UNIVERSITÉ DU QUEBEC À MONTRÉAL

THE PAST PRESENT AND FUTURE OF THE RIGHT TO HOUSING IN CANADA

FROM THE CHARTER TO THE NATIONAL HOUSING STRATEGY: WHERE IS THE RIGHT TO SOCIAL HOUSING IN CANADA TODAY

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UNIVERSITÉ DU QUÉBEC À MONTRÉAL

LE DROIT AU LOGEMENT AU CANADA D'HIER À DEMAIN

LE DROIT AU LOGEMENT SOCIAL D'AUJOURD'HUI: DE LA CHARTE À LA STRATÉGIE NATIONALE SUR LE LOGEMENT CANADIEN

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Dedicated to my new family and my old one

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List of Acronyms:

ACHR *(American Convention on Human Rights)*

ADRDM *(American Declaration of the Rights and Duties of Man)*

ACTO *(Advocacy Centre for Tenants of Ontario)*

ASC *(Alternative Social Charter)*

BCSC (*Supreme Court of British Columbia*)

BCCA (*British Columbia Court of Appeal*)

CAP *(Canadian Assistance Plan)*

CDL *(Charte des droits et libertés de la personne)*

CEDAW *(Convention on the Elimination of All Forms of Discrimination Against Women)*

CERA *(Centre for Equality Rights in Housing Accommodation)*

CESCR *(Committee of Economic, Social and Cultural Rights)*

CHRA *(Canadian Human Rights Act)*

CHRC *(Canadian Human Rights Commission)*

CMHC *(Canadian Mortgage and Housing Corporation)*

CRC *(Convention on the Rights of the Child)*

CRPD *(The International Convention on Rights of People with Disabilities)*

DALO (*Droit au logement opposable*)

ESCR *(Economic, Social and Cultural Rights)*

IACtHR (*Inter-American Court of Human of Human Rights*)

IAHR *(The Inter-American Human Rights System)*

ICERD *(International Convention on the Elimination of All Forms of Racial Discrimination)*

ICESCR *(International Covenant of Economic, Social and Cultural Rights)*

IGO *(Inter-Governmental Organizations)*

ONSC (*Ontario Superior Court*)

ONCA (*Ontario Court of Appeal)*

OAS (*Organization of American States*)

NDP (*New Democratic Party*)

NGO (*Non-Governmental Organization*)

NHA (*National Housing Act*)

R2H *(Right to Housing Coalition)*

UDHR *(Universal Declaration of Human Rights)*

UNHRC *(United Nations Human Rights Council)*

WHL *(Wartime Housing Limited Agency)*

Résumé

Avec l'affaire *Tanudjaja c. Procureur général du Canada* (2013), une cause portant principalement sur le droit au logement, de nombreux juristes et défenseurs des droits sociaux et économiques ont pu réexaminer la question de l'accès au logement social comme droit de la personne au Canada. La présente thèse tente de répondre à la question de savoir ce que signifie ce droit dans un ressort où il n'est pas encore reconnu explicitement, que ce soit sur le plan des droits constitutionnels nommément enchâssés dans la *Charte canadienne des droits et libertés*, dans les lois quasi constitutionnelles ou autres, ou même dans le droit prétorien. En s'appuyant sur des concepts théoriques issus du mouvement d'internationalisation des analyses judiciaires et sur une théorie de l'« incrémentalisme judiciaire », cette thèse examine les répercussions de la jurisprudence actuelle de la *Charte canadienne* sur la possible reconnaissance d'un droit au logement. Cette analyse est nourrie des récents développements dans le discours sociojuridique, politique et transnational en lien avec les droits socioéconomiques au Canada. Cette thèse se penche donc sur l'histoire et le statut actuel à l'échelle internationale et constitutionnelle, du droit au logement au Canada. Une attention particulière est portée sur les initiatives politiques et législatives modernes qui visent la mise en œuvre du droit au logement social et qui continuent d'alimenter les discussions relatives aux droits économiques, sociaux et culturels au Québec et au Canada. En outre, cette thèse examine comment il serait possible de mobiliser ces diverses sources normatives (internationales, constitutionnelles, législatives et jurisprudentielles) et politiques publiques pour garantir juridiquement la mise en œuvre du droit au logement social. Elle vise à déterminer quelles sont les meilleures avenues juridiques pour de futurs recours en matière de droit au logement au Canada. Enfin, dans l'optique de la revendication du droit au logement, cette thèse se penchera sur les obstacles à surmonter dans le climat juridique actuel, compte tenu du partage des pouvoirs au Canada et de la réticence évidente des législateurs et des tribunaux à lui conférer un caractère juridique.

Mots-clés: Charte canadienne, les droits socioéconomiques, droit au logement, droit au logement social, droit des personnes au Canada, droit international des personnes, droit transnational des personnes.

Abstract

With the 2013 application *Tanudjaja v. Attorney General of Canada*, a *Charter* challenge based indirectly on the right to housing, many jurists and housing rights' champions have been revisiting the question of access to social housing as a basic human right in Canada. This thesis attempts to answer the question of what that right means in a jurisdiction where it is has only recently been enshrined in Federal statute, given that in the constitution, judicial decisions and statute, the right remains nonjusticiable. It adopts innovative theoretical concepts such as Judicial Internalisation, Incrementalism, and other developments in transnational and international human rights law in considering the legal implications of *Charter* doctrines for the legal recognition of the right to housing in Canada. As well as examining, the international, constitutional, legal history and current status of the right to housing, notably in interpretations of the Canadian *Charter*, but also in the federal and sub-national contexts with regards to modern policy and legislative initiatives that drive the discourse associated with economic, social and cultural rights. Moreover, the dissertation examines the way in which these discussions might legally reinforce a substantive right to social housing in Canada**.** It sets out to determine what the best legal avenues for future litigation of housing rights in Canada might be, and what obstacles the exercise of such a right must overcome in the current legal climate, given the division of powers in Canada, and the traditional reluctance of law makers and the judiciary to give it legal effect.

Key words: Canadian Charter, Right to Housing, Right to Social Housing, International Human Rights Law, Transnational Human Rights Law, Socioeconomic Rights, Canadian Human Rights Law, Comparative constitutional law, Socio-Legal Theory, Social Rights, Human Rights Theory, Housing Rights, Public Policy on Housing, Canadian Constitutional Law, Canadian Jurisprudence, International Jurisprudence, Homelessness, Housing First.

Great is justice! Justice is not settled by legislators and laws-It is in the Soul;

It cannot be varied by statute, any more than love, pride, the attraction of gravity, can;

It is immutable—it does not depend on majorities-majorities or what not come at last before the same passionless and exact tribunal.

-Walt Whitman (Leaves of Grass, Great are the Myths, p.294, stanza 15)

The Right to Social Housing in Canada

In an influential collection of essays on the subject of Ontario's *Safe Street Act*[1] (introduced by Ontario's Harris government in 2000*)*,[2] Canadian jurist David Schneiderman discusses the negative impact of neo-liberal[3] ideology on modern notions of citizenship. He makes a disturbing point about modern trends in Canadian social, political and economic life and the ways that they are linked to and reflect the socio-economic norms surrounding inclusion/exclusion from the community: "Citizenship is constructed around the market….consumerism-the ability to consume goods and services from any place and to travel anywhere-offers a space of freedom to those who face obstacles in most other areas of their lives."[4] Conversely, "there are those who are denied this semblance of agency, those who have no capacity to participate in modern consumerism because they are poor without work, or

[1] *Safe Streets Act, 1999*, SO 1999, c 8.
[2] Joe Hermer & Janet E Mosher, eds, *Disorderly People: Law and the Politics of Exclusion in Ontario* (Halifax: Fernwood Publishing, 2002) [Hermer & Mosher].
[3] "The 'neo' part of neoliberalism indicates that there is something new about it, suggesting that it is an updated version of older ideas about 'liberal economics' which has long argued that markets should be free from intervention by the state. In its simplest version, it reads: ''markets good, government bad." Campbell Jones, Martin Parker & René ten Bos, *For Business Ethics* (New York: Routledge, 2005) at 100.
[4] David Schneiderman, "The Constitutional Disorder of the Safe Streets Act: A Federalism Analysis" in Hermer & Mosher, *supra* note 2, 79 at 79.

homeless (emphasis added)."[5] This perspective is shared by many economists, sociologists, urban geographers and those working on the housing crisis in Canada in a wide-range of disciplines.[6]

In the human rights field, especially, we find a growing concern with the question of the right to housing and right to social housing. Not simply in the traditional, more restrictive sense of tenant's rights, but also in the broader meaning of the term that sees the right to housing as a general substantive and justiciable right citizen can avail themselves of when no housing is available or accessible to them, either because they lack resources or the private housing sector simply cannot or will not provide for their fundamental needs. The right to social housing covers specifically the right to request that State actors provide the required housing when it is not otherwise available. This question is no longer strictly an academic one, as the issue of human rights violations for those prevented from accessing social housing has finally been litigated in Canada and, in fact, legislated in a Federal statute: the *National Housing Strategy (NHS)*[7]. While many international instruments, judicial precedents and doctrinal works to which I will refer deal with the more general concept of right to housing or housing rights, when appropriate, I prefer the more specific right to social housing.

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[5] *Ibid*.

[6] See e.g. Canadian economist Michal Rozworski who says that "it is possible to exclude unwanted others from neighbourhoods through pricing out, capturing planning regulation or other less explicit means." Michal Rozworski, "The housing problem is the housing market, but it can be solved" (28 January 2016), online (blog): *Political Eh-conomy* <rozworski.org/political-eh-conomy/2016/01/28/housing-problem-utopian-solution/>.

[7] *National Housing Strategy Act*, SC 2019, c 29, s 313 [*NHS*].

Tanudjaja v Attorney General (Canada)

In the course of my doctoral work, I recognized that Canadian law was potentially on the cusp of realizing a major shift in judicial norms surrounding the right to social housing. The proof of this momentum came in the form of a *Canadian Charter of Rights and Freedoms* ("*the Charter*"[8]) based application for judicial redress filed on the 26th of May 2010. The application would later become known as *Tanudjaja v. Attorney General (Canada)*.[9] While the case was not strictly speaking about a free-standing right to social housing in Canada, it was a highly innovative strategy in that it broached the question of how homelessness and poverty infringe upon *Charter* rights under section 15 and 7 and examined the causal relationship between the systemic roots of the housing crisis and the policy and regulatory frameworks (or the lack thereof) set up by the governments of Ontario and Canada. The application (note that *Tanudjaja* and "the application" will be used interchangeably in this dissertation) also called for the adoption of a human rights approach to governmental housing policies and programs that included, among other elements, the international human right to adequate housing as a basis for any provincial or national housing strategy in Canada. For the purposes of this dissertation, the formidable social science evidence and extensive legal research in *Tanudjaja*[10] proved irresistible and served as an invaluable source of analysis into the matter of the right to social housing in Canada. However, in light of the failure of the application to ever receive

[8] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
[9] *Tanudjaja v Canada (AG)*, 2013 ONSC 5410, 116 OR (3d) 574 [*Tanudjaja*].
[10] *Ibid*.

a hearing on the merits of the case[11] many questions with regards to the right to social housing in Canada, and the value of *Tanudjaja* both as a legal precedent and as a judicial strategy, remain unanswered (the case was never tried in court). [12] Thus, my dissertation will necessarily include a discussion in terms of legal and judicial avenues open to another hypothetical claim pursuing the right to social housing through the Canadian judiciary. I will consider the legal and human rights issues advanced in *Tanudjaja*[13] and other economic, social and cultural rights (ESCR) oriented legal challenges that pose the question: what are the most effective means for achieving favourable outcomes in the current Canadian judicial and legal climate.

Tanudjaja[14] will serve as the nexus for two interrelated and theoretical lines of inquiry in this dissertation and two very different critical approaches to ESCR litigation in Canada: 1) international, transnational and comparative human rights frameworks and; 2) the theory of judicial Incrementalism, as espoused by Jeff King.[15]

The latter element relates to the question of adjudication of ESCR (Economic Social and Cultural Rights) domestically, and in particular the right to social housing. That is, Incrementalism, as conceived by King, demonstrates the judiciary in Canada need not shy away from tackling ESCR,

[11] The case went beyond the domestic courts. It also appealed and received a review and opinion with respect to Canada's non-compliance with the right to housing under its Covenant obligations from the UN Committee on Economic Social and Cultural Rights, see Laurie Monsebratten, "Advocates taking Canada's housing policy to UN'', *The Star* (20 February 2016), online: <www.thestar.com/news/gta/2016/02/20/advocates-taking-canadas-housing-policy-to-un.html>.
[12] *Tanudjaja*, *supra* note 9 at para 4.
[13] *Ibid*.
[14] *Ibid*.
[15] Jeff King, *Judging Social Rights* (Cambridge: Cambridge University Press, 2012) [King, ''Judging Social Rights'']

provided that they do so in a collaborative manner, consistent with Incrementalist precepts, thus ensuring they do not engender legal overreach. This is very much in keeping with the notions of judicial deference to legislatures for reasons of democratic legitimacy and dialogue already practiced widely by Canadian judges.

The Tanudjaja Application: Chronology of a Charter Challenge

Until 2013 the specific issue of whether a right to social housing in Canada existed, had neither been raised directly nor indirectly in the judicial context. This changed when Ms. Tanudjaja and her co-applicants filed an application alleging that wait times and the lack of social housing stocks in Ontario actually violated their right to life and security of the person (s.7) and their equality rights (s.15) under the *Charter*. While it should be stressed that the constitutional challenge was not predicated on a claim to social, substantive or indeed, any form of the right to housing under Canadian law, *per se*, it did rely in part on established international legal norms on the right to housing.

As it transpired, much of the social science evidence presented by the applicants was designed to persuade the judiciary those provincial and Federal housing policies and regulations in Canada severely undermined their enumerated *Charter* rights, and that, therefore, they were entitled to a legal remedy. One such remedy, preferred by many involved in the application, was judicial recognition of the right to social housing in Canada. In their application, the applicants effectively endorsed the position of the UN

Special Rapporteur in Housing,[16] stating that State actors had "repeatedly recommended that a national strategy that ensures the right to adequate housing be implemented on an urgent basis…"[17]

Ultimately, however, the case failed by the most significant legal measure; it never received its day in court. The astonishing amount of material gathered by the dedicated team of lawyers, civil society and anti-poverty groups (i.e. the Right to Housing Coalition or R2H) working with Ms. Tanudjaja, *et al*., on the application was dismissed at every level of the Canadian judicial system on the grounds of non-justiciability.

The purpose of this dissertation is to, in the first instance, critically assess the reasoning behind the court's rejection of the application. The following sections are intended to offer some background for the issues that will be explored, subsequently, in this dissertation.

[16] *PROMOTION AND PROTECTION OF ALL HUMAN RIGHTS, CIVIL, POLITICAL, ECONOMIC, SOCIAL AND CULTURAL RIGHTS, INCLUDING THE RIGHT TO DEVELOPMENT: Report 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*, *Miloon Kothari* UNGAOR HRCOR, 10th Sess, Annex Agenda Item 3, UN Doc A/HRC/10/7/Add.3 (2009) at 12.

[17] Tracy Heffernan, Fay Faraday & Peter Rosenthal, "Fighting for the Right to Housing in Canada" (2015) 24:1 J Law Soc Policy 10 at 23.

Origins of the Application

Tanudjaja was a collective legal action brought by a claimant (Ms. Jennifer Tanudjaja[18]) and a group of co-applicants who, with the help of various social-justice oriented civil society organizations and housing rights champions (most notably the Advocacy Centre for Tenants of Ontario or ACTO) filed suit against the governments of Canada and Ontario in May of 2010. In a paper published after the fact, the claimants' legal counsel, described their strategy in some detail.

> The Advocacy Centre for Tenants Ontario (ACTO) launched the inaugural Right to Housing (R2H) Coalition meeting, which pulled together a wide range of individuals and groups with a deep concern for housing security. For a full year the Coalition discussed, debated, and argued about whether we should launch a legal challenge to assert the right to adequate housing in Canada. When four extraordinary individuals and one organization stepped forward as applicants, the Coalition decided to proceed with a constitutional challenge. [19]

The application, therefore, was the result of a dialogue initiated by the R2H Coalition between many different stake-holders. The legal strategy of the application was, however, especially influenced by the work of one of these stakeholders: the Center for Equality in Accommodations (CERA), its founder and ESCR scholar and activist, Bruce Porter.

As was said before, this strategy was predicated on a constitutional challenge that did not directly call for an enforceable right to social housing

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[18] To learn about Ms. Tanudjaja's inspiring personal story see Laurie Monsebraaten, ''Toronto homeless launch charter challenge'', *The Star* (27 May 2010), online: <www.thestar.com/news/gta/2010/05/27/toronto_homeless_launch_charter_challenge.html>.

[19] Heffernan, Faraday & Rosenthal, *supra* note 17 at 14.

under the *Charter*. In essence, *Tanudjaja* made a far more open-ended appeal by placing the onus on the State respondents (Ontario's and Canada's attorney generals) to provide a Federal and provincial housing scheme that would address homelessness and a lack of adequate social housing in Canada.[20] The legal basis of *Tanudjaja* is concisely summed up in this quote:

> The claim is novel in that it consciously maps the system and the interrelated systemic effects. In this way, the Right to Housing challenge examines the breadth of state action that is necessary to sustain particular power relationships and presents a direct challenge to how we conceived of government accountability of the consequences of its policy choices.[21]

Tanudjaja, therefore, posits that judicial recognition of the right to social housing may be part of the solution, but remains only one of many potential remedies to a systemic dysfunction that has resulted from policy and law makers deemphasizing and severely underfunding social housing.

This is very much in keeping with Porter's reflections on the best way forward in terms of ESCR adjudication. Porter favours a broad definition of ESCR and discourages defining their content or related entitlements too narrowly, as these may be easily defeated by State actors in court. Porter later clarified his thoughts on the matter: "A requirement that universally applicable entitlements must be determined in advance of the adjudication of particular claims places an insuperable obstacle upon claimants of ESC rights and greatly favours respondents."[22] Theoretically, then, the burden of framing and recognizing ESCR, specifically a substantive right to social housing,

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[20] *Ibid* at 22.
[21] *Ibid* at 12.
[22] See Bruce Porter, ''The Crisis of Economic, Social and Cultural Rights and Strategies for Addressing It'' in John Squires, Malcom Langford & Bret Thiele, eds, *The Road to a Remedy: Current Issues in the Litigation of Economic, Social, and Cultural Rights* (Sydney: Australian Human Rights Centre, 2005) 43 at 51 [Porter, ''The Crisis of ESC Rights''].

should rest largely with the respondents, rather than the applicants, as was the case with *Tanudjaja.*[23] In this respect, the thinking would resemble *Vriend v. Alberta*[24], where the Supreme Court of Canada determined that a lacuna in the law in question (in this instance, protection from discrimination on the basis of sexual orientation in Alberta) could be the subject of a *Charter* review: "where, as here, the challenge concerns an Act of the legislature that is under inclusive as a result of an omission, s.32 should not be interpreted as precluding the application of the *Charter*."[25]

Finally, the *Tanudjaja* application references Canada's obligations under international human rights law, [26] specifically naming two treaties (*International Covenant on Economic, Social and Cultural Rights*[27] and *International Covenant on Civil and Political Rights*[28]), to clarify the degree of Canada's mishandling of the homelessness crisis. This reliance on international human rights law was deemed an essential element of the legal strategy formulated by the R2H.

> Input from international human rights experts convinced the Coalition to call for the strategy to be human rights-based, with compliance mechanisms in place to ensure its successful implementation. The human rights based demand, for a fully funded federal housing strategy to end homelessness and inadequate housing, became both the remedy sought by the Applicants and the Coalition's rallying cry.[29]

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[23] *Ibid*.
[24] *Vriend v Alberta*, [1998] 1 SCR 493, 224 NR 1 [*Vriend*].
[25] See generally *Vriend*, *ibid* at para 61.
[26] *Tanudjaja*, *supra* note 9 at 4.
[27] *International Covenant on Economic, Social and Cultural Rights*. 993 U.N.T.S. 3, Can T.S 1976 No 46 (entered into force 3 January 1976) [*ICESCR*].
[28] *International Covenant on Civil and Political Rights*, 999 UNTS Can TS 1976 [*ICCPR*].
[29] For an excellent overview of the R2H strategy, see Yutaka Dirks, "Community Campaigns for the Right to Housing: Lessons from the R2H Coalition of Ontario" (2015) Res Matters Blog Homeless Hub 2015 at 138.

Ultimately, the remedies being sought by the applicants were: *"(a) declarations that rights under section 7 and section 15 have been violated; (b) an order to implement national and provincial housing strategies; and (c) a supervisory order in respect of developing strategies.*" [30]

[30] Heffernan, Faraday & Rosenthal, *supra* note 17 at 35.

The Tanudjaja Application: The Legal Process

In 2010 the litigants filed notice under the *Rules of Civil Procedure*[31] that they would be taking the state parties to court for violations of the *Charter* and international law. Subsequent to the filing of notice, the coalition behind the applicants gathered an extensive amount of expert testimony (in the form of affidavits and factums), designed to support their arguments in court.[32] The Attorney General of Ontario was served with the documentation (approximately 10,000 pages) in 2011, in its initial response, requested that it be given enough time to prepare its briefs. The Ontario government's legal counsel soon abandoned this request in favour of seeking the removal of Ms. Tanudjaja's application on the grounds of failure to raise a legal question. Under Ontario's *Rules of Civil Procedure* and doctrine developed through various case law[33], a motion to strike may be granted when a particular litigation "has no reasonable cause of action."[34] The Ontario Attorney General's motion to strike and dismiss was designed to stifle the *Tanudjaja*[35] application in two ways: Firstly, and most obviously, by depriving Ms. Tanudjaja, *et al*., of their chance to be heard at trial. But also, crucially, by ensuring that the massive evidentiary record put together by the R2H

[31] *Rules of Civil Procedure*, RRO 1990, Reg 194 [RRO].
[32] "Twelve expert witnesses gave freely of their time to draft expert witness affidavits, including: Miloon Kothari (the former UN Special Rapporteur on the right to housing); Catherine Frazee, the former Ontario Human Rights Commissioner; Charles Taiowisakarere Hill, Executive Director of the National Aboriginal Housing Association; and Dr. Stephen Hwang, a renowned doctor at St. Michael's Hospital who has conducted research on the correlation between inadequate housing and homelessness, serious illness, and mortality." Heffernan, Faraday & Rosenthal, *supra* note 17 at 16.
[33] See *Hunt v Carey Canada Inc*., [1990] 2 SCR 959, at 980, 1990 CanLII 90.
[34] RRO, *supra* note 31, s. 21.01 (1) (b).
[35] *Tanudjaja*, *supra* note 9 para 9.

Coalition would never reach the judge deciding whether to grant the motion to strike. The latter was arguably a more devastating blow to a case that relied heavily on the legislative facts regarding homelessness and its relationship with social housing policies in Canada.

> In the *Right to Housing* challenge, the 10,000 pages of affidavit evidence are the bedrock of the application; the breadth and depth of the record demonstrates that these are not issues to be argued in the abstract. Yet the *Rules of Civil Procedure* expressly provide that no evidence can be before the court on a motion to strike.[36]

In an effort to prevent the motion to strike from succeeding the R2H Coalition responded with a motion to intervene on behalf of several organizations[37] that had contributed expertise and resources to the case. Judge Lederer, the motion's judge at the Superior Court of Ontario, allowed three of these intervenors to participate in the deliberations with regards to the proceedings.[38]

Over a period of three days in May 2013, the judge heard from these organization and deliberated on the legal merits of the *Tanudjaja* claim without the benefit of access to the majority of the evidence [39]gathered by the various parties to the application.

Given the exclusion of this critical component of the application, Lederer J. was not impressed with the Ms. Tanudjaja's arguments. He dismissed the application *in toto*, stating first that the section 7 claim was *de facto* based on a positive economic obligation on the State

[36] Heffernan, Faraday & Rosenthal, *supra* note 17 at 17.
[37] These were 1) Amnesty International/the International Network for Social and Cultural Rights; 2) the Charter Committee on Poverty Issues/Pivot Legal Society/the Income Security Advocacy Centre/Justice for Girls; and 3) the David Asper Centre for Constitutional Rights.
[38] Heffernan, Faraday & Rosenthal, *supra* note 17 at 25-26.
[39] *Tanudjaja*, *supra* note 9 para 8.

under the *Charter* to provide a "minimum standard of living."[40] Yet, in Lederer J's view, "the *Charter* does nothing to provide assurance that we all share a right to a minimum standard of living. Any Application built on the premise that the *Charter* imposes such a right cannot succeed and is misconceived."[41]

Ergo, the Court found that the s.15 claim would fail on the same grounds. And that, furthermore, even though the point was moot, homelessness was not an analogous ground, as defined by jurisprudence because: "Without an understanding of the common characteristics which defines the group, it cannot be established as an analogous ground under s. 15(1) of the *Charter.* Poverty or economic status, which is seemingly the only common characteristic, is not an analogous ground."[42]

Finally, with regards to the position advanced by the applicants that all citizens are entitled to equal benefit of the law, Lederer J. found that government policies could not be shown to be the primary cause of homelessness stating: "I have found that the actions and decisions complained of do not deny the homeless a benefit Canada and Ontario provide to others or impose a burden not levied on others, meaning there can be no breach of s. 15 of the *Charter.*"[43]

Perhaps most galling for scholars of international human rights and their relevance in Canadian law, Lederer J. utterly disregards their

[40] *Ibid* at para 120.
[41] *Ibid*.
[42] *Ibid* at para 134.
[43] *Ibid* at para 128.

importance, writing: "whatever international treaties say about housing as a right is not of much help."[44]

The application was, therefore, thrown out by virtue of a successful motion to strike. But the R2H Coalition was not content to let Lederer have the last word. They appealed the ruling and, in December 2014, the Ontario Court of Appeal (ONCA) handed down its judgment in *Tanudjaja.*[45] The ONCA upheld the motion to strike granted by Lederer J and the dismissal of the court of first instance. It was not a unanimous decision, however: the court was divided, two to three. With respect to the lower court ruling, there was a great deal of criticism of both procedural and substantive aspects of Judge Lederer's judgment. The conclusion of the majority (written by Pardu J.A.) was that the case might be justiciable under different circumstances, contrary to the ONSC decision, and notions of polycentricity and political question doctrine should not have influenced Justice Lederer's analysis.

> I add that complexity alone, sensitivity of political issues, the potential for significant ramifications flowing from a court decision and a preference that legislatures alone deal with a matter are not sufficient on their own to permit a court to decline to hear a matter on the ground of justiciability (…)[46]

Despite this, the ONCA was not persuaded that Ms. Tanudjaja's particular *Charter* claim was justiciable for a number of reasons. It asserted that the applicants had not been precise enough in their challenge and "found that the systemic nature of the claim rendered it non-justiciable because it failed to follow 'archetypal feature of *Charter* challenges' which present a

[44] *Ibid* at para 150.
[45] *Tanudjaja v Canada (AG)*, 2014 ONCA 852, 123 OR (3d) 161 [*Tanudjaja* CA].
[46] *Ibid* at para 35.

challenge to a single law or single application of a law."[47]Justice Pardu, writing for the majority invoked the doctrine of non-justiciability:

> [T]here is no judicially discoverable and manageable standard for assessing in general whether housing policy is adequate or whether insufficient priority has been given in general to the needs of the homeless. This is not a question that can be resolved by application of law, but rather it engages the accountability of legislatures.[48]

Citing *Gosselin,*[49] the majority concluded that it was not necessary to explore the remote possibility of "positive" rights in the *Charter's* s. 7 and that, moreover, since the issues raised by the application were non-justiciable, it was also irrelevant whether s.15 would include homelessness by way of analogy. Finally, the majority was in agreement with the lower court regarding the appropriateness of allowing a motion to strike to be filed.[50] The Ontario Court of Appeal made no reference to international human rights law on the subject of housing rights in its decision and Pardu J. reinforced Lederer's mistaken assertion that the appellant's claim was predicated on "freestanding right to adequate housing." [51]

Feldman JA of the ONCA disagreed with many of the above points. In her dissent, she wrote that the ONSC had misapplied the rules of civil procedure under Ontario law:

> This application is simply not the type of "hopeless" claim for which Rule 21 was intended. It has been brought by counsel on behalf of a large, marginalized, vulnerable and disadvantaged group who face profound barriers to access to justice. It raises issues that are basic to their life and well-being. It is supported by a number of credible intervening institutions with considerable expertise in *Charter* jurisprudence and

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[47] Heffernan, Faraday & Rosenthal, *supra* note 17 at 19.
[48] *Tanudjaja* CA, *supra* note 45 at para 33.
[49] *Gosselin v Québec (AG)*, 2002 SCC 84, [2002] 4 SCR 429 [*Gosselin*].
[50] *Tanudjaja* CA, *supra* note 45 at para 38.
[51] *Ibid* at para 30.

> analysis. The appellants put together a significant record to support their application. That record should be put before the court.[52]

Ergo, *Tanudjaja* remained a viable *Charter* claim and could not be dismissed on the basis of the doctrine of non-justiciability. Among Lederer J's errors, Justice Feldman listed several that she believed were serious. According to Feldman, Lederer had mischaracterized the applicant's s.7 claim and exaggerated its scope and implications for the State.[53] Further, Justice Feldman criticized Lederer J's assertion that s.7 categorically does not contain any positive obligations on the State; when, in fact, the question remains open.[54] Lastly, Justice Feldman criticized the lower court's findings with respect to the validity of the applicants' claims about of their s.15 and s.7 rights in the context of a preliminary and pre-trial phase of the application given that applicants did not the benefit from a proper hearing.[55] As such, given that the applicants did not have a chance to submit all their arguments and put their evidence (much of which was socio-legal in nature) before the court, it was overhasty of Lederer J. to conclude that the application had no reasonable chance of success at trial.

Margot Young is in agreement with Justice Feldman on the procedural anomaly with respect to the imposing of the motion to strike. Specifically, she indicates that it is legally dubious for the analysis of remedial orders to occur in the context of a pre-trial exercise:

> Remedial requests have no place in the determination of whether or not the challenge can proceed to consideration on its merits. Should an infringement be found, then fuller

[52] *Ibid* at para 88.
[53] *Ibid* at para 52.
[54] *Ibid*.
[55] *Ibid*.

> engagement with the range of jurisprudence, showcased, for example, in the intervenor factum of the Asper Centre on remedy, can then be better canvassed. [56]

Finally, Feldman found that Justice Lederer's decision precluded crucial factual and evidential materials that were highly material to the application.[57] Feldman J.A., however, did not comment on the international human right to housing and, therefore, all the justices of the ONCA were equally silent on how ignoring such a well-established legal norm might be an error of law in the context of the application.

Justice Feldman did, however, give the applicants some hope that the next stage of their appeal might prove more favourable. She regarded the approach taken by Ms. Tanudjaja as promising, writing:

> [T]he novelty of a claim is not a bar to allowing it to proceed. Although the development of *Charter* jurisprudence has to date followed a fairly consistent procedural path, and has involved challenges to particular laws, we are still in the early stages of that development. There is no reason to believe that that procedural approach is fixed in stone. This application asks the court to view *Charter* claims through a different procedural lens. [58]

Alas, Feldman J.'s opinion notwithstanding, Ms. Tanudjaja's application would never go to trial, failing to be granted leave to appeal at the Supreme Court, the case was shut down in June of 2015.[59]

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[56] For a feminist legal perspective on this aspect of the decision see especially Margot Young, "Charter Eviction: Litigating Out of House and Home" (2015) 24:1 J Law Soc Policy 46 at 64 [Young, ''Charter Eviction''].
[57] *Tanudjaja* CA, *supra* note 45 at para 52.
[58] *Ibid* at para 84.
[59] *Tanudjaja v Canada (AG)*, 2014 ONCA 852, leave to appeal to SCC refused, 36283 (25 June 2015).

In Part III, Chapter C, I will provide a more detailed legal and normative critique of the *Tanudjaja*[60] application. This will revolve around three interrelated themes (each the subject of its own section): 1) *Tanudjaja and Incrementalism*; 2) *Tanudjaja and the substantive equality*; 3) *Tanudjaja and International law*. In the final section (4), I touch on the subsequent *Charter* based case law involving the right to housing that has been influenced, for better or worse, by the application. In particular, a piece of litigation launched by a coalition advocating for the rights of the homeless that emerged in British Columbia in 2015 (*Shantz)*.[61]

Beyond my critique of the *Tanudjaja* case, however, this dissertation grapples with an even more difficult issue for human rights scholars and ESCR advocates: **does the Canadian legal system contain a justiciable right to social housing, whether directly, indirectly or implicitly?** If the answer is yes, then where is such a right located and in what legal venue would it best be pursued? What are the international legal obligations placed on Canada and its territorial and provincial governments that might require them to respect, protect and fulfill the right to social housing? What are the elements of quasi-constitutional legislation, statutory law and governmental policies and programs that might have a significant impact, either positive or negative, on the exercise of such rights, particularly in Quebec? What are the potential jurisdictional issues raised by a recognized right to social housing in Canada (for instance the NHS), given the constitutional division of powers in Canadian federalism?

[60] *Tanudjaja*, *supra* note 9 at para 2.
[61] *Abbotsford (City of) v Shantz*, 2015 BCSC 1909, 392 DLR (4th) 106 [*Shantz*].

What does social housing mean?

I will take this section to briefly outline the terminology of social housing and my preference for this particular conception of housing in this dissertation. I have opted for the term social housing for three major reasons discussed below. They are: simplicity, universality and breadth.

Social housing in Canada can be defined simply as subsidized, adequate, public and accessible. "In Canada this includes non-profit, publicly owned and co-op housing, generally administrated by provincial/territorial and municipal governments, but currently funded by all levels of government."[62] The term social housing can be used to describe a wide variety of housing situations. This breadth makes it especially useful in my current task of defining and redefining the right to social housing in Canada:

> Social housing takes many forms, from large-scale multi-unit buildings, to smaller buildings and even scattered site housing. In the majority of cases, the housing is made available at below market rents, and tends to be used for low-income individuals and families and in some cases sub-populations, such as seniors and people with disabilities.[63]

The term social housing is often used interchangeably with "affordable housing." This is a mistake, albeit not an obvious one. For the sake of clarity, I will now attempt to distinguish the former from the latter. "Affordable housing" is, in economic terms, much broader than social housing. It includes housing that is not subsidized, regulated or provided by State actors. Generally speaking, the affordability of housing in a given

[62] Stephen Gaetz et al, *The State of Homelessness in Canada 2013* (Toronto: Canadian Homelessness Research Network Press, 2013) at 24.
[63] *Ibid*.

marketplace, may be determined by economic and financial factors such as housing supply, foreign investment, and market valuations of property.[64]

Affordable housing is a more controversial term among housing rights scholars for a variety of reasons. It is generally regarded in Canada as being any form of housing which costs less than 30% of a given household's gross income.[65]

The term "affordable housing" is not universally accepted among housing rights champions as it is susceptible to manipulation, having been reframed by governments in such a way as to misrepresent housing affordability. For instance, in their report to the United Nations Committee on Economic Social and Cultural Rights (CESCR), the Advocacy Centre for Tenants of Ontario (ACTO) criticized the misuse of "affordable housing" in government statements, stating "increasingly, both Ontario and Canada have begun to use the term 'affordable' to mean housing that is rented at 80% of market rent, in other words, housing which is unaffordable for low-income communities."[66] As such, I prefer the term "social housing", as it avoids this ongoing debate and is generally accepted among stakeholders in the housing

[64] John David Hulchanski, ''Housing Policy for Tomorrow's Cities'' (December 2002) at 7, online (pdf): *Canadian Policy Research Networks Inc. (CPRN)* <www.urbancentre.utoronto.ca/pdfs/researchassociates/Hulchanski_Housing-Policy-C.pdf>.

[65] This is according to a widely used formula developed by the CMHC: "In Canada, housing is considered 'affordable' if it costs less than 30% of a household's before-tax income." ''About Affordable Housing in Canada'' (31 March 2018), online: *Canada Mortgage and Housing Corporation* <www.cmhc-schl.gc.ca/en/developing-and-renovating/develop-new-affordable-housing/programs-and-information/about-affordable-housing-in-canada>.

[66] Tracy Heffernan, ''Submission on the Right to Adequate Housing Committee on Economic, Social and Cultural Rights'' (1 February 2016) at 11, online (pdf): *Right to Housing* <righttohousing.wordpress.com/2016/02/20/cescr-submission-on-the-right-to-adequate-housing/>.

sector, especially those that view social housing as a basic human right in Canada.

What does the right to social housing mean?

With a few notable exceptions,[67] the human rights implications of the crisis[68] in the Canadian housing sector resulting from, *inter alia*, the shortage of social housing and the issue of access to it is not a widely discussed topic in legal circles.[69] I believe, this is in large part due to the ambiguous relationship between Canadian human rights legislation, in particular the entrenched bill of rights contained in the *Charter*, and ECSR in Canada. This is especially true of the substantive right to social housing, which remains more or less ignored by the judiciary, as opposed to the limited or "negative" version of the right recognized in anti-discrimination laws around access to housing in Canada.[70]

When I talk about the substantive right to social housing, in the context of this dissertation, I am talking about much more than shelter from the elements. If the right is viewed through a human rights lens it is, by definition, not subject to misconceived debates on the differences between

[67] See e.g. Bruce Porter, "Homelessness, Human Rights, Litigation and Law Reform: A View from Canada'' (2017) 10:2 Austl J H R 133.
[68] The evidence of this crisis is well-documented, see e.g. Steve Pomeroy, ''Built to Last: Strengthening the Foundations of Housing in Canada'' (May 2015), online (pdf): *Federation of Canadian Municipalities* <data.fcm.ca/documents/reports/FCM/Built_to_Last_Strengthening_the_foundations_of_housing_in_Canada_EN.pdf>.
[69] Thought this might be changing, as UN Special Rapporteur Leilani Farha suggests in her final report: "Both civil society and governments are increasingly recognizing the housing crisis as a human rights crisis requiring a human rights response." *Guidelines for the Implementation of the Right to Adequate Housing*. *Report 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*, UNGAOR HRCOR, 43rd Sess, Annex, Agenda Item 3, Un Doc A/HRC/43/43 (2020) at 1.
[70] See e.g. the 17 grounds of prohibited discrimination enumerated in Ontario's *Human Rights Code*, RSO 1990, c H.19.

"negative" or first generation rights, on the one hand, and "positive", or second generation rights, on the other. To quote the UN General Assembly "All human rights are indivisible and interdependent."[71]

To put it another way, the substantive right to social housing is intertwined and interdependent with issues of access to housing and questions of exclusion/inclusion in Canadian society. "Sky rocketing costs of housing in large urban centres and the growing gap of income inequality show us that society is becoming more *exclusive* (emphasis added)."[72] Thus, in a normative sense, judicial recognition of the right to social housing in Canada can be seen as a means of social and economic integration. Furthermore, it ought to be regarded by the Canadian judiciary as a substantive right, essential to a person's dignity, no different, and, in fact, very much at the crux of such established *Charter* rights at the right to life, liberty, and personal security, or the right to equality before the law. As one of Ms. Tanudjaja legal advisors put it with respect to the application and the right to housing generally "housing is fundamental to ensuring physical and mental health, social inclusion, and participation in society."[73]

I am not talking about a "positive" right to housing, in the legal or normative sense. I do not subscribe to the artificial distinction between "positive" and "negative" human rights, nor do I intend to perpetuate such

[71] See article 1(a) of *Alternative approaches and ways and means within the United Nations system for improving the effective enjoyment of human rights and fundamental freedoms*, GA Res A/44/49, UNGAOR, 44th Sess, Supp No 49, UN Doc A/RES/44/63 (1990).
[72] Bill O'Grady & Robert Bright, "Squeezed to the Point of Exclusion: The Case of Toronto Squeegee Cleaners" in Hermer & Mosher, *supra* note 2, 23 at 39.
[73] Heffernan, Faraday & Rosenthal, *supra* note 17 at 10.

flawed theories of rights in this dissertation.[74] As Sylvestre and other Canadian legal scholars[75] have declared:

> The classical distinction between positive and negative rights has been widely condemned by the legal community and in academic literature, which convincingly argues that rights are indivisible and interdependent and that all types of rights require some obligation on the state in order to be meaningful.[76]

Unfortunately, Young has noted the problematic tendency towards legal interpretations that accept *prima facie* significant differences between "positive" and "negative" rights in housing, and ESCR more generally. These interpretations are overwhelmingly unchallenged in the adjudication of *Charter* claims by the Canadian judiciary.[77]And to some extent, will be addressed in the context of the dissertation's discussion on Canadian legal theory and judicial approaches to claims about ESCR, particularly *Charter* rights.

I wish to reiterate to the reader that traditional notions of the differences between so called "positive rights" (namely programmatic rights that require state actions to be realized and "negative rights" (namely rights that may be recognized by law without any other necessary state or legal intervention) represent a false dichotomy with harmful effects on the right to social housing, and ESCR practice more generally.[78]

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[74] The reader will note the use of the word "*substantive*" right to social housing as opposed to "*positive*," throughout this dissertation.
[75] Young, "Charter Eviction", *supra* note 56 at 60.
[76] Marie-Eve Sylvestre, ''The Redistributive Potential of Section 7 of the Canadian Charter: Incorporating Socio Economic Context in Criminal Law and in the Adjudication of Rights'' (2012) 42:3 Ottawa L R 389 at 403.
[77] Margot Young, "Abbotsford v Shantz: Housing Rights and the Canadian Constitution" (2015) Oxf Hum Rights Hub 12 at 103 [Young, ''Abbotsford v Shantz''].
[78] For more on this point, see discussion in Part I, Chap. A, s. 5.

Those that have focused on the substantive right to social housing in their scholarship like Nathalie Des Rosiers, recognize its legal and normative validity in the Canadian human rights context, but have nonetheless come to the conclusion that it is exceedingly difficult to justify such a right on the grounds of the *Charter*.[79]

Others have resorted to looking beyond the Canadian jurisdiction. Taking a comparativist approach, allows these Canadian scholars to employ concepts, doctrines and jurisprudence under international and transnational systems of law, in order to make the case that the substantive right to social housing must also exist domestically, by virtue of Canada's obligation under the former, and the undeniable weight and importance of legal norms generated by the latter.[80] Admittedly, this approach may result in the right to social housing being placed indirectly on the spectrum of Canadian human rights claims, and, at the very least, seems to have influenced the framers of the NHS.

Housing Rights in the Indigenous Canadian Context

At this stage, I warn the reader that I will not be addressing the question of an indigenous right to social housing directly, in this dissertation. It must be acknowledged; however, that the right to social housing may, in

[79] However, Des Rosiers finds that a "negative" right may be founded upon legal measures related to anti-discrimination in housing. See Nathalie Des Rosiers, ''Le droit au logement au Canada : un droit inexistant, implicite ou indirect?'' in Marc Verdussen, ed, *Les droits culturels et sociaux des plus défavorisés : actes du colloque international organisé le 18 avril 2008 à Louvain-la-Neuve par la Faculté de droit de l'Université de Louvain (UCL), en association avec la Faculté de droit de l'Université d'Ottawa et la Faculté de droit et de science politique de l'Université de Rennes* (Bruxelles: Bruylant, 2009) 341 at 366.

[80] See Bruce Porter, "Judging Poverty: Using International Human Rights Law to Refine the Scope of Charter Rights" (2000) 15 J L & Soc Pol'y 117 [Porter, ''Judging Poverty''].

fact, exist in the indigenous legal context (especially in relation to First Nations communities on-reserve[81]), and that the need for public investment in this area of social housing is acute.[82] The decision is meant to emphasize the need for a deeper understanding and analysis of this complex subject.

By no means is it my intention to marginalize the critical housing rights' claims of Canada's indigenous peoples. Quite the opposite; It is out of the greatest appreciation for the vast and well-documented history of institutionalized racism inherent in the Federal government's relations with indigenous Canadians and the ongoing often shocking human rights violations suffered by indigenous communities in Canada, that I have consciously decided to leave this sensitive and complex matter to be broached in future legal scholarship. As Margot Young, has rightly declared "housing insecurity as indigenous peoples experience it on reserve needs specific analysis."[83] And, unfortunately, this dissertation, with its already vast scope, simply cannot provide the full treatment that such a sensitive question rightfully deserves.

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[81] Housing on reserve remains a shared jurisdiction between federal and local authorities and a controversial issue for many First Nations. The provision of social housing is legally the responsibility of local government (i.e. "band councils") but the federal government has a vital supporting role to play under the *Indian Act*. Section m (regulations s.73.1) for instance, require federal funding "for empowering and authorizing the council of a band to borrow money for band projects or housing purposes and providing for the making of loans out of moneys borrowed to members of the band for housing purposes." *Indian Act*, RSC 1985, c I-5, s 15 [*Indian Act*].

[82] "Residents of beleaguered Attawapiskat reserve evacuated after fire in housing complex" *National Post* (23 November 2013), online: <nationalpost.com/news/canada/residents-of-beleaguered-attawapiskat-evacuated-after-fire-in-housing-complex>.

[83] Young, "Charter Eviction", *supra* note 56 at 52.

Theoretical and methodological components

At this juncture in the introduction, it is appropriate for me to say a few words about the theories and methods employed in the research and writing of this work.

At the heart of this study there is a theoretical framework that informs all other aspects that relate to the central hypothesis, namely: does the right to social housing exist in Canada. The theoretical lenses applied are derived largely, as we will see in *Part I,* from three conceptual frameworks concerned with the adjudication of ESCR: Judicial Internationalisation, Incrementalism, and Jessie Hohmann's Internationalist critique of housing rights rooted in her understanding of international human rights frameworks that govern and sometimes restrict the behaviour of state actors.

Concerning matters of methodology; this dissertation does not purport to be empirical, except in so far as it borrows from the empirical research of certain secondary sources.[84] Instead, it is more or less jurisprudential in nature. That is to say, it takes the Canadian judicial process in the *Tanudjaja*[85] application as a starting point and springboard for a broader discussion of the related domestic, transnational and international public legal norms surrounding the right to housing. This approach inevitably led me to a deeper analysis of the meaning of the right to housing in the modern Canadian judicial and legal context.

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[84] For instance, the comparative qualitative analysis of several constitutional courts, see Elaine Mak, *Judicial Decision-Making in a Globalised World: A Comparative Analysis of the Changing Practices of Western Highest Courts* (Oxford, UK: Hart Publishing, 2015).
[85] *Tanudjaja*, *supra* note 9 at para 149-151.

In looking critically at the jurisprudence, especially at the Supreme Court of Canada, the dissertation is mainly concerned with primary sources of legal norms. However, other formal sources of law include constitutional, legal, regulatory, and judicial norms enacted in Canada and other countries, especially for the purpose of comparative analysis of ESCR.

In terms of secondary sources, the most significant are legal analyses found in doctrinal texts and legal, socio legal and public policy literature. Though, this is supplemented with non-legal sources of material (media, policy papers, governmental reports, historical accounts, etc.).

Structure of the dissertation

This dissertation is divided into three major parts. The first part explains the normative framework I have used for broaching the substantive right to social housing in Canada. Much has been written in the field of comparative and transnational legal theory with respect to the relevance of housing rights and the way in which they affect domestic human rights regimes, both in Canada and elsewhere. This will inform my own writing about the right to social housing.

In Part I, Chapter A, I will assess the international theories of ESCR with regards to the right to social housing, focusing on the relevance of these to the Canadian human rights and legal contexts. International sources of ESCR norms are as different as they are numerous. However, in this dissertation I use the definition elucidated in conventional sources of international public law, namely the *International Covenant on Economic Social and Cultural Rights* (More on this in Part II, Chapter A, Section 2).[86]

[86] *ICESCR*, *supra* note 27.

There are two main reasons for this preference: 1. being that the Canadian government continues to cite these sources of rights in their submissions to various international bodies responsible for overseeing their implementation,[87] although these statements have been met with growing scepticism among human rights observers in Canada.[88] 2. Arguably more definitive proof of this commitment to the obligation of the second Covenant, can be found in the statute that introduced the National Housing Strategy, which makes reference to the ICESCR, stating "National Housing Strategy would support the progressive realization of the right to adequate housing as recognized in the International Covenant on Economic, Social and Cultural Rights, to which Canada is a party."[89]

Critically, the first section, also identifies key normative and legal elements employed throughout the inquiry with regards to both the meaning of ESCR in modern human rights discourse and the way in which the right to social housing is both rooted in this normative framework as well as the

[87] In the context of a 1993 report submitted to the Committee on Economic, Social and Cultural Rights [ESCR], the Federal government described its understanding of the relationship between s.7 of the Canadian *Charter* and its *Covenant* obligations the following way: "While the guarantee of security of the person under section 7 of the *Charter* might not lead to a right to a certain type of social assistance, it ensured that persons were not deprived of the basic necessities of life." UNESCOR CESCROR, 8th Sess, 5th Mtg, UN Doc E/C.12/1993/SR.5 (1993) at para 21.

[88] It must be said that many human rights' scholars have called into question the sincerity of the Canadian Government's declarations. See for example Gwen Brodsky who writes that privately, federal governments opposes such a reading of the *Charter* but, for whatever reason "the Canadian government will not say publicly that they do not believe that Canadians should enjoy these human rights or that they never intended social and economic rights commitments to be enforced domestically" Gwen Brodsky, "The Subversion of Human Rights by Governments in Canada" in Margot E Young et al, eds, *Poverty Rights, Social Citizenship, and Legal Activism* (Vancouver: UBC Press, 2007) 355 at 365.

[89] *NHS*, *supra* note 7.

application of ESCR within the current Canadian legal and human rights context (Particularly in the *Tanudjaja* application*).*

The latest developments in transnational and comparative law with regard to ESCR will be the focus of the discussion in sections B, C, D of Part I. In particular three jurists' (These are Elaine Mak, Jessie Hohmann, and Jeff King.) work will be highlighted to demonstrate that the question of housing rights remains dynamic, malleable, and continues to evolve normatively and legally, both in Canada and beyond.

Transnational and comparativist approaches feature heavily in my analysis of the right to social housing in Canada. These are human rights paradigms that see law as a dynamic and organic phenomenon with parallels that transcend national and sub-national jurisdictions and influence the progress of legal norms through a process of Judicial Internationalisation at the highest levels of internal legal structures. Specifically, the judicial review mechanism exercised by constitutional courts in various jurisdictions. Among the most recent and relevant of these theories of comparative law, and the one that I have chosen to examine in depth, is the Judicial Internationalisation lens advanced by Elaine Mak and applied to the judicial decision making of the Supreme Court of Canada.[90]

Jurists Jessie Hohmann,[91] is a Canadian scholar who frames her analysis on the right to housing in the language of intersectionality, exploring its impact in every sphere of legal activity and providing a thorough critique

[90] Mak, *supra* note 84.
[91] Jessie Hohmann, *The Right to Housing: Law, Concepts, Possibilities* (Oxford, UK: Hart Publishing, 2014).

of international and domestic legal institutions concerned with the right to housing.

Finally, I will critically examine and apply Jeff King's (another Canadian jurist) Incrementalist theory of judicial interpretation, as it relates to the question of the right to social housing in Canada and beyond. King's discussion of the way that Incrementalist thinking might be used to overcome the current obstacles faced by social rights in Canada merits greater understanding in the context of a potential path for ESCR litigation. It is my contention that *Charter* claims (including ones made in *Tanudjaja* [92]) related to the substantive right to social housing that can be framed as Incrementalist in nature, have a much greater chance of acceptance by courts in Canada.

In Part II, I will elaborate on the modern right to social housing in international law. Chapter A provides a brief overview of the major international public law sources of the substantive right to housing. Followed by an in-depth examination of every facet of the ICESCR's right to adequate housing, and its influence on Canadian legal norms around ESCR.

I will also be examining the major themes and criticisms of these human rights instruments and their relevance to the Canadian context. This will be followed, in Chapter B, by a look at the other legal bodies, including a review of the jurisprudence and doctrines employed by claimants seeking housing justice in Canada, from the major international human rights organs, such as the CESCR.

Finally, in the last Chapter C of Part II, I will undertake a comparative analysis of the right to housing in India, South Africa, Finland and France,

[92] *Tanudjaja*, *supra* note 9 at para 2.

with the aim of identifying key lessons for the Canadian legal situation and extrapolating potential judicial remedies for Canadian jurists concerned with the substantive right to social housing.

In Part III, the focus of the dissertation shifts to the domestic sphere in Canada vis-à-vis the right to social housing. In Chapter A, I will discuss the historical evolution of housing policy and laws with respect to social housing as a right. Chapter B is focused on the *Charter* based legal and human rights jurisprudence in Canada related to the right to social housing and ESCR doctrines, more generally. In light of the preceding chapter's discussion about *Charter* claims to ESCR, I will provide an in-depth account and diagnosis of the potential legacy of the *Tanudjaja*[93] case for future *Charter* challenges, in Chapter C. Chapter D deals with the modern statutory framework, in Canada, with respect to the right to social housing. This will, naturally, touch on the Federal Government's *National Housing Strategy*. In Chapter E, I will examine the constitutional, legislative and policy measures that touch on the right to housing and other issues with ESCR norms, in the province of Quebec. This proved not only to be a compelling case study and rich source of material in the implementation (and missed opportunities) of ESCR, but it also happens to be where I live and study. And, more to the point, where the research and writing of my dissertation took place.

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The subject of the substantive right to social housing may be too vast for one doctoral thesis, but it is too significant to continue to be misunderstood or, worse still, neglected by the Canadian judiciary. With the current discussion on the NHS in Canada, it is imperative that the idea of a

[93] *Ibid*.

substantive right to social housing be at the heart of any governmental policy targeting the crisis in housing and homelessness the Country is experiencing.[94] The present moment in Canada's evolution is, undeniably, a auspicious one for champions of the right to social housing in Canada.

To be sure, there are already some very dedicated and, highly qualified Canadian jurists, scholars and human rights advocates[95] involved in advancing the cause of ESCR generally in Canada, and the right to social housing in particular. Many of whom I have been fortunate enough to consult in the writing of the following dissertation.

[94] Ritka Goel, "We need a national housing strategy now'', *Toronto Star* (13 October 2015), online: <www.thestar.com/opinion/commentary/2015/10/13/we-need-a-national-housing-strategy-now.html>.

[95] I am referring here to such eminent jurists as Martha Jackman, Lucie Lamarche, Margot Young, Tracy Heffernan, Bruce Porter, Craig Scott, David Hulchanski, David Wiseman, and Leilani Farha, just to name a few.

Part I: International, Transnational, Comparative, Judicial Internationalisation, and Incrementalist Perspectives on the Right to Social Housing

The aims of Part I of my dissertation are as follows: First, I will undertake an analysis and critique of the latest developments in international, transnational and comparative human rights theories. I will place special emphasis on the utility of these for the right to social housing, in the current Canadian ESCR discourse. Second, I will provide a tentative normative framework for the translation and integration in the Canadian context of international and transnational ESCR norms. I will focus specifically on the right to social housing, in the Canadian human rights and legal contexts. I will take particular care to analyze the way in which such a framework might influence future legal actions, similar to the application.

There is a multiplicity of potential frameworks one could employ to analyze international human rights norms and the manner in which these norms interface with domestic and sub-national legal systems. I have chosen to focus my inquiry on the following four: 1. Internationally the rules and laws covering relations between states in all their myriad forms, and regulations operating at various international organizations.[96] 2. Transnational law: "the notion of transnational law has become and has acquired a general sense of law that is non-state in origin, that transcends particular states and that does not fall within the defined spheres of

[96] Malcolm Nathan Shaw, *International Law* (Cambridge: Cambridge University Press, 2006) at 2 [MN Shaw].

international law."[97] 3. Comparative law: the relationships between legal systems, between the norms of more than one system, and different legal cultures, with the aim of drawing conclusions about their normative effects.[98] 4. Judicial Internationalisation: "increasing use of international legal instruments has increasingly obliged the highest courts to develop expertise concerning legal source elaborated outside their national system."[99]

I have chosen these four because they offer the most effective arguments for the recognition and integration of the international right to housing in Canada. Crucially, they also involve the promotion of international and transnational remedies pertinent to legal issues related to the ESCR at the federal and sub-national levels of adjudication.

My review of the international and transnational paradigms in Section I, will be informed by Malcolm Langford's (and others) analysis and his expansive work on of the typology of ESCR obligations. Langford and his co-authors, provide an excellent overview in the form of a series of essays exploring the themes, challenges and solutions to common ESCR issues emerging in and across jurisdictions around the world. This study is intended to further the development and direction of ESCR norms transnationally, including Canada.

Also discussed in Section I is an important collection of essays[100] edited by Martha Jackman and Bruce Porter, about the significance of

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[97] H Patrick Glenn, *The Cosmopolitan State* (Oxford, UK: Oxford University Press, 2013) at 255.
[98] Mabel Shaw, "Guides: Foreign and Comparative Law Research Guide: Introduction", online, Georgetown Law: <//guides.ll.georgetown.edu/c.php?g=362128&p=2445998>.
[99] Mak, *supra* note 84 at 1.
[100] Martha Jackman & Bruce Porter, *Advancing Social Rights in Canada* (Toronto: Irwin Law, 2014) [Jackman & Porter, ''Advancing Social Rights'']

international and transnational legal norms on the evolving Canadian human rights' discourse related to ESCR. This selection provides the legal context for litigation strategies concerned with the advancement of the right to social housing in Canada. Further, and of particular relevance to my current task, the study explains the difficulties associated with pursuing the right to housing in the current legal climate in Canada. In particular, the essays in this collection highlight the challenge of securing legal recognition in Canadian courts for the already established international human right to social housing.

In Section II I will explore "Judicial Internationalisation" theorist Elain Mak's recent study of the manner in which international and transnational legal concepts have been employed by the highest courts in five different common law and civil law jurisdictions.[101] I will demonstrate that the lessons drawn from her largely qualitative research apply equally to the subject at hand in several key areas. Mak's comparativist theory applies particularly well to my dissertation as it relates to the impact of international and transnational ESCR norms on the thinking of Canadian courts, especially the Supreme Court of Canada (one of the five constitutional courts included in her analysis).

Part I is largely concerned with recent doctrinal, theoretical and normative developments in international, transnational and internal human rights law with respect to ESCR and the right to social housing. To this end, I will focus specifically on the normative critique of housing rights put forward by jurist Jessie Hohmann (Section III) and the Incrementalist theory of social rights proposed by Jeff King (Section VI). Both of these scholars

[101] Mak, *supra* note 84 at 2.

deal with how international and transnational legal norms surrounding ESCR intersect and are legitimized in national legal orders, including Canada's.

In some respects, there is nothing more fundamental to this project that an understanding of the meaning of the term economic social and cultural rights (or ESCR). In the first part of Section I, I will tackle the definition of ESCR in both an abstract and normative sense and its usage in modern legal and human rights practice and procedure. I will then attempt to show the way in which ESCR is evolving in international, comparative and transnational legal discourses, mainly through a study of the origins of ESCR and an examination of the way ESCR are understood in different domestic and international legal orders.

Comparativist scholar Elaine Mak, the subject of Section II of this Chapter, is particularly interested in the migration of legal remedies from one jurisdiction to another. According to her analysis, the nature of the claim being made in a particular case and legal order, is highly important in terms of the potential for a comparative study with other legal orders. Mak hypothesizes that foreign law will naturally be more relevant in cases involving a clear international legal question. Might this, for example, include the right to social housing: "In human rights cases…the applicability of international treaties and the case law of international courts will oblige national courts to consider binding international legal sources."[102]

Jesse Hohmann developed a theoretical and inter-disciplinary response to the legal questions on the nature of transnational and, especially, international housing rights. The first part of her analysis deals with housing

[102] Hohmann, *supra* note 91 at 27.

as a substantive human right. That is, Hohmann considers the various treaties, conventions and international human rights documents that, together, comprise the legal foundation for human rights norms and obligations that bind State actors to internally implement the right to housing. There is also an important comparative element in her study that utilises the examples of Indian and South African jurisprudence, two jurisdictions where the right to housing is already established and enforceable through the courts.

In the second part of the book, however, Hohmann boldly challenges human rights scholars to justify why the right to social housing is necessary in today's world. Her critique is, thus, both theoretical and practical. As she says: "there is a failure to define the right…second; the right is interpreted in an overly-procedural manner…the right to housing fails to connect to the conditions of violence, suffering and destitution that characterise the lives of those who it might expect to protect."[103] More to the point, hers is a powerful argument for the recognition of the substantive right to social housing on theoretical and normative grounds, as it strives to address many of the criticisms continually raised by opponents of legal recognition of housing rights in Canada.

Jeff King is a Canadian human rights theorist with a particular interest in questions of social rights adjudication. The term he uses for his approach is Incrementalism (adapted from organization theory[104]). Incrementalism is based on the notion that courts should avoid creating precedents that might lead to a major redistribution of wealth or resources. Rather, the courts should

[103] *Ibid* at 3.
[104] Murray Wesson, ''Enforcing Human Rights Incrementally: Review of Jeff King, Judging Social Rights'' (2012) 16 University of Western Sydney L Rev 129 at 132.

craft their rulings, with respect to social rights, on very specific and limited grounds. Failing that, the courts should avoid the development of constitutional or binding rules as much as possible in order to minimize the impact of their decisions on the resource allocation function of other branches of government and promote legal flexibility.[105] I will demonstrate the value of Incrementalist theory with respect to ESCR adjudication in general, and the right to social housing in particular, in the final section of Part I.

[105] King, ''Judging Social Rights'', *supra* note 15 at 293.

A) International, Comparative Legal Theories of ESCR and their Relevance for the Right to Housing in Canada

On one level ESCR simply connotes a reference to particular international human rights documents (more on this in Part II of my dissertation). As such ESCR can be taken as a reference to, the United Nations' *International Covenant of Economic, Social and Cultural Rights*, (sometimes called the "Second Covenant") and other documents that together constitute the "International Bill of Rights."[106] The three key elements of the latter date to the post-war era and were conceived very much in the context of not only preventing the atrocities of that global conflict from occurring again but also as a catalyst for the burgeoning global human rights revolution.[107] This revolution, aimed to create new international and domestic legal frameworks for securing accountability and participation in the enforcement of human rights. It was largely rooted in the public international legal norms defined by the *Charter of the United Nations*[108] and, in particular, Article 55 of the latter which imposes an obligation on members states to provide for the "well-being" of their citizenry. By some accounts, this instrument's provisions

[106] The "International Bill of Rights," according to Hohmann, consists of the *International Covenant of Economic Social and Cultural Rights*, *the International Covenant on Civil and Political Rights*, and the *Universal Declaration of Human Rights*. Hohmann, *supra* note 91 at 11.

[107] MN Shaw, *supra* note 96 at 247.

[108] The opening paragraph of *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7, article 55 reads "With a view to the creation of conditions of stability and *well-being* which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples" [emphasis added], United Nations Conference on International Organization, United Nations & International Court of Justice, eds, *Charter of the United Nations, Statute of the International court of justice, and interim arrangements* (San Francisco, 1945).

encompass certain basic human needs, including housing.[109] In this sense, the Second Covenant, and its binding right to adequate housing (Art. 11), can be seen as a consequence of the adoption by the UN member states of the General Assembly of a non-binding Resolution: *The Universal Declaration of Human Rights*.

Jurists like Malcolm Langford have adopted the terminology of the treaty in defining ESCR more generally and, in particular, as the Covenant famously declares the right to "adequate housing."[110] Others, like Jessie Hohmann have combined the latter with the constitutionally guaranteed rights found in domestic human rights instruments, such as the constitution of South Africa,[111] to create a transnational framework for discussing the substantive right to social housing. For an example of this, Jeremy Waldron in his critical examination of the intersection between theories of justice and socio-economic rights declared:

> By socioeconomic rights I mean rights of the kind we see listed in articles 23-26 of the Universal Declaration of Human Rights, articles 9-13 of the International Covenant on Economic, Social and Cultural Rights, and in national instruments such as the Bill of Rights (article 26-29) associated with South Africa's Constitution.[112]

ESCR must, however, be understood has having a deeper and broader meaning, which goes beyond the procedural rights in the law or policy related entitlements of governmental programs. As has been explained by

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[109] See especially the analysis on International Economic and Social Cooperation Chapter IX found in Bruno Simma & Hermann Mosler, *The Charter of the United Nations: A Commentary* (Oxford, UK: Oxford University Press, 2010) at 1535.

[110] "Adequacy although not defined must be read in light of the provisions purpose, which is the health and well-being of the individual and the family." Hohmann, *supra* note 91 at 16.

[111] *Constitution of the Republic of South Africa, 1996* (S Afr), No 108 of 1996, ch 2 [*Constitution RSA*].

[112] Jeremy Waldron, ''Socioeconomic Rights and Theories of Justice'' (2011) 48:3 San Diego L Rev 773 at 773.

Hohmann[113] and Jeff King[114], ESCR are, unlike other social programs that constitute the modern welfare state. They are not strictly the product of legislative and political processes at the domestic level. Thus, ESCR are not generally a part of the normal political bargaining process (though legal validation of ESCR may result from such internal processes), in the sense that they very often stem from substantive and universally recognized basic human rights enshrined in a variety of international legal instruments.

> Fundamental social rights are internationally…impose(d) substantive, legally binding obligations on the state to provide for the basic material needs (e.g. housing, health, and education) of people. They should be distinguished from mere legislative welfare entitlements.[115]

Throughout this dissertation, the concept of ESCR, in particular the right to social housing will be employed primarily in this sense: a substantive and legally recognized rights that is enshrined in numerous domestic and international public law instruments. Thus, ESCR exist regardless of whether they are explicitly recognized by domestic legal frameworks. The question of whether they are actionable in a given domestic judiciary is increasingly supported by transnational and international jurisprudence and doctrines, many of which will be discussed later in the context of international and comparative human rights law in Part II (especially Chapters B and C).

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In this dissertation I adopt the more conventional human rights framework of respect, protection and fulfilment of ESCR, articulated by the

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[113] Hohmann, *supra* note 91 at 6.
[114] King, ''Judging Social Rights'', *supra* note 15 at 17.
[115] Georges S Katrougalos & Paul O'Connell, "Fundamental Social Rights" in Mark Tushnet, Thomas Fleiner & Cheryl Saunders, eds, *Routledge Handbook of Constitutional Law* (Abingdon: Routledge, 2013) 375 at 375.

CESCR,[116] with regards to the obligations that the Covenant imposes on State parties. These are:

> The obligation to *respect* requires the State, and thereby all of its organs and agents, to abstain from doing anything that violates the integrity of the individual or infringes on her or his freedom, including the freedom to use material resources available to that individual in a way he or she finds satisfy basic needs. The obligation to *protect* requires from the State and its agents the measures necessary to prevent other individuals or groups from violating the integrity, freedom of action or other human rights of the individual including the prevention of infringements of his or her material resources. The obligation to *fulfil* requires the State to take measures necessary to ensure for each person within its jurisdiction opportunities to obtain satisfaction of those needs, recognized in the human rights instruments, which cannot be secured by personal efforts [emphasis added]. [117]

Canada is signatory to the second Covenant and consented to be bound by it in 1976. As such the government of Canada accepted the specific obligations imposed by the treaty.

> By ratifying the ICESCR in 1976, Canada formally acknowledged that adequate food, *housing*, health care, education, social security, and just and favourable conditions of work were not simply laudable goals of social policy. These were recognized as fundamental human rights requiring progressive implementation to the maximum of available resources by all appropriate means and demanding access to justice and effective remedies for rights claimants when governments fail to meet their obligations [emphasis added].[118]

1) Protection of ESCR

The CESCR conceives of the state's obligation to protect as one that is both horizontal and vertical, that is to say, binding on both State and non-State actors. In the latter category, the CESCR specifically regards the obligation to protect as applying to and regulating private entities, especially

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[116] See e.g. Committee on Economic, Social and Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment 12. The right to adequate food (art. 11)*, UNESCOR, 20th Sess, UN DOC E/C.12/1999/5 (1999).

[117] Asbjorn Eide, "Realization of Social and Economic Rights and the Minimum Threshold Approach" (1989) 1012 HRLJ 35 at 37.

[118] Jackman & Porter, ''Advancing Social Rights'', *supra* note 100 at 5.

those involved in the provision of public services such as social housing agencies.[119] As Langford indicates in his study, "there is a significant number of cases in this volume where government has been faulted for inaction or lack of due diligence in effectively regulating the behaviour of private actors."[120] One such example in the Canadian context is *Eldridge v British Columbia*[121]where the Supreme Court found that a hospital although a non-State actor, was providing publicly funded health care services and delivering a mandated healthcare program, by virtue of which they were bound by the *Charter*'*s* equality provisions on accessibility of their services.[122]

ESCR are inextricably linked with legal protection from discrimination. There are scores of examples where litigation has effectively established a State's substantive or negative obligation to recognize disadvantaged minorities on the grounds of the latter's right to equality of benefits and protection[123] of the law. In such cases, however, the right against discrimination seldom touches on issue of a more general right to social housing

2) Progressive Realization of ESCR

The concept of progressive realization is a highly complex one. What does seem settled, however, is that it requires what Bruce Porter describes as

[119] Scott Leckie, ''The Justiciability of Housing Rights" in Fons Coomans & Fried Van Hoof, eds, *The Right to Complain about Economic, Social and Cultural Rights: Proceedings of the Expert Meeting on the Adoption of An Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: Held from 25-28, January 1995, in Utrecht* (Utrecht, Netherlands: SIM, 1995) at 52 [Leckie, "Justiciability"].
[120] Malcolm Langford, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2009) at 17.
[121] *Eldridge v British Columbia (AG),* [1997] 3 SCR 624, 151 DLR (4th) 577 [*Eldridge*].
[122] Langford, *supra* note 120 at 20.
[123] MN Shaw, *supra* note 96 at 298.

long-term planning for governmental policy and programs, with respect to ESCR. This differs from most civil and political rights as some

> claims in more traditional civil and political rights framing tends to focus on a remedy that can immediately be granted by courts, establishing operating rules for government programs subject to immediate enforceability. The *new paradigm* of social rights, brings broader strategic aspects of policy and program development that are not subject to immediate remedies into the field of human rights practice (emphasis added). [124]

This "new paradigm" of progressive realization necessitates, a more inclusive and substantive approach than certain more limited notions of human rights; it promotes engagement with stakeholders in the shaping, development and execution of social and economic policies. Particularly those groups and communities most affected by the ongoing affordable housing crisis. In human rights terms, this means that all of us have a fundamental claim to housing. Furthermore, as rights-holders, all of us are empowered by ICESCR and other sources of human rights norms, to hold policy-makers and State actors to account.

> Those in need of housing or related social benefits should be treated as rights holders and as experts in what is required for a dignified life, not recipients of charity. They are entitled to participate actively, freely and meaningfully in the design and implementation of programmes and policies affecting them.[125]

Under the international human rights framework, therefore, social rights claims compel governments to pursue strategies within feasible time-frames, based on measurable outcomes, and, above all else, engage in substantive dialogue with stakeholders, be they rights holders, civil society groups or non-governmental organizations (NGOs), to both solicit their input

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[124] Bruce Porter, "Rights in Anti-Poverty and Housing Strategies: Making the Connection", in Jackman & Porter, *supra* note 100 at 35 [Porter, ''Rights in Anti-Poverty''].
[125] Report of Special Rapporteur for Housing, *supra note* 69 at 6.

and provide accountability through complaint resolution mechanisms, monitoring, and evaluating progress.[126]

[126] Porter, ''Rights in Anti-Poverty'', *supra* note 124 at 36.

3) Available Resources and Reasonableness in ESCR

Another key component of the obligation to implement ESCR pertains to the manner in which the State defines "available resources" with regards to progressive rights realization. Article 2(1) of the ICESCR requires state governments "to take steps...to the maximum of [their] available resources, with a view to achieve progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."[127] This means, in practical terms, that State actors are duty bound to not only immediately implement certain obligations, but also to, when able, fulfill the right to housing and address the more systemic problems of poverty, exclusion and discrimination which are the root causes of the failure to implement a given right.[128]

Crucially, a state's progress in policy and program implementation is assessed using a reasonableness standard. The "reasonableness" of a given measure is now incorporated into the Optional Protocol of the ICESCR,[129] and is widely accepted in international and many domestic legal systems as a legitimate measure of success in the enforcement of ESCR.

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[127] *ICESCR*, *supra* note 27.

[128] Porter, ''Rights in Anti-Poverty'', *supra* note 124 at 43-44.

[129] The standard, as worded in the Optional Protocol, is: "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." *Optional Protocol for International Covenant on Economic Social and Cultural Rights*, GA Res 63/117, UNGAOR, 63rd Sess, UN Doc A/63/435 (2008) [*OP-ICESCR*].

In its jurisprudence,[130] the CESCR identifies a number of potential factors that must be taken into account when examining whether a given State has complied with its treaty obligations. A non-exhaustive list of these factors includes: (1) whether the State actors' discretion was exercised in a non-discriminatory manner; (2) whether the State actor's actions were taken in reasonable amount of time; (3) whether the State actor's decisions were transparent.[131]

Arguably, a very important legal norm for the advancement of ESCR claims domestically is the development of a standard of reasonableness. Of equal importance is the ability of this defined standard to relate to the pre-existing constitutional and administrative principles within a legal system.[132] This reasonableness standard permeates and informs many aspects of Canadian law, most notably in the administrative context. In the case of *Baker v Canada* ("*Baker*") the Supreme Court held that a deportation order must be made in light of international human rights instruments[133] (in this case, in particular, the signed but unratified *Convention on the Rights of the Child*[134]) and the reasonableness standard inherent in the *Charter*. Moreover, as Porter and Jackman indicate in their analysis of the standard:

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[130] UN Committee on Economic, Social and Cultural Rights, *Report of the UN Committee on Economic, Social and Cultural Rights* (CESCR)*, 18th and 19th Sessions*, E/1999/22; E/C.12/1998/26 (1999).
[131] Porter, ''Rights in Anti-Poverty'', *supra* note 124 at 47.
[132] *Ibid* at 49.
[133] *Baker v Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817 at para 71, 1999 CanLII 699 (SCC) [*Baker*].
[134] *Convention on the Rights of the Child*, 20 November 1999, 1577 UNTS 3 (entered into force 2 September 1990) [*CRC*].

> the reasonableness standard imposes obligations on all actors to make decisions that are consistent with the recognition of adequate housing and a decent level of income as fundamental rights subject to effective remedy and meaningful participatory rights.[135]

They cite as evidence in support of this, the relevant jurisprudence on the subject contained in reasonableness doctrine developed by various UN human rights organs, over the years.[136]

It is less clear, however, how the second element of the obligation to protect, namely, the implied right to a remedy, applies under current Canadian law. Theoretically, when a minimal standard of a specific ESCR is achievable, remedy of State violation of that particular right ought to be that the State party simply provides the benefit.[137] While it is salutary, for international human rights regimes to provide a mechanism for the hearing and resolution of ESCR claims, it is incumbent on State parties to provide domestic relief for violations of recognized ESCR, under their own legal systems.[138] Or, to paraphrase the CESCR: where judicial remedies are not available, alternative, effective remedies for violations of the right to adequate housing and an adequate standard of living must be implemented outside of courts. This may include quasi-judicial or administrative bodies,

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[135] Population Health Improvement Research Network, *International Human Rights, Health and Strategies to Address Homelessness and Poverty in Ontario: A Making the Connection*, vol 3, no 3 (Ottawa: Population Health Improvement Research Network, 2012).

[136] See e.g. the *Lovelace* case at the United Nations Human Rights Committee. Sandra Lovelace became known internationally as an activist when, in 1979, she petitioned the United Nations over the treatment of aboriginal women and children in Canada by the government. Among the policies she criticized was revoking the status of a First Nation's woman if they married a non-aboriginal man, and denying their children status, on this basis. ''Sandra Lovelace v. Canada, Communication No. 24/1977: Canada 30/07/81, UN Doc CCPR/C/13/D/24/1977'' (14 February 2013) at para 1, online: *ESCR-Net* online: www.escr-net.org/caselaw/2010/sandra-lovelace-v-canada-communication-no-241977-canada-300781-un-doc-ccprc13d241977 [*Lovelace*].

[137] Porter, ''Rights in Anti-Poverty'', *supra* note 124 at 43.

[138] *Ibid* at 42.

including federal and provincial human rights commissions and tribunals involved in housing disputes.[139]

4) The Doctrine of Substantive Equality and ESCR

The doctrine of substantive equality is well established in the context of Canadian and increasingly international human rights law. This legal principle goes beyond a formal legal requirement to ignore differences and treat all human rights claims without discrimination or bias. Indeed, international human rights jurists tell us that it has become something of a hallmark of Canada's *Charter* jurisprudence.

> In its early section 15 *Charter* jurisprudence, the Supreme Court of Canada played a leading role, internationally, in affirming and developing a notion of substantive equality that includes important dimensions of socio-economic rights and places positive obligations on governments to remedy disadvantage.[140]

Whether poverty is included in the scope of s.15 is no longer a disputed point of law. As far as the courts are concerned, it has been ruled out.[141] However, the Supreme Court's post-*Charter* case law established that grounds that were not specifically prohibited in the text of s.15, may still qualify as analogous if they meet the criteria laid down by the courts. As such, there is some hope that homelessness may still be recognized as a category of prohibited discrimination and, therefore, subject to analysis under the *Charter's* equality rights provisions. Consider, for example, Supreme Court

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[139] Committee on Economic, Social and Cultural Rights, *General Comment No. 9: The domestic application of the Covenant*, UNESCOR, 19th Sess, UN Doc E/C.12/1998/24 (1998) at para 9.

[140] Langford, *supra* note 120 at 5.

[141] See e.g. the ONCA's obiter in *Banks* "while the 'poor' undoubtedly suffer from disadvantage, without further categorization, the term signifies an amorphous group, which is not analogous to the grounds enumerated in s. 15. The 'poor' are not a discrete and insular group defined by a common personal characteristic." *R v Banks*, 2007 ONCA 19, at para 104, 275 DLR (4th) 640.

Justice Abella's comments in *Quebec v. A*,[142] that heterogeneity within a certain group does not necessarily defeat a claim of discrimination under s.15.

Further, the CESCR has already made the argument that domestic anti-discrimination laws should, to the extent possible, prohibit discrimination in these areas, stating: "The socially constructed dimensions of poverty and homelessness have also been recognized as analogous grounds of discrimination under international human rights law."[143]

Moreover, in a recent report regarding extreme poverty, UN Special Rapporteur, Magdalena Sepulveda, specifically recommended that State parties "ensure that discrimination on the basis of economic and social status [be] prohibited by law and the law applied by courts."[144] Finally, human rights' regimes in Canada, at both the provincial and territorial level, already include "social condition"[145] and "economic disadvantage,"[146] "poverty"[147]

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[142] *Quebec (AG) v A*, 2013 SCC 5, at para 354, [2013] 1 SCR 61.

[143] See generally Committee on Economic, Social and Cultural Rights, *General comment No. 20. Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, UNESCOR, 42nd Sess, UN Doc E/C.12/GC/20 (2009), s 2(2); Martha Jackman & Bruce Porter, "Rights-Based Strategies to Address Homelessness and Poverty in Canada: The Charter Framework" in Jackman & Porter, ''Advancing Social Rights'', *supra* note 100 at 86 [Jackman & Porter, ''Rights-Based Strategies''].

[144] Magdalena Sepulveda Carmona, *Report of the Special Rapporteur on Extreme Poverty and Human Rights: Penalization of People Living in Poverty & Human Rights*, UNGAOR, 66th Sess, UN Doc A/66/265 at para 82.

[145] See Article 10 of the *Quebec Charter* that states "Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on…*social condition*…[emphasis added]", *Charter of Human Rights and Freedoms,* CQLR c C-12 [*Quebec Charter*].

[146] See the Definition section in New Brunswick's *Human Rights Act,* which declares that "social condition" must be construed in the following way: "in respect of an individual, means the condition of inclusion of the individual in a socially identifiable group that suffers from social *or economic disadvantage* on the basis of his or her source of income, occupation or level of education [emphasis added]." *Human Rights Act,* RSNB 2011, c 171.

[147] See Part I (1) definitions in the "interpretation and application" section of the: *Human Rights Act,* SNWT 2002, c 18.

and so on, within the scope of their anti-discrimination provisions. In fact, courts in Canada have been increasingly engaged in intersectional analysis of homelessness and discrimination.[148] This having been said, the courts in Canada have yet to settle the question of whether homelessness qualifies under s.15 as an analogous ground.

I adopt the substantive equality human rights doctrine, in order to supplement and expand the Committee's approach to ESCR in regards to the right to social housing in the Canadian context.

[148] See e.g. the judgement of Hinkson J. with regards to s.15, where he wrote "Courts have recognized claims for discrimination which are based on multiple grounds, requiring an assessment of the impact of the interaction or intersection between these grounds. The barriers faced by the City's homeless vary from person to person, but they share important intersections between disability, addiction and Aboriginal ancestry that have driven them towards, and for some, perpetuated their state of homelessness. It is the confluence of those factors together with the fact of the person's homeless status that DWS (the claimant) asserts to underpin its claim." *Shantz*, *supra* note 61 at para 229.

5) Fulfilling ESCR

Related to the debate around the place of the courts in fulfilling ESCR is the question of justiciability with regard to ESCR. Though many human rights scholars consider the debate redundant in light of the extensive and growing body of jurisprudence treating these types of claims, the challenges of adjudicating ESCR remains a major obstacle to their implementation by judiciaries worldwide. "This designation seems firmly entrenched despite the official position adopted by the UN and endorsed by most human rights' practices, activists and academics that all human rights are indivisible, interdependent and interrelated."[149] However, "the sheer weight of the jurisprudence makes it difficult to argue against the possibility of social rights justiciability."[150] The arguments against their inclusion as actionable legal claims, though less and less convincing, must still be addressed by ESCR litigants, particularly in Canada and especially with respect to the right to social housing.

First there are the arguments related to the legal nature of ESCR. These can be broadly distilled into three categories: 1) that ESCR are inherently "positive" and therefore not suitable for adjudication; 2) that they are ill-defined; and 3) that they are difficult to remedy due to their resource implications.[151] There can be little doubt that ESCR create substantive legal obligations for the State, but this is equally true of most human rights, including civil and political rights that are today well-established in

[149] Hohmann, *supra* note 91 at 7.
[150] Langford, *supra* note 120 at 29.
[151] *Ibid*.

Canada.[152] As Scott indicates in his thorough analysis of justiciability of international ESCR, "the experience of modern public law…appears to be one of constantly expanding justiciability."[153] Thus, the first objection that ESCR are non-justiciable on account of their "positive" nature, can generally be dismissed on normative grounds. Let us take a look at the other arguments against the enforceability of ESCR.

The secondary status of ESCR in domestic legal orders, as Hohmann and many others have observed, can be explained, in part, by the way in which they emerged in the post-war period. The development of ESCR was historically hindered by the initial division between the ICCPR[154] and the ICESCR (more on this in Part II, Chapter A). Although this distinction was largely the product of unique historical, international, and political circumstances, it continues to undermine the implementation of ESCR all over the world.[155]

Moreover, unlike the ICCPR Committee, which has heard disputes from state parties throughout the last 40 years, the ICESCR has comparatively little case law, this is owing to the fact that the ICESCR's complaint resolution mechanism, only dates to 2008.[156] Given that it is now entrenched in the form of an international legal mechanism "such a protocol…will no doubt have significant implications for the clarification,

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[152] See e.g. *New Brunswick v G(J)*, where the Supreme Court ruled that s.7 of the *Charter* contained a positive right to state-funded counsel in the context of a child custody hearing. *New Brunswick (Minister of Health and Community Services) v G (J)*, [1999] 3 SCR 46, at para 107, 177 DLR (4th) 124 [*G.(J.)*].

[153] Craig Scott, "Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights" (1989) 27:3 Osgoode Hall LJ 769 at 839.

[154] *ICCPR, supra 28*.

[155] Hohmann, *supra* note 91 at 19.

[156] *Ibid*.

interpretation, and even realisation, of the right to housing as contained in the Covenant."[157]

As for the alleged vagueness of ESCR, this is hardly a fair criticism, when one considers the obvious definitional problems associated with "classical liberties" , such as the right to life (found in the ICCPR's Article 6.1) and other rights that domestic courts deem as justiciable, even in Canada. Moreover, this argument can easily be countered by pointing to the growing jurisprudence and flourishing legal doctrines related to ESCR, within and across jurisdictions.[158]

As has been discussed before, in the context of the *Charter* on the development of a reasonableness standard with respect to progressive rights realization in accordance with a State's maximum available resources, international human rights norms, including the right to social housing, do impose an obligation on State parties to allocate the resources needed for the realization of ESCR.[159] However, in the Canadian human rights context, as in many other jurisdictions, there remains the thorny question of whether ESCR are too complex or "polycentric" to adjudicate owing to their dependence on the distribution or re-distribution of resources, by the courts.

This point is often raised in the context of the relationship between ESCR and government budgets. There is evidence to suggest that austerity or

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[157] *Ibid* at 19-20.

[158] Aoife Nolan, Bruce Porter & Malcolm Langford, "The Justiciability of Social and Economic Rights: An Updated Appraisal" (2009) Human Rights Consortium, Belfast, Northern Ireland Working Paper No 15, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=1434944> at 11.

[159] Committee on Economic, Social and Cultural Rights, *An evaluation of the obligation to take steps to the "maximum of available resources" under an optional protocol to the covenant*, UNESCOR, 38th Sess, UN Doc E/C.12/2007/1 (2007).

regressive fiscal measures adopted by governments at the expense of ESCR, such as when states attempt to reduce their financial burden by slashing social programs, may be regarded as a breach of their duty to protect, respect and fulfill their Covenant obligations. Much of the research for this dissertation, revealed no such special circumstances that would justify the austerity policies of Sate actors in Canada. On the contrary, In the words of Porter: "In summary, CESCR found…that, virtually in every respect, governments in Canada had taken deliberate, retrogressive measures undermining the right to adequate housing."[160]

Nor are budgetary constraints necessarily an excuse for ignoring duties related to ESCR. The CESCR has noted that fiscal policies that adversely affect a State's ESCR obligations are not beyond its review. Jackman and Porter explain: "The reasonableness of budgetary allotment can be assessed based on information about the percentage of the budget allocated to a specific right under the ICESCR and may be compared to other States with similar levels of development."[161] Furthermore, international human rights organs like the UN Human Rights Committee (UNHRC) have also recognized such rights as imposing a substantive duty on States.

> The Human Right Committee found that a failure to take "positive measures" to address homelessness may be found to violate the right to life under the ICCPR, at least in a country which so obviously has the resources to ensure that everyone has access to adequate housing.[162]

Finally, critics presume that ESCR or "positive rights" are resource-dependent and costly, whereas classical civil and political rights or "negative

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[160] See Bruce Porter, "Homelessness, Human Rights, Litigation and Law Reform: The View From Canada" in Scott Leckie, ed, *National Perspectives on Housing Rights* (The Hague: Nijhoff, 2003) at 21.
[161] Porter, ''Rights in Anti-Poverty'', *supra* note 124 at 48.
[162] Porter, "Homelessness 2017'', *supra* note 67 at 21.

rights" are not.[163] This argument simply does not hold water, especially in Canada. It is well-established in law that governments may be required to invest resources in the implementation of *Charter* rights, in order to ensure that these rights are exercised effectively. To cite two obvious examples of this; think of due process rights[164] and the right to freedom of association contained in 2(d).[165]

In the ongoing debate, at times more political than legal, between proponents seeking recognition of international ESCR and those who seek to deny the legality of these rights, there are certain themes that reoccur in informing or misinforming the discussion. Among the most problematic, particularly in Canadian human rights discourse, is the question of the democratic legitimacy of judicial review. It has often been cast as being a fundamental matter of democracy that court's refrain from adjudicating international human rights, because they are based on foreign sources of law, rather than domestic statute, constitution or other internal formal sources of laws.[166]

Argument that democratic legitimacy is undermined by judicial implementation of international treaties, are problematic in a few respects. As Langford points out, they prioritise, at least on a theoretical level, the instrument chosen for implementation of the right over the right itself, thus

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[163] See e.g. Frank B Cross, "The Error of Positive Rights" (2000) 48 UCLA L Rev 857.
[164] See e.g. *R v Askov*, [1990] 2 SCR 1199, 1990 CanLII 45.
[165] See e.g. *Dunmore v Ontario (AG)*, 2001 SCC 94, [2001] 3 SCR 1016.
[166] See e.g. Lebel J. writing for the majority in *Kazemi*: "Were we to equate all the protections or commitments in international human rights documents with principles of fundamental justice, we might in effect be destroying Canada's dualist system of reception of international law and casting aside the principles of parliamentary sovereignty and democracy." *Kazemi Estate v Islamic Republic of Iran,* 2014 SCC 62, at para 150, [2014] 3 SCR 176, Lebel J.

favouring a technical and narrow understanding of ESCR. Whereas it could be argued that the rights of those deprived of basic necessities, such as housing, should not depend on formalistic arguments over the hierarchy of legal sources.[167] Moreover, the lengths international bodies will go to in order to defer to State actors management of their domestic legal affairs cannot be overstated. This shows a clear respect for a State's democratic process. Langford elucidates:

> First, states have accepted human rights obligations in international human rights treaties and customary law and subjected themselves to the jurisdiction of such bodies. Second, some international human rights treaties have given the state a wide degree of latitude. Third, the case law…show[s] that regulatory…bodies place strong emphasis on their [the State party's] role in examining the justification for a particular act or omission as opposed to a general deliberation on the ideal measure for such a situation.[168]

This is to say nothing of the participatory and democratic aspect of the judicial process. As Porter has stated, the court system can function as a democratic space for those who lack any alternate recourse to resolve their grievances.[169] This is particularly true of the most politically marginalized communities in Canada, for instance the homeless, for whom a majoritarian political and electoral system is often unresponsive.[170] As the Supreme Court of Canada explained in the *Secession Reference*, democracy in Canada is much more than a question of the will of the majority.[171]

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[167] Langford, *supra* note 120 at 33.
[168] *Ibid* at 44.
[169] Nolan, Porter & Langford, *supra* note 158 at 5.
[170] Jackman & Porter, ''Rights-Based Strategies'', *supra* note 143 at 35.
[171] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at paras 76-78, 161 DLR (4th) 385 [*Secession Reference*].

6) Separation of Powers Doctrine

The separation of powers doctrine in Canada with regards to the application of international human rights norms post-*Charter* has traditionally focused on the question of whether unlegislated international human rights instruments, especially those adopted and ratified but still unimplemented, have any effect in Canadian law.[172] On this issue jurist Lorne Sossin has observed that Canadian courts have held that the application of international law is not a proper subject for domestic courts to adjudicate, particularly when it concerns unincorporated or unratified treaties.[173] This argument remains vulnerable theoretically and constitutionally, for at least three reasons.[174] First of all, as Patrick Macklem has pointed out, there has never been a clear separation of powers in the Canadian constitutional context:

> Despite their appellations, each plane contains elements of the other. In exercising legislative and administrative authority, political actors are responsible for interpreting and applying judicially formulated legal principles and rules. On the juridical plane, constitutional and legislative provisions require substantive normative content to acquire adjudicative significance in specific disputes.[175]

Thus, the theoretical distinction between executive and legislative powers in treaty making and legislating on the one hand, and the power of the courts to enforce obligations arising from international public law

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[172] See for example discussion in *Baker, supra* note 133 at para 71.
[173] Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Toronto: Carswell, 2012) at 197 [Sossin, ''Boundaries of Judicial Review''].
[174] Indeed, King has called this one of the "bad arguments" against adjudicating social rights. King, ''Judging Social Rights'', *supra* note 15 at 4-5.
[175] Patrick Macklem, ''Social Rights in Canada'' (2006) University of Toronto, Research Paper No 894327 at 1.

sources, on the other, is far less of a barrier to Canada's implementation of internationally recognized ESCR than it would appear at first glance.

Secondly, with regards to the constitutionality of applying international human rights norms, Macklem has argued that the judiciary has an equal role (not a subordinate one) with the legislative branch in terms of implementing and advancing human rights domestically.[176] Thus, governments (legislature and executive) may establish the programs and execute the policies that ESCR depend on, but the courts apply such rights by interpreting this domestic legal framework in light of Canada's international obligations.[177] This is consistent with Van Ert's assertion that "domestic courts are themselves part of the international legal structure" [178]

The Canadian case law post-*Charter* is arguably evolving in such a way as to undermine the traditional boundaries that separated the courts from the executive branch of government. There are a few cases, like *Doucet*[179]wherein the courts have shown, albeit only in the narrowest of circumstances, a willingness to impose their policy prescriptions on State actors that administer government and social programs. Thus, the separation of powers doctrine as it applies to the judiciary is not nearly as clean-cut as those that oppose so called "judicial activism" like to pretend.

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[176] *Ibid* at 3.
[177] *Ibid* at 2,3.
[178] Gibran van Ert, *Using International Law in Canadian Courts* (The Hague: Kluwer Law International, 2009) at 46.
[179] In this instance, the nature and scope of s.24 to monitor the implementation of judicial decisions, was upheld by the Supreme Court. At first instance, LeBlanc J. used section 24(1) of the *Charter* to set deadlines and demand that the government report to him as construction progressed. The obligation of the provincial government to report to the court was controversial. *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 SCR 3 [*Doucet*].

More relevant for my dissertation is how international or transnational norms with respect to ESCR might impact the right to social housing in Canada. If Van Ert is correct in his analysis of the presumption of conformity for ministerial discretionary powers with international human rights norms, particularly those that have a foundation in treaties signed by Canada, then it stands to reason that the same applies to the ICESCR. Therefore, any policy, regulations or administrative decision that touches on housing, should theoretically be subject to the rights enshrined in the treaties, conventions and other international public law sources that guarantee a right to adequate housing.

However, the effects of such public international legal norms on Canadian jurisprudence have been controversial, and in Canada some critics maintain that the judicial branch's attempts to incorporate international norms highly problematic and especially thorny when it challenges traditional notions of parliamentary sovereignty, and the doctrine of separation of powers. This view holds that customary international human rights have no legal effect in Canada so long as they have not been properly incorporated into domestic law.[180] Otherwise, to recognize it would be undermining the sovereign will of the people, as represented by their democratic institutions. Fox-Decent and De Mestral outline this theory, in their piece on the interaction between international and domestic law in Canada:

> One (theory) that conceives of international and domestic law as operating in separate domains can be seen to be motivated by a desire to protect Canadians from the unlicensed intrusion of international law…Dualism thus appeals to the democratic ideal of

[180] See dissent by Brown and Rowe JJ in *Nevsun Resources Ltd v Araya*, 2020 SCC 5 at para 134 and ff.

contemporary liberal democracies according to which law is to be made by popularly elected legislators.[181]

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There are some examples of effective judicial strategies that bypassed the domestic legal system in order to seek redress at an international body. *Lovelace* provides a good example of what an individual claimant's "subjective" or strategic goals might be in pursuing ESCR litigation at the international level. The claimant (Sandra Lovelace)[182] sought not only redress for the violation she suffered but was equally determined to generate publicity for the legal plight of indigenous women in Canada. This case would suggest that the answer to Langford's query is for claimants, whether individually or collectively, to decide what constitutes a victory in terms of ESCR.

In more concrete terms, litigation can impact policy discussions and effect legal reforms. This impact can be direct, such as through the setting of influential judicial precedents recognizing the existence of ESCR in a given legal order. In the example of *Grootboom*[183] (more on this in Part II, C, 1) we see the effects of transnational legal principles on a global scale. *Grootboom* involved a breach of Article 26 of the South African Bill of Rights; an article

[181] Armand De Mestral & Evan Fox-Decent, "Rethinking the Relationship Between International and Domestic Law" (2008) 53:1 McGill LJ 573 at 581.
[182] *Lovelace*, *supra* note 136 at para 1.
[183] An eviction was violently carried out by authorities of a shanty town and was, subsequently, challenged in court by the residents of that community, including Ms. Grootboom herself. *Grootboom and Others v Government of the Republic of South Africa and Others*, [2000] ZACC 14 (S Afr CC) [*Grootboom*].

that guarantees "access to adequate housing" for everyone.[184] The case served not only as the basis for a massive increase in the volume of ESCR litigation in South Africa[185] (albeit with mixed results[186]), but has had an impact on the interpretation of international human rights norms as well, specifically with regards to the way in which the CESCR applies the doctrine of reasonableness in reviewing the policies and legal frameworks around the right to housing of State parties.[187]

Like any form of case law, ESCR litigation can be seen to paradoxically produce positive and negative effects on society. This has led many who support legal recognition of ESCR to question the use of the judiciary as a mechanism to pressure governments to accommodate ESCR concerns. [188]

The Supreme Court's decision in *Chaoulli*[189] best exemplifies this dilemma. At the risk of oversimplifying a controversial judgment, the Supreme Court in *Chaoulli* ruled that delays in public health care services were a potential threat to life under the *Charter* and, hence, that restrictions on private health care in Quebec were unconstitutional. [190] It has been said

[184] *Constitution of South Africa*, *supra,* note 111.
[185] Langford, *supra* note 120 at 41.
[186] See e.g. Brand's criticism of Grootboom decision in Daniel Brand, "Between Availability and Entitlement: The Constitution, Grootboom and the right to food" (2003) 7:1 Law, Democracy & Development 1.
[187] Porter, ''Rights in Anti-Poverty'', *supra* note 124 at 36.
[188] See Young's critique of decision in *Tanudjaja*: "If litigation under the *Charter* is not allowed to present more than narrow pieces of the problem of housing insecurity at any one time, if all the *Charter* can do is stay silent in the face of government inaction, and if courts continue to dodge acknowledgement that rights are always already about redistribution, then the homeless and other marginalized groups in Canadian society are truly constitutionally outside in the cold" Young, "Charter Eviction", *supra* note 56 at 66.
[189] *Chaoulli v Quebec (AG)*, 2005 SCC 35, [2005] 1 SCR 791 [*Chaoulli*].
[190] *Ibid*.

that this type of human rights litigation represents how business interests, often with access to greater legal resources, are more effective at challenging governmental policies and statutes than disadvantaged groups, civil society, or social rights champions.[191]

For Langford, however, the most relevant question is: do victims of ESCR violations have a better option than litigation open to them. In the author's own words: "The criticism of litigation as a vehicle for social change is only sustainable if there are viable alternatives or if litigation makes the situation worse in the absence of alternatives."[192] The answer to this provocative question in the right to social housing context may lie in the lack of progress generally (the NHS notwithstanding) towards developing a substantive legal framework for the right to housing in Canada. Further, given that the *Tanudjaja* application set a negative legal precedent, particularly in the area of justiciability doctrine [193], it is difficult to criticize the appellant's choice to litigate violations of housing rights by using the often-cited critique of *Chaoulli.* Namely, that the decision exacerbated the lack of public health care services and resources by allowing for greater privatisation of the system.[194] We simply will never know what the outcome at trial might have been, in *Tanudjaja* if Lederer J. had agreed to hear the entire record. [195] *Charter*-based challenges tend to revolve around thorny factual arguments

[191] See Lorne Sossin, ''Towards a Two Tier Justice System: The Poverty of Health Rights'' in Colleen M Flood, Kent Roach & Lorne Sossin, eds, *Access to Care, Access to Justice The Legal Debate Over Private Health Insurance in Canada* (Toronto: University of Toronto Press, 2005) 161 at 162 [Sossin, ''Two Tier Justice''].
[192] Langford, *supra* note 120 at 38.
[193] *Tanudjaja*, *supra* note 9 at para 140-148.
[194] See Lorraine Weinrib, "Charter Perspectives on Chaoulli: The Body and the Body Politics" in Flood, Roach & Sossin, *supra* note 191, 56 at 56.
[195] See Feldman J.A.'s dissent which found "The appellants put together a significant record to support their application. That record should be put before the court. *Tanudjaja* CA, *supra* note 45 at para 88.

that require an increasing amount of socio-legal evidence. Hence, the decision to dismiss for a lack of cause to answer, made without the benefit of this type of evidence, was inevitably going to be problematic legally and normatively.

Langford does point to a few noticeable patterns in the transnational jurisprudence that might have parallels with what is taking place in Canada. For instance, it would seem that although courts are asserting their role in the adjudication of ESCR as an effective mechanism for accountability and enforcement, they remain rather reluctant to provide leadership in this regard. To wit: "Many of the adjudicatory bodies discussed … appear acutely aware of the constraints necessitated by their role but have fashioned a judicial role in reviewing but not leading the actual implementation of economic, social and cultural rights."[196]

This apprehension is particularly obvious in two interrelated areas that Langford identifies as being largely underrepresented in domestic ESCR jurisprudence: (1) the process of privatization of public services (*Chaoulli* for example) and; (2) the aggressive retrenchment of the welfare state.

In Canada, both of these policy questions come up in court, albeit infrequently. A cautious reading of the case law, therefore, appears to favour the interpretation that these policy questions are not above a courts' scrutiny.[197] Indeed, in *N.A.P.E.*, we have seen how a policy choice made by the Government of Newfoundland and Labrador, as part of its budget

[196] Langford, *supra* note 120 at 45.

[197] Hogg has stated that "In Canada many political controversies find their way into the courts. It is usually possible to construct an argument that any controversial government policy offends some part of the constitution." Peter W Hogg, *Constitutional Law of Canada* (Toronto: Thomson Carswell, 2017) at 36.6.

balancing efforts, was not necessarily immune to *Charter* analysis. And the Supreme Court reiterated that there is no political question's doctrine that would exclude such issues from adjudication.[198]

We can infer from this example, then, that ESCR trends in Canada do appear to display similar tendencies to those that have been observed at both international and transnational levels. This is to say that, though the courts in Canada are shy about tackling social rights claims directly, ESCR remain, to some degree, subject to judicial review. The justiciability of the twin issues of government divestiture of social housing and government cuts to social programs that will negatively affect housing accessibility, therefore, remains an open question in Canada.

At the international level, the mechanisms for enforcement of ESCR are few and far between, and those that exist may not have the mandate or the capacity to impose sanctions on States that are found wanting. Indeed, "many of the concluding observations of the Committee on Economic Social and Cultural Rights have not been observed by governments..." By the same token, many international legal organs, may not exercise the power to bind states to comply with their orders.[199]

Notwithstanding these drawbacks, ESCR has evolved well beyond the context of public international law and human rights treaties. The right to adequate housing in particular, is no longer, if it ever was to begin with, simply an international phenomenon. It has now been incorporated into and

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[198] *Newfoundland (Treasury Board) v NAPE*, 2004 SCC 66, at para 80, [2004] 3 SCR 381 [*NAPE*].

[199] See e.g. the *Kell* case: *Cecilia Kell v Canada*, ''Communication No. 19/2008'' (13 February 2012), [2012] CEDAW/C/51/D/19/2008, online: <www.worldlii.org/cgi-bin/sinodisp/int/cases/UNCEDAW/2012/3.html?query=title(Cecilia%20Kell%20and%20Canada%20)> [*Kell*].

recognized by any number of national constitutions around the word.[200] The public international law aspects of the right to housing also form the basis of many of the notable pieces of transnational jurisprudence.[201]

Langford identified four factors for ESCR recognition domestically. These factors are already, more or less, found in Canadian human rights discourse. The first factor concerns the progress of civil society and other institutions in advancing the cause of social rights politically and legally. There is also a link between a lack of political and governmental support for the redress of ESCR violations, and the impetus for judicial intervention (e.g. the application). The latter tend to be more active in these matters, while the former, as in Canada, demonstrates an unwillingness or inability to act. Thirdly, there is also a relationship between the progress of ESCR and the propensity for general human rights litigation within a legal system. Lastly, there is the phenomenon of judicial internationalisation, which is already rather developed in Canada's judiciary, particularly at the Supreme Court.

If we take the CESCR's proposed approach to ESCR, we find that there is much progress to be made with regard to the respect, fulfillment and protection of these rights. Examples of Canadian jurisprudence such as *Eldridge*, however, remain strong indicators of a growing trend towards the judicial application of important human rights doctrines such as the concept of substantive equality rights.

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[200] "Fifty-two national constitutions address access to housing. Many of these provisions contain explicit references to the right to adequate housing, whereas others suggest more general responsibility of the State to ensure adequate housing and living conditions to the population at large." Leckie, *supra* note 119 at 40.

[201] See eg, *Grootboom*, *supra* note 183.

There are also issues related to the protection and fulfillment of the right to adequate housing in Canada. Both of these concepts have been the subject of much doctrine at the international level, particularly at the CESCR, which has laid down the conditions which need to be met before a State party will be deemed to be in compliance with its ICESCR treaty obligations.

The obligation to fulfill the right to adequate housing must include the progressive realisation of the right. It is important to note that a State's obligation regarding realization of the right is limited by the CESCR. A state is required to provide for ESCR realization within the limits of its available resources. Thus, the Committee developed the reasonableness standard to ensure that States respect their duty to progressively, within their available means, implement ESCR.

The glaring lack of judicial remedies for the variety of ESCR breaches remains a major challenge to Canada's ability to fulfill its obligation to protect the right to adequate housing. This failure has been well documented by a variety of organizations concerned with ESCR, like the R2H Coalition, and in some case litigated, but rarely redressed in the Canadian human rights context.

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In the course of the preceding Chapter, we have examined how the argument against ESCR and claims that remain non-justiciable in the Canadian context can, and should be challenged. Thus, it is now fair to say, normatively speaking, as Langford, Hohmann, and others have already, that the majority of litigation involving ESCR, especially the right to housing, point to it being as viable as any civil or political rights claim before the judiciary. We have also seen that the distinction between "positive" or ESCR

and "negative" first generation rights, on the basis that the latter is justiciable because it is not resource-dependent, whereas the former is for the opposite reason, essentially, an exploded legal myth.

Furthermore, arguments that rely on the separation of powers doctrine to prevent a court from applying international human rights norms are relatively easy to overcome. These arguments are based on questionable distinctions between the different branches of government in the Canadian constitution and misunderstanding the binding power of international human rights norms on the judiciary internally. Critics who adopt this argument have a strict dualist understanding of the impact of international public law instruments. This strict interpretation does not reflect the "hybrid" nature, to use van Ert's terminology, of the relationship between domestic and international law in Canada and reveals an unjustified bias for foreign and international sources of civil and political rights over those that provide for ESCR.

It could also be argued that the dualist position which appears to favour the application of certain uncontroversial international human rights treaties (e.g. ICCPR) over those that contain ESCR norms (e.g. ICESCR), betrays the Canadian judiciary's unjustified double standard with respect to the application of international human rights norms. In fact, "socio-economic rights are now generally understood within the UN system as equal in status to civil and political in terms of human rights practice."[202]

Critics who denounce the integration of international human rights norms into a state's domestic legal system, in the belief that such integration is undemocratic, often underestimate two things. Firstly, they underestimate

[202] Porter, ''Rights in Anti-Poverty'', *supra* note 124 at 24.

the democratic value of the legal process, especially to claimant's whose voices would be ignored otherwise. Secondly, these critics underestimate the emphasis that international legal bodies place on the principle of subsidiarity.[203]

Finally, scholars who criticise the courts for being inherently reactionary and ill equipped for the task of adjudicating complex policies[204], must be able to show that there exists a better alternative available to the growing number of disempowered people in Canada and beyond, whose right to social housing is being denied.

It is also legally untenable, both in terms of international and domestic human rights law for States to hide behind arguments that their policies, be they related to privatisation, the retrenchment of social programs, (including social housing), or the balancing of budgets through deficit and debt reduction (i.e. "austerity"), are beyond judicial review due to their contentious political nature and resource distribution implications. I will demonstrate in this dissertation that the case law and ESCR theory, whether drawn from Canadian[205] or external sources, provide sufficient grounds for judicial review and examination of governmental policies which affect ESCR.

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[203] For more analysis of the concept of subsidiarity in international law, see generally Paolo Wright-Carozza, "Subsidiarity as a Structural Principle of International Human Rights Law" (2003) 97:1 AJIL 38.
[204] See e.g. Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton: Princeton University Press, 2009).
[205] *Tanudjaja* CA*, supra* note 45 at para 35.

B) The Judicial Internationalisation Theory of Human Rights Adjudication and ESCR in Canada

Comparative perspectives of human rights law are commonplace in judicial and academic circles, and are inherent in the process of Judicial Internationalisation. They range from relatively simple horizontal comparisons drawn by jurists between two separate legal jurisdictions, on a given legal issue, to more complex horizontal and vertical applications of binding and non-binding international human rights norms to domestic legal situations involving the same. Indeed, some Canadian scholars have noted a trend in the globalization of human rights jurisprudence, particularly at the constitutional court level.[206]

Canadian scholar H. Patrick Glenn has done a great deal to further our understanding of transnational law, a field of legal inquiry that is vast and varied, especially as it relates to modern Canadian law. Although, Glenn's conceptual framework of transnationalism touches on three categories of legal analysis, I am only concerned with two of them in this chapter: transnational law developed by State actors and transnational law developed by jurists and legal professionals (The third category of transnationalism, according to Glenn, is law developed by private actors, a field of law that does not speak to questions of ESCR directly).[207]

[206] See e.g. Kent Roach, "Constitutional, remedial and international dialogues about rights: the Canadian experience" (2005) 40 Tex Intl LJ 537 at 538.
[207] Glenn, *supra* note 97 at 255.

As noted in a previous section of this dissertation, according to Langford "Judicial Internationalisation," or the increased interactions between judges from different jurisdictions, specifically those on the benches of constitutional courts, plays a key role in determining whether a domestic judiciary considers international human rights norms when engaging in comparative analysis of a given social rights claim.[208]

At the heart of transnational jurist Elain's Mak's inquiry into the subject of Judicial Internationalisation is the notion that judiciaries no longer operate isolated from one another. Indeed, in her view today's high court judge, through the use of comparative techniques, constantly assimilates transnational case law in their decisions. This development is most striking in three areas of a high court judge's work: 1) the role the high court plays in society; 2) the growing network and exchanges between various high courts around the world and; 3) the legal principles upon which high court judges base their decisions.[209]

The methodology employed by Mak consisted of qualitative interviews with thirty-three justices sitting on the highest courts of five different jurisdictions (France, UK, Netherlands, U.S., Canada). This enabled the researchers to provide a more nuanced and deeper analysis of differences and similarities among these varied legal cultures, than a more quantitative approach.[210] These interviews were complimented by a comprehensive study of secondary sources including: academic publications, case studies, public

[208] Mak, *supra* note 84 at 2.
[209] *Ibid* at 68.
[210] *Ibid* at 66.

speeches of judges, and so forth. "This analysis started out from the judgments and publications mentioned during the interviews."[211]

One of the effects of this "globalization" of the judiciary is the growing transnational dialogue between courts in different jurisdictions. Many Canadian Supreme Court justices both past and present, have noted this phenomenon, and remarked on its positive impacts. Former Supreme Court Justice Claire L'Heureux Dubé has observed that, during her time on the bench, it was increasingly common for judges from different jurisdictions to discuss their work and compare legal analyses with one another.[212]

This can occur in one of two ways, according to Mak, through "horizontal dialogue" or "vertical dialogue."[213] Horizontal dialogue is characterized by the exchange of ideas or discussions between high court judges on legal topics.[214] This may be direct, for instance when justices meet at international conferences. Or more indirect through a particular kind of transnational dialogue, characterised by the finding of answers to a legal questions through reference to another jurisdiction's high court's similar findings.[215] Consider the judgement of the Supreme Court of Canada in *Carter*[216] where the Court was inspired by the UK Supreme Court's decision, finding that "[i]n a recent decision, a majority of the Supreme Court of the

[211] *Ibid*.
[212] Claire L'Heureux-Dubé, "The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court" (1998) 34:1 Tulsa LJ 15 at 16.
[213] Mak, *supra* note 84 at 2.
[214] *Ibid* at 80.
[215] *Ibid* at 80-81.
[216] *Carter v Canada (AG)*, 2015 CSC 5, [2015] 1 SCR 331 [*Carter*].

United Kingdom accepted that the absolute prohibition on assisted dying breached the claimants' rights."[217]

Vertical dialogue describes the more traditional relationship between domestic legal bodies, and their international counterparts, and is almost always based on international treaty obligations and other legally binding multilateral arrangements between States, although there are some interesting exceptions in Canadian jurisprudence. For instance, "the Supreme Court of Canada regularly pays attention to the case law of the ECtHR (European Court of Human Rights) without being bound to do so."[218]

The individual background of a particular justice may also play a part in whether they regard the impact of international law on domestic judicial decisions as positive or negative. Factors, such as personal interest in the topic, different mind-sets on the subject, the judicial culture of a particular body, and the legal training and values of a judge, may all affect their relationship with international law.[219]

For example, the Canadian judiciary, especially the Supreme Court of Canada, has a tendency, based largely on its historical preferences and its familiarity with two legal traditions as well as being a bilingual institution (English and French), towards comparative analysis where other common

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[217] *Ibid* at para 9.
[218] Justice McIntyre related that "article 14 of the *European Convention on Human Rights*… which secures the rights guaranteed therein without discrimination, lacks a section 1 or its equivalent and has also developed a limit within the concept itself." *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 177, 56 DLR (4th) 1 [*Andrews*]; Mak, *supra* note 84 at 80.
[219] Mak, *ibid* at 209.

and civil law jurisdictions are concerned.[220] Accordingly, this factor has played a crucial part in Canada's high court becoming the most globalized of those examined in the study, if we accept Mak's observation that it is the court with the "the most varied relations."[221] This goes beyond Commonwealth countries, and includes the Supreme Court referencing the ECtHR's treatment of legal questions, in some instances.[222] This might be considered inevitable given that "the *Charter* refers to the values of 'a free and democratic society,' and contains similarities with catalogues of fundamental rights in national constitutions elsewhere and with the ECHR."[223]

Citation of foreign jurisprudence is increasingly common and it is not extraordinary to see examples of transnational doctrines inserted into the decisions of Supreme Court cases. This is particularly true of cases involving human rights where a Canadian "judge observed that the Supreme Court of Canada has an obligation to the legal community in Canada to show that the Court has informed itself about relevant international and foreign sources, even though the citation of foreign sources is not obligatory."[224] This development has been echoed in all of the high courts examined by Mak, leading her to conclude that comparative methods are adopted by judges because they improve the quality of their judgments, while, at the same, time fostering greater efficiency and exposure of court proceedings.[225]

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[220] *Ibid* at 100.
[221] *Ibid* at 112.
[222] See e.g. SCC examination of the question of the risks of torture in deportation cases in *India v Badesha*, 2017 CSC 44 at para 47, [2017] 2 SCR 127.
[223] Mak, *supra* note 84 at 152.
[224] *Ibid* at 131.
[225] The questionnaires used in Mak's study were anonymous, *Ibid* at 136.

In some cases, references to international legal principles have become so common place as to not even elicit controversy anymore. In the field of human rights law, on the other hand, the notion of applying international sources with respect to domestic human rights claims remains contentious. Supreme Court Justice Abella has stated, regretfully, that in the area of enforcement of international human rights, there has been relatively little progress, in comparison to fields such as international trade law.[226]

However, Canada's legal culture has many other elements that have served to nurture its openness to international and transnational influences. For instance, the relatively small number of cases to draw upon for inspiration might make judges more inclined to look elsewhere. The bi-juridical co-existence between civil and common law jurisdictions in the Canadian federation, and finally, the common law foundation it shares with many other legal jurisdictions around the world.[227] In other words, the concept of strict dualism in Canadian law, especially post-*Charter*, has been severely challenged: "In general, the trend of globalisation seems to have mitigated the effects of the traditional dualist approach towards international law in the common law systems."[228]

Though the Supreme Court of Canada has been apprehensive about employing transnational human rights norms stemming from foreign sources definitively, it has no such qualms about citing foreign jurisprudence, even with regards to human rights claims. According to former Supreme Court

[226] Rosalie Silberman Abella, "International Law and Human Rights: the Power and the Pity" (2010) 55:4 McGill LJ 871 at 871.
[227] Mak, *supra* note 84 at 154.
[228] *Ibid* at 162.

Justice Michel Bastarache, foreign sources are used "to demonstrate established or emerging patterns informing human rights jurisprudence throughout the world."[229] Indeed, many landmark judicial decisions in Canadian human rights law were made partly on the basis of comparative legal analysis with foreign jurisprudence.[230]

However, judges are careful to draw a distinction between finding inspiration in foreign sources and imposing remedies applied elsewhere. The former might be necessary, even desirable, but the latter remains problematic owing to the specificity of Canada's legal culture and jurisdiction.[231] Be that as it may, justices on Canada's highest court can and do cite foreign case law in their decisions, and will typically highlight differences of opinion with other high courts in their reasoning, especially where a fundamental right is concerned.[232] Some judges, however, draw the line at citing foreign case law where moral or highly political questions are at stake. The reasoning seems to be that these questions, tend to be much more politically fraught than technical legal or constitutional points, and are, as such, often untranslatable from one jurisdiction to another. Conversely, some high court justices, the Supreme Court of Canada's Ian Binnie for instance, have "emphasized that the usefulness of comparative law in judicial decision-making is connected with the existence of shared societal practices and values."[233]

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[229] Sam Muller & Sidney Richards, eds, *Highest Courts and Globalisation* (The Hague: Asser, 2010) at 44.
[230] Mak, *supra* note 84 at 199.
[231] *Ibid* at 182.
[232] See e.g. the question of the death penalty and s.7 of the *Charter* in *United States v Burns*, 2001 CSC 7, [2001] 1 SCR 283 [*Burns*].
[233] Mak, *supra* note 84 at 186.

In Mak's formulation, a high court's search for non-binding, but domestically relevant, sources of persuasive legal authority is based on four major criteria: (1) visibility: cases with higher visibility or "public importance"[234] (to use Mak's phrase), will be preferred; (2); legal standards: a judge may be on the lookout for a particular legal standard with which to measure the legal merits of a domestic case; (3) Comparability: judges may feel the need to compare their own decisions to decisions rendered by their judicial peers, and; (4) trend identification: the comparative exercise can be used to identify important legal trends in a given area of law.

A court will base its decision on three main factors when choosing comparative legal sources and materials: tradition, language and prestige.[235] Mak describes the Supreme Court's views on language as "an important criterion in the selection of foreign legal sources for discussion"[236] A shared tradition or legal culture is equally important to the decision-making process. We have already seen that the Supreme Court preferences for Commonwealth law sources (Great Britain and South Africa, for example) over other jurisdictions. Canadian judges have "indicated that the judgements from Commonwealth countries are sometimes used as persuasive precedents in the decision-making".[237]

[234] *Ibid* at 201.
[235] *Ibid* at 206.
[236] Mak states that "[T]he Supreme Court of Canada is English oriented. For this reason, problems related to language are most clearly visible with regard to sources from jurisdictions in which English is not an official language." *Ibid* at 207.
[237] *Ibid* at 202.

The third and final factor is the level of prestige the court accords the particular source of foreign law. For example, we have seen that ECtHR provided a model for the Supreme Court to follow in the development of certain doctrines.[238] This was due in part to the Court's appreciation for the ECtHR jurisprudence, but was primarily based on "the resemblance between the approaches of the Supreme Court and the ECtHR concerning the weighing of arguments [which thereby] facilitated the use of comparative methods."[239] Regardless of the above, however, the judges interviewed for the study maintain that there is no systematic method for comparative law involving non-binding foreign jurisprudence.[240]

Mak's study draws several conclusions about the globalization of high courts, and, in particular, the potential for greater harmonization of legal questions across legal jurisdictions. Some of her conclusions will undoubtedly provide hope for Canadian human rights scholars looking to overcome the legal resistance regarding the use of foreign sources of law in expanding Canadian legal definitions of the right to social housing.[241] For example, many Canadian judges are coming around to the arguments made by Claire L'Heureux Dubé J., among others, regarding the value of foreign high court precedents. In other words:

> More and more courts, particularly within the common law world, are looking to judgements of other jurisdictions, particularly when making decisions on human rights issues. Deciding on applicable legal principles and solutions increasingly involves a consideration of the approaches that have been adopted with regard to similar legal problems elsewhere.[242]

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[238] *Andrews, supra* note 218 at 177.
[239] Mak, *supra* note 84 at 209.
[240] *Ibid at* 213.
[241] *Ibid.*
[242] L'Heureux-Dubé, *supra* note 212 at 16-17.

The globalization of the judiciary, and in particular high courts, has occurred not only as a result of the above described substantive developments, but is also due to organizational and professional changes. The Supreme Court of Canada is a prime example of a legal institution that is constantly expanding its foreign legal ties through its contacts, interactions and dialogues with other high courts all over the world.[243]

Mak also concludes that the nature of constitutional norms in a given jurisdiction can bring about the assimilation of transnational and international legal norms. In this regard, the influence of an individual judge's views on the importance of transnational and international sources of law can be critical, as judges are often faced with legal questions that allow, or even require, them to exercise their judicial discretion.[244]

> Interestingly, the worldwide increased emphasis on the protection of human rights has opened the doors to the development of alternative mechanisms of judicial review of parliamentary acts in legal systems which traditionally endorsed the unassailability of Acts of Parliament.[245]

Thus, based on the results of Mak's study (and those of many other scholars in the growing field of judicial internationalisation[246]), whether an individual judge is "localist" or "globalist"[247] in their judicial philosophy may, in fact, be more crucial in predicting their use of international or transnational law, than the traditional dichotomy between whether a given legal system is dualist or monist in nature. This is because such systemic

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[243] Mak, *supra* note 84 at 218.
[244] *Ibid* at 221.
[245] *Ibid* at 225.
[246] Tania Groppi & Marie-Claire Ponthoreau, eds, *The Use of Foreign Precedents by Constitutional Judges* (Oxford: Hart Publishing, 2013) at 157 [Groppi & Ponthoreau, *The Use of Foreign Precedents by Constitutional Judges*].
[247] Mak, *supra* note 84 at 30.

differences may have less and less of an impact on what is regarded as a binding legal source in the formulation and application of judicial norms.[248]

C) Assessment of Jessie Hohmann's Critique of Housing Rights as it Applies to the Right to Social Housing in Canada

In her work around housing rights, Hohmann draws a moving picture of the multifaceted and extremely complex set of real challenges faced by those who are, for whatever reason, deprived of their right to housing. The major challenges Hohmann identifies are related to privacy, identity and space. In this section we will also write about her conclusions, highlighting the possibilities of progress she identifies in the areas of law, politics and society, with the aim of applying these lessons to the Canadian situation.

The key to understanding the conceptual framework proposed by Hohmann is that it is based on an interdisciplinary and intersectional approach to the problem of the right to housing. Thus, her inquiry goes well beyond legal conceptions of housing rights.[249] She also makes a distinction between the right to housing, as defined by international human rights law, and "housing rights" which she regards as being largely the product of social welfare legislation and programmatic rights at the domestic level. Hohmann is, therefore, more inclined to base her normative claims on the former, rather than the latter.[250] This method allows her to question the relevance of a certain human rights' approaches to the issues of housing and to demand whether

[248] *Ibid* at 227.
[249] Hohmann, *supra* note 91 at 4.
[250] *Ibid* at 5.

such approaches have any bearing on the living conditions of individuals and communities around the world. Particularly in those jurisdictions where no right to housing exists or is effectively recognized by the legal system.[251]

Hohmann's critique of housing rights begins from the premise that housing as a human right remains ill defined.[252] She laments the fact that, unlike many classical political and civil rights which are grounded in the canon of western legal, philosophical and political writings dating back to the enlightenment, socio-economic rights, though normatively on the same level, do not enjoy the same level of respect and recognition in contemporary legal practice. Her hypothesis is that this is due, in part, to the lack of historical discourse in their defence.[253] Hence, it is central to her analysis of the right to housing "to provide an analysis of the 'why' of the right to housing that is both deep and wide-at times controversial- in order to stimulate this vital ongoing process of investigation and reflection."[254] This is achieved through the use of three conceptual lenses that correspond with the three challenges Hohmann identifies as depriving individuals and groups of their right to housing; *privacy*, *identity* and *space*. To some extent all three concepts overlap.

For the first concept, privacy, Hohmann asserts that the fundamental consequence of the legal and theoretical manifestations of privacy in housing law, are various kinds of homelessness:

> The first is the homelessness of the street person…the second manifestation of homelessness is women's 'essential' homelessness…. the living situations of some domestic workers, for whom home is work and work is also home, may amount to a situation of homelessness when

[251] *Ibid* at 6.
[252] *Ibid* at 3.
[253] *Ibid* at 141.
[254] *Ibid* at 142.

the worker is denied the control and authority normally provided by the private space of the home and the rights associated with it.[255]

All forms of homelessness are related to the concept of identity in the context of housing law. It is in her study of this area of housing rights that Hohmann makes reference to Canadian jurisprudence.[256] Hohmann specifically cites *Adams*[257] in which a Judge determined that s. 7 of the *Charter*, the right to life, liberty and the security of the person had been violated by city by-laws which prevented the building of temporary shelters in a public park: "Thus housing as a human right must be understood as being tied to the realisation of other fundamental rights and freedoms."[258]

One of the unfortunate effects of legally enforced privacy is to occasionally exclude and deny the most vulnerable the right to access housing. When such concepts of privacy are coupled with the denial of rights of women to housing, the result can be the intersectional social phenomenon of homelessness which often has dire consequences for women, especially indigenous women.[259] The question of privacy, the law and the *de facto* or "essential" homelessness of women is also the subtext of the little known international human rights case brought by Ms. Cecilia Kell,[260] an Indigenous Canadian women who's difficulty gaining access to housing was the subject of a petition heard by the Committee tasked with enforcing the *Convention on the Elimination of Discrimination Against Women* (CEDAW).[261] The issue

[255] *Ibid* at 143.
[256] *Ibid* at 150.
[257] *Victoria (City) v. Adams*, 2008 BCSC 1363, 299 DLR (4th) 193 [*Adams*].
[258] Hohmann, *supra* note 91 at 150.
[259] *Ibid* at 153.
[260] *Kell*, *supra* note 199.
[261] *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981)[*CEDAW*].

of privacy, in the broadest sense, was at the heart of the case, in that the judicial system in Canada repeatedly upheld the harmful decision of the local housing authority, to deny Ms. Kell housing on the basis of her ex-partner's actions.[262]

Briefly (This case will be revisited in a subsequent section of the dissertation [Part II, Chapter B, Section 2]), *Kell* involved a housing dispute in a First Nation's community in the North West Territories of Canada. The original lawsuit was filed in 1990, and was a complicated matter involving domestic violence, fraud, conflicting claims regarding ownership and, above all else, discrimination against an indigenous woman by both a local housing authority and Canada's legal system. The CEDAW Committee ultimately, arrived at the conclusion that Canada had violated a handful of articles under the Convention. As Hohmann explains:

> The case of Cecilia Kell v Canada…is a powerful reminder that while women may experience abuse and the violation of rights within the home, the struggle for an adequate and secure home remains at the same time, a powerful motivator for women's demand for their rights.[263]

This segues nicely into the next topic of Hohmann's analysis, namely that the concept of home contains within its important intangible characteristics, such as culture and, identity, that must be incorporated into the formulation of any right to social housing. Accordingly, the social and cultural aspects of housing are just as important as the financial and physical. Thus, housing must be viewed through the lens of identity in that the individual or community must be placed within the larger society that they

[262] *Kell*, *supra* note 199 at para 2.5.
[263] Hohmann, *supra* note 91 at 153.

belong to.[264] Hohmann's also examines the complex question of how governmental discourse on housing rights relates to identity: "…housing is a question of social and political priorities in that the shape of housing policy has a significant impact on how housing either promotes or marginalises identities,"[265] a point that has particular resonance in terms of the problematic reality of housing policies in relation to Indigenous peoples in Canada.

As was said earlier, the purpose of Hohmann's analysis of housing rights is largely rooted in her belief that the conceptual framework underpinning the right is underdeveloped. Unlike the right to life, which she claims is routinely accorded fundamental status by jurists with minimal explanation,[266] the essential nature of the right to housing remains contentious, particularly in the domestic judicial context. In her elaboration of the right, Hohmann maintains that the human right to housing is indeed similar to the right to life, in that it makes possible the exercise of all other fundamental rights.

At the heart of the quest for recognition of housing rights we find the following tension: On the one hand, the right to housing is normatively speaking, accepted as a human right whether in numerous international or domestic legal regimes. On the other, doubts as to its viability as a basic right persist. These doubts arise because the right does not fit into the traditional classical liberal human rights' paradigm. Or because socio-economic elements complicate and render impractical, if not impossible, any attempt to implement it. Or because any recognition of a substantive obligation on the state to fulfill the right would invariably lead to the imposition of

[264] *Ibid* at 170.
[265] *Ibid* at 171.
[266] *Ibid* at 198.

individualistic solutions that empower an inherently conservative institution like the judiciary to make policy prescriptions that favour the affluent and promote neo-liberalism.[267] To some extent, all of these objections have been articulated in Canadian human rights discourse, both at a theoretical and judicial level, regarding the right to social housing.

Hohmann responds to these arguments by exposing what she calls the "institutional mythologies" [268]that underlie them. She points out that, on a theoretical level, at least, the right to housing has been granted the same legal status as any of the classical first generation of rights enjoyed by citizens in liberal democracies.[269] Moreover, the argument that the right to housing is non-justiciable, on the grounds of resource limitations, tends to ignore the obvious resource implications of such fundamental universally recognized rights as voting and the right to a fair trial[270] in a reasonable amount of time; a point that has been made by many social rights scholars in Canada.[271]

Another argument familiar to Canadian housing rights advocates is the polycentric problem (an issue further discussed in the next chapter) of a legal recognition of housing rights. Namely that their enforcement of housing rights of housing rights would lead to policy prescriptions that the courts are

[267] *Ibid* at 233.
[268] *Ibid* at 234.
[269] *Ibid* at 233.
[270] See Supreme Court opinion in *Jordan* where the majority wrote "The ceiling is designed to encourage conduct and the *allocation of resources* that promote timely trials (emphasis added)". *R v Jordan,* 2016 CSC 27 at para 107, [2016] 1 SCR 631.
[271] For example: "section 11(*b*) protects a defendant's negative right not to be denied a trial within a reasonable time and, at the same time, imposes an obligation on the state to provide such a trial. *The same guarantee also demonstrates that it is unsound to assume that enforcing negative entitlements is without institutional consequences* (emphasis added)." Jamie Cameron, "Positive Obligations Under Sections 15 and 7 of the *Charter*: A Comment on Gosselin V. Québec" (2016) 20:1 SCLR 65 at 71.

ill-prepared to endorse. In fact, the "legal experience of justiciability illustrates that, by and large, practical concerns about the right to housing's impact on institutional coherence and relevance have been met." [272] This is evidenced in jurisdictions such as Finland, France, South Africa and India (that we will see in greater detail in Part II, Chapter C) where the right to housing is legally enforced by the courts, often with mixed results.

Finally, the criticism that the legal recognition of the right to housing through the courts propagates the classical liberal trope that human rights are exercised primarily by individuals and that, furthermore, this leads inevitably to an undermining of social justice and ignores the root causes of inequality, has also been voiced by human rights scholars in Canada, particularly with regards to *Charter* jurisprudence.[273] In her response to this point, Hohmann's makes a case for recognizing the right to housing in terms of the importance of agency and ownership of human rights. She indicates the above argument "largely fails to understand the illimitable potential of human rights, which inheres in the agency of those who claim them, and in the power of these claimants to make and remake the, human rights in service of their own visions of a just and emancipatory world."[274]

[272] Hohmann, *supra* note 91 at 234.
[273] See e.g. Allan Hutchison: "Charter adjudication is energized by a political ideology which emphasizes among other things that individual entitlements are much more important that social responsibility that negative liberty is to be promoted at the expense of positive liberty that people's capacity to exercise their rights is a matter of choice rather than circumstances and that legislatures are not only not to be trusted but are breeding grounds of capricious and arbitrary decision making." Allan Hutchison, ''Condition Critical: The Constitution and Health Care" in Flood, Roach & Sossin, *supra* note 191, 101 at 101 .
[274] Hohmann, *supra* note 91 at 241.

Yet, the persistent, often profound, objections to judicial recognition of housing rights remain. This is, in part, due to what Malcom Langford has described, in relation to why some human rights are preferred over others, as the obscure origins of the *status quo* of human rights. [275] That is, jurists generally take for granted, especially in a judicial proceeding, that the classical "first generation" rights are established and require no further explanation. Whereas, " positive rights " (i.e. the right to social housing) are considered fit for debate as to their justiciability and even, occasionally, their existence in Canada as a legal right.[276]

The stubbornness of this debate has led Hohmann to hypothesize that the question of recognition of the right to housing goes to the very heart of the modern political debate about the distribution of resources in society.[277] We must, therefore, move beyond the legal realm and into the economic, political and social aspects of the question in order to understand the housing rights debate. In this regard, the discussion hinges on an interdisciplinary and intersectional study of the question and Hohmann's critical reframing of human rights as being more political than legal in nature. Specifically: "with respect to the right to housing, we have not forgotten that the issues surrounding its interpretation, enforcement and realisation are political"[278]

[275] Langford, *supra* note 120 at 43.
[276] Karen Selick, "Housing rights case illustrates why positive rights are phoney rights" *Financial Post* (29 December 2014), online: <financialpost.com/opinion/housing-rights-case-illustrates-why-positive-rights-are-phoney-rights>.
[277] Hohmann, *supra* note 91 at 235.
[278] *Ibid* at 238.

This positions Hohmann's theory in diametrical opposition to the traditional notion that courts are simply enforcing parliamentary sovereignty.[279]

Accordingly, human rights generally, and housing rights in particular, can only be achieved through what Hohmann terms the "dissensus."[280] Dissensus is the source of tension between the legal order and those who define the judicial boundaries separating law from politics in society, and, conversely, those whose seek to reinterpret the law through the struggle for the recognition of subjective human rights claims. In Hohmann's own words "Human rights law is, thus, a site of constant tension between claims for recognition and inclusion in full human personhood, made in the name of human rights, and the gate-keeping or exclusive functions of the law."[281]Equally, I subscribe to the multidisciplinary lens endorsed by Hohmann, and drawn on it throughout my own analysis of the legal, historical, social, political and economic situation with respect to the right to housing, in this dissertation.

[279] Sossin states "The requirement that claim raises a legal rather than a political dispute arises from the long-standing common law and constitutional prohibition on courts adjudicating the wisdom or desirability of government action. This flows from the doctrine of parliamentary sovereignty." Sossin, ''Boundaries of Judicial Review'', *supra* note 173 at 164.
[280] Hohmann, *supra* note 91 at 245.
[281] *Ibid* at 240.

D) Assessment of Jeff King's Theory of Incrementalism and ESCR Adjudication in Canada

As conceived of by King, Incrementalism is aimed at the judiciary (in particular judges) as it relates mainly to the adjudication of ambiguous constitutional or legal rights. It can be broken down into three key elements:

> 1) Avoid significant nationwide allocative implications and either 2) give decisions on narrow particular grounds or 3) when adjudicating a macro level dispute with significant implications for large numbers of peoples, decide in a manner that preserves flexibility. Their (judges) decision making should ordinarily proceed in small steps informed by past steps and these steps might affect large numbers of people but in ways that preserve latitude for adaptation.[282]

At this point, I would like to raise, and eventually refute, a crucial argument against ESCR recognition in Canada. This argument is based on the polycentric notion that ESCR realization is invariably a question of resource allocation. As such, critics claim that ESCR are best dealt with by the executive and legislative branches of government (especially the former), rather than the judiciary. Such arguments can be found throughout Canadian case law [283] and are also found in the theoretical and normative debate on the viability of judicial enforcement of ESCR claims.[284] Critics of ESCR adjudication often adopt some version of the polycentric objection to judicial intervention in policy matters first put forward by Lon Fuller in the context

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[282] King, ''Judging Social Rights'', *supra* note 15 at 2.

[283] *Tanudjaja*, *supra* note 9 at para 66.

[284] ‘‘The argument that *polycentric* issues are non-justiciable is most frequently raised in the context of resource allocation disputes. Such disputes frequently involve claims to health, education, social security or *housing resources (*emphasis added)*”* King, ''Judging Social Rights'', *supra* note 15 at 2.

of contract law.[285] King elaborates: "Fuller aimed to show what kinds of social tasks are best assigned to courts, and those inherently unsuited for adjudicative disposition and thus best left to legislatures or the market."[286]

Another issue for domestic courts to consider before tackling ESCR related to international human rights norms is the polycentricity of social rights claims derived from international sources. Simply put, is the courtroom the best venue for the mediation of disputes involving several parties with a multiplicity of often diverging interests? Does the legal matter under review touch on the best use of scarce public resources? Or as Justice Bastarache defined the issue in *Pushpanathan*:

> While judicial procedure is premised on a bipolar opposition of parties, interests, and factual discovery, some problems require the consideration of numerous interests simultaneously, and the promulgation of solutions which concurrently balance benefits and costs for many different parties.[287]

Are the courts capable of formulating appropriate remedies for ESCR based litigations? [288]

The suggestion that the courts are not capable of rising to this challenge relies, to some extent, on a false dichotomy between ESCR and classical civil and political rights. Langford maintains that "the oversimplification comes through the caricature of social rights claims as

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[285] Two examples of polycentric problems (i.e. non-justiciable) given in his famous essay are assigning players on a football team and resolving a dispute involving where to place railway infrastructure. For a deeper understanding of the concept of legal polycentricity consult Lon L Fuller, *The Forms and Limits of Adjudication* (Cambridge: Harvard Law Review Association, 1978).

[286] Jeff King, *The Pervasiveness of Polycentricity* (Rochester: Social Science Research Network, 2007) at 4 [King, ''Pervasiveness''].

[287] *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982 at para 36, 160 DLR (4th) 193 [*Pushpanathan*].

[288] Langford, *supra* note 120 at 35.

polycentric in comparison with other areas of law."[289] Whereas, we know from the case law in Canada, that polycentric questions such as the *Reference on Secession*,[290] which involved highly complex question of international public law that had enormous constitutional implications for the parties to the case, was not deemed *ultra vires* for the Supreme Court to adjudicate. From a normative point of view, therefore, it is not acceptable for Sate actors in Canada to preclude judicial participation in the remedying of violations of international ESCR on the basis that the polycentricity of ESCR renders these rights inherently non-justiciable.

The polycentric doctrine is far from an insurmountable hurdle, however, and we shall see in this chapter, how contemporary jurists like King deal with the challenge of finding a balance between judicial deference to the other branches of government and judicial intervention in ESCR questions through the theory of Incrementalism.

Incrementalism is transnational in nature. It is aimed at creating a method for jurists in jurisdictions that currently meet the Incrementalist conditions (apart from the U.K., King identifies four other countries including Canada)[291] to apply social rights, including the right to housing, domestically *via* their internal judiciary. To a large degree, the theory is founded on a comparative model of constitutionalism. In establishing this theory, King relies extensively on Canadian jurisprudence and doctrines that have evolved out of Supreme Court decisions (in particular *Chaoulli).*[292]

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[289] *Ibid* at 36.
[290] *Secession Reference*, *supra* note 171, at paras 24–31.
[291] King, ''Judging Social Rights'', *supra* note 15 at 12.
[292] *Ibid* at 55.

King begins his analysis by identifying the key theoretical obstacles to the implementation of social rights judicially. He then separates these obstacles into two categories: "good" and "bad."[293] I will focus on the strong obstacles in my own outline of Incrementalism, as the latter are generally dealt with elsewhere in my dissertation and are easily disposed of by King himself in his work.

Broadly speaking, the strong obstacles identified by King can be divided into five types. First, there is the argument that judicial recognition of social rights may lead to unelected judges making decisions that affect policy choices made by elected representatives. This is particularly controversial when the judiciary's decision has resource implications for the State. To this end, King cites Jeremy Waldron's critique of judicial review[294], namely that "constitutional social rights might therefore threaten to remove important and contested issues from the political process to the hands of unelected judges."[295] Secondly, the concept of polycentricity[296]is crucial to understanding the Incrementalist project and its goals. Thirdly there is the

[293] The "bad arguments" include the following: "Social rights are not human right; courts cannot and will not adjudicate policy questions; courts cannot adjudicate positive rights; it would violate separation of powers; social rights are too vague; social rights conflict with each other." *Ibid* at 4-5.

[294] Jeremy Waldron, "The Core of the Case Against Judicial Review" (2006) 115:6 Yale LJ 1346.

[295] Wesson, *supra* note 104 at 129.

[296] Which states: "a polycentric problem is one that comprises a large and complicated web of interdependent relationships, such that a change to one factor produces an incalculable series of changes to other factors. Such relationships have 'interacting centres' the points where the strands of the web intersect where different parties interact with each other by means of negotiation, exchange, or in other ways. A problem having a profusion of such 'interacting centres' is one that is many-centred', hence, polycentric.'' King, ''Pervasiveness'', *supra* note 286 at 3.

question of expertise as it relates to whether the courts have the necessary capacity to resolve complex polycentric issues. Fourthly, King's theory advocates the greatest degree of administrative flexibility possible in the resolution of social rights claims, as, without the protection of such flexibility, the "Courts, with their capacity to issue binding orders subject to a system of precedent, might threaten to introduce an unwelcome element of rigidity into the welfare state."[297] Finally, though not an impediment like the other arguments raised against social rights, the litigants have alternatives to traditional legal avenues for the negotiation of social rights' claims.[298]

According to King, these issues, when taken together, point to a problem for the adjudication of social rights that may prove difficult to overcome. But they do not represent an insurmountable hurdle to the recognition of these rights by the courts. The answer to the adjudication problem may lie in the Incrementalist emphasis on an "institutional" approach to the concept of judicial deference. Such an approach would "focus on comparative merits and drawbacks of the judicial process as an institutional mechanism for solving problems."[299]

In order to address the issue of democratic legitimacy, Jeff King maintains that jurists seeking legal remedies to social rights violations must respect the political and legislative process. This would include the policy choices of a given State actor. However, in States such as Canada's, where ESCR, and the disadvantaged groups that would most benefit from them,

[297] Wesson, *supra* note 104 at 129.
[298] King, ''Judging Social Rights'', *supra* note 15 at 85.
[299] *Ibid* at 121.

have historically been neglected,[300]jurists should have little compunction about court challenges. King, therefore, believes that constitutionalizing social rights is part of the solution to the problem of enforcing these rights in a given legal system.[301] Others have singled out the right to housing as an example of ESCR in the Canadian context that would benefit from incorporation into the Constitutional framework, particularly in terms of removing it from the political bargaining process. "Yet without some kind of explicit constitutional recognition that there is a right to housing it is hard to imagine a way that funding could be completely decoupled from the electoral cycle."[302]

Once a State has established what King describes as a "bundle of resources" for ensuring a decent quality of life, (either through ordinary statute or constitutional provision), the judiciary would play a secondary role, functioning as a dispute resolution mechanism for social rights claims based on these democratically negotiated baselines.[303] This addresses the democratic legitimacy problem "because it defuses much of the concern that constitutional social rights might function as a Trojan horse for a complete theory of redistributive justice."[304] Indeed, as we shall see, that the right to housing might be the thin edge of the wedge for the inclusion of ESCR more generally in *Charter* claims, was an objection espoused by Judge Lederer in his criticism of the Tanudjaja Application.[305]

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[300] Sarah E Hamill, "Caught Between Deference and Indifference: The Right to Housing in Canada'' (2018) 7:1 Canadian Journal of Human Rights 67 at 80-85.
[301] King, ''Judging Social Rights'', *supra* note 15 at 17.
[302] Hamill, *supra* note 300 at 90.
[303] King, ''Judging Social Rights'', *supra* note 15 at 57.
[304] Wesson, *supra* note 104 at 130.
[305] *Tanudjaja*, *supra* note 9 at para 64.

The main thrust of Incrementalist theory is concerned with refuting the restrictions imposed on social rights by polycentric doctrine in law. Although originally developed to address contract law issues[306], Fuller's theory of polycentrism has been employed by jurists all over the world and applied to any number of diverse legal situations. This argument will be familiar to Canadian human rights scholars as the basis for much of the doctrine concerning justiciability of rights, and the ongoing debate about whether it is desirable for courts to adjudicate ESCR.[307]

The reality, according to King, is that the pervasiveness of polycentricity in modern legal questions, means that its central critique, namely that legal decisions should not bind unrepresented parties to legal precedents, must frequently be set aside by the judiciary, because its overuse might lead to an exclusion of a wide variety of issues from the scope of adjudication. In fact, "such examples abound in the field of constitutional law and human rights in particular, when interest balancing is an explicit function of…the judiciary."[308] Clearly, using a broad definition of polycentricity as a counter-argument to judicial intervention, is undesirable in the Canadian legal context. It becomes, therefore, necessary to refine and limit its use, particularly with respect to the exercise of social rights. King proposes a number of grounds to attenuate the impact of the legitimate application of polycentric doctrine and limit its use in only those rare examples where judicial intervention might produce demonstrable harms to society. These

[306] King, ''Pervasiveness'', *supra* note 286 at 6.
[307] See especially Sossin, ''Boundaries of Judicial Review'', *supra* note 173.
[308] King, ''Pervasiveness'', *supra* note 286 at 16.

are: judicial mandate, degree, access to information and case management and intervention.[309]

The first of these principles (judicial mandate) may be successfully employed in the Canadian legal context, and warrants greater detail. Certainly, legal questions can be defined in a manner that will minimize polycentricity. For instance, when the judiciary has been given a clear-cut mandate to adjudicate, polycentricity should not be the focus of the debate. As King clarifies, "If the legal sources are particularly clear in the case at issue then the legal issue will not be polycentric."[310] Some legal sources may confer a general mandate to resolve a category of disputes without assigning any particular outcome.[311] In these instances, polycentricity ought to constrain court's interpretations of the legal sources, but only if the judicial mandate does not provide the solution.[312] Conversely, polycentricity may be constrained where the purpose of the court's exercise is to determine if the area of law in question falls within the mandate of the court to decide. For instance, "the Supreme Court of Canada can adjudicate the legality of a section given the textual silence of the Constitution on the question…. this situation prevails in reading social rights into…the Canadian *Charter of Rights and Freedoms*."[313]

A related issue is the question of institutional expertise and the level of deference a judiciary should accord to this expertise in the

[309] King, ''Judging Social Rights'', *supra* note 15 at 198.
[310] *Ibid* at 199.
[311] For examples of administrative tribunals established by statute, see Bastarache J. opinion in *Pushpanathan, supra* note 287 at para 36.
[312] King "Judging Social Rights", *supra* see note 15 at 200.
[313] *Ibid.*

adjudication of social rights. Incrementalist theory takes into account different forms of expertise and discusses how deference should be accorded along certain criteria specific to the area of expertise under judicial review.[314] King elaborates the principle of restraint that should guide judicial deference towards expertise:

> First, we must recognize the idea of an expertise–accountability trade off, namely, that we rarely defer completely to another's expertise because it leads to unaccountable consequences. We accept an expert's definition as a trade-off for accountability. Second, its helpful to consider types of expertise when contemplating the role for courts in public law when we combine the idea of an expertise-accountability trade off with different types of expertise, some familiar interventions judicial review of expertise are explained. Third, public law must recognize a failure of expertise and these are discernible chiefly in three ways: a failure to apply expertise; a failure evident due to distinctive facts in the record or when state actions contradict a substantive and clear majority of the social science evidence relating to some problem.[315]

It should be stressed, however, that deference to external expertise is not an excuse for jurists to abandon their responsibilities with respect to social rights. Thus, "expertise cannot be a rational for complete deference."[316]

King believes that Incrementalism responds effectively to the critique that polycentricity renders social rights claims, non-justiciable. that Incrementalist theory addresses the accusation that courts may accidentally or deliberately restrict the growth of social rights by imposing inflexible legal remedies on law or policy makers.

While, King more or less agrees with sceptics like Gerald Rosenberg,[317] that, ultimately, courts are an ineffectual vehicle for advancing

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[314] *Ibid* at 221.
[315] *Ibid* at 212.
[316] *Ibid* at 229.
[317] Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 2008).

human rights and, thus, should not take the lead in deciding matters that are liable to radically expand the welfare state, he doesn't entirely adopt Rosenberg's "hollow hope" thesis.[318] King maintains that the judiciary ought to play a key part in the debate, to wit: "The courts, in my view must work in tandem and in collaboration with these other institutions."[319] Thus, we can say, that King advocates for judicial dialogue, in the Canadian sense of that term. That is, it is helpful to think of the court's *Charter* decisions as not imposing a veto on desired legislation or policy, but rather starting a "dialogue" with the legislative and executive branches, as to how best to reconcile the individual values of the *Charter* with the accommodation of social and economic policies for the benefit of the community as a whole.[320]

More to the point, King rejects the notion, held by some socially conscious jurists[321] and critics of ESCR, that constitutionalizing social rights would be a mistake.[322] Indeed, on balance, King finds that the empirical evidence favours some type of formal recognition of social rights, whether by implicit constitutional norms inferred by the judiciary, explicit recognition in statutory law, or within the legal human rights framework. King states: "The conclusion is that constitutional legal accountability can provide worthwhile benefits in general and for social rights, in particular."[323]

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[318] *Ibid* at 1.
[319] King, ''Judging Social Rights'', *supra* note 15 at 310.
[320] Hogg, *supra* note 197 at 13.
[321] See e.g. Mark Tushnet who says "To say that social and economic rights are constitutionalized is simply to say that courts will enforce them but courts are quite ill-suited for making essentially strategic choices among means." Tushnet, ''Weak Courts'' *supra* note 204 at 230.
[322] Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 2017) at 139.
[323] King, ''Judging Social Rights'', *supra* note 15 at 63.

Part I-Conclusions

The paradigms, theories and norms covered by the first part of my dissertation, have led me to overwhelmingly positive conclusions regarding the potential impact of these on the right to social housing in Canada. Elaine Mak's conception of Judicial Internationalisation and comparative legal analysis of constitutional courts, Jesse Hohmann's right to housing critique, and Jeff King's version of Incrementalism have much to offer Canadian human rights and housing rights scholars in their efforts to institute a legal right to social housing.

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Elaine Mak's study of the justices and case law of the Supreme Court of Canada is an example of the growing trend globalization of constitutional courts. The lessons drawn from her analysis will guide my own hypothesis on the existence of a right to social housing in several important ways. I will attempt to answer these questions: How do the courts and jurists currently define their role in Canadian ESCR discourse? What approach do courts and jurists in Canada generally adopt with regards to the importance of public international and transnational sources of law? Finally, how does the judiciary in Canada assimilate foreign human rights sources into its own jurisprudence?

Mak's findings confirm that, for the Supreme Court at least, the inclination has been to resort to comparative legal analysis of shared legal questions with other common law and civil law jurisdictions. This inherent affinity towards the jurisprudence of common law systems makes the Canadian judiciary ideally positioned to incorporate international and

transnational legal norms from transnational trends in human rights thinking into its own decisions (e.g. India or South Africa).

Furthermore, the effects of Mak's globalized judiciary on the Supreme Court are well documented by her, and manifest themselves in such practical examples as the Court's willingness to engage in transnational (or horizontal) dialogue with other high courts around the world. This may include growing communications between judges, through conferences, meetings, seminars and correspondences. In many respects, Mak finds the Supreme Court to be a perfect model of the phenomenon of Judicial Internationalisation.

Other criteria, identified by Mak that reinforce the tendency towards Judicial Internationalisation will also be applied in this dissertation. I will consider Mak's criteria, in my search for international and transnational remedies that might employed comparatively by the Canadian judiciary. These are normative discussions surrounding human rights and the right to housing, in particular, in foreign jurisdictions. I will consider high profile cases decided elsewhere, that might favour ESCR claimants seeking the right to social housing in Canada and judicial metrics for ESCR in foreign case law, that might be relevant to similar legal situations in Canada. Finally, the prominence of a particular human rights trend in transnational and international jurisprudence may be an influential factor in the way that ESCR are perceived by judges in Canada.

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Hohmann's dissertation on the right to housing is undoubtedly useful to any jurist in Canada who is studying the intersection between international, transnational and domestic law with respect to housing as a fundamental human right's norm. I have highlighted how Hohmann's work can be applied, to the inter-disciplinary and intersectional aspects of the right to social housing conundrum. I have further discussed how Hohmann's work has implications for indigenous claims and the political, social and historical contexts of the right to housing in Canada. We have seen how Hohmann's notions of privacy, identity and space relate to the right to housing in general. We have also seen how Hohmann applies these same notions to concrete examples of Canadian jurisprudence (e.g. *Adams* case) and to constitutionally enshrined rights (e.g. the right to a fair trial). Most notable, perhaps, is the pertinence of Hohmann's analysis of questions of identity as they relate to the indigenous context in Canada. Her analysis has particular relevance, as the housing rights of Canada's indigenous population are the subject of international litigation and involve basic human rights recognized by international treaties. This was exemplified by the case of Cecilia Kell.

Hohmann's work has still greater value as a theoretical framework in that it can be used to approach the quandary of the apparent lack of any explicit right to housing in Canadian law. Hohmann's analysis of the arguments against recognition of housing rights, are very apropos for those facing the challenges of overcoming hoary judicial theories and false dichotomies between so called classical "first generation" rights and "second generation" ESCR (often treated as second class by law-makers in Canada). Most importantly, Hohmann sets forth the notion that housing rights are a "prism through which to view complex conflicts and contested questions about the shape of the world, and the boundaries of the possibilities for

change and stability within and across societies."[324] It is in this last respect, I think, that Canadian human rights scholars will find her argumentation, a valuable tool for effecting legal, social and political change with respect to the right to social housing in Canada.

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Finally, the Incrementalist model of adjudication is a largely pragmatic approach to resolving disputes in modern common law jurisdictions where social housing rights may not be legally enforceable yet. But where the judiciary has a key role in interpreting and applying the law in manner that is both progressive and respectful of the boundaries of judicial review. The theoretical innovation Incrementalism represents has potential implications for Canadian ESCR litigation, as indeed the author himself has asserted: Incrementalism is conceived as a both transnational and an inherently common law-based paradigm.

With respect to the question of judicial deference towards policy makers in the face of ESCR claims, King has elaborated essential guidelines for jurists in Canada and elsewhere. He is mainly concerned with democratic legitimacy, flexibility, expertise, polycentricity and alternative mechanisms to the judiciary for the establishment of social rights (e.g. constitutionalization). The latter concept notwithstanding, the Incrementalist approach elaborated in his work, demonstrates that courts in Canada need not shy away from tackling the question of the right to social housing, provided that they do so in a collaborative manner that does not engender legal overreach. According to King, the courts must avoid establishing binding constitutional rules, unless there is no other option available to them. This is

[324] Hohmann, *supra* note 91 at 248.

very much in keeping with the notions of judicial deference to legislatures for reasons of democratic legitimacy and judicial dialogue doctrine already practiced widely by Canadian judges.

In essence, what Incrementalism strives to do is recast the justiciability doctrine as a potential solution to an impasse so often cited by Canadian jurists like Sossin[325] as being problematic in the context of ESCR. This transformation occurs, by creating and adhering to Incrementalist principles of judicial deference. King argues, therefore, that rather than being the end of the debate on social rights in Canada, judicial reticence and justiciability should, on the contrary, be the starting point for the judicial discussion on adjudication of these rights: "The question of how judges ought to exercise judicial restraint is a crucial important constitutional issue, one that goes to the heart of the role of courts in social rights adjudication."[326]

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The extent to which the judiciary in Canada is amenable to the theories of transnationalism, Judicial Internationalisation, Incrementalism and comparativist analysis with regards to the right to social housing, remains uncertain. It may well be that human rights advocates would do well to consider and exhaust other possibilities before turning their attentions to the courts in Canada. After all, there are a variety of alternatives to legal avenues. Initiatives in the social, political and economic spheres which are intended to

[325] See Sossin's discussion of international human rights obligations in the Canadian context and its implications for institutional legitimacy and capacity. Sossin, ''Boundaries of Judicial Review'', *supra* note 173 at 194.
[326] King, ''Judging Social Rights'', *supra* note 15 at 151.

bring about social housing reform may be more reliable and achievable, at least in the short term, than the legal recognition of the right to social housing.

And yet, as we shall see in the subsequent chapters, it would be wrong to write off the courts as a potential source of redress in the area of the right to social housing. As Porter and Jackman rightfully explain, crucial questions about the scope of s.15, s.7 and s.1, of the Federal Charter and their potential impact on the right to social housing, remain unsettled. Jurisprudence on the subject is still evolving. International and transnational human rights norms remain compelling evidence for the Canadian judiciary to consider and apply to domestic legal cases, and Canada remains a state party to the primary UN treaties that guarantee the right to adequate housing.[327]

Ultimately, the issues associated with ESCR litigation, may or may not lead claimants to pursue the judicial route in Canada. As Langford concludes "we can see that social rights adjudication is not without impact but should not be invested with either messianic expectations or carefree cynicism."[328] Thus we return to one of the crucial issues raised by this dissertation: what, if any role, does the judiciary in Canada have to play in the resolution of the ongoing debate surrounding the substantive right to social housing? Or, more explicitly, how should the courts address *Charter*-based challenges to social housing policy, like the one brought by Ms. Tanudjaja, and her co-applicants?

[327] The Federal government's policy paper on the National Housing Strategy explicitly recognizes its international legal obligation "Canada's First Ever National Housing Strategy", online: *Place To Call Home* <www.placetocallhome.ca> at 8.
[328] Langford, *supra* note 120 at 45.

Part II- The Modern Right to Housing in International Law

Although this dissertation does not purport to be an historical analysis of the subject of housing rights in international human rights law, it is important to examine, at least briefly, its origins to contextualize it and better evaluate its ongoing impact as a human rights norm. Therefore, in the first Chapter of Part II, I will provide the reader with an overview of the most significant historical legal developments with regards to the right to housing in the latter half of the 20th century.

This overview will cover the period beginning with the *Universal Declaration on Human Rights* (generally regarded as the first attempt to include housing specifically as basic human rights)[329] and the *Optional Protocol to the International Covenant on Economic Social and Cultural Rights*[330], all the way to the present day. However, this aspect should not be regarded by the reader as the end of the story, as the international public law regime protecting housing rights is evolving constantly and extends far beyond the public international legal framework included in my inquiry. The scope of my research in Chapter A is confined, due to the constraints of this dissertation, to what is regarded by most contemporary human rights

[329] *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71 [*UDHR*].
[330] *OP-ICESCR*, *supra* note 129.

scholars[331] as the most critical developments for the protection, fulfilment and respect of the right to housing, to date.

In Chapter B, several human rights instruments and the jurisprudence they generated will be examined with respect to their influence on Canadian human rights norms. The emphasis will be, as always, their bearing on ESCR and in particular the right to social housing, and contrasts, at least in a normative sense, between international and domestic interpretations and applications of the right. The most important of these documents are: the *International Convention on Civil and Political Rights*, the *Convention on the Elimination of all Discrimination Against Women, Convention on the Rights of the Child,* the *Inter-American Human Rights System,* and the *Convention on the Rights of Persons with Disabilities.* A further benefit of this study will be to expose some of the little-known housing rights cases in Canada related to these human rights treaties.

In Chapter C, a comparative and transnational inquiry of modern housing rights with regards to foreign jurisdictions and Canada will be undertaken. Three of the case studies will involve jurisdictions already familiar to jurists in Canada, particularly those working in the field of ESCR: India, South Africa and France. South Africa was chosen because it provides an excellent example of a free standing, *de jure* constitutional right to housing. India, because it represents an unwritten and *de facto* constitutional right with regards to housing that is based on a normative conception of that right.

[331] For an authoritative guide to international ESCR see especially Scott Leckie & Anne Gallagher, *Economic, Social, and Cultural Rights: A Legal Resource Guide* (Philadelphia: University of Pennsylvania Press, 2006) [Leckie & Gallagher].

The comparative aspect of the dissertation is aimed at determining what lessons about ESCR and housing rights adjudication transnationally can be applied to the Canadian human rights context and form part of what Mak designated the "horizontal dialogue" between jurisdictions. In particular, useful strategies, theories and doctrines that have proven effective for gaining legal and judicial leverage elsewhere, and the way such gains might be adapted for use in Canadian courts.

India's is an example of a judiciary taking the initiative in recognizing the right to adequate housing in a legal context where such a right was not explicitly defined in the Constitution or any other statutory or regulatory instrument. Thus, their Constitutional Court provides a model for judiciaries struggling to come to terms with constitutions that are ill-suited for the integration of complex ESCR norms as well as jurisdictions where there is a lack of political will for such action.

Both Indian and South Africa are also common law jurisdictions with strong historical[332] and modern[333]ties to the Supreme Court of Canada and remain among the most influential jurisdictions in terms of the frequency of their jurisprudential citations[334] throughout Canada's judiciary. Their influence on human rights discourse in Canada, is also noteworthy, especially

[332] For a study of the influence of Supreme Court of Canada jurisprudence on the Constitutional Court of South Africa, see Jeremy Sarkin, "The Effect of Constitutional Borrowings on the Drafting of South Africa's Bill of Rights and Interpretation of Human Rights Provisions" (1998) 1 U Pa J Const L 176 at 186.
[333] Mak, *supra* note 84 at 86.
[334] A search of CanLII's database yields 355 references to "South Africa" or "South African." Further, some of the leading examples of *Charter* litigation include comparisons between Canada and South Africa. Notably, in the context of the right to housing in *Shantz, supra* note 61; the right to the presumption of innocence: *R v Hall*, 2002 CSC 64, [2002] 3 SCR 309; and the right to personal security contained in s.7: *Khadr v Canada (Prime Minister)*, 2009 CF 405, [2009] 1 FCR 34.

where the right to housing is concerned.[335] Finally, South Africa's case law with respect to social rights is viewed as an excellent case in point for the application of Incrementalism by Jeff King.

Finland is a world leader in the fight against homelessness and implementing national housing policies that aim to address the human rights violations suffered by the homeless. As such, the country's approach may prove a useful model for the architects of Canada's NHS. Particularly with regard to the way it incorporated the right to social housing' within its national homelessness policy framework.

In the final section of Chapter C, the current French regime dealing with the right to housing in that country, will be scrutinized. The *Droit Au Logement Opposable* (DALO) [336], has been in force since 2007, and has attracted both praise and criticism from international and domestic housing rights experts. The critical lens I have chosen will view the law in terms of potential lessons for the *National Housing Strategy* in Canada, and explores some of the more obvious errors entrenched in the regulatory system created by DALO, that ought not to be repeated in the Canadian NHS context.

[335] See e.g. roundtable discussion on social rights in Canada with retired South African Justice Zak Yacoob: Social Rights Cura, "A Conversation with SACC Justice Zak Yacoob" (26 July, 2013), online: YouTube <www.youtube.com/watch?v=Qfiz6LIMFTo.>.
[336] *Loi n° 2007-290 du 5 mars 2007 instituant le droit au logement opposable et portant diverses mesures en faveur de la cohésion sociale*, JO, 5 March 2007, 4190 [DALO].

A) The Evolution of International Housing Rights

The strongest manifestation of the right to housing in modern human rights law is the one contained in *International Covenant of Economic Social and Cultural Rights*, specifically Article 11(1) which recognizes "the right to everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing."[337] This is true not only because of the largely positive contribution that the document had historically had on the thinking of jurists all over the world, but also because the right remains an obligation for Canada and scores of other countries as well, as parties to the Second Covenant.[338]

Therefore, in this Chapter, I examine the historical context that led to the creation of the ICESCR as well as the institutional framework it established for inquiries into the implementation of the right, and the mechanisms which ensure State parties remain accountable and enforce the right to adequate housing through their own institutions.

Section I, concerns what is now universally regarded by many international legal scholars as the birth of the current legal regime of human rights. That is the *Universal Declaration of Human Rights* (UDHR)[339] and its relationship with the modern international right to housing. *Section II*, furthers this analysis with a discussion of the origins of the "Second

[337] *ICESCR, supra* note 27.
[338] This moniker came about on account of the *ICESCR* being drafted after the *ICCPR*, its companion treaty (or the "First Covenant").
[339] *UDHR*, *supra* note 329.

Covenant" or ICESCR, and the way in which it enshrines the right to housing. The focus in this section will be parsing Article 11(1), to see what such an analysis can yield in terms of its relevance in the domestic legal sphere.

Section III, will provide a summary for the reader of the evolution and current doctrine and jurisprudence on housing rights of the Committee on Economic Social and Cultural Rights (CESCR) and their relevance for Canada. Also, it is at this point in the dissertation, that the concept of an NHS in the light of the ICESCR obligations on signatories, is broached. This element of the right to adequate housing may prove useful to the Canadian government in light of its ongoing consultations with housing rights champions, civil society groups, and others involved in housing and homelessness, and the general public, in its attempts to create a social housing policy framework for Canada.

Section IV, will elaborate the difficulties associated with the as-yet un-adopted in Canada, Optional Protocol of the ICESCR (in force internationally since 2013), as an imperfect but still vital tool for the pressuring of States to protect, respect and fulfill the right to housing in their domestic legal systems.

1) The Universal Declaration of Human Rights and Housing Rights

The starting point of any scholarship into the right to housing in the modern era at the international level, typically begins with the *Universal Declaration of Human Rights* Article 28(1):

> Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, *housing* and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. (emphasis added)[340]

This famous statement of principles would prove to be the foundation for the modern right to housing cited, directly or indirectly, in a myriad of other international, regional, and national, human right documents. According to King, the recognition of social rights in this declaration coincided with the emergence of the principle of equality in many western liberal democracies, in the latter half of the 20th Century.[341]

Crucially, there is no distinction made in the *Declaration* with respect to differences between ESCR, on the one hand, and civil and political rights on the other. Rather the two are viewed not only as being equally important, but as interdependent and inseparable in the fulfillment of all human rights. Thus, the subsequent debate about the hierarchy of human rights, classifying ESCR as "second generation rights,"[342] in effect categorizing them as

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[340] *Ibid*.
[341] King, ''Judging Social Rights'', *supra* note 15 at 23.
[342] Tushnet, ''Weak Courts'', *supra* note 204 at 1.

secondary rights, as the name would suggest, seems to be based on an erroneous inference drawn by some scholars in light of their being instrumentalized later than the rights found in the ICCPR. "Although the interconnections between dignity, freedom and basic material goods have since become a source of significant debate, no such controversy appears to have attended the inclusion of Article 28, in the UDHR's text." [343]

1) The International Covenant on Economic Social and Cultural Rights

Apart from the historical and normative significance of the UDHR (readers should note that as a UN resolution is not strictly binding on member states), by far the most important legal expression of the right to housing is Article 11(1) of the *International Covenant on Economic, Social and Cultural Rights*, which enunciates the following

> The state parties to the present Covenant recognizes the right to everyone to an adequate standard of living for himself and his family, including adequate food, clothing and *housing*, and to the continuous improvement of living conditions. The State 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. (emphasis added)[344]

One notable difference with the UDHR, from which it is obviously derived: Article 11(1) is attenuated both by internal limitations and by the clauses of other provisions in the ICESCR. Hence the right to housing has lost its absolutist status under the Second Covenant, and is subject to the principle of States being required only to "take appropriate steps towards its realization." More importantly, elsewhere in the document[345] the doctrine of progressive realization is enunciated, a legal doctrine that already has some

[343] Hohmann, *supra* note 91 at 16.
[344] *ICESCR*, *supra* note 27.
[345] *Ibid* ss 2(1).

currency in Canadian judicial circles.[346] A State party is bound only to fulfill the right "to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant"[347] It is also given a separate meaning rather than being part of a broader adequate standard of living article, as in the UDHR, and qualified by the attachment of the term "adequate", which would subsequently be elaborated in the normative framework set up by the CESCR, that is tasked with interpreting the Covenant. Yet, the two documents are inherently linked and have even been regarded by international jurists as constituting together an "international Bill of Rights."[348]

It should be noted that, though these documents have widespread normative authority and are regarded as interpretive guides in domestic judiciaries, they remained largely theoretical rights for much of their history and continue to be unenforceable in many jurisdictions.[349]

[346] See e.g. Rouleau J. opinion in *Mare* in which he declares that ''Counsel then refers me to International Conventions in which it is suggested that states adhering to such agreements have an obligation to undertake steps to the *maximum of their available resources* to achieve a certain standard of medical care'' [emphasis added]: *Mare v Canada (Minister of Citizenship and Immigration)*, 2001 CFPI 450 at para 11, 2001 FCT 450.

[347] *ICESCR*, *supra* note 27.

[348] Hohmann, *supra* note 91 at 15.

[349] Lucie Lamarche, ''Beyond the Rhetoric of Social Rights for the Poor : the Need to Promote a Methodology aimed at Reinforcing International and National Institutions'' (2003) UNESCO Poverty Project at 4, online (pdf): <criec.uqam.ca/textes-en-ligne.html#journaux>.

2) The Committee on Economic Social and Cultural Rights

While the jurisprudence and legal doctrines of the CESCR are not strictly binding on State parties, they remain among the most authoritative and persuasive sources of human rights and ESCR doctrine. This is especially true of the right to adequate housing which is the subject of many opinions. "In fact, General Comment 4 is considered 'the single most authoritative legal interpretation of what the right to housing actually means in legal terms under international law' and is certainly the most widely cited statement on the contents of the right." [350]

This Comment is known primarily for laying down the seven elements that the right to adequate housing contains and must be met in order to fulfill the obligations binding on State parties. They are: (i) legal security of tenure; (ii) availability of services, materials, facilities and infrastructure, (iii) affordability, (iv) habitability, (v) accessibility, (vi) location and, (vii) cultural adequacy. [351]

Subsequently, these conditions have been supplemented and expanded in transnational jurisprudence (e.g. *Grootboom*) and CESCR comments. For example, the Committee has found that the right to housing must be understood in relation to other rights including freedom of expression and association.[352] State parties must give priority in the provision of social

[350] Scott Leckie, *Legal Resources for Housing Rights: International and National Standards* (Geneva: Centre on Housing Rights and Evictions, 2000) at 73.
[351] *CESCR General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, UNESCOR, 6th Sess, Supp No 3, UN Doc E/1992/23 (1991) at 4-5.
[352] Leckie & Gallagher, *supra* note 331 at 294.

housing to traditionally underserved and neglected groups.[353] As I have already noted, the CESCR has dismissed economic austerity as a legitimate ground for derogation from the right to housing obligation. Indeed, Leckie states that "the obligations under the Covenant continue to apply and are perhaps more pertinent during times of economic contraction."[354] These measures must be monitored by the governments of the State party.[355] However, the CESCR has generally avoided being prescriptive in that it has seldom encouraged a particular approach to solving the housing crisis or homelessness in a given situation. Preferring instead to leave the right combination of private/public measures to the State in question.[356]

Rather more controversially, the CESCR has even advocated for collective legal action in those cases where there is a marked increase in the homeless population of a given State party[357], something that most likely influenced the *Tanudjaja* application.

We have already seen in *Part I* of this dissertation, that the CESR's compliance reviews of State parties can influence the development of such international and transnational legal doctrines as reasonableness and progressive realization of Covenant obligations. My emphasis here will be on those opinions that implicate Canada directly or have been cited in Canadian human rights discourse regarding the right to housing.

Concerns among International Governmental Organization's (IGOs) about the growing problem of homelessness and poverty rates in Canada

[353] *Ibid*.
[354] *Ibid* at 295.
[355] *Ibid*.
[356] *Ibid.*
[357] *CESCR*, *supra* note 351 at para 17.

came to a head in the early 1990's. The first damning report was published by the CESCR in 1993, at its second Periodic Review in the context of ICESCR norms. In that document the Committee focused particularly on Canada's apparent non-compliance with Article 11 of the Covenant "the right to an adequate standard of living, including adequate food, clothing and housing" and addressed the obligations under Article 2 of the Covenant to apply the "maximum of available resources" to the progressive realization of this right.[358]

Subsequent reviews expanded on this criticism. The central argument of these,[359] while not exclusively focusing on the lack of social housing, has been to advocate a holistic approach to the fulfillment of ESCR based on a national strategy that addresses the socio-economic and cultural factors contributing to poverty.[360] This strategy would be led by the Federal government but also supported by the provincial governments. Among other things, these reports have underscored the importance of consultation with those stakeholders most affected, transparency of the process, and the measurability of the outcomes: "Measurable goals and timetables, consultation and collaboration with affected communities, complaints

[358] UN Committee on Economic Social and Cultural Rights, *Consideration of reports submitted by states parties under Articles 16 and 17 of the covenant: concluding observations of the Committee on Economic, Social and Cultural Rights: Canada*, UNESCOR, 36th Sess, UN Doc E/C.12/CAN/CO/4, E/C.12/CAN/CO/5 (2006) at 11.
[359] UN Committee on Economic Social and Cultural Rights, *Concluding observations on the sixth periodic report of Canada*, UNESCOR, 20th mtg, 2016, UN Doc E/C.12/CAN/CO/6 (2016) at para 46.
[360] Porter, ''Rights in Anti-Poverty'', *supra* note 124 at 51.

procedures, and transparent accountability mechanisms, in keeping with Covenant standards."[361]

The CESCR has, quite naturally, supported the development of a human rights-based approach to poverty reduction. It has suggested that such an approach by the Canadian government is more likely to succeed by "encouraging the integration of human rights generally and the ICESCR in particular."[362]

Finally, other UN bodies (e.g. the Human Rights Council) have echoed the criticism of the CESCR in their assessment of Canada's inaction on poverty, particularly in light of its obligations under the ICESCR. Some have gone as far as to call upon governments both federally and provincially to take steps to incorporate the right to housing into the domestic legal framework.[363] Whether by virtue of legislation or reading it into the *Charter*, a notion broadly supported by human rights scholars in Canada.[364]

Indeed, there is a growing consensus among housing rights advocates[365] which calls upon the domestic judiciary to apply ICESCR

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[361] See e.g. the CESCR Report, UN Committee on Economic, Social and Cultural Rights, *Report on the 36th and 37th sessions*, Supp No 2, UNESCOR, 36 & 37th Sess, UN Doc E/C.12/2006/1 (2006) at para 200.

[362] See e.g. CESCR Report, UN Committee on Economic, Social and Cultural Rights, *Report on the Twenty-fifth, Twenty-sixth and Twenty-seventh Sessions (23 April-11 May 2001, 13-31 August 2001, 12-30 November 2001)*, UNESCOR, 26 & 27th Sess, Supp No 2, UN Doc E/C.12/2001/17 (2002), at para 3.

[363] *Kothari*, *supra* note 16 at para 90.

[364] "[…] it is hard to imagine how these documented effects of government inaction in relation to poverty and homelessness and governments' ongoing failure to implement effective *housing* and anti-poverty strategies, as recommended by experts and UN bodies, can reasonably be excluded from section 7 of the *Charter* [emphasis added]." Jackman & Porter, ''Rights-Based Strategies'', *supra* note 143 at 75.

[365] Richard Blackwell, "Canada Without Poverty's Leilani Farha thinks we can end homelessness'' *The Globe and Mail* (21 August, 2015), online:

principles and incorporate CESCR Commentary in their rulings as though they constitute a source of persuasive jurisprudence. Lamarche, and other Canadian jurists, have stressed that international human rights law should serve as an inspiration for judges interpreting domestic human rights instruments that are sometimes too vague.[366] Bruce Porter has similarly argued for the use of CESCR reports in Canadian human rights jurisprudence on the grounds that "referencing the *Charter* interpretation to social and economic rights and other substantive obligations under international human rights law will assist the courts in identifying and protecting the values fundamental to a free and democratic society."[367]

Perhaps more importantly from a democratic standpoint, the review process associated with the CESCR hearings gave voice to an often overlooked and marginalized segment of Canadian society.[368] As was discussed previously, this began in the 1990's, and was the result of a shift in the Committee's strategy toward a more proactive approach to tackling problems arising in State parties with regards to the practice of ESCR.[369]

Though many Canadian jurists are in agreement as to the overall benefits of heeding the CESCR recommendations, it must also be said, that certain objections have been raised towards them as well. In fact, Hohmann has taken a (mildly) critical stance on what she sees as the principle flaws of the reviewing process, specifically in the area of housing rights.

<www.theglobeandmail.com/report-on-business/careers/careers-leadership/canada-without-povertys-leilani-farha-believes-we-can-end-homelessness/article26054057/>.

[366] Joel Bakan & David Schneiderman, *Social Justice and the Constitution: Perspectives on a Social Union for Canada* (Ottawa: Carleton University Press, 1992) at 37.

[367] Porter, "Homelessness 2017'', *supra* note 67 at 162.

[368] *Ibid* at 157.

[369] *Ibid* at 127.

Hohmann identifies three major issues with respect to the analysis of the CESCR. First, the Committee is overly economic in its assessment of State compliance with their obligations under the Covenant. "It has made the CESR experts in evaluating the sufficiency of governmental policies in light of available resources, but has kept attention turned away from social and cultural aspects of the right." [370]Secondly, she speculates that some housing rights claimants might be overwhelmed by the seven key elements that have been outlined by the CESCR. This can manifest itself in two ways: 1) by confusing the applicant as to what can actually be claimed against the state party; 2) By putting the overwhelming emphasis on State organs as the sole actor in the provision of remedies for a violation of the right to housing. In fact, Hohmann argues such rights are equally incumbent on private sector entities.[371] Finally, the CESCR often alludes, quite rightly, to the intersectionality of the right to housing in its opinions. However, the Committee has done very little to further develop a normative critique related to the complexity of housing rights and its reports to State parties tend to be rather one dimensional, taken as whole. This is problematic because "…the right to housing is not only interlaced with the right to property and the rights of women…but also the right to freedom of movement in the face of globalizing economy and an urbanising world, rights to privacy and cultural identity, and rights to work.[372] Admittedly, she remains hopeful that these may be addressed, in the long run, by the exercise of the Protocol mechanism.[373]

[370] Hohmann, *supra* note 91 at 31.
[371] *Ibid* at 31-32.
[372] *Ibid* at 33.
[373] *Ibid* at 31.

3) The Optional Protocol for The International Covenant on Economic Social and Cultural Rights

In contrast to the ICCPR, which has long had an established dispute resolution mechanism in the Human Rights Committee (established in 1976), until very recently the ICESCR had no formal method for individual, State parties or non-governmental organisations to bring complaints to its attention. This resulted in a unique system that has been described as a *de facto* "petition procedure" for individual complaints.[374] This involved a far greater scrutiny of periodic reports submitted by State parties to the CESCR. Whereas, previously they had been more or less a formality, it is

> now only the beginning of a review procedure that is fundamentally adjudicative in nature. Ironically, the absence of an Optional Protocol for individual complaints of violations of social and economic rights has led the CESCR to lead the way in developing an adjudicative model for systemic social and economic rights claims.[375]

In 2008, the United Nations General Assembly unanimously adopted the Optional Protocol to the ICESCR.[376] Among the parties that have ratified it, the Protocol effectively serves as a mechanism by which individuals and groups may petition the CESCR for breach of ESCR provided it relates to obligations on a State party under the Covenant. "For many, the coming into force (in 2013) of the Optional Protocol completes the international bill of human rights, finally proving that the economic, social, and cultural rights of the ICESCR are equal to those rights in the ICCPR."[377]

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[374] Porter, "Homelessness 2017'', *supra* note 67 at 125.
[375] *Ibid*.
[376] *OP-ICESCR*, *supra* note 129.
[377] Hohmann, *supra* note 91 at 29.

In Canada, however, the impact of the Protocol remains to be seen, as the government not only refused to ratify it, but continues to deny the justiciability of ESCR both domestically and internationally and has hindered the expansion of this particular mechanism for adjudicating them.[378] Indeed, the arguments put forward by the Federal Government during the negotiations of the Protocol, echo the ongoing debate within Canada on ESCR justiciability.[379] Many human rights scholars have lamented this fact as a source of shame and betrayal of Canada's human rights obligations both domestically and internationally. That having been said, the Protocol represents a landmark for social rights internationally and human rights in general, that "now operate firmly within this new internationally recognized social rights paradigm. The paradigm directly informs not only legal but also political social rights advocacy in Canada."[380]

The international legal regime protecting the right to housing represented by the institutions associated with the "International Bill of Rights", must be considered among the most comprehensive and established of all those found in the international typology of human rights. The nature of the right to adequate housing is well defined (e.g. affordability, cultural adequacy, etc.) and the doctrine (e.g. CESCR's periodic reviews) provides relatively clear benchmarks for jurist to follow domestically and internationally (e.g. doctrines such as "maximum available resources," etc.)

[378] See Bruce Porter, "Claiming Adjudicative Space: Social Rights, Equality, and Citizenship" in Young et al, ''Poverty Rights'', *supra* note 88, 77 at 87.
[379] Commission on Human Rights, *Report from the Second Session of the Open-Ended Working Group to consider options for an Optional Protocol to ICESCR,* UNESCOR, 31st Sess, UN Doc E/CN.4/2005/52 (2005) at para 6.
[380] Porter, ''Rights in Anti-Poverty'', *supra* note 124 at 85.

when applying these norms. Indeed, these have been regarded by Canadian judges as reinforcing and informing *Charter* rights from the latter's inception.

Though as Hohmann has remarked, this has, thus far, done little to empower those fighting for the right domestically and the extent of the right's application, including Canada's, remains a complex and evolving legal issue. In fact, she warns us that, in the past, jurists and academics have placed excessive emphasis on the "institutional question of enforcement and interpretation"[381] and not enough emphasis on the nexus between the right to housing and other less controversial human rights such as health and the right to life.

It has become clear from my research that, in a legal sense, if the right to social housing is not interpreted by the courts in Canada in a substantive manner, the ratification of the Optional Protocol for the ICESCR becomes imperative. Ratification of this Optional Protocol is, in my opinion, a necessary step in the quest for recognition of the legality of this fundamental human need. By the same token, housing rights advocates may need to come to grips with the lack of any effective remedy for violations of the right to social housing in Canada. This remains true, despite Canada's fairly clear obligations under the Covenant to fulfill, respect and protect housing rights and the Canadian government's newfound commitment to implementing a human rights-based *National Housing Strategy*.[382] The traditional positivist legal maxim of "no right without remedy," a notion that implies that there is

[381] Hohmann, *supra* note 91 at 10.
[382] John Paul Tasker, "'One person on the streets is too many': The implications of making housing a human right" *CBC News* (23 November 2017), online: <www.cbc.ca/news/politics/trudeau-housing-rights-human-rights-1.4414854>.

a judicial resolution to every legal quandary involving recognized rights, simply may not be applicable in this instance.

B) International Human Rights Instruments and Jurisprudence that Influence Canadian ECSR Norms

In this first part of Chapter B, I examine the major international human rights instruments with respect to human rights norms in Canada and the way in which they relate to the right to social housing. These include, The *International Convention on Civil and Political Rights (ICCPR),* The *Convention on the Elimination of all Discrimination Against Women (CEDAW),* The *Convention on the Rights of the Child (CRC),* The *International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),* The *American Declaration of the Rights and Duties of Man (ADRDM)* and The *Convention on the Rights of Persons with Disabilities (CRPD).*

The focus of this analysis is limited by certain parameters related to the relevance of the instrument in the Canadian legal context. For instance, the "bindingness" of the instrument, and prestige associated with the instrument in question will obviously affect their potential persuasiveness as a legal source in the Canadian context.

I will first address the matter of relevance. All of these conventional sources of ESCR norms have been cited at one time or another in the context of Canadian human right jurisprudence (e.g. the ICCPR in *Oakes*[383] or the

[383] *R v Oakes*, [1986] 1 SCR 103 at para 31, 53 OR (2d) 71 [*Oakes*].

CRC in *Baker*[384]). Especially with regards to fleshing out human rights claims as normative and legal concepts. They have also been cited by law and policy makers, at all levels of government, in discussions surrounding the definition of ESCR. Crucially, they all enshrine a right to housing, in one way, shape or form, within their texts.[385] Thus, they have demonstrated, on any number of occasions that they are relevant in a normative sense to the development and application of ESCR in the context of modern Canadian human rights adjudication and its associated legal discourse.

Secondly, with respect to "bindingness"[386], all of these instruments have been signed and ratified, and in most cases implemented, either by means of specific legal instruments (e.g. ICCPR)[387] or indirectly through the existing body of human rights case law (e.g. CRC), by the courts. All of them also created optional protocols, subsequently adopted by Canada (except for the CRPD and ADRDM). These are dispute submission mechanisms that enable individuals or groups to register and communicate formal complaints

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[384] *Baker, supra* note 133 at paras 69-71.

[385] *ICCPR* has been construed as including a right to housing by virtue of its right to life (art 6.1); *CEDAW*, art 14(2)(H): the right "to enjoy adequate living conditions, particularly in relation to *housing*, sanitation, electricity and water supply, transport and communications"; *CRC*, Art 27(3): "State parties […] shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in this case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and *housing*."; *ICERD*, 5(e)(iii): State Parties undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee the right to everyone without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably, in the enjoyment of the following rights…e) in particular…(iii) the *right to housing*"; *ADRDM*, art 11: "every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, *housing* and medical care, to the extent permitted by public and community resources."; *CRPD*, art 28: "States parties must ensure that persons with disabilities and their families have access to food, shelter, clothing and drinking water; that persons with disabilities have equal access to Government social safety nets, e.g., *public housing*."

[386] Mak, *supra* note 84 at 29-30.

[387] van Ert, *supra* note 178 at 180.

within the UN system that are tasked with hearing them (this does not apply to ADRDM). Finally, and most importantly, all have been cited by the judiciary of Canada in various legal proceedings involving a wide range of human rights issues.

Bindingness can cover a broad range of international legal sources of ESCR. From the binding obligations found in certain public international law instruments to those that are merely considered persuasive authority by the Canadian judiciary. The former holds, evidently, a greater degree of bindingness in that it has been incorporated into Canada's internal legal rules with respect to human rights norms. See, for instance, the judgement in *Hape*[388] where the Supreme Court found that "in interpreting the scope of application of the *Charter*, the courts should seek to ensure compliance with Canada's binding obligations under international law where the express words are capable of supporting such a construction."[389] Whereas, the doctrine of "persuasive sources"[390] allows for much greater flexibility of interpretation of the legal norms in question and generally involves international and transnational legal authorities that, while regarded as valuable in comparative analysis, have yet to be implemented or even ratified by the Canadian government. In many cases, such persuasive authority may stem from foreign case law with no legal effects in Canada.[391]

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[388] *R v Hape*, 2007 CSC 26, [2007] 2 SCR 292.
[389] *Ibid*, para 53.
[390] See Dickson CJ (in dissent) in *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313, at para 57 [*PSAC*]: "The various sources of international human rights law – declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms must, in my opinion, be relevant and persuasive sources for interpretation of the *Charter's* provisions."
[391] See e.g. the evidence of wrongful convictions in other jurisdictions (U.S. and U.K.), *Burns*, *supra* note 232 at paras 112-116.

Finally, for the question of prestige, I refer again to the study conducted by Elaine Mak on constitutional courts, with respect to the likelihood of their adherence to international or transnational norms. This is based on many factors including that "a perceived similarity in methods of decision making with a prestigious court can also be a reason for Canadian judges to engage in comparative legal research"[392] As well as the notion of the migration of ideas through the transmission and translation of legal norms between and across different constitutional systems. A process sometimes referred to by jurists as "judicial internationalisation."[393]

The purpose of this analysis is to further the discussion of the ways in which international human rights norms influence, directly or indirectly, the understanding and application of ESCR and specifically social housing as a right in Canada. These treaties and their legal organs already provide potential legal remedies for the lack of any recognized right to social housing in Canada. Namely, through their jurisprudence, doctrine and reports delivered to State parties that have been found in breach of the right to housing (A situation that Canada has, all too often, found itself in, at the international level).

1) The International Covenant on Civil and Political Rights

It should be said from the beginning that in the ICCPR there is no explicit mention of the right to housing. Furthermore, the Human Rights Committee (HRC) (the body responsible for hearing complaints with regards to its

[392] Mak, *supra* note 84 at 208.
[393] Gianluca Gentili, "Canada: Protecting Rights in a 'Worldwide Rights Culture': An Empirical Study of the Use of Foreign Precedents by the Supreme Court of Canada (1982-2010)" in Groppi & Ponthoreau, *The Use of Foreign Precedents by Constitutional Judges supra* note 246, 39 at 40.

breach) has been reluctant to read any such right into the text of the treaty. However, for the human rights activist concerned with housing in Canada the treaty has three distinct advantages: it is not subject to the progressive realization and available resources limitations of the ICESCR. Its Optional Protocol has been adopted by Canada, thus individual grievances can be heard by the HRC, and, theoretically at least, enforced against the State should an infringement be found. The language of the treaty, particularly that of Article 6.1 (protecting the right to life)[394] is very similar to the Canadian *Charter*'s Section 7. Indeed, it has been said many times by Canadian scholars that the drafters of the *Charter* were greatly influenced by the ICCPR,[395] that the Supreme Court has referred to it in key decisions,[396] and it has been the general position of the Federal Government over the years, that the rights contained in the treaty have indirect effect domestically because of the corresponding enumerated *Charter* rights.[397] On the doctrinal side, it has been observed by Scott that, viewed through the lens of interdependence in international human rights instruments, Article 6.1 can and should be read in a manner that is consistent with the obligation to protect and fulfill international ESCR, including the right to adequate housing. [398]

For these reasons, the HRC remains a viable option for those seeking to exercise their right to housing under international law. "Given the availability of a widely ratified Optional Protocol for individual complaints, and the

[394] *ICCPR*, *supra* note 28.
[395] Anne F Bayefsky, *International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation* (Toronto: Butterworths, 1992) at 54.
[396] See e.g. majority opinion in *Oakes*, *supra* note 383 at para 31.
[397] Bayefsky, *supra* note 395 at 127.
[398] Scott, "Interdependence and Permeability", *supra* note 153 at 878.

publicity that attends its decisions, individual and communities who find their housing rights denied or violated ought to harness the power of the ICCPR."[399]

Much of the jurisprudence of the ICCPR is concerned with discrimination[400] in, among other issues, the housing rights context. Notwithstanding the obvious importance of these areas of human rights, for the purposes of my analysis, I will focus on the rather thornier socio-economic and cultural conditions for the enjoyment of the right to social housing under the Treaty and their potential application to Canada.

According to Hohmann, the HRC has denied that the Covenant guarantees a right to housing, *per se*.[401]Although, the recent trend in its decisions demonstrates an increasingly nuanced understanding of the classical rights protected under the treaty. Among the most promising judicial avenues that might lead to recognition of an implied right to housing, may well be its insertion into the right to life and security enshrined in the Covenant.[402] Though there is already some limited doctrine in this area, the HRC has yet to flesh out the normative content that this seems to entail. This

[399] Hohmann, *supra* note 91 at 32.
[400] Human Rights Committee, *Concluding observations on the seventh periodic report of the Russian Federation*, HRCOR, 3157th mtg, UN Doc CCPR/C/RUS/CO/7 (2015).
[401] Hohmann, *supra* note 91 at 32.
[402] In one report the UN Secretariat declares "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 (*emphasis added*)." UN Secretariat, *Compilation of general comments and general recommendations adopted by human rights treaty bodies: note by the Secretariat*, UNSOR, 2006, UN Doc HRI/GEN/1/Rev.8 at para 7.

had led some observers to stress "overall, any protection of a right to housing through the right to life remains some way off under the ICCPR."[403]

[403] Hohmann, *supra* note 91 at 37.

2) The Convention on the Elimination of All Forms of Discrimination Against Women

In subject-specific treaties, the right to housing tends to be more limited in scope. Nevertheless, for a Canadian looking for legal remedy to for their infringed right to housing, conventions like CEDAW are a legal mechanism that if applied properly can actually produce tangible results, as in the case of Cecilia Kell. The reader may recall that Ms. Kell was the victim of an abusive husband as well as an unjust interference with her right to housing when her ex-common law husband maneuvered to have her removed from the assignment of a lease.

Similarly, to the ICCPR, the Convention does not guarantee the right to housing, *per se*. It does however protect, in Article 14(2), women based in a rural part of the world's access to adequate living conditions.[404] In addition, the treaty has an Optional Protocol that deals with individual complaints from State parties. Hence Ms. Kell was able to challenge the denial of her property by the housing authority in Northwest Territories before the CEDAW Committee in 2004.[405] The case vindicated her claim and the Committee recognized that Ms. Kell experience of domestic violence and status as an indigenous woman, were interconnected and determined that they were the result of intersectional discrimination.[406] The Committee noted this was indirectly to blame for her inability to exercise property rights and access her

[404] See art 14(2)(h) that states must provide for women "particularly in relation to housing, sanitation, electricity and water supply, transport and communications," *CEDAW*, *supra* note 261.
[405] *Kell*, *supra* note 199.
[406] *Ibid* at para 10.2.

family home. Consequently, it was held that her Article 16(1) (h) rights on the equal enjoyment of spouses in respect of their ownership, acquisition, management, administration, enjoyment and disposition of property, had been infringed.[407] Indeed, the Committee recommended that the government of Canada compensate Kell with adequate housing, as well as for the 'material and moral damages' she had suffered.[408] Therefore, as Hohmann says, the CEDAW Committee has the potential to shine a powerful light on the largely underexplored issue of housing as a means of protecting or promoting a host of rights, particularly for indigenous women.[409]

[407] *Ibid* at para 10.7.
[408] *Ibid* at para 11.
[409] Hohmann, *supra* note 91 at 41.

3) Convention on the Rights of the Child

As in the ICESCR, the *Convention on the Rights of the Child* (CRC) mentions housing in the context of other ESCR. Article 27(3) states the following:

> State parties, 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 this case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.[410]

The provision also limits the State's responsibility for providing an adequate standard of living in situations where the individual parent is unable to fulfill the right themselves.[411] The Canadian government has signed the Optional Protocol for the CRC and has, thus, committed to submitting periodic reports to the Committee responsible for monitoring the implementation of CRC rights. However, thus far, there has yet to be any case law that deals directly with the rights to housing, or even the right to an adequate standard of living, originating from Canada.[412]

In 2003 the Committee did recommend that Canada address the issue of homelessness and children and the related social problems of violence, prostitution, trafficking and child pornography.[413] According to Hohmann, such reports demonstrate "the interconnections among material needs such as safe and secure housing, poverty, conflict, and the exploitation of children

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[410] *CRC*, *supra* note 134.
[411] Hohmann, *supra* note 91 at 42.
[412] *Ibid*.
[413] *UN Committee on the Rights of the Child: Concluding Observations: Canada*, UNCRCOR, 34th Sess, UN Doc CRC/C/15/Add.215 (2003) at para 42.

under the subject matter of both this Optional Protocol could be a fruitful avenue." [414]

The CRC has, albeit in a very different context, already been applied in Canadian law, in the landmark *Baker* decision. In this administrative legal matter involving a deportation order that risked separating a mother from her child, Supreme Court Justice L'Heureux-Dubé invoked the CRC, since incorporated into domestic law, in her ruling, writing "[a]nother indicator of the importance of considering the interests of children when making a compassionate and humanitarian decision is the ratification by Canada of the *Convention on the Rights of the Child*."[415]

[414] Hohmann, *supra* note 91 at 42.
[415] *Baker*, *supra* note 133 at para 69.

4) The International Convention on the Elimination of All Forms of Racial Discrimination

Article 5(e) (iii) of the *International Convention on the Elimination of All Forms of Racial Discrimination* (signed and ratified by Canada) lays down a guarantee to equal treatment with respect to the right to housing.

> In compliance with the fundamental obligations laid down in Article 2 of this Convention, State Parties undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee the right to everyone without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably, in the enjoyment of the following rights…e) in particular… (iii) *the right to housing* (emphasis added). [416]

Article 14 of ICERD contains an individual complaint mechanism that has already been exercised in a number of cases involving housing rights infringed by discriminatory policies.

A landmark piece of jurisprudence, under ICERD, came about in 2005. The Committee (CERD) decision in *LR et al v. Slovak Republic* [417], may help housing rights champions in Canada who are interested in exposing the fundamental link between substantive equality and formal equality in housing rights. In this particular example, a local city council adopted a resolution to create more social housing in order to meet the needs of its Roma population. However, public opposition to the policy subsequently pressured the council to pass a second resolution that canceled the housing scheme. The Committee heard the complaint and was convinced by the

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[416] *International Convention on the Elimination of All Forms of Racial Discrimination*, 7 Mars 1966, 660 UNTS 195 (entered into force 4 January 1969) [*ICERD*].

[417] *Ms L R et al v Slovakia,* Communication No 31/2003*,* CERD/C/66/D/31/2003, online: <www.escr-net.org/caselaw/2006/ms-l-r-et-al-v-slovakia-cited-communication-no312003-cerd-c-66-d-31-2003>.

plaintiff, that "ethnicity was understood as such by the council as the primary if not exclusive basis for revoking its first resolution."[418]

Tellingly, the State party attempted to wriggle out of its duty by putting forward a formalistic argument to the effect that nothing in the first resolution obliged the council to provide more social housing, nor was it a recognition of an enforceable right that could be invoked in court.[419] The Committee dismissed this argument as reductionist and contrary to the holistic nature of the right to housing under both ICERD and the right to housing found in Article 11 of the ICESCR. Thus, Hohmann draws the conclusion that, under the Convention, "the 'vesting' of the right to housing occurs at an early stage in the development of a government policy, and the policy does not need to be followed through to the end for a claim to arise."[420]

However, the few cases related to the right to housing in ICERD are essentially issues of racial discrimination and have little bearing on the question of whether the State party under review has a substantive obligation under the ICERD to provide social housing for all. Hence, the Committee's cases "have a limited capacity to advance understandings of what the right to housing is, although they play an important role in elucidating the conditions of discrimination in housing which relate to rights to equality, dignity, education citizenship and participation among others."[421]

Canadian litigants like Ms. Tanudjaja continue to include the treaty in their submissions to the courts, and ICERD remains one of the most cited pieces of international human rights in the Canadian judiciary today, having

[418] *Ibid* note 199 at para 10.5.
[419] *Ibid* at para 7.7.
[420] Hohmann, *supra* note 91 at 45.
[421] *Ibid* at 46.

been referenced a great many times by tribunals, courts and other judicial bodies, including the Supreme Court of Canada.[422]

[422] See e.g. discussion of remedial rights in international law in *Kazemi*, *supra* note 166 at para 196.

5) Inter-American Human Rights System

There are many regional treaties that explicitly or implicitly protect the right to housing. In this dissertation I will examine only one of these: The Inter-American Human Rights system (IAHR). This system is unique in the way it reads a right to housing into its instruments but also in the method it establishes for its enforcement.[423] The IAHR has jurisdiction in Canada since the country is a member state of the Organization of American States (OAS) though the Federal government continues to eschew the *American Convention on Human Rights (ACHR)*.[424] Thus, the IAHR is relevant to my inquiry for these two reasons.

The most important of these human rights instruments for our purposes is the *American Declaration of the Rights and Duties of Man* (ADRDM) of 1948.[425] It is also regarded as imposing universally enforceable norms within IAHR system, at least by the Inter-American Court of Human Rights which holds it "to be a binding source of legal obligations over the OAS member states, despite the fact that it does not have treaty status."[426]

The right to housing is contained within the larger context of a State duty to provide for the right to health. The relevant Article (11) states "every person has the right to the preservation of his health through sanitary and

[423] Hohmann, *supra* note 91 at 85.
[424] *American Convention on Human Rights "Pact of San José, Costa Rica",* 22 November 1969, 1144 UNTS 123, B-32 OASTS No 36, (entered into force 18 July 1978) [*ACHR*].
[425] OAS, Conference of American States, 9th Conference, *American Declaration of the Rights and Duties of Man*, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992) (1948) [*ADRDM*].
[426] Hohmann, *supra* note 91 at 84.

social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources."[427]

The IAHR puts forward a number of different human rights instruments and created an enforcement mechanism for the rights protected therein, based on a two-fold structure. The two organs designed to protect the recognized rights in member States are the Inter-American Commission on Human Rights (the Commission) and the Inter-American Court of Human Rights (IACtHR). Neither of these bodies' treaties has been ratified by Canada, and thus neither is strictly speaking binding on the Canadian government. Yet, a given human rights instrument while not binding may still be regarded as influential in the Canadian domestic legal context. And, as some human rights scholars in Canada have remarked, the jurisprudence of the IAHR may yet prove compelling in that "many countries are currently facing important challenges in the field of economic, social, and cultural rights - an area for which the system, with its instruments and mechanisms, can provide useful recommendations for states."[428]

As Hohmann illustrates, three judicial techniques have been pioneered by the IACtHR and the Commission that have resulted in the imputing of housing rights to the human rights regime[429]: 1) State actions that may result in the eviction or expulsion of individuals or communities, in the event they constitute violation of the treaty obligations incumbent on State parties; 2) The right to a dignified life based on article 4(1) of the ADRMD ("Every person has the right to have his life respected. This right shall be

[427] *ACHR*, *supra* note 424.
[428] Bernard Duhaime, "Canada and the Inter-American Human Rights System: Time to Become a Full Player" (2012) 67:3 Int J 639 at 658.
[429] Hohmann, *supra* note 91 at 85.

protected by law, and, in general, from the moment of conception. No one shall arbitrarily be deprived of his life");[430] 3) the awarding of reparations in cases where a violation has occurred, even when the right to housing was not at issue.

Some of this case law and related doctrine may be relevant to arguments put forward by the right to housing in Canada, particularly those made on behalf of indigenous communities whose housing rights may have been infringed by State actors.

Two cases adjudicated by the IACtHR seem particularly apposite, and are worth mentioning here: *The Lagos del Campo vs. Peru*[431] case, and *Cuscul Pirival and Others vs. Guatemala*.[432] The former represents a fairly dramatic departure from the previous decisions of the Court that had favoured a more restrictive doctrine of justiciability, in the past, often putting ESCR claims outside the scope of the Court's jurisdiction. In *Lagos*, the Court found that "the direct enforceability of ESCR as autonomous rights, the sheer number of judicial decisions focused on ESCR across the world has confirmed that such claims can be argued before and decided by courts in practice"[433] In *Cuscul* the Court expanded further on the precedent established in *Lagos* by defining how the concept of progressive realization of ESCR in the IAHR system should be applied. Specifically, the relationship

[430] *ACHR*, *supra* note 424.
[431] *Alfredo Lagos del Campo v. Peru* (2017), Inter-Am Ct HR (Ser C), No 340, online (pdf): <https://www.corteidh.or.cr/docs/casos/articulos/seriec_340_ing.pdf > [*Lagos*].
[432] *Cuscul Pivaral et al. v. Guatemala* (2019)), Inter-Am Ct HR (Ser C), No. 359, online (pdf): <https://www.corteidh.or.cr/docs/casos/articulos/seriec_359_ing.pdf> [*Cuscul*].
[433] "Inter-American Court recognizes the direct enforceability of ESCR", online: *ESCR-Net* <https://www.escr-net.org/caselaw/2018/lagos-del-campo-vs-peru-case-no-12795-judgment-31-august-2017-preliminary-objections>.

between the right to health implicit in Article 26,[434] and the ESCR obligations of State parties.[435]

[434] Article 26 reads "The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving *progressively*, by legislation or other appropriate means, the full realization of the *rights implicit in the economic, social, educational, scientific, and cultural* standards set forth in the Charter of the Organization of American States [emphasis added]" *ACHR*, *supra*, note 424.

[435] See *Cuscul, supra* note 433 at paras. 75-96. See also "Inter-American Court Enforces Positive Duty of Progressive Realization in Health Case on Persons Living with HIV", online: <https://www.escr-net.org/caselaw/2019/cuscul-pivaral-and-others-vs-guatemala>.

6) Convention on the Rights of People with Disabilities

Finally, the *Convention on the Rights of People with Disabilities* [436] (CRPD) is a fine example of what Canada has accomplished internationally when it includes key stakeholders, in this case a coalition of disability rights' groups, in the bargaining process surrounding an international treaty.[437] This began in 1981, with a non-partisan report issued by a special Parliamentary committee on Canadians with physical disabilities that advocated the then unheard of concept of "social model of disability."[438] This process eventually culminated with the incorporation of the theory into the final draft of the CRPD in 2007.

The resulting human rights document actually contains a free-standing right to housing. Not only does Article 28 of the Convention require that the State party take "appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability"[439] but, further, commits the State party, in section 2(d) to "ensure access by

[436] *Convention on the Rights of Persons with Disabilities*, GA Res 61/106, UNGAOR, 61 Sess, Supp No 49, UN Doc A/RES/61/106 (2007) [*CRPD*].
[437] Jackman & Porter, ''Advancing Social Rights'', *supra* note 100 at 7.
[438] The Social model of disability is a normative analysis that suggests that many of the obstacles people with disabilities face in everyday life are the result of systemic barriers, prejudices and exclusion by society (whether intentional or indirect) and identifies social and economic conditions as a major contributory factor in disabling people, House of Commons, Special Committee on the Disabled and the Handicapped, *Obstacles: Report of the Special Committee on the Disabled and the Handicapped* (1981) (Chair: David Smith).
[439] *CRPD*, *supra* note 436.

persons with disabilities to *public housing programmes* (emphasis added)."[440]

Canada has signed and ratified the treaty and its associated Optional Protocol. Thus, while Canadians with disabilities may not have had recourse to the Committee on the Rights of People with Disabilities for infringements of their rights under the Convention until relatively recently,[441] the government still felt compelled to submit a report with respect to its progress on implementation.[442]

To date, there have been no legal challenges against the Federal government specifically on the grounds that its policies regarding housing do not favour the development of social and accessible housing for people with disabilities, arguably, breaching its obligations under the CRPD. However, the document remains a "key reference point for domestic advocacy groups, such as the Council of Canadians with Disabilities, working to advance the rights of people with disabilities in Canada."[443] In fact, some Canadian jurists see a key role for the Committee in developing a new doctrine of reasonableness with respect to accommodating people with disabilities and empowering them to realize their ESCR under the Convention.[444]

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[440] *Ibid*.
[441] Employment and Social Development Canada, News Release, "The Government of Canada tables the Optional Protocol to the United Nations Convention on the Rights of Persons with Disabilities" (30 November 2017), online: *Government of Canada* <www.canada.ca/en/employment-social-development/news/2017/11/the_government_ofcanadatablestheoptionalprotocoltotheunitednatio.html>.
[442] Canada, Minister of Canadian Heritage and Official Languages, *Convention on the Rights of Persons with Disabilities: First Report of Canada,* Catalogue No. CH37-4/19-2013E-PDF (Ottawa: Minister of Canadian Heritage and Official Languages, 2014).
[443] Porter & Jackman, ''Advancing Social Rights'', *supra* note 100 at 19.
[444] Population Health Improvement Research Network, *supra* note 135 at 53.

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The preceding has hopefully shown the reader many of the international public law instruments available to human rights scholars and jurists searching for new and established legal avenues for the realisation of housing as a social right. Though many of these do not mention the right to housing explicitly (e.g. ICCPR) they remain viable paths for the application of the right to social housing in Canada. That is, in the sense that they provide persuasive jurisprudence and doctrines on housing rights and are, with the exception of the ACHR, ratified by the Federal Government.

It may strike us as unlikely in the current legal atmosphere, but nothing prevents future jurists at any level from invoking the right to housing under international law as defined by a legally binding and enforceable document pertaining to human rights. Indeed, as Hohmann suggests, even in those instances where the right to housing remains couched in somewhat vague terms and must be read into classical civil and political rights, as is this case with the Article 6.1 of the ICCPR.[445] "A right to housing implied through civil and political rights may offer a richer and more powerful justification for the protection of housing as a human right than an explicitly crafted right to housing has achieved."[446] As has been said many times by the government of Canada itself about the *Charter's* s.7, for example, which, though it may not contain a specific right to social housing, should, nevertheless, be interpreted in such a way as to guarantee the "basic necessities of life." [447]

[445] *ICCPR*, *supra* note 28.
[446] Hohmann, *supra* note 91 at 93.
[447] CESCR, *supra* note 87 at para 21.

As we have also seen in the context of the IAHR system jurisprudence, in particular in Hohmann's analysis, the development of the right to housing in the ACHR framework continues to grow with respect to protecting ESCR in the treaty provisions, specifically where indigenous communities are involved.[448] In such cases, the IACtHR has recognized the fundamental link between indigenous communities and their ancestral territory.[449] This pattern of recognizing indigenous rights undoubtedly will continue and could conceivably shape, albeit in a very specific indigenous legal context, the right to social housing as it is develops in Canada.

In many other treaties that we examined previously, the right to housing remains a secondary right. That is to say, the focus of treaties such as the CRC, CEDAW, and CERD, is on other issues with the question of housing being referenced obliquely in different human rights contexts. Moreover, these documents pay attention to housing "only through the violation of the rights that form the main focus of the Convention."[450] However, as the *Kell* case demonstrates, such instruments when deployed internationally, can achieve positive outcomes in instances where an individual has been deprived of their right to housing under national law. In this case as a result of intersectional discrimination.

[448] Hohmann, *supra* note 91 at 93.
[449] *Ibid*.
[450] *Ibid* at 48.

C) Comparative Analysis of the Right to Housing in Foreign Jurisdictions with Canada

I have already mentioned that numerous national constitutions worldwide contain references to the right to housing; some even go so far as to expressly guarantee some degree of access to social housing through their human rights instruments. Others may have included it in a more roundabout manner, and have developed a normative framework surrounding housing rights by means of "judicial discovery" of such a right in their State's constitutional and legal regime. South Africa and Finland are examples of the former, while India is a case study in the more organic and doctrinal means of reading a right to housing into existing constitutionally established rights. Finally, France is an example of codifying the right into the legal human rights framework.

Canadian and international jurists have recognized these similarities between Canada's constitution and that of India and South Africa, for some time. South African human rights champion and former U.N. Human Rights Commissioner Navi Pillay, has observed that South Africa and Canada share a common legal culture and institutions.

> Given the similarities between our constitutions, including the fact they are of similar modern vintage, the constitutional jurisprudence of our respective courts may appropriately be regarded as relevant in the ongoing exercise of constitutional interpretation of both countries.[451]

[451] Navi Pillay, "Litigating Socio-Economic Rights in South Africa, How Far Will the Courts Go?" in Young et al, ''Poverty Rights'', *supra* note 88 at 240.

Elaine Mak's study revealed that Canadian judges at the Supreme Court regard their regular exchanges with the Indian Supreme Court to be highly productive. These discussions occasionally revolve around innovative legal approaches, though these concepts may not always be transferable to both jurisdictions.[452] The latter's jurisprudence, as we will see, is also an excellent example of Hohmann's point that often times, it seems, courts are better able to deal with social rights when they are embedded in classical civil and political rights.[453]

In this Chapter, I explore similarities between the Indian and the Canadian constitutional courts, while still acknowledging the limitations of such a comparative exercise. In doing this I will make use of David Robitaille's extensive work on the differences in legal culture and constitutions between India and South Africa, on the one hand, and Canada's, on the other. I share the general assessment of Robitaille and others with regards to the way that the two jurisdictions may serve as an example for the Canadian judiciary to follow in regards to recognition of the right to social housing domestically and how "the interpretation of economic and social rights often depends on the choices made by the judge and on their will to participate in socio-economic change."[454] I hope that such a comparison will serve to deepen the already strong commonality between these jurisdictions and Canada's, and narrow the existing human rights' gap with respect to the right to housing in these three Common Law jurisdictions.

[452] Mak, *supra* note 84 at 88.
[453] Hohmann, *supra* note 91 at 93.
[454] David Robitaille, "L'interprétation des droits socioéconomiques en Inde et en Afrique du Sud : par-delà le texte, la volonté judiciaire" (2011) 41:2 RGD 497 at 497.

I will begin with the South African Constitution looking at some of its jurisprudence and doctrine in housing rights, (in particular the landmark *Grootboom* case) in attempt to draw lessons from them that could help advance the right to social housing judicially in Canada. By the same token, in the second part of the Chapter, I will examine India's constitutional Court in search of jurisprudence related to housing rights, with the aim of making comparisons and contrasting it with the current judicial intransigence on legal recognition of the same rights in Canada.

I will then proceed with an admittedly unusual comparison, between Canada and Finland with respect to national housing policy. This is relevant for a number of reasons: 1) Finland is a developed country with a similar economy, geography and climate to Canada's; 2) Finland is considered a world leader in the fight against homelessness, in large part because of a national housing framework (including a key "Housing First" dimension) and human rights regime, based on the notion of the right to social housing. This is particularly relevant at a time when Canada's Federal government is seeking input on developing its own NHS.

Conversely, France's *Droit au Logement Opposable,*[455] provides just the opposite lesson for law and policy makers in Canada interested in constructing a legal framework for the realization of the right to housing in Canada. In Section 4, I will provide a brief overview of the statutory framework in France to demonstrate its flaws and strengths, partly in the hopes that this critique, however short, will help readers better understand the potential hurdles that a national housing scheme will inevitably face in

[455] *DALO, supra* note 336.

Canada. As well as a case study with respect to housing rights pitfalls that should by all means be avoided in the execution of the NHS.

1) A Constitutional Right to Housing: The South African Experience and its Lessons for Canada

Article 26 of South Africa's Bill of Rights enshrines a right to access housing and divides it into three clauses.

1. Everyone has the right to have access to adequate housing.

2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

3. No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.[456]

This article containing housing rights constitutes one of the most influential ever drafted by law makers. "South African constitutional housing rights protection is, without doubt, the most widely cited and internationally applauded and academically analysed of any jurisdiction."[457]

Out of this provision a host of cases[458] involving constitutional claims for housing have emerged, none more important than *Grootboom*. The reader

[456] *Constitution RSA, supra* note 111.
[457] Hohmann, *supra* note 91 at 94.
[458] *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others (Mukhwevho Intervening)* [2001] ZACC 19, 2001 (7) BCLR 652 (CC) [*Kyalami Ridge*] (A case involving State trying to create emergency shelter for victims of a natural disaster); *President of the Republic of South Africa and Another v Modderklip Boerdery* (Pty) Ltd, [2005] ZACC 5, 2005 (8) BCLR 786 (CC) (2005) [*Modderklip Boerdery*] (A case involving balancing the rights of an owner to property and the rights of 40,000 squatters to housing); *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* (24/07) [2008] ZACC 1, BCLR 475 (CC) (2008) [*Occupiers*] (A case involving an urban renewal plan spearheaded by private developers aimed at removing "bad buildings" in the city of Johannesburg).

may recall, Mrs. Grootboom challenged the eviction and forced relocation of her community away from their informal settlement built on private land that had been slated for a new housing development. The collective legal action was undertaken by the community and plaintiff in order to exercise their rights under Article 26.

In writing his judgement Justice Yacoob referenced both Article 11(1)[459] of the ICESCR and the related analysis of its Committee in order to clarify the nature of the right to housing under the constitution (something that is required by the South African Bill of Rights, s.39)[460] Though the Court distinguished between the two, it also found that Article 26 has both positive and negative implications for the State.[461]

Yacoob fleshed out the State's substantive obligations under the Bill of Rights. Three conditions would have to be met by the State in their provision of the right to housing: a) the obligation to take reasonable legislative measures, b) to progressively realize the right, and finally, to achieve these outcomes within available resources.[462] Informed by the guidelines laid down by the CESCR, the Court found that the right to housing would necessarily have to be put in its proper context when deciding how to apply it in a given case.

However, the court did not find the CESCR doctrine of minimum core obligations very compelling, something that would engender a great deal of

[459] *Grootboom, supra* note 183 at para 27.
[460] *Ibid* at para 26.
[461] *Ibid* at para 34.
[462] *Ibid* at para 38.

criticism among jurists.[463] Instead the Court developed a doctrine of reasonableness which then rapidly became the norm for adjudication involving ESCR in South Africa.[464] This translated, under these specific circumstances, into an obligation on the State to undertake policies and programs to provide social housing, and a "programme that excludes a significant segment of society cannot be said to be reasonable".[465] In a more general sense, the Court elaborated a new doctrine that could serve as precedent for future litigation with comparable claims. The exercise of determining whether a particular policy or legal measure was reasonable for the courts would boil down to these elements:

> A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The questions would be whether the measures that have been adopted are reasonable.[466]

Hence, on the basis of the reasonableness of the State actions under review, it was determined that those urgent housing needs, like Mrs. Grootboom's, had not been served by the housing program in question and was, therefore, unreasonable.[467] Moreover, the eviction had transpired in such a way as to violate rights of the claimant against unlawful eviction.[468]

The legacy of Grootboom for housing rights

There is still some disagreement on the desirability of the outcome in *Grootboom*. On the one hand, the judgment of Yacoob J., provided hope,

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[463] For a detailed critique of this aspect of *Grootboom* see especially David Bilchitz, *Poverty and Fundamental Rights: the Justification and Enforcement of Socio-Economic Rights* (Oxford: Oxford University Press, 2008).
[464] Hohmann, *supra* note 91 at 98.
[465] *Grootboom, supra* note 183 at paras 41-43.
[466] *Ibid* at para 41.
[467] *Ibid* at para 69.
[468] *Ibid* at para 88.

especially in common law jurisdictions like Canada, offering proof that housing rights are, among other things, capable of being justiciable.[469] On the other hand, many jurists pointed to the lack of headway made in realising the right in both South Africa and elsewhere, as proof that "the Court has not gone far enough, and that amidst the growing discussion of the right, its substantive content, has slipped away."[470] Hohmann notes this unfortunate pattern in the subsequent jurisprudence including *51 Olivia Road*[471]*, Kyalami Ridge,*[472] and *Modderklip Boerdery.*[473]

However, there is also evidence that, to the contrary, the Constitutional Court may be moving towards a more holistic understanding of the question of the right to housing. In *Joe Slovo*[474] the Court was again concerned with a mass relocation of an informal settlement. This time developers promised the residents alternate accommodations, as compensation. When none was forthcoming, residents petitioned the courts for redress. The Court was faced with the following question: can informal residents be deemed unlawful occupiers under South Africa's *Prevention of Illegal Evictions Act*?[475]

In their highly nuanced but divided judgment, Hohmann finds that a shift has occurred "with the Court reinserting, the question of the social, the

[469] Nolan, Porter & Langford, *supra* 158 at 7.
[470] Hohmann, *supra* note 91 at 108.
[471] *Occupiers*, *supra* note 458.
[472] *Kyalami Ridge*, *supra* note 458.
[473] *Modderklip Boerdery*, *supra* note 458.
[474] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others,* [2009] ZACC 16, 2009 (9) BCLR 847 [*Joe Slovo*].
[475] The Act defines an unlawful occupier as: "A person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land." *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* (S Afr)*,* No 19 of 1998, s 1(xi).

political and the historical into its reasoning, and paying significant attention to how these factors actually affect the conditions of housing in South Africa."[476]

The decision involved the fate of another informal settlement (dubbed "Joe Slovo" by the residents) that was illegally occupying private land. The Constitutional Court ruled that an evacuation order was "just and equitable" and varied the terms of the order initially made by the High Court.[477]

The Court found that the residents fit the legal definition of "unlawful occupiers" under the Act. Thus, the eviction could proceed. However, certain requirements imposed by Article 26 would also have to be respected by the developers: 1) they would have to engage in a public consultation with the residents, 2) they would have to provide alternate accommodations of an adequate standard. And, finally, the third, and arguably most important condition; the vast majority of new homes being built would have to be provided to the residents of the evicted community.[478] Unusually, for South African jurisprudence, the Court in *Joe Slovo* also retained the right to monitor the implementation of its injunction and enforce the timetable it established for the resettlement.[479]

The effects of South African jurisprudence concerned with housing rights, can be found at both international and national levels of legal discourse with respect to ESCR. In particular, *Grootboom* reasonableness analysis[480] has served as the inspiration for the wording of the Article dealing with the

[476] Hohmann, *supra* note 91 at 104.
[477] *Joe Slovo*, *supra* note 474 at para 5.
[478] *Ibid* at paras 5-7.
[479] *Ibid*.
[480] *Grootboom*, *supra* note 183 at para 69.

CESCR review of State party compliance with their obligations under the ICESCR Covenant.[481] This is relevant to Canada, as a State Party, for two reasons: 1) "An important avenue for the integration of international human rights norms into housing and anti-poverty strategy in Canada, as in South Africa, will be through the development of domestic standards of reasonableness under both administrative and constitutional law."[482] 2) The *Baker*[483] decision, though not about housing rights, requires that the reasonableness test be applied to administrative decisions in such a way that it incorporates both international human rights norms and *Charter* values. However, as Lamarche has noted, the Supreme Court had an opportunity to draw lessons from the *Grootboom* decision in *Gosselin* but apparently ignored its profound impact in their ruling.[484]

On a more theoretical level, Jeff King has cited the case and the Courts approach as important examples of judicial restraint and possibly a good model of Incrementalism for jurists to emulate when faced with a

[481] The Protocol indicates "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." *OP-ICESCR*, *supra* note 129.

[482] Porter, ''Rights in Anti-Poverty'', *supra* note 124 at 49.

[483] See majority opinion by L'Heureux Dubé J in *Baker*: "[administrative] discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*" and "The principles of the Convention and other international instruments place special importance on protections for children and childhood, and on particular consideration of their interests, needs, and rights. They help show the values that are central in determining whether this decision was a reasonable exercise of the H & C [humanitarian and compassionate] power." *Baker*, *supra* note 133, at para 56 and 71.

[484] See Lucie Lamarche, ''Le droit social et les droits sociaux: des outils dissonants pour la régulation sociale dans le contexte du néolibéralisme'' in Diane Roman, ed, *La justiciabilité des droits sociaux : vecteurs et résistances : actes du colloque tenu au Collège de France, Paris, 25 et 26 mai 2011* (Paris: Pedone, 2012) at 25.

balancing exercise between substantive obligations of the State on the one hand, and the polycentric implications of these, on the other.[485] Such "vague legal standards" as "the concept of *Grootboom* 'reasonableness'…in protection from evictions allows the judges to extend the scope of the right in flexible manner."[486]

Porter has commented, perhaps with the *Charter* in mind, that the real issue at stake in *Grootboom* was whether, the case would open up new possibilities in connecting social rights with other more established human rights in the domestic legal context:

> The real issue in the debates about whether to make social and economic rights justiciable was whether Irene Grootboom and others like her would, through new "adjudicative space", be able to bring to life this link between social and economic rights and the promise of dignity and equality that is at the core of all human right. [487]

It has also been noted by Canadian commentators in drawing parallels between the two jurisdictions, that, though *Grootboom* has demonstrated the legitimacy of the supervisory order, the South African judges appear to share their Canadian counter-parts extreme caution in exercising this judicial function.[488]

There are, however, a few legal scholars that have suggested that this type of reasoning ought to be adopted by Canadian jurists, in particular

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[485] King, ''Judging Social Rights'', *supra* note 15 at 105.
[486] *Ibid* at 297.
[487] Nolan, Porter & Langford, *supra* 158 at 7.
[488] Paul S Rouleau & Linsey E Sherman, "Doucet-Boudreau, Dialogue and Judicial Activism: Tempest in a Teapot?" in CIAJ 2009 Annual Conference, ed, *Taking Remedies Seriously - Les recours et les mesures de redressement : une affaire sérieuse* (Montreal: Canadian Institute For The Administration Of Justice - Institut canadien d'administration de la justice, 2015), 326 at 340.

judges, in their interpretation of the *Charter* and its rapport with ESCR.[489] Porter describes the case as representing "a useful model of flexible approach to remedies that can be adopted in relation to substantive *Charter* claims linked with social and economic rights in Canada."[490]

The question remains, however, how does the reasonableness concept as elaborated in *Grootboom* with regards to the right to housing fit in with the prevailing human rights paradigm in Canada? In order to answer this, we must first understand the existing major obstacles to recognition of such a right. By and large, the Supreme Court has been fairly restrained in its reading of the *Charter* with respect to claims for ESCR, generally working within the traditional "positive"/"negative" rights dichotomy. As Robitaille has outlined[491], there are essentially two normative objections to courts intervening in the policy making process: 1) lack of expertise;[492] 2) separation of powers doctrine. [493]

In order to overcome these, Yacoob J., somewhat controversially, crafted a housing rights' norm that was largely devoid of specific content with respect to remedies to the problem. Instead, his judgement more or less adapted the formula created by the ICESCR[494] (i.e. three conditions:

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[489] Lamarche, ''Droit social et droits sociaux'', *supra* note 484 at 25.
[490] Porter, ''Rights in Anti-Poverty'', *supra* note 124 at 40.
[491] David Robitaille, "Adjudication of Social and Economic Rights in South Africa: Beyond the Rhetoric of Illegitimacy and Excessive Complexity" 23 National Journal of Constitutional Law 215.
[492] La Forest J expounded, in a concurring opinion in *Andrews*, that "[m]uch economic and social policy making is simply beyond the institutional competence of the courts: their role is to protect against incursions on fundamental values, not to second guess policy decisions." *Andrews*, *supra* note 218 at 194.
[493] *NAPE*, *supra* 198 at para 105.
[494] Part II: Article 2(1) "Each State Party to the present Covenant undertakes to take steps….to the maximum of its available resources, with a view to achieving progressively

reasonableness, progressive realisation, within available resources) and applied it to the situation he found before him. At no point did Yacoob J. overstep his bounds by advocating for a particular policy or legislative measure to redress the infringement of housing rights.

Indeed, in a panel discussion led by Yacoob J (which included Bruce Porter and Leilani Farha, then advising the Right to Housing Coalition [R2H] on the *Tanudjaja*[495] application) on a tour of Canada, the following question was put to the South African jurist, with respect to attempts to litigating housing rights in Canada and overcoming the standard objections raised by judges and governments: what, in his opinion, would be the best strategy for human rights lawyers to use? [496] In his vast experience with the struggle for ESCR, both at home and abroad, Judge Yacoob replied that he believed the question of housing rights in the Canadian context hinged on avoiding framing the issue simply in terms of the exercise of a hypothetical substantive and enforceable *Charter* right to social housing under Canadian law. The latter argument would simply lead to another dead end. In legal terms, it could very easily play into the hands of those who espouse the *status quo* or strict interpretation of *Charter* jurisprudence, giving them the obvious counter that no such right currently exists in Canada. Furthermore, it is not the prerogative of the courts to decide these matters. Instead, Yacoob proposed that they raise the matter of housing rights indirectly, by suggesting the best approach would be to establish that, on the facts, it was plain to see that people's ability to enjoy the right to "security of the person" (s.7) and their right to equality (s.15) under the *Charter*, were *de-facto* in jeopardy as a result of, among other

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the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measure." *ICESCR, supra* note 27.

[495] Heffernan, Faraday & Rosenthal *supra* note 17 at 14.

[496] Social Rights Cura, *supra* note 335 at 00h:42m:15s.

things, a lack of adequate affordable housing and homelessness. Thus, leaving the question of how to redress this difficult problem open to the relevant State institutions and, hopefully, at the same time, nudging them in the direction of more equitable housing policies with a human rights-based approach.

This most likely informed the strategy of the R2H in the application, and the results speak for themselves. The litigation was dismissed for a lack of any "case to answer." We can only speculate on what might have happened had the arguments put forward by Yacoob J. and others made it to trial, but as a legal tactic, the roundabout approach instrumentalized by the application failed to produce the desired outcome of forcing the government to address the crisis in housing. Nor did it seemingly have enough legal merit to advance the *Charter* issues it raised.

2) The Informal Right to Housing: The Indian Experience and its Lessons for Canada

The Indian Constitution contains no right to housing *per se*. Rather; the right has been read into it in a series of landmark constitutional cases. "The right to housing has emerged from the Indian Supreme Court's broad view of the right to life in Article 21."[497] That Article declares that "[n]o person shall be deprived of his life or personal liberty except according to procedure established by law." [498]

Indian Jurisprudence on Housing Rights

There are a handful of ground-breaking constitutional cases concerned with the right to life, beginning with *Francis Coralie Mullin*[499] and *Olga Tellis*[500] and culminating in the establishment of a right to housing under India's Constitution that have served as the foundational for countless other cases that touch on the same question.[501] Suffice it to say, that all of these judgments share a common holistic approach to the right to housing and see it as being a multi-faceted right touching on all aspects of the right to life.

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[497] Hohmann, *supra* note 91 at 109.
[498] *Constitution of India*, online: *National Portal of India* < https://www.india.gov.in/sites/upload_files/npi/files/coi_part_full.pdf>.
[499] *Francis Coralie Mullin v The Administrator, Union Territory of Delhi & ORS*, (1981), [1981] AIR 746, 1981 SCR (2) 516 [*Francis Coralie Mullin*].
[500] *Olga Tellis & ORS v Bombay Municipal Corporation & ORS* (1985), [1985] INSC 155, 1986 AIR 180 1985 SCR Supl. (2) [*Olga Tellis*].
[501] See e.g. the decision in *Shantistar Builders v Narayan Khimalal Totame And Others* (1990) 1 SCC 520 [*Shantistar Builders*].

> Indian Supreme Court cases on the right to housing have been welcomed across the world as revealing a perceptive, profound and contextualised view of human life and the interconnected nature of all human rights-from equality to livelihood and from social inclusion to education.[502]

Hence, they contradict the notion that ESCR are profoundly different from classical rights (e.g. the right to life).

In *Francis*, the Court was faced with an issue that had no apparent connection to right to housing. Instead, the plaintiff was appealing the legality of a preventative detention order. Nevertheless, the Court expounded the meaning of the right to life under India's constitution. In its ruling the court found that the right to life was much broader than protection from physical harm.

> We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and *shelter* over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings… (emphasis mine)[503]

By contrast, in *Olga Tellis,* the issue of the right to housing and shelter was directly raised by the residents of an informal settlement in Mumbai that was contesting an eviction order. The petition argued that eviction from their homes would deprive them of paid work (protected under Article 21[504]). They also claimed the right to be compensated by the government with alternative accommodations for their loss of shelter illegally built on public land. On the first point, the Court was in agreement.[505] On the second, however, the Court, found against the plaintiffs, declaring "[n]o one has the right to make use of public property for private housing without the requisite authorisation".[506]

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[502] Hohmann, *supra* note 91 at 118.
[503] *Francis Coralie Mullin*, *supra* note 499 at para 34.
[504] *Olga Tellis*, *supra* note 500.
[505] *Ibid* at 193.
[506] *Ibid* at 198.

Nevertheless, some observers consider a victory for housing rights as it "regularises and 'legalises' the complex negotiations over who has the right to stay in informal settlements and who has the responsibility for the provision of services and infrastructure."[507]

How does all this relate to Canadian human rights discourse on housing rights today? To begin with, it should be noted that there is a fair amount of contact between the Supreme Court of Canada justices and their counter parts in India. "For example, in the international exchange with India a delegation of five judges visits every nine years in Canada or in India."[508] This dialogue would almost certainly lead to a greater familiarity among Canadian Supreme Court Justices with the jurisprudence of the Indian Supreme Court, than many other jurisdictions.

Moreover, there are similarities in the interpretations of the right to life between the two supreme courts. For instance, though not part of the majority of the decision, Justice Arbour's holistic conception of the right to life in *Gosselin,* which she called the "prerequisite…for enjoying all the other rights of the Charter."[509] Robitaille observes:

> Ainsi, selon la Cour, comme la juge Arbour le soulignait elle aussi, mais de manière plus générale dans le contexte de l'article 7 de la Charte canadienne, le droit à la vie serait vide de sens s'il n'incluait pas au moins les éléments de base nécessaires à une vie digne et au développement humain, notamment *le logement*, l'alimentation, la santé et l'éducation (emphasis added). [510]

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[507] Jessie Hohmann, "Visions of Social Transformation and the Invocation of Human Rights in Mumbai: the Struggle for the Right to Housing" (2014) 4 Hum Rights Asia Pac 193 at 195.

[508] Mak, *supra* note 84 at 89.

[509] *Gosselin*, *supra* note 49 at para 346.

[510] David Robitaille, "L'influence du contexte économique et idéologique sur la conception de l'être humain par le droit et le juge constitutionnels : les cas canadien, indien et sud-africain" (2011) 26:01 CJLS 1 at 18.

More importantly, with respect to its relevance for Canadian jurists, India's jurisprudence illustrates the value of informal or unwritten sources of legal norms in a given jurisdiction, especially with regards to ESCR:

> La jurisprudence indienne…nous apprendra toutefois que le texte et le contexte ne constituent pas nécessairement les seuls éléments dans la détermination du sens des droits et libertés et que la réponse se trouve parfois ailleurs, soit dans la volonté du juge de contribuer à une meilleure justice sociale.[511]

The lessons from India for Canadian jurists who seeks the recognition of the right to housing in Canada are rich in potential interconnectedness. Above all else, they speak to the fact that legal distinctions between classic civil and political rights (e.g. the right to life), on the one hand, and ESCR, on the other, are not tenable normatively and can be overcome through the application of a holistic lens on human rights. Indeed, the hallmark of the Indian jurisprudence on housing rights, is perhaps the surprising fact that none of it aims to nor establishes a free-standing right to housing in that country's Constitution. Similar to the *Tanudjaja* application "none of the cases on the right to housing as a right to life contain a substantive definition of the right to housing as a right in itself."[512]

I must also caution the reader, however, about the downside of such an approach for the Canadian judiciary. This development has not been without its detractors, and it has been argued by Hohmann that the Court's progressive approach resulting in the expansion of Article 21 of the Indian Constitution, is the greatest example of "judicial activism" to be found in any legal jurisdiction.[513]

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[511] Robitaille, "L'interprétation des droits socioéconomiques ", *supra* note 454 at 501.
[512] Hohmann, *supra* note 91 at 119.
[513] *Ibid* at 110.

3) Housing First and The Right to Social Housing: the Finnish Model as a Case Study for the National Housing Strategy in Canada

It was said, before the advent of the NHS by Canadian social housing experts that "Canada is the only G8 country that doesn't have a national housing strategy."[514] The lack of any overarching policy framework in the past, has had devastating consequences for both the supply of social housing stocks in Canada and the growing homeless population. Indeed, so widely accepted is this argument today that the current Federal Government in Canada is proposing to develop and implement just such a policy framework, in part to address the ongoing crisis in social housing and homelessness.

Other countries, Finland for instance, have experimented with what is known as the "Housing First" approach, on a national scale.

> "Housing First centres on the idea of housing as a *human right*, with flexible non-judgmental services delivered with an emphasis on consumer choice, separation of housing from support (housing not being conditional on compliance with a treatment plan), harm reduction, person-centred planning and an active but non-coercive focus on recovery... Unlike some earlier models of homelessness services, housing is not offered after a series of steps or targets have been met by a homeless person with high support needs. Instead housing is provided immediately alongside support. Housing First also provides support for as long as is needed (emphasis added)" [515]

Housing First is regarded in many jurisdictions as an effective program for dealing with homelessness and the Finnish example (known as

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[514] Goel, *supra* note 94.

[515] Nicholas Pleace et al, "The Strategic Response to Homelessness in Finland: Exploring Innovation and Coordination within a National Plan to Reduce and Prevent Homelessness" in Naomi Nichols & Cary Doberstein, eds, *Exploring Effective Systems Responses to Homelessness* (Toronto: Canadian Observatory on Homelessness, 2016) 426 at 430.

Paavo I & II), in particular, has been proposed by some scholars as a good model for other countries, including Canada, to emulate.[516]

In that instance, Housing First polices were implemented on the basis of a series of agreements reached between different levels of government in Finland, primarily between municipalities and the national government. "Elected local government from 10 cities, including the capital Helsinki…signed letters of intent which committed them into the *Paavo* I program and had them working in coordination with the central government."[517] An even division of funding for the scheme resembled the NHS proposal, in the sense of producing a cost sharing scheme between municipal and central governments for the provision of housing and the execution and attainment of the *Paavo* program's objectives.[518]

Finally, the strategy contained a multitude of elements, not the least of which was two key aspects related to reducing eviction rates among the recently housed: the securing of tenancy agreements and the creation of housing advisors. The tenancy agreements were legally binding contracts between occupants and their housing provider, and were predicated on the notion of putting tenants on an equal footing with their neighbours, especially in matters of eviction. "Finnish Housing First service users held their own tenancies, giving them the same housing rights as any other citizens renting an apartment and also managed their own finances."[519]Further, tenants had access to housing advisors (similar to the proposed "Community Based

[516] *Ibid* at 3.
[517] *Ibid* at 427.
[518] Hannele Tainio, "The Finnish Homelessness Strategy : From a 'Staircase' Model to a 'Housing First' Approach to Tackling Long-Term Homelessness" (2009) 3 European Journal of Homelessness 181 at 188.
[519] Pleace, *supra* note 515 at 431.

Tenant Initiative"[520], in the NHS) whose job it is to inform tenants of their rights and advise them on the best way to resolve disputes with their housing provider. "Housing advice is also provided, which can include support if a landlord tries to evict someone illegally or negotiating with a landlord if someone is threatened with eviction due to rent arrears."[521]

It is not necessary to do a profound analysis between Canada and Finland to note that there are striking differences between their human rights regimes. For instance, Finland's Constitution clearly enshrines a substantive duty (chap. 2, s.19) on the Central Government to "promote the right of everyone to housing and the opportunity to arrange their own housing" (the result of a 1995 amendment).[522] No such right has been recognized in Canadian law, as yet. The socio-legal consequences of this absence for the latter's homeless population are now the subject of some analysis in Canadian human rights literature.[523]

However, this is not to say that a constitutional guarantee to access housing is a pre-condition for a successful national housing scheme or Housing First program. Indeed, many jurisdictions in Canada have implemented the latter without one (though often with a human rights

[520] *Place to Call Home*, *supra* note 327 at 9.
[521] Pleace, *supra* note 515 at 427.
[522] ''The Constitution of Finland (translation)'' (translation completed 13 June 2019), online: *Finlex* <www.finlex.fi/en/laki/kaannokset/1999/en19990731?search%5Btype%5D=pika&search%5Bpika%5D=Constitution>.
[523] See Marie-Eve Sylvestre & Céline Bellot*, "Challenging Discriminatory and Punitive Responses to Homelessness in Canada"* in Jackman & Porter, *supra* note 100 at 174 [Sylvestre & Bellot, "Challenging Discriminatory"].

component) and have produced demonstrably positive results for their homeless populations.[524]

Housing First strategies success is not strictly dependant on the legal means chosen to achieve the objective of eradicating homelessness, but rather the formulation of policies that are predicated on the notion that affordable, adequate, and accessible housing are not merely desirable objectives for governments to enact but are, in fact, a substantive right of the individual in need. Housing First models, almost universally, view immediate access to housing as being the duty of State actors, regardless of the individual's financial or social circumstances, and especially if that individual is chronically homeless.

Whether this is expressed in a constitutional provision, the way it is in Finland, or the non-binding objectives of a provincial effort to address the homelessness crisis (as Quebec's *Politique nationale de lutte à l'itinérance*[525] does), the end sought by governments remains the same. That being said, constitutional guarantees may be a necessary nudge to ensure that States live up to their international ESCR commitments of providing for the right to adequate housing in their domestic legal systems.

The other major constitutional difference between Canada and Finland is its governmental structure, being essentially a unitary state. Hence, there is no sharing of powers between the central government and other

[524] See e.g. study of Hamilton Ontario's Housing First program in Julia R Woodhall-Melnik & James R Dunn, "A Systematic Review of Outcomes Associated with Participation in Housing First Programs" (2016) 31:3 Housing Studies 287.

[525] "Politique nationale de lutte à l'itinérance - Ensemble, pour éviter la rue et en sortir | Le rond-point de l'itinérance", online: <http://rondpointdelitinerance.ca/ressource/politique-nationale-de-lutte-%C3%A0-l%E2%80%99itin%C3%A9rance-ensemble-pour-%C3%A9viter-la-rue-et-en-sortir> [Quebec's *National Homelessness Strategy*].

administrative jurisdictions, especially where housing and homelessness is concerned. Whereas, Canada is, of course, a highly decentralized federal state that generally views the problem of homelessness as being a provincial or municipal matter. There are exceptions to this arrangement, however, notably in the Federal support for the *Homelessness Partnering Strategy*.[526] Thus, any Federal initiative towards a national Housing First program would require not only the consent and participation of provincial governments but also some form of legal agreement with them.[527]

In contrast to the Federal Canadian Government's relative inaction on homelessness, the *Paavo* I and II anti-homelessness schemes have produced impressive results in Finland, as has been noted by policy makers and homelessness scholars the world over, including Canada. Consequently, today Finland is one of the few developed economies that can boast that its "long term"[528] homeless population is actually in decline, and that this, according to some studies, is "mainly due to the national programme to reduce chronic homelessness." [529]

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[526] The government of Canada defines the HPS as "a community-based program aimed at preventing and reducing homelessness by providing direct support and funding to 61 designated communities and to organizations that address Aboriginal homelessness across Canada." Employment and Social Development Canada, "About Reaching Home: Canada's Homelessness Strategy" (6 April 2013), online: *Government of Canada* <www.canada.ca/en/employment-social-development/programs/communities/homelessness.html>.

[527] Ontario already has a bilateral agreement on the NHS in place, see "$4.2B going to Ontario under $40B national housing plan", *Globalnews* (30 April 2018), online: <globalnews.ca/news/4177526/ontario-funding-national-housing-plan/>.

[528] Defined by the Finnish government as "people who had both a sustained experience of homelessness and often very high support needs, including comorbidity of severe mental illness and problematic drug and alcohol use" see Pleace, *supra* note 515 at 426.

[529] Juha Kaakinen, "Lessons from Finland: helping homeless people starts with giving them homes", *The Guardian* (14 September 2016), online: <https://www.theguardian.com/housing-network/2016/sep/14/lessons-from-finland-helping-homeless-housing-model-homes>.

This is germane for Canada's current homelessness and housing situation in that the Federal government should consider the possibility of adopting a model similar to the Housing First strategy executed by the central government in Finland. This could be enacted with a view to making its own NHS more successful in reducing homelessness, one of the NHS's stated priorities,[530] and would ideally entail that federal policy maker's start from the principle that access to social housing is a substantive human right. Furthermore, given the obvious success of the Finnish model, the Canadian Mortgage and Housing Corporation (CMHC), Canada's Federal housing corporation, should craft similar legal instruments to the tenancy agreements and housing advisors, discussed here.

[530] The CHMC announced that one of the NHS objectives would be reduce chronic homelessness-defined as people who use emergency shelters-by 50% over ten years NHS, *Place to Call Home*, *supra* note 327 at 6.

4) DALO: An Example of the Pitfalls of Legislating the Right to Housing from France.

The French Constitution also alludes to the right to housing. It is a recognized as being part of the section containing socio-economic rights promulgated by virtue of subparagraphs 10 and 11 of the Preamble in the 1946 Constitution:

> 10- La Nation assure à l'individu et à la famille les conditions nécessaires à leur développement.
>
> 11- Elle garantit à tous, notamment à l'enfant, à la mère et aux vieux travailleurs, la protection de la santé, la sécurité matérielle, le repos et les loisirs. Tout être humain qui, en raison de son âge, de son état physique ou mental, de la situation économique, se trouve dans l'incapacité de travailler a le droit d'obtenir de la collectivité des moyens convenables d'existence.[531]

Since the constitution does not provide an enforceable right to housing *per se*, many attempts were made over the years to create a more robust legal mechanism for French citizens to claim the right through the judicial system. Some, like *The Besson Act*[532]*,* which was carefully worded so as not to contain an actionable right to housing, were nevertheless a step forward in terms of entrenching the right.[533]

This situation would change dramatically in 2005 when a tragic fire in Paris claimed the lives of homeless residents living in terrible conditions

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[531] ''Constitution de 1946, IVe République'' (2 April 2020), online: *Conseil Constitutionnel* <www.conseil-constitutionnel.fr/les-constitutions-dans-l-histoire/constitution-de-1946-ive-republique>.

[532] *Loi n° 90-449 du 31 mai 1990,* JO, 31 May 1990, 90-449.

[533] Marie Loisin, "The Implementation of an Enforceable Right to Housing in France" (2007) 1 European Journal of Homelessness 185 at 186.

and unsafe housing. The result of which was a public outcry and a mobilization of various civil society actors[534] to pressure the central government into adopting a more substantive right to housing that would make the latter available to the most desperate segments of the population. Finally, the French National Assembly adopted and published DALO (*Droit Au Logement Opposable*) in 2007, partly as a concession to the work of these housing rights activists.

The law was implemented progressively, at first only targeting the poorest citizens for housing. Subsequently, the law would be applied more generally. The DALO consists of five key measures: 1) The State is obligated to provide social housing to those in need. Thus, any administrative legal proceedings with regards to realizing the right to housing, automatically implicates State actors. 2) Like the proposed Canadian NHS, the DALO initially identified certain socio-economic groups that were considered high risk for homelessness.[535] 3) From 2012 onwards, the law has had a general application to anyone who has been on a social housing waiting list for an inordinate amount of time. 4) The State set up mediation committees to resolve disputes involving access to housing. In the event that the committee rules in favour of the applicant and no remedy is forthcoming, a complaint can be taken to an administrative tribunal that has the power to impose a binding decision on State actors. 5). Similar to the tentative NHS scheme, the Act contains financial measures (e.g. tax breaks) designed to incentivise the

[534] Especially the work of the charity known as *Les Enfant de Don Quichote, Ibid* at 194.

[535] The six categories, according to Loisin, were the following: roofless people ; tenants facing eviction with no prospect of rehousing ; people in temporary accommodation ; people placed in housing considered to be substandard or unfit ; people with at least one dependent child living in housing not regarded as decent ; people with a disability (or with a disabled dependent) whose housing is not regarded as decent. *Ibid* at 190.

development of social housing stocks in the private housing market.[536]It also created a national anti-homelessness scheme.

This last aspect (point five) deserves to be elaborated on further. Indeed, it is another similarity with the NHS, which has promised to cut chronic homelessness in half by 2020.[537] The DALO created a national anti-homelessness program called the *Plan d'Action Renforcé Pour Les Sans Abri* (PARSA). When the program was announced the Minister of Employment and Social Cohesion (Jean-Louis Borloo) described the objectives as being:

> Anyone taken into emergency accommodation provision must be offered an appropriate, permanent and if need be supported solution appropriate to their circumstances in the public social housing stock, the officially approved private stock, a CHRS, a CADA (asylum seeker reception centre), LogiRelais (government-subsidized residence hotels), a halfway house or community reintegration accommodation. [538]

On paper, this appears, though not explicitly mentioned, to be a version of the Housing First model, that has been quite successful elsewhere (e.g. Finland) and, as we have seen in the previous section, starts from the premise that housing is a basic human right.

French homelessness scholar and sociologist, Marie Loison, explains the way the right is supposed to work today:

> Those who are living lawfully in France but do not have decent housing will be able to apply to an administrative tribunal for legal relief against the authorities. If they have been waiting for housing for an 'abnormally long time' during which they have been offered no alternative permanent housing that matches their needs and ability to pay, the case can be referred to a mediation committee whose main concern is to settle the matter by agreement and to determine what priority the applicant should have. If the decision goes against the State, it will have to compensate the complainant.[539]

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[536] *Ibid* at 191.
[537] *Place to Call Home*, *supra* note 327 at 18.
[538] Loisin, *supra* note 533 at 191.
[539] *Ibid* at 190.

Many scholars have observed, with some skepticism, the effects on housing and homelessness in France of DALO, more than a decade after its enactment. Loison notes some of the glaring issues that appear to be have been baked into the scheme from its inception. As she sees it, this well documented failure,[540] is owing to the fact that the political class in France was extremely reluctant to adopt the plan, in this first place, and that it was forced to succumb after intense media and other external pressures, around homelessness, especially in the Capital.[541]

> Arguably, the French legislation does not take all these elements (of housing crisis) into account: it was enacted in response to media pressure, and there was no preliminary consultation with the different stakeholders (e.g. researchers, voluntary organizations, local authorities) to identify and analyse the processes that produce exclusion from and by housing.[542]

Other problems are more structural in nature. The administration of DALO, by virtue of the centralized governance of the French State inevitably resulted in distortions of DALO's programs and policies at a local level. As well as disparities between the social housing services in different regions, departments and prefectures.[543] This is largely because of the nature of the regime that it set up, where the local authorities can choose the means for implementing the right to housing. Conversely, they may choose to simply opt out. "Local authorities...can apply to have responsibility for implementing the right to housing devolved to them. Any appeal to the

[540] See e.g. the French Senate's 2012 report that found that in the regions where there was the greatest number of housing disputes special housing tribunals should be created, with sufficient legal powers to enforce the law and impose arbitration, if necessary. "Le droit au logement opposable à l'épreuve des faits - Sénat", online: <https://www.senat.fr/notice-rapport/2011/r11-621-notice.html>.
[541] Loisin, *supra* note 533 at 194.
[542] *Ibid* at 195.
[543] *Ibid* at 196.

administrative tribunal will therefore be exercised against them and not against the State."[544]

In the final analysis, then, human rights experts have noted, with a measure of cynicism, the negative impacts of the DALO experiment on an enforceable right to social housing. Declaring that the substantive right to housing has essentially become empty rhetoric in the context of State actors who prefer to pay fines rather than tackle the root causes of homelessness or provide more social housing to those in need. "l'État préfère payer les amendes qu'il se verse à lui-même que de construire des logements ou d'offrir des logements décents. La loi semble ainsi davantage consacrer le droit à être sur une liste d'attente que le droit au logement proprement dit." [545]

In conclusion, the mixed results of DALO ought to serve as a warning to law makers in Canada concerned with the success of the NHS, in a few ways. First, the DALO was essentially devised in response to specific incidents involving the homeless population of Paris, by the French bureaucracy, as opposed to having a much broader, national scope and being done in collaboration with the stakeholders whose interests are arguably most affected by its objectives. In addition, DALO was not, in its essence, evidence-based policy making. Evidence of homelessness and housing affordability must drive the debate, and eventual policy formulation of the NHS in Canada. Finally, the DALO was essentially conceived of and executed by the Central government in France. This would be almost unthinkable in the Canadian federal context, where the issue of social housing and homelessness, are more or less a matter of provincial jurisdiction.

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[544] *Ibid*.

[545] Martin Gallié & Bernard Duhaime, ''Le droit au logement comme enjeu de lutte'' (2013) Revue de la Ligue des droits et libertés at 52.

Though, the question of the right to housing may originate and be legislated at either (or both) levels of government.

Part II-Conclusions

On balance, it would seem to even a casual student of international and transnational law that it has a great deal to teach us in Canada in terms of both the theory and practice of access to social housing as a substantive human right. The sources of this influence can be divided into two categories: international treaty systems, especially the doctrines (reports, judicial opinions, etc.,) of the legal and quasi-legal bodies that are tasked with monitoring that system. And foreign/transnational sources of law including both constitutional regimes and case law related to housing rights, of foreign legal systems, particularly those with historical and contemporary links to Canada's.

The question of whether these sources will penetrate the domestic legal system in Canada in the future is a difficult one. Take for example international treaties that deal, in some fashion, with housing rights. In most cases, they are far from new. The regimes they established (e.g. the ICESCR and ICCPR) have been operating for over 40 years now, and virtually every judicial body at every level in Canada, at one time or another, has made reference to them. Yet, while other rights have found echoes domestically, the right to adequate housing remains under developed in Canadian law.

But to the extent that they might advance the right to housing in Canada, they are almost without exception, regarded as being strictly a persuasive source of legal authority, with little or no binding force

internally.[546] Hence, it would seem right for Canadian jurists promoting housing rights to put their hopes in the more indirect effect of such classical civil rights as the right to life. In fact, this was the same conclusion reached by Robitaille in his analysis of the Indian constitutional jurisprudence on the relationship between housing rights and the right to life, a lesson that might resonate in Canada's relatively restrained judicial climate.

Even so, some of the treaty organs do provide a legal path forward, albeit, for the time being, only in very specific types of claims to the right to housing. The *Kell* case shows Canadians, in particular indigenous women, that seeking justice by means of an international human rights avenue (e.g. CEDAW), can produce results, though often lengthy and frustratingly slow. By the same token, the right to social housing is clearly stated in the CRPD, that obligates State Parties to provide social housing for citizens with disabilities. Furthermore, it provides a mechanism that States that are unwilling or unable to provide such a basic standard of living, can be subject to public sanctions or "naming and shaming" by the Committee responsible for monitoring State compliance. There is some evidence to suggest that this type of moral censure can exert pressure on recalcitrant states like Canada.[547] Thus, it would be advisable for housing rights advocates to pursue this path at the international level, for some measure of legal recourse to the worsening housing crisis in Canada, if it is feasible to do so.[548]

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[546] See the author's article on the intersection between *Charter* rights and international housing rights in David DesBaillets, "The International Human Right to Housing & the Canadian Charter: A Case Comment on Tanudjaja v. Canada (Attorney General)" (2016) 32:1 Windsor YB Access Just 121.

[547] H Richard Friman, *The Politics of Leverage in International Relations: Name, Shame, and Sanction* (London: Palgrave Macmillan UK, 2015).

[548] Indeed, this has already been done by ACTO and the R2H Coalition with some degree of success, see Heffernan, *supra* note 66.

This last point may be heartening to the plaintiffs in *Tanudjaja,* and especially the intervenors that put forward international and transnational arguments.[549] The stark contrast between the domestic judicial state of affairs in Canada and what is happening currently from a transnational perspective with respect to housing rights, is quite remarkable. According to a statement made by Amnesty International, many judiciaries around the world, especially in the Global South,[550] are at the forefront of making progress in protecting, fulfilling and respecting the right to housing in their domestic jurisdictions. Whereas Canada's judiciary, continues to stagnate, and will do so for the foreseeable future, in the wake of the defeat of the application. Yet, as Hohmann and others have reminded us emphatically "Courts have made determination on the rights to housing without bringing the economies of states to their knees or marginalising the elected branch of government to the point of pointlessness…practical concerns can be overcome."[551]

[549] *Tanudjaja*, *supra* note 9 at 149.

[550] Chris Grove, Executive Director for ESCR-Net, is quoted as saying "Courts in many southern countries have been playing an important role in providing a venue for marginalized groups to hold governments accountable to international human rights norms with respect to addressing homelessness and inadequate housing as a human rights issue," "Human Rights Organizations Urge Court to Consider Canada's International Human Rights Obligations in *Charter* Challenge to Homelessness", Amnesty International, News Release, "Human Rights Organizations Urge Court to Consider Canada's International Human Rights Obligations in Charter Challenge to Homelessness" (27 May 2013), online: Amnesty International Canada <www.amnesty.ca/news/news-releases/human-rights-organizations-urge-court-to-consider-canada%E2%80%99s-international-human-ri>.

[551] Hohmann, *supra* note 91 at 234.

Part III-The Right to Social Housing in Canadian Law

At the heart of this dissertation lies a question that remains thorny for modern Canadian jurists concerned with human rights and ESCR: why haven't Canadian courts recognized a substantive right to social housing? Although there are a variety of answers to this question, none of them are altogether satisfying. These answers are predicated on a number of diverse and disparate assumptions about how the Canadian legal system operates, and what values constitute the foundations of that system. As we will see in Part III, some of these assumptions are correct, others need updating and revising, and still others have no basis in law and ought to be discarded by jurists entirely. Having said all that, overall, none of the answers examined in this dissertation are sufficient to explain the continued refusal by courts in the Canadian legal system to accept the justiciability of the right to social housing.

This segment of my dissertation, then, is concerned with separating the wheat from the chaff, legally speaking, in terms of the way that housing rights are perceived by the Canadian judiciary. In particular, the role the *Charter* plays in accommodating or denying such rights and the means open to of housing rights advocates who believe that the courts can provide relief for the housing crisis in Canada, despite the setback of the *Tanudjaja* application.

In Chapter A, I begin with an historical and legal overview of the evolution of housing rights in Canada. This will include its almost total absence from human rights legislation, all the way to constitutional attempts

to rectify this situation in the eighties and nineties. Finally, ending with the abrogation of *The Canadian Assistance Plan*[552] (CAP) in 1996 in what is regarded by many ESCR activists as a major blow to the institutions of the Canadian welfare state, and, by extension, access to social housing throughout the Country.

In Chapter B, I will look into the Canadian legal context to locate the substantive right to social housing, if such a right can be found. The focus will be on the case law and specifically the doctrines and conceptual frameworks that are favoured by jurists in Canada, especially those involved in adjudication of ESCR. This *Charter* context runs the gamut, including reasonableness doctrine as it pertains to protecting disadvantaged groups; contextual versus textual method, purposive approaches to the *Charter*; teleological approaches; the dialogue principle; polycentric thinking in Canadian law; Incrementalism; harm reduction as a principle of the *Charter*; and substantive equality rights doctrine. Moreover, an analysis of the relevant Supreme Court case law in Canada with respect to applying international human rights norms to *Charter* based human rights claims, will be detailed. Similarly, Chapter B touches on the question of Supreme Court opinions and decisions in the area of substantive obligations on the State and the degree to which ESCR claims, especially those tied to enumerated *Charter* rights, are justiciable in Canadian courts.

One of the paradoxes of the judgement handed down by Lederer J. in *Tanudjaja* was its wrongheaded insistence that the case should be dismissed owing to a lack of any cause of action.[553] As Young points out in her analysis, if the application lacked any merits whatsoever, it should have

[552] *Canada Assistance Plan Act,* RSC 1985, c C-1 [*CAP*].
[553] *Tanudjaja*, *supra* note 9 at para 5.

been dismissed without any need for the kind of extensive *Charter* analysis performed by the Ontario Superior Court and the Ontario Court of Appeal. Conversely, If it was worthy of such analysis, then the case should have been given its due by allowing for proper adjudication at trial.[554]

The *Tanudjaja* decision will serve as a precedent, even if only in a symbolic sense, for any future litigation related to the right to social housing. Thus, the focus of my analysis in Chapter C is the *Tanudjaja* application and its relationship with the *Charter*. I examine the criticism and potential legacy of this constitutional challenge for both ESCR and social housing as a right in Canada, in a way that demonstrates its value and deficiencies as a potential legal tool for advocacy in the area of housing rights, and ESCR more generally. This will include an analysis of the *Shantz* case in Section IV, thus far the only *Charter* dispute to base part of its *ratio decidendi* on the precedent set by *Tanudjaja*.

In Chapter D*,* the statutory, policy and regulatory regime with regards to modern housing rights in Canada will be discussed. This will include the *National Housing Act* (NHA) and the *Canadian Housing and Mortgages Society* (CMHC), and the *Canadian Human Rights Act* (CHRA). Finally, this section will deal with the Federal government's 2016 initiative: the *National Housing Strategy*. To be sure, a significant yet tentative step towards the realization of the right to social housing, but still requiring a great deal of political capital and a much clearer policy/legal framework based on strong human rights rather than mere programmatic rights, in order to get to the point where a substantive legal right to social housing is established in Canada.

[554] Young, "Charter Eviction", *supra* note 56 at 57.

Chapter E examines the sub-national situation in Canada with respect to housing rights, specifically in Quebec. The Chapter provides an analysis of the statutory, regulatory and policy regimes in Quebec, including the *Quebec Charter of Rights and Freedoms* (*Quebec Charter*), in *Section (i).* I then undertake an analysis of the relevant ESCR case law that has been adjudicated already in Quebec. Finally, in Section (ii) of the last Chapter, a study of the *Quebec Act to Combat Poverty and Social Exclusion*, is presented to the reader.

A) The Historical Constitutional and Legal Contexts in Canada with Respect to the Right to Housing

The history of the right to housing in Canada is, on balance, decidedly underwhelming. The right does not appear in any of the constitutional documents that form Canada's human rights bedrock, nor has it been integrated into the legal system by means of the other formal legal sources (i.e. regulation, case law, and statute), as yet. That is to say there are no court or tribunal rulings that establish the substantive right to housing (in fact, we find the opposite in *Tanudjaja*). Equally, Canadian legislative institutions have yet to produce a justiciable right to social housing.

However, there have certainly been attempts to realise housing rights in the history of Canadian human rights. In fact, even at the constitutional level, the negotiations surrounding the ill-fated *Charlottetown Accord*, remains an example of the often passionate debate and discussion around housing as a constitutional entitlement that took place among both the political leadership and, to an even greater degree, the civil society, of that era.[555]

In this Chapter, I will examine the history of the right to housing in Canada, with particular emphasis on the way that the right to housing has evolved and changed at a constitutional level. The first section will be concerned with the *Canadian Bill of Rights*[556], the first national codification of human rights in Canada. This Chapter will ultimately lead to a discussion

[555] Peter H Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* (Toronto: University of Toronto Press, 2004) at 155.
[556] *Canadian Bill of Rights,* SC 1960, c 44 [*Bill of Rights*].

of the defunct *Canada Assistance Plan* a cornerstone of the welfare system and key element of the Federal social transfer scheme that is still regarded by many housing rights advocates as the most important measure ever conceived for Federal assistance in the area of social housing.

In briefly examining this history, it is hoped that the lessons drawn from the underemphasized right to social housing (certainly when we compare Canada's history with other jurisdictions like France and South Africa), will help the reader and elucidate the particular housing rights context in Canada. In the next chapter, in particular with respect to the *National Housing Strategy*, these lessons will be applied to overcoming the contemporary legal and judicial intransigence that the right to social housing faces today.

1) The Canadian Bill of Rights

The first Federal human rights legislation in Canada was not the *Charter*, but rather the Diefenbaker government's *Canadian Bill of Rights.* Indeed, the *Act* remains on the books today and has never been repealed, though it was largely eclipsed by the Charter in 1982. The *Bill of Rights* arguably suffered from three major flaws: 1) The *Act* was never binding on the provinces, on account of its strictly Federal remit; 2) The *Act* was a simple parliamentary statute rather than a supreme law or constitutionally entrenched bill of rights; 3) The *Act* did not recognise any ESCR.

> Most of those who advocated for a Canadian bill of rights and freedoms, activists tended to stress certain rights over others. This division hinged most clearly on the issue of social and economic rights …While they wholeheartedly supported the idea of entrenching civil liberties in the constitution, they hesitated on social and economic demands. [557]

For this, and many other reasons (not the least of which was a series of decisions at the Supreme Court of Canada that resulted in the gradual nullification of the heart of the legislation, mainly on the basis of parliamentary supremacy doctrine).[558] The *Bill of Rights* continued to fade in importance in the years after its adoption.

The Bill of Rights certainly made a negative impression on the drafters of the *Charter*, as a lesson in constitutionalism and federalism and the way in

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[557] Christopher MacLennan, *Toward the Charter: Canadians and the Demand for a National Bill of Rights, 1929-1960* (Montréal: McGill-Queen's University Press, 2014) at 10.

[558] In *Lavell,* a case involving gender discrimination against Ms. Jeannette Vivian Corbiere Lavell, an indigenous women living on a First Nation's reserve, Ritchie J wrote for the majority "There cannot, in my view, be any doubt that whatever may have been achieved by the *Bill of Rights,* it is not effective to amend or in any way alter the terms of the *British North America Act* and it is clear from the third recital in the preamble that the Bill was intended to "reflect the respect of Parliament for its constitutional authority[…]"" *Attorney General of Canada v Lavell*, [1974] RCS 1349 at 1358, 38 DLR (3d) 481.

which the next bill of rights, namely the *Charter*, should be improved through the entrenchment of fundamental rights against the State.[559]

2) The Canadian Assistance Plan and the Impact of Federal Social Transfers on the Right to Social Housing

In the 1960's Canada's welfare state expanded rapidly under the guidance of mostly Liberal governments in Ottawa and with significant pressure being applied by the opposition New Democratic Party (NDP).[560] These governments created such pillars of socio-economic stability and support as the *Canadian Pension Plan*[561] and, more importantly from the standpoint of this discussion, The *Canadian Assistance Plan* (CAP).

CAP served as the basis for Federal/Provincial cost sharing of important social programs including social housing from its enactment in 1966 to its abrogation and replacement with "block funding"[562] by the Federal government in 1995.[563] Initially, CAP evenly divided the costs of providing social services between various governments. In 1990, however, the Federal government funding for the construction of social housing, among other things, imposed spending limits on the wealthiest provinces (Ontario, British

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[559] MacLennan, *supra* note 557 at 161.
[560] Gregory F L Suttor, *Still Renovating: A History of Canadian Social Housing Policy* (Montreal: McGill-Queen's University Press, 2016) at 48.
[561] *Canadian Press Pension Plan Solvency Deficiency Funding Regulations,* 2010, SOR/2010-245 [*CPP*].
[562] Block funding is "In place of the sharing formula developed under the CAP are block funding arrangements whereby the Federal Government issues tax points to provincial governments, thereby removing itself from social services." Jim Albert & Bill Kirwin, "Social and Welfare Services" (7 February 2006), online: *Canadian Encyclopedia* <www.thecanadianencyclopedia.ca/en/article/social-and-welfare-services>.
[563] Suttor, *supra* note 560 at 127.

Columbia and Alberta), effectively forcing them to augment their own funding for social programs by as much as 70 percent.[564]

Today, the primary role that the Federal government plays in social housing it is to ensure sub-national governments "provide assistance to those 'in need' so that each jurisdiction has a procedure in place to appeal the decision of welfare officials and that all provinces …not have a residency requirement as a condition of eligibility."[565]

CAP is now regarded by housing rights supporters as the foundation of a legislative and regulatory framework that sustained social housing stocks in Canada throughout much of the sixties all the way to the early nineties. "*The Canadian Assistance Plan*…has been a central pillar of the right to an adequate standard of living, ensuring that those in need received enough financial assistance to cover the cost of necessities, such as *housing* (emphasis added)."[566]

In fact, under the CAP, not only were transfers to social housing legally enforceable, but claimants could take the provincial government to court on the grounds that the eligibility requirements set by the Act were not being respected by provincial social programs, as happened in the *Finlay* case.[567]

In that challenge, the Supreme Court ruled that people who had not received adequate assistance for, among other things, social housing, and had what amounted to public interest standing[568] to seek legal recourse for an

[564] Kirwin & Albert, *supra* note 562.
[565] *Ibid*.
[566] Jackman & Porter, ''Advancing Social Rights'', *supra* note 100 at 19.
[567] *Finlay v Canada (Minister of Finance)*, [1986] 2 SCR 607, 33 DLR (4th) 321.
[568] *Ibid* at para 36.

infringement of the standards contained in the CAP regime. The significance for social rights of this precedent lies partly in the fact that, despite Mr. Finlay losing his claim to social assistance, "the Supreme Court admitted that…citizens may resort to the legal system to interfere with a course of action by governments that is essentially political."[569]

Furthermore, CAP was also a key legal vehicle in the realisation of Canada's ESCR obligations under the Second Covenant. "Together with corresponding provincial legislation, CAP was the major instrument that provided for the domestic implementation of Articles 9 and 11 of the ICESCR, which guarantee respectively rights to…housing."[570]

In 1990, the CAP was again the subject of legal battle with the Federal government, only this time, it was dealt a devastating blow by the Supreme Court. In a *Reference*,[571] the Court was asked to pronounce on whether the scheme it created was constitutionally mandated and guaranteed, or whether an act of Parliament was sufficient to eliminate the social programs it had established. The Court chose the latter interpretation.

The first major decision was on the constitutionality of the repeal of the CAP itself. Despite the fact that the federal government is under a constitutional commitment to "providing essential public services of reasonable quality to Canadians," the Court upheld the repeal of the CAP, arguing that it was a legislative measure that could unilaterally altered by subsequent legislation. [572]

In 1993 a complete freeze on social housing spending was instituted by the new Liberal government's finance minister, and no new Federal

[569] See Johanne Poirier, "Intergovernmental Agreements in Canada: At the Crossroads Between Law and Politics" in J Peter Meekison et al, eds, *Reconsidering the Institutions of Canadian Federalism* (Montreal : McGill-Queen's University Press, 2004) at 443.
[570] Macklem, *supra* note 175 at 12-13.
[571] *Reference Re Canada Assistance Plan (BC)*, [1991] 2 SCR 525, 127 NR 161.
[572] Macklem, *supra* note 175 at 35.

incentives for social housing construction were made available.[573] Subsequently, in 1996, the same government enacted a complete withdrawal of Federal funding for social housing.[574] This time "the requirement of an adequate level of assistance to cover the cost of housing and other necessities and the mechanism for providing legal remedies when such assistance was not provided, were eliminated."[575] Ironically, these austerity measures were carried out by the same former Finance Minister, Paul Martin, who had called for housing rights to be recognized as a basic human right in Canada in a report submitted to the Federal Liberal Party in 1990.[576]

The story of CAP, with all its vicissitudes, serves as a case study of the perils of federalism as well as a potential model for improvement in future Federal social programs and their implementation. "Transfers from the federal government to the provinces for social programs within provincial legislative jurisdiction played an important role in both the promotion and the erosion of social citizenship."[577] Thus, as Cameron contends, any advancement of social rights in Canada would require a new paradigm that is consistent with the constitutional principles of Canada, and the complex, often fraught, negotiations between various levels of government. "This

[573] Suttor, *supra* note 560 at 135.
[574] Dirks, *supra* note 29 at 136.
[575] Jackman & Porter, ''Advancing Social Rights'', *supra* note 100 at 19.
[576] "Martin and Fontana have observed that although Canada had signed onto the rights in ICESCR, these rights 'tend still to be looked upon only as worthy goals of social and economic policy rather than legally enforceable rights. ... the Task Force believes that those searching for adequate, affordable housing may be better served by giving them some form of constitutionally guaranteed right to shelter'' House of Commons, *Finding Room: Housing Solutions for the Future (Report of the National Liberal Caucus Task Force on Housing*) (1990) (Chair: Joe Fontana & Paul Martin) at 4.
[577] Barbara Cameron, "Accountability Regimes for Federal Social Transfers: An Exercise in Deconstruction and Reconstruction" in Jackman & Porter, ''Advancing Social Rights'', *supra* note 100 at 129.

means any transfers of money from the central to the sub-national governments require an accountability regime that respects two fundamental constitutional principles: federalism and responsible government."[578] Hence, respect for the former principle entails taking into account the reality of asymmetrical federalism.[579] The promotion of Federal standards, for example in the NHS, similar to those that had been introduced under the CAP (what Cameron calls an 'administrative regime"[580]), are likely to be resented by some provincial State actors, policy makers and civil society, for their inherently Federal or centralizing orientation.[581] "Thus, the Federal spending power and the social transfers that are based on that power are problematic. Not in the least because of the historic opposition to them by the Quebec government."[582] However, this resistance to intrusions by Ottawa in the delivery of social services has manifested itself in a number of other jurisdictions as well.[583]

Finally, the other lesson to be drawn from the demise of the CAP is the fluid nature of legislative and regulatory regimes and the entitlements (as

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[578] *Ibid* at 131.

[579] "[F]ederations often treat their constituent units differently (asymmetrically) in terms of legislative powers, rights and obligations, and how they are represented in central institutions. These amount to de jure asymmetrical features, i.e. provisions entrenched in constitutional law. More common, however, are de facto arrangements, not entrenched in constitutional law, but providing the application of fiscal arrangements and administrative devolution or centralization. Canada provides examples of both de jure and de facto asymmetry". Douglas Brown, *Who's Afraid of Asymmetrical Federalism?: A Summary Discussion* (Kingston: Queen's University Press, 2005) at 9.

[580] Cameron, *supra* note 577 at 134.

[581] The Conference Board of Canada, ''What We Heard: Shaping Canada's National Housing Strategy: Analysis of Consultation Feedback'' (2016) at 8, online (pdf): <www.placetocallhome.ca/-/media/sf/project/placetocallhome/pdfs/nhs-what-we-heard-report-en.pdf>.

[582] Cameron, *supra* note 577 at 130.

[583] See McLachlin CJ's conclusion on interjurisdictional immunity in *Canada (AG) v PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134 [*PHS*] at para 70.

opposed to ESCR) they provide. The Supreme Court decision in the CAP *Reference* reduced ESCR to a political and legislative issue and, therefore, the legal basis for them became a revisable governmental policy rather than the basic human rights that many jurists now consider them to be. Hence, any NHS proposed today must have a human rights framework at its crux. "The purposes and substantive standards of the transfer should be articulated clearly, using the language of social rights and referencing where appropriate Canada's international human rights commitments."[584] Indeed, this was the recommendation of the Senate Sub-Committee on Cities, in their 2008 report on poverty, housing and homelessness in Canada.[585]

[584] Cameron, *supra* note 577 at 148.

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

3) Charlottetown and the Social Charter Debate

With the passage of the *The Canada Act*,[586] by the Parliament of the United Kingdom in 1982, Canada gained its first constitutionally guaranteed set of entrenched human rights. This document was notable for many reasons. Among other things, the absence of any specific guarantees with respect to social and economic rights.

As the former Justice Minister and the driving political force behind the *Charter*, Prime Minister Pierre Elliott Trudeau expressed ambivalence about the inclusion of "economic rights," in the bill of rights he and others were then formulating (let alone the right to housing, which he never mentioned specifically). Although he stated that the "the guarantee of such economic rights was desirable and should be the ultimate objective of Canada,"[587] he also feared that "it might take considerable time to reach agreement on the rights to be guaranteed and on the feasibility of implementation."[588] Hence he advised against the incorporation of socioeconomic rights into the Canadian *Charter*.[589]

That being said, many jurists and human rights champions at the time and since, had expected that the almost exclusively first-generation rights would not be the extent of the *Charter's* human rights protections and would require that the courts extend these protections, through progressive interpretation, to

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[586] *Charter, supra* note 8.
[587] Pierre Elliott Trudeau, *A Canadian Charter of Human Rights* (Ottawa: Queen's Printer, 1968) at 15.
[588] *Ibid*.
[589] Notwithstanding this advice, it seems that the Special Joint Committee of the House and the Senate of Canada, did seriously contemplate including a reference to the *ICESCR* in s.36, when tasked with reviewing the different recommendations for the *Charter*. Jackman & Porter, ''Advancing Social Rights'', *supra* note 100 at 3.

include social rights such as housing. Indeed, they have observed the failure to do so with surprise and alarm.[590]

That the *Charter* framers did not enshrine social or economic rights was not an insurmountable difficulty for those who thought they should have. Two decades later, the issue of ESCR would come up during the constitutional negotiations that had been started by the Mulroney Government and culminated in the proposed Charlottetown amendments to the *Charter*. The right to access housing first appeared in the proposed "*Social and Economic Union*" advanced by the government of Ontario,[591] and again in the final draft of *Charlottetown Accord* itself. The Accord's section B(4) contains the following clause:

> The policy objectives set out in the provisions on the social union should include… providing adequate social services and benefits to ensure that all individuals resident in Canada have reasonable *access to housing*, food and other basic necessities (emphasis added).[592]

During these conferences, the question related to ESCR was essentially which of the proposed rights should make the list and be included in the Accord? This is where a report issued by a joint Committee of the Senate and the House of Commons, would prove useful. The Beaudoin-Dobbie Report[593] would adopt the Ontarian initiative as the basis for its own recommendations.

> The *Social Covenant*…would commit governments in Canada to provide the following: comprehensive and universal health care, adequate social services (including access to

[590] Bakan, *supra* note 322 at 26.
[591] Russell, *supra* note 555 at 253.
[592] *Ibid* at 279.
[593] Canada, Senate and House of Commons, Special Joint Committee on a Renewed Canada, *Special Joint Committee on a Renewed Canada, minutes of proceedings and evidence* (1 July 1992) (Joint Chairmen: Gérald Beaudoin & Dorothy Dobbie).

housing), high quality education, protection of collective bargaining rights, and the integrity of the environment (emphasis added).[594]

The reader will note that I italicized the use of the term "Social Covenant." This change from "*Charter*" to "Covenant" was done deliberately by the Committee and should not be regarded as simply a semantic difference. The authors of the Report, recognized that:

unlike the rights in the *Charter* that can be judicially enforced against the government, a statement of what governments are positively obliged to do for citizens is not something that should be judicially enforced. It recommended that an intergovernmental agency be established to assess and report on the performance of government in meeting their obligations under the Social Covenant.[595]

This change in terminology would later be the subject of heated debate among commentators concerned with social rights in Canada.[596] Indeed, it was severely criticized by many progressive jurists who believed it to be a well-intentioned, though nevertheless toothless attempt to reach a compromise on housing rights.

Among the most vocal critics was Canadian constitutionalist Joel Bakan. In his work *Just Words,* Bakan posits that the Social Covenant concept suffers from the same inherent flaws as the *Charter of Rights and Freedoms* itself:

First because of their abstract formulation, there is no guarantee that social rights would be interpreted progressively by judges or other authoritative interpreters, and there is a risk that they would be given regressive meaning. Second because the form of social rights is atomistic, such rights would address only discreet symptoms, not the complicated causes of inequality, Third, as a consequence of these features, the symbolic message, of social rights implies a client-consumer model of citizenship.[597]

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[594] Russell, *supra* note 555 at 185.
[595] *Ibid* at 185-186.
[596] However, at the First Ministers Conference in 1992 convened by the Federal Government, "Premier Rae's social charter…came through with flying colours. The meetings endorsed a constitutional declaration of social and economic policy objectives very much like that proposed by the Beaudoin-Dobbie Report. The design of a mechanism to monitor the covenant would be left to future first minister's conferences." *Ibid* at 200.
[597] Bakan, *supra* note 322 at 135.

Given the general feeling among champions of ESCR that the Social Covenant didn't go far enough with regards to protecting social rights, some jurists responded with their own more expansive document, which they dubbed the "Alternative Social *Charter* (ASC)."[598] This alternative version of the Social Covenant would emphasize the dignity and security of poor Canadians and required governmental policies to be aimed at elimination of poverty, through the reduction of social and economic disadvantages.[599] The ASC would have enshrined a right to housing, *inter alia*, in its first section.[600]

More to the point, if it had been adopted, the ASC would have created an enforcement mechanism for the right to social housing, in the form of special tribunals, a "preferable alternative to the current court system. The democratic composition of the Tribunal, together with the ongoing dialogue it envisions having with legislatures, sets up a system defining and defending rights that is, in and of itself, democratic."[601] In Part III of the ASC, the legal framework for the new Tribunal was outlined. S.10(1) states, "the Tribunal shall have as its main purpose the consideration of selected petitions alleging infringements that are systemic or that have significant impact on vulnerable or disadvantaged groups and their members."[602] The Tribunal was viewed as a Federal body with jurisdiction over legislation, regulations, policies and programs, at every level of government.

Although, mindful of the fraught debate over devolution and the distribution of powers, the ASC made concessions to the principle of

[598] See e.g. Craig Scott & Jennifer Nedelsky "Constitutional Dialogue" in Bakan & Schneiderman, *supra* note 366 at 59.
[599] Bakan, *supra* note 322 at 138.
[600] Bakan & Schneiderman, *supra* note 366 at 155.
[601] *Ibid* at 176.
[602] *Ibid* at 159.

autonomy for Quebec (and any other province) and self- the determination of First Nations, allowing them to create alternatives to the Tribunal.[603]

According to the ASC, The Senate of Canada would appoint all members of the Tribunal, with the caveat that they represent three stakeholders in the Canadian polity: 1) The Federal government. 2) The provincial and territorial governments. 3) NGOs representing "vulnerable and disadvantaged groups."[604]

Finally, oversight of the Tribunal would be provided, above all, by the Supreme Court (Section 10[8]), the Parliament of Canada and the legislatures of the provinces, who would effectively have veto power over all decisions made by the Tribunal by subjecting them to a vote that could overturn them if carried by simple majority (s.7[A]).[605]

As to whether the Tribunal, would have worked as an effective enforcement mechanism for the right to housing, the question is an interesting one. It is, of course, purely in the realm of the hypothetical, both in terms of the ASC being integrated into the *Charter*, and, further, the acceptance by the provinces of Canada of a special Tribunal that would have dealt with a set of socio-economic rights, including the right to housing.

My sense of the ASC proposal is that its architects were genuine in their desire to influence the discussion around the proposed amendments of the *Charter* during the Charlottetown constitutional project, and that their own agenda was viewed as complementary to that process, rather than competitive

[603] *Ibid* at 161.
[604] *Ibid* at 155.
[605] *Ibid* at 160.

with it. Thus, the ASC would have required an awful lot of goodwill among the governments of the day to realize such a significant degree of cooperation, and would likely require even more today. In light of the collapse of the *Charlottetown Accord* over issues of devolution of power and the popularity of notions of asymmetrical federalism today (especially to Quebec), the Accord with its emphasis on ignoring jurisdictional differences and tensions in a number of key areas of dispute (education, employment, Indigenous rights, etc.), it is nearly impossible to imagine such a framework, ever being acceptable to the various levels of government in Canada.

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The Accord met with failure in both Quebec and the rest of Canada, after it was rejected by voters in a series of referenda, albeit, largely over differences related to devolution and decentralization within the Federation, rather than anything to do with the Social *Charter*/Covenant or housing rights. This view is confirmed by Suttor's analysis of the history of social housing in Canada.[606]

Hence, an appreciation of the Social Covenant, and the constitutionalization of housing rights never really had a chance to take place in the public debate that ensued, and was, quite inevitably, forgotten by the general public and much of the Canadian political class when the *Charlottetown Accord* was scrapped.

[606] Suttor, *supra* note 560 at 128.

B) The Canadian Charter Framework and the Right to Social Housing

In this second Chapter of Part III, we will look in depth at the current ESCR norms that prevail in Canadian *Charter* jurisprudence. To begin with we will look at the evolving norms with regards to *Charter* rights, specifically, the various doctrines that serve as the underpinnings for the rights enumerated in s.15[607] and s.7.[608] The relationship between these two elements and the progress, or lack thereof, of ESCR, is a well-documented subject[609] in Canadian legal literature. Though, it has been noted that s.7 remains favoured by ESCR litigation,[610] the two sections are not opposed. S.7 goes to the individual's inherent dignity and basic protection of life and security, without which, other rights would be devoid of meaning. While s.15 is a matter of correlative justice, of equal respect for individuals within our society. The right to social housing is one way to fulfil the promise of s.7 on the grounds of "security of the person," as it gives them the means they need to be safe, while it also guarantees a certain level of substantive equality

[607] S. 15 (1) reads "Every Individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." *Charter*, *supra* note 8.
[608] S.7 of the *Charter* reads "Everyone has the right to life liberty and the security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." *Ibid*.
[609] See e.g. J Cameron, *supra* note 271 at 71.
[610] Martha Jackman, "The Protection of Welfare Rights under the Charter" (1988) 20 Ottawa L Rev 257 at 258.

under s.15, by ensuring that Canadian society leaves no one without the basic necessities of life.

The first thing to note about the particular constitutional mechanisms of the *Charter* is that they are strictly binding on State actors and statutory laws. That is, the *Charter "*…only applies to government activity, not private activity."[611] Further, the *Charter* is equipped with a "Notwithstanding"[612] clause. A constitutional device designed to protect the traditional concept of parliamentary sovereignty and provincial autonomy from judicial review by the judiciary. And, conversely, ensure that such derogations from the *Charter* are limited by the rule of law.[613]

Throughout Chapter B, I explore the jurisprudence in Canada involving international, transnational and comparative human rights norms relevant to the interpretation of enumerated *Charter* rights. My study also includes more recent uses of foreign sources of law. Finally, the doctrines outlined (e.g. Substantive Equality) will be applied to my specific analysis of the jurisprudence on ESCR. Although the list of cases in this category is arguably fairly short (relative to other types of constitutional jurisprudence), many of the cases concerning recognized ESCR have potential implications for the recognition of the right to social housing in Canada and the relationship between the judicial and the other two branches of government with respect to the enforcement of such a right.

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[611] Hogg, *supra* note 197 at 34.7.
[612] *Charter, supra* note 8.
[613] The leading case in in this matter remains *Ford v Quebec (AG)*, [1988] 2 SCR 712, 90 NR 84 [*Ford*].

1) The Charter, S.1 and its Relationship to ESCR

As we shall see, s.1 is the primary means by which courts in Canada reconcile the rights of the individual or group enshrined in the *Charter* with the powers and duties of the State. Or has Hogg explains it, s.1 "implicitly authorizes the courts to balance guaranteed rights against competing social values."[614]

The *Charter* declares that it "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free democratic society."[615] There are two stages to the constitutional reasonableness test that has been read into the Section. The first stage of judicial review involving *Charter* claims is to determine whether there is, in fact, a breach of *Charter* rights at stake in a given legal question. Once this inquiry has been satisfied, the courts may proceed to the second stage of the *reasonableness test*: whether the purpose sought by the impugned measure was sufficiently important and whether such a breach was proportionate enough to be justified in a free and democratic society.

Perhaps the most cited doctrine in Canadian constitutional law with respect to *Charter* rights is the "Oakes" or "reasonableness test" and is most frequently used as an example of the second stage of s.1 analysis. In the oft quoted words of Dickson C.J:

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[614] Hogg, *supra* note 197 at 36.11.
[615] *Charter*, *supra* note 8.

To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s.1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

Second, once a sufficiently significant objective is recognized, then the party invoking s.1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance".[616]

The test comes from a judicial interpretation of the requirements of s.1, rather than being explicitly stated in the text of the *Charter*. The various doctrines of Canadian human rights which are derived from jurisprudential interpretations of s.1 are known primarily for limiting rights, but as some ESCR scholars have noted, jurists sometimes overlook the dual function of the test to both restrict and promote our rights.[617] Thus, reasonableness in the *Charter* context means many things and is highly dependent on the particular legal issue under review.

In this section of my dissertation, I begin with an explanation of how s.1 could be used to justify a more substantive conception of ESCR in the courts. Especially with respect to the right to social housing. As Porter and Jackman indicated in their comprehensive study of the *Charter* framework

[616] *Oakes*, *supra* note 383 at paras 69 and 70.
[617] Jackman & Porter, ''Rights-Based Strategies'', *supra* note 143 at 95.

and the right to housing, the reasonable test can be read in manner that is consistent with the substantive nature of the rights contained in s.7 and 15. "The obligation to ensure that any limits on Charter rights are reasonable and demonstrably justified, pursuant to section 1."[618]

Going back to some of the earliest examples of *Charter* jurisprudence confirms that s.1 has generally been interpreted in the broadest possible terms, in order to protect legislation aimed at vulnerable or disadvantaged groups. *Irwin Toy*[619] is an example of this type of framing of the *Charter*'s first section. The applicant's demanded the repeal of a provision in Quebec law that restricted advertising to children on the grounds of harm reduction. The Supreme Court rejected their argument that a more reasonable measure would achieve the same end on the basis that it would not "in the name of minimal impairment [of a *Charter right*]…require legislatures to choose the least ambitious means to protect vulnerable groups."[620]

On other occasions, the balancing of the interests of the State or public and the interests of the individual or applicant's *Charter* rights under s.1, have even been decided, at least partially, through using the lens of an international human rights, specifically the ICESCR. In *Slaight Communications*[621] the Supreme Court interpreted the measures taken by the government regulation of employers' actions being limited in order to protect the rights of their employees. International legal obligations on the State were an important aspect of their evaluation: "the result of the Section 1 balancing…was that the adjudicator's duty to recognize the vulnerability of workers in relation to

[618] *Ibid*.
[619] *Irwin Toy Ltd v Quebec (AGl)*, [1989] 1 SCR 927, 94 NR 167 [*Irwin Toy*].
[620] *Ibid* at 999.
[621] *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038, 93 NR 183.

employers, and to protect the right to work as recognized in the ICESCR, took precedence over the employer's explicitly protected right of freedom of expression under section 2(b)." [622] This decision, *inter alia*, has prompted Hogg to observe:

> The cases before the CESCR and the Human Rights Commission of the UN constitute a body of jurisprudence as to the meaning of the limitation clauses which has been relied upon by the academic commentators of s.1 of the *Charter* and which is starting to be used by Canadian courts.[623]

The Reasonableness Test in the Context of s.15

S.15 confers its rights on an "individual" and specific "groups." Equality, in s.15 (1) is expressed in four distinct ways: 1) Equality before the law; 2) Equality under the law; 3) Equal protection of the law; 4) Equal benefit of the law. Subsection 2(1), identifies the importance of affirmative action programs and their "ameliorative effects"[624] in regards to "any law, program or activity that has its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race national or ethnic origin, colour, religion, sex, age or mental or physical disability."[625] Over the years Canadian jurisprudence has gone beyond this list of protected enumerated categories by using "analogous grounds" doctrine, first established in *Andrews*.[626]

At any rate, a s.15 analysis, with respect to ESCR claims, must address: "the structural and systemic patterns of discrimination and exclusion that underlie these problems, and assist in understanding poverty and

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[622] Jackman & Porter, ''Advancing Social Rights'' *supra* note 100 at 15.
[623] Hogg, *supra* note 197 at 38.3.
[624] For more on this doctrine see *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 38, [2011] 1 SCR 396 [*Withler*].
[625] *Charter*, *supra* note 8.
[626] *Andrews*, *supra* note 218.

homelessness as more than simply a matter of unmet needs but also, fundamentally, as a denial of dignity and rights."[627]A more profound discussion of the jurisprudence around substantive equality doctrine as it relates to the right to social housing and homelessness as an analogous ground under s.15 can be found in Section 9 of this Chapter.

More recent Supreme Court cases have engendered critiques of the "legislating from the bench[628]" variety, for their novel employment of the concept of reasonableness. Among these, *Eldridge* has been regarded as highly influential in the area of reasonable accommodation law. In this case involving a claimant with a disability, the Court determined that positive measures are reasonably required to accommodate disability or other immutable characteristic of a disadvantaged group, such as the hearing impaired. And that the failure to do so was a breach of s.15's equal benefit of the law and was not saved by s.1 analysis. La Forest J, writing for the majority, wrote that "in my view, in s.15 (1) cases the principle is best addressed as a component of the s.1 analysis. Reasonable accommodation, in this context, is generally equivalent to the concept of 'reasonable limits.'"[629] Therefore, the undue hardship[630] standard in human rights law was inherent in the "reasonable limits" component of the *Oakes* test.[631] Put another way, if the respondent could prove that the obligation to accommodate would put an

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[627] Jackman & Porter, ''Rights-Based Strategies'', *supra* note 143 at 81 and 82.
[628] Sometimes defined negatively as "Those (judges) who do not legislate from the bench will vote to uphold the decisions of the elected branches unless those decisions are plainly and unquestionably unconstitutional." "Legislating from the Bench" (5 October 2005) online: *University of Chicago Law School Faculty Blog* <uchicagolaw.typepad.com/faculty/2005/10/legislating_fro.html>.
[629] *Eldridge*, *supra* note 121 at para 79.
[630] The doctrine of undue hardship in Canadian human rights law is highly context dependent. See the majority of the Supreme Court in *Council of Canadians with Disabilities v VIA Rail Canada Inc*, 2007 SCC 15, [2007] 1 SCR 650 at paras 123-141.
[631] Jackman & Porter, ''Rights-Based Strategies'', *supra* note 143 at 97.

excessive strain on medical services being offered in B.C. hospitals, this would be a reasonable limit on the allocation of resources. *Eldridge* demonstrated that, on the contrary,

> [the appellants] ask only for equal access to services that are available to all. The respondents have presented no evidence that this type of accommodation, if extended to other government services, will unduly strain the fiscal resources of the state. To deny the appellants' claim on such conjectural grounds, in my view, would denude s. 15(1) of its egalitarian promise and render the disabled's goal of a barrier-free society distressingly remote.
>
> (…)
>
> Stated differently, the government has not made a "reasonable accommodation" of the appellants' disability. In the language of this Courts' human rights jurisprudence, it has not accommodated the appellants' needs to the point of "undue hardship" [632]

S.1 has been employed with regards to other substantive obligations on the State, as well. The balancing act required, when the measures in question are fiscal and budgetary, can be particularly tricky. Nevertheless, "budgetary measures without reference to the human rights standard of 'undue hardship' the standard that has been applied under Section 1, has, like *Eldridge*, been described as a rigorous one."[633] For instance, in *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights),* the Supreme Court warned against the use of budgetary constraints or austerity measures as an excuse for rights being infringed. "It is all too easy to cite increased costs as a reason for refusing to accord the disabled equal treatment." [634]

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[632] *Eldridge*, *supra* note 121 at paras 92 and 94.
[633] Jackman & Porter, ''Rights-Based Strategies'', *supra* note 143 at 97.
[634] *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights),* [1999] 3 S.C.R. 868 at para 41.

The Reasonableness Test in the Context of s.7

Section 7 of the Charter reads "Everyone has the right to life, liberty and the security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[635] This crucial piece of the *Charter*, can be further broken down into three clauses, each interrelated and central to understanding the whole section; 1) Life and Liberty 2) Personal Security 4) the Fundamental Justice Clause.

Not every aspect of Canadian jurisprudence on s.7 is relevant to our discussion here. But I must at least explain the three parts as they relate to ESCR. As regards the first clause (Life and Liberty), many scholars have contended that it contains a more substantive sense, than merely traditional legal norms on the restrictions of state power vis-à-vis the exercise of individual rights. Jackman stated, early in the life of the Charter, that "at a more basic level, a person who lacks access to adequate income, food, *shelter*, medical care and educational opportunity cannot be said to enjoy a right to life and liberty in any real sense (emphasis added)."[636]

Similarly, the personal security element has been the subject of a robust and purposive interpretations by the Canadian judiciary, especially the Supreme Court, occasionally warranting state intervention in order to fully flesh out ESCR. For instance, in *Chaoulli*, where excessive wait times in Quebec hospitals was under scrutiny, the Court found that waiting for

[635] *Charter*, *supra* note 8.
[636] Jackman, *supra* note 610 at 265.

medical procedures was a violation of personal security, as the empirical evidence showed that increased the risk of death.[637]

Finally, ESCR jurisprudence, like all other case law related to s.7, has a particular challenge in overcoming the fundamental justice test in the *Charter.* Many have recognized that the Fundamental Justice Clause entails a more substantive approach to the right in question, than a basic procedural fairness, though this is also be part of any analysis of the latter. Jackman explains the relationship between administrative law and ESCR in the following passage:

> At a minimum, fundamental justice should guarantee the right to contest or to appeal a termination of a welfare benefit, be it income assistance or a social service… However, in most welfare cases, fundamental justice should also require an opportunity to be heard before a decision to terminate a benefit is actually taken.[638]

In *G.(J.),* a landmark case that touched on reasonableness as a way of assessing whether governments are meeting there ESCR duties under the *Charter*, the Court found that the government had a substantive obligation to provide legal aid, when the parent's rights under s.7 were threatened by legal action to take custody of their children. The case hinged on the question of whether savings gained from the denial of legal counsel to parents involved in custody disputes with the State were too small to be grounds for denying the plaintiff their s.7 rights. In these circumstances, Lamer C.J. opined that " the rights protected by s. 7 -- life, liberty, and security of the person -- are very significant and cannot ordinarily be overridden by competing social interests. Second, rarely will a violation of the principles of fundamental

[637] *Chaoulli, supra* note 189 at paras 123-124.
[638] Jackman, *supra* note 610 at 311-312.

justice (…) be upheld as a reasonable limit demonstrably justified in a free and democratic society."[639]

That limitations on fundamental *Charter* rights are not generally subject to fiscal austerity remains true today. Though, the precedent set by *G.(J.)* in this regard has been challenged since, and in at least one case, *N.A.P.E*, it was essentially ignored.

> In only one case has the (Court)…accepted that the saving of government money is sufficiently important objective to justify a limit on a *Charter* Right…. but the Court held that the Act was saved by s.1 the financial crisis of the province supported a sufficiently important objective to justify the limit on female workers equal rights.[640]

In *N.A.P.E*, the majority opinion was written by Binnie J, and he recognized that budgets were a product of social values. He acknowledged that the Court was in a position of deference vis-à-vis the legislators in this instance, since there was no clear solution to the budget crisis "but, rather, a range of options each with its advantages and disadvantages. Governments act as they think proper within a range of reasonable alternatives."[641] In an earlier ruling, *RJR-Macdonald,*[642] the Court's former Chief Justice, Beverley McLachlin, had stated that the existence of reasonable alternatives would not necessarily mean a finding of constitutionality and that courts were not obliged to reserve judgement simply because State actors had acted reasonably in promulgating an impugned measure:

> [N]othing in the jurisprudence suggests that the contextual approach reduces the obligation on the state to meet the burden of demonstrating that the limitation on rights imposed by the law is reasonable and justified. Context is essential in determining legislative objective and proportionality, but it cannot be carried to the extreme of treating the challenged law as a unique socio-economic phenomenon, of which Parliament is deemed the best judge. This would be to undercut the obligation on Parliament to justify limitations which it places on

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[639] *G.(J.)*, *supra* note 152 at 99.
[640] Hogg, *supra* note 197 at 38.31.
[641] *NAPE*, *supra* note 198 at para 83.
[642] *RJR-MacDonald Inc c Canada (PG)*, [1995] 3 RCS 199, 127 DLR (4th) 1.

Charter rights and would be to substitute *ad hoc* judicial discretion for the reasoned demonstration contemplated by *Charter.*[643]

In fact, even in the *N.A.P.E* decision the Court did not apply the separation of powers doctrine employed by the Newfoundland Court of Appeal (NCLA), that would have given government's a license to ride roughshod over the judicial review process in political matters such as the execution of the budget.[644] Binnie J. found that "[d]eference to the legislative choice to the degree proposed by Marshall J.A. (the Judge who wrote the majority opinion for the NLCA) would largely circumscribe and render superfluous the independent second look imposed on the courts by s.1 of the *Charter*."[645]

In the final analysis, then, it would seem Canadian jurists should be rather skeptical with regards to fiscal claims made by governments for budgetary reasons, when they infringe *Charter* rights. Such arguments cannot generally be justified by reference to s.1.[646]

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As was said before, some have described this jurisprudence on s.1 and its relationship to State policy, as an example of "judicial activism." Manfredi singles out *Eldridge,* saying it "illustrates how independent stakeholders can use right based claims to circumvent policy decisions made in the interest of

[643] *Ibid* at para 134.
[644] *Newfoundland Assn of public employees v R*, 2002 NLCA 72, 2002 NFCA 72.
[645] *NAPE*, *supra* note 198 at para 103.
[646] Jackman & Porter, ''Rights-Based Strategies'', *supra* note 143 at 99.

the system as a whole."[647] Indeed, for these critics the decisions are symptomatic of the way that courts may revise governmental policies indirectly, not by questioning legislative objectives, *per se*, but rather by ruling that the means chosen to carry them out, are unconstitutional or unreasonable. However, if the *Eldridge* case proves anything, it is that the courts have a duty to exercise judicial review when a *Charter* right is at stake, even in matters of complex public policy. They should not shy away from a particular question merely because it might be viewed as having political consequences.

2) Systemic and Textual Methods of Reading Charter Rights

The Textual and systemic methods of interpreting *Charter* rights are inextricably related in judicial practice. By Textual, I mean

> Textual arguments, both in the narrow textualist sense of examining the meaning of the specific words used in the constitutional text (in both English and French) as well as in the wider sense of interpreting the meaning of a proposition in light of the rest of the constitutional text. [648]

This technique, had been previously dominant for most of Canadian judicial history, particularly in the pre-*Charter* period. However, the conception of the judicial role in interpreting the human rights frameworks shifted dramatically after the introduction of the *Charter* and the establishment of a more purposive understanding of its rights.

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[647] Christopher P Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2nd ed (Oxford: Oxford University Press, 2001) at 156.

[648] For an overview of the influence of international and transnational law on the decisions of the Supreme Court of Canada read see Hugo Cyr & Monica Popescu, "Constitutional Reasoning at the Supreme Court of Canada" in András Jakab, Arthur Dyevre & Giulio Itzcovich, *Comparative Constitutional Reasoning* (Cambridge: Cambridge University Press, 2017) at 171.

The central precept of Textualism is that jurists, through a combination of a textual reading of primarily statutory law, and reference to the context in which it was created, may discover the true intent of the law-maker and the legislature on a particular legal point. It is described by Driedger's famous quote in the following terms:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.[649]

However, a Textualist approach should not be equated necessarily with a conservative or strict application of the *Charter*, as evidenced by the famous Arbour dissent in *Gosselin.*[650] In that discussion, it was argued that the way in which s.7 of the *Charter* was worded, with its two separate clauses, the first being concerned with the right to life, liberty and the security of the person. The second, being concerned with "the right not to be deprived thereof except in accordance with the principles of fundamental justice," was highly relevant to the ESCR issues raised by the challenge.[651]

> There is indeed something plausible in the idea that, by omitting such language, the first clause extends the right to life, liberty and security of the person beyond protection against the kinds of state action that have habitually been associated with the term "deprivation". Essentially, this interpretation would suggest that by omitting the term "deprivation" in the first clause, the section implies that it is at most in connection with the right afforded in the second clause, if at all…, that there must be *positive state action* in order to ground a violation; the right granted in the first clause would be violable merely by state inaction (emphasis added).[652]

This opinion has been the object of vigorous criticism, by many jurists, who regard it as an attempt to read ESCR into the *Charter* and worse

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[649] Elmer Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1983) at 87.
[650] *Gosselin*, *supra* note 49 at paras 307-400.
[651] *Charter, supra* note 8.
[652] *Gosselin*, *supra* note 49 at para 342.

still, in their view, provide a legal justification for a more robust role for the judiciary in the policy-making process. In his critique, Cameron states that "lost in Arbour J's goal of returning to the text and overcoming doctrinal constraints was any recognition that section 7's interpretation is based on respect for institutional boundaries."[653]

Irrespective of the outcome of such constitutional debates, a creative application of the Textualist method, well demonstrated by Arbour's analysis of s.7 in *Gosselin*, can be useful to jurists that are searching for alternative and more dynamic interpretations of the *Charter*'s enumerated rights.

3) Purposive and Teleological Approaches to ESCR in the Charter

Purposive or teleological judicial theories can also be valuable lenses in interpreting a given piece of constitutional law. These theories demonstrate that the object of the law, rather than the intention of law-makers, should take precedence when it comes to interpretation of the *Charter*. Indeed, in the history of Canadian jurisprudence, there have been many instances where the courts have ignored the *travaux préparatoire,*[654] in other words the law-maker's intent, when such sources would undermine or hinder a more purposive interpretation of the rights in question.

In *Reference re Motor Vehicle Act*, Justice Lamer distinguished between the narrower conception of the fundamental justice clause advanced

[653] J Cameron, *supra* note 271 at 84.

[654] Simard defines them thusly "On le retrouve dans les exposés de politique gouvernmentale, les notes, techniques ou explicatives, les discours en chambre, les interventions en comité ou en commission." Jeanne Simard, ''L'interprétation législative au Canada: la théorie à l'épreuve de la pratique'' (2001) 35:3 Revue juridique Thémis 549 at 585.

by the framers of the *Charter* and the somewhat expansive definition with respect to s.7 rights adopted by the Court:

> Moreover, the simple fact remains that the *Charter* is not the product of a few individual public servants, however distinguished, but of a multiplicity of individuals who played major roles in the negotiating, drafting and adoption of the *Charter*. How can one say with any confidence that within this enormous multiplicity of actors, without forgetting the role of the provinces, the comments of a few federal civil servants can in any way be determinative?[655]

By the same token, advocates for purposive approaches to the *Charter* seek a more generous reading of *Charter* rights, so that the objective of the right in question dictates the scope of that right's application. "What this involves is an attempt to ascertain the purpose of each *Charter* right and then to interpret the right so as to include activities within the purpose and exclude activities that do not." [656]

This purposive doctrine relates to most of the sections of the *Charter*, but for this analysis, we will look mainly at the way in which this concept shapes the judiciary's understanding of s.1, s.7 and s.15, in light of the fact that these are the areas most relevant to the inquiry in my dissertation. As Porter has said the purposive analysis of these three sections is the most desirable approach to social rights' claims. He advocates for the use of a human rights' framework when interpreting and applying *Charter* rights, in particular those related to questions of reasonableness.[657]

> It is important that the nature of the obligations and the reasonableness of the decision-making is viewed through the lens of the rights claims, understood from the standpoint of particular claimants in particular circumstances and through a purposive approach to the right that is to be protected. [658]

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[655] *Reference re Motor Vehicle Act,* [1985] 2 SCR 486 at 508, 63 NR 266.
[656] Hogg, *supra* note 197 at 36.30.
[657] Porter, "The Crisis of ESC Rights", *supra* note 22 at 56.
[658] *Ibid*.

The courts, however, have not always agreed with this. In many cases, what Porter terms the "presumption of reasonableness"[659] with which courts regard government distribution of resources, has led the latter to rationalise infringements of fundamental rights of the applicant, as they did in *N.A.P.E.* (when they found a budgetary crisis superseded the principle of pay equity for women, under the *Charter)*. Writing for the majority, Binnie J. stated that "[T]he fact that the impugned legislation delayed pay equity implementation rather than eliminating it showed that 'reasonable effort' had been made to minimize the infringement."[660]

[659] *Ibid* at 54.
[660] *NAPE*, *supra* note 198 at para 27.

Purposiveness and s.7

In human rights terms, s.7 has arguably become the most important vehicle for advancing *Charter* claims to ESCR. "Section 7… may arguably hold great promise for incorporating social context and for ensuring the rights of poor people."[661] The Supreme Court established early in the *Charter* jurisprudence that the principle of fundamental justice went beyond procedural legal norms or "natural justice" to include substantive human rights considerations[662] (despite strong evidence that the framers of the *Charter* more or less intended for it to be confined to conceptions of natural justice).[663] In *Doucet*, the majority of the Court opined

> Purposive interpretation means that remedies provisions must be interpreted in a way that provides "a full, effective and meaningful remedy for *Charter* violations" since "a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach" (…). A purposive approach to remedies in a *Charter* context gives modern vitality to the ancient maxim *ubi jus, ibi remedium*: where there is a right, there must be a remedy. More specifically, a purposive approach to remedies requires at least two things. First, the purpose of the right being protected must be promoted: courts must craft responsive remedies. Second, the purpose of the remedies provision must be promoted: courts must craft effective remedies. [664]

Further, courts have interpreted s.7 in a generous manner in several landmark cases, leading to key expansions of the rights it contains, beyond

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[661] Sylvestre, *supra* note 76 at 391.

[662] *Reference re Motor Vehicle Act*, *supra* note 655, at 501-02 (Lamer J.): " it would be wrong to interpret the term "fundamental justice" as being synonymous with natural justice as the Attorney General of British Columbia and others have suggested. To do so would strip the protected interests of much, if not most, of their content and leave the "right" to life, liberty and security of the person in a sorely emaciated state. Such a result would be inconsistent with the broad, affirmative language in which those rights are expressed and equally inconsistent with the approach adopted by this Court toward the interpretation of *Charter* rights (…)"

[663] Hogg, *supra* note 197 at 47.20.

[664] *Doucet, supra* note 179 at para 25.

strict legal rights to include ESCR norms. Examples of purposiveness abound among the *Charter* jurisprudence.

A similarly robust interpretation of s.7 rights, as in the preceding examples, was also called for in a case that directly relates to the question of housing and homelessness. In *Adams,*[665] a case involving homeless applicants fighting for a right to shelter, the British Columbia Court of Appeal (BCCA) found in favour of the plaintiffs, on the grounds of "overbroad" [666] regulation unreasonable under s.1.

The *Adams* claim had been largely grounded in the negative framing of *Charter* rights that views them as inherent rights that should never be denied by State actors. Consequently, Justice Ross, the judge at trial, went to great pains to emphasize that no substantive right to housing was at stake, in this instance. The claimants did not request the city of Victoria to provide alternative shelters or social housing. Subsequently, on appeal, the respondents maintained they simply wanted to be left alone to build shelters that improved their overall security and health. And that, absent access to shelters beds, by depriving them of these, the municipal government was infringing their s.7 *Charter* rights.[667] This framing of the right to shelter, arguably, made it easier for the State actor in question to ignore the spirit while still respecting the letter of the ruling, when it later complied with the court order.

The city of Victoria neither addressed the issue of homelessness nor did it dramatically increase funding for shelters in the City. Instead, the City modified its by-law to prohibit the erection of shelters except in the evenings and in some designated public places, which was in accordance with the Court of Appeal ruling[668]

[665] *Victoria (City) v Adams*, 2009 BCCA 563, 313 DLR (4th) 29 [*Adams* CA].
[666] *Ibid* at para 116 and 129.
[667] *Ibid* at para 1.
[668] Sylvestre, ''The Redistributive Potential'', *supra* note 76 at 404-405.

Similarly, the Supreme Court has interpreted security of the person relatively broadly to include psychological harm. In *New Brunswick v G.J.* a child custody dispute, the State denied the plaintiff legal aid, in part for the sake of saving public funds. In his majority opinion, Lamer C.J. deems that this point was insufficient to defeat a valid s.7 claim under the *Charter.* In a previous case *(Mills),* he had established that "the concept of security of the person is not restricted to physical integrity (…)."[669] This opinion was in stark contrast to the far more limited interpretation of the right found in the previous case law.

Lamer C.J. found that a "combination of stigmatization, loss of privacy, and disruption of family life were sufficient to constitute a restriction of security of the person."[670] Furthermore, such a breach cannot be defended by reference to the Fundamental Justice clause. It has been argued, that these same conditions are met virtually every day by the homeless in Canada who are, thus, undeniably victims of *Charter* violations, and that, therefore, homelessness should fall into the ambit of s.7.[671]

These are just a few examples of the kind of cases that have provoked much debate among jurists as to the appropriate role for the judiciary to play in reviewing the actions of the other branches of government through the prism of s.7 rights.

Charter s.7 has increased the law-making powers of the courts and particularly of the Supreme Court of Canada. For some commentators, review under s.7 is only the most

[669] *R. v. Mills*, [1986] 1 SCR 863 at para 146, 58 OR (2d) 543.
[670] *G (J)*, *supra* note 152 at para 62.
[671] Jackman & Porter, ''Rights-Based Strategies'', *supra* note 143 at 78.

egregious instance of the power to make law being transferred from popularly elected and democratically accountable legislatures to unelected and unaccountable judicial elites.[672]

We will discuss the nature of these objections in greater detail in a subsequent section of this Chapter (Section 7) that provides an overview of the doctrine of polycentricity in Canadian law and the judicial theory of Incrementalism. Suffice it to say that s.7 rights can and should be interpreted in a more expansive and generous manner, especially when it comes to homelessness and the right to social housing. "Failure to take positive steps to ensure the protection of life and the security of the person of people who are living in poverty and who are living homeless, are clearly not in accordance with s.7"[673]

[672] Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2012) at 308.
[673] Jackman & Porter, ''Rights-Based Strategies'', *supra* note 143 at 78.

Purposiveness and s.15

Section 15 claims are equally popular among human rights claimants who challenge State actors on the grounds that the latter's actions infringe *Charter* based ESCR.[674] As we have seen earlier, the section expressly prohibits specific instances of discrimination, but also leaves the article open to purposive interpretation by the courts regarding what might constitute an analogous ground. In a number of s.15 cases dealing with the definition of analogous grounds, the Court has expounded that this inquiry should consider both the context and the purpose of the measure under review. [675]

In *Law v Canada*[676] for example, Iacobucci J. noted, for the first time, that the concept of human dignity would be an essential consideration for the courts in deciding whether a particular group had suffered an s.15 breach:

> the nature and situation of the individual group at issue, and the social, political, and legal history of Canadian society's treatment of that group. A ground or grounds will not be considered analogous under s.15(1) unless it can be shown that differential treatment premised on the ground or grounds has the potential to bring into play human dignity.[677]

These contextual factors are still relevant in deciding whether a particular group can be included in the scope of s.15. However, in *R v Kapp*[678] the Court abandoned the "Law Test" in favour of the simpler analysis put

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[674] Manfredi, *supra* note 647 at 115.
[675] Therefore "the analogous grounds inquiry, according to the Supreme Court, must be undertaken in a *purposive* and contextual manner (emphasis added)" Jackman & Porter, ''Rights-Based Strategies'', *supra* note 143 at 84.
[676] *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, 170 DLR (4th) 1 [*Law*].
[677] *Ibid* at para 93.
[678] *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 [*Kapp*].

forward in *Andrews.*[679] To wit, the substantive equality analysis of the latter with regards to whether an alleged discrimination occurred, provides the essential yardstick. Hence jurists must still proceed by asking "first, whether a law, policy, or provision creates a distinction on an enumerated or analogous ground and, second, whether that distinction is discriminatory in a substantive sense."[680]

Thus, though these precedents may appear to be victories for social rights, Sylvestre warns us that "In light of the limited negative rights framework chosen by the applicants in these cases, the question now is whether the right to security protected under section 7 can be a complement to section 15 or whether it will merely become a pale substitute for equality."[681]

[679] *Ibid* at para 24.
[680] Jackman & Porter, ''Rights-Based Strategies'', *supra* note 143 at 83.
[681] Sylvestre, *supra* note 76 at 404.

4) The Principle of Dialogue, ESCR, and the Charter

Since the coming into force of the *Charter*, the judicial practice in Canada has been moving towards a greater cooperation between the various branches of the State, with the principle of dialogue now being firmly established among Canadian jurists and widely cited by judges.[682] This is especially true of *Charter*-based litigation where the courts view their role as being mutually beneficial with the law makers and regulators.

> In reviewing legislative enactments and executive decisions to ensure constitutional validity, the courts speak to the legislative and executive branches. As has been pointed out, most of the legislation held not to pass constitutional muster has been followed by new legislation designed to accomplish similar objectives. By doing this, the legislature responds to the courts; hence the dialogue among the branches.[683]

Dialogue theory and practice is, however, as many of its detractors and admirers like to point out, a rather amorphous, multifaceted phenomenon which contains a wide range of different interrelated elements. According to one definition of the theory behind dialogue, put forward by Kent Roach, they can be categorised in five different ways:

> The first form of conversation and interchange will be the dialogue that occurs between different constitution makers in the making of constitutions. The second will be the dialogue that occurs between courts and legislatures in the context of judicial review and, in particular, the ability of legislatures under many modern bills of rights to enact laws limiting and even overriding rights as interpreted by the courts. The third will be the dialogue that occurs when courts issue remedies that have implications for the executive and legislative branches of government, but allow the elected branches of government a range of possible responses. The fourth form of dialogue concerns the impact of non-enforceable decisions of international bodies, such as the U.N. Human Rights Committee, on domestic jurisdictions such as Canada. The final form of dialogue concerns the use that domestic courts make in dualist systems of nonbinding comparative and international law sources in their decisions.[684]

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[682] Hogg has described the level of cooperation between legislative and judicial branches in this era as "the *Charter* Revolution" Hogg, *supra* note 197 at 36.9.
[683] *Vriend*, *supra* note 24, at para 138.
[684] Roach, ''Constitutional, Remedial'', *supra* note 206 at 539.

The concept of dialogue is important in terms of its impact on ESCR for a number of reasons. First, it has been used numerous times (though seldom is the term explicitly invoked), such as in *Chaoulli,* to justify the judiciary's attempts to rectify a harm to or an infringement of a *Charter* right (in this case the right found in s.7) brought about by the actions of the State.[685]

Citing the dialogue theory of Kent Roach[686], Justice Deschamps observed "The courts have a duty to rise above political debate. They leave it to the legislatures to develop social policy. But when such social policies infringe rights that are protected by the charters, the courts cannot shy away from considering them. The judicial branch plays a role that is not played by the legislative branch."[687]

The dialogue principle is often evident in the way that the judiciary exercises s.24 of the *Charter*, the section that gives the courts the power to craft a "remedy as the court considers appropriate and just in the circumstances."[688] This sometimes leads the courts to suspend or stay a sentence, as the court did in *Bedford,*[689] or even calling for a supervisory order as they it did in *Doucet.*[690]

[685] Read in particular Deschamps J.'s judgement in *Chaoulli, supra* note 189 at para 89.
[686] Kent Roach, "Dialogic Judicial Review and its Critics" (2008) 23 SCLR (2nd) 49.
[687] *Chaoulli*, *supra* note 189 at para 89.
[688] *Charter, supra* note 8.
[689] The Supreme Court stated that: "It will be for Parliament, should it choose to do so, to devise a new approach, reflecting different elements of the existing regime." *Canada (AG) v Bedford*, 2013 SCC 72 at para 165, [2013] 3 SCR 1101 [*Bedford*].
[690] *Doucet*, *supra* note 179 at para 88.

In *Doucet*, the Court found a violation of s.23(2) minority language protection[691] caused by a lack of governmental support for French language schooling in Nova Scotia. The majority opinion of the Court made it clear the decision was being made on the grounds that it was consistent with a purposive conception of *Charter* rights.[692] The ruling, exceptionally for Canadian courts, also required the State to report periodically to the judge on its progress in implementing the Court's order.[693]

Chaoulli and Dialogue Theory

In a similar vein to the democratic legitimacy critique of so-called judicial activism, are the theories advanced by critical legal scholars on dialogue theory (even Manfredi acknowledges a debt to them[694]). These are based on the notion that the judiciary in Canada is inherently conservative in its values, thus rendering it ill-equipped for the recognition of ESCR. Much of this criticism is directed toward the *Chaoulli* decision, viewed by some jurists as an example of litigation that betrays the biases of the Court in favour of individualistic and classical conceptions of human rights and the fundamentally negative role for the courts in protecting them.

In 2005, the Supreme Court heard the case of Dr. Chaoulli, a claim based on a purported violation to the right to life under the Quebec[695] and

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[691] S.23(2) "Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their Children receive primary and secondary school instruction in the same language." *Charter, supra* note 8.
[692] *Doucet*, *supra* note 179 at para 45.
[693] *Ibid* at para 88.
[694] Manfredi, *supra* note 647 at 11.
[695] Regarding the Quebec Charter the majority declared that "the prohibition against contracting for private health insurance violates s.1. of the Quebec *Charter of Human Rights and Freedoms* (…) and is not justifiable under s. 9.1." *Chaoulli*, *supra* note 189 at para 102.

Canadian charters caused by delays in the public health care system and a legal prohibition of access to private alternatives. In a deeply divided and complex decision, the Court found that "we conclude that the provision impermissibly limits the right to life, liberty and security of the person protected by s.7 [of the *Canadian Charter*] and has not been shown to be justified as a reasonable limit under s.1 of the *Charter*"[696] At the crux of *Chaoulli*, we find a certain notion of *Charter* rights that is not only fundamentally negative, in the sense that it eschewed government interference in access to health care by the claimant, but was also devoid of the substantive human rights norms that ESCR and a progressive application of judicial dialogue doctrine would normally require.

The *Chaoulli* case provides several lessons about the way in which human rights, especially ESCR, are constrained and applied negatively by the courts in Canada. In response to this development, Jeff King commented "human rights adjudication has increasingly tended to focus on the proportionality of limitations to rights. In this process, the characterization of the legislative objective is crucial."[697] Chief Justice McLachlin and Major and Bastarache JJ, in their concurring opinion, found that in the absence of evidence that the prohibition on the purchase and sale of private health insurance protected the health care system, the State did not establish a "rational connection" between the regulation and its objective of maintaining the quality of services provided by the public health care system. *Ergo*, it was unreasonable, under s.1 of the Canadian *Charter*.[698] Dr Chaoulli was,

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[696] *Ibid*.
[697] Jeff A King, "Constitutional Rights and Social Welfare: A Comment on the Canadian Chaoulli Health Care Decision" (2006) 69:4 Mod L Rev 631 at 635 [King, "Constitutional Rights"].
[698] *Chaoulli*, *supra* note 189 at para 155.

therefore, vindicated in his bid to challenge the regulations on private health insurance in Quebec. Thus, all Quebeckers had a right to timely health care, albeit not on ESCR grounds, nor by virtue of a specific right to healthcare in the Federal *Charter*. Rather, the majority of the Court seemed to be saying the impairing of the appellants right to life in s.7, and the prohibition on private health care under Quebec law, were unreasonable according to the criteria inherent in the Canadian *Charter*'s s.1 test.[699]

Roach critiqued the remedy in *Chaoulli* for being too simplistic:

> Courts may be reluctant to issue more complex remedies that attempt to achieve system reforms of the public system even though such remedies may be necessary to ensure the promise of *Chaoulli* is realized for all Canadians, especially those who are unable to afford private health insurance. [700]

Some critics, Hutchison for example, excoriated the ruling and its reliance on judicial dialogue, for undermining the progressive public policies of the State. "The substantive turn to a 'dialogue theory' not only failed to legitimize judicial review but also serve to facilitate the kind of reactionary politics informing *Chaoulli*."[701]

However, there are also scholars, Hamish Stewart for instance, who adopted a more optimistic view of the decision. He remarked on the ambitiousness of the ruling's judicial intervention in policy matters as a helpful precedent in future ESCR litigation. Certainly, the majority of the Court in *Chaoulli* showed none of its historical reticence to challenge the

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[699] The majority of the Court was of the view that there were no rational connection between the prohibition on private health insurance and the legislative objective, that the prohibition was not minimally impairing the appellant's rights and that the deleterious effects, psychologically and physically, on the appellant's health outweighed the benefits. *Ibid*., paras. 155-157.

[700] Kent Roach, "The Courts and Medicare: Too Much or Too Little Judicial Activism" in Flood, Roach & Sossin, *supra* note 191, 184 at 185.

[701] *Ibid* at 102.

legislature in Quebec with regards to, what it deemed, unconstitutional attempts to regulate healthcare.[702]

Sossin, in a discussion on what he regarded as the most worrying implications of *Chaoulli*, essentially claimed that it would lead to a "two tier Constitution,"[703] with different sets of rights for the rich and poor. Nevertheless, he finds a silver lining in the outcome for ESCR in Canada. Taking Stewart's observation, a step further, Sossin calls for a dialogue predicated on an anti-poverty agenda. "The time is ripe for the Court to recognize social rights and public obligations based on the states responsibility to those in need and that, notwithstanding flaws in both the majority and the dissent in *Chaoulli*, that case may yet serve as a catalyst for progressive change."[704]

5) Judicial Internationalisation and the Charter

The various forms of Judicial Internationalisation have had a strong impact in *Charter* jurisprudence from the very first decisions of the Supreme Court, when international sources of public law were deemed "relevant and persuasive"[705] with respect to judicial interpretation by Chief Justice John Dickson.

Thus, it is difficult to choose one example from the case law that encompasses the whole concept. To that end, perhaps the majority opinion of

[702] Stewart, *supra* note 672 at 141.
[703] Sossin, "Two Tier Justice'', *supra* note 191 at 162.
[704] *Ibid* at 163.
[705] *PSAC, supra* note 390 at para 57.

Justice L'Heureux-Dubé in *Baker* would be most instructive. In this landmark ruling of administrative law, the Justice was able to resolve a *Charter* claim partly by recourse to the international human rights norms enshrined in the *International Convention of the Rights of the Child*. Indeed, ministerial discretion was subject to such considerations, even though the legal source in question had not been incorporated in Canada's domestic legal framework. At the time. L'Heureux-Dubé J. stated that

> [i]nternational treaties and conventions are not part of Canadian law unless they have been implemented by statute […] Nevertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review. [706]

It has been noted by several Canadian jurists that "*Baker* properly established that the default position in Canadian administrative law, like that of Canadian law generally is respect for international law."[707]

Earlier foundational Supreme Court precedents demonstrate the credibility of this interpretation. For instance, in *Irwin Toy*, a case that involved restrictions on advertising towards children, Justice Antonio Lamer referred to the ICESR social rights, in an *obiter* reflecting his analysis on the findings of the lower court "that the rubric of "economic rights" embraces a broad spectrum of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property – contract rights."[708]

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[706] See *Baker*, *supra* note 133 at para 69-70.
[707] van Ert, *supra* note 178 at 227.
[708] *Irwin Toy*, *supra* note 619 at 1003.

This continues to be reflected in the most recent decisions of the Supreme Court of Canada. The majority of the Supreme Court indeed reaffirmed that

> in some administrative decision making contexts, international law will operate as an important constraint on an administrative decision maker. It is well established that legislation is presumed to operate in conformity with Canada's international obligations, and the legislature is "presumed to comply with . . . the values and principles of customary and conventional international law" (…) Since *Baker*, it has also been clear that international treaties and conventions, even where they have not been implemented domestically by statute, can help to inform whether a decision was a reasonable exercise of administrative power (…)

and that

> It is well established that domestic legislation is presumed to comply with Canada's international obligations, and that it must be interpreted in a manner that reflects the principles of customary and conventional international law (…) [709]

[709] See majority opinion in *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 at para 114 and 182, 441 DLR (4th) 1 (references omitted).

6) Justiciability Doctrine and ESCR

Much of the jurisprudence we have seen thus far highlights a central feature of Canadian judicial culture, namely that courts are extremely reluctant to get involved in judicial review of government policies or polycentric questions. This was at heart of Justice Lederer's opposition to granting Ms. Tanudjaja her day in court:

> …the application is misconceived. There is an inherent tension between, the "institutional boundaries" that, on one hand, define the authority of the Legislature and, on the other hand, determine the responsibility of the court to protect the substantive entitlements the *Charter* provides.[710]

Sossin has identified one of the key reasons for this in his work on justiciability: the lack of "institutional capacity" in expertise and resources.[711] In King's analysis, this is a commonly cited critique of judicial interventionism that stems from jurist Lon Fullers' arguments about polycentricity and the law.[712] This doctrine of judicial deference asks whether judicial bodies are suitable (particularly in terms of information and expertise) to ascertain and understand the relevant facts of a case, navigating the minefield of potential competing policy choices and resource demands and crafting appropriate functional remedies.

Canadian courts have tackled these polycentric issues over the years, but generally with some reluctance. Take for example *M v. H*, Bastarache J.

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[710] *Tanudjaja*, *supra* note 9 at para 83.

[711] First, courts do not have the resources or expertise to competently establish what policy or law best advance the public interest." See Sossin, ''Boundaries of Judicial Review'', *supra* note 173 at 165.

[712] King, ''Judging Social Rights'', *supra* note 15 at 190.

explained the need for judicial deference on the grounds of respect for "non-judicial decision makers":

> Another factor militating in favour of deference is complexity. In deciding the standard of review of administrative decisions, one of the criteria to be considered is the level of expertise required of the decision-maker in settling the question in dispute. The animating principle is not that a court should shy away from difficult decisions, but rather that, with regard to certain types of questions, a greater degree of deference might be owed to non-judicial decision-makers.[713]

Even though, in the aforementioned, the Court didn't show a great degree of deference to law makers, it is important to deal with the challenge that a more deferential stance poses because, as King indicates, "the argument that polycentric issues are non-justiciable is most frequently raised in the context of resource allocation disputes. Such disputes frequently involve claims to health, education, social security or *housing resources* (emphasis added)."[714]

In the Canadian human rights context, Sossin has written extensively about polycentric obstacles with respect to ESCR, and views the issue primarily through the lens of justiciability doctrine, which he defines as "institutional capacity concerned with whether there are judicially discoverable and manageable standards for resolving the issue"[715] Indeed, ESCR applications (e.g. *Tanudjaja*) have often been deemed non-justiciable, or unsuitable for adjudication owing to a combination of three reasons: "1) purely policy matters; 2) matters that touch on the legislative process; 3) matters that touch on the wisdom of government actions."[716] According to

[713] *M v H*, [1999] 2 SCR 3 at para 310, 43 OR (3d) 254.
[714] King, ''Judging Social Rights'', *supra* note 15 at 2.
[715] "First, courts do not have the resources or expertise to competently establish what policy or law best advance the public interest." Sossin, ''Boundaries of Judicial Review'', *supra* note 173 at 130.
[716] *Ibid* at 147.

this critique, the judiciary is prone to making mistakes in ESCR cases because it

> has been unduly driven by abstract concept distinctions rather than by functional considerations concerning the relative capacity of each level of government to perform the regulated activities and, secondly, it has failed to consider adequately relative costs and benefits of national and provincial regulations. [717]

Moreover, the reasoning goes, their lack of expertise in a given policy question means that they are more likely to overreach than policy or law makers, when creating rules intended to guide State policies, with potentially harmful repercussions for the economy and society. "Courts lack the tools of bureaucracy. They cannot create government programs. They do not have systematic overview of government policy. It is therefore unrealistic to expect courts to enforce positive rights."[718]

However, many jurists in Canada have countered that polycentric arguments should be mitigated by a more nuanced understanding of the vital role that the judiciary actually plays and ought to have, in the review of laws. In an influential piece co-authored by Macklem and Scott, on the subject of constitutionalizing social rights in South Africa, the authors tackled the issue in both a general sense and the specific context of the country's constitutional *Bill of Rights*. Regarding the question of the inherent polycentricity of ESCR, they argue that more liberal rules with respect to standing and intervenor status in a given piece of litigation, is a better approach than excluding them entirely from judicial review. "The extent to which participation is open to

[717] Manfredi, *supra* note 647 at 152.
[718] Stephen Holmes & Cass R Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (New York: W.W. Norton, 2000) at 113.

persons and groups not intimately connected to the dispute is also critical to the ability to avoid some dangers associated with judicial review."[719]

Others have questioned the assumption made by proponents of judicial deference, on the grounds that it overestimates the capacity of the legislature in regards to the expertise and resources it can deploy in addressing polycentric issues.

> We should not presume that legislatures are always more competent at dealing with polycentricity. Division of governmental responsibilities in different ministries, lack of overall accountability of transparency in the budget setting process, failure to consider competing evidence and a tendency to respond to the most vocal or powerful lobby groups may present significant obstacles on the legislative side.[720]

Critics of polycentricity that concentrate on ESCR also suffer from a fundamental contradiction; namely that polycentricity is by no means confined to the adjudication of social rights. Certainly, it could be argued, as it has by King, that polycentricity permeates the judicial process to such an extent that to apply it mainly on questions of ESCR is, at best, arbitrary, at worst, hypocritical.

> If the argument justifies excluding the courts from addressing social rights cases on the basis of their resource implications, then surely it should also exclude courts from adjudicating on, for example, tax appeals, which patently have substantial resource implications, but are nonetheless routinely dealt with by the courts.[721]

In the upper echelons of the judicial system, polycentricity is regularly discussed in the context of administrative law.[722] In some cases,

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[719] Craig Scott & Patrick Macklem, "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution" (1992) 141:1 U Pa L Rev 1 at 140.

[720] Nolan, Porter & Langford, *supra* note 158 at 19.

[721] King, ''Judging Social Rights'', *supra* note 15 at 11.

[722] King cites the example of *Pushpanathan* with regards to the proper standard of judicial review, *Pushpanathan*, *supra* note 287; King, *ibid* at 12.

N.A.P.E for instance, the Supreme Court deemed it appropriate to show deference to the wisdom of the State actor with respect to its fiscal policy, owing to the extraordinarily difficult "weighing exercise" that such a decision required under very particular circumstances.[723] Yet, this "weighing exercise" remains subject to judicial review no matter how political or polycentric. And judicial deference toward the other branches of government in ESCR, especially in the matter of housing, should never be automatic. The Supreme Court, it should be remembered, did not turn down the government's requests for an opinion on the legality of Quebec secession[724] or the question of patriation[725], on the grounds of polycentricity or political sensitivity.[726]

7) Incrementalism and the Charter: Does the Theory Provide a Model for ESCR Adjudication in Canada

As expounded earlier in this dissertation, I proposed that King's theory of Incrementalism not only attempts to resolve the question of proper judicial deference vis-à-vis the other branches of government, it also attempts to adapt the theory for use in the Canadian judicial context, one that could have implications for the right to social housing. King bases this on the fact

[723] See NAPE *supra* note 198 at 72.
[724] "As to the "proper role" of the Court, it is important to underline, contrary to the submission of the *amicus curiae*, that the questions posed in this Reference do not ask the Court to usurp any democratic decision that the people of Quebec may be called upon to make. The questions posed by the Governor in Council, as we interpret them, are strictly limited to aspects of the legal framework in which that democratic decision is to be taken. The attempted analogy to the U.S. "political questions" doctrine therefore has no application." *Secession Reference*, *supra* note 171, para 27.
[725] *Re: Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 SCR 793, 45 NR 317.
[726] King, ''Judging Social Rights'', *supra* note 15 at 16.

that the Canadian judicial system meets the conditions he lays down for modern judiciaries in terms of the capacity to implement an Incrementalist approach.[727] The reader may recall that King advocates a tripartite evaluation for its application to a particular legal situation: reasoning by analogy, taking incremental legal steps, and deciding cases on narrow judicial grounds.

Examples of Incrementalist thinking (though not as a coherent doctrine) already exist in Canadian jurisprudence, particularly in the area of ESCR. For King, one example of a successful legally defined minimum content for a positive social right is the *Charter*[728] guarantee of French language education based on the doctrine of "where numbers warrant," thus imposing a substantive obligation on the State, as was held in the case of *Mahé.*[729] "Section 23 of the *Charter* imposes on provincial legislatures the positive obligation of enacting precise legislative schemes providing for minority language instruction and educational facilities where numbers warrant." [730]

King believes that the question of judicial deference must be governed by basic normative guidelines. Incrementalism is highly circumspect, especially in the area of adjudicating social rights. Of particular interest to Canadian human rights and ESCR scholars, is his dissection of the *Chaoulli*[731] case as an example where judicial deference should have been exercised by the Supreme Court. And his analysis of the *Doucet* case in the context of his study of structural injunctions and supervisory jurisdictions.[732]

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[727] *Ibid* at 12.
[728] *Charter, supra* note 8.
[729] *Mahe v Alberta*, [1990] 1 SCR 342, 68 DLR (4th) 69.
[730] *Ibid* at 393.
[731] King, "Constitutional Rights", *supra* note 697.
[732] King, ''Judging Social Rights'', *supra* note 15 at 273.

King's assessment of the majority opinion in *Chaoulli* is generally quite negative. However, he argues that the case may yet prove useful to litigators of ESCR.

> First, that the case was wrongly decided because of its poor characterisation of the legislative objective of the ban, unprincipled approach to judicial deference, and poor treatment of expert and social science evidence. Second, far from justifying suspicion of constitutional social rights, the case illustrates precisely why such rights can make a positive difference.[733]

King goes further, advocating for the constitutionalization of these social rights to avoid a repetition of the same error in the future. He contends that without entrenching such clear human rights norms, inevitably courts will favour classical civil and political rights in their understanding of the *Charter*.[734] Other jurists have observed that recognizing a substantive right to healthcare in Canada in *Chaoulli* would have resulted in a more equitable outcome. It would have other benefits as well. "Not only would such a right be consistent with s.7 but also would bring *Charter* jurisprudence in line with s.36 of *The Constitution Act*, and with Canadian commitments to interpret human rights instruments which recognize the right to adequate social services."[735]

King also takes issue with the equality analysis of the Supreme Court in *Chaoulli*. He cites the examples of two other cases that involved the Court redressing examples of pre-existing disadvantage (*G.[J.]* and *Eldridge*) to demonstrate that substantive equality doctrine would have provided an impetus for restraint or Incrementalism with regard to health care policy in Quebec. Both cases involved disadvantaged groups that were appealing to the *Charter* for projection under s.15. In fact, in *Rocket v Royal College of*

[733] King, "Constitutional Rights", *supra* note 697 at 631.
[734] *Ibid* at 639.
[735] Sossin, "Two Tier Justice" *supra* note 191 at 173.

Surgeons,[736] McLachlin J. (as she was then known) recognized that "[t]he fact that the provincial legislature here acted to protect a vulnerable group argues in favour of viewing its attempted compromise with some deference."[737] King concludes that, had the Supreme Court respected its own previous standard for judicial deference, a more Incrementalist approach to decision making based on substantive equality for traditionally marginalized groups in Canada (in this case less wealthy patients), it would never have found in favour of the interests of the wealthy claimant at the expense of comprehensive public health care system for those who cannot afford private insurance. [738]

The value of administrative flexibility is another factor in King's critique of the decision in *Chaoulli*. "While administrative decision-makers and policy-makers can reverse their decisions as new information comes to light, courts are far more restricted in this regard."[739]This appreciation of polycentricity, he speculates, would have helped the Court in *Chaoulli* as it did for Justice Bastarache's dissent in *Gosselin*.

> [G]iven the broad impact of this legislation on Quebec society, as well as a wide range of alternatives that might be taken in order to bring complex social legislation such as this into line with constitutional standards, I believe that suspension of the declaration would have been appropriate in this case. Given…the complexity of the programs at issue, a court should not intrude too deeply into the role of the legislature in this field.[740]

King does believe that *Chaoulli* can serve as a positive lesson for the adjudication of ESCR in the future. Provided that it leads to a conception of individual liberty that is compatible with meeting the needs of socially and economically marginalized groups in Canada and a greater deference to

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[736] *Rocket v Royal College of Dental Surgeons of Ontario*, [1990] 2 RCS 232, 73 OR (2d) 128.
[737] *Ibid* at 248-249.
[738] King, "Constitutional Rights", *supra* note 697 at 641.
[739] *Ibid*.
[740] *Gosselin*, *supra* note 49 at para 293.

governments in cases involving genuine polycentricity and policies that redistribute resources.[741]

Doucet is, on the other hand, cited by King as a prime example of Incrementalist principles being applied correctly. "It may be said that when deployed well structural injunctions in fact lead to a coordinated process that is distinctly incremental in nature."[742] It is also in this context that King raises the need for a greater acceptance of the established principle of dialogue, as a means of expanding the flexibility of the judiciary with respect to social rights. "The Supreme Court of Canada evolved a doctrine whereby it can suspend the effects of any constitutional remedy for a given time in order to give legislators a chance to adjust to the ruling."[743] It must be said that this was mainly because the State actor, in this case the government of Nova Scotia, had been found to have acted in bad faith. Hence, the injunction of the lower court in *Doucet*, is appropriately Incrementalist in the sense that it is based on the State actor's past behaviour with regards to its constitutional duties and applied in the context of an unconventional type of remedy (e.g. supervisory order). "The state has demonstrated bad faith in respect to its own obligations under the matter Incrementalism will be less appropriate unless it is the strategy adopted within the framework of more intrusive remedies such as a structural injunction."[744]

As we have seen elsewhere, King views the *Eldridge* case as a fine example of Incrementalism in practice.[745] The reader will remember that in that case, the governmental discriminatory policies were justified in part, on

[741] King, "Constitutional Rights", *supra* note 697 at 643.
[742] King, ''Judging Social Rights'', *supra* note 15 at 275.
[743] *Ibid* at 248.
[744] *Ibid* at 294.
[745] *Ibid* at 318.

the grounds of scarcity of resources and the risk that the State may have to expand language services to include hearing impaired people. The Court dismissed this point, observing "the possibility that [a s.15(1)] claim might be made, […] cannot justify the infringement of the constitutional rights of the deaf."[746] Thus, King finds that even the harshest critics of the judiciary would be hard pressed to make the case that resource scarcity should trump basic human rights principles, in instances where the latter has been clearly violated by the State.[747] In evaluating the Government of British Columbia's claims of resource scarcity and the potential detriment to public health services of granting the appellant her *Charter* rights, under s.15, the Court deemed the evidence presented very weak. From an Incrementalist perspective, then, no deference to policy-makers, by the judiciary, was called for. "In this case, the allocative impact was projected to be 0.0025 per cent of the provincial health care budget, a mere CND $150,000. This was rightly deemed insufficient to justify the type of unequal treatment said to arise from the case."[748]

The Incrementalist approach has already been endorsed by many jurists in Canada, albeit not always in the form promoted by King. The jurists and lawyers behind the application, for example, defined their claim in terms of a dialogue between the different government institutions concerned with homelessness. They aimed for an incremental solution to the situation, potentially, but not necessarily, involving the recognition of a judicially enforceable right to social housing.[749] The judge presiding over the motion

[746] *Eldridge*, *supra* note 121 at para 90.
[747] King, ''Judging Social Rights'', *supra* note 15 at 317.
[748] *Ibid* at 318.
[749] Heffernan, Faraday & Rosenthal, *supra* note 17 at 25.

to dismiss at first instance disagreed, however, calling the case "a Trojan Horse. It hides its true impact."[750]

Peter Hogg's critique of the dissenting opinion in *Gosselin* echoes Incrementalist thinking on the necessity for judicial deference with respect to highly polycentric issues.

> The suggested role also involves a massive expansion of judicial review, since it would bring under judicial scrutiny all of the elements of the modern welfare state, including the regulation of trades and the adequacy of labour standards and bankruptcy laws and, of course, the level of public expenditures in social programs.[751]

Hogg's view of the outcome in *Doucet* is at odds with King's for much the same reasons that he praises the majority view in *Gosselin*. Roach has similarly argued that polycentricity in the Canadian context, rather than being an obstacle to judicial remedy, can actually facilitate the remedial process. "This could involve a delayed invalidity…while the government develops a plan or interim remedies that may address the emergency needs of the applicant while it (the courts) takes time to develop an order for more systematic relief."[752]

Some jurists have noted, with a degree of despair, that the Incrementalist strategy may result in the defeat of a *Charter* claim when the claim is subjected to the reasonableness test in s.1. But Incrementalists still maintain that this is an acceptable trade-off in that, unlike questions of justiciability, when the courts invoked judicial deference on the grounds of polycentricity, they at least acknowledge the viability of the claim.[753] At any

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[750] *Tanudjaja*, *supra* note 9, para 64.
[751] Hogg, *supra* note 197 at 47.15.
[752] Langford, *supra* note 120 at 37.
[753] See Nathan Wiseman, "Taking Competence Seriously" in Young et al, ''Poverty Rights'', *supra* note 88, 263 at 265.

rate, some observers of the Supreme Court today maintain that when it comes to polycentric ESCR litigation, the judiciary should no longer wash its hands of the situation simply by invoking judicial deference or a questionable Canadian version of the political questions doctrine. As Porter notes:

> The Supreme Court has appropriately preferred to exercise deference at the remedial stage in these types of cases rather than abdicate from any judicial role simply because substantive *Charter* claims may engage issues of programme implementation or legislative duties.[754]

[754] Porter, ''Judging Poverty'', *supra* note 80 at 38.

8) The Principle of Harm Reduction and the Charter

Recent *Charter* jurisprudence, especially those claims based on s.7, hint at an emerging doctrine which might have an impact on the application of current and future ESCR claims related to the *Charter*. Especially those based on challenges to governmental policy and regulations on the grounds of the harm reduction principle. This was most apparent in the *Carter*[755] decision where the Supreme Court broke with its own past decision,[756] and agreed with the trial judge's distinction vis-à-vis the ruling in *Rodriguez* [757] (a case where the Court had deemed the *Criminal Code* constraints on doctor assisted suicide, "*Charter*-proof.").

Similarly, in *Carter,* the harm in question was caused by the *Criminal Code* prohibition on doctor-assisted suicide, which was again the subject of a *Charter* analysis. "The trial judge explained her decision to revisit *Rodriguez* by noting the changes in both the legal framework for s.7 and the evidence on controlling the risk of abuse associated with assisted suicide."[758]

The facts were that the plaintiffs, Ms. Carter, *et al*, challenged the prohibition on doctor-assisted suicide under Canada's *Criminal Code* specifically on the grounds that it violated their rights under the *Charter*. It is significant to note that in its judgement, the Supreme Court found that s.15 and s.7 contained positive obligations for doctors assisting patients with end

[755] *Carter*, *supra* note 216.
[756] *Ibid* at paras 42 to 47.
[757] *Rodriguez v British Columbia (AG)*, [1993] 3 SCR 519, 158 NR 1.
[758] *Carter*, *supra* note 216 at para 45.

of life care. Hence, under certain carefully defined circumstances, State regulated service providers (similar to the hospital in *Eldridge*) must provide help to victims of the identified harm.

The Supreme Court appears to impute a duty on the State to provide end of life care.

> We therefore conclude that ss. 241 (*b*) and 14 of the *Criminal Code*, insofar as they prohibit physician-assisted dying for competent adults who seek such assistance as a result of a grievous and irremediable medical condition that causes enduring and intolerable suffering, infringe the rights to liberty and security of the person.[759]

The majority of the Court ordered the government to repeal Section 14[760] of the Code that criminalizes assisted suicide. In its opinion, the Court held that one of the plaintiffs would be "permitted to seek, and her physician will be permitted to proceed with, physician-assisted death under specified conditions." Some scholars have found this to be an ambiguous commitment by the Court to a *de-facto* binding and substantive duty on public health care providers. Thus, "personal autonomy involving…control over one's bodily integrity free from state interference has morphed into a *positive right*, entitling one…to state assistance (emphasis added)."[761]

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Hamish Stewart has written about three cases that, taken together, seem to best represent this harm reduction approach to enforcing and

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[759] *Ibid* at para 68.

[760] S.14 declares "No person is entitled to consent to have death inflicted on them, and such consent does not affect the criminal responsibility of any person who inflicts death on the person who gave consent." *Criminal Code*, RSC 1985, c C-46.

[761] Douglas Farrow, "The Acid of Autonomy" (1 June 2016), online: *Convivium* <www.convivium.ca/articles/the-acid-of-autonomy/>.

assessing the legitimacy of *Charter* claims. These are *Bedford, Chaoulli* and *PHS*. "If *Chaoulli, PHS*, and *Bedford* are correct, the allegations that a particular prohibition is arbitrary under Section 7 can only be established, or indeed refuted, by a careful empirical analysis of its effectiveness in controlling the harm at which it is directed."[762]

The relationship between public policies and their connection to the *Charter*'s protection of the public from harm, is enunciated clearly by the Chief Justice McLachlin and Major and Bastarache JJ in *Chaoulli* when they ask: "is the violation of s.7 of the *Charter* to prohibit private insurance for health care, when the result is to subject Canadians to long delays with resultant risk of physical and psychological *harm* (emphasis added)?"[763]

We have seen that social science evidence (also known as "legislative facts") played a key part in the Court's analysis of s.7 in *Chaoulli*. In that case, the majority of the Court believed that, on the evidence, the impact of the availability of a parallel private healthcare system on the quality of the services in the public sector, would be negligible.

> The government undeniably has an interest in protecting the public health regime but, given that the evidence falls short of demonstrating that the prohibition on private health insurance protects the public health care system… the prohibition goes further than would be necessary to protect the public system and is thus not minimally impairing.[764]

By contrast, the dissenting voices on the bench found that contradictory evidence was more persuasive and that the government had based its policies on sound social science and other sources of empirical data.[765] These positions in *Chaoulli* (majority and dissenting) have in

[762] Stewart, *supra* note 672 at 148.
[763] *Chaoulli*, *supra* note 189 at para 108.
[764] *Ibid* at paras 155-156.
[765] *Ibid* at para 276.

common that they subscribe to the same notion of employing a harm reduction lens to s.7 and "they are involved in the use of social and economic data to establish a more general context to policy making."[766]

As Wright observes in his analysis of *Chaoulli*, the heart of the majority judgment was based on a particular reading of the evidence and that such evidence was always bound to be highly debatable.

> Judges decided, apparently, that the evidence they found most compelling was that related to the suffering and death of patients on wait lists that the government apparently unwilling to take steps that would be necessary to improve the situation and the fact that a public Medicare system and private health insurance co-exist in various forms in many countries.[767]

This type of evidence was in abundance in *Tanudjaja*, thanks to the affidavits submitted to the ONSC to support the claims of the applicants. More to the point, the social science evidence overwhelmingly demonstrated the negative impacts of homelessness on the quality and length of life for homeless Canadians. I would argue, then, it should legally engage s.7 and s.15, as it did in *Chaoulli*.

> The material deprivation experienced by people living in poverty and who are homeless directly threatens life, liberty and security of the person related interests under s.7 of the *Charter*. Far from justifying exclusion from s.15, these material conditions reinforce the call for equal protection and equal benefit of the *Charter*'s equality guarantee.[768]

All of evidence gathered was for naught, however, as the case never reached trial, and was denied a full and substantive treatment on the grounds of a lack of justiciability.[769] Thus the substantial socio-legal data compiled

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[766] Hamish Stewart, ''Implications of Chaoulli for fact finding in Constitutional Cases" in Flood, Roach & Sossin, *supra* note 191, 207 at 209.
[767] Charles Wright, "Different Interpretations of Evidence and Implications for Canadian Healthcare System" in Flood, Roach & Sossin, *supra* note 191, 220 at 224.
[768] Jackman & Porter, ''Rights-Based Strategies'', *supra* note 143 at 91.
[769] Justice Lederer stated: "Quite apart from the question of whether there is a viable claim for breaches of the *Charter,* what the Court is ultimately being asked to do is

and detailed by the applicants, framing homelessness as a source of harm, both physically and mentally, does not appear in the final decision to dismiss.

In *PHS* the Supreme Court carefully considered the evidence presented by both sides, and made a determination based partly on considerations of harm reduction. The case involved the revoking of an exemption that allowed for a safe injection site in Vancouver to use illicit substances, by the federal government. "Where, as here, the evidence indicates that a supervised injection site will decrease the risk of death and disease, and there is little or no evidence that it will have a negative impact on public safety, the Minister should generally grant an exemption."[770] Thus, evidence (in this case with regards to public policy on addiction) that has potential to cause harm to marginalized individuals or groups, will be crucial in evaluating whether the policy under review is "*Charter*-proof."

Jackman has concluded that there is a parallel to be drawn with the issue of homelessness under the *Charter*. "The Court's decision in Insite (*PHS*) has significant implications for the application of s.7 to governments' failure to act to protect the life and security of the person of those who are homeless or living in poverty."[771]

In *Bedford,* we find the Supreme Court again weighing the legislative facts in order to determine whether the *Criminal Code* provisions regulating the sex trade violates the *Charter* rights of sex-workers. Among other things, former Chief Justice McLachlin, found that the Ontario Court of Appeal was

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beyond its competence and not *justiciable* [emphasis added]*". Tanudjaja*, *supra* note 9 at para 148.

[770] *PHS*, *supra* note 583 at para 152.

[771] Jackman & Porter, "Rights Based Strategies", *supra* note 143 at 76.

right to depart from the opinion of the Supreme Court in the *Prostitution Reference*[772] in light of compelling new evidence.

> [A] trial judge can consider and decide arguments based on *Charter* provisions that were not raised in the earlier case; this constitutes a new legal issue. Similarly, the matter may be revisited if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or *evidence* that fundamentally shifts the parameters of the debate (emphasis added).[773]

Stewart ties these three cases together by using a common normative thread. He finds that, in all of them, the "approach…resembles the approach taken in *Chaoulli* in that it involves a detailed and careful consideration of the State's claim that the instrument it has chosen to pursue its objectives does not, in fact, contradict that objective."[774] Other jurists have noted the fact that these cases represent a harm reduction conception of s.7. In other words, on the evidence, the government's actions threaten health and bodily integrity, and, therefore, violated the claimant's *Charter* rights.

According to Stewart, it might be beneficial if the Court had done something similar in their analysis of *Malmo-Levine*[775] case, whose applicants explicitly argued for an understanding s.7 as including harm reduction. Ultimately, they failed to gain the recognition of the majority of the Court, indeed, it was the dissenting justices that identified harm reduction as a relevant principle implicit in the relationship between s.7's right to liberty and the Fundamental Justice Clause.[776] Had they done otherwise, Stewart believes that the outcome would have been rather different. "If the court had considered whether evidence supports the proposition that prohibiting

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[772] *Reference re ss 193 and 1951(1)(c) of the Criminal Xode (Man)*, [1990] 1 SCR 1123, 109 NR 81.
[773] *Bedford*, *supra* note 689, at para 42.
[774] Stewart, ''Implications of Chaoulli'', *supra* note 766 at 148.
[775] *R v Malmo-Levine; R v Caine*, 2003 SCC 74, [2003] 3 RCS 571 [*Malmo-Levine*].
[776] *Ibid* at 717.

marijuana was an effective way to assist vulnerable users, the analysis would certainly have been different and so might the result."[777]

However, Sylvestre finds a contradiction, in the way that *Malmo-Levine*, was handled on the basis of a *Charter* claim to a s.7 violation, versus the way it was handled in the case of *Labaye*[778] in light of common law principles regarding harm to the public interest.[779] *Labaye* was a case involving the proprietor of a club intended for couples, that was prosecuted under s.210(1) of the *Criminal Code* for "keeping a common bawdy-house for the practices of acts of indecency"[780] Then McLachlin C.J. wrote that the Court had to apply an earlier Supreme Court doctrine established in *Butler*[781]*:*

> I conclude that the evidence provides no basis for concluding that the sexual conduct at issue harmed individuals or society. *Butler* is clear that criminal indecency or obscenity must rest on actual harm or a significant risk of harm to individuals or society. The Crown failed to establish this essential element of the offence. The Crown's case must therefore fail. The majority of the Court of Appeal erred, with respect, in applying an essentially subjective community standard of tolerance test and failing to apply the harm-based test of *Butler.*[782]

In Sylvestre's view this leads to quandary: why the different judicial standards for harm to the public between *Malmo-Levine* and *Labaye*? She speculates that the standard for establishing lack of harm is higher in cases involving the *Charter*.[783] Therefore, we can infer, by way of analogy with the *Tanudjaja* application, that, had the case employed a harm reduction lens in court, more specifically in relation to homelessness, it would have been unlikely to reach the threshold necessary at trial for a *Charter* claim to

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[777] Stewart, ''Implications of Chaoulli'', *supra* note 766 at 147.
[778] *R v Labaye*, 2005 SCC 80, [2005] 3 SCR 728 [*Labaye*].
[779] Sylvestre, *supra* note 76 at 408.
[780] *Criminal Code*, supra note 760.
[781] *R v Butler*, [1992] 1 SCR 452, 134 NR 81 [*Butler*].
[782] *Labaye*, *supra* note 778 at para 70.
[783] Sylvestre, *supra* note 76 at 408.

succeed. This means that future litigation in the area of the right to social housing ought to be careful about employing the harm reduction principle.

9) The Doctrine of Substantive Equality and ESCR

In the words of David Wiseman: "substantive equality transcends formal equality at the point where it demands differential legal treatment in order to ameliorate and overcome inequalities in social and economic circumstances."[784]

In a number of *Charter* cases, mostly involving s.15, substantive equality rights theory has been employed by judges in order to remedy harms suffered by disadvantaged groups[785]or individuals in society whose victimization is the result of complex and interrelated social, historical, economic, and cultural causes. This doctrine can be used to reinforce both substantive and limited state obligations towards equality rights.

The *Charter*, while not explicitly recognizing social condition, poverty or homelessness, does guarantee equality right, with special recognition of the remedial efforts that might be required to ensure the equality of women, visible minorities (people who are not Caucasian), persons with disabilities, and aboriginal peoples.[786]

Much as it has with s.7, the Supreme Court has thus far refused to recognize any general substantive obligation on the State stemming from s.15. But the door to a more generous interpretation of the Section has not

[784] David Wiseman, "The Past and Future of Constitutional Law and Social Justice: Majestic or Substantive Equality?" (2015) 71 SCLR: Osgoode's Annual Constitutional Cases Conference 563 at 564.

[785] For a definition of disadvantaged group, see for example Wilson J. writing for the majority in *Turpin:* "In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context." *R v Turpin*, [1989] 1 SCR 1296 at 1331, 93 NR 115.

[786] Canada, Senate, Standing Committee on Social Affairs, Science and Technology, Subcommittee on Cities, *In from the margins : a call to action on poverty, housing and homeless* (December 2009) at 2 (Chair: Art Eggleton).

been closed either, at least at the Supreme Court level.[787] Some human rights scholars now believe that the trend in recent s.15 jurisprudence is moving the Court in this direction already. "In light of recent commentary from the Court, there remains a solid conceptual basis for a renewed rights-based approach to poverty and homelessness in Canada."[788]

The most important milestone on substantive equality doctrine since *Andrews* remains the Supreme Court ruling in *Eldridge*. In that decision the Court ruled against the government of British Columbia, mainly on the grounds that the provincial health care system had failed to respect the *Charter* rights of a hearing-impaired claimant (Ms. Robin Susan Eldridge), who had requested special accommodations for her disability. [789]

The respondent (i.e. government of British Columbia) attempted to distance itself from the private actor (i.e. the hospital) it had delegated the delivery of public medical services to. The Court declared that

> The Legislature, upon defining its objective as guaranteeing access to a range of medical services, cannot evade its obligations under s. 15(1) of the *Charter* to provide those services without discrimination by appointing hospitals to carry out that objective.[790]

In the end, the majority of the Court were unimpressed by the government's arguments, including minimal impairment and undue hardship on the State, and found that the State actor has failed to demonstrate the reasonableness, under s.1, of its policy towards the Ms. Eldridge and others with her disability.

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[787] ''Section 15 – Equality rights" (last modified 17 June 2019), online: *Department of Justice* <www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art15.html>.
[788] Jackman & Porter, ''Rights-Based Strategies'', *supra* note 143 at 82-83.
[789] Langford, *supra* note 120 at 25.
[790] *Eldridge*, *supra* note 121 at para 51.

This was essentially an interventionist measure that was designed by the justices to rectify what the Court considered to be an undermining of equality by means of government regulations of a private hospital (but still mandated by the State). Moreover, the argument advanced by the government that such a finding would undermine the government's ability to allocate resources effectively and had negative implications for health care services, was also rejected by the justices.[791]

> Clearly the result in *Eldridge* demonstrates that…deference to legislatures in the social and economic domain ought not to be taken as justifying a refusal on the part of the courts to ensure that governments meet their substantive obligations toward vulnerable and disadvantaged groups.[792]

However, it would seem that the Supreme Court later changed its own position in similar circumstances involving a reasonable accommodation claim on the grounds of disability that was brought by the parents of autistic children. In the *Auton*[793] case, the provincial government argued that increased health costs justified its decision to deny funding for certain autism therapies. McLachlin C.J., writing for the majority of the Supreme Court, more of less agreed with this logic stating that government funding for non-core medically necessary treatments is not protected under s.15(1) of the *Charter* and that the courts need to use the "appropriate comparator" as a baseline in discrimination cases.[794] Therefore, "in contrast to the earlier decision in Eldridge, the court's reasoning in *Auton* regresses to the kind of formal equality comparison which had been explicitly rejected when the wording of the right to equality in the Canadian *Charter* was being

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[791] *Ibid* at para 88-89.
[792] Porter, ''Judging Poverty'', *supra* note 80 at 29.
[793] *Auton (Guardian ad litem of) v British Columbia (AG),* 2004 SCC 78, [2004] 3 SCR 657 [*Auton*].
[794] *Ibid* at para 3.

debated."[795] All of which raises an important question: which yardstick with respect to *Charter* equality rights should be used in future ESCR cases involving the right to social housing: the one applied in *Auton* or the one in *Eldridge?* Unfortunately, the answer in *Tanudjaja* appears to clearly favour the formal equality of the former over the substantive equality of the latter.[796]

The Chief Justice in *Auton*, relied on the controversial notion of a so-called "comparator group" to establish that no breach of s.15 had occurred. In *Law v. Canada,*[797] the Court first laid down the rules regarding the application of this principle. In that instance, Nancy Law was seeking survivor's benefits under the *Canadian Pension Plan,*[798] The appellant claimed discrimination because the statute, at the time, required that the applicant for benefits be awarded at the age of 65, except in the case of dependents and disabled applicants. The comparator analysis (sometimes referred to as the "Law test") was described in the following way:

> Ultimately, a court must identify differential treatment as compared to one or more other persons or groups. Locating the appropriate comparator is necessary in identifying differential treatment and the grounds of the distinction. Identifying the appropriate comparator will be relevant when considering many of the contextual factors in the discrimination analysis.[799]

However, this was subsequently reversed in *R v. Kapp,*[800] a case of indigenous fishing rights being challenged on the grounds that they were

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[795] Porter, ''Judging Poverty'', *supra* note 80 at 29.

[796] J Lederer indicated that: "For there to be a breach of s. 15(1) of the *Charter,* the applicants must be treated differently, in that they are denied a benefit provided to others or have a burden imposed on them that others do not." *Tanudjaja*, *supra* note 9 at para 95.

[797] *Law*, *supra* note 676.

[798] *CPP*, *supra* note 561.

[799] *Law*, *supra* note 676, at para 56.

[800] *Kapp*, *supra* note 678.

discriminatory, where provisions of the *Charter* dealing with treaty rights (namely s.35) were also in question. In her majority opinion, former Chief Justice McLachlin, returned the s.15 analysis to the previous standard established by *Andrews*, declaring that "[c]riticism has also accrued for the way *Law* has allowed the formalism of some of the Court's post-*Andrews* jurisprudence to resurface in the form of an *artificial comparator analysis* focussed on treating likes alike (emphasis added)."[801]

In *Withler v Canada* the Court shed light on the meaning of comparator group in the context of s.15.[802] This was a class action suit brought against the government, on the grounds that Federal statutes regarding supplementary death benefits violated the prohibition of age discrimination. It would seem that establishing an infringement of s.15 does not hinge on finding a particular group that is comparable to the applicant, so long as the latter "establishes a distinction based on one or more enumerated or analogous grounds […]"[803]

In *Moore v. British Columbia (Education)*[804], the dispute involved the Provincial Ministry of Education's decision to deny a severely dyslexic child funding for his special needs education. It transpired that the Supreme Court found, *inter alia*, that the comparator group approach, would have resulted in deeper discrimination towards those with learning disabilities. "Comparing Jefferey [the plaintiff] only with other special needs students would mean that the District could cut *all* special needs programs and yet be immune from the claim of discrimination."[805] Thus, *Auton's* and *Tanudjaja's* adherence to

[801] *Ibid* at para 22.
[802] *Withler, supra* note 624 para 55-60.
[803] *Ibid* at para 63.
[804] *Moore v British Columbia (Education),* [2012] 3 SCR 360.
[805] *Ibid* at para 30.

formal equality, based partly on a comparator group analysis, would seem to be a thing of the past.

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The *Sparks v Dartmouth/Halifax Housing Authority*[806] case, furthers the point that poverty, though not strictly the legal question under review, should be recognized as an analogous ground under s.15 of the *Charter*. The plaintiff, Ms. Irma Sparks (an African Canadian women), challenged a provincial statute[807] dealing with the rights of tenant, which excluded public housing tenants from the legal protections granted to other kinds of tenants. The Court of Appeal overturned the lower Court's decision, which had ruled against Ms. Sparks, on account that the *Residential Tenancies Act*

> Sections 10(8)(d) and 25(2) of the Act are inconsistent with the public housing tenants' rights to equal benefits of the law without discrimination. The provisions are overly broad. The most appropriate and just remedy is to declare these provisions to be of no force or effect.[808]

Hallett J.A., writing for a unanimous court, engaged in an extraordinary intersectional analysis of the plaintiff's circumstances and personal characteristics and concluded that her being a single black woman and public housing tenant meant she belonged to one of the most impoverished minorities in Canada.[809] Hence "the Court recognized that while people may move in and out of public housing, social attitudes related to residency attach to a personal identity in a way that attracts stigma and

[806] *Sparks v Dartmouth/Halifax County Regional Housing Authority*, 1993 NSCA 13, 119 NSR (2d) 91 [*Sparks*] (cited in NSR).
[807] *Residential Tenancies Act,* RSNS 1989, c 401.
[808] *Sparks*, *supra* note 806 at para 43.
[809] *Ibid* at para 32-33.

discriminatory treatment."[810] The Justice, therefore, concluded that being a public housing tenant should be included in s.15 as an analogous ground.[811]

The remedy in Sparks remains a touchstone for intersectional legal analysis of poverty in Canada, and has been cited widely in the literature surrounding ESCR jurisprudence. In Sossin's assessment of the *Canada Health and Social Transfer*[812] (the federal legislation introduced to replace the *Canada Assistance Plan* in 1996), he opines that fiscal arrangements for transfer payments between the Federal and provincial governments are vulnerable to the s.15 critique put forward by the Court in *Sparks*.

The Nova Scotia Court of Appeal found that public housing tenants constituted a class analogous to the classes enumerated in s.15. This is why the type of *Charter* challenge to the CHST, alleging an unequal impact on certain categories of welfare recipients, would appear to have the greatest chance of success. [813]

In *Masse,*[814]an Ontario class action law suit, a group of people receiving social benefits challenged the Ontario governments cuts to their income, partly on the grounds that their unequal treatment was the result of discriminatory policies directed at the most vulnerable and impoverished in society.

Judge O'Driscoll, disagreed. He accepted the argument advanced by counsel for the government respondent, to the effect that poor Ontarians did not constitute an analogous group under the *Charter*. "[T]he class of social assistance recipients is heterogeneous and their status is not a personal

[810] Jackman & Porter, ''Rights-Based Strategies'', *supra* note 143 at 89.
[811] *Sparks*, *supra* note 806 at 34.
[812] *Federal-Provincial Fiscal Arrangements Act,* RSC 1985, c F-8.
[813] Lorne Sossin, "Salvaging the Welfare State?: The Prospects for Judicial Review of the Canada Health and Social Transfer" (1998) Dalhousie Law J Vol 21 Number 1 1998 P 141-198, online: <https://digitalcommons.osgoode.yorku.ca/scholarly_works/425> at 15.
[814] *Masse v Ontario (Ministry of Community and Social Services),* [1996] OJ No 363 (QL), 134 DLR (4th) 20 [*Masse*].

characteristic within the meaning of s.15(1) of the *Charter*. The class is not related to merit or capacity. Statistics show that the class is *not immutable* (emphasis added)."[815]

The minority opinion, written by Corbett J., dissented on this point. The burden imposed by the law in questions (the *General Welfare Assistance Act*[816]*)* on "sole support" was discriminatory. Moreover, "sole-support" parents constituted an analogous group for the purposes of s.15, on account that "[s]ole-support parents on social assistance are further marginalized socially, economically, and psychologically by their poverty."[817]

Porter agrees with the minority in *Masse.* He deplored the majority decision, that was not only wrong to refuse intervention on the grounds that doing so would undermine the policy choices made by the State actor, but also failed to grasp the more general responsibility of courts to act when governments neglect the problems of large numbers of disadvantaged people, regardless of whether there is a specific domestic legal obligation to do so. "It (intervention) should also be triggered where governments are simply not meeting their normative obligations to address the needs of vulnerable groups, particularly where they have adequate resources to do so."[818]

Immutability and s.15

The question of immutable characteristics, so often used to deny poverty and homelessness from being recognized under the *Charter,* is also a key factor in determining analogous grounds of prohibited discrimination.

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[815] *Ibid* at para 374.
[816] *General Welfare Assistance Act,* RSO 1990, c G.6.
[817] *Masse*, *supra* note 814 at para 109.
[818] Porter, ''Judging Poverty'', *supra* note 80 at 31.

The Canadian version of this doctrine is based on the reasonable accommodation cases surrounding special measures for religious minorities (see *Multani*[819] and *Amselem*[820]) that laid down conditions that would need to be met for a person's religious convictions to be regarded as fundamental and unchangeable.

In *Corbiere*[821], the Court revisited the question of immutability, and introduced another dimension to s.15 analysis: constructive immutability.[822] The case concerned unconstitutional discrimination between on-reserve and off-reserve indigenous peoples with regards to voting rights. The plaintiffs were being denied voting rights despite being members of the Batchawa Indian Band living away (i.e. off reserve). They asked that s. 77(1) of the *Indian Act*[823], which required band members to reside on reserve for the purposes of voting be struck down on the grounds that it infringed s.15(1) of the *Charter*. The Court agreed with this claim, on the basis of a complex analogous grounds analysis, that, while not based on a characteristic as immutable as, for instance, ethnicity, were still exceedingly difficult to change in practice.

> [T]he distinction goes to a personal characteristic essential to a band member's personal identity, which is no less constructively immutable than religion or citizenship. Off-reserve aboriginal band members can change their status to on-reserve band members only at great cost, if at all.[824]

Porter and Jackman view the analysis in *Corbiere* as taking the judiciary one step closer to recognizing poverty and homelessness under s.15

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[819] *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 SCR 256.
[820] *Syndicat Northcrest v Amselem*, 2004 SCC 47, [2004] 2 SCR 551.
[821] *Corbiere v Canada (Minister of Indian and Northern Affairs),* [1999] 2 SRC 203, 173 DLR (4th) 1 [*Corbiere*].
[822] For more on this concept see Sylvestre & Bellot, *supra* note 523 at 185.
[823] *Indian Act*, *supra* note 81.
[824] *Corbiere*, *supra* note 821 at para 14.

of the *Charter*. "There are compelling reasons for recognizing that the socially constructed dimension of homelessness and poverty make these characteristics constructively immutable, in the same way as residential status was found to be in *Corbiere*."[825] Thus, by analogy, it is not simply that homelessness and being impoverished are strictly examples of constructive immutability that can only be changed at excessive cost to the individual. Rather, it is an example, of what the majority of the Court in *Corbiere*, found to be the type of characteristic that, according to their reasoning, "the government has no legitimate interest in expecting us to change to receive equal treatment under the law."[826]

With regards to equality rights under the *Charter*, discrimination is not simply a matter of laws that contain double standards. There is also the question of "substantive discrimination," related intimately to the legal norm of substantive equality.[827] As the decision in *Kapp* demonstrated very well "perpetuation of disadvantage and stereotyping [are] the primary indicators of discrimination."[828] Thus, a State's inaction on homelessness and poverty should be understood "in light of the discrimination, exclusion, and discounting of rights that lie behind the denial of adequate benefits."[829] Namely, as this dissertation maintains, adequate benefits ought to synonymous with access to social housing.

Indeed, the Supreme Court has included the concept of substantive discrimination in much of the s.15 jurisprudence at least since its decision in

[825] Jackman & Porter, ''Rights-Based Strategies'', *supra* note 143 at 85.
[826] *Corbiere*, *supra* note 821 at para 13.
[827] Jackman & Porter, ''Rights-Based Strategies'', *supra* note 143 at 92.
[828] *Kapp*, *supra* note 678, at para 23.
[829] Jackman & Porter, ''Rights-Based Strategies'', *supra* note 143 at 93.

Andrews.[830] In *Law,* the Court explained that State policies may avoid discriminatory consequences if they "[…] take into account the actual needs, capacity, or circumstances of the claimant and others with similar traits in a manner that respects their value as human beings and members of Canadian society […]"[831]

To illustrate how this might work towards the realization of a Canadian right to housing in practice, consider the variety of ways the doctrine of substantive equality has been applied in the jurisprudence we have already seen. There is the substantive discrimination of *Eldridge*; the intersectional analysis of poverty in the *Charter* with respect the analogous grounds under s. 15 in *Sparks*; the constructive immutability aspect of substantive equality, laid down in *Corbiere*; and, finally, the substantive discrimination doctrine established in *Kapp*. All of these suggest a path forward for the right to social housing to be recognized legally as being within the scope of s.15 on the grounds that homelessness constitutes a protected category and, thus, ought to be enforced by the judiciary.

As Canadian human rights scholars have noted, the only approach to equality rights in the *Charter* that would be acceptable is one based on the human rights norms of substantive equality, constructive immutability, poverty and homelessness as prohibited grounds of discrimination and understanding the disparate sources of persistent and systemic discrimination. "A rights-based approach, which restores equal citizenship to

[830] *Andrews*, *supra* note 218 at 174.
[831] *Law*, *supra* note 676 at para 70.

members of the group, is critical to a remedial, purposive approach to addressing homelessness and poverty amidst affluence."[832]

[832] Jackman & Porter, ''Rights-Based Strategies'', *supra* note 143 at 95.

C) Tanudjaja v. Canada in the Charter Context

It is quite difficult to know how posterity will view the *Tanudjaja* case. The case concluded having never been given full consideration by the courts, nor receiving a proper hearing. As a result, the matter of its *Charter* claims, remains unsettled, at least outside Ontario, and could even be the subject of future litigation. As Fay Faraday and others have said regarding the significance of the challenge

> the framing of housing security as protected by fundamental constitutional rights is worth examining in more detail because the nature of the framing engages fundamental issues of constitutional law that are relevant to the next evolution in the accessibility and enforceability of these rights.[833]

The implications of the application for future litigation are the purpose of my analysis in this section of the dissertation. Unpacking both the jurisprudence related to *Tanudjaja* (most notably the *Shantz* and *Adams* cases) the case itself, as well as the criticism of those decisions and the merits of the application may provide valuable clues for any litigation in the area of poverty reduction, homelessness, ESCR, and the right to social housing. At the very least, such an analysis will inevitably assess the prospects of the judiciary ever recognizing a right to social housing in Canada.

In this Chapter, I apply the lenses of Incrementalism, substantive equality, dialogue, international and comparative human rights norms, and the doctrine of polycentricity, to the *Tanudjaja* application, with a view to

[833] Heffernan, Faraday & Rosenthal, *supra* note 17 at 21.

critiquing both good and bad points in the decision to dismiss. In doing so, I will demonstrate why the case was essentially misunderstood by the courts and how such unfortunate misconceptions as the ones displayed in the judicial process, may be avoided by social rights champions, moving forward.

1) Tanudjaja and Incrementalism

One example of debate we have already seen with respect to Incrementalism, was the disagreement between Justice Lederer and the applicants over whether Ms. Tanudjaja's request that the court consider the right to social housing in the context of s.7, constituted an incremental step. The Judge was clearly of the opinion that it would never be Incrementalist in nature.[834] Whereas the Coalition behind the application framed their arguments as what both they and many others would describe as being essentially Incrementalist. Thus the latter requested "no specific concrete measures…simply that the two governments put their institutional minds to the development and adoption of some strategy to reduce and eliminate housing insecurity, in a framework that prioritizes the needs of vulnerable groups."[835] In other words, the application doesn't get into specifics with respect to policy prescriptions or legal remedies. Nor, pointedly, does it propose judicial recognition of a free-standing right to housing, as the ultimate solution to the *Charter* infringements suffered by Ms. Tanudjaja.

What accounts for this divergence of opinion in the application? Simply put the definition of Incrementalism varies depending on the

[834] *Tanudjaja*, *supra* note 9 at para 64.
[835] Young, "Charter Eviction", *supra* note 56 at 62.

particular circumstances of a given piece of case law and the way the remedy being requested is received by the judiciary. When Justice Lederer offers a definition of Incrementalism, which he conflates with the doctrine of the "Living Tree" (first applied by Lord Sankey in the landmark "Persons case"[836]), he means by this "an increase in the size of something in a series of small, often regular or planned stages."[837] He then goes on to contrast this definition with the one being promoted by the applicants which he maintains, are advancing claims that all "relate to the provision of *monetary supplements* that could be used to pay for proper accommodation. The policies that could be the subject of the review that is asked for go well beyond those affected by the decisions being questioned (emphasis added)." The clear implication being that the polycentric and broad range of public policies with respect to homelessness potentially implicated in a process of judicial review, render the application unsuitable for adjudication.

> What is sought here is anything but *incremental* It perceives not a single act or action, but a wholesale review of an entire policy area that would undoubtedly touch on a large number of other areas of governmental concern and responsibility, areas that would be of interest to other groups of our citizens (emphasis added). [838]

In Lederer's interpretation we see echoes of Fuller's spider web metaphor.[839] However, the application never posited that public funds needed to be redistributed towards social housing or government supported homeless programs. The assumption that all ESCR is necessarily based on "monetary supplements" is not well founded in this instance, and certainly should not be grounds for dismissal of the specific legal claims being advanced.

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[836] *Edwards v Attorney General for Canada*, [1930] AC 124 [*Persons case*].
[837] *Tanudjaja*, *supra* note 9 at para 64.
[838] *Ibid* at para 66.
[839] King, ''Pervasiveness'', *supra* note 286 at 3.

The issue of polycentricity raised by the application, according to Lederer's logic, is problematic in that it involves a broad consultation with the various actors, State and non-State, that are already involved in combating homelessness in Canada, and are better equipped than the courts to deal with the inherent complexity of the issues under review.

I would disagree with the Judge's assessment of *Tanudjaja* as a non-starter on the grounds that it sought wide ranging policy changes. The issue of homelessness and housing rights was framed in such a careful way by the applicants that it is, by and large, compatible with King's understanding of Incrementalism:[840]

Lederer begins by suggesting that the definition of Incrementalism established in *Gosselin*[841] necessarily rules out the acceptance of the claim being put forward by the application. But seen from the Incrementalist perspective derived from King's work, the *Gosselin* case is also an example of the principle of judicial restraint in the name of administrative flexibility. Indeed, King specifically cites the minority opinion of Justice Bastarache who, although he found in favour of Ms. Gosselin's unconstitutional discrimination claim, also would have deferred to the State in terms of proposing a remedy: "In determining the appropriate remedy in the case of legislation that is found to violate a *Charter* right, courts must walk a fine line between fulfilling their judicial role of protecting rights and intruding on the legislature's role (…)"[842] This is basically an example dialogue theory in

[840] "Incremental steps are those that require only a relatively small departure from the status-quo, or which, when addressing significant macro level policy, allow for substantial administrative or legislative flexibility by way of response." King, ''Judging Social Rights'', *supra* note 15 at 9.
[841] See majority opinion of McLachlin C.J. in *Gosselin*, *supra* note 49 at para 79.
[842] *Ibid* at para 292.

action, whereby "sometimes, judges wisely indicate that it is not their role to specify what is required."[843] It reinforces, rather than undermines, the Incrementalist nature of the claim being advanced by Ms. Tanudjaja and her co-applicants. Hence, according to this logic, the claim in *Tanudjaja* was also exercising similar restraint when they argued that their application was focused on the infringement to life, personal security and the benefits of equality under the *Charter*, rather than the means that the State should adopt to redress the homelessness situation. Indeed, they framed the issue in a broad manner indicating "the present application does not request that either Respondent be ordered to implement any particular measures that would provide housing or would entail the *expenditures of any monies* (emphasis added)."[844]

The *Tanudjaja* decision diverged with Incrementalism in other areas as well. Judge Lederer appears to believe that the *Chaoulli* decision demonstrates the correct application of the *Charter* with respect to relationship between s.7 and substantive ESCR obligations on the State. Accordingly, just as there is no freestanding right to health care in the *Charter*, there should be no freestanding right to social housing.[845] This is a fundamental misreading (an error that would be repeated by the majority of the Ontario Court of Appeal) of the application, which does not, by any means, propose that there exists a substantive right to social housing and corresponding obligation on the State in Canadian law, to provide for it. Instead, *Tanudjaja's* applicants makes the case that, in light of overwhelming evidence, homelessness is a violation of the rights contained in s.7 and s.15,

[843] King, ''Judging Social Rights'', *supra* note 15 at 284.
[844] Heffernan, Faraday & Rosenthal, *supra* note 17 at 33.
[845] *Tanudjaja*, *supra* note 9, at para 31-32.

and that structural and systemic causes (including inadequate and underdeveloped governmental policies and programs) are to blame for the ongoing violation of these *Charter* rights.

King understands the implications of *Chaoulli* differently from Lederer, and makes the argument that, far from being an appropriate model of judicial deference, as the latter seems to think, it is instead a cautionary example of Canadian judicial activism ran amok. This is due to the decision in *Chaoulli* ignoring much of the social science evidence and imposing an arbitrary remedy with unclear consequences for the problem of hospital wait times. Accordingly, the problem of health care policy in *Chaoulli* require far more diligence than was shown by the Supreme Court of Canada in this instance. Especially when we consider the effects of such a dramatic shift in policy on the most essential institutions in society (e.g. the health care system). King observes the need for judicial deference in *Chaoulli* on the basis of the Incrementalist principles vis-à-vis ESCR.[846] Since rights based-reviews by the courts, such as the right to life and equality, are inevitable, "it is necessary to include social rights among the protected rights because otherwise fundamental socio-economic interests will be unjustly subordinated to classical civil rights." This can be achieved by constitutionalization, legislation, or judicial recognition of ESCR.[847]

By the same token, the refusal to spell out a specific right to social housing for the problem of homelessness contained in Ms. Tanudjaja's challenge, is subscribing to this same principle of Incrementalism. That is;

[846] *Ibid*.
[847] King, "Constitutional Rights", *supra* note 697 at 639.

the application is not asking the Court to rule on whether the right to social housing exists in Canadian law, and, if the answer is positive, an application of such a right as a remedy. Rather, it was asking the Court to determine whether s.7's "Right to Life" and "Security of the person," and s.15's right to "equal Benefit under the Law," were being infringed; nothing more, nothing less.

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On the question of whether the supervisory order being requested would be appropriate in this instance, Lederer J. was not convinced of its legal validity. The counsel for the David Asper Centre for Constitutional Rights submission had argued that a supervisory role for the court was not only constitutional under s.24 of the *Charter*, but also perfectly applicable to the circumstances of the litigation, in view of the decision of the Supreme Court in *Doucet*.[848] Judge Lederer disagreed with the David Asper Centre for two reasons: 1) the application was not impugning a single government policy or program that existed, unlike *Doucet* that was based on the well-established doctrine of "where number warrant" (e.g. *Mahé*). 2) The fact that the *Charter* clearly binds governments to provide public French language education under s.23. The application, by contrast, required the Court to undertake a comprehensive policy review, whereas in *Doucet* there was nothing of the sort.[849]

On the former point, the Judge appears to be on relatively firm ground. The fact of the matter is that *Tanudjaja,* by the R2H's (the NGO coalition that drove the application) own admission, constitutes a novel

[848] *Tanudjaja* CA, *supra* note 45 at para 61.
[849] *Tanudjaja*, *supra* note 9 at para 90.

constitutional challenge. It does not have the benefit of a series of precedents and established doctrine laying down the parameters of where and when the courts should intervene in State policies on homelessness, in the way that the lower court judge in *Doucet* did with respect to minority language education rights. Hence, as the reader already knows, King does consider *Doucet* to be a successful example of judicial Incrementalism, despite the controversy surrounding certain aspects of the remedy, saying "[t]he case illustrates how even a *mild supervisory jurisdiction* in a case with clear history of non-compliance prompted strong divisions (emphasis added)."[850]

On the second point about the judicial practice of non-interference with regards to policy matters and the questionable democratic legitimacy of such reviews, which is only hinted at in his judgment, Judge Lederer has far less credibility. The notion that an issue is too political to be justiciable simply does not hold water in light of *Charter* jurisprudence.[851] As for the question of whether courts have a mandate to hear matters that are historically left to the legislatures to resolve, it is still quite contentious. Normatively speaking, and according to the conditions laid down in King's guidelines for judicial deference, it is highly debatable whether the claim being made by the appellants in *Tanudjaja* infringes the boundary between the judiciary, on the one hand, and the legislative and executive branches, on the other. Where fundamental human rights are at stake, the presumption that law makers should have the final say, is based to a certain extent on a demonstration of political will, by the latter, to protect those rights[852] and notions of parliamentary supremacy, that are not altogether compatible with the *Charter*

[850] King, ''Judging Social Rights'', *supra* note 15 at 273.
[851] Sossin, ''Boundaries of Judicial Review'', *supra* note 173 at 133.
[852] King, ''Judging Social Rights'', *supra* note 15 at 153.

era's emphasis on judicial review of public policy. I would argue, then, that the obvious blind spot that legislatures in Canada have repeatedly displayed towards the most marginalised in our society, namely its homeless population, would seem to be a strong argument in favour of judicial intervention, especially in the context of this application.

2) Tanudjaja and Substantive Equality

The s.15 claims proposed by the application are very much part of the doctrinal tradition articulated definitively in the Supreme Court ruling in *Eldridge* according to which there is a crucial distinction between formal and substantive equality,[853] with the latter being focused on pre-existing disadvantages of the claimants in relation to the rest of society. Furthermore:

> The equality claims in the *Right to Housing* challenge addresses three themes. It examines the principle of substantive equality; the government's role in *creating* a new disempowered class within society; and the discriminatory impacts that the federal and provincial actions have on discrete and identifiable marginalized populations.[854]

Lederer J. does not frame the equality issue at the heart of *Eldridge* in the same manner. Instead, he prefers to consider it an example of reasonable accommodation doctrine. "To be clear, what was applied in *Eldridge* is the concept of reasonable accommodation, the idea that to treat those with disabilities 'equally', we may have to provide different treatment…"[855] Moreover, Lederer J. discounts the value of the precedent for *Tanudjaja.* That is, that the positive dimension to s.15 found in *Eldridge* when the Supreme Court

[853] Young, ''Charter Eviction'', *supra* note 56 at 56.
[854] Heffernan, Faraday & Rosenthal, *supra* note 17 at 29.
[855] *Tanudjaja*, *supra* note 9 at para 74.

ruled that "the action it compelled was not directed to the provision of programs to deal with a societal concern, but to ensure that an existing benefit the state was already delivering was provided in a manner that did not discriminate."[856] Whereas, Ms. Tanudjaja's claim was against a systemic and pervasive form of discrimination, including the discrimination faced by homeless Canadians in the housing market. *Ergo,* their *Charter* right to equality was being denied.

It is not quite true that *Eldridge* did not yield a positive obligation on the State, nor is it correct to say it didn't touch on positive obligations under s.7, as Lederer J. suggested in his analysis.[857] While it may be true, that *Eldridge* has not created a general positive obligation, it is surely a misapprehension to say that the Supreme Court did not impose a positive obligation upon the State due to a breach of s.15 of the *Charter,* in order to redress its discriminatory behaviour. On the contrary, it should never be forgotten that the Supreme Court ruled that "[t]he principle that discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public is widely accepted in the human rights fields."[858]

The concept of "constructive immutability" as defined by the Supreme Court of Canada in *Corbiere* was discussed previously (in Section 9 of Chapter B) of this dissertation. Courts have often struggled with the doctrine related to analogous grounds under s.15, and it continues to be problematic when applied to communities struggling with homelessness and

[856] *Ibid* at para 73.
[857] *Ibid* at para 76.
[858] Eldridge, *supra* note 121 at para 78.

poverty. Indeed, jurists like Lederer J. continue to cling to the debatable notion that homelessness is not immutable in that people have many possibilities of escaping poverty and getting off the streets, regardless of powerful evidence to the contrary.[859]

A case in point can be found in the application, when, in distinguishing the facts in *Tanudjaja* from the case in *Falkiner*[860] Justice Lederer suggested that the homeless population does not constitute an identifiable group suffering discrimination on the basis of immutable characteristics:

> This is not, strictly speaking, immutable. The identity of the people who are eligible to collect these benefits will change as the vagaries of life impact on the individuals involved…In the circumstances of this Application, it is not possible to identify who is "homeless."[861]

Moreover, he claimed that, according to the fact pattern, since the group filing the application possessed a diverse set of characteristics it was impossible to argue that they were a homogenous group. However, in *Corbiere* and *Falkiner,* the courts were more concerned with a contextual analysis that included "how residency status was tied to social identity and social relations."[862] The analysis in *Corbiere* also went beyond the particular circumstances of the claimants, to touch on conditions of discrimination that

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[859] See Sylvestre & Bellot, *supra* note 523 at 184.

[860] In *Falkiner v Ontario (Ministry of Community and Social Services, Income Maintenance Branch),* [2000] OJ No 1771, the Ontario Court of Appeal overturned the Ontario Government's "spouse in the house" rule for welfare eligibility on the grounds of discrimination. The question was whether amendments to Ontario's social assistance regulations, which dramatically change the definition of the term "spouse" for the purpose of receiving benefits, infringes upon sections 7 and 15 of the *Charter*. These regulations provide that, if a recipient of benefits lives with a person in common law relationship, the two are presumed to be spouses and the recipient is presumed to have access to the income of the other person.

[861] *Tanudjaja*, *supra* note 9 at para 129.

[862] Jackman & Porter, ''Rights-Based Strategies'', *supra* note 143 at 88.

have their roots in historical, economic, social and racist governmental policies not under review, *per se*, by the Court.[863] Although, in fairness, Justice Lederer appears to acknowledge this fact when he concludes "[w]hatever an analogous ground may be, they are not restricted to characteristics that bear that [immutability] quality."[864]

3) Tanudjaja and International Law

Perhaps most strikingly for any jurist with training in international human rights law, there is a conspicuous absence of any substantive references to the international comparative legal doctrines of ESCR, in any of the proceedings related to the *Tanudjaja* application. It beggars belief that all of the jurists presiding over the case could essentially ignore such a substantial source of human rights, including the international case law, doctrines and treaties, some of which bind Canada, in a litigation based in part, on the international human right to housing. Moreover, these matters have also been the subject of any number of foreign, constitutional and legal challenges and discussions among jurists for a least forty years.

At first glance it would seem to be yet another sad example of the Canadian judiciary's traditional double standard with regards to the relevance of international norms of ESCR, versus the supposed undeniable relevance of the same type of international public law sources with respect to so-called "negative" first generation rights (for example, in *Tanudjaja*, Lederer J.

[863] *Ibid*.
[864] *Tanudjaja*, *supra* note 9 at para 123.

alluded to the presumption of innocence found in international instruments in the context of *Oakes)*.[865]

The reality of this omission of any references to international law in the ruling is even more troubling. Judge Lederer and others, not only dismissed their importance when he stated bluntly in one of the concluding paragraphs that "whatever international treaties may say about housing as a right is not of much help."[866] He also, whether deliberately or mistakenly, made no reference to their importance in any of the Canadian jurisprudence adduced by the parties to the application.

The Court's analysis in *Tanudjaja* looked at the British Columbia Supreme Court precedent in. *Adams* for an example of s.7's possible relationship with the right to adequate housing in Canada. The facts of the case concerned the homeless community in the city of Victoria challenging a city by law that prohibited the building of temporary shelters in public parks where the homeless applicants lived. The applicants of the case not only maintained that this violated their constitutional s.7 rights but also that this must be viewed as a violation of international human rights law. As Justice Ross put it, "they seek to have reference to the international covenants as an aid in the interpretation of the meaning and scope of rights under the *Charter*."[867] Justice Ross also mentioned specifically the UDHR and the ICESCR's Article 11[868] as being relevant factors when courts in Canada look at the connection between ESCR and s.7. In her conclusion, she found that "while the various international instruments do not form part of the domestic

[865] *Ibid* at para 150.
[866] *Ibid*.
[867] *Adams*, *supra* note 257 at para 95.
[868] *Ibid* at paras 85-87.

law of Canada, they should inform the interpretation of the *Charter* and in this case, the scope and content of s.7."[869] This aspect, among others, of her decision, was subsequently upheld by the British Columbia Court of Appeal (BCCA), in its review of the case.[870]

Lederer J. chose to ignore this significant aspect of the case. Instead, to the limited extent that he found the case useful, he focused on the limiting of s.7's scope, which does not require a State intervention to create temporary shelter. Rather, it aimed to strike down a city bylaw that prevented homeless people from protecting themselves from the elements by the building of such structures, thus undermining their right to personal security, under s.7.[871] He highlighted that the British Columbia Court of Appeal, in "respect of the putative right to shelter", dismissed the right to erect temporary shelters which would have amounted to a property right.[872]

This element of the *Tanudjaja* judgment is highly problematic, in at least two ways. Firstly, it ignores what is arguably a key component of the applicant's *Charter* argument in *Adams* with respect to the impact of international human rights law on Canadian human rights in general and specifically on s.7 rights.

Secondly, it is also questionable, in a more technical legal sense. By this I mean it is well established in judicial practice that as a matter of common law, according to the hierarchical nature of the court system and the

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[869] *Ibid* at para 100.
[870] Court of Appeal states the following "The use of international instruments to aid in the interpretation and meaning and scope of rights under the *Charter*, and in particular the rights under s.7 and the principles of fundamental justice, is well-established in Canadian jurisprudence." *Adams CA*, *supra* note 665 at para 35.
[871] *Tanudjaja*, *supra* note 9 at para 79.
[872] *Ibid* at para 80.

doctrine of *stare decisis,*[873] lower courts are bound by the precedents set by courts that are constitutionally above them. Given the federal nature of Canada's judiciary, it is not uncommon for court decisions to go beyond their jurisdiction of origin and be applied by judges throughout Canada.[874] The British Columbia Court of Appeal is the highest appellate court in that Province, and though it may be in another jurisdiction, and thus its precedents are not strictly speaking binding on Ontario courts, it remains above them in the legal hierarchy. Regardless of the status of the case being pre-trial, Judge Lederer was probably not sufficiently honouring this central common law principle when he neglected to at least acknowledge the persuasive precedent set with respect to the pertinence of international human rights norms in *Adams*. Yet, he had no qualms citing the precedent in the related case of *Johnston,*[875] another British Columbian case*,* as proof that "Section 7 of the *Charter* does not provide a positive right to affordable, adequate, accessible housing and places no positive obligation on the state to provide it."[876]

4) Abbotsford v. Shantz

The *Shantz* case, adjudicated in 2015 by the Supreme Court of British Columbia, after *Tanudjaja* had been settled, also dealt with a question of the intersection between ss. 7 and 15 of the *Charter*, on the one hand, and the violations of these suffered by the homeless community in the city of

[873] For more on the doctrine of *stare decisis* in the Canadian legal context see *Canada v Craig*, 2012 SCC 43, [2012] 2 SCR 489; *R v Henry*, 2005 SCC 76, [2005] 3 SCR 609.
[874] See e.g. *Barbeau v British Columbia (AG)*, 2003 BCCA 406 at para 3-8 where the Court of Appeal of British Columbia, in supplementary reasons, cited the ruling of the Ontario Court of Appeal in *Halpern v Canada (AG)*, 2003 CanLII 26403 (ON CA), (2003) 65 OR (3d) 161 with regards to that court's finding that the common law definition of marriage as being between a man and women, contravened s.15, was not saved by s.1 and ought to be remedied immediately.
[875] *R v Johnston*, 2006 BCSC 1592, [2006] BCJ no 2817 (QL).
[876] *Tanudjaja*, *supra* note 9 at para 81.

Abbotsford, on the other. The case was equally concerned with *Charter* claims regarding infringements of s.2(c) and 2(d), freedom of peaceful assembly and freedom of association, respectively.[877]

More to the point, for my examination of the right to social housing, Chief Justice Hickson cited the ruling in *Tanudjaja* a handful of times in his decision. The result was the realization of the R2H's worst case scenario: in effect, Hickson relied on the precedent (though largely procedural) set by Judge Lederer *vis-à-vis* the absence of any "positive right" to housing in Canadian law without regard to the substantial legislative facts, compelling *Charter* arguments, and novel interpretations made by Ms. Tanudjaja and her co-applicants, in their challenge.

Shantz involved social rights activists (Drug War Survivors or DWS) suing the city of Abbotsford for damages and to overturn city by-laws that required permits and licenses to camp on city grounds overnight. City authorities also allegedly ran a campaign of persistent harassment, in their attempts to remove the homeless applicants sleeping rough in public spaces.

The applicants successfully petitioned and received a remedy from the Court on the grounds of a s.7 breach. In its decision the Court struck down the bylaw under review. However, the claim for damages and redress for s.15 and s.2[878] breaches of the *Charter* were dismissed.[879]

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[877] *Shantz*, *supra* note 61 at para 4.
[878] *Ibid* at paras 5, 267, 271, 283-284.
[879] "I declare that portions of the bylaws passed by the City which prohibit sleeping or being in a park overnight without permits or erecting a temporary shelter without permits violate the guarantee the right to life, liberty and security of the person set out in s. 7 of the *Charter*. I decline to issue other declaratory relief sought by DWS or to award any damages". *Ibid* at para 6.

It's seems that the *Tanudjaja* application served to reinforce the Chief Justice's findings in *Shantz* in three key ways: 1) No "positive" right to housing in Canadian law;[880] 2) homelessness is not an analogous ground under s.15;[881] 3) Hickson J. also reinforced the dubious political questions doctrine argument advanced in *Tanudjaja.* He stated bluntly "it is not for this Court to wade into the political arena to assess the city's reaction to the need for housing."[882]

Margot Young's *post-mortem* analysis of *Shantz* identified at least one silver lining for critics who decry the lack of analysis by the courts of the systemic and structural causes of homelessness "the Court forged new progressive ground in relation to evaluating shelter availability. It recognised that the accessibility to specific shelter spaces can be complicated, nuanced and 'impractical for homeless individuals."[883]

Other legal scholars found the decision by the Court puzzling and its use of precedents to resolve the legal issues associated with the plaintiff's homelessness, questionable. Hamill states that the case unfortunately repeats the error made in *Adams* in its analysis of s.7 infringements, essentially adopting the negative conception of the right to life in the *Charter* and limiting itself to determining whether State actors had behaved unconstitutionally in interfering with it.

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[880] "In seeking remedies that require the City to have regard to the *Charter* rights of the City's homeless, DWS is not seeking to impose any positive obligations on the City. Indeed such a remedy was held to be non-justiciable by the Ontario Court of Appeal in *Tanudjaja v. Canada* […]". *Ibid* at para 148.
[881] *Ibid* at para 231.
[882] *Ibid* at para 123.
[883] Young, ''Abbotsford v Shantz'', *supra* note 77 at 153.

> As with *Adams*, *Shantz* held that municipal bylaws that sought to limit or prevent overnight 'camping' in urban parks were unconstitutional because they violated section 7 of the *Charter*. Like *Adams*, such a holding ignores that the nature of the claim was not necessarily about overnight camping but about a tent city, or as they were called in *Shantz*, 'tent camps.'"[884]

This mistake could have been avoided had Hickson CJ viewed the issue of homelessness more holistically. That is, the Court ought to view the "tent city" as a symptom of a much greater problem in access to social housing for the residents of Abbotsford. Insofar as the *Charter* claim in *Shantz* was successful, it was only successful in terms of the section 7 claim. What *Shantz* did not make explicit is that a right to life is not much use without space in which to live.[885]

Hamill does find that the decision, though ultimately negative regarding the Fundamental Freedoms claims of the plaintiffs, gives the homeless community some cause for hope. Here Hickson CJ seems to suggest that the homeless of Abbotsford have a constitutional right to access public spaces. Albeit one that is restricted by the need to reconcile their claim with those of the general public. Is this, Hamill ponders, a positive obligation on State actors to strike a balance between competing *Charter* rights, in this case, between homeless and other users of public property? "It also suggests that the government is responsible for ensuring that one group does not ride roughshod over the rights of others to use particular spaces for the exercise of certain rights."[886]

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[884] Hamill, *supra* note 300 at 81.
[885] *Ibid* at 90.
[886] *Ibid* at 92.

Together with the *Tanudjaja* application, *Shantz* represent a judicial closed-mindedness to *Charter*-based legal strategies for combating homelessness in Canada. These two cases were innovative attempts to fit the regular and repeated violations of the rights of Canadians living on the street, into a constitutional and legal framework that mostly ignores, or worse, criminalizes their existence. In their indifference to this reality, the judges that heard both of these claims, appeared to arguing that the thin equality of s.15, excludes any meaningful responsibility on the State and the acceptance of an s.7 infringement (in *Shantz*), is only justiciable in the sense of non-interference with the right to life. Thus, the courts seemed to be, perhaps unintentionally, invoking the spirit of French author Anatole France's famously sarcastic aphorism, illustrating the difference between formal and substantive equality rights. "la majestueuse égalité des lois, qui interdit au riche comme au pauvre de coucher sous les ponts, de mendier dans les rues et de voler du pain."[887]

[887] Anatole France, *Le lys rouge,* (Paris: Calmann-Lévy, 1894) at 118.

D) Canadian Statutes and Policies relevant to the Right to Social Housing

There are a number of different statutory, regulatory and policy instruments concerned with social housing at the federal level in Canada. The most important among them are the *National Housing Act* (NHA)[888] (the statute that empowers the Canadian Mortgage and Housing Corporation) or CMHC and the *Canadian Human Rights Act*[889] (CHRA). In this Chapter both of these will be examined, with the goal of determining what these statutory instruments currently offer in terms of housing rights provisions, and how they could potentially affect a recognized human right to social housing in Canada.

The NHA is an example of a federal law that regulates certain aspects of the housing market throughout Canada. The statute has historically played a small but crucial part in the development and regulations of the housing sector, especially as regards social housing, across the country. Moreover, it provides the legal mandate for the Crown Corporation CMHC that built and funded much of the country's social housing stocks in the post-war era, and is still involved, to a much smaller degree, in the production and maintenance of social housing throughout the country.

The CHRA and the Canadian Human Rights Commission provide a number of grounds on which discrimination by a Federal State actor is prohibited and can be legally challenged. It can be regarded as primarily a

[888] *National Housing Act, R.S.C. 1985,* c. N-11 [*NHA*].
[889] *Canadian Human Rights Act,* RSC 1985, c H-6 [*CHRA*].

conservative conception of the right to housing, in so far as it only enforces non-discrimination provisions in Federal housing and residential accommodations without guaranteeing any access to social housing. These guarantees are still relevant with respect to the right to housing and ESCR questions in Canada more generally.

As we shall see later in my analysis of the right to social housing in Quebec (Chapter E), while the regulation of the housing sector remains, constitutionally speaking, a provincial jurisdiction, in Canada's Federal system, there are areas of overlapping powers, particularly with respect to management of homelessness and social housing. Municipal governments are increasingly sharing the responsibility for the provision of social housing and creating new policies for addressing homelessness.

> For example, the federal government possesses unilateral power to legislate on criminal activity and drug policy; the provincial governments legislate on social assistance, housing, mental health policy, and child welfare; and the local governments legislate the neighbourhood dimensions of homelessness, like zoning and provision of housing, shelter, and community services.[890]

Indeed, when jurisdictional issues arise over intersecting or conflicting policies related to social issues and questions of the *Charter*'s application, courts in Canada, particularly at the Federal level, have shown a flexibility at odds with strict doctrines of federalism, such as that of "interjurisdictional immunity"[891] in favour of more recent and purposive

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[890] Carey Doberstein, *Building a Collaborative Advantage: Network Governance and Homelessness Policy-Making in Canada* (Vancouver: UBC Press, 2016) at 50.

[891] See Justice Bastarache's minority opinion: " … the test for immunity should not focus on any specific *activity* or operation at issue […] and whether this activity or use is immune from the municipal by-law, but rather on whether the federal *power* over navigation and shipping (expressed in this case as the federal power over land use planning and development decisions by a port authority, a federally regulated undertaking) is immune from the application of the municipal by-law. The immunity doctrine is about jurisdiction;

doctrines of federalism. The Supreme Court recently declared that, "[i]n summary, the doctrine of interjurisdictional immunity is narrow. Its premise of fixed watertight cores is in tension with the evolution of Canadian constitutional interpretation towards the more flexible concepts of double aspect and cooperative federalism."[892]

what matters is whether or not a provincial law affects the core of a *federal head of legislative power*, regardless of whether or how that federal power is exercised or will be exercised, if at all, with respect to a particular project or activity." *British Columbia (AG) v Lafarge Canada Inc,* 2007 SCC 23 at para 109, [2007] 2 SCR 86.

[892] *PHS*, *supra* note 583 at para 70.

1) The National Housing Act and Canadian Mortgage and Housing Corporation

In the 20th Century, the largely forgotten *Wartime Housing Limited Agency* (WHL), a Canadian crown corporation was the most significant driver of social housing during the war and the immediate post-war period. Responding to the enormous growth in the general population and families. "Social housing on a significant scale was initiated in Canada by the…WHL, which built 46,000 rental homes for working class munitions employees and returned veterans, from 1941 to 1948."[893]

However, significantly, the WHL was amended in 1964 (becoming the NHA) to provide cheap loans to provincial housing agencies, essentially paving the way for more social housing. This led the Federal government in 1969 to expand the NHA even further to provide for cooperative and non-profit housing programs.[894] This, in turn, "launched an effective public housing program that created about 200, 000 units over about 10 years."[895]The NHA is sometimes described by historians as the Country's first ever national housing program.[896]

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[893] Suttor, *supra* note 560.
[894] Allan Moscovitch, "Welfare State" (last edited 13 August 2015), online: *Canadian Encyclopedia* <www.thecanadianencyclopedia.ca/en/article/welfare-state/>.
[895] Hulchanski, *supra* note 64 at 6.
[896] Cathy Crowe, "Canada needs a new national housing program", *The Globe and Mail* (3 October 2019), online: <www.theglobeandmail.com/opinion/article-canada-needs-a-new-national-housing-program/?utm_medium=Referrer:%20Social%20Network%20/%20Media&utm_campaign=Shared%20Web%20Article%20Links&fbclid=IwAR35jjn3UT65ENxWeSDH3xhVOhiHu7ULnZIS5fqjcxLfzSdmAiTe6QjXE4g>.

Founded in 1946, the CMHC has had a role in the construction of almost half of all the social housing in Canada. It has achieved this through a variety of means, including insuring private mortgages, and provision of grants and affordable loans to prospective home owners.[897] More to the point, according to its own mandate, the CMHC must be engaged in affordable housing initiatives:

> The CMHC is concerned with providing housing for low-income people and meeting special needs of the elderly and disabled. The Corporation administers programs to encourage provinces, cities, and non-profits and cooperative societies to provide housing for those who would otherwise be unable to obtain adequate or *affordable housing* (emphasis added). [898]

In the 1980's Canada, like many developed countries with neo-liberal economic policies, witnessed the beginning of the unraveling of its welfare State institutions. The Federal government led the way with massive cuts to social housing construction, eventually coming to head with an almost complete cancelation of social housing subsidies in 1993.[899]

With the elimination of the *Canadian Assistance Plan* (CAP) in 1996 (See Chapter A, Section 2), and its replacement by a system of transfer payments between the two levels of government (Federal and Provincial), some provinces, embarking on their own largely neo-liberal agendas, began to eliminate social programs including social housing programs with devastating effects for the social housing sector of the economy.[900] "Today Canada has the most private sector dominated, market-based housing system

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[897] Anne Mcafee, "Canada Mortgage and Housing Corporation" (last edited 16 December 2013), online: *Canadian Encyclopedia* <www.thecanadianencyclopedia.ca/en/article/canada-mortgage-and-housing-corporation/>.
[898] *Ibid*.
[899] Hulchanski, *supra* note 64 at 6.
[900] Heffernan, Faraday & Rosenthal, *supra* note 17 at 12.

of any Western nation…and the smallest social housing sector of any major Western nation." [901]

This had led many experts on housing in Canada to conclude, that the NHA and CMHC must renew their commitment to social housing, and that the recognition of housing rights as human rights would serve as an impetus for this shift. "A focus on the human right to adequate housing for all Canadians, which was the basis of housing policy from the mid-1960s to the mid-1980s, is essential to promote sustainable urban development, human development and social cohesion."[902]

2) Canadian Human Rights Act and the Human Rights Commission

Does the Federal human rights framework hold a potential solution to the absence of any right to social housing in Canada? First of all, it is important to understand the jurisdiction, mandate and scope of the institutional framework created by the *Canadian Human Rights Act* (CHRA). The CHRA, the Human Rights Commission and Human Rights Tribunal (a quasi-judicial body tasked with inquiring into and enforcing rights under the CHRA) were all created in 1977 with the following mission:

> Protecting people in Canada from discrimination when they are employed by or receive services from the federal government, First Nations governments or private companies that are regulated by the federal government such as banks, trucking companies, broadcasters and telecommunications companies. [903]

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[901] Hulchanski, *supra* note 64 at 7.
[902] *Ibid*.
[903] "Human Rights in Canada" (6 June 2019), online: *Canadian Human Rights Commission* <www.chrc-ccdp.gc.ca/eng/content/human-rights-in-canada>.

This, naturally, includes discrimination in Federal housing.[904] It is important to mention, however, that the jurisdiction of these bodies extends only to entities falling within their remit and those regulated by Federal statute. Significantly, there is a growing body of case law at the Tribunal pertaining to judicial review of the Crown's obligations towards First Nations peoples, particularly with respect to the enforcement of non-discrimination in funding for public services on-reserve.[905]

However, two obstacles to a hypothetical social housing rights claim posed by the Federal regime are relevant here: 1) according to Johnson and Howe's study of the human rights codes of Canada, discrimination in housing is largely relegated to provincial tribunals and other quasi-judicial bodies;[906] 2) more problematically, the CHRA does not recognize discrimination on social grounds, poverty or homelessness. This situation persists despite the fact that all other governments in Canada, provincial, and territorial, have enacted legislation to protect individuals from discrimination on such grounds (whether perpetrated by private or public entities operating in the housing market).

There is some hope that this may be rectified one day. The Canadian Human Rights Act Review Panel, led by former Supreme Court Justice Gerard La Forest, recommended that "the inclusion of social condition as a prohibited ground of discrimination in all areas covered by the *Act*…in order

[904] Robert Brian Howe & David Johnson, *Restraining Equality: Human Rights Commissions in Canada* (Toronto: University of Toronto Press, 2000) at 3.
[905] See e.g. the case of *First Nations Child and Family Caring Society of Canada* et al*. v Canada (Minister of Indigenous and Northern Affairs)*, 2016 CHRT 2.
[906] Howe & Johnson, *supra* note 904 at 3.

to provide protection from discrimination because of disadvantage socio-economic status, including homelessness."[907]

In a more recent study (2009) of the situation, published by the Human Rights Commission itself, the authors detailed the arguments in favour of incorporating poverty or social condition into the CHRA.

> There continues to exist a significant problem of poverty in Canada and one of its manifestations is in the form of social condition discrimination. The response of the legislative, executive and judicial branches of the Canadian state has not been adequate, in our view, and the addition of the ground of social condition to the CHRA in a controlled and defined way will be one more tool in advancing the rights and interests of those on the margins of Canadian society. [908]

Even with such a provision, however, the CHRA is still an unlikely instrument for the implementation of the right to housing on national scale, due to the fact that it does not recognize any substantive rights in this regard, nor does it apply outside the Federal jurisdiction.

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[907] Nancy Holmes, Canada & Direction de la recherche parlementaire, *Le Comité de révision de la Loi canadienne sur les droits de la personne, rapport de 2000: résumé* (Ottawa: Direction de la recherche parlementaire, 2002) at 106-112.

[908] A Wayne MacKay, Natasha Kim & Canadian Human Rights Commission, *Adding Social Condition to the Canadian Human Rights Act* (Ottawa: Canadian Human Rights Commission, 2009) at 210.

3) The National Housing Strategy

In the course of writing and researching this dissertation, the Canadian government made a startling and highly promising announcement: the creation of a *National Housing Strategy* (NHS). In a published policy paper, it is described as:

> A rights-based approach to housing will ensure that the National Housing Strategy prioritizes the most vulnerable Canadians including women and children fleeing family violence, Indigenous peoples, seniors, people with disabilities, those dealing with mental health and addiction issues, veterans and young adults.[909]

The NHS was released November 22nd, 2017, and was accompanied by the usual combination of press releases and conferences at which the former Minister (The Hon. Yves Duclos, Minister of Families, Children and Social Development) in charge and, more importantly the current Prime Minster, Justin Trudeau, made an unprecedented acknowledgment of housing as a basic human right in Canada. "Housing rights are human rights and everyone deserves a safe and affordable place to call home... and one person on the streets in Canada is too many." [910] Indeed, the law makes explicit reference to Canada's obligations under ICESCR, to progressively realize the right to adequate housing.[911]

However, as with all such pronouncements by political actors, careful scrutiny of the proposed legal measures by human rights scholars and jurists must be brought to bear. Nor does the Federal statute, laudable as its preamble

[909] *Place to Call Home*, *supra* note 327 at 4.
[910] Tasker, *supra* note 382.
[911] *NHS, supra* note 7.

might sound, provide a legal framework for either the form or the foundation in which the right to social housing will be grounded.

Yet, the fact remains, even if only a symbolic declaration of principles, the document is the first of its kind and deserves a deeper analysis. By this I mean it is the first time that the Federal Government of Canada has recognized the right to housing publicly, emphatically and in an officially sanctioned publication and as such represents a significant and exciting opportunity for Canadians to finally enjoy one of the fruits of the Second Covenant signed by Canada over four decades ago.[912]

It has to be stressed that it is somewhat premature to discuss the NHS at this stage, the law having only been enacted in the summer of 2019. However, the policy paper does describe, albeit in very broad terms, what potential legal instrument might be put forward by the government, for the purpose of bringing the right to social housing into force.

The first element is a federal law that would regulate some aspects of the housing crisis in Canada and be mainly predicated on providing access to housing, to "vulnerable populations." The NHS recognizes that many identified as being marginalized in the housing market (women, indigenous peoples, etc.) are excluded from housing in part because of entrenched systemic discrimination. Hence, the need for a human rights approach. "By implementing a human rights-based approach, housing access will be facilitated for populations identifying systemic barriers and discrimination."[913]

[912] *Place to Call Home*, *supra* note 327 at 8.
[913] *Ibid* at 25.

Legislation will accomplish this in two ways: 1) it will require the Minister in charge to provide reports to Parliament on their progress with the NHS. In particular, a detailed NHS report will be tabled by the government every three years, starting in 2020, and assessing the progress of the policy.[914] 2) The NHS also proposed the creation of a new office: the Housing Advocate. Their mandate would be to assist Canadians with housing issues by giving them:

> the opportunity to raise systemic issues or barriers they face in accessing adequate housing. The Federal Housing Advocate will provide advice to Canada Mortgage and Housing Corporation and the responsible Minister, identifying potential corrective actions to these systemic barriers.

Aside from these aspects, other more vague measures designed to protect the right to social housing include the creation of a public awareness campaign intended to inform Canadians of their housing rights.[915] And a so called "Community-Based Tenant Initiative"[916] that may provide resources and support to tenants with legal and human rights issues.

Admirable though these goals may be, they do not amount to a justiciable and substantive legal right to social housing in Canadian law. It remains to be seen what coercive legal powers, if any, the Federal Housing Advocate will wield, and the way in which the role will play out both on a

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[914] *Ibid*.

[915] "Reducing discrimination and stigma are pillars of a human rights-based approach to housing. The Government of Canada will undertake a multi-year public engagement campaign focused on better informing public views on different housing types and tenures." *Ibid at 9*.

[916] "A new, community-based program will provide funding to local organizations that assist people in housing need. As a result of the proposed initiative, those in housing need will be better represented and able to participate in housing policy and housing project decision making." *Ibid*.

policy and a legislative level, will determine the effectiveness of such a new parliamentary mechanism.

Should the Housing Advocate's office operate at arm's length from the executive and be sufficiently resourced to investigate the government's implementation of the NHS. As well as hearing complaints from private citizens with respect to housing rights issues, similar to the role played by the Privacy Commissioner[917] in Canada. They might have the potential to pressure the government and relevant policy maker, into action on housing reform and the right to social housing. As it stands, the idea of an internal officer of the Federal ministry responsible for housing, being able to cajole the Federal government into compliance with their housing rights objectives or influencing them through appeals to the minister in charge of the file or the CHMC, seems more like wishful thinking than reality.

On balance, there is little in the way of robust protection or enforcement for the right to social housing in the Federal government's NHS.

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[917] "The Privacy Commissioner monitors compliance with the *Privacy Act* and investigates complaints that the federal government has not responded adequately to an individual's request to see personal information or that a federal agency is collecting information in a manner that does not comply with the *Privacy Act*. The Privacy Commissioner is also responsible for complaints relating to the collection, disclosure, use and protection of personal information in the private sector under the *Personal Information Protection and Electronic Documents Act*. Under this Act, the Commissioner also has a mandate to promote privacy rights…The Auditor General plays an important role in the process of government accountability to Parliament by conducting independent audits of federal government operations and reporting his or her findings to the House of Commons. The Auditor General verifies the accounting methods and accuracy of the financial statements of the government, and determines whether public funds were used efficiently and for the purposes intended by Parliament. The Auditor General appears regularly before parliamentary committees, particularly the Public Accounts Committee.'' Canada, Library of Parliament, *Appointment of Officers of Parliament*, Publication No. 2009-21-E, by Andre Barnes, Laurence Brosseau & Élise Hurtubise-Loranger (Ottawa: Library of Parliament, 2019) at 18.

It would seem to have multiple potential obstacles with respect to recognizing a right to social housing, that appear to go well beyond what is anticipated in the brief document outlining the NHS.

Most problematic, from a provincial standpoint, will be the top-down imposing of a Federal law that attempts to interfere with an area of constitutional jurisdiction (whether viewed as regulating the real-estate market or home ownership and property rights) that has been almost exclusively the remit of the provinces. In the meantime, the Federal government must somehow resolve this and reconciles the NHS with these thorny constitutional and jurisdictional challenges.

E) The Legal Context for the Right to Social Housing in Quebec

Being both a property and civil matter, many aspects of housing have traditionally been viewed as falling into provincial jurisdiction, according to the constitutional division of powers. Theoretically, however, any enforceable right to social housing could be recognized by the Federal, government. That is the right to adequate housing included in the NHS might be valid, so long as that legislation makes it clear that the exercise of the right was dependant on provincial cooperation in creating a proper legal framework for its implementation sub-nationally, as was suggested by Craig Scott and others in the proposed *Alternative Social Charter*, of the early nineties (see Chapter A, Section 3).[918]

[918] Bakan & Schneiderman, *supra* note 366 at 161.

However, s. 92 (13) of the *Constitution Act*[919] gives the provinces legislative competence over property rights. Furthermore, housing rights in the form of legal and regulatory anti-discrimination measures related to the housing sector, both private and public, are governed largely by the human rights' codes, regulations and by-laws enacted or derived from provincial statute. The *Quebec Charter,* for instance, prohibits discrimination in housing on the several grounds enumerated in Chapter 1, Section 10, of the statute.[920]

Housing rights in Canada are also, by and large, enforced by human rights and housing tribunals and other administrative bodies that derive their regulatory powers from various sources of statutory law. In Quebec for instance, discrimination in rental housing is subject to the *Act Respecting the Régie du Logement* [921] and is enforced, to a large extent, by the Quebec rental board (or *Régie du logement*). This quasi-judicial body "core task has been to advance equal rights in the area of employment, *housing* and the provision of public services (emphasis added)."[922]

In the first part of Chapter E, I will assess the right to housing under Quebec's laws. I have concentrated on the situation in Quebec, because it has a unique legal architecture with regards to human rights embodied by the

[919] Department of Justice Canada, ''A Consolidation of the Constitution Acts 1867-1982'' (consolidate as of 1 January 2013) at 32, online (pdf): *Justice Canada* <laws-lois.justice.gc.ca/PDF/CONST_E.pdf>.
[920] "Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, gender identity or expression, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap." *Quebec Charter*, *supra* note 145.
[921] *Act respecting the Régie du logement*, CQLR C R-81.
[922] Howe & Johnson, *supra* note 904 at 13.

Quebec Charter.[923] This supreme law actually incorporates ESCR into its list of guaranteed rights and duties enjoyed by citizens of the Province.

As well, Quebec has a specific law designed to eliminate poverty (the only one of its kind in Canada), and a policy framework, in place since 2014, that has made attempts at recognizing the right to housing. Further, the Province has had a handful of interesting ESCR jurisprudence based on the *Quebec Charter*, that have pushed for the recognition of certain social rights, including those related to housing.

In some respects, Quebec legal and political climate is ripe for a breakthrough in housing rights, as we shall see in the following Chapter. A recognized right to social housing in Quebec, whether statutory or regulatory, constitutionally or in the form of a judicial decision, would go a long way toward demonstrating the legal viability of such rights in the Canadian context. In addition, such a move by State actors in Quebec might spur housing rights movements across the country.

[923] *Quebec Charter*, *supra* 145

1) The Quebec Charter and ESCR

The Quebec human rights' context is unique, and any inquiry into it must begin with the fact that its provincial *Charter* has a quasi-constitutional status. Enshrined in said statute, is a bill of rights and a provision explicitly giving those rights supremacy over other provincial statutes. Moreover, *Chapter IV*, Art. 45 of the *Quebec Charter* enshrines a measure of social assistance to those in need. "Every person in need has a right, for himself and his family, to measures of financial assistance and to social measures provided for by law, susceptible of ensuring such person an acceptable standard of living."[924] In addition, the same chapter provides for a right to education in Article 40, and a host of other ESCR rights.[925]

This ESCR section was greatly influenced by international human rights norms. In fact, Article 9.1 of the *Quebec Charter*[926] (the equivalent of s.1 in the Canadian *Charter*) closely resembles the limitation clause in 29.2 of the UDHR.[927] Further, the *Quebe*c *Charter*, unlike the Canadian *Charter,* includes poverty under the guise of "social condition" in its equality provisions.

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[924] *Ibid*.

[925] These include, the right for child protection (art. 39), information (art. 44), cultural life (art. 43), fair and reasonable working conditions (art.46), and protection for the elderly and handicapped (art. 48) *Ibid*.

[926] It states: "In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Quebec. In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law." *Ibid*.

[927] *UDHR*, supra note 329.

Perhaps the biggest contrast between the two charters, though, is the fact that the *Quebec Charter* is both vertical and horizontal in its effects. Thus, it applies equally to relations between citizens and the State as it does to relations between private parties. That having been said, *Chapter IV* rights have been applied in all manner of litigation, both civil and public law, cases involving challenges to State actors as well as private entities.[928]

The right to equality in Article 10 (in particular protection from discrimination on the grounds of social status), has also been invoked in housing rights disputes.[929] In one such case, *Côté v Dakin*[930], where the appellant, a tenant, challenged his eviction at the Quebec Court of Appeal, by the property's owner, on the grounds that the latter's repossession of the property for his family, allowed under the *Act* regulating evictions, was a prohibited form of discrimination. Specifically, the tenant framed the eviction as a prejudice suffered as a result of his "*condition sociale.*"[931] However, ESCR were not the *ratio decidendi* of the Court in this instance. Rather, they were used to supplement other arguments that constituted grounds for dismissal of the appeal. Though the presiding judge left some hope for future litigants, asserting:

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[928] Pierre Bosset, "Les droits économiques et sociaux: parents pauvres de la Charte québécoise?" (1996) 75:4 Can Bar Rev 583 at 591.

[929] For some examples of the case law related to art. 10 involving the Commission/Tribunal see *Whittom* which established that discrimination in the housing market on the basis of collecting welfare was prohibited; *Brodeur* was a case involving a student refused a lease for not having a guarantor; In *Blanchette* the plaintiff successfully claimed that they had suffered a *Charter* breach when the building owner imposed a fixed percentage of their income for rental payments. *Whittom c Québec (Commission des droits de la personne)*, [1997] RJQ 1823 — 29 CHRR 1*; Commission des droits de la personne et des droits de la jeunesse c Brodeur-Charron*, 2014 QCTDP 10; *Commission des droits de la personne et des droits de la jeunesse c Blanchette*, 2014 QCTDP 9.

[930] *Côté c Dakin* [1991] RJQ 2751, AZ-91011764 [*Côté*].

[931] Bosset, *supra* note 928 at 592.

Je ne voudrais pas prétendre que l'exercice de ce droit de reprise de possession ne pourrait pas constituer, dans les circonstances et à l'égard des individus qui tombent sous l'application de l'article 15, dans certains cas, une violation du droit à l'égalité. Dans ce cas, Côté ne se trouve pas dans un état de faits qui donnerait application à la garantie constitutionnelle.[932]

In practice, the ESCR in *Chapter IV* of the *Quebec Charter* are much restricted both by the limitation clause (thought s.9.1 does not apply to Article 10[933]) and by virtue of the fact that they are excluded from the supremacy (or override) clause in Article 52, which holds that any Quebec legislation that does not comply with the *Quebec Charter* will be inoperative unless the infringing provision was expressly exempted from the *Charter*'s protection by the law maker. As a result, the Quebec *Charter* effectively created three classes of rights[934], and ensured that ESCR are not accorded the same status as the largely political and civil rights contained in Articles 1 to 38, by the judiciary, especially with regards to adjudication. "Thus excluded from the rule of supremacy, enjoyed by other rights…they cannot be applied until after government establishment of an implementation mechanism."[935]

Similarly, to the *Canadian Human Rights Act*, the *Quebec Charter* has two administrative bodies that are responsible for its administration and enforcement: the *Commission of Human and Youth Rights* and the *Quebec Human Rights Tribunal*. The former was created around the same time that the *Quebec Charter* came into force and its main mandate is raising awareness about the rights and duties of citizens, advising the State on

[932] *Côté*, *supra* note 930 at 6.
[933] See Supreme Court of Canada's judgement in *Ford*, *supra* note 613 at para 76.
[934] These are 1) Fundamental Rights subject to the Limitation Clause 2) Anti-discrimination rights 3) ESCR. *Quebec Charter*, *supra* note 145.
[935] Lucie Lemonde, ''(Quebec) Charter of Human Rights and Freedoms" (last edited 5 March 2014), online: *Canadian Encyclopedia* <www.thecanadianencyclopedia.ca/en/article/quebec-charter-of-human-rights-and-freedoms>.

creating compatible legislation, and, crucially, the investigation of complaints and referral of serious disputes to the Tribunal for resolution.

The mandate of the *Quebec Human Rights Tribunal* gives it limited jurisdiction (basically defined by the Commission and involving the referral of disputes that have not been resolved by the parties after the Commission released its findings) to hear specific cases of alleged human rights abuses.[936] And, in cases of non-compliance with the *Charter*. It may even exercise certain remedies prescribed by the *Quebec Charter,* including in certain types of housing disputes. Article 111, most notably, provides that:

> The Tribunal is competent to hear and dispose of any application submitted under section 80, 81 or 82, in particular in matters of employment or *housing* or in connection with goods and services generally available to the public […] (emphasis added).[937]

Today some human rights scholars believe that, since its inception in 1991, the Tribunal has proved a more progressive and egalitarian alternative to the traditional court system, particularly with respect to ESCR:

> Analysis of the decisions of the Tribunal of Human Rights enables us to conclude that the creation in Quebec of a tribunal specialized in discriminatory issues allow us to remedy several legal shortcomings and draw up a more consistent and progressive body of jurisprudence. [938]

According to this jurisprudence, to the extent that the rights in *Chapter IV* of the *Quebec Charter* are involved and inextricably predicated

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[936] According to the official literature, the Tribunal hears cases "concerning discrimination, harassment, exploitation of elderly or handicapped persons and affirmative action programs." "The Human Rights Tribunal" (July 23 2019), online: *Tribunaux.qc.ca* <www.tribunaux.qc.ca/mjq_en/tdp/index-tdp.html>.
[937] See *Quebec Charter*, *supra* note 145 art 111.
[938] Bosset, *supra* note 928.

on rights (such as equality) that are guaranteed by the supremacy clause, they can play a decisive role in deciding the outcome of a particular case.

An example of the Tribunal's positive impact can be seen in the case of *Commission des droits de la personne et Commission scolaire de St Jean-sur-Richelieu.*[939] The case concerned a school that denied accommodation to a student with special needs owing to his physical and mental disability. The parents of the student argued that their child required special measures in order to access the same level of education. On the basis of the *Quebec Charter* (specifically the right to equal treatment), the Tribunal awarded the parents damages for harms suffered as a result of the school's discriminatory behaviour. The Tribunal's reading of Article 40 (the right to education) in the light of Article 10 (the right to equality) was such that, even though the former doesn't benefit directly from the Supremacy Clause (Art. 52), in this specific instance, the latter's protection against discrimination should be dispositive:

> [s]i l'article 40 ne peut, lorsque pris isolément, bénéficier de l'effet de la règle de prépondérance énoncée à l'article 52, il peut en quelque sorte le faire de façon indirecte lorsque le recours dans lequel il est invoqué à titre principal met également en cause le droit à l'égalité, lequel profite de la protection de la clause de préséance. [940]

It is an ongoing debate among human rights scholars and jurists as to the nature of ESCR and how they should be interpreted by the judiciary.[941] Lamarche, in particular, has developed a critical stance on the *Quebec Charter* on account of its limitations and interpretive provisions that seem

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[939] *Commission scolaire St-Jean-sur-Richelieu c Québec (Commission des droits de la personne)*, 1991 CanLII 1358 (QC TDP), [1991] RJQ 3003 (confirmed on appeal on this point: 1994 CanLII 5706 (QC CA), [1994] RJQ 1227, 117 DLR (4th) 67).
[940] *Ibid,* quote taken from the text between footnote 63 and 64.
[941] Bosset, *supra* note 928 at 593.

designed to prevent the right to housing, *inter alia*, from ever being recognized in a judicial context.[942]

As Bosset has pointed out, there is no sound legal reason for Article 45 to be viewed as somehow less obligatory than the other articles of the *Quebec Charter*. Hence, the judicial reasoning that upholds this dubious distinction, borders on dogmatic, and should be set aside by the judiciary, in favour of recognition of the justiciability of ESCR:

> Ni la lettre des dispositions en cause, ni l'invocation rituelle et quasi-incantatoire d'une différence de nature entre eux et d'autre droits ne justifient, cependant, l'indifférence dans laquelle on continue à considérer les droits économiques et sociaux. De notre analyse ressort, plutôt, l'image d'une juridicité réelle, encore peu explorée.[943]

Bosset states elsewhere that the Court of Appeal's hesitation with regards to justiciability of ESCR in *Gosselin,* was in part due to the political sensitivities of the Court. Specifically the notion that they would be imposing greater costs on the State, should they be given the same application as political or civil rights,[944] rather than the legal nature of the Article 45.

The way forward, Bosset believes, involves a rethinking of the relevance of ESCR in the *Quebec Charter* context, by the courts, in two ways: "first through a more systematic use of economic and social rights in interpreting other human rights; and second, through exploration of the idea of a 'central core' of economic and social rights that could be legally enforced against possible encroachments by the state."[945]

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[942] See Lucie Lamarche, "The 'Made in Quebec Act' to combat poverty and exclusion: The Complex Relationship between Poverty and Human Rights", in Young et al, ''Poverty Rights'', *supra* note 88 at 141.
[943] Bosset, *supra* note 928 at 603.
[944] *Ibid* at 595.
[945] *Ibid* at 584.

While the ESCR found in the *Quebec Charter* borrow heavily from international sources of human rights, the courts have generally refused to take this into consideration when adjudicating them, leading Lamarche to point out the disconnect between the two legal orders. The *Quebec Charter* does not "make the level of welfare benefits and the right to an acceptable standard of living subject to such additional or foreign priorities."[946] Nevertheless, it has been said many times and by many different jurists that it is essential that administrative tribunals take into account international human rights norms in their rulings, particularly those contained in the ICESCR that relate to housing.

Bien que le droit au logement ne soit pas particulièrement spécifique dans la législation québécoise, les gouvernements du Québec et du Canada ont tout de même l'obligation légale, en droit international, d'appliquer les préceptes découlant au PIDESC ainsi que ceux relevant du droit international humanitaire classique : reconnaitre, respecter, protéger et réaliser. [947]

Indeed, all housing rights should be viewed through these international human rights obligations domestically. The Quebec *Commission on Human and Youth Rights* has made reference to the obligatory nature of the right to housing in international law, in one of its many recommendations regarding improving the application of Article 45 in the context of the *Quebec Charter*. "La Commission recommande que le droit à un logement suffisant soit explicitement reconnu comme faisant partie du droit, garanti par l'article 45 de la Charte, à des mesures sociales et financières, susceptibles d'assurer un niveau de vie décent »[948]

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[946] Lamarche, ''The 'Made in Quebec Act'"', *supra* note 942 at 143.

[947] Maroine Bendaoud, "Le droit au logement tel que vu par le Pacte international relatif aux droits économiques, sociaux et culturels : sa mise en œuvre québécoise est-elle conforme ?" (2010) 23:2 RQDI 51 at 61.

[948] Québec, Commission des droits de la personne et des droits de la jeunesse, *Après 25 ans: la Charte québécoise des droits et libertés*. Bilan et recommandations, vol 1, adopté à

Sossin and Flood, in the context of provincial administrative law as it relates to the relationship between ESCR and Canada's obligations under international law, have commented on the way that the international right to housing should be applied to Ontario's regulations on lawful evictions in housing (e.g. the *Ontario Tenant Protection Act).*[949] "It could be argued on the basis of Article 11 of the 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."[950]

There is a large degree of consensus on the normative value of housing rights in the Quebec context among legal and human rights scholars, yet there remain some thorny jurisdictional issues. This is largely due to the dualism[951] inherent in the Canadian Constitution that not only applies to the relationship between the domestic and international plains, but is equally relevant to the international legal instruments that bind the Federal government in an area that is either shared with provincial governments or belongs to them exclusively. According to this principle of Canadian law, even in instances where the provincial government has consented to the treaty in question, they do not apply directly. For implementation to have domestic effect the relevant legislature must enact the treaty or international

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la 483e séance de la Commission, résolution COM-483-3.1.1 (Québec: Commission des droits de la personne et des droits de la jeunesse, 2003) at 25.

[949] *Residential Tenancies Act, 2006,* SO 2006, c 17, s 5.

[950] Lorne Sossin & Colleen M Flood, *Administrative Law in Context* (Toronto: Emond Montgomery Publications, 2017) at 503.

[951] See definition of Dualism in *Kazemi* delivered by Lebel J for the majority: "This means that, unless a treaty provision expresses a rule of customary international law or a peremptory norm, that provision will only be binding in Canadian law if it is given effect through Canada's domestic law-making process" *Kazemi*, *supra* note 166 at para 149.

instrument's obligations within their jurisdiction, through statute or other legal means. [952]

One Canadian constitutional scholar, Hugo Cyr, has discussed the situation in great detail *via* the concept of "organic constitutionalism" of treaty making powers, and has concluded, on the basis of the famous *Labour Conventions*[953] case, *inter alia*, that "if a treaty dealt with matters belonging to the provincial jurisdiction, it was up to the provincial legislatures to adopt the proper laws to implement the obligations flowing from the treaty."[954] Accordingly, Quebec's administrative bodies "may be reluctant, on division of power grounds, to give 'automatic' domestic effect in areas of provincial jurisdiction to treaties ratified by the federal executive"[955] despite the general presumption of conformity to international law in the interpretation of Canadian law.

This dualist interpretation of international legal norms might have implications for some of the international treaties concerned with housing rights that have not been incorporated by Quebec's government. However, the ICESCR is generally uncontroversial in the province and has been ratified by the Government of Quebec[956] and reinforced, at least in public declarations

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[952] See *Act respecting the Ministère des Relations internationales,* CQLR, c M-25.1, art 15 .
[953] *Reference re: Weekly Rest in Industrial Undertakings Act (Can),* [1937] JCJ No 5 (*Labour Relations*).
[954] Hugo Cyr, *Canadian Federalism and Treaty Powers: Organic Constitutionalism at Work* (New York: P.I.E. Peter Lang, 2009) at 50.
[955] Sossin & Flood, ''Administrative Law'', *supra* note 950 at 502.
[956] Arrêté en Conseil No 1438-76, (*Concernant la ratification du Pacte international relatif aux droits économiques, sociaux et culturels, du Pacte international relatif aux droits civils et politiques, et du Protocole facultatif se rapportant aux droits civils et politiques*, 21 avril 1976) [*Arrêté en conseil*]; "Economic and Social Rights'' (10 August 2019), online: *Commission des droits de la personne et des droits de la jeunesse* <www.cdpdj.qc.ca/en/droits-de-la-personne/vos-droits/Pages/des.aspx>.

and policy positions adopted by subsequent governments representing different political stripes.

One example of support for and the means to implement the international right to housing is the *Politique nationale de la lutte contre l'itinérance*[957] (the National Policy on the Fight Against Homelessness) introduced in 2014. It is noteworthy for, among other things, specifically committing the government of the day to fulfilling the obligations imposed by the ICESCR, including incorporating a right to adequate housing into Quebec's human rights regime: "Ce droit ne doit pas être interprété au sens étroit d'avoir un toit au-dessus de sa tête, mais comme le droit à un chez-soi, le droit à un lieu où l'on puisse vivre en sécurité, dans la paix et la dignité."[958] However, it stops short of guaranteeing an individual right to social housing. Furthermore, the proposed policy measures were designed to constitute a mere "action plan" for State actors. The inter-ministerial round-table on homelessness that followed the policy announcement was tasked with making recommendations to the government in power. However, no concrete legislative solutions to the housing crisis and homelessness were proposed, and the right to social housing was barely mentioned in the discussion.[959] The framework set up by the policy remains in place, and various ministries (e.g. Health and Security) have participated in the publication of the roundtable's findings, proposing any number of solutions to the homelessness crisis in Quebec, although the right to housing was mentioned only in passing, in the

[957] See Quebec's *National Homelessness Strategy*, *supra* note 525.
[958] *Ibid* at 35.
[959] ''Les dispositions requises seront prises afin d'évaluer correctement l'implantation de ce plan d'action, d'en mesurer les impacts, et d'en rendre compte à la Table interministérielle en itinérance''. *Ibid* at 52.

final document.[960] In my view, the policy has not produced the hoped for results and remains largely pious wishes.

2) The Quebec Act to Combat Poverty and Social Exclusion and the Right to Social Housing.

The Act to Combat Poverty and Social Exclusion (the Act)[961] is a provincial statute adopted in 2002 by the Quebec legislature. The law is ambitious in its scope but does not contain an enforceable right to social housing, despite many housing rights advocates pushing for such recognition.[962] It does however, impose a normative duty on State actors, stating in its first Article: "The object of this Act is to guide Government and Quebec society … towards a process of planning … actions to combat poverty … and to adopt a national strategy to combat poverty."[963]

In Article 9, the Act lays down the five key areas where government action will be taken to shore up the "social safety net." Among other things, this provision promises to expand the social housing sector.[964] The Act created certain concrete measures to achieve this objective, including a

[960] Québec, Ministère de la Santé et des Services sociaux, *Mobilisés et engagés pour prévenir et réduire l'itinérance : plan d'action interministériel et itinérance 2015-2020* (Québec: Direction des communications du ministère de la Santé et des Services sociaux, 2014) at 7.
[961] *Act to combat poverty and social exclusion*, CQLR L-7.
[962] Porter, "Homelessness 2017'', *supra* note 67 at 10.
[963] *Act to combat poverty*, *supra* note 961 s 1.
[964] See s 9(5): ''facilitating the availability of decent and affordable housing through housing assistance measures or the development of *social housing* for the socially disadvantaged, including the homeless, and strengthening community support for those persons." [Emphasis added] *Ibid.*

National Strategy;[965] a fund to support social initiatives; a reporting mechanism for the Minister of Social Solidarity; an Observatory; and an Advisory Committee on the Prevention of Poverty and Social Exclusion.[966]

The "*Comité consultatif*" was tasked with the creation of a strategic plan, one that was in keeping with the benchmarks that the legislation defined for the government in poverty reduction. [967]

The *Act* has had many admirers and has been cited by some social rights advocates, as a good model for democratic participation in the decision-making process for other jurisdictions to follow.[968] Political scientist Alain Noël, for instance, called it an "important evolution in advanced democracies"[969] and supports it for three reasons.

> First, it adopts a longitudinal perspective, and takes into account the incidence of poverty over the entire life cycle. Second, the approach is integrated and considers education, health and *housing* as much as employment and income. Third, the strategy focuses on participation and empowerment, and assumes progress cannot be accomplished without the involvement of persons living in poverty and of communities, and without a strong commitment of the entire society (emphasis added).[970]

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[965] Which the Act describes the following way: "to progressively transform Quebec over a ten-year period into one of the industrialized societies with the least poverty, according to recognized methods of international comparison." *Ibid*.

[966] Alain Noël, *Law Against Poverty: Quebec's New Approach to Combating Poverty and Social Exclusion* (Ottawa: Canadian Policy Research Networks, 2002) at 1.

[967] ''Mis en place en mars 2006, le Comité consultatif de lutte contre la pauvreté et l'exclusion sociale a entrepris un exercice de planification stratégique de la réalisation de sa mission et des tâches qui lui sont confiés par la Loi visant à lutter contre la pauvreté et l'exclusion sociale.'' Québec, Comité consultatif de la lutte contre la pauvreté et l'exclusion social, *Planification et orientations,* (Québec: Gouvernment de Québec, 2016) at 29.

[968] Lamarche, *supra* note 942 at 139.

[969] Noël, *supra* note 966.

[970] *Ibid*.

Just as many detractors were critical of the approach crystalized by the *Act*, for a variety of reasons. Not the least of these was the complete lack of any enforcement mechanism and the failure of the drafters to opt for a more ambitious approach that would have included substantial changes to the human rights framework in Quebec, including amending the *Quebec Charter* to include *Chapter IV* rights within the scope of its Supremacy Clause. "Quebec human rights activists have been asking for an amendment to the *Quebec Charter* that will give economic and social rights the same precedence over ordinary laws that other rights have been given. Instead, the government passed *The Act to Combat Poverty*."[971]

A related criticism of the *Act* is that it appears to deliberately avoid the international human rights paradigm that places a great deal of emphasis on enforcement and application, in favour of non-binding sources of human rights in international law.[972] Lamarche, a long-time defender of the right to social housing, was dismayed that her years of lobbying for an amendment to the *Quebec Charter* aimed at according *Chapter IV* the same status as the other rights enshrined in the *Quebec Charter*, instead resulted in an *Act* which does not provide for any concrete legally actionable obligations in the domestic legal framework, as is requires by international legal norms.[973]

The *Act* has also been reproached by others for a very different reason. Namely, that it seems to re-victimize those in poverty by placing the emphasis on their responsibility for rising above their circumstances. Vincent Greason calls this concept "responsibilization" of the poor and sees evidence of it not only in the *Act* itself but also in the policy framework that implements

[971] Lamarche, *supra* note 942 at 153.
[972] *Ibid* at 148.
[973] *Ibid* at 153.

it. "The *Act* is quite clear: the poor themselves are the principal actors for fighting poverty. This idea is explicitly pursued throughout both Quebec action plans."[974] In fact, it has been said that the *Act* completely ignores the reality that poverty can be seen as both a cause and consequence of human rights violations.[975]

In actual fact, the Committee set up in 2006 by the Government of Quebec, expressed some concern that, the preamble to the *Act* would perhaps inadvertently promote an approach to fighting poverty that would stigmatize the poor while, at the same time, more problematically, put the onus on them to extricate themselves from poverty. The Committee was, however, clear in its endorsement of legal recognition for ESCR generally and, in particular, the right to housing as potential solution to homelessness in Quebec.[976]

The best that can be said about the *Act to Combat Poverty and Social Exclusion*, is that expanding social housing is mentioned as an objective but never as a binding obligation on the State. This deliberate omission by the drafters ought to be corrected with a revision of the law, along the lines suggested by the *Comité consultatif* with regards to providing for an actionable right to housing in Quebec.

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[974] See Vincent Greason, "Poverty as a Human Rights Violation (Except in Governmental Anti-Poverty Strategies)'' in Jackman & Porter, ''Advancing Social Rights'', *supra* note 100, 107 at 120.
[975] Lamarche, *supra* note 942 at 153.
[976] Paul Dechêne, Jeannine Arseneault & Richard Gravel, *Revoir nos façons de faire, un choix judicieux et humain: avis du Comité consultatif de lutte contre la pauvreté et l'exclusion sociale* (Québec: Comité consultatif de lutte contre la pauvreté et l'exclusion sociale, 2009) at 20.

Part III-Conclusions

There is no escaping the fact that the right to social housing has been largely ignored by the constitutional documents (with the exception of the failed Charlottetown experiment and the NHS) which together represent the modern legal framework of human rights in Canada. Hence, the legal history of housing rights in Canada and Quebec is not a particularly long or dynamic one. This obliviousness has sadly been extended to the judiciary as well, where a substantive right to social housing, as opposed to the essentially negative understanding of the right found in legal protections against discrimination and unlawful evictions in housing, is hardly ever mentioned. The right to housing remains, however, an essential ingredient of a host of other rights that are recognized by the courts, government institutions and the Canadian *Charter*. As has been stated many times "It safeguards the capacity to exercise and experience other fundamental rights. It is necessary to human life and essential to survival."[977]

There is still cause for optimism. The *Charlottetown Accord*/*Alternative Social Charter* (ASC) demonstrates that an attempted constitutionalization of a right to housing, while unlikely, remains a genuine historical precedent. Such a measure would have to be coupled with some form of judicial accountability, either through the suggested ASC tribunal system (see Chapter A, s.3) or more clearly defined justiciable and enshrined *Charter* guarantee to access housing.

[977] Heffernan, Faraday & Rosenthal, *supra* note 17 at 10.

Moreover, the experience with *Canadian Assistance Plan* shows us that federal legislation of social programs may in fact provide a way forward provided that any such measures are designed according to the principles of asymmetrical federalism and substantive human rights norms identified by human rights scholars and civil society (e.g. R2H coalition) in their work. This is especially germane in light of the discussions around the NHS.

In Chapter B, I have shown how the various theories and doctrines of Canadian human rights norms entrenched in the Constitution work in practice, especially at the Supreme Court, and that they may hold the key to any advances the right to social housing will make in the Canadian judiciary.

Some of these theories, doctrines and principles have already been employed for that purpose, notably in the *Tanudjaja* application, with respect to substantive equality, dialogue theory, Incrementalism, and purposive approaches to reading the law, contextual and harm reduction doctrines as they relate to *Charter* rights (especially ss. 7 and 15). The fact that the *Tanudjaja* application was unsuccessful, and failed to put all of the social science evidence amassed into the official records, means that these arguments have yet to be tested in a court of law. More encouragingly, they remain, theoretically at least, a viable future strategy for a *Charter*-based right to social housing claim.

The harm reduction doctrine (having only begun with the *Malmo-Levine* case) remains relatively new and underdeveloped, but as Hamish Stewart and others have said, this principle may lead to a greater understanding of the value of legislative facts and social science-based evidence in determining the acceptability of government actions (or in this case inaction on the housing crisis), especially regarding policies that are demonstrably

detrimental to vulnerable and marginalized individuals and groups (e.g. the homeless).

As Daniel Weinstock has said about this emerging doctrine in the context of *PHS,* "where their section 7 interests are at play…Canadians have a right to demonstrably superior, where demonstrably means empirically…superior policy, as opposed to ideologically driven policy."[978] Might the Canadian judiciary extend this principle in its attempts to address s.7 violations caused by homelessness to the NHS? If it were to apply a *PHS* type analysis, would it not become obvious then, that only a substantive and justiciable right to social housing would remedy this violation suffered by homeless citizens?

In light of the opinion of Judge Lederer in *Tanudjaja,* I would also argue that the Incrementalist approach [979] to social housing as a right should be carefully considered and applied to future litigation in ESCR. It would seem that Incrementalism as an idea has the potential to sway jurists like Lederer towards intervention in areas that are more or less traditionally regarded as the domain of policy and law-makers, and, hence, viewed with apprehension by the courts. Evidence of this can be found in the Lederer's referring approvingly[980] of the reasoning behind the majority decision in *Gosselin*.[981]

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[978] ''AG Canada v Bedford, Part II'' (30 septembre 2013), online (podcast): *McGill Law Journal* <mljpodcast.libsyn.com/ag-canada-v-bedford-part-ii-alan-young-daniel-weinstock-and-russell-browne>.
[979] *Tanudjaja*, *supra* note 9 at para 66.
[980] The exact passage from *Gosselin* quoted was "The meaning of the administration of justice, and more broadly the meaning of s. 7, should be allowed to develop *incrementally*, as heretofore unforeseen issues arise for consideration [emphasis added]."*Gosselin*, *supra* note 49 at para 79.
[981] *Tanudjaja*, *supra* note 9 at para 86.

At any rate, the preceding analysis demonstrates that all of the identified doctrines, principles and theories of adjudicating the *Charter* have already contributed, with varying degrees of success, to the advancement of ESCR in Canadian jurisprudence and, more generally, have had a beneficial impact on the realisation of human rights in Canada.

In the final analysis of the application that I presented mostly in Chapter C, the legal action that Ms. Tanudjaja *et al*., undertook collectively deserved a better fate than the one it received. The case may have failed to receive a proper hearing from the courts, but as I have shown here, this was not for a lack of legal merit. The argumentation of the applicants, while it might have been improved (e.g. the questionable demand for a supervisory order), was, on balance, very sound in terms of being rooted in *Charter* jurisprudence. The application itself outlined a sufficiently flexible remedy so as to allow both the ONSC and ultimately, the State parties (the governments of Canada and Ontario), a chance to respond to their grievances in an Incrementalist, democratic, constructive and constitutional fashion.

It cannot be stressed enough how much the application was hurt by the fatuous notion that Ms. Tanudjaja was claiming a right to housing under Canadian law. In actuality, the claim was aimed at acknowledgment of violations of s.7 and s.15 for the appellants, some of whom were at risk for homelessness. Perhaps the most paradoxical turn of events for the applicants was that counsel for the government parties resorted to questionable procedural tactics (e.g. motion to strike) in order to delay and eventually, kill the application, rather than face the damning and overwhelming evidence it presented with respect to the severe violations of human rights being experienced everyday by the homeless population in Canada.

The Incrementalist framework put forward by Ms. Tanudjaja, though denied by Judge Lederer, remains a strong point of the reasoning behind the application. Allowing that a dialogue must take place both between civil society and the governments concerned with the right to housing, as well as between governmental structures (e.g. judiciary and executive), in order for the homelessness crisis in Ontario and Canada to be overcome. Incrementalism allows law and policy makers sufficient control over the remedial process and gives the judiciary the necessary confidence that it is not overextending itself and encroaching on the territory of the other branches of governmental power.

The substantive equality framework proposed by *Tanudjaja* is largely consistent with the significant jurisprudence in the field (e.g. *Eldridge*) and the hypothesis that homelessness is an "immutable characteristic" is increasingly accepted by governments when designing policy, based on the latest empirical studies of the relationship between housing and homelessness.

Regardless of their being dismissed in the application, the international human rights framework invoked by the claimants are still important and should not be abandoned in any future attempts to secure housing rights via adjudication. As *Adams* has proven, the Canadian *Charter* will inevitably and rightly be regarded in light of the international human rights norms, especially the right to adequate housing in the ICESCR. Equally, there is no escaping the ongoing and potentially substantive impact that these developments might have on exercising the right to social housing in Canadian courts. With the growing internationalisation of justice, it is

incumbent on Canadian jurists, especially in instances of alleged human rights breaches, to look at international and transnational legal trends in adjudication with respect to the same.

Some legal scholars now consider the Federal human rights regime, and its provincial counterparts, to be the best legal avenue for the pursuing of ESCR in Canada. As Gwen Brodsky, *et al*, explain in their essays on the subject: "in Canada, human rights legislation is a primary means for giving effect to Canada's obligations under international human rights law, including the obligations to fulfill the right to work, education, social security, and an adequate standard of living."[982]

In the meantime, both human rights scholars and housing rights champions continue to press for reform of the Federal regime, along the lines of provincial human rights codes, with regards to expanding the grounds for prohibited discrimination: "At a statutory level, there is already a national consensus that the discrimination against poor people is endemic and requires remediation through fundamental human rights legislation."[983]

At the provincial level, Quebec's human rights regime is quite sophisticated, with the *Quebec Charter*, the *Act to Combat Poverty and Social Exclusion,* and other legislation concerned with protecting certain

[982] Gwen Brodsky, Sheilag Day & Yvonne Peters, "*Litigating to Advance the Substantive Equality Rights of People with Disabilities",* in Jackman & Porter, ''Advancing Social Rights'', *supra* note 100, 223 at 225-226.
[983] See Clair McNeil & Vincent Calderhead, "Access to Energy: How Form Overtook Substance and Disempowered the Poor in Nova Scotia", in Jackman & Porter, ''Advancing Social Rights'', *supra* note 100, 253 at 279.

vulnerable segments of the population from homelessness.[984]Various decisions at the administrative level, provide jurists, law, and policy makers with material that can be deployed for the advancement of ESCR projects. Nonetheless, the question of whether a right to social housing can be claimed through the judiciary by citizens in the Province of Quebec, remains thorny.

As Lamarche and Bosset make clear in their detailed analyses of the problem, there are two major legal obstacles that will need to be overcome somehow if the right to social housing in Quebec is to be established in law: 1) the lack of a recognized right to social housing in Quebec law and 2) the lack of any meaningful attempt by the State to provide a policy and regulatory framework based on international human rights norms that would implement and create an enforcement mechanism for such a right, internally.

Yet, there is no shortage of politicians, jurists and human rights advocates that have appealed for the right to social housing in Quebec to be entrenched in law over the years.[985] Civil society actors in particular, have been voicing their concerns with the sharp decline of the State's role in this

[984] See e.g. the *Projet de loi n 492*, that adds an art. 1959.1 to the *Civil code of Quebec*, that generally provides that: "The lessor may not repossess a dwelling or evict a lessee if the lessee or the lessee's spouse, at the time of repossession or eviction, is 70 years of age or over, has occupied the dwelling for at least 10 years and has income equal to or less than the maximum threshold qualifying the lessee or spouse for a dwelling in low-rental housing according to the *By-law respecting the allocation of dwellings in low-rental housing*." Québec, Projet de loi n°492, *Loi modifiant le Code civil afin de protéger les droits des locataires aînés*, 1st Sess, 41st Leg, Québec, 2015 (assented on 10 June 2016), SQ 2016, c 21.

[985] See e.g. Claude Castonguay's report which recognized the right to housing as being an important component of urban development policy, Québec, Groupe de travail sur l'urbanisation, *L'urbanisation au Québec: rapport du groupe de travail sur l'urbanisation* (Québec: Éditeur officiel du Québec, 1976).

shrinking of the social housing sector in Quebec and the inevitable consequences this will have on the right to access social housing.[986]

The issue of the right to social housing should be a viable human rights project for any government serious about ESCR and the credibility of the *Quebec Charter* as a comprehensive modern bill of rights. Unlike the amendment mechanism designed by the framers of the Canadian *Charter*, the *Quebec Charter* is a provincial statute, albeit with a special status, subject to the ordinary processes of parliamentary deliberations and amendment procedures. Therefore, changing the provisions concerned with social rights in *Chapter IV* to reflect their rightful place alongside the rest enshrined by the *Quebec Charter*, is basically a matter of political will and democratic consensus.

As has been detailed in this dissertation, the human right to adequate housing in international law is recognized by many in Quebec and has received official recognition, in various forms, by government bodies. There is little debate in Quebec about the normative aspects of international law in this matter, at least, not in the case of the ICESCR and Article 11.[987]

Should any representative of the current government care enough about the right to housing to bring the matter up and expend the political capital needed to carry it out, the right to social housing could be introduced

[986] See e.g. criticism of the 2015 budget with regards to social housing stocks: André Desroche, "Budget Leitao : 1500 logements sociaux de moins par année'' *Journal Métro* (27 March 2015), online: <journalmetro.com/local/sud-ouest/actualites/744834/budget-leitao-1500-logements-sociaux-de-moins-par-annee/>.
[987] See e.g. Quebec *Commission des droits de la personne*'s recommendations in *supra* note 948 at 23.

into Quebec law. This is especially true today, in light of the Federal government's newfound commitment to do the same.

General Conclusions about the Right to Social Housing in Canada

At the beginning of this dissertation I suggested that the politics of exclusion were often intertwined with the issue of housing rights and the right to social housing in Canada. Arguably, no better legal example of this could be found, than in the *Tanudjaja* ruling. The case and, more importantly, the applicants, including Ms. Tanudjaja herself, were never given the opportunity to present their arguments in court. Instead, due to an unfortunate procedural tactic, their important application was thrown out of the judicial system, and the substantial evidence they had amassed on the *Charter* breaches they suffer daily, as a consequence, will forever be excluded from future decisions by the judiciary. As one applicant, Janice Arsenault, put it after the case had been rejected by the ONCA, "I feel like I'm being swept under the rug, do I not have rights because I don't make $60,000 or $70,000 a year?"[988]

The point has been made countless times by a whole host of ESCR experts and jurists (many have been quoted in this dissertation[989]) that the courts function as a democratic safety valve, in the sense that they provide those who seek recourse for injustice with the means to have their grievance heard and sometimes even resolved, in an equitable, transparent fashion and, more importantly, in accordance with the law. *Tanudjaja* may prove just the opposite. That is, when such issues are excluded by the judiciary, especially

[988] Colin Perkel, "No place for courts in affordable housing fight, Ontario's top court rules - Toronto" *Global News* (1 December 2014), online: <globalnews.ca/news/1702006/no-place-for-courts-in-affordable-housing-fight-ontarios-top-court-rules/>.

[989] "When characterized as non-justiciable and as a matter to be relegated to legislation and resolution by elections, social rights lose their legitimacy as rights claims and become no more than competing policy positions advocated by 'interest groups' lacking political power''. Martha Jackman & Bruce Porter, ''Introduction'' in Jackman & Porter, ''Advancing Social Rights'', *supra* note 100, 1 at 15.

for questionable legal reasons, those who are most affected by them will inevitably feel betrayed by the legal system and will come to the unfortunate conclusion that their voices are being ignored, yet again.

Conversely, with the announcement of the *National Housing Strategy* the executive branch of the Federal government has tentatively moved towards acceptance of the right to social housing, vague though some of the statements about the right may be.[990] At any rate, this would appear to me much more promising than what is on offer from the judicial side, at the moment. Indeed, the government of Canada has undertaken the NHS that will provide a policy and legal framework for the development of social housing throughout Canada, though scant attention has been paid to a justiciable right to social housing in the process, thus far.[991]

With respect to advancing the right to social housing through constitutional reform almost no progress has been made since the introduction of the Canadian *Charter* and the subsequent debates with respect to ESCR and their place in the constitutional framework that Canadians can count on to be upheld by the courts. It would seem highly improbable that the type of constitutional amendment that the 1992 Charlottetown Accord with its related negotiations over a Social Union (including a reference to "access to housing") will be attempted again in my lifetime. Especially in light of the

[990] "Right to housing to be mainstay of $40B national housing plan, Duclos says'' *CBC News* (26 March 2018), online: <cbc.ca/news/politics/canada-national-housing-strategy-right-minister-duclos-1.4594100>.
[991] Yutaka Dirks, "Community Campaigns for the Right to Housing", *supra* note 29 at 6.

current Federal government's ruling out of such an initiative in the context of the NHS already.[992]

I concur with King, that there is greater hope that social rights will be legislated through the human rights regimes that already exist in Canada's various jurisdictions, than any foreseeable amendment of the Canadian Constitution.[993] More plausibly, the right to housing read into the rights and duties already established by existing statutory frameworks related to human rights regimes, possibly through the application of international human rights norms in the context of administrative law, as proposed by Sossin and Flood. Until such a time, much of the Incrementalist arguments would be difficult to effectively raise in the Canadian judicial context where, as King has said, it is a pre-condition for the success of claims to social rights that they be predicated on formalization through codification, or some other means, of the so-called "social minimums."[994]

It may be that the application of the Incrementalism paradigm, or indeed any paradigm, to the right to social housing is simply misguided in the sense that it presupposes that there is one normative framework for dealing with a multiplicity of diverse legal situations throughout the Canadian legal system, each one with its own specificity and unique challenges.

Two socio-legal scholars in the United Kingdom observed with regards to the social housing institution in that country that, in essence, national housing strategies (or the 'cookie cutter approach" as they call it)

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[992] "Liberals establish road map for talks to legislate a right to housing'' *CBC News* (24 March 2018), online: <cbc.ca/news/politics/liberals-government-housing-strategy-plan-1.4591615>.
[993] King, ''Judging Social Rights'', *supra* note 15 at 41.
[994] *Ibid* at 18.

invariably fail because they do not foresee the micro-level issues associated with social housing in a particular time and place. "Our point is that part of the problem with the 'cookie cutter' approach is that it uses macro social theory to explain micro phenomena"[995] Might this be true of macro legal theories of ESCR and the right to social housing in Canada? The question must now be posed, in light of the setback represented by the *Charter*-based *Tanudjaja* claim, which was, after all, a very broad legal strategy based on both domestic, transnational, and international human rights norms. Young argues that judicial remedies for housing rights issues will always fall short if not made adaptable to changing circumstances and applied with flexibility.

> Solutions to the problem at large are necessarily multi-faceted and require nuanced calibration across a number of economic, social, and cultural fronts. Addressing housing concerns for one demographic may ignore, complicate, even frustrate, solutions required for other groups. And judicial orders, unless nuanced to this reality and reflective of a moving, shifting picture, rather than simple snapshots, will not fix the problems.[996]

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In the end, I find myself increasingly agreeing with the conclusions reached by Jessie Hohmann: Whatever the answer to the housing crisis in Canada is, it might be futile and counterproductive to believe that it lies entirely within the current legal structures. Hence, in the course of her analysis of the jurisprudence related to housing rights, she had the realisation that "the law alone does not yield meaningful or coherent answers on what the right to housing was."[997]

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[995] Chris Bevan, "Uses of Macro Social Theory: A Social Housing Case Study" (2016) 79 Nat'l Law Rev 79 at 79.
[996] Young, ''Charter Eviction'', *supra* note 56 at 57.
[997] Hohmann, ''The Right to Housing'', *supra* note 91 at 4.

This is not meant to be pessimistic with respect to future attempts to achieve the right to social housing through the judiciary. On the contrary, there are still legal avenues that can and should be explored and that, I believe, remain relatively overlooked by social rights champions.

Canadians with disabilities can and ought to make claims based on the binding obligations to provide social housing contained in the *Convention for the Right of People with Disabilities* and the appeal mechanism created by its corresponding Optional Protocol. By the same token, women, especially indigenous women, can and ought to avail themselves of the provisions of *Convention on the Elimination of Discrimination of Against Women* and its Optional Protocol, in order to redress the infringement of their housing rights in Canada, in the same way that Cecilia Kell once did. Canadians more generally can and ought to appeal to the right to adequate housing in the ICESCR in their claims before administrative tribunals concerned with housing rights, especially those with access to justice in Quebec.

If these quasi-hypothetical examples share anything at all, it is that each is based on unique human rights emergency with their own related accountability mechanisms, often legal, that do not lend themselves to an overarching normative human rights framework. Nor do these examples rely on a particular paradigm of ESCR law, whether domestic, international or transnational. In other words, what these potential legal arguments for the right to social housing all have in common is, paradoxically, their distinctiveness. When considering future legal challenges in Canada based on the claim that access to social housing is a fundamental human right, whether they are direct, indirect or implicit conceptions of the right, this is the essential point that must be absorbed.

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