide to measurement and implementation* (New York and Geneva, 2012), Online at:

<http://www.ohchr.org/Documents/Publications/Human_rights_indicators_en.pdf>, at 34–42.

²⁵⁶ UN Human Rights Council, *supra* note 60.

²⁵⁷ *Ibid.*

²⁵⁸ Centre for Economic and Social Rights, *supra* note 248.

9

Conclusion and summary of the government's responsibilities

As novel legislation, the NHSA offers a unique opportunity to apply the progressive realization of the right to adequate housing to end the housing and homelessness crisis in communities across the country. A review of the literature on progressive realization of the right to adequate housing demonstrates a strong consensus among authorities that **the right to adequate housing must be understood as a fundamental human right linked to core human rights values such as dignity and must be subject to effective remedies.** There is consensus that the right must be understood in the context of the lived experience of rights

holders and must recognize systemic discrimination experienced by particular rights-claimant groups including persons with disabilities, Indigenous peoples, racialized persons, women and gender-diverse persons, and children.

A review of the literature also demonstrates that authors continually draw on authorities such as the ICESCR, and bodies like the Committee on ESC Rights or Special Rapporteurs to interpret and apply the right to adequate housing in particular contexts. The National Housing Council, in forming recommendations, can similarly draw upon international human rights authorities and recommendations

that Canada has been receiving for decades (as outlined in Chapter 5) to apply progressive realization to systemic issues, consistent with international human rights norms.

The responsibilities of the Government of Canada in implementing the right to adequate housing can be summarized as follows:



THE GOVERNMENT'S RESPONSIBILITIES

- Ensure **meaningful engagement** with claimant community about their circumstances and dignity interests, including through NHTS mechanisms.
- Identify and **prioritize** those in the most extreme or vulnerable circumstances.
- Address **systemic discrimination and socioeconomic inequality**, with particular attention paid to the rights of Indigenous peoples, women, persons with disabilities, persons relying on social assistance, racialized groups, and persons experiencing homelessness.
- Ensure a **“comprehensive” approach** by hearing from diverse perspectives.
- **Engage in good faith** with treaty body recommendations.
- Exercise national leadership to allocate responsibilities and ensure co-operation of **all orders of government**, including through funding and inter-governmental agreements.
- Ensure **appropriate budgeting and resource allocation** based on "maximum of available resources" standard including all appropriate taxation measures.
- Ensure **access to justice** and accountability for the right to adequate housing and within all housing programs and areas of governance affecting the right to adequate housing.
- Ensure **independent monitoring** and assessment of progress.
- Use **all appropriate means**, including regulatory and legislative measures, to ensure that investment and actions of private and non-governmental actors contribute to and do not undermine progressive realization of the right to adequate housing (e.g., **regulate private actors** to address the financialization of housing).
- **Avoid any retrogressive measures**, except where absolutely necessary in times of crisis, with provisions to ensure that vulnerable groups are not affected.
- Incorporate a "transformative" dimension to all legislation, regulation, planning, and decision-making to ensure the progressive realization of the

right to adequate housing within **the shortest possible time**. This involves ensuring that housing policies (particularly national strategies on housing and homelessness) have goals grounded in, and consistent with international human rights law.

As noted above, the authors of this paper are pleased that the National Housing Council is commissioning a separate paper on Indigenous rights, including treaty rights, and the right to adequate housing by Indigenous authors. Given that the authors of this paper are all settlers, our analysis in this regard is limited. However, First Nations, Métis, and Inuit persons in Canada—and particularly those living in urban, rural, northern, and remote areas which are not covered by treaty and legal processes—disproportionately bear the brunt of Canada’s housing crisis, and the new mechanisms present in both the NHSA and in the UNDRIP Act provide unique opportunities to genuinely engage Indigenous persons in developing new understanding of human rights and the right to adequate housing and engaging in decision-making regarding changes to laws, policies, and programs directly affecting their rights.

It is anticipated that Council members, in applying the NHSA, will be in a position to apply progressive realization in a way that urges multijurisdictional coordination (as

outlined in Chapter 7) and apply human rights standards with regard to the standards of reasonableness and a maximum of available resources (as outlined in Chapter 6). This literature review has outlined key resources related to the dimensions of the Government of Canada’s responsibility and human rights indicators by which to measure human rights obligations.

There are inherent limitations to this review, as the NHSA marks a significant departure from Canada’s previous resistance to economic, social, and cultural (ESC) rights. As systemic cases are reviewed by the Federal Housing Advocate and cases proceed to review panels, it is anticipated that a significant amount of literature will be produced analyzing the parameters and application of progressive realization of the right to adequate housing.

The National Housing Council has a challenging task ahead; alongside the Federal Housing Advocate and rights-claimants, members will make Canada’s new and transformative approach to the right to adequate housing live. This brave task is one that could genuinely end Canada’s housing and homelessness crisis if the NHSA’s core commitments to the right to adequate housing in international human rights law are treated, as proposed by the Supreme Court of Canada, not as “theoretical aspirations or legal luxuries, but moral imperatives and legal necessities.”²⁵⁹

²⁵⁹ *Nevsun*, *supra* note 27, para 1.

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