

# Executive Summary

In 2014 it was conservatively estimated that over 235,000 individuals in Canada experience homelessness in a year, with over 35,000 Canadians homeless on any given night, thousands of whom will be unsheltered – living in parks and public spaces.<sup>1</sup> These statistics are widely known, yet necessary acts of survival, such as sleeping in a park or sheltering with a tent or tarp, are acts prohibited by law in many Canadian jurisdictions. Homeless people can be targeted, ticketed, displaced by law enforcement, and, ultimately, enter the criminal justice system<sup>2</sup> for taking basic steps for survival. The majority of prohibitions on sleeping and sheltering exist in municipal bylaws. Enforcement happens at the local levels and is not subject to oversight by higher levels of government. The legal avenue available for challenging these bylaws, constitutional challenges on a city-by-city basis, is virtually impossible.

We do not argue that setting up a tent, tarp or box constitutes an adequate standard of living or housing. However, we recognize that for homeless people who are currently being displaced and exposed to the elements the liberty to legally sleep in a park and set up a survival structure would constitute a vast improvement in quality of life. Constructing a temporary shelter provides a level of security, privacy, warmth, sun protection and comfort that can be lifesaving when one has no other viable, accessible and safe options. Prohibiting such acts of necessity infringes the right to life, liberty and security of the person, as enshrined in section 7 of the *Canadian Charter of Rights and Freedoms*.

Ultimately, the answer to Canada's housing and homelessness crisis is for governments to recognize the country's obligations under the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and to legislate a legally enforceable right to adequate housing in accordance with Article 11 of the ICESCR. While we advocate for this larger goal, it is imperative that systems of law that criminalize and stigmatize acts of basic necessity are no longer tolerated. Article 11 requires the protection of an adequate standard of living and Article 2(2) requires application of the ICESCR without discrimination. There is no justifiable basis upon which to deny some of Canada's most vulnerable people the ability to safeguard their own lives and safety.

Similar laws have been challenged in the United States of America. Subsequent to the UN Human Rights Committee's 2014 recommendations to abolish laws criminalizing homelessness, the American Department of Justice has taken the position that punishing unavoidable conduct when a person has no viable alternative violates the American Constitution.

While Canada's federal government is the signatory state to the ICESCR, all levels of government are responsible for

the implementation of these rights. Municipalities are the key government actor in the area of treatment and regulation of homeless people living in public spaces, and require both direction and resources to ensure that their ICESCR obligations are met. In two British Columbia municipalities, Victoria and Abbotsford, bylaws regulating sleeping and sheltering public space have been found to be unconstitutional; however, these decisions have not resulted in other Canadian municipalities amending similarly harmful bylaws. Litigating this issue one municipality at a time is not a viable option for people living without shelter.

We submit that the failure of Canada to officially recognize a right to an adequate standard of living and the position taken by all levels of government that economic, social and cultural rights ("ESC rights"), particularly housing rights, are not justiciable and are contrary to Canada's obligations and stated intentions under the ICESCR.

In the face of a national housing crisis and recognized violations of the rights of homeless people, we propose that Canada commit to acknowledging in law the right of homeless people to an adequate standard of living and to the highest attainable standard of physical and mental health and to enacting a legally enforceable right to adequate housing as well as protections from discrimination on the basis of social status and homelessness.

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1 Stephen Gaetz, Tanya Gulliver & Tim Richter, *The State of Homelessness in Canada* (Toronto: The Homeless Hub Press, 2014) at 5, online: <<http://homelesshub.ca>>.

2 Marie-Eve Sylvestre, expert affidavit testimony prepared for *Tanudjaja v Canada*, Ontario Superior Court, File No. CV-10-403688 at paras 44-47, online: <[www.acto.ca](http://www.acto.ca)>. Dr. Sylvestre is a lawyer and expert in the study of laws and state actions that stigmatize and criminalize people who use public space for survival activities.

# Recommendations

Pivot Legal Society recommends that:

- a. All levels of government in Canada commit to revoking laws that penalize, criminalize or discriminate against people for engaging in behavior necessary for survival and related to their homelessness and poverty, such as sleeping and erecting shelter in public spaces;
- b. Canada offer incentives for decriminalization including provision of continued financial support to local and subnational authorities that implement alternatives to criminalization and withdrawal of funding from local and subnational authorities that criminalize the homeless;
- c. Canada recognize the right to an adequate standard of living for homeless people and the right to adequate housing as justiciable, legal rights and commit to ensuring that subnational governments understand their legal obligations under the ICESCR;
- d. Canada ensure close cooperation among all relevant stakeholders, including social, health, law enforcement and justice professionals at all levels, to intensify efforts to find solutions for homeless people, in accordance with human rights standards;
- e. Canada ensure that any processes of devolution to lower levels of government in relation to housing is guided and informed by human rights, in particular the right to adequate housing. Transfers of responsibility for housing or other programmes from one level of government to another should be accompanied by a clarification of concomitant human rights obligations including requirements of monitoring and accountability;
- f. Canada ensure that local and subnational governments have adequate financial and other resources for the discharge of their responsibilities, with capacity to respond to changing housing needs at the local level, particularly for marginalized and disadvantaged groups;
- g. Canada amend the *Canadian Human Rights Act* to prohibit discrimination on the basis of homelessness and social condition and work with subnational governments to incorporate similar amendments into provincial and territorial human rights legislation;
- h. Canada, along with subnational governments, cease to argue against the recognition of homelessness and social condition as an analogous ground of discrimination under section 15 of the *Charter*;
- i. Canada recognize the rights of homeless people to physical and mental health and coordinate with all levels of government to protect the physical and mental health of homeless people;
- j. Canada commit to implementing qualitative, longitudinal and other research methodologies for assessing the extent of homelessness among marginalized groups and its systemic causes with full inclusion of stakeholders in the design and implementation of studies;
- k. Canada ensure that data collected includes information required to measure Canada's implementation of ESC rights.