

IMPLEMENTING THE RIGHT TO HOUSING THROUGH COMMUNITY EDUCATION AND EMPOWERMENT

A Project of the Community-Based Tenant Initiative Fund (CBTIF)



What does the right to housing mean for vulnerable tenants and marginalized groups and how can they use it?

This presentation will briefly review:

- How the right to housing under international law can be considered and applied by courts and tribunals
- How the right to housing in the *National Housing Strategy Act* can be claimed and implemented
- How these mechanisms can be applied to address the current crisis of arrears and pending evictions resulting from the pandemic

The right to housing: a fundamental human right or a policy aspiration?

- Canada has long recognized the right to housing under international human rights law as guaranteed in the **International Covenant on Economic, Social and Cultural Rights (ICESCR)** and other human rights treaties.
- Under the ICESCR States are committed to what is referred to as “progressive realization”:
“achieving progressively the full realization of the rights recognized in the Covenant, “to the **maximum of its available resources by all appropriate means**, including particularly the **adoption of legislative measures.**”
- Courts and governments in Canada have seen progressive realization as an aspiration rather than as a human rights obligation that can be the subject of adjudication and remedy by courts, tribunals or human rights bodies. This view is now **entirely out of step** with both international human rights and experiences in other countries, where the right to housing is claimed and adjudicated before courts and tribunals.

Human rights made whole: the Optional Protocol to the ICESCR

- In 2008 the UN adopted the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, (OP-ICESCR) providing a complaints mechanism equivalent to the mechanism that had existed for civil and political rights since 1976.
- Justice Louise Arbour as High Commissioner on Human Rights described this historic advance as “**human rights made whole**”, “eliminating the artificial divide between freedom from fear and freedom from want that has characterized the human rights system since its inception.”
- **Compliance with progressive realization is based on a reasonableness standard:** “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 set forth in the Covenant.”

International human rights in Canadian law: Moral imperatives and legal necessities

- Rights in international human rights treaties ratified by Canada **not directly enforceable in courts as such**. They generally rely on domestic legislation. Canada has undertaken to adopt all necessary legislation to ensure that these rights are protected.

HOWEVER.

- The Supreme Court has recently made it clear that courts and tribunals have a critical role to play. International human rights norms must be treated as much more than “aspirations”.
- **“Those norms were not meant to be theoretical aspirations or legal luxuries, but moral imperatives and legal necessities. Conduct that undermined the norms was to be identified and addressed.”** (Nevsun Resources Ltd. v. Araya, 2020 SCC 5).

The right to housing and the Canadian Charter

- In the *Tanudjaja* case, the Ontario Court of Appeal dismissed a Charter claim demanding that homelessness be addressed as a violation of Charter rights without any consideration of Canada's international human rights obligations.

HOWEVER

- Supreme Court of Canada has not decided this issue and has **expressly left the question of what components of the right to housing are protected by the Charter open to be determined in future cases.**
- The Supreme Court has been clear 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.”**

We can't afford to be timid about the Charter rights of those who are denied the right to housing

- Do the rights to life, security of the person and equality under the Charter require protection from homelessness or unreasonable eviction? We still don't know!

Justice Louise Arbour, after her experience as UN High Commissioner of Human Rights observed that:

- In Canada there has been in Canada “a certain timidity – both on the part of litigants and the courts – to tackle head on the claims emerging from the right to be free from want.”
- “The legality of judicial review of all human rights is not open to question under the Canadian constitutional system. The legitimacy of a **constitutional interpretation that reflects the universality and indivisibility of all human rights expressed in international instruments ratified by Canada should also not be open to question.**”

International Human Rights and statutes (like the Residential Tenancies Act)

- “It is a well-established principle of statutory interpretation that legislation will be presumed to conform to international law. ...**the legislature is presumed to act in compliance with Canada’s obligations as a signatory of international treaties and as a member of the international community.**
- ... **as a matter of law**, courts will **strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations**, unless the wording of the statute clearly compels that result. (*R. v. Hape*, 2007)
- **International human rights “help show the values that are central in determining whether [an exercise of statutory discretion] was a reasonable”** (*Baker v. Canada (Minister of Citizenship and Immigration)*, 1999.)
- “[I]n some administrative decision making contexts, **international law will operate as an important constraint on an administrative decision maker.**” (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65)

Conclusions about the legal status of the right to housing under international human rights law

- 1. Legislation that permits evictions to violate human rights to life, security of the person and equality** can still be challenged under the Canadian Charter. We should not be timid about arguing for the right to life, security of the person and equality of those denied housing.
- 2. Charter rights** should be interpreted consistently international human rights, including the right to housing, and governments should promote, not oppose, such interpretations. The right to life is now widely recognized as requiring access to housing and Canadian courts need to catch up.
- 3. Tribunals or boards** applying laws governing arrears and evictions should strive to avoid violating international human rights and the right to housing. They should exercise discretion NOT to evict where an eviction would violate international human rights norms.

Residential Tenancies Act.

Power of Board, eviction

83 (1) Upon an application for an order evicting a tenant, **the Board may, despite any other provision of this Act or the tenancy agreement,**

(a) refuse to grant the application unless satisfied, having regard to all the circumstances, that it would be unfair to refuse; or

(b) order that the enforcement of the eviction order be postponed for a period of time. 2006, c. 17, s. 83 (1).

Other powers of Board

201 (1) The Board may, before, during or after a hearing,

(a) conduct any inquiry it considers necessary or authorize an employee in the Board to do so;

Mediation or other dispute resolution process

194 (1) The Board may attempt to settle through mediation **or another dispute resolution process any matter that is the subject of an application** or agreed upon by the parties. 2020, c. 16, Sched. 4, s. 30 (1).

National Housing Strategy Act.

Housing Policy Declaration

4 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.

National Housing Strategy

5 (1) The Minister must develop and maintain a national housing strategy to further the housing policy, taking into account key principles of a human rights-based approach to housing.

National Housing Council: participatory governance

The National Housing Council “is established for the purpose of furthering the housing policy and the National Housing Strategy

provides advice to the Minister, on the effectiveness of the National Housing Strategy;

Ex Officio members include President of CMHC, 2 Deputy Ministers, the Federal Housing Advocate and up to 15 appointed members, considering importance of including:

- (a)** persons who are members of vulnerable groups;
- (b)** persons with lived experience of housing need, as well as those with lived experience of homelessness;
- (c)** persons who reflect the diversity of Canadian society; and
- (d)** persons who have expertise in human rights.

Federal Housing Advocate

- Monitors the implementation of the progressive realization of the right to housing under the housing policy
- Assesses the impact of housing policy on persons who are members of vulnerable groups
- Monitors progress in meeting the goals and timelines based on progressive realization
- Researches systemic housing issues affecting vulnerable groups and initiates studies into economic, institutional or industry conditions that affect the housing system
- Consults with vulnerable groups and civil society organizations
- Receives and investigates submissions with respect to systemic housing issues;
- Advises the Minister

Federal Housing Advocate: Power to Review

Submissions – power to review issues

13.1 (1) The Federal Housing Advocate may conduct a review of any **systemic housing issue** that is raised in a submission received under paragraph 13(f).

Report

(4) If the Federal Housing Advocate conducts a review of the systemic housing issue, he or she must, at the conclusion of the review, provide the Minister and the person or group that presented the submission with a report setting out the Advocate's opinion on the issue and any recommendation to take measures — respecting matters over which Parliament has jurisdiction — to further the housing policy, including the progressive realization of the right to adequate housing, or the National Housing Strategy.

Review Panel: Participatory Hearings into Systemic Issues

(2) The Federal Housing Advocate may request that the National Housing Council **establish a review panel to hold a hearing to review any systemic housing issue within the jurisdiction of Parliament that is raised in a submission** received under paragraph 13(f).

16.3 A review panel must

- (a) hold a hearing** to review the systemic housing issue in respect of which it was established;
- **(b) hold the hearing in a manner that offers the public, particularly members of communities that are affected by the issue and groups that have expertise in human rights and housing, an opportunity to participate;**
- **(c) prepare a report that sets out the panel's opinion on the issue and any recommendation to take measures** - respecting matters over which Parliament has jurisdiction - to address the issue;
and
- **(d) submit the report to the Minister.**

Accountability and Remedial Measures

Minister's response to Advocate's reports

17.1 The Minister must respond to each report provided by the Federal Housing Advocate under paragraph 13(h) and subsection 13.1(4) **within 120 days** after the day on which it is received.

Minister's response to review panel reports

17.2 (1) The Minister must respond to a report submitted by a review panel under paragraph 16.3(d) within 120 days after the day on which it is received.

Tabling in Parliament

(2) The Minister must cause the response to be laid before each House of Parliament on any of the first 30 days after the day on which it is provided to the review panel or, if either House is not sitting on the last day of that period, on any of the first 15 days on which that House of Parliament is sitting.

The right to housing and the evictions/arrears crisis

- Although the National Housing Council and the Federal Housing Advocate have not yet been appointed, the NHTA is in force and the policy commitment to the right to housing should guide the response to the current crisis facing vulnerable tenants.

A Rights Based Approach Based on the NHTA

A rights-based approach starts with hearing from rights-holders and those affected by the current crisis, as well as from advocates and experts to:

- Identify the key systemic issues
- Ensure attention to particular issues facing women, racialized groups, Indigenous households, persons with disabilities, migrants, youth, children, homeless persons and other affected groups
- Assess the effects of govt policies and programs as well as private actors on these groups and consider what measures would be required for compliance with the right to housing
- Identify appropriate policy recommendations as well as litigation strategies through which to claim the right to housing

Key Components of the right to housing applicable to the arrears/eviction crisis

1. Evictions can only be justified under exceptional circumstances after all other options have been explored. There must be “no alternative means or measure less injurious to the right to housing available, and the persons concerned must not be left in or exposed to a situation constituting a violation of other Covenant or human rights.”
2. Residents must be “meaningfully engaged” in exploring all options. Meaningful engagement means more than mere consultation. Affected residents must have access to hearings and a role in decision-making based on the recognition of their human rights.
3. No eviction should be permitted where it would lead to homelessness or violations of other human rights. If eviction is unavoidable, governments must “take all appropriate measures, to the maximum of its available resources” to ensure that adequate alternative housing is made available.

Key Components of the right to housing that are applicable to the arrears/eviction crisis (cont'd)

4. Particular attention must be directed to marginalized groups and those facing systemic discrimination, including women, racialized groups, Indigenous Peoples, persons with disabilities and sole support parents. The best interests of children and the protection of the family must always be ensured.
5. Where increased or significant numbers of households are unable to afford their rent payments because of a systemic issue of affordability created by rent increases and/or loss of income, evictions for arrears are not permitted. Instead, governments are required to address the systemic causes of unaffordable rents, through financial assistance to tenants, rent regulation or adjustment, and other measures.
6. Business practices and rights of landlords and other private actors must be regulated to ensure that the right to housing is not violated. Landlords may be required to accommodate the needs of tenants in particular circumstances where it would not impose a disproportionate burden

Key Components of the right to housing applicable to the arrears/eviction crisis (cont'd)

7. Longer term measures should be adopted to eliminate the underlying causes of unaffordability and arrears, such as speculation in land, real estate and housing, inadequate income supports, inadequate supply of social housing and growing economic inequality.
8. Guidance Note of the Special Rapporteur on the right to housing on mortgage and rent arrears during the pandemic. Three Principles
 - i) the burden of the response to the pandemic must be shared across society in a fair and equitable manner;
 - ii) renters and homeowners – whether in informal or formal markets – must not emerge from the pandemic overburdened with housing related debt and
 - iii) the financial burden shouldered by banks, financial institutions, corporate landlords and other financial actors must be proportionate to their resources.

Some tentative conclusions about policy and program requirements

- The moratorium on evictions must be extended until programs and procedures have been put in place to meet human rights requirements.
- Through meaningful engagement, expert studies and statistical analysis, challenges facing groups that have been most severely affected must be identified and addressed, including,
 - women who have experienced disproportionate income loss and suffered most severely from school closures, loss of child care and high rent;
 - persons with disabilities who have lost support services and for whom relocation may impose undue hardship;
 - racialized and immigrant communities disproportionately affected by both income loss and discriminatory practices among landlords.
- Governments must provide relief from accumulated arrears and unmanageable debt as well as assistance with ongoing rent payments, by redesigning or supplementing existing income and housing assistance programs.

Some tentative conclusions with respect to policy and program requirements (cont'd)

- The Canada Housing Benefit or a comparable benefit must be significantly expanded and redesigned to address the needs of all tenants who were unable to afford rents.
- Those for whom the CERB did not provide sufficient income to cover rent, may need to be provided with supplementary financial assistance to cover rental arrears.
- Specific measures must be developed to ensure access to permanent housing for homeless persons who were moved into temporary accommodation during the pandemic.
- All levels of government must work together, operating on the basis of an expanded 'Jordan's Principle' so that the right to housing is not violated because governments are arguing about jurisdictional responsibility.

Legal Advocacy and the right to housing

- In Charter challenges to Ontario's Residential Tenancies Act or other provincial legislation, courts should be encouraged to interpret the Charter consistently with Canada's international human rights obligations, to ensure that tenants have a right to have their circumstances fully considered and eviction ordered only after canvassing all other options, and never into homelessness.
- Tribunals and courts applying existing legislation governing evictions and arrears should be urged to exercise discretion not to order an eviction where it would violate international human rights.
- Evictions that violate the right to housing should be judicially reviewed as unreasonable.
- Any alternative dispute procedures to resolve issues of arrears should include government authorities able to provide necessary financial assistance as required and be supervised by a mediator mandated to ensure compliance with human rights.

Challenges of Housing Research in Support of Systemic Right to Housing Claims

Challenges of capturing the way the housing system work in relation to particular households based on aggregate data.

Example: Scott Leon and James Iveniuk's important study study "Forced Out: Evictions, Race, and Poverty in Toronto" found that in **neighbourhoods with significantly higher incidence of tenant low income, rates of eviction applications for arrears were 2.5% higher.**

In CERA's human rights case of *Kearney v Bramalea Ltd*, however, challenging landlords use of rent to income ratio as means to predict the likelihood of an individual tenant applicant to default, the data indicated **no significant correlation between low income and risk of default.** We found that it was income LOSS that more frequently led to arrears and evictions.

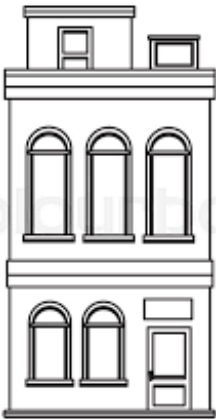
These two findings, in fact, are **not incompatible.**

Challenges of Housing Research in Support of Systemic Right to Housing Claims

Consider two buildings with 100 units each. Building A is very desirable, with more affordable rents, and the landlord rents to only higher income tenants. It has a turnover rate of 5%

Building B is run-down, badly maintained, over-priced, turnover rate of 20%. Only low income tenants rent apartments in Building B. They had limited choice, but they also hope not to stay there very long.

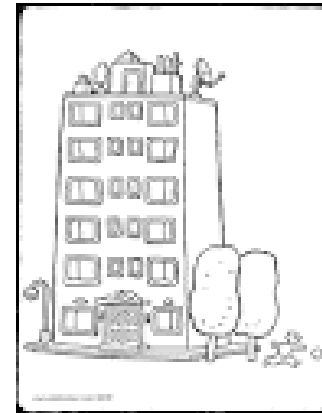
Building A – 100 high income tenants



1 tenant evicted for arrears every year

Risk of a new high income tenant defaulting is 20%

Building B – 100 low income tenants



4 tenants evicted every year for arrears

Risk of a new low income tenant defaulting is 20%

Challenges of Housing Research in Support of Systemic Right to Housing Claims

Some Questions to Ponder

- **Tenant mobility rates vary considerably in response to market conditions. Apartment turnover rates based on CMHC data declined in Toronto from 15.9% in 2016 to 9.5% in 2019. The rate is 33.3% in Calgary. How can we better understand what happens to tenants when they are forced to move in a market such as Toronto's?**
- **What kind of data is available to most accurately capture the affordability crisis during the pandemic for particular types of tenants households, and to estimate their accumulated debt burden?**
- **If assistance is targeted to tenants facing eviction applications for arrears , will it be getting to those most in need? What other methods can be used to identify those most in need?**
- **Do we need collaborative research involving affected groups and qualitative data?**
- **To what extent is the evictions crisis a function of systemic problems with the housing system in Canada and how can responses to the current crisis be leveraged into longer term measures consistent with the commitment to the right to adequate housing**