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RECOVERING FROM THE INEQUALITY VIRUS: GIMME SHELTER OR PROTECTION FROM DISCRIMINATION FOR LACK THEREOF

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ABSTRACT

The right to shelter has seen a markedly turbulent evolution in the jurisprudence. On the one hand, there is doctrinal optimism as to the possibilities left open by *Gosselin* and *Adams*. On the other hand, there is judicial confusion on whether such a right exists and how such a right might look. Trial and appellate courts in British Columbia and Ontario continue to oscillate between reliance on section 7 guarantees to enforce negative non-interference rights in striking down anti-encampment bylaws, with a reticence to heed any ground on equality claims advanced based on section 15 or similar provincial rights legislation. The judicial oscillation has led to inconsistency across provincial borders on what the *Charter* guarantees Canadians.

This article clarifies what such a right might look like and why it is both legally defensible and morally justified. I aim to draw a coherent picture of the underlying values of dignity and non-domination that animate considerations relating to housing and homelessness. To arrive at the argument, I survey extant case law, tracing the evolution of section 7 *Charter* cases and propose an argument based on a substantive account of equality and analogous grounds. The paper draws on Canada's international law obligations, including its domestically ratified commitments in the *National Housing Strategy Act*, provincial and federal case law, as well as relevant scholarship to argue for the necessity of linking rights within the constitutional framework where it concerns non-commercial human rights of a socioeconomic nature, such as adequate shelter and housing. These varied sources consider human rights as interrelated, giving renewed significance to the interpretation and merits of linking *Charter* rights. I use the Quebec COVID-19 Curfew Order as a case study to provide a glimpse of the socially constructed dimensions of homelessness.

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INTRODUCTION

"Housing rights are human rights, and everyone deserves a safe and affordable place to call home."[*]

Courts across the country have proved reluctant to extend the *Charter of Rights and Freedoms* ("*Charter*")[1] protection of equality to housing rights – be they equality claims based on homelessness as an analogous ground under section 15 or extending security of the person under section 7 to positive rights of adequate shelter.[2] On the other hand, the pandemic has exacerbated the distinct public health crisis that is poverty, including a long-term expected rise in homelessness,[3] disproportionately harming those at the socioeconomic margins while interacting with racialized and gendered inequality.[4] The pandemic marked a permanent change in the "political and cultural realities of Canadian society",[5] requiring a constitutional response to ensure that the *Charter* "speaks to the current situations and needs of Canadians."[6] Against the spectrum of socioeconomic rights, the living document that is the *Charter* has so far been more of a mangrove shrub than a maple tree. What follows thus proceeds from the premise that socioeconomic rights are inextricable from equality claims. People experiencing homelessness need only show that the distinction undermines substantive equality by perpetuating harm against them, such as historical economic disadvantage as well as psychological harms.

In a 1958 lecture, philosopher Isaiah Berlin argued for the bifurcation of the concept of liberty by tying a positive view of liberty to the notion of self-mastery and rational self-determination.[7] This conception has gained traction in cases where litigants have expressed a positive view of constitutional rights and freedoms. This characteristically positive view examines the state's role in promoting socioeconomic opportunities to increase the self-actualization of its citizens. The judicial trend thus far has consistently rejected this view in favour of a negative conception of rights and freedom. Negative freedom, as suggested by Berlin, views liberty as non-interference or the absence of interference by others.[8] This interpretation of freedom lives in many Western constitutional landscapes,

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1 *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

2 See below discussion at Part I.

3 Nick Falvo, "The long-term impact of the COVID-19 Recession on homelessness in Canada: What to expect, what to track, what to do" (December 2020), Final Report, Homeless Hub, online: <nickfalvo.ca/wp-content/uploads/2020/11/Falvo-Final-report-for-ESDC-FINAL-28nov2020.pdf> [perma.cc/9RMA-XNE8].

4 See Xinyue Duan, "The Relationship Between COVID-19 Pandemic and People in Poverty" (Aug 2020) UBC Sustainability Scholar Report at 1, online: <sustain.ubc.ca/sites/default/files/2020-41_Relationship%20between%20COVID-19%20and%20poverty_Duan.pdf> [perma.cc/WYX9-FSGF]; Deniqua Leila Edwards & Vanessa Poirier, "Poverty Pandemic Watch: The Effects of Poverty During COVID-19" (April-June 2020), Canada Without Poverty Report, online: <cwp-csp.ca/wp-content/uploads/2020/11/Poverty-Pandemic-Report-FINAL-Nov2.pdf> [perma.cc/5DYB-DYZS].

5 *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 23 [*Canadian Western Bank*].

6 *Health Services and Support - Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27 at para 78 *[Health Services*] .

7 Isaiah Berlin, *Four Essays on Liberty* (Oxford UK: Oxford University Press, 1969) at 131–133.

8 *Ibid* at 122.

such as Canada, whereby rights ultimately protect us against state interference. While negative rights emphasize freedom *from* government interference, positive rights require some direct state action to ensure meaningful access to rights.[9]

Part I traces the evolution of the 'right to shelter' cases that have emerged under section 7 of the *Charter*. According to a series of provincial decisions, while courts are willing to strike down or limit the application of anti-encampment bylaws under section 7, they consistently reject similar claims advanced under the section 15 equality rights. I turn to cases that invoked either a negative or positive right to suggest that the factors that determine judicial success include the framing of the substantive claim and presence of affirmative government action. The legal framing of the negative-positive rights dilemma is misleading and results in judicial restraint hindering the constitutional progress of human rights.[10] The decision in *Toussaint v Canada*[11] brings renewed significance to the justiciability of so-called positive rights claims and the binding nature of Canada's domestically ratified international obligations, such as the *National Housing Strategy Act ("NHSA")*.[12]

Part II foregrounds the equality link. I build on Jeremy Waldron's and Terry Skolnik's work on discrimination[13] to contend that homelessness – as a form of societal domination – can and should be recognized as a protected personal characteristic under s. 15 of the *Charter*. Drawing on Waldron's theory of homelessness and negative liberty and Catherine MacKinnon's work on domination and discrimination,[14] I suggest that the analysis of protected personal characteristics should be unambiguously tied to considerations of non-domination, the hallmark of true liberty. Against this backdrop, the Quebec Curfew Order[15] provides a glimpse of the socially constructed dimensions of homelessness – the picture that emerges is a stark lack of meaningful freedom, choice, and a general inability to obey the law. The article delves into a constitutional analysis of homelessness as a constructively immutable trait before surveying international human rights standards for persuasive guidance in *Charter* interpretation. I critique the judicial reticence, which has ultimately hindered the progressive realization of Canada's national and international commitments and obligations.

Part III discusses the security link and argues for the corollary recognition of a constitutional right to housing by affirming it as integral to security of the person rooted in the protection of human dignity. After noting how vagrancy laws engage the security interest under section 7,

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9 Normative arguments for a purposive interpretation of the *Charter* to include socioeconomic rights are well established; see Martha Jackman, "The Protection of Welfare Rights under the Charter" (1988) 20:2 Ottawa L Rev 257.

10 Margot Young, "Temerity and Timidity: Lessons from *Tanudjaja v. Attorney General (Canada)*" (2020) 61:2 C de D 469 at 480; Martha Jackman, "One Step Forward and Two Steps Back: Poverty, the Charter and the Legacy of Gosselin" (2019) 39 NJCL at 92 [Jackman, "One Step Forward"].

11 *Toussaint v Canada (Attorney General)*, 2022 ONSC 4747 [*Toussaint* ONSC].

12 *National Housing Strategy Act*, Canada, SC 2019, c 29, s 313 [*NHSA*].

13 Jeremy Waldron, "Homelessness and the Issue of Freedom" (1991) 39:1 UCLA L Rev 295; Terry Skolnik, "Homelessness and Unconstitutional Discrimination" (2019) 15 JLE 69.

14 Catherine MacKinnon, "Substantive Equality: A Perspective" (2011) 96 Minn L Rev 1 at 11.

15 *Clinique Juridique Itinérante v Attorney General of Quebec*, 2021 QCCS 182 [*Clinique*].

I turn to the possibility left open by the Supreme Court in *Gosselin v Quebec*.[16] Canada's statutory developments in legislative recognition of housing rights do little more than pay lip service to the legally binding instrument that is the *International Covenant on Economic, Social and Cultural Rights* ("*ICESCR*").[17] To remedy this gap, a minimum positive rights approach should be adopted.

I. THE CONSTITUTIONAL "RIGHT TO SHELTER": TO DO OR NOT TO DO?

I discuss cases where claimants invoked either a negative or positive right to housing. Turning first to successful litigation in *Victoria (City) v Adams*[18] and subsequent cases, I note the judicial trend that characteristically rewards negative rights claims on narrow questions of government non-interference regarding homelessness. When rights violations are conceptualized as negative rights, plaintiffs are successful.[19] I then turn to the failed positive housing rights claim in *Tanudjaja v Attorney General (Canada)*,[20] which was struck at a pre-trial motion.

A. The Genesis and Evolution of the Constitutional "Right to Shelter" Cases

In the absence of an authoritative ruling from the Supreme Court of Canada, lower courts remain divided on whether a constitutional right to shelter exists within Canada, and what such a right might resemble. While British Columbia courts seem to recognize and extend the constitutional 'right to shelter,' Ontario courts are more reluctant. This ongoing confusion creates an inconsistency that varies across provincial boundaries, signaling the need for clarity in the law on "whether the poor can benefit from *Charter* equality rights."[21] Individuals seeking rudimentary shelter are stuck between an oscillating 'right to do and not to do,' depending on the bylaw in question, the evidence presented, and the particular framing of the claim.

i. British Columbia Cases: *Victoria (City) v Adams et al*

The notion of a 'right to shelter' in the context of section 7 of the *Charter* first arose in the 2008 decision of the British Columbia Supreme Court in *Adams*.[22] The narrow question before the Court was whether a bylaw that prohibited homeless people from erecting a 'temporary abode overnight' in a public park violated their constitutional rights to life, liberty, and security of the

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16 *Gosselin v Quebec*, 2002 SCC 84, at para 83 [*Gosselin*] (whereby "one day s. 7 may be interpreted to include positive obligations [...] to sustain life, liberty, or security of the person [...] in special circumstances").

17 *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) [*ICESCR*].

18 *Victoria (City) v Adams*, 2008 BCSC 1363 [*Adams* BCSC], confirmed in *Victoria (City) v Adams*, 2009 BCCA 563 [*Adams* BCCA].

19 Martha Jackman, "Charter Remedies for Socio-economic Rights Violations: Sleeping Under a Box?" in Robert J Sharpe & Kent Roach, eds, Taking Remedies Seriously (Montreal: Canadian Institute for the Administration of Justice, 2010) 279 [Jackman, "Charter Remedies"].

20 *Tanudjaja v Attorney General (Canada)*, 2013 ONSC 5410 [*Tanudjaja*]; upheld in *Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852.

21 Bruce Ryder & Taufiq Hashmani, "Managing Charter Equality Rights: The Supreme Court of Canada's Disposition of Leave to Appeal Applications in Section 15 Cases, 1989-2010" (2010) 51 SCLR (2d) 505 at 527.

22 *Adams* BCSC, *supra* note 18.

person. Justice Ross made a series of factual findings with respect to the specific bylaw at issue, such as the number of homeless people living in Victoria at the time, the number of available shelter beds, and noted that the bylaw does not prohibit sleeping in public spaces.[23] Individuals were legally permitted to sleep in the parks; just not to erect tents, tarps, or cardboard boxes as forms of rudimentary shelter. At no point were the litigants asserting a property right over the parks. Rather, they argued that the "city could not manage its own property in a way that interfered with their ability to keep themselves safe and warm."[24] Not only did the government create a bylaw prohibiting overnight shelters in parks, it also failed to provide sufficient beds for all the homeless. Taken together, this had the cumulative effect of forcing people to sleep in public spaces while denying them the right to erect temporary shelter, thus invariably exposing them to "significant health and safety risks."[25]

While Justice Ross finds the bylaw to be in violation of the right to security of the person in a way that is arbitrary and overbroad, he stops short of declaring that section 7 mandates a positive duty on the government to provide adequate housing. He cites *Gosselin* to note that the possibility for section 7 to include positive rights had not been foreclosed, but the plaintiffs in this case were not seeking such a finding.[26] Drawing the analogy to the situation in *Chaoulli v Quebec*,[27] where the prohibition on accessing private healthcare was found to violate the *Charter*, he reasons that the state's deprivation of a right was problematic, not the failure to provide it. Ultimately, the *Adams* case "did not afford the homeless any positive right to housing; it simply affirmed "a Charter right to sleep outside at night under a box.""[28] Similar cases challenging anti-encampment bylaws have emerged based on a narrow "right to shelter", as a distinct legal principle emanating from *Adams*.[29]

In *Johnston v Victoria*, the British Columbia Court of Appeal clarified that *Adams* "did not create a "right" to do anything" and noted that "the appeal decision mistakenly refers to a right to erect temporary shelters."[30] According to *Adams* and *Johnston*, recognizing a right "to do something" would amount to a property right, which the Court clarified was not the legal result.[31] Rather, *Adams* recognized "a right to be free of a state-imposed prohibition on the activity of creating or utilizing shelter". Its legal effect was thus to prevent such state interference.[32]

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23 *Ibid* at para 4.

24 *Ibid* at para 38.

25 *Ibid* (unavailability and insufficiency of shelters was framed around the inadequacy of what the city failed to provide).

26 *Ibid* at para 94, citing the majority and dissenting opinions in *Gosselin*, *supra* note 16.

27 *Ibid* at para 66, citing *Chaoulli v Quebec* [2005] 1 SCR 791 at *paras* 183–85 [*Chaoulli*].

28 Colleen Sheppard, "'Bread and Roses': Economic Justice and Constitutional Rights" (2015) 5 Oñati Socio-Legal Series 1 at 235 [Sheppard, "Bread and Roses"], citing Jackman, "Charter Remedies", *sup*ra note 19 at 300.

29 *Vancouver Board of Parks and Recreation v Williams*, 2014 BCSC 1926; *Abbotsford (City) v Shantz*, 2015 BCSC 1909; *British Columbia v Adamson*, 2016 BCSC 584; *British Columbia v. Adamson*, 2016 BCSC 1245; *Nanaimo (City) v Courtoreille*, 2018 BCSC 1629; *Vancouver Fraser Port Authority v Brett*, 2020 BCSC 876 [*Brett*]; *Prince George (City) v Stewart*, 2021 BCSC 2089.

30 *Johnston v Victoria (City)*, 2011 BCCA 400 at *paras* 10–11 [*Johnston*] .

31 *The Corporation of the City of Kingston v Doe*, 2023 ONSC 6662, at para 65 [*Kingston*], citing *Johnston, supra* note 30 at para 11.

32 *Johnston, supra* note 30 at paras 11–13; *Adams* BCCA, *supra* note 18 at para 100.

In the 2022 decision of *Bamberger v Vancouver*, Justice Kirchner circumscribed the "constitutional right as articulated in *Adams*", noting that it is exercisable in two situations: (1) when the number of people who are homeless outnumbers the available indoor shelter beds and (2) the shelter is erected overnight.[33] Citing recent British Columbia cases, Justice Kirchner notes that while the jurisprudence has not expressly expanded the "scope of the constitutional right to daytime sheltering, it was not specifically enjoined."[34] For him, the question was only one of temporality: whether the existing right of sheltering in public parks could be extended to daytime hours. However, this limited *Charter* right has been refuted in recent Ontario cases where the nature of the prohibition in question restricted the legal analysis undertaken.[35]

ii. Ontario Cases: *Waterloo* and *Kingston*

In *Waterloo v Persons Unknown*, Justice Valente cites *Bamberger* to affirm that "the essence of the British Columbia decisions is the establishment of a constitutional right to shelter oneself when the number of homeless persons exceed the number of available and accessible indoor shelter spaces within a given jurisdiction."[36] To this he adds the condition of accessibility, namely that it is not purely a quantitative exercise of counting available beds. Rather "to be of any real value to the homeless population, the space must meet their diverse needs, or in other words, the spaces must be truly accessible."[37] Given that the encampment site in *Waterloo* concerned a vacant lot rather than a park created with the purpose of public enjoyment, Justice Valente forgoes the usual balancing exercise between the rights of those sheltering overnight and the interests of other residents. As a matter of judicial comity, he adopts British Columbia case law to find that "the constitutional right to shelter is invoked where the number of homeless individuals exceed the number of available and truly accessible indoor sheltering spaces" and "the Encampment residents' right to shelter is not limited to the overnight hours."[38] The bylaw exposes homeless persons to physical and psychological health risks, thereby depriving them of security of their person.[39] He finds the "ability to provide adequate shelter for oneself is a necessity of life that falls within the right to life protected by s. 7 of the Charter."[40] Shelter is also critical to an individual's dignity and independence,

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33 *Bamberger v Vancouver (Board of Parks and Recreation)*, 2022 BCSC 49 [*Bamberger*].

34 *Ibid* at paras 13-20.

35 See *Black v Toronto (City)*, 2020 ONSC 6398 and *Poff v City of Hamilton*, 2021 ONSC 7224 where individuals sought an injunction to prevent the municipality from evicting them from city parks. The ONSC distinguished the BC decisions based on a factual finding that there were adequate shelter spaces to accommodate all the cities' homeless.

36 *The Regional Municipality of Waterloo v Persons Unknown and to be Ascertained*, 2023 ONSC 670 at para 82 [*Waterloo*].

37 *Ibid*.

38 *Ibid* at para 105.

39 *Ibid* at para 104 [emphasis added].

40 *Ibid* at para 96 [emphasis added] (Justice Valente further states that "the very clear and uncontroverted evidence before [him] is that exposure to the elements without adequate shelter can result in serious harm, inducing death.").

therefore interfering with the homeless population's choice to protect itself from the elements is a deprivation of liberty under section 7.[41]

In the 2023 decision of *Kingston v Doe* issued shortly after *Waterloo,* Justice Carter declared another anti-encampment bylaw unconstitutional under section 7.[42] After tracing the development of the "right to shelter" cases, Justice Carter concludes that no free-standing constitutional right exists, nor did the trial or appellate decisions in *Adams* purport to articulate such a right.[43] He further notes the principles of horizontal *stare decisis* apply to questions of law as a matter of judicial comity.[44] He finds that he is not bound by the *Waterloo* decision since the "conclusion with respect to day-time shelter is factual in nature and not a legal principle."[45] However, Justice Carter does not foreclose the possibility of daytime sheltering in parks, so long as the claimants do not purport to exercise exclusive use.[46]

In both *Waterloo* and *Kingston*, the section 15 equality claim is rejected. In *Kingston*, it was a question of insufficient evidence. In *Waterloo*, Justice Valente cites Justice Lederer's reasons in *Tanudjaja* in support of rejecting homelessness as an analogous ground, since it is neither a personal characteristic, nor a fact that is objectively discernible:[47]

> To my mind, there is inevitably a subjective element in determining what may or may not be accessible housing given an individual's particular circumstances […] Other than poverty, which is not an analogous ground, in my opinion there are no common characteristics that define those individuals experiencing homelessness in the Region […] While I acknowledge without hesitation that women, gender-diverse individuals, and those who suffer from mental illness and additions have been the subject of historic mistreatment, to my mind it does not follow that these groups of individuals, as compared to other groups, have been discriminated against in some way as a result of the By-Law.

B. The Constitutional Boogeyman of Justiciability: From *Tanudjaja* to *Toussaint*

i. The *Tanudjaja* Case: Positive Rights and Judicial Reticence

> "There is no positive obligation on Canada or Ontario to act to reduce homelessness and there are no special circumstances that suggest that such an obligation could be imposed in this case."[48]

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41 *Ibid* at para 101 [emphasis added], citing Justice Wilson in *R v Morgentaler*, 1988 CanLII 90 (SCC) at 164-166 [*Morgentaler*].

42 *Kingston*, *supra* note 31 at para 117.

43 *Ibid* at para 64.

44 *Ibid* at para 90, citing *R v Sullivan*, 2022 SCC 19 at paras 44, 46-56, 61-66, and 68.

45 *Ibid* at para 95.

46 *Ibid* at para 113 (disagrees with the City that invoking section 7 to protect sheltering amounts to the grant of a property right).

47 *Waterloo*, *supra* note 36 at paras 126–27.

48 *Tanudjaja, supra* note 20 at para 82.

These were the words of Justice Lederer when he granted the government's preliminary motion to dismiss the claim in *Tanudjaja*. Before him were four human beings, homeless or at the imminence of homelessness. The first claimant was a single mother living in precarious housing with her two sons unable to secure housing with her social assistance allowance.[49] The second claimant was a severely disabled man with two disabled children as his dependents living in inaccessible and unsafe housing unable to obtain subsidized accessible housing.[50] The third claimant was a widowed woman living with her two sons having been in and out of homelessness for years due to unaffordable housing.[51] The fourth claimant became homeless as he was unable to work and pay his rent due to his cancer diagnosis — he had awaited subsidized housing for four years.[52] Together, the four claimants asked the Court to recognize a positive right to housing based on the security of the person guarantee under the *Charter*. Notably, the case involved a positive rights dimension, which examined both government action and inaction. Justice Lederer expressed his sympathies but concluded that the courtroom was not the "proper place to resolve the issues involved."[53] By this he meant that socioeconomic rights are not justiciable in Canada. Surely, he would not be the first judge to open that can of worms. On appeal, Justice Feldman, in her dissenting reasons, finds "the motion judge erred in concluding that it is settled law that the government can have no positive obligation under s.7 to address homelessness […] *Gosselin* specifically leaves the issue […] open for another day."[54] She would not have struck the appellants' section 7 claim, suggesting the lower court was too quick to dismiss the 10 000 page, 16-volume record of evidence put before it.[55] She cautions that "it is premature and not within the intent of *Gosselin* to decide there are no "special circumstances" in such a serious case, at the pleadings stage."[56] Ultimately, the Ontario Court of Appeal dismissed the appeal.

ii. The *Toussaint* Case: A Novel Claim on the Right to Access Health Care

The *Toussaint* case brings renewed significance to the justiciability of positive rights claims and the binding nature of Canada's domestically ratified international obligations, such as the *NHSA*. The case raises novel questions about the relationship between various orders and sources of law, namely the enforcement of (1) human rights guarantees under the *Charter*, (2) human rights obligations under Canada's treaty obligations, and (3) similar obligations under customary international law.[57] The case speaks to the profound interrelationship between the *Charter*, customary international law, and domestic administrative law.[58]

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49 *Ibid* at para 13.
50 *Ibid*.
51 *Ibid*.
52 *Ibid* at para 14.
53 *Ibid* at 82.
54 *Tanudjaja*, *supra* note 20 at para 62.
55 *Ibid* at 66.
56 *Ibid*.
57 *Toussaint* ONSC, *supra* note 11 at para 3. *Toussaint v Canada (Attorney General)*, 2023 ONCA 117 allowed Canada's appeal in part on the issue of raising a limitations period defence and upheld the decision as to the ONSC's jurisdiction.
58 *Ibid* at para 146.

Ms. Nell Toussaint's tragic case signals a shift in the judicial current that has thus far been reticent to extend the recognition of justiciable human rights of a socioeconomic nature. It may present the type of 'special circumstances' necessary to recognize the merits of homelessness as worthy of protection from discrimination, with the jural correlative of a right to adequate housing or shelter. The unfortunate series of events spanned over two decades following Ms. Toussaint's lawful entry into Canada in 1999. Following the expiry of her visitor status in 2005, she was unable to regularize her resident status due to conditions beyond her control and remained in Canada as an irregular migrant. In 2009, Ms. Toussaint required urgent medical care, which Canada repeatedly denied over four years. In 2013, after gaining residency status and exhausting her domestic remedies at the Federal Court, she made a submission to the UN Human Rights Committee that Canada had violated her right to life and her right to non-discrimination.[59] In 2018, the Committee agreed that Canada violated Ms. Toussaint's right to life and non-discrimination recognized in articles 6 and 26 of the *International Covenant on Civil and Political Rights* ("*ICCPR*"), and equally failed to uphold its international obligations to ensure irregular migrants are not denied access to health care when their lives are endangered.[60] Pursuant to its undertaking in article 2.3 (a) of the *ICCPR,* Canada must provide Ms. Toussaint with an effective remedy and ensure future violations are prevented.

In a sweeping decision, Justice Perell dismissed Canada's motion to strike Ms. Toussaint's claim on the grounds of, *inter alia*, jurisdiction and justiciability. The Court of Appeal agreed with Justice Perell that the Ontario court has concurrent jurisdiction with the Federal Court in applications of judicial review where it concerns *Charter* claims against the federal government. Furthermore, the Minister's decision not to implement the UNHRC recommendation was an exercise of a Crown prerogative, and thus outside the exclusive jurisdiction of the Federal Court. Since all exercises of government discretion must conform to the *Charter* and Canada's prerogative powers are subject to judicial review,[61] the claim is reviewable.[62] Justice Perell makes a series of key findings on how the substantive claim is framed and Canada's relevant international obligations.

First, on the issue of framing, Justice Perell notes that Canada's mischaracterization of Ms. Toussaint's claim as a free standing constitutional right to universal healthcare is "a dog whistle argument that reeks of the prejudicial stereotype that immigrants come to Canada to milk the welfare system."[63] Her claim did not assert such a right, therefore "Canada's argument is a fallacious straw man argument that might successfully knock down claims that are not

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59 *Toussaint v Canada (AG)*, 2010 FC 810 (CanLII), aff'd 2011 FCA 213.

60 Human Rights Committee, *Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2348/2014*, 2018, UN Doc CCPR/C/123/D/2348/2014, online: <escr-net.org/sites/default/files/caselaw/toussaint_judgment.pdf> [perma.cc/3LXD-LEZR].

61 *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 [*PHS*]; *Operation Dismantle v The Queen*, 1985 CanLII 74 (SCC); J.A. Klinck, "Modernizing judicial review of the exercise of prerogative powers in Canada" (2017) 54 Alta L Rev at 997.

62 *Toussaint* ONSC, *supra* note 11 at paras 96-97, citing *Black v Canada (Prime Minister),* 2001 CanLII 8537 (ONCA) at paras 74, 76.

63 *Ibid* at para 134.

being asserted."[64] Justice Perell's explicit rejection of the 'framing issue' that continues to bar rights claimants at the procedural stage will make such mischaracterizations increasingly difficult. However, the reach of the *Toussaint* decision may be limited. As the reasoning in the *Kingston* decision suggests, the precedential weight of cases like *Toussaint* may be narrowly circumscribed to the immigration and healthcare context. In other words, Justice Carter's decision in *Kingston*, which followed the *Toussaint* decision just a few months later, could have considered the 'framing issue' of government action and inaction and the related issue of positive rights, but ultimately did not.

Second, on the question of judicial review, the *Toussaint* decision recalls the primacy of *Charter* compliance in the administrative law context, which extends to all exercises of statutory discretion.[65] To ascertain the reasonableness of state action, the courts apply the Doré/Loyola public law framework,[66] even where it concerns non-binding recommendations issued by the UNHR.[67] Citing *Nevsun v Araya*,[68] the *Toussaint* case highlights the principle of *pacta sunt servanda*, according to which all treaties are binding and must be performed in good faith — a central unifying principle of *jus cogens* and of the international legal system.[69] The *pacta sunt servanda principle* requires that "parties to a treaty must keep their sides of the bargain and perform their obligations in good faith."[70] Canada's actions pursuant to international law obligations and the courts' ability to review them as both a procedural and substantive matter falls into this latter category.

In this way, *Toussaint* may have significant implications in the context of the right to housing when considering Canada's domestically ratified international obligations. The *NHSA* recognizes and affirms the right to adequate housing as a fundamental human right found in international law and ties the right to the inherent dignity and well-being of persons.[71] It also declares the housing policy will "further the progressive realization of the right to adequate housing as recognized in the [*ICESCR*]."[72] The *NHSA* establishes a Federal Housing Advocate, a National Housing Council, and a Review Panel, which provide the government with non-binding "recommended measures" and opinions.[73] Accordingly, Canada's response to the measures that emerge from the *NHSA*'s mechanisms should similarly be judicially reviewable to check for reasonableness and good faith. In tandem with the Supreme Court's recent decision in

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64 *Ibid* at para 136.

65 *Ibid* at paras 150–153, citing *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 41; *R v Conway*, 2010 SCC 22.

66 *Doré v Barreau du Québec* 2012 SCC 12; *Loyola High School v Québec (Attorney General)* 2015 SCC 12.

67 *Toussaint* ONSC, *supra* note 11 at paras 198-199 (reasoning that it is not "plain and obvious" that the case is doomed to fail where Canada is alleged to be in breach of international obligations which it has domestically ratified).

68 *Nevsun Resources Ltd v Araya*, 2020 SCC 5 at paras 70-73.

69 *Toussaint* ONSC, *supra* note 11 at paras 181–182.

70 *Ibid*, citing *Canada v Alta Energy Luxembourg SARL*, 2021 SCC 49 at para 59.

71 *NHSA*, *supra* note 12, s 4 (a)-(d).

72 *Ibid*.

73 *Ibid*, s 6, 13, 16.1.

Comission Scolaire[74] affirming the robustness of the *Doré* duty, plaintiffs could argue that once they establish a *Charter* engagement, the requirement of responsive justification requires the state or decision-maker to demonstrate a proportionate balancing of rights and statutory objectives. This way, any evidentiary hurdles in the context of judicial review may be partially alleviated when the onus shifts to the state actor to justify their decision.

II. THE EQUALITY LINK: HOMELESSNESS AS SOCIETAL DOMINATION

The recognition of homelessness as an analogous ground has the dual effect of "remedy[ing] the constitutional exclusion this group has experienced since the *Charter*'s enactment" while fulfilling Section 15's purpose to "prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice."[75] Under what conditions could homelessness – the status of lacking any real private property right for an indeterminate period – constitute a protected ground upon which to seek protection from discrimination under the law?

According to extant Canadian jurisprudence, the answer is unequivocally none. Courts across the country, at both appellate and trial levels, have categorically rejected equality arguments based upon homelessness as a personal characteristic — reasoning, on the one hand, that it is too amorphous to be circumscribed meaningfully, and that, either way, it fails to constitute an "immutable" or even "constructively immutable" trait to deserve protection from discrimination.[76] In other words, should Parliament or a provincial legislature enact a law to the explicit effect that "homeless people cannot receive vaccines", this legislation would not contravene the equality protection under section 15 of the *Charter.* Such an ex-post rationalization is both detached from and unduly reduces the real moral concerns underlying equality – as well as the lived experiences of society's most marginalized – to the antiseptic confines of legalistic reasoning.

A substantive equality framework remains pivotal to address the structural causes underpinning homelessness, and poverty more generally, as a societal problem. An emphasis on equality rights under section 15, regardless of any enforceable socioeconomic rights under other provisions, ensures appropriate focus on the discrimination endured by the most marginalized of society – a key condition in assessing the "reasonableness" of such government policies under international human rights law.[77] In other words, an equality framework sheds light on and makes more transparent the varying ways in which the homeless are stigmatized, recognizing that extreme poverty is more than simply a matter of unmet material needs but

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74 *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)* 2023 SCC 31 [*Commission scolaire*].

75 Emily Knox, Jeanne Mayrand-Thibert & Michelle Pucci, "Ticketing Poverty: An Analysis of The Discriminatory Impacts of Public Intoxication By-Laws on People Experiencing Homelessness in Montreal" (2023) 32 Dal J Leg Stud [Knox] at 176, citing *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 at para 51 [*Andrews*].

76 *Tanudjaja*, *supra* note 20 at paras 103–10.

77 *Toussaint* ONSC, *supra* note *10*. See discussion above at Part I(B)(ii).

also, crucially, a denial of dignity and thus equality. To quote the *Federal Poverty Reduction Plan* by the House of Commons' Standing Committee, an equality approach "limits the stigmatization of people living in poverty".[78] In a similar vein, as the Senate Sub-Committee on Cities notes in its report, *In from the Margins*:

> The *Charter*, while not explicitly recognizing social condition, poverty or homelessness, does guarantee equality rights, with special recognition of the remedial efforts that might be required to ensure the equality of women, visible minorities (people who are not Caucasian), persons with disabilities, and Aboriginal peoples. As the Committee has heard, these groups are all overrepresented among the poor – in terms of both social and economic marginalization.[79]

What follows thus proceeds from and presumes the premise that socioeconomic rights are inextricable from equality claims. Building on legal philosopher Jeremy Waldron's and Professor Terry Skolnik's work on discrimination,[80] this article contends that homelessness can and should be recognized as a protected personal characteristic under section 15 of the *Charter*. The argument is twofold. First, using the Quebec government's mandated curfew order as a case study, we glean the socially constructed dimensions of homelessness. The picture that emerges is a stark lack of meaningful freedom, choice, and a general inability to obey the law. Second, drawing on Jeremy Waldron's theory of homelessness and negative liberty and Catherine MacKinnon's work on domination and discrimination,[81] the section suggests that the analysis of protected personal characteristics should be unambiguously tied to considerations of dignity and non-domination, the hallmark of true liberty. Against this backdrop, the article delves into a constitutional analysis of homelessness as a constructively immutable trait – akin to the recognition of "off-reserve residential status" as a protected ground in the Supreme Court decision of *Corbiere*[82] – before surveying international human rights standards for persuasive guidance in the *Charter* interpretation.

A. Discrimination Beyond The Two Concepts Of Liberty

The positive and negative rights debate has occupied large terrain in Canadian legal academia since the genesis and patriation of the *Charter*. The rigid bifurcation of positive and negative

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78 House of Commons, *Federal Poverty Reduction Plan: Working in Partnership Towards Reducing Poverty in Canada*: *Report of the Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities*, 40-3 (November 2010) (Chair: Candice Hoeppner) online: <ourcommons.ca/Content/Committee/403/HUMA/Reports/RP4770921/humarp07/humarp07-e.pdf> [perma.cc/8556-RVYN].

79 Senate, The Standing Senate Committee on Social Affairs, Science and Technology, *In From the Margins: A Call to Action on Poverty, Housing and Homelessness: Report of the Subcommittee on Cities*, (December 2009) at 69, online: <sencanada.ca/content/sen/Committee/402/citi/rep/rep02dec09-e.pdf> [perma.cc/N8J5-N6US].

80 Waldron, *supra* note 13; Skolnik, "Homelessness", *supra* note 13.

81 MacKinnon, *supra* note 14.

82 *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 [*Corbiere*].

rights and government action reflects an unsettled debate in Canadian constitutional law.[83] The framing of the distinction is dubious – many judges themselves increasingly questioning the sharp divide.[84] The centrality of the rights dichotomy effectively bars *Charter* claims at the pre-trial stage – hindering the very social inclusion the *Charter* was created to protect. The effect of this discursive move is to foster confusion and disadvantage some of the most marginalized members of society. Those individuals living through situations of homelessness do not have the means to continually litigate *Charter* claims. In such cases, Colleen Sheppard notes:

> "Erasure occurs through a range of conceptual and discursive techniques, including the purported centrality of the positive versus negative rights dichotomy, the division between civil and political versus social and economic rights and arguments about judicial incapacity to adjudicate social and economic rights."[85]

Questions of socioeconomic justice should be understood as questions of substantive human rights.[86] One need only turn to the history of the Supreme Court of Canada's decision making in the past 40 years of *Charter* litigation to see that the Court has recognized that rights are comprised of both negative and positive dimensions. A brief survey of previous case law suggests the rights dichotomy is a futile angle to approach *Charter* litigation. According to Sandra Fredman, most rights comprise a positive dimension as they are situated within and carried out by an active state apparatus.[87] Rights equally have a negative dimension when they require the government *not* to step in. They are two sides of the same coin: whether the argument involves freedom from government interference or a right to government action, the right being heralded is the same. The distinction "is notoriously difficult to make [and] appropriate verbal manipulations can easily move most cases across the line."[88] Accordingly, the Supreme Court has applied a unified legal standard to a wide variety of rights claims. For instance, this purposive approach is consistently applied to equality rights as seen in *Eldridge* where translation services were provided for deaf hospital patients[89] and in *Vriend* where legislative protection against discrimination based on sexual orientation was read into Alberta's rights code.[90] The protection of freedom of association was read purposively in *Health Services* to include a right to collective bargaining;[91] in *Mounted Police Association* to include a right to statutory protections for collective bargaining;[92] and in *Ontario v Fraser*

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83 Lawrence David, "A Principled Approach to the Positive/Negative Rights Debate in Canadian Constitutional Adjudication" (2014) 23 Const Forum Const 41. See also Sandra Fredman, *Human Rights Transformed: Positive Duties and Positive Rights* (Oxford UK: Oxford University Press, 2008) [Fredman].

84 See *Toussaint* ONSC, *supra* note 11; *Gosselin*, *supra* note 16 (Justice Arbour's dissent).

85 Sheppard, "Bread and Roses", *supra* note 28 at 232.

86 See e.g. Martha Jackman & Bruce Porter, A Human Rights Context for Addressing Poverty and Homelessness (2012) Exchange Working Paper Series (Ottawa, PHIRN), online: <socialrightscura.ca/documents/publications/HR-context-poverty-homelessness.pdf> [perma.cc/TVR9-3JUN].

87 Fredman, *supra* note 83 at 34.

88 Seth Kreimer, "Allocational Sanctions: The Problem of Negative Rights in a Positive State" (1984) 132:6 U Pa L Rev 1293 at 1325.

89 *Eldridge v British Columbia*, [1997] 3 SCR 624 [*Eldridge*].

90 *Vriend v Alberta*, [1998] 1 SCR 493 [*Vriend*].

91 *Health Services, supra* note 6.

92 *Mounted Police Association of Ontario v Canada*, [2015] 1 SCR 3 [*Mounted Police Association*].

to include a right to good faith bargaining.[93] Similarly, the standard is applied to the right to life, liberty, and security of the person as seen with the right to a publicly funded abortion,[94] medical assistance in dying,[95] and safe injection facilities.[96] In each of the previously listed cases, the threshold did not vary with the nature of the claim to the right. Each right has its own definitional scope and content, subject to a robust proportionality test under section 1.

In other words, if it sounds like a human right and acts like a human right, it most probably is a right worthy of *Charter* recognition and protection. There is no reason to superimpose an additional hurdle on the constitutional structure of dividing rights into positive and negative ones for analytic purposes. In that vein, Jeremy Waldron takes up Berlin's arguments and adopts a negative conception of freedom. He posits that the unfreedom faced by homeless people is grounded in the reality that "everything that is done has to be done somewhere,"[97] whether it be on public or private property. As Skolnik notes "the cumulative effect of private property rules and laws […] forecloses homeless people's liberty to pursue both options."[98] Laws regulating public property, such as by-laws prohibiting encampments or mandatory curfew orders, ultimately coerce and prohibit rudimentary human conduct, such as sleeping and urinating. The lack of meaningful alternatives, such as private property to engage in basic human conduct, forces homeless people into an impossible scenario: to live illegally or to face grave physical and psychological harm. It is in this way that "homeless people lose the negative freedom to engage in human conduct."[99] Appealing to the classical republican tradition, Skolnik argues that to experience homelessness "is to lack protection against others' power over us."[100] While Skolnik ties considerations of equality to those of liberty, I propose it is explicitly tied to human dignity, which "finds expression in almost every right and freedom guaranteed in the *Charter*."[101] Against this conceptual backdrop, the government of Québec's curfew order during the COVID-19 pandemic emerges as a prime case study of the social dimensions of homelessness.

B. Québec's Curfew Order: Case Study

On January 8th, 2021, the Québec government issued an Order in Council No. 2-2021 prohibiting all non-exempt persons from being outside their residence from 8pm until 5am at the risk of being fined anywhere from $1000 to $6000.[102] The local Mobile Legal Clinic, represented by counsel from Trudel Johnston & Lespérance, filed an application for judicial review challenging Article 29 of the Order in Council, which established a curfew for all people

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93 *Ontario (Attorney General) v Fraser*, 2011 SCC 20.

94 *Morgentaler*, *supra* note 41.

95 *Carter v Canada*, [2015] SCC 5 [*Carter*].

96 *PHS, supra* note 61.

97 Waldron, *supra* note 13 at 296.

98 Skolnik, "Homelessness", *supra* note 13 at 74.

99 Waldron, *supra* note 13 at 302.

100 Terry Skolnik, "How and Why Homeless People Are Regulated Differently" (2018) 43 Queen's LJ 297 at 324.

101 *Morgentaler*, *supra* note 41 at 166. Wilson J further reasons at 164 that "[t]he *Charter* and the right to individual liberty guaranteed under it are inextricably tied to the concept of human dignity."

102 Ordering of measures to protect the health of the population amid the COVID-19 pandemic situation, OC 2-2021, (2021), GOQ II, art 29, ss (a)–(k)).

subject to limited exceptions — none of which applied to individuals experiencing homelessness. The application sought to have the order declared invalid to the extent that it applied to these individuals. Justice Chantal Masse issued a safeguard order suspending the application of Article 29 to the extent that it applied to individuals experiencing homelessness.[103] The following day, the Minister of Health and Social Services announced that Quebec would not challenge the Superior Court of Quebec's decision to suspend the curfew's application.

The two primary legal issues before the Court were sections 7 and 15 *Charter* challenges to the Order in Council. Specifically, the Mobile Legal Clinic alleged that the impugned provision (article 29) would infringe the rights to life, liberty, and security of people experiencing homelessness unjustifiably and contrary to the principles of fundamental justice. Secondly, they argued that the measure would have further discriminatory and disproportionate effects on such people contrary to the right to equality per section 15. These arguments, however, were not adjudicated at a full trial on the merits given the promptness of the safeguard order to protect the rights of the homeless. Nonetheless, Justice Masse did go on to cite seven important points of "uncontradicted evidence" which guided her decision and favoured the Mobile Legal Clinic when considering the balance of inconvenience in issuing a temporary injunction.[104]

The uncontradicted evidence linked the adverse effects of the curfew to health concerns of people experiencing homelessness. First, it was noted that during the hours that the curfew is in effect, these people sought to hide from the police for fear of being arrested, which effectively put their health and safety at risk during winter months. Further, many had legitimate fears of contracting the COVID-19 virus in overcrowded shelters known to have been subject to outbreaks.[105] The last of the evidence dealing with health concerns looked at the mental health aspect of the curfew. The curfew's adverse impacts on the homeless exacerbated pre-existing mental health problems like anxiety linked with densely populated spaces. Many of the shelters have strict rules on drug and alcohol consumption and do not allow certain persons based on their alcohol/drug consumption level. Finally, the strict prohibitions on consumption dissuaded many people struggling with addiction from staying in the shelters overnight. Beyond health concerns, the evidence showed that many shelters lacked access and capacity.[106]

i. Relevant Social Science Evidence

Justice Masse's decision scarcely relied on social science evidence; however, social science entirely corroborates her reasoning. Indeed, research suggests that homeless individuals are almost invariably likely to have experienced some form of clinical trauma; putting aside the fact that homelessness itself can be conceived as a traumatic experience, in addition to

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103 *Clinique*, *supra* note 15.

104 *Ibid* at paras 10, 17.

105 *Ibid*. See also Alexandra Mae Jones, "Shelter outbreaks leave people experiencing homelessness even more vulnerable during COVID-19" CTV News (21 March 2021), online: <ctvnews.ca/canada/shelter-outbreaks-leave-people-experiencing-homelessness-even-more-vulnerable-during-covid-19-1.5356600?cache=y> [perma.cc/AA5Y-PKY3].

106 *Clinique*, *supra* note 15 at paras 10, 17.

increasing the further risk of victimization and retraumatization.[107] Moreover, the prelude to many individual's experience of homelessness is known to include child abuse and disrupted attachment, among other traumatic incidents – with domestic violence continuing well into adulthood for many and often paving the way for homelessness.[108] In her extensive work on social rights and *Charter* litigation in Canada, legal scholar Martha Jackman has argued that there is an inextricable link between health and homelessness, noting "it has become obvious that governments' failure to ensure reasonable access to housing and to an adequate standard of living for disadvantaged groups undermines section 7 interests."[109] The uncontradicted evidence citing the various health risks in the record only supports this determination. While there is no reliable census nor sufficient data, available research conservatively approximates that over 35,000 Canadians experience homelessness on a given night — amounting to one individual sleeping outdoors for every five in a shelter.[110] As those numbers invariably increased amid the COVID-19 pandemic, there was also a corollary increase in the policing of encampments at the municipal level.[111] The criminalization of homelessness is anything but novel; vagrancy prohibitions enjoy a 700-year-old history in English criminal law, holistically targeting the very presence and survival tactics of homeless people in public places.[112] Homeless encampments in Canada must also be considered more broadly within the context of the global housing crisis, which has been recognized by the UN Human Rights Office of the High Commissioner:

> 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

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107 Elizabeth K Hopper et al, "Shelter from the Storm: Trauma-Informed Care in Homelessness Services Settings" (2010) 3 The Open Health Services and Pol'y J at 80.

108 Joan Zorza, "Women battering: a major cause of homelessness" (1991) 25 Clgh Rev at 412-29.

109 Martha Jackman & Bruce Porter, "Rights Based Strategies to Address Homelessness and Poverty in Canada: The Charter Framework", in Martha Jackman & Bruce Porter, eds, Advancing Social Rights in Canada (Toronto: Irwin Law, 2014) at 7.

110 Stephen Gaetz et al, "The State of Homelessness in Canada 2016" (2016) Canadian Observatory on Homelessness Press, Working Paper No 12, online: <homelesshub.ca/sites/default/files/SOHC16_final_20Oct2016.pdf> [perma.cc/8AYC-2T4M].

111 Leilani Farha & Kaitlin Schwan, *A National Protocol for Homeless Encampments in Canada* (United Nations Special Rapporteur on the Right to Housing) 2020 at 5 ("[T]he term 'encampment' [refers] to any area [where a person] or a group of people live in homelessness together, often in tents or other temporary structures (also known as homeless camps, tent cities, homeless settlements or informal settlements"), online: <make-the-shift.org/wp-content/uploads/2020/04/A-National-Protocol-for-Homeless-Encampments-in-Canada.pdf> [perma.cc/J2J9-PMSM].

112 Joe Hermer & Elliot Fonarev, "The Mapping of Vagrancy Type Offences in Municipal By-Laws" (22 July 2020), online: <homelesshub.ca/blog/mapping-vagrancy-type-offences-municipal-laws> [perma.cc/6BRW-WSFX].

> homelessness as a human rights violation, and few have provided for effective monitoring, enforcement, or remedies.[113]

These statistics show only the tip of the iceberg.[114] Homeless people are also more prone to be victims of violent crime relative to the general population,[115] with homeless women particularly vulnerable to sexual violence.[116] These intertwined *indicia* of vulnerability and marginalization are central to the analogous grounds analysis under section 15. As discussed, the proposed approach considers both the negative liberty argument of non-interference and the positive liberty argument of self-mastery against the pervasive system of asymmetrical power dynamics that shape society. In this way, we acknowledge the intimate link between liberty and non-domination to allow for a more robust understanding of substantive equality in line with the progressive realization of the *Charter*'s human rights commitments, including Canada's obligations under international law.

ii. The Provincial–Federal Equality Link

Recent law graduates, Emily Knox et al., explore the usefulness of human rights legislation in the context of the discriminatory impacts of public intoxication by-laws on people experiencing homelessness in Montreal.[117] The authors propose an analytical framework under section 10 of the *Quebec Charter of Rights and Freedoms*[118] based on the protected ground of 'social condition' to expand the scope of the anti–discrimination protection. They reason that "successful claims […] affirming that people experiencing homelessness are a protected, equity-seeking group may be persuasive to one day expand Canadian courts' analysis of constructive immutability within the interpretation of analogous grounds in Subsection 15(1)." Their strategy underscores the importance of building provincial case law as a source of persuasive interpretation for appellate courts throughout Canada. Such case law, they argue, may guide courts towards an interpretation of the Canadian *Charter* that is inclusive of economic and social rights since human rights codes also attract a broad and purposive interpretation.[119] A national "consensus that homelessness is a protected ground

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113 United Nations Human Rights Office of the High Commissioner, "Homelessness and the Right to Housing" (nd), online: <ohchr.org/en/special-procedures/sr-housing/homelessness-and-human-rights> [perma.cc/Q5KU-Q9S2].

114 For further discussion on the intersecting vulnerabilities faced by various groups, see Stephen W Hwang, "Mortality among Men Using Homeless Shelters in Toronto, Ontario" (2000) 283 J of the Am Medical Assoc 2152 (on mortality rates for homeless young men in Toronto's shelter system being eight times that of the general population); James Frankish, Stephen W Hwang & Darryl Quantz, "Homelessness and Health in Canada: Research Lessons and Priorities" (2005) 96 Can J of Pub Health S23 at S24–5 (on the higher likelihood of contracting contagious diseases due to the confined nature of shelters); Roy et al, "Mortality in a Cohort of Street Youth in Montreal" (2004) 292 J of the Am Medical Assoc 569 at 569–70 (on the mortality rate for homeless youth in Montreal being 31 times higher than the general population).

115 Barrett A Lee, Kimberly A Tyler & James D Wright, "The New Homelessness Revisited" (2010) 36 Annual Rev of Sociology 501 at 506.

116 Jana Jasinski et al, *Hard Lives, Mean Streets: Violence in the Lives of Homeless Women* (Lebanon, NH: Northeastern University Press, 2010) at 55–6

117 Knox, *supra* note 75 at 157.

118 *Charter of Human Rights and Freedoms*, CQLR c C-12, s 10 [*Quebec Charter*].

119 *British Columbia Human Rights Tribunal v Schrenk*, 2017 SCC 62 at paras 31, 103.

within an equality rights framework in Quebec may eventually provide "a persuasive source for interpreting the scope of the [Canadian] *Charter*.""[120] However, this strategy may only be a limited source of persuasive guidance for other provincial courts considering the *Quebec Charter*'s unique structure and quasi-constitutional status.[121] The authors note this limitation as well as "a lack of case law in which equality provisions in human rights codes are applied to declare by-laws inoperable outside of Quebec."[122] Since the guarantees of the right to life, security, and dignity exist within an anti-discrimination framework in Quebec, the authors limit their proposed strategy, which does not speak to the section 7 guarantees of the Canadian *Charter*.[123]

While no claim has yet been successful in this context, anchoring the analysis in a provincial human rights framework may prove effective. In the context of challenges to municipal by-laws, courts in other Canadian provinces, notably in British Columbia and Ontario, have extended remedial protections to people experiencing homelessness through exemptions, declarations of unconstitutionality, and refusals to grant injunctions to remove encampments. The constitutional basis of successful rights litigation elsewhere has consistently been rooted in the security of the person guaranteed under section 7 of the *Canadian Charter*. A constitutionally anchored argument can be made at the intersection of sections 7 and 15 to find that "security and equality are not mutually exclusive bases."[124]

C. Homelessness as Constructively Immutable

In the 2020 decision of *Fraser v Canada*, Justice Abella clarified the test to establish a *prima facie* violation of the section 15(1) *Charter* right to equality. Claimants must show at the first stage of the test that the impugned law or state action "imposes differential treatment based on protected grounds, either explicitly or through adverse impact."[125] At the second stage, the claimant must establish that this distinction has "the effect of reinforcing, perpetuating or exacerbating disadvantage."[126] As is the case with many seemingly neutral laws, the explicit wording of the bylaw is not discriminatory as it appears to apply to the entire population equally. *Fraser* confirmed the Court's commitment to substantive equality by noting how the "increased awareness of adverse impact discrimination has been a central trend in the development of discrimination."[127] In the case of Québec's curfew order, as in *Tanudjaja*, the adverse distinction created was not based on an enumerated ground, but rather, on an analogous one.

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120 *Ibid* at para 176, citing *Health Services, supra* note 6 at para 78.

121 *Ibid* at 196. This is a result of the Quebec Charter's in-operability or paramountcy clause under s 52, the functional provincial equivalent of s 52(1) of the *Constitution Act*.

122 *Ibid* at 196.

123 *Ibid* at 196–197; *Quebec Charter*, *supra* note 118, ss 1, 4.

124 *Ibid* at 197.

125 *Fraser v Canada (Attorney General)*, 2020 SCC 28 *at pa*ra 81 [*Fraser*].

126 *Ibid*.

127 *Ibid* at para 31.

i. Distinction

The distinction here is between the homeless population and those with a home. For seemingly neutral laws, distinctions are discerned by examining the impact. The curfew's adverse impacts included ticketing and uncertainty of police discretion, most felt by the homeless. Further evidence may be useful in showing that the curfew order has a negative impact on the homeless, such as the disproportionate ratio of fines given to the homeless compared to the general population. As Terry Skolnik argues, "laws that manage public property operate like a self-fulfilling prophecy against those without access to housing." As such, people are at the greatest risk of alleviating their needs on public property, which in turn justifies the "state's management of public property through coercion."[128] The first hurdle of the legal analysis is thus met: seemingly neutral laws controlling public property, such as the curfew order, create a distinction between those with a home and those without one.

While there is no need for a formal "mirror comparator", there may be some difficulty in identifying a comparator group based on enumerated or analogous grounds.[129] Claims based on "intersecting grounds of discrimination" are accepted.[130] As noted by Justice Masse, the homeless population are at the intersection of various marginalized groups such as those with mental and physical disabilities, Indigenous persons (race), racialized persons, as well as youth and seniors.[131] Nonetheless, courts thus far have been reticent to recognize the intersectional ground of homelessness as a freestanding analogous ground of discrimination.

ii. Analogous Ground: Constructively Immutable

How, then, would the Supreme Court of Canada assess whether homelessness as a ground of differential treatment deserves protection? The 1999 decision in *Corbiere*, now the *arrêt de principe* for analogous grounds, marked the first clear endorsement of immutability — or 'constructive' immutability — as the prime variable of the analysis. The inquiry has since evolved to be both contextual and multivariable.[132] No one variable is decisive — the Supreme Court considers vulnerability,[133] links to a discrete and insular minority,[134] and political powerlessness[135] as relevant to recognizing new protected characteristics. The inquiry into immutability is based on liberty and on values of freedom, autonomy, and dignity.[136]

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128 Terry Skolnik, "Freedom and Access to Housing: Three Conceptions" (2018) 35 Windsor YB Access Just at 241.

129 *Fraser, supra* note 125 at para 67; *Tanudjaja*, *supra* note 20 at para 82.

130 *Corbiere, supra* note 82.

131 *Clinique, supra* note 15 at para 10.

132 See Joshua Sealy-Harrington, "Assessing Analogous Grounds: The Doctrinal and Normative Superiority of a Multi-Variable Approach" (2013) 10 JL & Equality at 37.

133 See *Andrews, supra* note 75 at 152; *Egan v Canada,* [1995] 2 SCR 513 at 554.

134 *Ibid*. See also *Miron v Trudel,* [1995] 2 SCR 418 at para 158.

135 See Colleen Sheppard, "Grounds of Discrimination: Towards an Inclusive and Contextual Approach" (2001) 80 Can Bar Rev 893 at 908.

136 Sophia Moreau, "In Defense of a Liberty-based Account of Discrimination" in Deborah Hellman & Sophia Moreau, eds, Philosophical Foundations of Discrimination Law (Oxford UK: Oxford University Press, 2013) 71 at 81.

In *Andrews v Law Society of British Columbia*,[137] the first *Charter* equality case before the Supreme Court, the inquiry concerned whether citizenship could be an analogous ground under section 15(1).[138] In her concurring reasons, Justice Wilson described the analogous category as including "discrete and insular minorities," which are "those groups in society to whose needs and wishes elected officials have no apparent interest in attending [and] will continue to change with changing political and social circumstances."[139] The inherent social and relational notions of power thus inform the analogous grounds analysis. In this way, not only do the homeless, sitting at the margins of society, readily constitute a "discrete and insular" group, but they are also socially dominated and thus politically powerless.

The Montreal homeless population, for instance, does not constitute an amorphous group whose scope cannot be circumscribed. In fact, as discussed by Justice Masse in detailing the uncontradicted evidence in the case of the curfew order, the homeless population in Montreal includes at least 3000 people,[140] which is a "discrete and insular minority."[141] The adverse impact on this "insular minority" must flow from historical disadvantage and stereotyping. Skolnik notes that "homeless people have historically experienced discriminatory disadvantages through vagrancy statutes and laws that regulate public property."[142] In detailing the many historical and contemporary disadvantages faced by this insular and circumscribed group, Skolnik documents the health and liberty disparities, and the disparate impact of vagrancy laws on the homeless compared to those with a home. Courts should take judicial notice that the homeless have historically faced significant socio-economic disadvantages given their treatment as second-class citizens, both societally and legally. Historically, "vagrancy statutes prohibited positive acts in which homeless people characteristically engaged, such as wandering and sleeping on public property without providing an account of oneself."[143] In many ways, the curfew order operates as a *justified* vagrancy law in the context of the COVID-19 pandemic.

The artificial distinction between status and conduct is further challenged when one accounts for the systemic power dynamics at play. Those at the socio-economic margins of society have no meaningful control over their dire situation, which is often grounded in mental disability. Courts can and should take judicial notice of a long history of vagrancy laws disproportionately harming the homeless (including municipal regulations in parks, trespassing, mandatory victims' surcharge, etc.).[144] In *Corbiere*, the majority emphasized that categories of discrimination cannot be reduced to watertight compartments but will inevitably overlap.[145] Differential treatment on the basis of homelessness can hardly be separated from the reality that *racialized* and *disabled* persons are disproportionately affected by vagrancy laws

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137 *Andrews, supra* note 75.

138 *Ibid* at 183.

139 *Ibid* at 152, citing John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980).

140 *Clinique, supra* note 15 at para 10.

141 *Corbiere, supra* note 82 at para 62.

142 Skolnik, "Homelessness", *supra* note 13 at 72.

143 *Ibid* at 79.

144 Knox, *supra* note 75.

145 *Corbiere, supra* note 82 at para 259.

such as the curfew. Government arguments that homeless people "choose to be homeless" only further stigmatize and stereotype the illusory notion of choice in the vicious cycle of poverty resulting in homelessness. That the status is theoretically changeable in no way dilutes its constructive immutability – what matters is *meaningful* control thereon, akin to marital status or "off-reserve residence" as protected grounds. To conclude otherwise conflates the distinct notions that are immutability *de jure* (such as race, etc.) and immutability *de facto* (or *constructive*). Arguments to this effect misunderstand the jurisprudence of the Supreme Court on immutability which endorses a multivariable and contextual approach.

Indeed, the constructive immutability analysis also accounts for societal power imbalances and historical disadvantage. It considers intersecting grounds, for no characteristic is a watertight compartment. That is, any differential treatment based on homelessness – be it explicit or implicitly through adverse impact — is hardly separable from the fact that it will disproportionately affect racialized, disabled, and Indigenous people. It constitutes a flagrant denial of their human dignity, the value underpinning section 15, in addition to fueling the stereotype that those at socioeconomic margins are either unlucky or lazy — a blatantly inaccurate conclusion which ignores the structural dynamics underlying homelessness as a *societal* problem. To reject equality claims by homeless people on legalistic technical grounds diverges from the purposive approach endorsed by the jurisprudence. It also ignores the vast body of social science literature explaining the causes, consequences, and complex vulnerability of lacking shelter.

In assessing disadvantage, courts should use a purposive and contextual approach and acknowledge that there is no "rigid template" of *indicia*.[146] The homeless need only show that the distinction undermines substantive equality by perpetuating harm against them, such as historical economic disadvantage as well as psychological harms. Vagrancy laws such as the curfew perpetuate such harm by imposing unreasonable financial penalties and forcing individuals into situations that exacerbate their physical and psychological vulnerabilities. This leads to a burden on the homeless that those with a home do not experience.

D. Interpretive Significance of International Law

Any analysis of the plausibility of homelessness as a protected personal characteristic must also consider Canada's obligations under international law. Former Chief Justice Dickson's frequently quoted passage from *Alberta Reference* is the locus classicus for the interpretive significance of international law in a *Charter* analysis.[147] The Court declared that the various sources of international human rights law are persuasive sources for *Charter* interpretation.[148]

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146 *Fraser, supra* note 125 at para 76.

147 *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313 at para 59 [*Alberta Reference*] ("The *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.")

148 *Ibid* at para 57 ("declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms"). See also Martha Jackman & Bruce Porter, "Socio-Economic Rights Under the Canadian Charter" in M Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, 2008) 209 at 214-15.

The Supreme Court has embraced this interpretative presumption several times.[149]

The relevance of Canada's binding international obligations to the interpretation of sections 7 and 15 should accordingly seem trite. However, it has proved controversial in a recent Supreme Court decision holding that the *Charter*'s protection against cruel and unusual punishment under section 12 does not extend to corporations.[150] While unanimous on the result, the Court was split on the proper significance of international law in constitutional interpretation. Justices Brown and Rowe, reflecting the majority, criticized Justice Abella for "the prominence she gives to international and comparative law in the interpretive process."[151] For them, international standards play "a limited role of providing *support* or *confirmation* for the result reached by way of purposive interpretation."[152] Respectfully, the majority's statement represents a marked departure from the Court's consistent jurisprudence on the persuasiveness of international law, which has been lauded globally.[153] Empirically, from 2000 to 2016, the Supreme Court referred to international treaties 336 times, in addition to citing 1,761 judgments from foreign jurisdictions.[154] Considering how other courts have dealt with similar questions is undeniably helpful in determining how to exercise judicial discretion.[155] This echoes the late Peter Hogg, according to whom "the search for wisdom is not to be circumscribed by national boundaries."[156] As legal scholar Karen Eltis similarly explains, living tree constitutionalism and the *Charter*'s commitment to multiculturalism indicate an approach that embraces looking outward to foreign and international law.[157]

There are at least six international human rights treaties, ratified by Canada, of relevance to the discrimination of the homeless.[158] Chief among them is the *International Covenant on Economic,*

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149 *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038 (the Court refers to Canada's ratification of the *ICESCR*); *Health Services, supra* note 6 at para 70 ("Canada's current international law commitments and the [...] state of international thought on human rights [is] a persuasive source for interpreting the scope of the Charter").

150 *Quebec (Attorney General) v 9147-0732 Québec inc*, 2020 SCC 32.

151 *Ibid* at para 19.

152 *Ibid* at para 22 [emphasis in original].

153 See Ran Hirschl, "Going Global? Canada as Importer and Exporter of Constitutional Thought", in Richard Albert and David R. Cameron, eds, Canada in the World: Comparative Perspectives on the Canadian. Constitution (Cambridge, UK: Cambridge University Press, 2018) 305.

154 Klodian Rado, "The use of non-domestic legal sources in Supreme Court of Canada judgments: Is this the judicial slowbalization of the Court?" (2020) 16 Utrecht L Rev 57 at 61, 73.

155 Adam Dodek, "Comparative Law at the Supreme Court of Canada in 2008: Limited Engagement and Missed Opportunities" (2009), 47 SCLR (2d) 445 at 454.

156 Peter W. Hogg, Constitutional Law of Canada (5th ed Supp), s 36.9(c).

157 Karen Eltis, "Comparative Constitutional Law and the 'Judicial Role in Times of Terror'" (2010), 28 NJCL 61 at 69-70.

158 Other than the *ICESCR*, relevant treaties ratified by Canada include: *Convention on the Rights of Persons with Disabilities*, 12 December 2006, Can TS 2010 No 8 art 28 (entered into force 3 May 2008, accession by Canada 11 March 2010); *Convention on the Rights of the Child*, 20 November 1989, Can TS 1992 No 3 art 27 (entered into force 2 September 1990, accession by Canada 12 December 1991); *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 UNTS 195 art 5 (entered into force 4 January 1969, accession by Canada 14 October 1970); as well as the *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, Can TS 1982 No31 art 14 (entered into force 3 September 1981, accession by Canada 10 December 1981).

Social and Cultural Rights ("*ICESCR*"), which includes the articulation of the right to housing under its article 11.1 as follows: "the right of everyone to an adequate standard of living for [themselves] and [their] family, including adequate food, clothing and housing, and to the continuous improvement of living conditions."[159] The right to housing has been interpreted by the UN Committee on Economic, Social and Cultural Rights ("the Committee") in General Comments No. 4 and 7.[160] Notably, the Committee has warned that under article 11.1 of the *ICESCR* "the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity."[161] As part of these obligations, Canada must "take steps to the maximum of [its] available resources with a view to achieving progressively the full realization of the right to adequate housing, by all appropriate means, including particularly the adoption of legislative measures."[162] In doing so, Canada is obligated to prioritize marginalized groups living in precarious housing conditions — including residents in homeless encampments.[163] The same rights are articulated in article 25(1) of the *Universal Declaration of Human Rights*. The Office of the UN Commissioner explains that the right to adequate housing extends beyond a physical structure since "adequacy is determined by social, economic, and cultural elements, as well as […] security of tenure, availability of services […] affordability, habitability, accessibility, location, cultural adequacy."[164] As such, discrimination faced by the homeless and the right to adequate housing cannot be considered in a national vacuum, but rather, must be informed by the global housing crisis internationally.[165]

There are at least two bundles of lessons that can be distilled from the relevant international authorities. The first concerns the pivotal role of municipalities — merely "creatures of provincial statute" under the constitutional separation of powers (section 92(8) of the *Constitution Act*, 1867).[166] Provincial and federal governments in Canada have historically deferred engagement with the homeless and policing thereof to municipal officials who receive minimal support or guidance, in fact, most are often unaware of their legal obligations

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159 *ICESCR*, *supra* note 17, Article 11 (masculine pronouns corrected).

160 Committee on Economic, Social and Cultural Rights, General Comment 4 (1991), UN Doc E/1992/23 [General Comment 4], online: <refworld.org/legal/general/cescr/1991/en/53157> [perma.cc/5N9S-VX7H]; Committee on Economic, Social and Cultural Rights, General Comment 7 (1997), UN Doc E/1998/22, online: <refworld.org/legal/general/cescr/1997/en/53063> [perma.cc/MG4S-FQGJ].

161 General Comment 4, *supra* note 160 at para 7.

162 *ICESCR*, *supra* note 17, Article 2(1).

163 Human Rights Council, *Report of the Working Group on the Universal Periodic Review*, UNGA, 2023, UN Doc A/HRC/55/12, online: <undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F55%2F12&Language=E&DeviceType=Desktop&LangRequested=False> [perma.cc/ZRL2-UH3E].

164 For a more comprehensive discussion of the right to adequate housing in International Law, see Office of the United Nations High Commissioner for Human Rights, *The Right to Adequate Housing*, Fact Sheet 21 Rev 1, May 2014, online: <ohchr.org/sites/default/files/Documents/Publications/FS21_rev_1_Housing_en.pdf> [perma.cc/7PAZ-9JYM].

165 Farha, *supra* note 111.

166 Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5, s 92(8); see also Ron Levi & Mariana Valverde, "Freedom of the City: Canadian Cities and the Quest for Governmental Status" (2006) 44 Osgoode Hall LJ 409.

under international human rights law.[167] This does not absolve Canada from its international obligations. To the contrary, human rights treaties ratified by Canada "extend to all parts of federal States without any limitations or exceptions" and municipal governments are equally bound by these obligations.[168] This is particularly relevant in a context where the over-policing of the homeless and the enforcement of vagrancy laws falls upon municipal authorities.

Secondly, the right to adequate housing under the *ICESCR includes* the right to be free from discrimination of any kind on the basis of one's lack of shelter whether through explicit differential treatment or disproportionate adverse impact.[169] As such, international law recognizes that the lack of housing constitutes a protected personal characteristic that deserves protection from discrimination under the law, albeit indirectly. This is relevant to section 7 rights as well through a negative conception of non-interference. Tangibly, it means that the right to housing includes protection from arbitrary or unlawful interference with one's privacy, family, and home as well as any forced eviction, independently of legal title. As a result, many usual motives for evictions of encampments, such as the "public interest", urban planning, or real estate development, in no way justify such interferences.[170] Instead, the assessment of relocation or eviction must be rooted in the dictum that "the right to remain in one's home and community is central to the right to housing."[171] What form, then, would this right to housing take under section 7?

III. THE SECURITY LINK: CONCEPTUALIZING A RIGHT TO ADEQUATE HOUSING

To better unpack the content of the right to housing, it is helpful to view housing rights as a spectrum. This ranges from minimum and necessary conditions, such as government non-interference, to more robust and sufficient conditions, such as cultural adequacy in housing. Without providing an operational definition of what such a right encompasses, we risk overly widening its scope or inversely, being unduly narrow in its potential reach. As Margot Young suggests, "housing insecurity at large — its causes, manifestations, and potential solutions — is a pixelated picture."[172]

On the one end of the spectrum lie negative rights claims, such as the curfew case[173] and the *Adams* case,[174] where at a minimum in situations of homelessness, government action

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167 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*, UNGA, 2019, UN Doc A/HRC/43/43 [A/HRC/43/43] at paras 7, 60, online: <make-the-shift.org/wp-content/uploads/2020/04/A_HRC_43_43_E-2.pdf> [perma.cc/X5X2-G53K].

168 *ICESCR*, *supra* note 17, Article 28.

169 A/HRC/43/43, *supra* note 167.

170 *Ibid* at para 36.

171 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, UNGA, 2018, UN Doc A/73/310/Rev.1 at para 26.

172 Young, *supra* note 10 at 479.

173 *Clinique*, *supra* note 15.

174 *Adams*, *supra* note 18.

should not undermine or exacerbate housing precarity. Government non-interference is the minimum standard of necessary conditions on one end of the scale. This accounts for instances of homelessness, housing precarity, and shelter availability.

The middle of the spectrum includes instances of positive rights claims which ask the government to step in and provide remedial relief for specific litigants. The case of *Tanudjaja* involved a positive rights dimension, that looked both at government action and inaction while also asking for the recognition of a positive right to housing under section 7. This closely resembles the South African case of *Government v Grootboom*.[175] The South African constitution recognizes an extensive list of positive socio-economic rights, including article 26, the right to housing, and article 27, an acceptable standard of living.[176] In *Grootboom*, the South African Constitutional Court concluded that the country's national housing program did not live up to the government's obligations under the Constitution because it did not provide relief for those in desperate need. It further reasoned that "civil, political, social and economic rights in the Constitution are all interrelated and mutually supporting, and that affording socio-economic rights to people enables them to enjoy their other rights."[177]

On the other end, are more robust positive rights claims, in line with the federal government's international commitments and obligations under the *ICESCR*, which would require increased resource allocation initiatives. Under the *ICESCR*, conditions for housing include such things as a location with access to healthcare services, schools, employment possibilities and other social services.[178] More robust conditions such as cultural adequacy means that the construction of housing must consider cultural identity and diversity.[179] In that respect, Jesse Hohman explains how housing fulfils an important psychological need associated with social, democratic participation and social inclusion:

> Housing provides and protects some of our most fundamental needs. It shields us from the elements and provides refuge from external **physical threats.** It gives us a base from which to build a livelihood and take part in the community, from the neighbourhood to the state. Moreover, housing provides a space in which our **psychological needs** can be met and fostered… housing is important in the formation and protection of identity, community and place in the world. [180]

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175 *Government v Grootboom and Others*, ZACC 19, 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) South Africa Constitutional Court [*Grootboom*].

176 *The Constitution,* Republic of South Africa, Bill of Rights, Chapter 2, article 26 and 27, 1996.

177 *Grootboom*, *supra* note 175. See Child Rights International Network, Government v Grootboom, online: <archive.crin.org/en/library/legal-database/government-v-grootboom.html> [perma.cc/Q7R7-EK9C].

178 General Comment 4, *supra* note 160 at para 8(f) ("housing should not be built in polluted sites [...] that threaten the right to health of the inhabitants").

179 *Ibid* at para 8(g) (including building materials, methods, and policies).

180 Jesse Hohmann, *The Right to Housing: Laws, Concepts, Possibilities,* (Oxford: Hart Publishing Ltd, 2013) at 197 [emphasis added].

A. Adequate Housing as Security of the Person

i. The Security Link: Section 7's Life, Liberty, and Security

Security of the person is broadly interpreted and contains both a physical and psychological aspect. Foremost, it includes a person's right to control their bodily integrity and will be engaged where the state interferes with personal autonomy, as seen with prohibitions on medical assistance in dying and imposing unwanted medical treatment.[181] Equally, the security interest has an important health dimension and will be engaged where state action has the likely effect of seriously impairing one's physical or mental health.[182] As recognized in *Canada v. Bedford*,[183] government action that prevents individuals engaged in "risky but legal activity" from taking steps to protect themselves from such risks implicates the security of their person. Further, in the landmark decision on healthcare rights, *Chaoulli v Quebec*, the Court held that the government's failure to ensure access to health care of "reasonable" quality within a "reasonable" time engaged the right to life and security of the person – triggering the application of section 7 and the equivalent guarantee under the *Quebec Charter*.[184] A few years later in *Insite* (*PHS*), the Court reaffirmed that where a law creates a health risk, this amounts to a deprivation of the right to security of the person and that "where the law creates a risk not just to the health but also to the lives of the claimants, the deprivation is even clearer."[185]

State action causing severe psychological harm will also engage the right to security where it has "a serious and profound effect on the person's psychological integrity" and the harm results from the state action.[186] As with the curfew order under the security interest, one need only point to the many health risks, which amount to seriously impairing one's physical and mental health as well as constituting serious state-imposed psychological stress. Here, the risks with unavailable shelters would effectively mirror the abortion delays in *Morgentaler*, forcing homeless people on the streets in winter conditions and causing "profound consequences on physical and emotional well-being."[187] Other risks include hiding from the police in winter conditions, contracting COVID-19 in crowded shelters prone to outbreaks, and the mental health impacts of those with dependency who remain in the shelter without access to alcohol and drugs. The harmful conditions here can also be analogized to *Bedford*, whereby the government is "imposing dangerous conditions" on the *usually* legal activity of merely being outdoors. It also may impede homeless peoples' ability to control their "physical or bodily integrity."[188] Given the preponderance of evidence put forth regarding the link between mental and physical health and homelessness, including the right to adequate housing under the security of the person interest seems most in line with the section's guarantee and the Court's jurisprudence thus far.

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181 *Morgentaler, supra* note 41 at 56; *Carter, supra*, note 95.
182 *Chaoulli, supra* note 27 at paras 111–24.
183 *Canada v Bedford*, [2013] 3 SCR 1101 [*Bedford*].
184 *Chaoulli, supra* note 27.
185 *PHS, supra* note 61.
186 *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at paras 58, 60–61 [*Blencoe*].
187 *Morgentaler, supra* note 41.
188 *Bedford*, *supra* note 183.

B. Gosselin and the Open Door

Among the *Quebec Charter's* list of enumerated protected rights is section 45, an "acceptable standard of living."[189] The plain text may indicate an obligation incumbent on the government to satiate what they provide for as: "Every person in need has a right, for himself and his family, to measures of financial assistance and to social measures provided for by law, susceptible of ensuring such person an acceptable standard of living".[190] The first case to challenge provincial legislation under this section was *Gosselin v Quebec*.[191] Louise Gosselin argued that a Quebec law excluding citizens under the age of 30 from receiving full social security benefits violated her right to security of the person under section 7 of the *Charter*, the prohibition against age discrimination under section 15, and the right to an acceptable standard of living under section 45 of the *Quebec Charter*.

In 1992 at the Superior Court of Quebec, Justice Reeves dismissed Louise Gosselin's claim under the *Quebec Charter* on the grounds that section 45 is merely a statement of policy which provides no authority for the courts to review the adequacy of social measures the legislature chooses to adopt.[192] Seven years later on appeal, Justice Robert of the Quebec Court of Appeal ruled that the provincial regulation violated section 45 of the *Quebec Charter*.[193] At the Supreme Court of Canada, Justice L'Heureux Dubé, in her dissenting reasons, agreed with Justice Robert's finding that "Section 45 of the Quebec Charter […] bears a very close resemblance to article 11 of the International Covenant on Economic, Social and Cultural Rights […] and was intended to establish a domestic law regime that reflects Canada's international commitments."[194] In this way, section 45 contains "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels [of subsistence needs and the provision of basic services]."[195] However, Justice Robert found that, in accordance with the remedial and anti-derogation provisions set out under sections 49 and 52 of the *Quebec Charter*, section 45's guarantee of financial assistance "susceptible of ensuring [...] an acceptable standard of living" is not judicially enforceable.[196] Ultimately, all three Justices of the Quebec Court of Appeal agreed that Gosselin's claim to an adequate level of assistance involved an economic right that was not included in section 7.[197]

Writing for the majority, Chief Justice McLachlin (as she then was) upheld the trial decision, but left open the possibility that "one day s.7 may be interpreted to include positive obligations [...] to sustain life, liberty, or security of the person […] in special circumstances."[198]In doing so, she evoked Lord Sankey's celebrated phrase in *Edwards* that "the *Canadian Charter* must

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189 *Quebec Charter*, *supra* note 118, s 45.
190 *Ibid*.
191 *Gosselin, supra* note 16.
192 *Gosselin v Quebec*, [1992] QCCS, RJQ 1647 at 1667.
193 *Gosselin v Quebec*, [1999], RJQ 1033 [*Gosselin* QCCA].
194 *Gosselin*, *supra* note 16 at para 147. See also *Gosselin* QCCA, *supra* note 193 at 1092, 1099.
195 *Ibid*.
196 *Gosselin* QCCA, *supra* note 193 at 1119.
197 *Ibid* at 1042-43.
198 *Gosselin*, *supra* note 16 at para 83.

be viewed as a living tree capable of growth and expansion within its natural limits."[199] Chief Justice McLachlin also recalled Justice LeBel's cautionary words in *Blencoe* that it "would be dangerous to freeze the development of this part of the law" and the Court "should safeguard a degree of flexibility in the interpretation and evolution of s. 7 of the *Charter*."[200] While the majority left the door open for future cases, they shut it for *Gosselin* due to a lack of evidence.[201]

In her dissenting opinion, concurred by Justice L'Heureux Dubé, Justice Arbour would have accepted *Gosselin*'s section 7 challenge and found that section 7 imposed positive obligations on the government to act.[202] The bulk of her argument rejected the inflexibility of the Canadian positive-negative rights dichotomy as well as the need for affirmative government action to render claims justiciable. Using a purposive, contextual, and textual analysis, she concluded that "any approach to the interpretation of s. 7 mandates the conclusion that the s. 7 rights of life, liberty and security of the person include a positive dimension."[203] Justice Arbour dealt with the issue of section 7 and economic rights by citing *Irwin Toy v Quebec (AG)*, where the Court distinguished between "corporate-commercial economic rights" which are excluded from *Charter* protection, and "economic rights fundamental to human life or survival" which may fall within the scope of section 7.[204] As Chief Justice Dickson (as he then was) explained:

> The rubric of "economic rights" embraces a broad spectrum of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing, and shelter, to traditional property-contract rights. To exclude all of these at this early moment in the history of Charter interpretation seems to us to be precipitous.[205]

Justice Arbour referred to this reasoning to explain why "those economic rights fundamental to human life or survival" should not in fact be treated as the same kind of thing as corporate-commercial economic rights.[206] I draw the same distinction here. As was the case in *Gosselin*, certain rights, such as a right to adequate housing, "are so intimately intertwined with considerations related to one's basic health [and hence "security of the person"] that they can readily be accommodated under s. 7 without the need to constitutionalize property rights."[207] Since security of the person has both physical and psychological dimensions, socio-economic rights can be effectively reframed as basic human rights in those circumstances where a physical and psychological aspect is inherently tied to the right claimed. Such a right would be distinct from the type of purely corporate-commercial right that Chief Justice Dickson distinguished. As noted in both *Irwin Toy* and *Gosselin*, housing rights are the sort

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199 *Ibid*.
200 *Ibid*. See also *Blencoe, supra* note 186 at para 188.
201 *Gosselin*, *supra* note 16 at para 83.
202 *Ibid* at paras 319–329.
203 *Ibid* at para 324.
204 *Irwin Toy Ltd v Quebec*, [1989] 1 SCR 927 [*Irwin Toy*].
205 *Ibid*.
206 *Gosselin*, *supra* note 16 at para 324.
207 *Ibid* at para 311.

of interest which fall under the scope of human rights distinct from commercial property rights. Conflating the human right to adequate housing with economic rights effectively obfuscates the true substance of the protected security interest.

CONCLUSION: RECOVERING FROM THE INEQUALITY VIRUS

The past few years have been a tale of two pandemics; not only did COVID-19 disproportionately harm the poor, it also amplified financial disparities which predated it, further marginalizing racialized individuals and women in particular .[208] The expected long-term rise in homelessness, and over-policing thereof, only reflects the tip of this inequality iceberg. Politics aside, a constitutional response to the pandemic is worth considering. Thankfully, the *Charter* remains subject to the living tree doctrine, through which we can revisit definitional issues related to what constitutes life, liberty, and security of the person and account for evolving notions of equality in modern Canadian society. The substance of section 7 and section 15 must account for the vast and emerging body of social science literature on the structural causes, health consequences, and complex vulnerability resulting from a lack of shelter. Against the pixelated spectrum of housing rights, the ambit of *Charter* rights may evolve incrementally, from non-interference to holistic adequacy, transcending the rigid and artificial positive-negative divide between state action and inaction.

The pandemic marked a permanent change in the "political and cultural realities of Canadian society"[209] because it exacerbated the lived realities of housing inequality. To ensure that the *Charter* is a responsive document that "speaks to the current situations and needs of Canadians"[210] it must recognize homelessness as worthy of equality. Such constitutional recognition need not open the floodgates to a revolution of justiciable socioeconomic rights. Canada's constitutional history is one of evolution, rather than revolution.

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208 See Zara Liaqat, "Why Covid-19 is an Inequality Virus", *Policy Options* (20 April 2021) online: <policyoptions.irpp.org/magazines/april-2021/why-covid-19-is-an-inequality-virus> [perma.cc/S4HX-9Y3K].

209 *Canadian Western Bank*, *supra* note 5 at para 23.

210 *Health Services, supra* note 6 at para 78.