



ARE WE THERE YET? CANADA'S PROGRESS ON THE ROAD TO HOUSING RIGHTS

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Abstract: Canada is legally required to respect, protect and fulfill the right to adequate housing by law. Some obligations are immediate in nature, while others are assessed on a longer-term basis and are subject to a reasonableness standard. While certain of these obligations are being met progressively, others are not. Homelessness in Canada appears to be on the rise and social and affordable housing is increasingly unavailable to those who need it most. Despite the important role that the federal government plays, Canada's provinces and territories have not adopted their own strategic framework legislation which would allow for more seamless integration of housing initiatives nationally and greater accountability measures on the road to housing rights. This article examines the standards used to assess progressive realization of the right to housing and reasonableness in international law, including recent decisions from the international UN Committee that oversees the Covenant on Economic, Social and Cultural Rights.

Introduction

The [National Housing Strategy Act](#) (NHSA) was passed in 2019 by the federal government to great fanfare. It provides a legal foundation for one of Canada's main policy planks and directly imports the international human right to adequate housing into law, a rarity for Canada in social and economic areas like housing.

Canada's obligation to ensure social and economic rights is based mainly on the idea of "progressive realization" which, in turn, depends on "[appropriate steps](#)." This article examines these concepts under the United Nations [International Covenant on Economic, Social and Cultural Rights](#) (the "Covenant") and discusses the implications for Canada.

Section 1 discusses the requirement to take certain steps immediately. Section 2 explores the concept of "progressive realization." Section 3 discusses the burden on the state to make its case that it is moving progressively towards making the right to housing a reality. Section 4 reviews recent legal cases in Europe where people were denied access to alternative housing despite long years on waiting lists and subject to stigmatizing eligibility requirements.

The article closes with an assessment of how Canada is faring on the road to housing rights in relation to the criteria and standards under discussion.

Why adopt rights-based legislation?

Canada has been a party to the United Nations [Covenant](#) since 1976. Although the Covenant recognizes the right to an adequate standard of living (which includes adequate housing), a majority of the [Ontario Court of Appeal held](#) in 2014 that housing is so broad, diffuse, and complex that the right to housing is not “justiciable” under the [Canadian Charter of Rights and Freedoms](#).ⁱ That is why the intervention of the legislature was needed in Canada and why the NHSA was [hailed](#) as pioneering legislation.

Still, Canadian federalism poses a challenge. The federal government plays an important role, but most of the practical work – from zoning to building to eviction – falls to the provinces, territories and municipalities. Given that housing is mainly a provincial matter, legislative coherence among different layers of government is critical if programs are to function seamlessly across jurisdictional lines.

That is why, In November 2022, the Quebec Homelessness Prevention Policy Collaborative (QHPPC) released a [report](#) calling on Quebec not only to include the right to adequate housing in Quebec’s [Charter of human rights and freedoms](#), but to go the next step and adopt a “made-in-Quebec” law to operationalize the right to housing and advance housing policy in a way that takes into account key principles of a human rights-based approach.

Indeed, Article 2(1) of the Covenant [provides](#) that states must take steps, “particularly legislative measures.” In 1990, the [Committee on Economic, Social and Cultural Rights](#) (the “Committee”), which oversees the Covenant, said that legislation is “highly desirable and in some cases may even be indispensable”.

The NHSA is legislation but it is insufficient because it operates only at the federal level: laws at the provincial/territorial levels (which are also subject to the treaty obligations created by the Covenant) are also needed to respond to the complexity of Canadian federalism and ensure that the right to housing is truly a national effort.

Progressive Realization

Adopting new legislation at the provincial and territorial levels will not, however, create individual recourses: one cannot go to court to enforce the NHSA directly, for example, by demanding an individual right to a home or to property. For some, this approach to law raises more questions than it answers. What, then, does progressive realization mean in action? How can we tell if a government is making good on its commitments?

In 1990, the Committee issued a General Comment on progressive realization in answer to such questions:

General Comment No. 3, International Covenant on Social and Economic Rights (1990)

The concept of progressive realization [recognizes] that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. [...] Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. [...] It thus **imposes an obligation to move as expeditiously and effectively as possible toward that goal**. Moreover, any **deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified** by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources. (Emphasis added.)

A year later, the Committee applied these standards directly to housing. [General comment No. 4](#) reiterated that States must demonstrate that, overall, “the measures ... are sufficient to realize the right for every individual in the **shortest possible time in accordance with the maximum of available resources**” (emphasis added, para 14).

What “steps” or measures?

Immediate measures

The previous paragraphs set out the legal requirement on States to undertake steps or measures on a progressive basis. But it is important to remember that some of these steps or measures must be taken right away. In other words, certain steps or measures need to be **undertaken immediately**, not progressively. They include:

Plans of action and the preference for legislative measures (and Canada already has the NHSA and a [National Housing Strategy](#)).

Addressing homelessness: Homelessness is the most severe form of deprivation of the right to housing. [General Comment No. 4](#) requires that States determine the extent of homelessness and adopt plans based on consultation with people experiencing homelessness. This in turn requires that the state be capable of producing data to demonstrate progress (or lack thereof).

[General Comment No. 7](#) from the Committee also emphasizes that forced evictions should not result in homelessness or vulnerability to the violation of other human rights (para 16).

Monitoring: States must monitor the housing situation (General Comment 3, art. 11), preferably with an independent monitoring mechanism that includes the impacts of legislation, programs, policies, and budgets.

Equality/non-discrimination rights: Rights must be available in an equal and non-discriminatory manner ([Art 2\(2\) of Covenant](#)). These rights are fundamental to all human rights, and are not subject to progressive realization: they must be implemented immediately.

Progressive measures: Latitude in making policy choices

Returning to progressive measures, there is little in the way of specific guidance on what particular steps need to be taken, subject to the comments in the previous section about those steps that need to be taken immediately.

Beyond immediate measures, the Committee has [noted](#) that states enjoy considerable discretion, or policy latitude, to justify legal, policy, and budgetary decisions to achieve the right to adequate housing (para 15.5). Sandra Liebenberg writes that a “choice of means is implicit in the concepts of the duty ‘to take steps’ ... “by all appropriate means...”.”ⁱⁱ

However, latitude in policy choices and in the exercise of discretion does *not* mean that anything goes. As the Committee noted:

[Ben Djazia et al. v. Spain](#), CESCR, Communication No. 5/2015, UN Doc. E/C.12/61/D/5/2015 (20 June 2017)

States parties can choose a variety of policies to achieve this purpose [...] However, **any measures adopted must be deliberate, specific and as straightforward as possible to fulfil this right as swiftly and efficiently as possible** [...] Moreover, States parties should take consistent and coordinated measures to resolve institutional shortcomings and structural causes of the lack of housing” (para.15.3). (Emphasis added)ⁱⁱⁱ

The key standard used for determining what is, and what is not, acceptable depends on the concept of reasonableness.

Assessing Progressive Realization: The Standard of Reasonableness

The assessment of reasonableness is contextual and state-specific. The State is responsible for justifying its own progress (or lack thereof). In [Ben Djazia et al. v Spain](#), the Committee reiterated that the responsibility to justify the reasonableness of policy choices or measures rests on the State (at para 15.5).^{iv}

The Committee has [specified](#) circumstances that give rise to particular burdens of justification such as:

- a failure to fulfill minimum core obligations,^v

- discrimination, which gives rise to immediate obligations on the state to cease the treatment, and
- the adoption of "deliberately retrogressive measures," which impose the need for stringent justification.^{vi}

The 2008 [Optional Protocol to the Covenant](#) (Optional Protocol) to the Covenant is a separate treaty or instrument that creates a legal mechanism for people to file complaints (called 'communications') under the Covenant against their countries, provided the country has ratified both the Covenant and the Optional Protocol.

Article 8(4) of the Optional Protocol says that:

Art 8.4. the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.

Art. 8.4 also makes the point that governments have a **degree of policy latitude** to choose among the "range of possible policy measures." In 2000, a South African court, in a case called [Grootboom](#), had established standards to provide content and meaning to the range of appropriate steps and the reasonableness of those steps. These standards were picked up by the Committee in [comments on earlier drafts](#) of the [Optional Protocol](#) and together, they may be summarized as follows:

- timeliness;
- deliberate, concrete, and targeted nature of the steps;
- exercise of discretion in a non-discriminatory, non-arbitrary manner;^{vii}
- allocation of resources in a manner that complies with international human rights standards;
- when choosing the available policy options, the state adopted the option that least restricts Covenant rights;
- consideration of the situation of disadvantaged and marginalized individuals or groups and whether the state prioritized grave situations or situations of risk.

The Optional Protocol does not contain substantive law, but it sets out standards for reviewing the reasonableness of the steps taken. Although Canada is not yet a party to it, the views of the Committee in response to complaints are relevant to interpreting the Covenant itself.

Noted anti-poverty advocate [Bruce Porter writes](#) that after "years of debate about this central issue, article 8(4) [of the Optional protocol] reflects a consensus that access to justice in cases where ESC rights violations are linked to failures by states to adopt positive measures requires a robust standard of review of the reasonableness of the steps taken" (at 4).

Reasonableness, policy choices and resource allocations

Resource constraints

While insufficient resources are legitimate constraints the Committee will assess reasonableness in the particular circumstances, as discussed in the following section.

While acknowledging the reality of resource constraints, [Porter notes](#) that states are obliged to utilize “available budgets and institutional capacity ... reasonably in accordance with the priority that must be accorded to human rights” (at 20). In a literature review prepared for Canada’s National Housing Council, [Biss et al. write](#) that a “standard for consideration is that of a maximum of available resources, which looks at whether Canada’s budgeting, programming, taxation measures, goals, and targets measure up to its international and domestic commitments to eliminate homelessness and realize the right to adequate housing within the shortest possible time based on available resources” (at 6).

Averting homelessness

The Committee has established both substantive and procedural standards for holding the state accountable for achieving the right to housing. Averting homelessness should be a priority for both.

In terms of substantive standards, the Committee will look not only at the individual circumstances of a complaint, but also at the broader structural context. [Ben Djazia et al. v Spain](#), the Committee [noted](#) that a lack of housing is often the result of structural factors, (e.g., high unemployment or systemic patterns of social exclusion). These factors are also the responsibility of the State to resolve “through an appropriate, timely and coordinated response, to the maximum of their available resources.”

Have participatory approaches been used?

Participatory approaches and transparency in decision-making are procedural aspects of the State’s obligations and are fundamental to human rights-based approaches. They require positive steps and, necessarily, the allocation of resources. As Porter [writes](#), “[e]ffective participatory rights and monitoring depend on the transparent allocation and expenditure of resources.”^{viii}

Recent jurisprudence from the Committee

Spain is a party to the Convention and the Optional Protocol and has been the subject of several recent international cases on housing, procedural protections in cases of evictions, and the importance of considering marginalized or vulnerable individuals.

In [Ben Djazia et al. v Spain](#), a poor family was evicted into homelessness and precarious, inadequate housing after decade of unsuccessfully applying for social housing. The Committee as found that it was a violation of the State's obligation to provide alternative housing given the dire circumstances. In particular, the Committee noted the lack of procedural protections for preventing evictions into homelessness caused by lack of payment of rent.

Other cases have addressed eligibility requirements for social housing:

- [Cortés and Bermúdez v. Spain \(2018\)](#): Spain failed to meet its obligations to provide alternative housing for persons facing forced eviction. The Committee said that Spain should cease excluding people from social housing because they had previously occupied a dwelling illegally at the time of their application for housing (at para 13(b)).
- Without identifying a clear timeline, the Committee in [Cortés and Bermúdez v. Spain \(2018\)](#) recommended that Spain “[d]evelop and implement [...] a comprehensive plan to guarantee the right to housing, [which] should provide for the necessary resources, indicators, time frames and evaluation criteria to guarantee [...] the right to housing in a reasonable and measurable manner” (at para 13(d)).^{ix}
- In [Albán v Spain \(2019\)](#) the Committee recommended that the State adopt the necessary measures to ensure that all persons have equal access to the social housing stock by removing unreasonable conditions that might exclude persons at risk of indigence. Again, the Committee noted that the practice of automatically excluding persons who occupy a property without legal title because they are in situations of necessity placed Spain in violation of its obligations (para 17(c)).
- The Committee in [Albán v Spain \(2019\)](#) also recommended the development of a comprehensive plan to guarantee the right to adequate housing for low-income persons based on maximum available resources (para 17(e)).
- In [Hakima El Goumari and Ahmed Tidli v Spain](#) (2021), Spain was obliged to provide an effective remedy (adequate housing and financial compensation) to vulnerable people who had been evicted. The Committee made interesting comments about the extent to which considerations should be given to key factors, such as:
 - the adequacy of temporary housing (e.g., in poor condition and far from services),
 - necessity,
 - the level of priority on waiting lists,
 - the length of time that the application for housing had been on file,
 - proportionality of the measure, having regard to whether the limitations placed on rights are compatible with the nature of the rights and general welfare.

The last issue in the list, proportionality, was discussed in [Hakima El Goumari and Ahmed Tidli v Spain \(2018\)](#): the Committee examined whether authorities had even considered the fact that vulnerable people, such as persons with disabilities, were being excluded from public or social housing. Interestingly, the Committee also made it a requirement to take into account whether the legal entity evicting the occupants had considerable assets and many rental units.

Are we there yet? Some reflections on Canada's progress

Ratifying the Optional Protocol

As previously noted, Canada is not yet a party to the Optional Protocol which creates a right of communication to the Committee. Now that the NHSA has been adopted, Canada should move forward to ratify this instrument and strengthen Canada's accountability to the international community and to the people of Canada.

Legislation and planning

Canada took more than 40 years to enact the [National Housing Strategy Act](#), counting from the date that it acceded to the Convention (although the [National Housing Strategy](#) preceded the NHSA). Both the NHSA and the National Housing Strategy specifically give priority to vulnerable groups.

Several process-based requirements of the NHSA, such as accountability measures, are being put into place: reporting systems are being established and an independent monitoring mechanism, the [National Housing Advocate](#) has been created. The Canadian Mortgage and Housing Corporation and the [National Housing Advocate](#) have begun consultations to ensure a participatory approach, and a strategy and the development of a comprehensive monitoring framework is underway.

However, none of the provinces or territories have as yet enacted legislation comparable to the NHSA.

Data

Data is essential for tracking progress and ensuring that the needs of marginalized groups are met. Statistics Canada has [introduced](#) a wide range of data products to begin to meet the rapidly growing need for robust and granular data on housing statistics. There is no doubt that more robust and granular data are needed, but at the same time it should be acknowledged that data gaps are slowly starting to be addressed.

In terms of tracking homelessness, the federal government's first and second nationally Coordinated Point-in-Time Counts took place in [2016](#) and [2018](#), and [preliminary findings are available for the third nationally coordinated Point-in-Time](#) (PiT) count of homelessness in Canadian communities which took place in March 2020 and December 2022.

Homelessness

Measuring homelessness is a challenge, but even though we may not have a complete and clear picture, Canada appears to be headed in the wrong direction in terms of outcomes.

According to the 2018 count in Québec, there were approximately 5,789 experiencing visible homelessness. The count took place before the COVID-19 pandemic and [many commentators agree that there has been an increase since the last count](#).^x

The results of Quebec's third PiT in 2022 were not released at the time of writing: they are expected in the Fall of 2023. However, preliminary findings, entitled [Everyone Counts 2020-2022](#), are available. More than 32,000 people in 59 communities across Canada experienced absolute homelessness in shelters, transitional housing and unsheltered locations. When compared with the 55 communities that had also participated in the 2018 count, the report notes a 12% increase in the enumeration. As well, the preliminary findings point out that:

People experiencing chronic homelessness accounted for 71% of all respondents, which is higher than what was reported in 2018 (60%). The proportion identified as chronic was typically higher among those who were in unsheltered locations (84%), followed by those in Hotels/Motels (73%) and those experiencing hidden homelessness (68%).

Some of these increases are due to structural factors, such as insufficient social and transitional housing, rising interest rates, and [the financialization of housing](#), for example. Because international law considers country circumstances in context, it is not clear, based on the preliminary data alone, that Canada would necessarily be found to be in violation of its obligations despite the negative trends in homelessness. Having said that, it is the responsibility of the state to resolve structural factors through an appropriate, timely and coordinated response, to the maximum of their available resources, as part of the progressive realization

Housing availability and affordability

Here too, results are not encouraging. Canada continues [to lag behind](#) most OECD countries and the OECD average in terms of housing units per 100,000 inhabitants.

While there have been slight improvements in the number of people waiting for social and affordable housing on a national level, the latest cycle of the Canadian Housing Survey [shows](#) that the figures are still unacceptably high: about 227,100 renter and owner households were waiting for social and affordable housing in 2021 compared with 262,000 in 2018.

In Montreal alone, more than [24,000 households are on the waitlist for social housing](#), with many people waiting for years. The QHPPC has also [recommended](#) significant increase in investment and access to social and affordable housing, not only by increasing

the amount of supported housing such as second step housing with wraparound services, but also by eliminating barriers that currently exist in Quebec to access such housing for people with precarious immigration status.

The Canadian Housing Survey [report notes that](#) the share of households spending 30% or more of their income on housing—a key measure of affordability—is still high, but it did decline from 22.0% in 2018 to 19.5% in 2021. [According to the 2021 census, in Québec nearly one-fifth of renters live in unaffordable housing](#), spending more than 30% of their income on rent. However, these figures were collected before many of the effects of the pandemic were felt by households across the country and rates may have increased.

The numbers of households living in unsuitable (5 in 100), or inadequate (7 in 100) housing were reported to be largely unchanged from 2018 to 2021.

Recent developments in Montreal illustrate how difficult it is to effect change. The City of Montreal announced changes to by-laws with promises to work with developers to build affordable housing. However, [media reports say](#) that the developers actually preferred to pay millions of dollars in penalties than build affordable housing. These developments raise serious questions about whether the private sector should be relied on to increase the affordable housing stock, and the zoning changes in Montreal have so far proven ineffective.

Finally, [a recent study revealed a rise in development-related and mass evictions](#), tied to the financialization of housing across Canada. Evictions into homelessness or precarious housing violate security of tenure, a key component of the right to housing. In the face of a changing evictions landscape, stronger procedural protections for people facing evictions in such circumstances should be established. In Quebec, failure to pay rent for three weeks leads to automatic termination of the lease unless arrears, costs and interest are paid before the Housing Tribunal reaches a decision. None of the safeguards that the international cases indicate are required to protect tenants at risk of homelessness are provided in the [law](#).

Conclusion

The QHPPC has [recommended](#), as a starting point, that the Quebec government show that it is serious about housing. Adopting legislation immediately would provide a legal foundation for a rights-based approach and send a strong signal of Quebec's commitment to housing rights. Such legislation would ensure accountability, including through an independent housing advocate and provide transparent and reliable information to set the government on track toward progressively realizing the right to adequate housing for all and strengthen efforts to prevent homelessness.

For more information, see the QHPPC policy paper, [Law Reform Opportunities in Quebec for Women Experiencing Intimate Partner Violence](#).

ⁱ *Tanudjaja.v.Canada (Attorney General)*, 2014. ONCA.852, leave to appeal refused SCC, 2015-06-25, 36283.

ⁱⁱ Sandra Liebenberg, “Between Sovereignty and Accountability: The Emerging Jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights Under the Optional Protocol” (2020) *Human Rights Quarterly* 42(1), 48-84 [Liebenberg].

ⁱⁱⁱ See also the 2019 [Guidelines](#) by Leilani Farha, a Canadian. and former Special Rapporteur on the Right to Housing (at 5).

^{iv} See also Liebenberg, at 83.

^v The flexibility of progressive realization can mean that governments invoke a lack of resources as an excuse for failing to respect their obligations under the Covenant. The concept of “minimum core obligations” aims to impose minimum substantive guarantees. [Allison Corkery and Ignacio Saiz argue](#) that “allocations must ensure that minimum core obligations are met, must account for the needs of vulnerable groups” and must combat discrimination. Minimum core obligations represent an effort to avoid this scenario, as described by the Committee in [General Comment no. 3](#):

... a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of ... basic shelter and housing... is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d’être” (at para 10).

^{vi} See also Liebenberg, at 29.

^{vii} Recalling that discrimination requires immediate and not progressive state action.

^{viii} See also the Committee’s [General Comment 3](#), at para 11.

^{ix} See also *Fátima El Ayoubi and Mohamed El Azouan Azouz v Spain*, ESCR, Communication No. 54/2018, UN Doc. E/C.12/69/D/54/2018 (19 February 2021), at para 17(d).

^x Québec Ministry of Health and Social Services, « [L’itinérance au Québec : deuxième portrait](#) » (2022) ; See also Eric Latimer, « Nombre de personnes en service d’hébergement d’urgence à Montréal, Québec et Gatineau le 27 avril 2021 et comparaison avec le 24 avril 2018 » (2021) Report submitted to the Ministry of Health and Social Services at 11.