EVICTION AND INTERNATIONAL OBLIGATIONS: SECURITY OF TENURE IN CANADA

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The opinions, findings, and conclusions or recommendations expressed in this document are those of the author and do not necessarily reflect the views of the Canadian Human Rights Commission or the Federal Housing Advocate.

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LIST OF ABBREVIATIONS

CCAPEX — *Commission de coordination des actions de prévention des expulsions* (commission for the coordination of actions to prevent evictions)

CESCR — Committee on Economic, Social and Cultural Rights

COMED — *Commission départementale de médiation* (departmental mediation commission)

DALO — Enforceable Right to Housing

ECHR — European Court of Human Rights

FHA — Federal Housing Advocate

ICESCR — International Covenant on Economic, Social and Cultural Rights

NHC — National Housing Council

INTRODUCTION•

Respect for the right to housing and ending evictions have never been a priority of successive Canadian governments, despite the ratification of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) in 1976.[1] The many concerns and recommendations of the Committee on Economic, Social and Cultural Rights (CESCR), the committee charged with monitoring compliance with the international commitments of state parties, have largely gone unheeded. And for a very long period, Canadian governments have submitted their reports to the CESCR years late, without ever addressing the issue of evictions, which is regularly raised by the Committee.[2]

The passage of the *National Housing Strategy Act* on June 19, 2019, however, significantly changes existing legislation and the obligations of the Canadian state.[3] Canada now explicitly recognizes the right to housing in legislation.[4] And the intent of the legislature is "clear and unambiguous," to quote the Supreme Court. Canadian housing policy is now based on human rights and in particular on the right to housing as enshrined in the ICESCR.[5]

Given the debates in the Supreme Court on the scope of Canada's international commitments, it should be noted at this point that this treaty was ratified without reservation and is *binding.*[6] Secondly, it should be emphasized that compliance with obligations under international law is

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[1] Under Article 11.1 of the ICESCR, Canada recognizes "the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions."

[2] Report of Canada, E/C.12/CAN/6, submitted 17 October 2012 (due 30 June 2010) at paras 47*ff*; Responses of Canada to the List of Issues, E/C/12/CAN/Q/6/Add.1, 12 February 2016, online: <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Countries.aspx?CountryCode=CAN&Lang=EN>

[3] *National Housing Strategy Act*, S.C. 2019, c 29, s 313

[4] According to subsection 4 of the *National Housing Strategy Act*, "It is declared to be the housing policy of the Government of Canada to: (a) recognize that the right to adequate housing is a fundamental human right affirmed in international law; (b) recognize that housing is essential to the inherent dignity and well-being of the person and to building sustainable and inclusive communities; (c) support improved housing outcomes for the people of Canada; and (d) further the progressive realization of the right to adequate housing as recognized in the International Covenant on Economic, Social and Cultural Rights." (Section 4d) See also, Ryan van den Berg, *A Primer on Housing Rights in Canada*, Background Paper, Parliament of Canada Publication, No. 2019-16-E, 2019-06-21.

[5] The legislature emphasizes Canada's international commitment by citing from the Act's Preamble: "Whereas … a 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."

[6] *Quebec (Attorney General) v 9147-0732 Québec Inc.*, 2020 SCC 32 (CanLII) at paras 32ff. See also, "Indeed, there is a presumption that laws are intended to comply with Canada's international obligations," online: <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/harmonization/ouell/int2.html>.

the responsibility of the state party, "which is in any event ultimately responsible for the observance of the rights enshrined in the Covenant, including the right to housing of tenants."[7] Thus, the Canadian government cannot exempt itself from its international responsibility by invoking shared jurisdiction with the provinces or territories.

As a result, since the passage of the Act on June 19, 2019, there is now a "presumption of compliance" of Canadian eviction legislation with the obligations of the ICESCR and in particular with the valuable jurisprudence recently developed by the Committee on Economic, Social and Cultural Rights.[8] And the legal principle guiding government action on eviction is clear:

> "Forced evictions are prima facie incompatible with the requirements of the International Covenant on Economic, Social and Cultural Rights and can be justified only in the most exceptional circumstances, and in accordance with relevant principles of international law."[9]

Such a principle now obliges the Canadian state to ensure that every eviction carried out complies with international obligations as defined by the UN CESCR.

In the context of this report, we propose to focus on four of these obligations that have at least two points in common. The first is that they are either ignored or violated by the Canadian government or are only very partially implemented and only in certain provinces. The second commonality is that their implementation would entail little cost to the Canadian or provincial governments. They have been in force for years in almost all European states and are subject to the control of the European Court of Human Rights (ECHR). In other words, these obligations could be easily implemented, and these examples could be used to make them effective if the political will existed in Canada or in the provinces.

We will cover here the obligation to develop an eviction prevention policy (I), the obligations to respect the principles of adversarial proceedings and the right to a fair trial (II),the principle of proportionality (III), and finally, the obligation to provide rehousing following an eviction (IV). In each case, we will rely on the data available in France and the United States in particular to try to present both the scope and the limits of these legal instruments.

I) EVICTION PREVENTION

To our knowledge, there is no eviction prevention policy at either the federal or provincial level. Only some municipalities, particularly when faced with the problem, have adopted guidelines,

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[7] *Mohamed Ben Djazia and Naouel Bellili v Spain* (2021) E/C.12/61/D/5/2015 at para 14.1, 2021 [*Ben Djazia*].

[8] Sandra Liebenberg, "Between Sovereignty and Accountability: The Emerging Jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights Under the Optional Protocol," (2020) 42:1 Human Rights Quarterly; Fons Coomans and Miguel Ruiz Diaz-Reixa, "Effectiveness of the ICESCR Complaint Mechanism—An Analysis and Discussion of the Spanish Housing Rights Cases," Myth or Lived Reality 17.

[9] The right to property, unlike the right to housing, is not enshrined in the ICESCR. Committee on Economic, Social and Cultural Rights, General Comment No. 7: *The right to adequate housing (Art. 11, para. 1) – forced evictions*, Off. Doc. UN ESC, 1997, Doc. UN E/1998/22-E/C.12/1997/10 at para 1.

and these are not very restrictive.[10] Nor do things seem to be changing very much. The National Housing Strategy[11] does not even mention the term *eviction*. However, recent studies highlight the urgent need to coordinate actions in this area, especially between the federal government, which has the necessary funds, the provinces, which have jurisdiction over rental law, and the municipalities, which regulate housing conditions and emergency accommodation.[12] We will therefore first review the obligations of the Canadian State with respect to prevention, before illustrating in concrete terms what could be done based on the legislation in force in France.

EVICTION PREVENTION AND THE CESCR

The CESCR and the United Nations Special Rapporteurs constantly remind us that states must put in place policies to prevent evictions.[13] To get to the heart of the matter, states are minimally required to document, conduct a needs assessment, identify responsible administrations, identify available resources, identify targeted categories, rethink urban development plans and regulations, allocate resources, etc. In short, it is a matter of putting in place a genuine public policy to ensure security of tenure and prevent evictions by precisely identifying the various measures that can be taken.

To our knowledge, nothing of the sort has yet been put in place by the federal government, which remains ultimately responsible. Compliance with this obligation is not insurmountable, however, as evidenced by the adoption of prevention policies in almost all European countries.[14] The European Commission has already developed a framework for analysis in this area, which is highly valuable because it lists and compares the various existing mechanisms.[15] The document

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[10] Shelter, Support & Housing Administration, "Eviction Prevention Framework," (2016), online: *City of Toronto* <https://www.toronto.ca/wp-content/uploads/2017/10/96e5-SSHA-Eviction-Prevention-Framework.pdf>

[11] Canadian Mortgage and Housing Corporation, *What Is the Strategy* (2018) online: *CMHC* <https://www.cmhc-schl.gc.ca/en/nhs/guidepage-strategy#strategyfr>.

[12] Julie Mah, "Evictions in Toronto: Governance Challenges and the Need for Intergovernmental Cooperation" (2021) 32 IMFG Perspectives, online: <https://tspace.library.utoronto.ca/bitstream/1807/107632/1/imfgperspectives_no32_evictionsintoronto_juliemah_october_7_2021.pdf>.

[13] CESCR, *supra* note 9 at paras 10–11; see also the document prepared in 2014 by Special Rapporteur Raquel Rolnik: "Guiding Principles on Security of Tenure for the Urban Poor" (2013) NU A-HRC-25-54, online: *Housing and Land Rights Network* <https://www.ohchr.org/sites/default/files/HRBodies/HRC/RegularSessions/Session25/Documents/A-HRC-25-54-Add1_en.doc>.

[14] François Henry et al, Évaluation de la prévention des expulsions locatives, France, Ministère de l'intérieur et des outre-mer, (2015), online : *Ministère de l'intérieur et des outre-mer* <https ://www.interieur.gouv.fr/Publications/Rapports-de-l-IGA/Logement/Evaluation-de-la-prevention-des-expulsions-locatives>

[15] P. Kenna et al., Pilot project—Promoting Protection of the Right to Housing—Homelessness Prevention in the Context of Evictions, European Union (2016) at pp 114–180, online: *Publications Office of the European Union* <https ://data.europa.eu/doi/10.2767/463280>.

distinguishes between so-called *primary* prevention measures, which aim to guarantee security of tenure and avoid non-payment (social housing, rent control, social benefits, housing allowances, support measures for landlords in difficulty, etc.), and *secondary prevention* measures, i.e., those adopted to avoid eviction once non-payment has been established (emergency aid for rent or mortgage, counselling services, staggering of debts, moratorium on evictions, etc.). Finally, the document presents the judicial guarantees that apply when one is summoned to court (mediation, legal services, debt rescheduling by magistrates, appeal procedure, etc.).

In short, if the Government of Canada ever has the political will to comply with its international prevention obligations, it can always draw on these experiences and data. To this end, it should be noted that this documentation and data sharing work falls squarely within the mandates of the National Housing Council (NHC) and the Federal Housing Advocate (FHA), as defined in the *National Housing Strategy Act*. In particular, the FHA is required to "analyze and conduct research … on systemic housing issues," consult with vulnerable persons, and "initiate studies, as the Advocate sees fit, into economic, institutional or industry conditions—respecting matters over which Parliament has jurisdiction—that affect the housing system.[16]

FRANCE'S CHARTERS FOR THE PREVENTION OF EVICTIONS

The prevention policy implemented in France illustrates, perhaps more concretely, the type of policy that could be implemented in Canada. This analysis also points out some limitations. Indeed, in addition to having a much larger social housing stock than Canada and more restrictive rent control mechanisms, France is probably among the European countries that have adopted the most developed prevention policies[17]—at least on paper.[18]

In concrete terms, the French government requires each *département*—roughly equivalent to a Canadian province in terms of population—to adopt a charter for the prevention of evictions[19] and create a *commission de coordination des actions de prévention des expulsions*[20] (CCAPEX, commission to coordinate actions in prevention of eviction) in order to fight against evictions and to facilitate the rehousing of evicted tenants. The Commission is made up of representatives of the state, local authorities, and social housing landlords, among others. It is responsible for implementing a coherent prevention policy and for analyzing and dealing with individual

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[16] *National Housing Strategy Act* (S.C. 2019, c. 29, s. 313) at ss 13(c), (d) and (c).

[17] Susanne Gerull, "Evictions Due to Rent Arrears: A Comparative Analysis of Evictions in Fourteen Countries," 8:2 *European Journal of Homelessness* 137, online: *FEANTSA* <https ://www.feantsa.org/download/policy-review-3-2588895012682035129 3.pdf>

[18] For an in-depth analysis see: Henry et al, *supra* note 14.

[19] See for example: Préfet du Haut-Rhin, *Charte départementale de prévention des expulsions locatives* (2019), en ligne : *Conseil départemental du Haut-Rhin* <https ://www.haut-rhin.gouv.fr/content/download/32218/196643/file/CharteVdefsignée.pdf>

[20] *Loi du 25 mars 2009 de Mobilisation pour le Logement et la Lutte contre l'Expulsion* et la Loi ALUR du 24 mars 2014. CCAPEX operations: Décret n° 2008-187 du 26 février 2008, replaced by Décret 2015-1384 du 30 octobre 2015.

situations. To this end, it must always be informed as soon as a landlord, private or public, begins eviction proceedings for non-payment of rent. The bailiff who sends a "payment order" to the tenant—the equivalent of a notification of eviction proceedings—must then send it to the CCAPEX.

Once the matter is referred to the Commission, a social worker is named to meet with the persons affected by the eviction notice. The social worker must then prepare a "social and financial assessment" that documents the family's situation, available resources, and necessary expenses.[21] The CCAPEX can then issue notices, in particular to the departments in charge of family and housing allowances, so that they can grant emergency funds and thus avoid eviction.

In theory, this is a valuable prevention mechanism. The CCAPEX makes it possible to document situations and take measures before an eviction occurs. In practice, however, the available data reveals significant gaps. For example, an inter-ministerial body in 2014 exposed the lack of coordination and the absence of a "structured approach" between the various agencies involved, the fact that many departments have still not adopted a charter, that the existing charters are "vague," that they include few obligations, that there is little or no follow-up of the measures taken, etc. For the authors of the report, this "reduced effectiveness" is largely due to a lack of resources, governance, and political will.[22]

Other studies paint a similar picture. The CCAPEX is depicted as "a gas factory with no means or powers," unable "to provide rapid assistance to tenants at risk of eviction due to unpaid rent."[23] Finally, some authors question the conditions for the allocation of emergency funds (particularly the *Fonds de solidarité pour le logement* housing fund). Local authorities would instrumentalize these emergency funds and "cherry-pick" funding. These emergency funds thus encouraged a form of political clientelism by allowing "households with strong local roots to be rewarded" at the expense of others, particularly foreigners. Denial of emergency funds would also facilitate the eviction of "problem" households.[24]

A recent parliamentary report, conducted in 2021 in the midst of the pandemic, gave an equally critical assessment.[25] Nevertheless, both theoretically and in practice, this policy offers valuable

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[21] Yves Rouqet, "Résiliation d'un bail d'habitation : établissement et contenu du diagnostic social et financier," *Dalloz actualité*, (18 janvier 2021), online : *Dalloz Actualité* <https ://www.dalloz-actualite.fr/flash/resiliation-d-un-bail-d-habitation-etablissement-et-contenu-du-diagnostic-social-et-financier#.ZAihEOzML0o>

[22] Henry et al, *supra* note 14.

[23] Sarah Faucheux-Leroy, Pauline Kertudo, Clémence Petit et al, "Les ménages 'aux portes du logement" (2014) 4:212 *Recherche sociale* 6.

[24] Camille François, "Un droit au logement à géométrie variable. Les ancrages sociospatiaux du Fonds solidarité logement" (2017) 3:170 *Espaces et sociétés* 91.

[25] Nicolas Démoulin, Prévenir les expulsions locatives tout en protégeant les propriétaires et anticiper les conséquences de la crise sanitaire (Covid-19), France, Ministère de la Transition écologique et de la Cohésion des territoires, (2020), online : *Ministère de la Transition écologique et de la Cohésion des territoires* <https ://www.ecologie.gouv.fr/sites/default/files/RapportDEMOULIN-PEX.pdf>.

food for thought should the issue of eviction prevention be on the agenda of a Canadian government.

II) THE RIGHT TO A FAIR TRIAL

A second obligation that flows from the Canadian government's commitment to the right to housing is the obligation to ensure a fair trial and thus provide judicial guarantees to litigants. To be as clear as possible, the CESCR means at least three things by this: that tenants be informed that a proceeding has been initiated against them; that they have time to defend themselves; and that they have access to legal services. This is an important issue, as the vast majority of tenants facing eviction proceedings do not attend the hearing. In order to combat this massive absenteeism and the resulting inequity, legal practitioners stress the importance of providing information and, in particular, legal counsel. However, we will see that this solution, which has been promoted for more than fifty years, has a very limited impact. Faced with this observation, recent sociological studies emphasize the need to deal with the problem upstream and to drastically reduce the number of judicial applications for eviction, knowing that in some states, more than half of the decisions rendered are not executed. And to fight against such instrumentalization of the courts, these studies recommend making the procedure costlier for the owners.

DUE PROCESS AND THE CESCR

From a procedural point of view, the Committee reiterates its point from General Comment No. 7 and repeatedly indicates that "appropriate procedural protection and due process are essential aspects … but are especially pertinent in relation to a matter such as forced evictions."[26]

More specifically, among the enshrined procedural protections, the Committee has already mentioned the obligation of the state party to provide "adequate and reasonable notice for all affected persons prior to the scheduled date of eviction,"[27] "guarantee a fair process" and "provide these persons with access to the remedies provided by law so that they can defend themselves."[28] Finally, states "must ensure access to information, independent advice and

[26] See the Committee's General Comment No. 7 (2017) at paras 15ff, online: *OHCHR* <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCESCR%2FGEC%2F6430&Lang=fr>.

[27] *Ibid.*

[28] *Ibid.*

expertise, and facilitate engagement and dialogue."[29] Access to justice is thus considered a "means of realizing the right to housing."[30]

Behind these procedural requirements, the central objective is to oblige public authorities and magistrates to be aware of and take into account the *causes* of non-payment as well as the social and health *consequences* of evictions before making a decision. Thus, the Committee regularly reiterates that state parties are required to ensure that procedures potentially resulting in evictions comply with guarantees, such as the guarantee of "a real opportunity for consultation with those affected and adequate and reasonable notice for all affected persons prior to the scheduled date of eviction."[31]

An idea of the importance placed by the Committee on these procedural requirements can be seen in the 2015 *I.D.G. v. Spain* case.[32] In this case, the applicant landlords demonstrated that they had attempted to serve eviction notices on tenants on at least four occasions but were unsuccessful. Eviction was therefore ordered. However, the Spanish state was criticized by the Committee on the grounds that it "has not shown that the Court had exhausted all available means to serve notice in person—it does not, for example, explain why the Court did not notify the author by means of a note or form left in her letter box or any of the other means of notification provided for in the Civil Procedure Act, such as leaving the notice with the caretaker or the nearest neighbour."[33]

THE ILLUSION OF A FAIR TRIAL

But whatever the "judicial guarantees" offered by domestic or international law, the problem—and this problem is common to all Western countries—is that, in eviction proceedings, tenants are mostly absent from the hearing. As the tables below show, they are absent in more than 60% of cases in housing courts, and it is not uncommon for this to be 90% of cases in evictions specifically. Representation, whether by counsel or not, is the exception. Fewer than 6% of tenants are represented in France and Quebec, for example. The vast majority of landlords are represented by counsel or real estate agents.[34]

Quebec	70%

[29] Leilani Farha, Report of the Special Rapporteur*, Access to Justice for the Right to Housing,* A/HRC/40/61, 15 January 2019, online: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/007/30/PDF/G1900730.pdf?OpenElement>.

[30] *Ibid* at para 63.

[31] Committee on Economic, Social and Cultural Rights, *Communication No. 2/2014*, Off. Doc. UN ESC, 55th Sess., E/C.12/55/D/2/2014 at para 12.3.

[32] *I. D. G. v Spain,* E/C.12/55/D/2/2014, 13 October 2015 at para. 13.3.

[33] *Ibid*.

[34] The data is taken from Martin Gallié, "L'accès à la justice : une idéologie? À propos des réformes en droit du logement" (2020) 54 *RJTUM* 233 and Camille François, "Un droit au logement à géométrie variable. Les ancrages sociospatiaux du Fonds solidarité logement" (2017) 3:170 *Espaces et sociétés* 91.

New York	68%
France	63%

Table 1: Tenant Absenteeism in Housing Courts

Quebec	6%
New York	10%
France	6%

Table 2: Representation of tenants at hearings (by counsel or non-lawyers). The representation of landlords varies from 50% to 80%.

In other words, eviction hearings are most often parodies of justice; they are held mainly in the absence of tenants and are completed in a few minutes by judges who endorse the requests of the landlords or their representatives, i.e., who "rubber stamp" according to their own terms. To give an example, a magistrate in Quebec might order 120 evictions in three and a half hours of hearings.[35]

To explain the absence of tenants from hearings, lawyers generally hypothesize that it is due to a lack of information. This is one reason why the CESCR insists that property owners exhaust "all available means of serving notice in person."[36] And more generally, legal practitioners are actively campaigning to provide litigants with information and legal services and, above all, to have the right to counsel recognized where this is not yet established or to increase the funds available for legal aid. In other words, they advocate for the state to pay for counsel for people facing eviction proceedings.

Since this is a central claim in the legal field, where it is more or less unanimously accepted,[37] I think it is worth clearly pointing out here the limits of this very idealistic claim.[38] First of all, the right to counsel has been recognized in France for tenants since the 1970s. And yet, here, too, tenants are mostly absent from hearings and do not seek legal counsel. The right to counsel does not therefore in and of itself guarantee that tenants will attend the hearing or that there will be compliance with the adversarial principle. Moreover, counterintuitively, the data available in France shows that represented tenants are more likely to be evicted than unrepresented tenants. One explanation is that only the poorest, most indebted tenants, those

[35] Martin Gallié and Marie-Claude Plessis-Bélair, "La judiciarisation et le non-recours ou l'usurpation du droit du logement – le cas du contentieux locatif des HLM au Nunavik" (2014) 55:3 *Les Cahiers de droit*.

[36] *Supra* note 32 at para 13.3.

[37] See report by Sarah Buhler in this series.

[38] Gallié, *supra* note 34.

most likely to be evicted, are entitled to counsel.[39] Moreover, as many studies in the United States have noted, there is no clear evidence that lawyers have "better" eviction outcomes than non-lawyers. Finally, and perhaps most importantly, it is completely unrealistic to think that the state will ever fund legal services on an equitable basis, i.e., at the same level as those enjoyed by real estate companies.[40] In particular, to our knowledge, no state that recognizes the right to counsel provides legal advice and government and parliamentary lobbying, all of which are very expensive legal services but which allow bankers, real estate companies and landlords to change housing policy to their advantage.[41]

COMBATTING SERIAL EVICTION FILING

Faced with the difficulties of providing "fair" legal services in eviction matters, another approach deserves attention, particularly because it offers avenues for reflection to limit the number of legal proceedings and forces us to question the procedure currently in force in the housing courts, which are overloaded with eviction applications.

Recently, American sociologists have highlighted the fact that in some states, more than 50% of the eviction rulings handed down were in fact aimed households who had previously faced eviction and were still living in the same dwelling. In other words, what this work reveals is that very often landlords do not enforce judgments but initiate eviction proceedings as soon as they become aware of non-payment. It must be concluded that landlords do not go to court to evict their tenants. Legal doctrine describes this as *serial eviction filing.*[42]

To explain this phenomenon, researchers first note that landlords rarely have an interest in evicting tenants. In addition to possible bailiff fees and the difficulty of recovering the amount owed, it is often necessary to clean the apartment and, in all cases, to look for new tenants. In short, it is frequently more cost-effective to keep a household, even one that is delinquent, than to evict it. So, apparently what the landlords are seeking in court is an official document, a judgment that would allow them to apply pressure to their tenant, "discipline" them, and obtain

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[39] Camille François, "Déférer au tribunal. Les figures imposées de la défense des locataires au tribunal des expulsions" (2020) 3:106 *Droit et société* 527.

[40] Richard L. Abel, "Socializing the Legal Profession: Can Redistributing Lawyers' Services Achieve Social Justice" (1979) 1 Law & Policy 5 at 37.

[41] Pierre Bourdieu and Rosine Christin, "La construction du marché – Le champ administratif et la production de la 'politique du logement'" (1990) 8182 Actes de la recherche en sciences sociales 65.

[42] Lillian Leung, Peter Hepburn and Matthew Desmond, "Serial Eviction Filing: Civil Courts, Property Management, and the Threat of Displacement" (2021) 100:1 Social Forces, 316, online: <https://doi.org/10.1093/sf/soaa089>; Dan Immergluck et al, "Evictions, Large Owners, and Serial Filings: Findings from Atlanta" (2019) 35:5 Housing Studies 903; Philip ME Garboden and Eva Rosen, "Serial Filing: How Landlords Use the Threat of Eviction" (2019) 18:2 City & Community; Ashley Gromis, *Eviction: Intersection of Poverty, Inequality, and Housing* (PhD Postdoctoral Research Associate Eviction Lab, Princeton University, 2019), online: <https://www.un.org/development/desa/dspd/wp-content/uploads/sites/22/2019/05/GROMIS_Ashley_Paper.pdf>.

payment of rent by any possible means[43]. For, according to the landlords themselves, when officially threatened with the forced execution of the ruling by the police or sheriff, tenants do everything they can to pay the rent and avoid eviction. Landlords then apparently have a relatively easy time negotiating a debt repayment schedule, payment of social assistance, payment of rent in kind, etc.[44]

Moreover, these serial actions apparently allow landlords to collect additional amounts because, in at least some states, judgments are accompanied by interest, legal costs, and even fines, to be paid by tenants.[45] One study estimates that the cost of eviction proceedings (legal costs or fines imposed by the courts) represented a 20% increase in a tenant's monthly rent[46]. Many real estate companies have seen the value of these proceedings and have completely automated the procedure and, as soon as non-payment is noted, an eviction is filed.

Tenants, on the other hand, are indebted to their landlords and subject to legal proceedings. Given the virtual certainty that, if evicted, they will be unable to find equivalent housing, or even any housing at all, they are forced to accept the landlords' demands and give up exercising their rights. Highlighting the dramatic effects of tenant blacklisting and the resulting inability of tenants to find new housing,[47] some authors go even further.[48] They argue that, paradoxically, eviction proceedings are not intended to achieve eviction but, on the contrary, to force tenants *to remain* in the dwelling and pay rent, preventing them from seeking housing elsewhere: "Ironically, then, an eviction filing may be a strategy used to retain tenants, not displace them, by rendering them ineligible for competing housing options."[49]

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[43] "Property owners may rely on the threat of eviction to collect rent and discipline tenants." Philip ME Garboden and Eva Rosen, "Serial Filing: How Landlords Use the Threat of Eviction" (2019) 18:2 City & Community 638 at 655.

[44] *Ibid* at 649.

[45] In Quebec, for example, a "classic" eviction judgment will order the tenant to pay the rent owed, plus interest at the legal rate and the additional indemnity provided for in Article 1619 C.C.Q., plus legal costs ($102).

[46] Lillian Leung, Peter Hepburn and Matthew Desmond, *supra* note 42.

[47] Gerald Lebovits and Jennifer Addonizio Rozen, "The Use of Tenant Screening Reports and Tenant Blacklisting" (2018) LEGALEase Pamphlet, New York State Bar Association, online: *SSRN* <https://ssrn.com/abstract=3212080>.

[48] "In this way, the threat of eviction operates less as a means to get the tenant out of the property, and more as a tool to squeeze money out of a tenant." Philip ME Garboden and Eva Rosen, *supra* note 42 at 655.

[49] Lillian Leung, Peter Hepburn and Matthew Desmond, *supra* note 42.

In short, instead of guaranteeing the right to a fair trial, ensuring that the rights of the parties are respected, and guaranteeing the right to housing, the judicial system acts as an auxiliary to landlords,[50] as a "state debt collection agency."[51]

These works invite us to find solutions to fight against these serial court applications and this instrumentalization of the courts. And the recommended solution is relatively simple: increase the costs of the procedure, make the judicial procedure less profitable for landlords. But rather than increasing legal costs—costs that could easily be passed on to tenants—these studies advocate for increasing the time required before one is entitled to file a court application for eviction.

A priori, a proposal to increase time limits may seem strange in a context where lawyers are constantly fighting to reduce judicial delays and in contradiction with the obligations set by international law. But what these studies also reveal is a very strong link between the time needed to initiate eviction proceedings and the number of serial eviction filings. The shorter the timelines and the easier it is to go to court to obtain an eviction, the greater the volume of litigation and the fewer judgments are enforced. For example, serial eviction petitions are most common in states with extremely rapid procedures (5–7 days).[52] On the other hand, where the timelines are longer, the volume of litigation is lower but judgments are more likely to be enforced.[53]

As far as we know, there is no comparable data in Canada, but it is clear that the legal times required to evict tenants are extremely short in this country, sometimes even much shorter than in the United States. Clearly, both Canadian and American courts are much more serious about protecting banking and rental income than in fighting against substandard housing, since it often takes years to get the work done.[54]

For example, in British Columbia, a landlord can give a notice of termination on the day of non-payment. If the tenant does not contest within five days, the landlord may file a direct application for an order of possession without the tenant's having an opportunity to be heard. By comparison, the minimum time in France is four months.

British Columbia	6 days[55] (and only if disputed by the tenant)

[50] Jean-Gabriel Contamin, "L'exemple du contentieux en matière de logement", in J.-G. Contamin et al. (ed), *Le recours à la justice administrative. Pratiques des usagers et usages des institutions*, Paris, La Documentation française (2008) 138.

[51] Philip ME Garboden and Eva Rosen, *supra* note 42 at 649.

[52] Lillian Leung, Peter Hepburn and Matthew Desmond, *supra* note 42.

[53] Ashley Gromis, *supra* note 42.

[54] Martin Gallié and Julie Verrette, "Le parcours judiciaire des victimes d'insalubrité (le cas de la moisissure)" (2020) 13:2 RD & santé McGill 181.

[55] *Residential Tenancies Act*, SBS 2002 c 78, s 46 (4b).

Ontario	15 days[56]
Quebec	22 days[57]
France	4 months[58]

Table 3: Minimum time between non-payment and filing a claim

Of course, it would require thorough study to verify this hypothesis in Canada. But it seems particularly telling that, according to the latest available study published in 2020, the percentage of evictions is highest in British Columbia, where eviction proceedings can be initiated most quickly and most easily, twice as high as in Ontario or Quebec.[59]

And if this hypothesis were confirmed, why not require, as is done in France, that tenants be notified before an eviction procedure can begin or even grant "sufficient and reasonable" time periods, in accordance with CESCR jurisprudence? Entailing virtually no (financial) cost for the federal and provincial governments, such measures do not actually address the inability to pay rent. However, they would at least allow time for social services to intervene and for tenants to find the necessary funds and prepare their defence in court, and they would certainly contribute to reducing the court's workload and thereby save money.

III) THE PRINCIPLE OF PROPORTIONALITY

Generally speaking, once summoned to court, a tenant being pursued has very few legal means to oppose eviction. The contractual logic of civil law prevails in most jurisdictions around the world. The fault (non-payment) causes damage to the landlord (loss of income), and this justifies termination of the lease and eviction. Public policy norms that could challenge this contractual logic are almost non-existent. At best, tenants can claim the "guarantee of habitability" and justify non-payment on the basis of the property's substandard condition. However, studies are unanimous in noting that it is the exception for judges to take this argument into account.[60]

[56] *Residential Tenancies Act, 2006*, LO 2006 c 17, ss 59 and 94.4 (2).

[57] *Civil Code of Quebec,* art 1971.

[58] In fact, the tenant must be given at least two months to regularize their situation and then a period of at least two months must elapse before the tenant is summoned to the relevant court, which leaves time to refer the matter to the CCAPEX; *Loi n° 89-462 du 6 juillet 1989*, art 24.

[59] "10.6% of renters in British Columbia reported being evicted within 5 years, more than any other province or territory whereas less than 4% of renters were evicted within 5 years in Manitoba, Quebec, and Nunavut. Vancouver experienced more evictions than Toronto, Montreal and other Census Metropolitan Areas (CMAs)." See Silas Xuereb, Andrea Craig and Craig Jones, *Understanding Evictions in Canada Through the Canadian Housing Survey*, The University of British Columbia (2021) at 8.

[60] David A. Super, "The Rise and Fall of the Implied Warranty of Habitability" (2011) 99:2 Cal L Rev 389.

Certainly, some Canadian provinces allow judges to take the proportionality of eviction into consideration and to suspend eviction if necessary, in accordance with CESCR jurisprudence. This is the case, for example, in Saskatchewan and Ontario. In Ontario, the competent court must take into account "all of the circumstances"[61] and ensure that the measure is proportional before ordering eviction. This allows the court to spread the repayment out and draw up a schedule when it feels this is necessary.[62] To our knowledge, there has never been an impact study since these provisions were introduced in Canada.[63] However, this measure is not in effect in all provinces. In Quebec, for example, evictions are ordered regardless of the presence of children, the elderly, the sick or the handicapped, for $2 or $100 of debt. As the judgments regularly remind us: "The tenant's financial hardship is extraneous to the landlord's right to collect rent." We will therefore briefly review this provision as understood by the CESCR before presenting some of the available data, particularly in France and more broadly in Europe, on its concrete scope.

THE PRINCIPLE OF PROPORTIONALITY AND THE CESCR

The Committee regularly reiterates that when an eviction is considered justified, "it should be carried out in strict compliance with the relevant provisions of international human rights law and in accordance with the general principle of proportionality."[64]

The obligation to balance the interests of the parties and of society in general is now a "quasi-canonical" principle[65] in the field of European doctrine, for example. And the Committee regularly reminds us that this protection applies just as much to property owners facing foreclosure proceedings as it does to tenants of both public and private housing and also to occupants without title, or "squatters."[66] Thus, the absence or inadequate consideration of the principle of proportionality is one of the main reasons why the CESCR sanctions states for non-compliance with the right to housing.

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[61] *Residential Tenancies Act, 2006*, LO 2007, c 17 s 83(1)(2).

[62] *Residential Tenancies Act 2006*, LO 2006 c 27, s 204.

[63] See Mary Truemner, "A Closer Look at Seemingly Pro-Tenant Provisions in the Residential Tenancies Act" (2009) 22 J L & Pol. 27 at 30.

[64] CDESC, *supra* note 9 at para 15. See *Soraya Moreno Romero v Spain*, E/C.12/69/D/48/2018, 12 April 2021 at para. 12.4 [*Soraya Moreno Romero*]; *Gómez-Limón Pardo v Spain*, E/C.12/67/D/52/2018, 2018 at para 9.4.

[65] Michel Vols, "European Law and Evictions: Property, Proportionality and Vulnerable People" (2019) 27:4 *European Review of Private Law* 719 at 747; C. Martinez-Escribano, "Tenancy and Right to Housing: Private and Social Policies" (2015) 23 *European Review of Private Law* 777; C.U. Schmid (ed.), *Tenancy Law and Housing Policy in Europe: Towards Regulatory Equilibrium*, Cheltenham: Edgar Elgar (2018).

[66] *Maribel Viviana López Albán v Spain*, E/C.12/66/D/37/2018 at paras 11.5 and 11.7 [*López Albán*]. See also *Soraya Moreno Romero*, *supra* note 64 at para 12.4.

The Committee has systematized the five substantive requirements needed to approve an eviction under this principle.

> Thus, in order for an eviction to be justifiable, it must meet the following requirements. First, the limitation must be determined by law. Secondly, it must promote the common good in a democratic society. Thirdly, it must be suited to the legitimate purpose cited. Fourthly, the limitation must be necessary, in the sense that if there is more than one measure that could reasonably be expected to serve the purpose of the limitation, the least restrictive measure must be chosen. Lastly, the benefits of the limitation in promoting the common good must outweigh the impacts on the enjoyment of the right being limited.[67]

The Committee has specified the obligations that flow from this principle. We will summarize them here.

First of all, magistrates are obliged to *weigh* the consequences of the evictions on landlords, tenants, and society as a whole. This requires, at a minimum, that the consequences of the eviction be seriously documented and that the court justify its decision on the basis of this principle. As the Committee has already noted, the court cannot "simply state that the arguments put forward [precariousness, health, etc.] by the authors could not be invoked in a 'procedure of this type.'"[68] In other words, judges must take into account the precariousness, health, age, etc. of the persons subject to eviction proceedings before making their decisions and must indicate this in their judgment.

Secondly, in order to "determine proportionality," it is not enough to look at the *impact* on the persons subject to the eviction order but also on the owners of the property. This means that the court must assess the damage suffered by the property owner. However, the damage suffered by a multinational housing company is obviously not the same as that suffered by an individual whose only source of income is rent. And in this sense, the Committee has repeatedly stated that "this inevitably involves making a distinction between properties belonging to individuals who need them as a home or to provide vital income and properties belonging to banks, as in the current case."[69]

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[67] *Fátima El Ayoubi and Mohamed El Azouan Azouz*, E/C.12/69/D/54/2018, 19 February 2021 at para 14.5 [*Fátima El Ayoubi*]; *López Albán, supra* note 66 at para 11.3.

[68] *Fátima El Ayoubi, supra* note 67 at para 14.5; and *López Albán v. Spain*, *supra* note 66 at para 14.6.

[69] *López Albán, supra* note 66 at para 11.5; see also *Hakima El Goumari and Ahmed Tidli v Spain*, E/C. 12/69/D/85/2018, 16 March 2021 at para 8.3 [*Goumari*]. "This inevitably involves making a distinction between properties belonging to individuals who need them as a home or to provide vital income and properties belonging to banks or other entities."

Thirdly, magistrates must have the power "to stay or postpone the eviction order."[70] The Committee has also made it clear that judges can, and indeed should,[71] also compel "administrative services [to] assist tenants to mitigate the impact of eviction."[72]

It should be noted, however, that this principle is highly contested. Bankers and landlords believe that this principle is unfair.[73] They claim that this provision, which challenges freedom of contract, unfairly places the cost of the right to housing on them by granting delays in the event of non-payment. Taking up the liberal argument, they also put forward the idea that the principle of proportionality is a new obstacle to access to housing for the poorest segments of society. According to them, landlords increase rents or require a deposit, for example, in order to avoid loss of income related to the application of this principle. Such criticisms are certainly not unrelated to the recent decision of the European Court of Human Rights (ECHR) to limit the scope of this principle.[74] Indeed, for the ECHR, in the absence of a specific provision in domestic law, the principle of proportionality should not have a "horizontal effect" but only a "vertical effect." This means that it could be invoked only if there is a dispute between the state (signatory of international commitments) and individuals.[75] In other words, in states where the principle of proportionality is not recognized in domestic law, this fundamental principle of international law could not be used against private lessors. This judgment constitutes a significant reversal in the Court's jurisprudence; it runs counter to recent developments in the CESCR and has been strongly criticized.[76]

EXAMPLE: THE PRINCIPLE OF PROPORTIONALITY IN FRANCE

To illustrate in concrete terms how this principle could be implemented, we will take the example of France, where the process contains many protections compared to what is in force in Canada, including Ontario.

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[70] *Fátima El Ayoubi*, *supra* note 67 at para 14.5; *López Albán, supra* note 66 at para 14.5.

[71] "8.4 In addition, there must be a real opportunity for genuine and effective prior consultation between the authorities and the persons concerned, there must be no alternative means or measure less injurious to the right to housing available…" *Goumari, supra* note 69 at para 8.3.

[72] *Fátima El Ayoubi*, *supra* note 67 at para 14.5; *López Albán, supra* note 66 at para 14.5.

[73] Sarah Fick and Michel Vols, "Horizontality and Housing Law: Protection against Private Evictions from a European and South African Perspective" (2022) 9:2 European Journal of Comparative Law and Governance 118 at para 6.2.2.

[74] *FJM* v *the United Kingdom* ("*FJM*"), European Court of Human Rights, 76202/16, November 2018 [*FJM*]. In this case, a severely disabled tenant who was at risk of being homeless could not avail herself of this principle.

[75] Charlotte Lilian Lane, *The Horizontal Effect of International Human Rights Law: Towards a Multi-Level Governance Approach*, Gronigen, University of Gronigen (2018) at 15.

[76] Sarah Fick and Michel Vols, "Horizontality and Housing Law: Protection against Private Evictions from a European and South African Perspective" (Forthcoming); Justin Bates, "When 'Any Person' Doesn't Mean 'Everyone': *FJM v. UK*, Proportionality and the Private Rented Sector" (2019) 24:2 Judicial Review 69.

First, when the case goes to court,[77] about four months after the first non-payment, the magistrate must have received a *social and financial report* produced by a social worker. This assessment allows judges to take note of the social and health situation of the persons targeted by the eviction procedure whether or not they are present at the hearing. This allows them to take into account the causes and potential consequences of the eviction and thus to assess the proportionality of their decision. In concrete terms, such an assessment allows them, even *ex officio*, i.e., without being asked, to stay the eviction and spread debt repayment over a period of 24 months. Approximately 40% of the decisions spread out the debt and grant extended deadlines.[78]

Secondly, the hearings are more like an accounting and social work exercise than a classic judicial procedure.[79] The magistrates listen to the clients, assess the debt, determine the resources available and calculate, with a calculator in hand, the additional amounts required per month to pay off the debt. When possible, they set up a schedule and stay the eviction. If the applicant is unable to pay the debt on time or has not fulfilled the commitment to pay the debt, eviction is usually ordered.

To our knowledge, there has yet to be a national study on the impact of judgments that grant time limits and stagger the debt, in terms of preserving the tenancy. It is therefore unclear whether these timelines and instalment plans ultimately allow tenants to remain in the premises. However, a local study shows "a very positive compliance rate with court-ordered settlement plans,"[80] i.e., rental debts are paid off and tenants remain in their housing. In contrast, a study in the Netherlands concluded that the principle of proportionality has only limited application to tenants.[81] One of the reasons for this is that tenants rarely go to court to assert their rights, they are rarely represented, and even if they invoke the principle of proportionality, the courts still allow eviction based on unpaid rent.

In any event, regardless of the scope of this legal instrument, the opinion of the property owners, and the analysis of the European Court, the Government of Canada now has an obligation, in accordance with CESCR jurisprudence, to ensure that all provinces allow judges to take into account the proportionality of the eviction.

IV) THE OBLIGATION TO REHOUSE

Just as there is no eviction prevention policy in Canada, we are not aware of any provisions to ensure that evicted people are rehoused. However, this is still an obligation according to CESCR

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[77] *Loi n° 89-462 du 6 juillet 1989 tendant à améliorer les rapports locatifs et portant modification de la loi n° 86-1290 du 23 décembre 1986*, France.

[78] Henry et al, *supra* note 14 at 151.

[79] Gallié, *supra* note 34.

[80] Henry et al, *supra* note 14 at 66.

[81] Michel Vols, "European Law and Evictions: Property, Proportionality and Vulnerable People" (2019) 27:4 *European Review of Private Law* 719 at 719 and 750. "Although tenants do put forward proportionality defences, no significant differences are found between cases in which the tenant [sic] raise a proportionality defence and cases in which they do not advance such a defence."

jurisprudence, and the CESCR has made it clear that the state cannot simply assert that it does not have sufficient resources. Using the case of France, which is one of the few countries to have transferred this obligation into law with the *Droit au logement opposable* (DALO, enforceable right to housing), we will review both the contributions and the limitations of such a mechanism, which is regularly demanded by tenant defence organizations in Canada.

THE OBLIGATION TO REHOUSE AND THE CESCR

The Committee systematically reiterates in its decisions:

> "Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available."[82]

The Committee considers that it is not only a question of providing a roof over one's head, a temporary home, but of providing "suitable housing" that meets people's needs[83]. Specifically, "Policies on alternative housing in cases of eviction should be commensurate with the need of those concerned and the urgency of the situation and should respect the dignity of the person."[84] The importance that the Committee attaches to this principle is such that it is, along with non-compliance with the principle of proportionality, one of the main grounds for condemning states for violations of the right to housing.[85]

Thus, in the recent case of *Hakima El Goumari et al.*, the Committee further clarified the international obligations of states in this area. In this case, a couple and their six children, two of whom were disabled, were evicted and then rehoused in unsuitable temporary housing, hotels and hostels.[86] For the Committee, "dignity and safety and security cover, *inter alia*, stability and certainty notwithstanding the temporary nature of the accommodation in question; conditions of hygiene at the alternative dwelling; and the privacy available to individuals according to their needs." Therefore, substandard housing that is "far from the school of the children" and in which tenants live in constant fear of having to move every day is not a rehousing solution that complies with international law.[87]

Finally, in two other cases, the Committee made important clarifications. In the 2017 case of *Ben Djazia et al.,*[88] Spain had offered to relocate a mother with her children to a women's centre

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[82] *Goumari, supra* note 69 at para 16. CDESC, *supra* note 26 at para 16.

[83] *Goumari, supra* note 69; CDESC, *supra* note 9 at para 8.

[84] *Ayoubi, supra* note 72 at para 12.2.

[85] Michel Vols and Erna Dyah Kusumawati, "The International Right to Housing, Evictions and the Obligation to Provide Alternative Accommodation: A Comparison of Indonesia and the Netherlands" (2020) 21:2 *Asia-Pacific journal on human rights and the law* 237.

[86] *Goumari, supra* note 69.

[87] *Ibid* at paras 11.1-11.3.

[88] *Ben Djazia, supra* note 7 at para 17.7.

that did not allow her spouse. In the Committee's view, this solution, "which would have broken up the family unit," was contrary to international law, and the Spanish government had failed to demonstrate that it was impossible to provide alternative accommodation (paragraph 7.8). In the *López Albán* case in 2019*,* the Committee addressed the conditions of access to public housing and the impossibility of such access for untitled occupants or people who have been evicted from public housing:

> "The Committee considers that the requirement with which the author had to comply in order to gain access to the waiting list of applicants for public housing placed her at an impasse, forcing her and her children either to move into a temporary shared shelter or to live in destitution before being able to apply for social housing. It also considers that this restriction on access to social housing might cause the children to suffer the consequences of the parents' actions."[89]

The issue of restricted access to public housing is an important one. In Quebec, for example,[90] people who have been evicted from social housing or who have "bailed" (without paying the rent) no longer have access to social housing for three years.[91] There was a shocking case where some Inuit people were evicted from their social housing in Nunavik and thus forced, for lack of alternative housing, to move to major urban centres, without the right to access social housing.[92] This certainly helps to explain the over-representation of Indigenous people among those experiencing homelessness.

REHOUSING AND STATE RESOURCES

It is worth focusing here on the main argument put forward by states to justify the absence of a rehousing solution. A state being sued before the CESCR generally argues that it spends large sums of money on housing, that there are many people on public housing waiting lists and that there is not enough housing to meet the needs of applicants—in short, that State resources are limited.

The Committee therefore has had to question and analyze the policies actually implemented in order to establish whether a state has indeed made "every effort and used all the resources at its disposal" to guarantee the applicants' right to housing. This is an important issue in Canada where, according to the majority interpretation of the courts, the provisions of the Charter and fundamental rights do not confer any "positive obligations" on the state; to put it another way, fundamental rights cannot compel the Canadian state to finance the right to housing (to

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[89] *López Albán, supra* note 66 at paras 12.2 & 17.7.

[90] See also in Alberta, Damian Collins et al, "'When We Do Evict Them, It's a Last Resort': Eviction Prevention in Social and Affordable Housing" (2021) 32:3 Housing Policy Debate 473, DOI: 10.1080/10511482.2021.1900890.

[91] *Règlement sur l'attribution des logements à loyer modique Loi sur la Société d'habitation du Québec* chapitre S-8, r. 1, art.16, en ligne : *LégiQuébec* <https://www.legisquebec.gouv.qc.ca/fr/document/rc/S-8,%20r.%201>

[92] Martin Gallié and Marie-Claude Plessis-Bélair, « La judiciarisation et le non-recours ou l'usurpation du droit du logement – le cas du contentieux locatif des HLM au Nunavik » (2014) 55:3 Les Cahiers de droit.

guarantee or build housing, to provide social housing, to increase benefits, etc.).[93] Fundamental rights, such as the right to housing, can at most be used to overturn an administrative decision (such as the closure of an encampment) that is discriminatory (Section 15 of the Charter) or that would infringe on the complainants' right to life or security (Section 7 of the Charter).[94] In short, in the name of the separation of powers, Canadian courts generally refuse to question policy and funding choices.

For the CESCR, however, and thus unlike the Supreme Court of Canada, the separation of powers argument is not sufficient in itself; the state must demonstrate that it does not have the resources. In the 2017 *Ben Djazia et al*. case, for example, it criticized the Spanish state because it "did not explain that denying the authors social housing was necessary because it was putting its resources towards a general policy or an emergency plan to be implemented by the authorities with a view to progressively realizing the right to housing, especially for persons in a particularly vulnerable situation."[95] The Committee went even further by questioning the policy choices made by the state party, pointing out their contradictions, in particular the privatization of rental housing while thousands of people were still on waiting lists:

> Moreover, the state party has not explained to the Committee why the regional authorities in Madrid, such as the Madrid Housing Institute, sold part of the public housing stock to investment companies, thereby reducing the availability of public housing, despite the fact that the number of public housing units available annually in Madrid was significantly fewer than the demand, nor has it explained how this measure was duly justified and was the most suitable for ensuring the full realization of the rights recognized in the Covenant.[96]

Thus, in contrast to the Ontario Court of Appeal's 2014 *Tanudjadja* case,[97] the Committee believes that the right to housing requires jurisdictions to examine political and economic choices and priorities and to identify, where appropriate, whether they are "regressive

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[93] Margot Young, "Charter Eviction: Litigating Out of House and Home" (2015) 24 JL & Soc Pol'y 46; *Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852 (CanLII) [*Tanudjaja*].

[94] Mark Zion, "Making Time Critique: Canadian 'Right to Shelter' Debates in Chrono-Political Frame" (2020) 37:1 The Windsor Yearbook of Access to Justice 88, DOI: <https://doi.org/10.22329/wyaj.v37i0.6563>

[95] *Ben Djazia, supra* note 7 at para 17.5.

[96] *Ibid.*

[97] *Tanudjaja, supra* note 93 at para 33. "Finally, there 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 the legislatures. Issues of broad economic policy and priorities are unsuited to judicial review. Here the court is not asked to engage in a 'court-like' function but rather to embark on a course more resembling a public inquiry into the adequacy of housing policy."

measures,"[98] as is the case with the "privatization of social housing" in times of housing shortages, for example.

EXAMPLE: THE ENFORCEABLE RIGHT TO HOUSING (DALO)

To promote this right to rehousing after an eviction, the doctrine and many associations are calling for the establishment of a legal mechanism to force the state to honour its commitments and to provide housing and/or compensation.

Such a mechanism exists in France, where evicted people can invoke the *Enforceable Right to Housing* (DALO)[99] in order to obtain a rehousing solution. To this end, tenants must apply to the *Commission départementale de médiation* (COMED, departmental mediation commission) responsible for verifying the file, reviewing tenants' needs, and establishing priorities and the urgency of the situation[100].

If the Commission refuses to allocate a unit, tenants can go to court to challenge the legality of the refusal. Similarly, if the Commission gives a favourable opinion but public landlords are in practice unable to allocate housing, the tenant can go to court to obtain compensation. Thus, there are two separate appeals. Applicants can go to court to have the state sanctioned if they are denied housing (injunction litigation) and to obtain compensation (compensation litigation) in the event of non-allocation of housing by public landlords. In their defence, to justify the lack of housing for applicants, the public authorities can invoke the reasons for exemptions spelled out in law, such as "the refusal of suitable housing by the applicant or the lack of available housing throughout the territory." But it is up to the public authorities to prove that no housing is available.

Unfortunately, all studies are unanimous. The effectiveness of these remedies is very limited. When the state is condemned for not honouring its obligation to provide housing, it is sentenced to a penalty payment, the amounts of which are paid into a national support fund for housing managed by the state and not to the evicted tenants.[101] The state pays itself for not meeting its obligations. Furthermore, when the state is ordered to pay compensation to tenants, the amount is now a flat rate of 250 euros per person per year,[102] unless there are exceptional circumstances.[103]

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[98] *Ben Djazia, supra* note 7 at para 17.6.

[99] Code de la construction et de l'habitation, art. L300-1, R300-1 - R300-2-2, L441-2-3, R441-13-18, Arrêté du 29 mai 2019 fixant la liste des titres de séjour ouvrant droit au droit au logement (DALO), memo from 13 December 2017 relating to the details of implementing the enforceable right to housing (DALO).

[100] L. 441-2-3, II CCH.

[101] Virginie Donier, « Le contentieux indemnitaire dans le paysage du contentieux du droit au logement » [2021] 4 Revue de droit sanitaire et social 589. See in particular the case judged by the European Court of Human Rights on April 19, 2015, *Tchokontio Happi c France*.

[102] *Chowdhury,* CE 28 March 2019, n° 414630, AJDA 2019, 730.

[103] *M^me^ Chikhi,* CE 23 October 2019, n° 422023, AJDA 2019, 2150.

Thus, litigants often win their cases in court but do not get housing and receive paltry compensation. The enforceable right to housing, this remedy of last resort[104] is also a "hopeless" remedy,[105] especially for the society's most vulnerable.[106] The more optimistic commentators, however, argue that this remedy puts financial pressure on the state and that this may force it to reconsider its housing policy.[107] In general, however, public authorities—whether local or state—show indifference or even resistance in implementing DALO.[108] The most vocal critics point out that there is almost no public information available on these appeals; that there is very little coordination; that the mediation commissions render only *"*38% favourable decisions"; and that compensation is so insignificant that it is illusory to think that it has an impact on public finances.[109] Finally, other authors insist on the facts: "The obligation to rehouse is not being met in areas of housing market stress*.* In 2019, 21,000 DALO priority households were rehoused while 34,000 new households were recognized as priorities. The result is a growing number of DALO priority cases that have not been rehoused: 71,000 by the end of 2019."[110]

In short, the judicialization of the right to housing offers the litigant a remedy, but it does not guarantee—far from it—access to suitable housing.

CONCLUSION

The passage of the *National Housing Strategy Act* is, from a legal standpoint at least, an important step forward for Canadian litigants. The right to housing is now recognized in Canadian law, which implies a "presumption of compliance" of federal and provincial legislation with international obligations. This means that the Canadian state and the provinces must henceforth set up a coherent policy for the prevention of evictions; offer judicial guarantees and legal services to those subject to eviction; recognize the principle of proportionality; grant powers to magistrates (to suspend evictions and spread out repayment) in order to take social and health situations into account; and finally, guarantee rehousing.

Moreover, as the European examples show, these obligations are far from revolutionary, and their implementation would cost public authorities very little. Their integration into domestic

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[104] Hafida Belrhali-Bernard, "L'action en responsabilité : recours de la dernière chance pour le DALO?" AJDA*,* 2011, 690.

[105] F. Roussel, "Le contentieux du droit au logement opposable, un "contentieux sans espoir?" RFDA*,* 2012, 1175.

[106] Isabelle Van de Walle et al, "La mise en œuvre du droit au logement opposable (DALO) à l'épreuve des représentations et des préjugés" (2016) 2:218 Recherche sociale 6.

[107] Caroline Bugnon, "L'impact du contentieux indemnitaire DALO sur les politiques du logement : coup d'épée dans l'eau ou ultime sursaut en faveur de l'effectivité du droit?" [2021] 4 Revue de droit sanitaire et social 616.

[108] *Ibid*.

[109] Hafida Belrhali, "250 € par an et par personne : une chance pour le DALO?" [2021] 4 Revue de droit sanitaire et social 632.

[110] Bernard Lacharme, "L'impact du recours indemnitaire : du relogement du requérant à la prise en compte du droit au logement dans les politiques" (2021) 4 Revue de droit sanitaire et social 625.

law would at least have the merit of humanizing a judicial eviction procedure which, in most Canadian provinces, remains completely indifferent to human dignity.

However, like all obligations that cost little or nothing, they also solve little or nothing.[111] Their implementation in Europe has not put an end to evictions, nor to the structural difficulties a still considerable portion of the population have in paying their rent or mortgage,[112] nor to the lack of affordable and sanitary housing, nor to the increase of social inequalities in housing[113] and, therefore, to financial inequalities.[114]

But whatever the limits of these legal provisions,[115] whatever the shortcomings noted in the countries where they have been implemented, we believe it is important to fight for their adoption. Because the main obstacle to the right to housing and the end of evictions is political in nature. It is the opposition of bankers, entrepreneurs, real estate companies and associations of large property owners—in short, a very tightly knit and privileged minority that firmly defends its privileges. For more than forty years, this minority has effectively and methodically opposed any public policy provision that might challenge freedom of contract, any rent control, and any investment in public services or public housing. At the same time, it has sought and continues to obtain substantial direct or indirect subsidies from successive federal and provincial governments, ostensibly to promote access to housing by building private housing.[116]

In this context, enforcing compliance with these few international obligations that restrict contractual freedom and force a small shift of funds to the public sector would undoubtedly be an important political victory.

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[111] Neil Smith, « Retour sur la question du logement » (2017) 3:170 Espaces et sociétés 133.

[112] Fanny Bugeja-Bloch, *Logement, la spirale des inégalités*, France, PUF (2013); Florence Bouillon, Anne Clerval et Stéphanie Vermeersch. « Logement et inégalités » (2017) 3:170 Revue espace et société 7.

[113] For examples of work on gender, age, or race inequalities in housing, see Sibylle Gollac, "Le genre caché de la propriété dans la France contemporaine" (2017) 62:1 Cahiers du Genre 43. François Nénin and Sophie Lapart, *L'Or gris,* France, Flammarion (2011); Matthew Desmond and Carl Gershenson, "Who Gets Evicted? Assessing Individual, Neighborhood and Network Factors" [2016] 62 Social Science Research 1.

[114] Thomas Piketty, *Le Capital au XXIe siècle*, France, Seuil (2013).

[115] In this vein, we can refer to the famous sentence by Friedrich Engels, "The housing shortage from which the workers and part of the petty bourgeoisie suffer in our modern big cities is one of the numerous smaller, secondary evils which result from the present-day capitalist mode of production." Friedrich Engels, *The Housing Question*, online (pdf): *Marxists.org* <https://www.marxists.org/archive/marx/works/download/pdf/Housing_Question.pdf>.

[116] Pierre Bourdieu and Rosine Christin, "La construction du marché – Le champ administratif et la production de la 'politique du logement'" (1990) 8182 *Actes de la recherche en sciences sociales* 65.