



# Homeless Rights in Canada

Submission of the Pivot Legal Society to the  
Committee on Economic, Social and Cultural Rights  
for the Sixth Periodic Report of Canada for the CESCR's 57th Session

February 1, 2016

**PIVOT**  
equality lifts everyone

## **PIVOT LEGAL SOCIETY**

Pivot is a non-profit legal advocacy organization working in Vancouver's Downtown Eastside ("DTES"), one of Canada's poorest urban neighbourhoods. Pivot's mandate is to take a strategic approach to social change, using the law to address root causes of issues that undermine the quality of life of those most on the margins. Pivot takes a responsive approach to community need through direct consultation with people most affected by laws and state actions that entrench poverty and stigma. In particular, Pivot works to promote the safety of sex workers, defends the rights of injection drug users, litigates for police accountability in relation to marginalized people and represents people who have been criminalized and displaced because they are homeless.

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# 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.

# Overview of Issues

"The Committee reiterates its recommendation that the federal, provincial and territorial governments address homelessness and inadequate housing as a national emergency by reinstating or increasing, where necessary, social housing programmes for those in need, improving and properly enforcing anti-discrimination legislation in the field of housing, increasing shelter allowances and social assistance rates to realistic levels, and providing adequate support services for persons with disabilities. The Committee urges the State party to implement a national strategy for the reduction of homelessness that includes measurable goals and timetables, consultation and collaboration with affected communities, complaints procedures, and transparent accountability mechanisms, in keeping with Covenant standards."<sup>3</sup>

- 2 This was the recommendation of the Committee to Canada in 2006, almost one decade ago. The housing situation, quite rightly described as a "national emergency," remains dire and accountability mechanisms remain illusory. It is within this context that Pivot Legal Society makes these respectful submissions in relation to laws, state actions and state inaction that are putting the lives of Canada's homeless at risk and violating their rights to an adequate standard of living, health and human dignity.
- 3 Many aspects of this review under the ICESCR touch the lives of Pivot's clients, including inadequate income assistance rates, housing insecurity, food insecurity, inadequate disability benefits, lack of access to justice and lack of access to health care. We support the recommendations of Canada Without Poverty and the Charter Committee on Poverty Issues and Social Rights Advocacy Centre on these issues.
- 4 Here, we propose to focus solely on the stigmatization, criminalization and ongoing displacement of homeless people in Canada through the operation of laws that do not accord with their ESC rights – specifically Article 2(2) protecting all individuals from discrimination, Article 11 recognizing the right of every person to an adequate standard of living, including housing, and Article 12 ensuring the right to the highest attainable standard of physical and mental health through the prevention, treatment and control of disease.
- 5 Laws that prohibit acts of basic necessity include, but are not limited to, prohibitions on sheltering oneself or lying down in public places and sleeping in parks. The enforcement of such laws causes both physical and psychological harm and has been found to violate the right to life, liberty and security of the person enshrined in section 7 of the *Canadian Charter of Rights and Freedoms*. Despite such findings in two municipalities, subnational governments across the country continue to enforce similar legislation.

Laws criminalizing acts of human necessity are based on prejudice and stereotypes that homeless people, by virtue of their existence, are a form of public disorder that should be eliminated from the public sphere. Theories of governance that perpetuate such laws necessarily create a divide between the "respectable" or "good" citizen and homeless people, who are characterized as "disreputable", potentially dangerous criminals. In Canada, approaches to policing public space grounded in stigma and discrimination can be tracked along the same timeline as the decline in housing, social assistance, health and employment programs. For example, the number of statements of offence issued against homeless people for various street-based survival activities increased 800% and 1400% in the Ontario cities of Toronto and Ottawa respectively between 2000 and 2006.<sup>4</sup> The existence of such laws empowers authorities to conduct social profiling, perpetuating discriminatory and disgraceful conduct against homeless people.<sup>5</sup>

In 2013 in the province of British Columbia, police in the City of Abbotsford cut down and pepper-sprayed the tents of homeless people for the purpose of destroying their survival shelters and displacing them. No consideration was given to where they might go. The same year, City of Abbotsford employees spread chicken manure on a homeless camp where people were living in an attempt to make the camp uninhabitable.<sup>6</sup>

In the absence of both a national housing strategy that recognizes an adequate standard of living and housing as human rights and explicit legal protection from discrimination for homeless people, prohibitions on the necessities of life will continue to put at risk the lives and safety of Canada's homeless population.

3 United Nations Economic and Social Council, "Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada" (22 May 2006) at para 62, online: <<http://www.refworld.org/publisher/CESCR/CAN/45377fa30,0.html>> [Concluding Observations: Canada]

4 Sylvestre, *supra* note 2 at paras 25-30.

5 Sylvestre, *supra* note 2 at para. 36. For example, recently in Toronto multiple police officers have been disciplined for preying on homeless people, issuing them unjustified tickets that they are unable to pay (some of which resulted in those individuals being convicted in absentia for tickets that never should have been issued), one officer has been disciplined in northern Ontario for ticketing a homeless man and driving him out of town, leaving him to walk home at night in freezing temperatures. See *Toronto Star*, "Toronto cop preyed on vulnerable people in fake ticket scheme" November 5, 2015 <http://www.thestar.com/news/gta/2015/11/05/toronto-cop-preyed-on-vulnerable-people-in-fake-ticket-scheme.html> and *Toronto Star*, "Hundreds of officers in the Greater Toronto Area disciplined for 'serious' misconduct in past five years" September 19, 2015 <http://www.thestar.com/news/canada/2015/09/19/hundreds-of-officers-in-the-greater-toronto-area-disciplined-for-serious-misconduct-in-past-five-years.html>

6 *Abbotsford (City) v Shantz*, 2015 BCSC 1909 at paras 97, 100, 102, 105, 107-115 [Shantz]. Police and City employees testified in open court that the purpose of these actions was to evict homeless people from their camps without consideration as to whether they had other viable shelter or housing options.

# Article 11 (part 1)

## REPEALING ANTI-CAMPING LAWS THAT VIOLATE THE RIGHT AN ADEQUATE STANDARD OF LIVING

### Review - Anti-camping laws violate the Canadian Charter of Rights and Freedoms

9 In 2008, the Supreme Court of British Columbia (B.C.) declared anti-camping bylaws in the City of Victoria unconstitutional in their application to homeless people living in a park in *Victoria (City) v Adams* on the basis that such laws infringe a homeless person's rights to life, liberty and security of the person. The Court of Appeal for B.C. upheld that finding in 2009.<sup>7</sup> The declaration allowed homeless people to erect structures in parks on a temporary overnight basis, requiring that they be taken down each day. Central to the findings in *Adams* were the lack of available emergency shelter beds and the danger posed to homeless people when they are prohibited from sheltering themselves from the elements.

10 In determining the rights of homeless people to shelter themselves in public spaces, the trial judge in *Adams* referred directly to Canada's assertions that section 7 of the *Charter*, which protects the rights to life, liberty and security of the person, "must be interpreted in a manner consistent with Canada's obligations under the Covenant to not deprive persons of the basic necessities of life..."<sup>8</sup>

11 Despite these assertions made by Canada, and the findings of unconstitutionality in *Adams*, local and subnational governments<sup>9</sup> across the country continue to criminalize acts of basic necessity through anti-camping and similar laws. Local governments across the country have failed to change similar laws following *Adams*, despite an ongoing lack of accessible shelter and housing alternatives in their municipalities. It is our position that this is the case, not because any existing anti-camping bylaws would withstand constitutional challenge, but because homeless people have so little access to justice that all levels of government remain confident there will not be legal consequences if they continue to turn a blind eye to the ongoing abuse of human rights caused by these laws.

12 On appeal, the court order in *Adams* was amended to provide the City of Victoria the option of returning to court to terminate the declaration of unconstitutionality upon showing that the number of homeless people no longer exceeds the number of available shelter beds in the City of Victoria. The City of Victoria has not yet made such application and the number of homeless people in Victoria continues to outnumber available shelter beds.

In 2015, in *Abbotsford (City) v Shantz*, the Supreme Court of B.C. declared almost identical anti-camping bylaws in Abbotsford, B.C. unconstitutional as they violate homeless people's liberty and security of the person. Like *Adams*, this case arose when Abbotsford sought to displace a group of homeless people living in a park. The case differs from *Adams*, however, in that the City of Abbotsford was also found to have used chicken manure, bear spray and the destruction of tents to displace their homeless population.

### Shelter and housing options must be accessible and adequate

The findings in *Shantz* expand upon those in *Adams*, holding that not only are there insufficient shelter spaces in Abbotsford, but also that what shelter exists is impractical for many homeless people – meaning there must be a subjective assessment of whether a shelter or housing option is actually a practicable alternative to sleeping in public spaces for an individual homeless person. For example, certain homeless people may be unable to avail themselves of shelter spaces due to their personal circumstances, restrictive shelter rules, and being banned from the emergency shelters as a result of conflicts with staff or other shelter users, breaking shelter rules or being subject to bail and probation conditions that prohibit people from entering areas of the city where shelters are located.<sup>10</sup>

Further, the court found that being homeless and on the streets is not a matter of choice, as such assertions ignore "realities such as poverty, low income, lack of work opportunities, the decline in public assistance, the structure and administration of government support, the lack of affordable housing, addiction disorders, and mental illness"<sup>11</sup> and that access to housing is "limited by supply, the monthly amount they receive in income assistance/welfare, by requirements for the payment of application fees, and by other things, such as whether they are actively using drugs or alcohol. Any market housing that is available to those with the limited incomes of the City's homeless is often in deplorable condition."<sup>12</sup>

7 *Victoria (City) v Adams*, 2008 BCSC 1363 [*Adams BCSC*]; *Victoria (City) v Adams*, 2009 BCCA 563 at paras 102-110 [*Adams BCCA*].

8 *Adams BCSC*, *supra* note 7 at para 98.

9 We have used the term "local" in reference to municipal governments and "subnational" to reference municipal as well as provincial and territorial governments. The terms are largely interchangeable, however "subnational" is broader in scope.

10 *Shantz*, *supra* note 6 at para 54-55, 73, 82.

11 *Shantz*, *supra* note 6 at para 81.

12 *Shantz*, *supra* note 6 at para 68.



## ***Displacement and eviction causes harm***

- 16 Many homeless people are displaced from public spaces on a daily basis, while others attempt to form small, informal encampments in more secluded areas. Displacement and eviction of these people causes harm and exacerbates their already vulnerable positions in society. As found by the B.C. Supreme Court, displacement “causes them impaired sleep and serious psychological pain and stress and creates a risk to their health” and inhibits “the ability of the service providers who endeavoured to help the City’s homeless to actually locate them and provide help.”<sup>13</sup>
- 17 In *Shantz* it was further established that there exists a “legitimate need for people to shelter and rest during the day and no indoor shelter in which to do so” and that the minimally impairing way to govern moving forward would be to allow for temporary overnight camping in parks and public spaces between 7pm and 9am and to designate specific places where more than overnight camping is permitted, ensuring that space exists in which the City’s homeless can sleep, rest, shelter, stay warm, eat, wash and attend to personal hygiene.<sup>14</sup>
- 18 Despite the findings that displacement itself causes harm, that daytime shelter is needed; and that there are barriers to using emergency shelter services and inadequate access to housing, the court only ordered that the bylaws must allow for temporary overnight structures between 7pm and 9am. Subsequent to this ruling, Abbotsford has maintained the practice of removing encampments during daytime hours, perpetuating the harmful pattern of displacement. The City has not designated any place for the homeless to shelter on more than an overnight basis so they can access sleep, rest, shelter, stay warm, eat, wash and attend to personal hygiene.

### ***Charter rights ring hollow for those without a minimum adequate standard of living***

- 19 The court in both *Adams* and *Shantz* quoted Professor Martha Jackman, stating:

[A] person who lacks the basic means of subsistence has a tenuous hold on the most basic of constitutionally guaranteed human rights, the right to life, to liberty, and to personal security. Most, if not all, of the rights and freedoms set out in the *Charter* presuppose a person who has moved beyond the basic struggle for existence. The *Charter* accords rights which can only be fully enjoyed by people who are fed, are clothed, are sheltered, have access to necessary health care, to education, and to a minimum level of income. As the United Church’s brief to the

Special Joint Committee declared: “Other rights are hollow without these rights”.<sup>15</sup>

This passage highlights the reality that not only is homelessness itself an affront to the realization of ESC rights, protections afforded under Canada’s constitution are illusory to those without the basic necessities of life such as shelter or housing. Without housing other rights become largely meaningless in practice.

Both *Adams* and *Shantz* are clear that there is a desperate shortage of affordable housing and access to shelter space in Canada. Despite this, courts continue to make only the smallest of allowances for survival behaviours associated with homelessness. In a recent case at the Ontario Court of Appeal, *Tanudjaja v Canada*, the court declined to even hear arguments in relation to a possible violation of housing rights – finding that challenges relating to homelessness and inadequate housing are not justiciable.<sup>16</sup> This leaves litigants to argue for the most meager of survival rights – the right to place a tent, tarp or box over oneself overnight – because courts have declined to embark on any examination of whether a lack of housing can itself violate *Charter* rights.

Due to the significant limitations faced by homeless people in accessing the justice system it is of great importance that Canada commit to ensuring the repeal of anti-camping by-laws across the country rather than relying on an already marginalized group of people to bring forward challenges on a city-by-city basis.<sup>17</sup>

### ***The end of criminalizing homelessness in the United States of America***

Similar laws and ordinances to those that restrict camping in many Canadian municipalities exist and have been challenged in the United States of America. In 2014 the Human Rights Committee, in their Concluding observations on the fourth periodic report of the United States of America in relation to the International Covenant on Civil and Political Rights, recommended that:

The State party should engage with state and local authorities to:

13 *Shantz*, supra note 6 at paras 209 & 219.

14 *Shantz*, supra note 6 at paras 92, 276-278.

15 *Shantz*, supra note 6 at para 178; *Adams BCSC*, supra note 6 at para 143; *Adams BCCA*, supra note 6 at para 75

16 *Tanudjaja v Canada*, 2014 ONCA 852 at para 19 [*Tanudjaja*].

17 In *BC/Yukon Association of Drug War Survivors v Abbotsford (City)*, 2014 BCSC 1817 at para 61, the court found that there were no other viable ways to raise the constitutional issues at bar and that it would be impossible for individual homeless people to each mount a constitutional challenge on their own.



- (a) Abolish the laws and policies criminalizing homelessness at state and local levels;
- (b) 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 the homeless, in accordance with human rights standards; and
- (c) Offer incentives for decriminalization and the implementation of such solutions, including by providing continued financial support to local authorities that implement alternatives to criminalization, and withdrawing funding from local authorities that criminalize the homeless.<sup>18</sup>

24 Subsequently, the United States Department of Justice has stopped supporting subnational governments that punish and criminalize homeless people who are without accessible shelter and housing options, taking the position in litigation that “punishing conduct that is a universal and unavoidable consequence of being human” violates the American Constitution and is poor public policy. Their Human Rights Division further holds that “Many homeless individuals are unable to secure shelter space because city shelters are over capacity or inaccessible to people with disabilities,”<sup>19</sup> much like shelters in Canada.

### Recommendations

25 We recommend that:

- a. all levels of government in Canada commit to revoking laws that penalize 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.

## Article 11 (part 2)

### ARTICLE 11 - IMPLEMENTING A RIGHT TO HOUSING AND A RIGHT TO AN ADEQUATE STANDARD OF LIVING

#### Review - Regressive government views on ESC rights in litigation

Canada does not have a national housing strategy and maintains that Article 11 rights to an adequate standard of living, including housing, are not legally enforceable rights in Canada. Regardless of policies and investments made in housing, there is no protection for the homeless or redress for violations of their rights unless and until Canada commits to honouring the right to adequate housing. 26

This failure to recognize the rights to an adequate standard of living, including housing as enforceable has led to regressive government views on ESC rights generally, and has perpetuated a system in which subnational governments are both committing human rights abuses against homeless people and failing to take measures to the maximum of their available resources to ensure access to adequate housing. 27

The Committee has repeatedly noted that, under General Comment No. 9 (1998),<sup>20</sup> the federal, provincial and territorial governments of Canada have an obligation to promote interpretations of the *Charter* and other domestic law in a way consistent with the ICESCR.<sup>21</sup> To that end, Canada has stated that section 7 of the *Charter* is to be interpreted in a manner consistent with the ICESCR and ensuring that people are not deprived the necessities of life.<sup>22</sup> 28

Despite such statements by Canada, and despite reference to these statements in cases such as *Adams*,<sup>23</sup> governments at all levels continue to take the position that no claim ensuring access to the basic necessities of life is justiciable in Canada.<sup>24</sup> 29

18 United Nations Human Rights Committee, *Concluding Observations on the Fourth Periodic Report of the United States of America*, 23 April 2014 (CCPR/IC/USA/CO/4) at para 19, online: <<http://www.state.gov/documents/organization/235641.pdf>>.

19 United States District Court for the District of Idaho, *Statement of Interest of the United States*, 6 August 2015, online: <[www.justice.gov/opa/file/643766/download](http://www.justice.gov/opa/file/643766/download)>; see also Department of Justice, “Justice Department Files Brief to Address the Criminalization of Homelessness” (6 August 2015), online: <<http://www.justice.gov>>. The focus in the USA is largely on arrest and prosecution based on local anti-camping laws. In Canada, enforcement focuses more on displacement, discriminatory targeting, and ticketing. All of these practices themselves cause harm and can lead to incarceration for failure to pay fines and involvement in the criminal justice system. While the mechanisms do not directly match, many of the harms are the same, including over-policing of homeless people and over representation of homeless people in the prison system.

20 United Nations Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 9: The domestic application of the Covenant*, 3 December 1998 (E/C.12/1998/24), online: <http://www.refworld.org/docid/47a7079d6.html>.

21 *Concluding Observations: Canada*, *supra* note 3 at para 41.

22 *Adams BCSC*, *supra* note 7 at para 98.

23 *Adams BCSC*, *supra* note 7 at paras 98-100.

24 See *Shantz*, *supra* note 6; Tanudjaja, *supra* note 16.

30 Most recently in *Shantz*, the Chief Justice of the Supreme Court of B.C. declined to order a declaration that:

the rights of the City’s homeless to exist and obtain basic necessities of life, including:

- (i) warmth and adequate protection from the elements, including survival shelter;
- (ii) rest and sleep;
- (iii) community and family connection;
- (iv) effective access to safe living spaces;
- (v) freedom from physical, mental and psychological health risks and effects of exposure to the elements, sleep deprivation, chronic threatened or actual displacement and the isolation and vulnerability related to such displacement;

are each aspects of life, liberty and security of the person guaranteed by s. 7 of the *Charter*.<sup>25</sup>

31 The ICESCR has long been known as an important interpretive aid when determining Charter rights; however, the ICESCR has not led to substantive change in Canadian human rights and constitutional jurisprudence in relation to homeless people.

32 Positions taken by government parties to litigation which advocate for the non-inclusion of ESC rights within Canada’s constitutional framework result in a lack of legal recourse or remedies for the breach of ESC rights. The problematic interpretation of the justiciability and enforceability of these rights is accurately reflected in the Submission of the Charter Committee on Poverty Issues and Social Rights Advocacy Centre For the Pre-Sessional Working Group of the Committee on Economic, Social and Cultural Rights Considering the List of Issues for the Sixth Periodic Report of Canada For the CESCR’s 55th Session, (February 2015):

Canada’s refusal to recognize its obligations to ensure effective legal remedies for ESC rights is integrally related to the continued and growing violations of ESC rights in Canada in law and policy. Canada treats ESC rights as mere policy issues rather than as human rights. This position is reflected in Canada’s Periodic Report, which focuses on policies and programs but ignores the need to recognize Covenant rights as human rights.<sup>26</sup>

33 This course of action by government has contributed to a state of affairs where not only have government parties argued that there exists no enforceable right to adequate housing, as seen in *Tanudjaja*, but have further argued that laws prohibiting homeless people from sheltering in public spaces are justified, despite an absence of accessible shel-

ter or housing.

These concerns have been raised repeatedly by the Committee, noting in 2006 that recommendations made in 1993 and 1998 were not implemented and that the following remain unaddressed:

- (a) The State party’s restrictive interpretation of its obligations under the Covenant, in particular its position that it may implement the legal obligations set forth in the Covenant by adopting specific measures and policies rather than by enacting legislation specifically recognizing economic, social and cultural rights, and the consequent lack of awareness, in the provinces and territories, of the State party’s legal obligations under the Covenant.
- (b) The lack of legal redress available to individuals when governments fail to implement the Covenant, resulting from the insufficient coverage in domestic legislation of economic, social and cultural rights, as spelled out in the Covenant; the lack of effective enforcement mechanisms for these rights; the practice of governments of urging upon their courts an interpretation of the *Canadian Charter of Rights and Freedoms* denying protection of Covenant rights.<sup>27</sup>

**Review - The roles and responsibilities of local and subnational governments**

While the majority of dialogue relating to ESC rights occurs with Canada’s national government, “[i]nternational human rights obligations extend to all levels of government within their allocated sphere of responsibilities,”<sup>28</sup> and the ability to realize a right to adequate housing requires accountability and effective application of constitutional rights at subnational government levels.<sup>29</sup>

Canada describes municipal governments as being “responsible for services such as water supply, sewage and garbage disposal, roads, sidewalks, street lighting, building codes, parks, playgrounds, libraries and so on.”<sup>30</sup>

25 *Shantz*, *supra* note 6 at para 260.  
26 Charter Committee on Poverty Issues & Social Rights Advocacy Centre, Submission for the Pre-Sessional Working Group of the Committee on Economic, Social and Cultural Rights Considering the List of Issues for the Sixth Periodic Report of Canada for the CESCR’s 55th Session, (February 2015) at para 1, online: <[http://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/CAN/INT\\_CESCR\\_JCO\\_CAN\\_19677\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/CAN/INT_CESCR_JCO_CAN_19677_E.pdf)>.  
27 Concluding Observations: Canada, *supra* note 3 at para 11.  
28 Leilani Farha, Human Rights Council, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context*, Twenty-eighth session, GE.14-24816 (E), A/HRC/28/62, 22 December 2014 at para 5, online: <<http://www.ohchr.org/EN/Issues/Housing/Pages/HousingIndex.aspx>>.  
29 Farha *supra* note 28 at para 43.  
30 United Nations International Human Rights Instruments, “Core Documents Forming Part of the Reports of State Parties: Canada”, 28 January 2013, HRI/Core/Can/2013 at para 83, online: <<http://tbinternet.ohchr.org/> [Canada Core Documents].

37 Such a description fails to take into account decades of decentralization, urbanization and downloading of government responsibilities, which together have created “new and challenging responsibilities on local and other subnational governments with respect to housing”<sup>31</sup> and the rights of homeless people.

38 A more comprehensive view of local governments includes:

land-use planning, zoning and development, which relates to decisions regarding evictions, displacement and relocation; implementing programmes to upgrade informal settlements and inadequate housing; enforcing health, safety, environmental and building standards; providing local emergency shelter; ... and regulating the use of public space.<sup>32</sup>

39 The failure to fully recognize a right to an adequate standard of living and housing or to offer legal protection against discrimination on the basis of social status and homelessness in Canada means that local governments struggle with a lack of both resources to provide adequate housing and a lack of understanding of their obligations under the ICESCR. In the absence of clear obligations, and sufficient knowledge transfer and resources, an increasing number of cities (particularly in affluent countries)<sup>33</sup> have resorted to law enforcement to manage and criminalize acts such as sleeping and erecting shelter.

40 While some countries, with varying constitutions, have made some progress in recognizing the right to adequate housing through challenges to forced evictions, failures at local levels to provide accessible accommodation, pollution, lack of engagement with affected communities, etc.,<sup>34</sup> in Canada subnational governments have not been held to account for their role in ensuring a right to adequate housing and have only been held to account in very limited circumstances for the ways in which homeless people are treated in public spaces as a result of those governmental failures.

### Recommendations

In putting forth these recommendations, we have referred to portions of recommendations of the Special Rapporteur on adequate housing to the Human Rights Council on December 22, 2014<sup>35</sup> and the submissions of other civil society organizations. We recommend that:

a. 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 sub-national governments understand their legal obligations under the ICESCR;

b. 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;

c. 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;

d. 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.

31 Farha *supra* note 28 at para 4.

32 Farha *supra* note 28 at para 13.

33 Farha *supra* note 28 at para 24. See eg. National Law Center on Homelessness & Poverty, *No Safe Place: The Criminalization of Homelessness in U.S. Cities* (2014) at 8, online: <<https://stateinnovation.org>> [No Safe Place]

34 Farha *supra* note 28 at paras 40-52.

35 Farha *supra* note 28 at paras 72, 76(e), 76(g), 76(h), 76(i).

# Article 2(2)

## ARTICLE 2(2) - RECOGNIZING SOCIAL STATUS AND HOMELESSNESS AS PROTECTED GROUNDS FOR DISCRIMINATION

### Review

- 41 Homeless people have been described in Canadian jurisprudence as being one of our most vulnerable and marginalized populations.<sup>36</sup> Despite this, Canadian law offers no explicit protection against discrimination on the basis of homelessness. Homeless people continue to be targeted and disproportionately negatively impacted by anti-camping laws that put their lives, health and safety at risk and perpetuate prejudice and stigma against them.
- 42 While we agree with the submissions of other NGOs that there is a need to create legislated protections against discrimination on the basis of social status, it is our position that specific protection is also required in relation to homeless people.
- 43 In relation to ESC rights, Canada relies in large part on policy and programming to address our housing and homelessness crisis, rather than acknowledging the legal rights of homeless people.<sup>37</sup> Canada points to courts and tribunals as the primary form of redress for human rights violations,<sup>38</sup> however, homelessness is not a protected ground for discrimination under the *Charter* or in federal or provincial human rights legislation,<sup>39</sup> leaving the question of redress entirely unclear and, to date, largely inaccessible. This failure to create avenues for redress and remedy has been recognized by the United Nations Human Rights Office of the High Commissioner, stating:

Homelessness has emerged as a global human rights crisis even in States where there are adequate resources to address it. It has, however, been largely insulated from human rights accountability and rarely addressed as a human rights violation requiring positive measures to eliminate and to prevent its recurrence. While strategies to address homelessness have become more prevalent in recent years, most have failed to address homelessness as a human rights violation and few have provided for effective monitoring, enforcement or remedies.<sup>40</sup>

Canada acknowledges that laws governing the use of public space exist and affect the activities of homeless people, but has failed to repeal anti-camping laws or adequately address laws and policies that discriminate against and stigmatize homeless people in public spaces.<sup>41</sup>

The failure to create explicit protection against discrimination has a direct effect on the ability of homeless people to advocate for their human rights. For example, in *Shantz*, the Supreme Court of B.C. found that the anti-camping bylaws at issue did pose significant risk to the mental and physical health of homeless people and that, though they are laws of general application, the laws had greater impact on the homeless. The Court nonetheless found that homelessness is not a basis upon which to seek protection from discrimination.<sup>42</sup>

### Recommendations

That Canada:

- a. 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;
- b. along with subnational governments, cease to argue against the recognition of homelessness as a social condition as analogous ground of discrimination under section 15 of the *Charter*.

36 *Adams BCCA*, *supra* note 6 at paras 4, 75, 100.

37 Canada's Response to Questions from the Special Rapporteur on the Right to Adequate Housing in anticipation of the forthcoming Report to the United Nations Human Rights Council, March 2016, questions 5-6, online: <<http://www.ohchr.org/Documents/Issues/Housing/Homelessness/States/09112015-Canada.pdf>> [Canada's Responses].

38 Canada Core Documents, *supra* note 30 at paras 131 to 137.

39 Canada's Responses, *supra* note 37, questions 5-6.

40 United Nations Human Rights Office of the High Commissioner, "Homelessness and the Right to Housing", online: <<http://www.ohchr.org>>.

41 Canada's Responses, *supra* note 37, questions 5-6.

42 *Shantz*, *supra* note 6 at paras 231, 235-236.



# Article 12

## ARTICLE 12 - RECOGNIZING THE RIGHT TO PHYSICAL AND MENTAL HEALTH OF HOMELESS PEOPLE

### Review

- 46 The finding of the courts in *Adams* and *Shantz* are clear that prohibiting homeless people from sheltering is a risk to life and health and that repeated displacement causes both physical and mental harm.
- 47 Furthermore, homelessness is linked increased rates of many diseases including tuberculosis, respiratory tract infections, cellulitis, impetigo, scabies, body lice, HIV and Hepatitis C. Rates of mental illness among homeless adults are much higher than the general adult population. Homelessness is also linked to sleep deprivation, victimization by assault and sexual assault, heatstroke, hypothermia and frostbite.<sup>43</sup> Individuals sleeping in the streets have extremely high mortality rates and much lower life expectancies than the general population – even as compared emergency shelter users.<sup>44</sup>
- 48 Homelessness itself is an affront to the protection of physical and mental health. Existing anti-camping laws constitute state-imposed harms to the health of this already vulnerable population and prevent homeless people from attaining even a meager level of protection of their physical and mental health.

### Recommendations

- 49 That Canada:
- a. 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.

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43 Stephen Hwang, expert affidavit testimony prepared for *Tanudjaja v Canada*, Ontario Superior Court, File No. CV-10-403688 at paras 18- 37 citing Frankish, Hwang & Quantz, "Homelessness and Health in Canada" 2005 Vol 96 Issue 2 CJP 23 as well as "Handbook of Urban Health Populations, Methods and Practice", "Homeless People's Trust and Interactions With Police and Paramedics", "Homeless People's Perceptions of Welcomeness and Unwelcomeness in Healthcare Encounters" and "Drug Problems Among Homeless Individuals in Toronto, Canada: Prevalence, Drugs of Choice, and Relation to Health Status", online: <[www.acto.ca/assets/files/cases/s%20Hospital%20-%20FINAL\(2\).pdf](http://www.acto.ca/assets/files/cases/s%20Hospital%20-%20FINAL(2).pdf)> [Hwang, *Tanudjaja*].

44 Hwang, *Tanudjaja*, *supra* note 43 at para 10.

# General Recommendation

## DEVELOP EVIDENCE-BASED LAWS AND POLICIES USING ROBUST AND ACCURATE DATA

### Review

- 50 The Canadian government, though it does not have a single consistent definition of homelessness,<sup>45</sup> estimates that the baseline size of Canada's homeless population is approximately 150,000 each year based on "emergency shelter use, measured over a period of years."<sup>46</sup>
- 51 Emergency shelter use is not an appropriate metric by which to measure homelessness. It necessarily excludes the hidden homeless (people 'couch surfing', staying in abusive relationships to avoid absolute homelessness, trading drugs or sex for shelter, etc.) and people who, because of personal circumstances including disability, institutional trauma, gender expression, etc., do not have access to existing shelters. Other estimates, which go beyond mere shelter data, indicate that over 235,000 people are homeless in Canada each year,<sup>47</sup> though this estimate also does not include the full magnitude of hidden homelessness in Canada.<sup>48</sup> This lack of clarity on the definition and scope of homelessness leaves local and subnational governments to make significant policy decisions without adequate data or direction.
- 52 Perhaps most concerning is that Canada purports to use shelter data to understand the "size and composition of the homeless population."<sup>49</sup> This means that Canada's understanding of homelessness is based largely on what government shelter services are provided. To illustrate, Canada may come to the conclusion, based on this methodology, that there is not a significant number of trans people in the homeless community. There may, however, be significantly more homeless trans people than captured in existing data simply based on the reality that there are homeless trans people who do not access shelters because many of them are not gender-inclusive safe spaces for trans people.
- 53 The failure to ensure effective data collection has direct implications for human rights. As noted above, the rights of homeless people articulated in *Adams* are directly related to the number of homeless people in a community as compared to the number of shelter beds. Failure to properly capture the size and demographics of Canada's homeless population could lead to the continued use of law enforcement against homelessness people engaged in acts of necessity in public spaces when they have no viable shelter and housing options.

We commend the federal government for undertaking the first nation-wide point in time homeless count; however, such counts are widely acknowledged to be under-counts of the homeless population, even the absolute homeless, and do not reflect the magnitude of hidden homelessness. 53

### Recommendations

- In light of the need for reliable and complete data, we agree with the report of Canada Without Poverty and recommend that Canada: 54
- 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;
  - ensure that data collected includes information required to measure Canada's implementation of ESC rights.

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45 See Canada's Responses, *supra* note 37 question 1.

46 See Canada's Responses, *supra* note 37.

47 Gaetz, Gulliver & Richter, *supra* note 1 at 5.

48 Canada without Poverty, "Consideration of the List of Issues related to the Sixth Periodic Report of Canada For the CESCR's 55th Session: Poverty, Homelessness and Hunger in Canada", 23 February 2015 at para 13, online: <<http://www.cwp-csp.ca>>.

49 See Canada's Responses, *supra* note 37.

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