



# Coming in from the Cold: Canada's National Housing Strategy, Homelessness, and the Right to Housing in a Transnational Perspective

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## Abstract

Canada's National Housing Strategy (NHS) commits the government to eliminating chronic homelessness and promises that realizing the right to housing is a key objective. In this article, we explore how the Canadian government could realize the right to housing in the context of eliminating chronic homelessness. We argue that it is helpful to look at how other jurisdictions have successfully reduced homelessness. In this article we examine Finland and Scotland's approaches because they offer certain similarities in how homelessness is addressed, yet they also differ, most crucially in how they understand the right to housing. We argue that both of these jurisdictions offer important lessons for Canada to draw on as it seeks to reduce long-term homelessness.

**Keywords:** Human rights, Finland, Scotland

## Résumé

La Stratégie nationale sur le logement (SNL) du Canada engage le gouvernement à éliminer l'itinérance chronique et soutient que la réalisation du droit au logement en constitue un objectif clé. Dans cet article, nous explorons comment le gouvernement canadien pourrait, à travers le contexte de l'élimination de l'itinérance chronique, parvenir à instituer un droit au logement. Nous soutenons qu'il est utile de procéder à un examen des moyens empruntés par d'autres juridictions qui ont réussi à réduire l'itinérance. Dans cet article, nous examinons l'approche de la Finlande et celle de l'Écosse parce qu'elles offrent certaines similitudes dans la manière de traiter l'itinérance, mais aussi parce qu'elles diffèrent sur certains points, surtout dans la façon dont elles appréhendent le droit au logement. Nous

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soutenons que ces deux juridictions offrent d'importantes leçons dont le Canada peut s'inspirer dans ses propres efforts pour réduire l'itinérance à long terme.

**Mots clés:** Logement, itinérance, droits de la personne, Finlande, Écosse

## Introduction

In September 2016, the Canadian Federal government unveiled its National Housing Strategy (NHS) via a policy paper: *Canada's National Housing Strategy: A Place to Call Home*.<sup>1</sup> The NHS promised to be an ambitious intervention in Canadian housing policy; it emphasized “safe, affordable housing”<sup>2</sup> and spoke of the “right to housing.”<sup>3</sup> Perhaps its most ambitious goal relates to homelessness: the NHS promises to eliminate chronic homelessness.<sup>4</sup> However, it was only in 2019 that the federal government passed the *National Housing Strategy Act*, which commits the government to “further[ing] the progressive realization of the right to adequate housing as recognized in the International Convention on Economic Social and Cultural Rights” (ICESCR)<sup>5</sup> and creates several advisory bodies around the realization of the NHS.<sup>6</sup>

As cheering as it is for there to be an explicit, statutory commitment to realizing the right to housing, Canada has arguably been committed to realizing the right to housing since it signed the ICESCR in 1976. So, too, has Canada's federal anti-homelessness policy adopted an approach, known as Housing First (HF), which is generally thought to respect the right to housing and to be a human-rights-based approach to reducing homelessness.<sup>7</sup> Housing First seeks to provide “stable housing as a priority for those experiencing...homelessness.”<sup>8</sup> Housing First differs from “traditional” approaches to homelessness by housing people first and *then* offering the necessary supports to address issues such as addiction and mental health.<sup>9</sup> Given that the federal Homelessness Partnering Strategy has been following HF since 2014,<sup>10</sup> it is questionable whether the NHS represents a new approach to reducing homelessness or just a new target for reducing long-term homelessness.

<sup>1</sup> Government of Canada, *Canada's National Housing Strategy: A Place to Call Home* (30 January 2018), <https://eppdscrmssa01.blob.core.windows.net/cmhcprodcontainer/sf/project/placetocallhome/pdfs/canada-national-housing-strategy.pdf> (accessed 9 December 2020).

<sup>2</sup> *Ibid.*, 3.

<sup>3</sup> *Ibid.*, 8.

<sup>4</sup> Initially the NHS promised to reduce chronic homelessness by half, but this has since been revised to the complete elimination of chronic homelessness, COW – National Housing Strategy, 10 June 2021, accessed 2 December 2021, <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/transparency/committees/cow-jun-10-2021/national-housing-strategy.html>. For earlier criticism of the NHS, see, e.g., Canadian Alliance to End Homelessness (CAEH), *Discussion Paper: Ending Homelessness and the Right to Housing* (18 April 2018), 4, accessed 9 December 2020, <https://caeh.ca/wp-content/uploads/CAEH-Ending-Homelessness-and-the-Right-to-Housing.pdf>.

<sup>5</sup> *National Housing Strategy Act*, SC 2019, c 29, s 4 (d) [NHS Act].

<sup>6</sup> *NHS Act* ss 6–16.

<sup>7</sup> Employment and Social Development Canada, *Evaluation of the Homelessness Partnering Strategy: Final Report* (11 May 2018), at iii, but see, e.g., Damian Collins and Madeleine Stout, “Does Housing First Policy Seek to Fulfil the Right to Housing? The Case of Alberta, Canada,” *Housing Studies* 36, no. 3 (2021): 336–58. This point is discussed further below.

<sup>8</sup> Employment and Social Development Canada, *Evaluation*, 1.

<sup>9</sup> See, e.g., Sam Tsemberis and Ronda F. Eisenberg, “Pathways to Housing: Supported Housing for Street-Dwelling Homeless Individuals with Psychiatric Disabilities,” *Psychiatric Services* 51, no. 4 (2000): 487–93; Nestor M. Davidson, “‘Housing First’ for the Chronically Homeless: Challenges of a New Service Model,” *Journal of Affordable Housing and Community Development Law* (2006): 125–36.

<sup>10</sup> Employment and Social Development Canada, *Evaluation*, iii.

However, while it is clear that homelessness is a “prima facie violation of the right to housing,”<sup>11</sup> simply housing the homeless is not necessarily respect for the right to housing, nor a human-rights-based approach to reducing homelessness.<sup>12</sup> Our goal in this article is to explore what an effective and human-rights-based approach to realizing the right to housing for homeless Canadians should look like. To do this, we set out the existing state of the right to housing in Canada, and we draw lessons from two jurisdictions—Finland and Scotland—which have reduced homelessness substantially.

Throughout the article, we argue that a full realization of the right to housing must consider the seven essential features of the right as set out by the United Nations Committee on Economic, Social and Cultural Rights’ General Comment No. 4: “legal security of tenure; (ii) availability of services and materials; (iii) affordability; (iv) habitability; (v) accessibility; (vi) location; and (vii) cultural adequacy”<sup>13</sup>—and that any realization of the right to housing should rely on an approach which recognizes the importance of community participation, state accountability, and homeless people’s dignity and autonomy.<sup>14</sup> Consequently, we also raise questions about whether HF does or could fully realize the right to housing, and whether, reductions in homelessness notwithstanding, Finland’s and Scotland’s approaches fully realized the right to housing.

Our reason for choosing these two jurisdictions is that they offer two different approaches to realizing the right to housing for homeless people, and, we argue, a blend of their approaches would likely have success in Canada should they be followed by state actors under the NHS. Finland has a constitutionally enshrined right to housing,<sup>15</sup> but it was not until it adopted a nationwide policy, known as *Paavo I* and *II*, modelled on an HF approach, that it saw a reduction in levels of long-term homelessness. Thus, Finland offers an example of the progressive realization of the right to housing: Finns cannot enforce their right to housing through the courts. In contrast, the right to housing *is* ultimately enforceable through the courts in Scotland; that is, Scotland has a legal right to housing, rather than Finland’s programmatic right.<sup>16</sup> In fact, the United Kingdom as a whole has long recognized a legal duty on the part of local authorities to house certain classes of the unintentionally homeless.<sup>17</sup> British scholars have noted the overlap between HF approaches and this statutory duty, and have hypothesized that such similarities can explain the relatively small inroads HF has made in the United Kingdom.<sup>18</sup>

<sup>11</sup> Leilani Farha and Kaitlin Schwan, *A National Protocol for Homeless Encampments in Canada: A Human Rights Approach* (UN Special Rapporteur on the Right to Housing, 30 April 2020), para 11.

<sup>12</sup> Collins and Stout, “Does Housing.”

<sup>13</sup> Quoted in Jessie Hohmann, *The Right to Housing: Law, Concepts, Possibilities* (Oxford: Hart Publishing, 2014), 21–29.

<sup>14</sup> This approach is adapted from Farha and Schwan, paras 37–69.

<sup>15</sup> Constitution of Finland, section 19.

<sup>16</sup> Suzanne Fitzpatrick, Sarah Johnsen, and Beth Watts, *International Homelessness Policy Review: A Report to Inform the Review of Homelessness Legislation in Wales* (Cardiff: Welsh Government, 2012), 3.

<sup>17</sup> See *Housing (Homeless Persons) Act 1977*, s 2; Suzanne Fitzpatrick and Hal Pawson, “Fifty Years since Cathy Come Home: Critical Reflections on the UK Homelessness Safety Net,” *International Journal of Housing Policy* 16, no. 4 (2016): 543–555.

<sup>18</sup> Fitzpatrick, Johnsen, and Watts, *International Homelessness Policy Review*, 4–5.

What Scotland now does differently is that, from 2012, it abolished the “priority classes” among the unintentionally homeless.<sup>19</sup> There are particular advantages to the legal right to housing as it exists in Scotland, and, given previous experiences with the right to housing in Canada, we argue that a mix of HF and a legally enforceable right to housing is needed under the NHS. Accordingly, we contend that the right to housing in Canada should be thought of as something to be progressively realized, as required by statute and international law *and*, in certain contexts, should be seen as an individual, legal right, enforceable through the courts. As such, we suggest that the federal government’s decision to make the right to housing non-justiciable is short-sighted and will fall short of achieving its ambitious goal of eliminating chronic homelessness under the NHS. In addition, both Finland and Scotland also illustrate the necessity of social housing and other forms of welfare to reducing homelessness and so point towards the sort of infrastructure and legal framework that Canada should develop.

We begin by setting out the ongoing debate over the right to housing, notably the question over whether it is a legal or programmatic right. The second and third parts examine the current state of the right to housing in Canada. In part II, the focus is on attempts to win judicial recognition of the right, while in part III, the focus is on HF in Canada and whether it realizes the right to housing, and whether it is, in its current form, a human-rights-based approach, as it purports to be. Taken together, these parts illustrate shortcomings with both the legal and progressive realization of the right to housing in Canada. In parts IV and V, we set out Finland’s and Scotland’s experiences. Where relevant, we refer to the broader constitutional context and the housing situation in each jurisdiction. As will be seen, there are surprising similarities between the Canadian housing sector and the Finnish approach, and divergences between the Canadian and the Scottish experience. In part VI, we conclude by setting out the lessons Canada could learn from the Finnish and Scottish experiences and how they might be adapted for the Canadian context, but we also note the barriers to Canada successfully reducing homelessness. In particular we note the challenges posed by Canadian federalism and the need to ensure that all levels of government are involved in and committed to reducing homelessness.

## I. Understanding the right to housing

In 2013, Hohmann noted that the right to housing’s status as a human right “is often greeted with scepticism.”<sup>20</sup> In part this is because, like many of the economic, social, and cultural rights (ESCRs), the right to housing is often classed as a programmatic rather than a legal right.<sup>21</sup> Programmatic rights, rather than being protected via the courts, are to be progressively realized, typically through the

<sup>19</sup> Intentionally homeless is defined by the *Housing Act (UK) 1996*, s 191; see also Fiona King, “Scotland: Delivering a Right to Housing,” *Journal of Law and Social Policy* 24 (2015): 155–57.

<sup>20</sup> Hohmann, *Right to Housing*, 1.

<sup>21</sup> Hohmann, *Right to Housing*, 2; Suzanne Fitzpatrick and Beth Watts, “‘The Right to Housing’ for Homeless People,” in *Homelessness Research in Europe*, ed. Eoin O’Sullivan *et al.* (Brussels: FEANTSA, 2010), 113.

formulation of public policy frameworks.<sup>22</sup> As Porter notes, progressive realization obliges governments

to facilitate the design of strategies and programs to realize rights with identified timeframes and with measurable goals and targets to recognize the central role that must be played by rights claimants and to strengthen government accountability through compliance procedures, monitoring and evaluation.<sup>23</sup>

Accordingly, ESCRs run into the positivist claim that there is no right without a remedy,<sup>24</sup> and so ESCRs do not seem to be “rights” in a concrete legal sense.<sup>25</sup> That has not prevented litigants from attempting to rely on the right to housing in court but, as the next section sets out, litigation has not done much to realize the right to housing in Canada. In this section we offer a brief overview of how the right to housing is understood.

Whether or not the right to housing is properly classed as a programmatic right is open to question. Hohmann seems critical of understanding the right to housing as a programmatic right, noting that the end result has been an interpretation which is “unduly procedural”<sup>26</sup> and does little to help those most in need.<sup>27</sup> Here, Hohmann is criticizing the case law arising in those jurisdictions with a constitutional right to housing. Yet, given the “broad and abstract” nature of the right to housing and other ESCRs, judicial enforcement would be “a major transfer of policy-making power from the political to the legal sphere,”<sup>28</sup> sometimes known pejoratively as “legislating from the bench.” Hence ESCRs are seen as guidelines for governments for what they ought to do rather than an enforceable standard.<sup>29</sup> The cultural shift that progressive realization requires, particularly for common-law jurisdictions like Canada, is significant. That does not mean programmatic rights never find legal expression—section 19 of Finland’s constitution, with its reference to realizing the right to housing, illustrates how programmatic rights can be legally expressed—though merely giving programmatic rights legal expression does not guarantee their realization.

In addition to concerns around judicial interference in policy decisions, the choice between legal and programmatic rights matters from the perspective of rights-holders. Granting a homeless person a legally enforceable right to accommodation can be empowering because it removes the discretion that “those who administer welfare goods or services” have.<sup>30</sup> As such, homeless people go from

<sup>22</sup> Fitzpatrick and Watts, “Right to Housing,” 113.

<sup>23</sup> Bruce Porter, “International Human Rights in Anti-Poverty and Housing Strategies: Making the Connection,” in *Advancing Social Rights in Canada*, ed. Martha Jackman and Bruce Porter (Toronto: Irwin Law, 2014), 34.

<sup>24</sup> Fitzpatrick and Watts, “Right to Housing,” 114.

<sup>25</sup> For a detailed discussion of the topic, see Hohmann, *The Right to Housing*.

<sup>26</sup> Hohmann, *Right to Housing*, 137.

<sup>27</sup> *Ibid.*, 134–37.

<sup>28</sup> Fitzpatrick and Watts, “Right to Housing,” 111; see, also, Alana Klein, “Judging as Nudging: New Governance Approaches for the Enforcement of Constitutional Social and Economic Rights,” *Columbia Human Rights Law Review* 39 (2008): 351–422.

<sup>29</sup> Suzanne Fitzpatrick, Bo Bengtsson, and Beth Watts, “Rights to Housing: Reviewing the Terrain and Exploring a Way Forward,” *Housing, Theory and Society* 31, no. 4 (2014): 453.

<sup>30</sup> *Ibid.*, 455.

clients to citizens.<sup>31</sup> The risk, however, is that such legal rights might “foster an adversarial rather than problem-solving atmosphere in public services,”<sup>32</sup> to say nothing of how those who are homeless may not be best placed to enforce their rights through the courts, given the time and expense of so doing.

In sum, the right to housing promises much but seems to deliver little. In particular, it seems to deliver little practical benefit to those most in need. Where it is recognized as a programmatic right, there is little scope to realize the right to housing absent political will and significant resources. Yet, if and when it is litigated, it has the potential to become “unduly procedural” and to foster an adversarial approach to housing, neither of which do much to realize the right.

## II. The Canadian Experience with Litigating the Right to Housing

Since Canada signed the ICESCR in 1976, it has faced criticisms that it has been neglecting its socioeconomic duties under international law. As recently as 2017, the United Nations Special Rapporteur for Housing, Leilani Farha, reiterated Canada’s failings in her report to the United Nations General Assembly.<sup>33</sup> Absent the political will to undertake measures to realize the right to housing, Canadians were and are left without recourse for violations of this right. Not surprisingly, homeless Canadians and their allies have turned to the courts in an attempt to secure the right to housing.

While the *Canadian Charter of Rights and Freedoms* guarantees a number of rights, the right to housing is not among them. Consequently, those who have attempted to argue for a right to housing have tried to link it to existing *Charter* rights. Housing rights activists have turned to rights such as the right to life, protected under section 7 of the *Charter*, and the right to equality, protected under section 15 of the *Charter*,<sup>34</sup> in their attempts to win judicial recognition of the right to housing. The end result has been recognition of a right to shelter—albeit in limited circumstances—which falls far short of the right to housing. In terms of case law, there are three major cases that deal with the issue of homelessness and access to shelter and/or housing as a *Charter* right: *Victoria (City) v Adams* [Adams],<sup>35</sup> *Abbotsford (City) v Shantz* [Shantz],<sup>36</sup> and *Tanudjaja v Canada (AG)* [Tanudjaja].<sup>37</sup> As all of these examples have received substantial academic attention.<sup>38</sup> Our focus is on the arguments around the right to housing or shelter in these cases.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> Leilani Farha, *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* (United Nations Human Rights Council, 2018).

<sup>34</sup> *Canadian Charter of Rights and Freedoms*, ss 7, 15, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

<sup>35</sup> *Victoria (City) v Adams*, 2008 BCSC 1363, varied by 2009 BCCA 563 [Adams].

<sup>36</sup> *Abbotsford (City) v Shantz*, 2015 BCSC 1909 [Shantz].

<sup>37</sup> *Tanudjaja v Canada (AG)*, 2014 ONCA 852, 123 OR (3d) 161, aff’g *Tanudjaja v Canada (AG)* 2013 ONSC 5410.

<sup>38</sup> See, e.g., Margot Young, “Temerity and Timidity: Lessons from *Tanudjaja v Attorney General (Canada)*” *Cahiers de Droit* 61 (2020): 469–93; Scott McAlpine, “More than Wishful Thinking: Recent Developments in Recognizing the Right to Housing under s 7 of the *Charter*,” *Windsor Review of Legal and Social Issues* 38 (2017): 1.

*Adams* emerged out of an attempt by Victoria to get an injunction against a tent city in a local park. The defendants sought to rely on the *Charter* as a defence and subsequently filed a counterclaim arguing that a city bylaw prohibiting temporary shelters in public parks was unconstitutional.<sup>39</sup> The defendants argued that the bylaw violated their s. 7 rights and submitted that “the *Charter* must be interpreted and applied in a manner consistent with Canada’s international obligations, which include those obligations that recognize adequate housing or shelter as a fundamental human right.”<sup>40</sup> At trial, Ross J found that “international instruments... should inform the interpretation of the *Charter*,”<sup>41</sup> but she did not explicitly refer to them in her analysis of the issues in *Adams*. While Ross J agreed that the bylaw violated s. 7 and the Court of Appeal upheld this decision, the violation was narrow. This limitation is illustrated by the Court of Appeal rendering the bylaw inoperative “insofar and only insofar as...[it] prevent[s] homeless people from erecting temporary overnight shelter in parks when the number of homeless people exceeds the number of available shelter beds.”<sup>42</sup>

As for the argument around a right to shelter, this left the defendants open to the charge that they were seeking a positive benefit. Such positive benefits would run counter to *Gosselin v Quebec (AG)*, where a majority of the Supreme Court of Canada refused to find that s. 7 created positive rights.<sup>43</sup> *Gosselin* did not preclude the potential for s. 7 to create positive benefits,<sup>44</sup> but to date no case has interpreted s. 7 as so doing. In *Adams*, Ross J found that the defendants were not seeking positive benefits,<sup>45</sup> and the Court of Appeal agreed.<sup>46</sup> As such the right to shelter in *Adams* was conceived of as a right imposing negative obligations on the City.<sup>47</sup>

*Shantz* had a similar fact pattern to *Adams* as it challenged city bylaws requiring permits to camp on city grounds overnight. The homeless litigants in *Shantz* advanced a number of *Charter* arguments, including s. 7 and s. 15 claims, as well as claims based on violations of ss. 2(c) and 2(d), freedom of peaceful assembly and freedom of association, respectively.<sup>48</sup> The homeless litigants also argued that “international instruments... were relevant to the s. 7 analysis,” but the judge found them of no assistance and the decision in *Shantz* did not rely on them.<sup>49</sup>

Not surprisingly given the precedents of *Adams* and *Gosselin*, the homeless litigants noted that there was “no obligation to provide housing or services to the City’s homeless.”<sup>50</sup> However, like *Adams*, *Shantz* held that municipal bylaws that sought to limit or prevent overnight “camping” in urban parks without permits

<sup>39</sup> *Adams*, BCSC, paras 6–30.

<sup>40</sup> *Ibid.*, para 80.

<sup>41</sup> *Ibid.*, para 100.

<sup>42</sup> *Adams*, BCCA, para 166.

<sup>43</sup> *Gosselin v Quebec (AG)*, 2002 SCC 84, [2002] 4 SCR 429.

<sup>44</sup> *Ibid.*, para 82.

<sup>45</sup> *Adams*, BCSC, para 119.

<sup>46</sup> *Adams*, BCCA, para 97.

<sup>47</sup> For how it has been interpreted see *Johnston v Victoria (City)* 2011 BCCA 400, paras 3–4, 16.

<sup>48</sup> *Shantz*, para 4. *Shantz* was a joined action, with the City as plaintiffs in the first and defendants in the second, *ibid.*, paras 1–2.

<sup>49</sup> *Ibid.*, paras 173–75.

<sup>50</sup> *Ibid.*, para 148.

were unconstitutional because they violated s. 7 of the *Charter*.<sup>51</sup> The end result of both *Adams* and *Shantz* is that a homeless person has the right, where there are insufficient shelter spaces or other alternatives, to build their own *temporary* shelter. In short, a narrow, individual right which imposes a negative obligation on governments and one which falls far short of the right to housing.

*Tanudjaja* was perhaps the most ambitious attempt to recognize the rights of homeless and precariously housed Canadians to date. However, it never advanced to a full hearing and the reported decisions centre on the ultimately successful motion to dismiss the application on the basis there was “no reasonable cause of action.”<sup>52</sup> The application at issue in *Tanudjaja*, was a complex *Charter* challenge brought against the governments of Canada and Ontario on the grounds that changes to the funding of social housing and social assistance programs in Ontario were indirectly contributing to the infringement of the applicants’ section 7 and section 15 *Charter* rights.<sup>53</sup> As Ms. Tanudjaja’s lawyers put it: “in taking the active decisions to implement these laws and policies that produce and perpetuate homelessness and inadequate housing, the federal and provincial governments have violated the constitutional rights of the most marginalized members of our communities.”<sup>54</sup> In contrast, the governmental respondents in *Tanudjaja* alleged that the applicants sought “a positive obligation to provide for affordable, adequate and accessible housing.”<sup>55</sup>

*Tanudjaja* was novel in several ways, but that did not mean it deserved to be dismissed at so early a stage.<sup>56</sup> Indeed, while a majority of the Court of Appeal upheld the dismissal, Feldman JA issued a strong dissent.<sup>57</sup> Feldman JA noted that the motion judge “erred by concluding it is settled law that the government can have no positive obligation under s. 7 to address homelessness.”<sup>58</sup> However, the majority on appeal held that the dismissal was correct because *Tanudjaja* “did not raise justiciable issues” and, further, there was no need to examine whether positive obligations could be imposed under s. 7.<sup>59</sup>

*Tanudjaja* illustrates the difficulty of litigating a programmatic approach to the right to housing. *Tanudjaja* also shows how federalism matters for housing rights, as the case involved the provincial government and the federal government, which have overlapping policies with respect to housing and welfare.<sup>60</sup> Although *Tanudjaja* did not succeed, or even proceed to a full hearing, its requested remedies are echoed by the NHS and the *NHS Act*. *Tanudjaja* requested “an order that Canada and Ontario must implement effective national and provincial strategies to reduce and eliminate homelessness,” which should be subject to a “supervisory

<sup>51</sup> *Ibid.*, paras 188–224, 285.

<sup>52</sup> *Tanudjaja*, ONCA, para 16.

<sup>53</sup> *Tanudjaja*, ONCA, paras 9–15.

<sup>54</sup> Tracy Heffernan, Fay Faraday, and Peter Rosenthal, “Fighting for the Right to Housing in Canada,” *Journal of Law and Social Policy* 24 (2015): 11.

<sup>55</sup> *Tanudjaja*, ONSC, para 3; Young, “Temerity,” 480.

<sup>56</sup> See Young, “Temerity,” 487–89.

<sup>57</sup> *Tanudjaja*, ONCA, paras 40–89.

<sup>58</sup> *Ibid.*, para 62.

<sup>59</sup> *Ibid.*, para 37.

<sup>60</sup> *Ibid.*, paras 11–12.



jurisdiction” of Ontario’s Superior Court of Justice.<sup>61</sup> The *NHS Act*, in creating a National Housing Council with a quasi-judicial power to review housing rights violations referred to it by the Federal Housing Advocate, commits these new bodies to oversee the implementation of the NHS.<sup>62</sup> Such oversight reflects the request in *Tanudjaja*, but neither the Council nor the Advocate have much power in and of themselves to realize the right to housing. To some extent, both echo the supervisory bodies and rapporteurs at an international level. What matters more is how the Council’s and the Advocate’s recommendations and reports will be implemented; indeed, the second aspect of the order sought in *Tanudjaja* was that any strategies for reducing homelessness should be *effective*. With that desire for a response which actually reduces homelessness in mind, we turn to how HF has worked in Canada, as this policy is often praised for its effectiveness, though questions remain about whether it does realize the right to housing.

### III. The Canadian Experience with Progressive Realization: Housing First and the Right to Housing

Housing First is typically traced to the Pathways to Housing program which emerged in New York in the early 1990s, but Suttor argues that a Canadian model of HF first emerged in 1980s Toronto.<sup>63</sup> The Canadian model was developed as a response to growing homelessness and lack of rental stock in Toronto. Although the model resulted from collaboration between municipal, provincial, and federal actors responsible for housing policy, its origins were largely driven by grassroots organizing by social housing activists and “community agencies.”<sup>64</sup> Suttor notes that the language of housing as a human right was commonplace among these civil society groups.<sup>65</sup> Indeed, the narrative that HF respects the right to housing is often accepted at face value rather than critically examined.<sup>66</sup> Regardless of origins, our interest in this section is in whether current HF models are a human-rights-based approach to realizing the right to housing and whether HF is effective in Canada.

The name “Housing First” captures the spirit of its response to homelessness. Instead of housing coming last after a person advances through various treatments, under HF, housing comes first, with treatments following if and how the person chooses.<sup>67</sup> Using the Pathways program as an example, the HF approach seems successful. Over a five-year period, Pathways saw 88% of its tenants remain housed compared with 47% of tenants housed under New York City’s prevention

<sup>61</sup> *Ibid.*, para 15.

<sup>62</sup> *NHS Act*, ss 6–16.

<sup>63</sup> Nicholas Pleace and Joanne Bretherton, “The Case for Housing First in the European Union: A Critical Evaluation of Concerns about Effectiveness,” *European Journal of Homelessness* 7, no. 2 (2013): 22; but see Jeannette Waegemakers Schiff and John Rook, *Housing First: Where is the Evidence?* (Toronto: Homeless Hub, 2012), 5–7, <https://www.homelesshub.ca/resource/housing-first-where-evidence>; Greg Suttor, *Still Renovating: A History of Canadian Social Housing Policy* (Montreal: McGill-Queen’s University Press, 2016), 118.

<sup>64</sup> Suttor, *Still Renovating*, 118.

<sup>65</sup> *Ibid.*, 117.

<sup>66</sup> Tsemberis and Eisenberg, “Pathways to housing,” 488; Collins and Stout, “Does Housing,” 337.

<sup>67</sup> Davidson, “Housing First,” 125.

program.<sup>68</sup> Following this success, HF has been adopted across the world with similarly positive results.<sup>69</sup>

There is, however, one caveat to HF's success in reducing homelessness. O'Donnell's recent study based on long-term survey data from Australia indicated that social housing has an important role to play in reducing and preventing homelessness.<sup>70</sup> Housing First, by its nature, relies on the private rented sector (PRS). The rationale for this is often "that the 'community norms and social pressures' found within mixed neighbourhoods help to sustain normative behaviours, promote recovery, and encourage social and economic inclusion."<sup>71</sup> The reliance on the PRS also fits with HF's emphasis on "consumer preference."<sup>72</sup> Clients choose their own apartment, whether to have roommates, and whether or not to engage with additional services.<sup>73</sup> Yet choice alone is not sufficient to respect the right to housing nor to make HF a human-rights-based approach. Affordability, security of tenure, and location are key features of the right to housing and these can be lacking in HF programs given their reliance on the PRS. Furthermore, HF's ambivalence towards social housing continues to stigmatize social housing<sup>74</sup> instead of normalizing it. In effect, some aspects of HF replicate rather than challenge dominant assumptions about desirable housing.

Replicating HF has not always been straightforward. Pathways has since provided a "fidelity checklist" but Pleace and Bretherton doubt the checklist's efficacy for a program that is now used internationally.<sup>75</sup> Instead, Pleace and Bretherton offer a list of core features which are central to an HF approach. These features include a separation of housing and services—so that housing is a right which is not conditional on completing treatment of any kind. Flowing from the non-mandatory nature of services offered, the HF approach supports choice and involves users in their own support. Where support is accepted, it will be intensive, open-ended, and focused on harm reduction.<sup>76</sup> The housing provided can be either "scattered-site" where individuals are placed "in ordinary housing in ordinary neighbourhoods" or it can be "single-site" in "apartment blocks" and so on.<sup>77</sup> Pleace and Bretherton are clear that those services which offer low-intensity

<sup>68</sup> Tsemberis and Eisenberg, "Pathways to housing," 491.

<sup>69</sup> For an overview, see Angela Ly and Eric Latimer, "Housing First Impact on Costs and Associated Cost Offsets: A Review of the Literature," *Canadian Journal of Psychiatry* 60, no. 11 (2015): 475–87.

<sup>70</sup> James O'Donnell, "Does Social Housing Reduce Homelessness? A Multistate Analysis of Housing and Homelessness Pathways," *Housing Studies* (2019), <https://doi.org/10.1080/02673037.2018.1549318>.

<sup>71</sup> Jalene T. Anderson-Baron and Damian Collins, "'Take Whatever You Can Get': Practicing Housing First in Alberta," *Housing Studies* 34, no. 8 (2019): 1290–91 [citations omitted].

<sup>72</sup> Tsemberis and Eisenberg, "Pathways to housing," 489.

<sup>73</sup> *Ibid.*, 488–89.

<sup>74</sup> For the stigmatization see, e.g., Sean Purdy, "'Ripped off' by the System: Housing Policy, Poverty, and Territorial Stigmatization in Regent Park Housing Project, 1951–91," *Labour/Le Travail*, 52 (2003): 45.

<sup>75</sup> Pleace and Bretherton, "Case for Housing," 25. The checklist can be found here: [http://housingfirsttoolkit.ca/wp-content/uploads/Pathways\\_Housing\\_First\\_Fidelity\\_Scale\\_ACT\\_2013.pdf](http://housingfirsttoolkit.ca/wp-content/uploads/Pathways_Housing_First_Fidelity_Scale_ACT_2013.pdf).

<sup>76</sup> Pleace and Bretherton, "Case for Housing," 26–27.

<sup>77</sup> *Ibid.*, 27–28.

support are *not* HF.<sup>78</sup> These core principles echo the six core principles identified by Canada's Homelessness Partnering Strategy in its 2018 report.<sup>79</sup> Strikingly, this report also noted that many HF programs were not fully following these principles.<sup>80</sup>

In sum, HF adopts and inverts the individualistic approach to homelessness. We say adopts because HF emphasizes respecting both an individual's free choice and their perspective on which services they need; and we say inverts because HF does not see homelessness as an individual problem. In our view, HF recognizes that the *causes* of homelessness are systemic rather than individual but seeks to respect homeless people as individuals who are capable of making choices for themselves.<sup>81</sup> As such HF can be said to respect the inherent dignity and autonomy of each person.

Here is not the place to offer a full overview of every HF program in Canada. Instead, we seek to draw on two examples which illustrate both the potential for HF's success and its shortcomings in Canada. These two examples are Toronto's "Streets to Homes" (S2H) and Lethbridge's "Bringing Lethbridge Home" (BLH). Both pre-date the Homelessness Partnering Strategy's nationwide adoption of HF in 2014, but given that one is located in Canada's most populous city while the other is in a smaller, more homogeneous city, they illustrate HF's ability to work in a range of circumstances.

Streets to Homes began in 2005 in response to increasing homelessness in Toronto.<sup>82</sup> Its approach emphasizes housing the chronically homeless as a means of providing the support and resources to deal with addiction, mental illness, unemployment, and other drivers of homelessness. Streets to Homes relies on "multi-disciplinary outreach teams" and provides "rent subsidies...[for] housing in the private rental market, with cooperation from landlords."<sup>83</sup>

Though S2H has produced good outcomes for many, it remains vulnerable to criticism and has been viewed with skepticism by some in the homeless community. This is partly because it has not solved the homelessness problem, given its focus on the chronically homeless instead of the much larger transient, precarious, or inadequately housed population. As Doberstein observes: "S2H has successfully housed thousands of individuals since it was first piloted," yet "occupancy of emergency shelters has grown to four thousand on any given night, and...many are using shelters as their long-term housing, suggesting that S2H leaves many unattended."<sup>84</sup>

<sup>78</sup> Ibid., 29.

<sup>79</sup> Employment and Social Development Canada, *Evaluation*, 4–5.

<sup>80</sup> Ibid., 18.

<sup>81</sup> For criticism see Marjorie Johnstone, Eunjung Lee, and Jo Connelly, "Understanding the meta-discourse driving homelessness policies and programs in Toronto, Canada: The neoliberal management of social service delivery," *International Social Work* 60, no. 6 (2017): 1443–56.

<sup>82</sup> Nick Falvo, *Homelessness, Program Responses and an Assessment of Toronto's Streets to Homes Program* (CPRN Research Report, February 2009), 19, [http://cprn3.library.carleton.ca/documents/50981\\_EN.pdf](http://cprn3.library.carleton.ca/documents/50981_EN.pdf) (accessed July 13, 2021).

<sup>83</sup> Carey Doberstein, *Building a Collaborative Advantage: Network Governance and Homelessness Policy-Making in Canada* (Vancouver: UBC Press, 2016), 109.

<sup>84</sup> Ibid., 114.

Insofar as it seeks to engage homeless people as partners, S2H can be thought of as a human-rights-based approach. Yet, like all HF programs, its reliance on the PRS undermines key features of the right to housing. Affordability and availability are long-standing issues in Toronto's PRS,<sup>85</sup> to say nothing of the lack of security of tenure that the PRS provides.

Issues of affordability and availability were also seen in Lethbridge and across Alberta once the province switched to an HF model for reducing homelessness.<sup>86</sup> The dependence of BLH on subsidized rental units in the PRS meant that it relied on the cooperation of landlords and building managers. This sometimes required special arrangements and even legal education for landlords, building managers, and tenants on rights and obligations vis-à-vis the tenants' use of the property and their lease. Notably, funding was provided to Lethbridge Legal Guidance to "provide specific support to Housing First clients and landlords to educate and assist with landlord-tenant issues."<sup>87</sup>

As with S2H, BLH was criticized for not comprehensively tackling issues faced by the homeless community. In particular, the racialized nature of the housing market proved too complicated for the scheme to resolve, with the program's Indigenous and First Nations participants bearing the brunt of the discrimination. As Gaetz and Scott note: "Racism is an ongoing issue for Aboriginal People in Lethbridge. Housing First staff specifically ask landlords if they 'rent to natives' in an attempt to avoid future problems for their clients."<sup>88</sup> Thus while BLH may have sought to emphasize the right to housing, it exposed the lack of equality in the PRS. Theoretically, such racial discrimination is prohibited under the *Alberta Human Rights Act*, but such discrimination may be hard to prove.<sup>89</sup>

The success of BLH is mixed. Gaetz and Scott note that "[t]he data from Lethbridge demonstrates that Housing First is an effective means of supporting people experiencing homelessness in securing and maintaining housing."<sup>90</sup> Yet, in Lethbridge, and across Alberta, there are "recurring challenges with housing affordability" which undercut both client choice—in that they may have to take whatever is available—and the importance of affordability to the right to housing.<sup>91</sup> In turn, affordability touches on security of tenure and location, both key components of the right to housing.

In sum, attempts to progressively realize the right to housing in Canada via HF programs are caught between the ideals of human rights that they aspire to and the

<sup>85</sup> See, e.g., Robert A. Murdie, "Housing Affordability and Toronto's Rental Market: Perspectives from the Housing Careers of Jamaican, Polish, and Somali Newcomers," *Housing Theory and Society* 20, no. 4 (2003): 183–96; Doberstein, *Building a Collaborative Advantage*, 108.

<sup>86</sup> Anderson-Baron and Collins, "Practicing Housing First," 1300.

<sup>87</sup> Stephen Gaetz and Fiona Scott, "Lethbridge Alberta City of Lethbridge: Housing First in Action," in *Housing First in Canada: Supporting Communities to End Homelessness*, ed. Stephen Gaetz, Fiona Scott, and Tanya Gulliver (Toronto: Canadian Homelessness Research Network Press, 2013) The Homeless Hub, <http://www.homelesshub.ca/housingfirstcanada> (cited to pages of pdf: [https://www.homelesshub.ca/sites/default/files/attachments/HousingFirstInCanada\\_0.pdf](https://www.homelesshub.ca/sites/default/files/attachments/HousingFirstInCanada_0.pdf)), 91.

<sup>88</sup> *Ibid.*, 86.

<sup>89</sup> Compare, Murdie, "Housing Affordability."

<sup>90</sup> Gaetz and Scott, "Lethbridge," 83.

<sup>91</sup> Anderson-Baron and Collins, "Practicing Housing First," 1300.

practicalities of the housing markets in which they operate. The emphasis on choice, in particular, is diminished given the lack of affordable housing. This is not the fault of HF, however, as HF programs seek micro-realizations of the right to housing and cannot challenge the macro-level constraints on housing and welfare. In short, HF can realize the right to housing on a case-by-case basis but cannot do so for everyone. What the shortcomings of HF illustrate is that, *by itself*, HF cannot fully realize the right to housing; it is reliant on a range of policies. The experiences of Finland and Scotland make this point clear and thus further highlight that Canada's NHS is at risk of becoming a missed opportunity to permanently reduce homelessness.

#### IV. Reducing Homelessness in Finland: Paavo I and II

Although Finland has a generous system of social security, its pattern of housing tenure is similar to Canada's. In 2014, approximately 65% of Finns were owner-occupiers<sup>92</sup> while, according to Statistics Canada, in 2016, the rate of owner-occupation in Canada was 67.8%.<sup>93</sup> There is significant regional variation in the Canadian context with owner-occupation ranging from 55.7% in Montreal to 77.8% in Oshawa, as well as variation depending on age group.<sup>94</sup> This pattern is also seen in Finland, with younger persons more likely to be tenants.<sup>95</sup>

Outside of owner-occupation, 4% of Finns live in cooperative housing, 17% in the PRS, and 14% in social housing.<sup>96</sup> In terms of its PRS, Finland liberalized its rental laws in the 1990s and removed strict rental controls.<sup>97</sup> Meanwhile, Canada's PRS varies from province to province, with some provinces being more liberal than others. As a general rule, there are relatively weak protections for tenants in most provinces.<sup>98</sup> As of 2018, about 32% of Canadian households are in the PRS.<sup>99</sup>

Roughly 70% of Finns are eligible for social housing. Here, Finland diverges from Canada, where only a much smaller proportion are eligible for social housing. In the 2016 census 575,830 people, or about 1.6% of the population, lived in social housing in Canada.<sup>100</sup> In 2018, the Canadian Housing Survey recorded that 1.9% of

<sup>92</sup> Rik de Boer and Rosamaria Bitetti, "A Revival of the Private Rental Sector of the Housing Market?: Lessons from Germany, Finland, the Czech Republic and the Netherlands," *OECD Economics Department Working Papers*, No. 1170, OECD Publishing, <http://doi.org/10.1787/5jxv9f32j0zp-en> (2014), para 17.

<sup>93</sup> "Housing in Canada: Key Results from the 2016 Census," Statistics Canada, <https://www150.statcan.gc.ca/n1/daily-quotidien/171025/dq171025c-eng.htm> (accessed 20 March 2020).

<sup>94</sup> Statistics Canada, "Housing in Canada," <https://www150.statcan.gc.ca/n1/daily-quotidien/171025/dq171025c-eng.htm>.

<sup>95</sup> Statistics Finland, "Household-Dwelling Units and Housing Conditions 2015," [https://www.stat.fi/til/asas/2015/01/asas\\_2015\\_01\\_2016-10-13\\_kat\\_002\\_en.html](https://www.stat.fi/til/asas/2015/01/asas_2015_01_2016-10-13_kat_002_en.html) (accessed 20 March 2020).

<sup>96</sup> De Boer and Bitetti, "Revival," para 17.

<sup>97</sup> *Ibid.*, para 18.

<sup>98</sup> See, e.g., the situation in Ontario: Heffernan, Faraday, and Rosenthal, "Fighting," 20.

<sup>99</sup> Shane Dingman, "Canada's rental housing growth outstrips home ownership," *The Globe and Mail*, 7 May 2018, <https://www.theglobeandmail.com/real-estate/the-market/article-demand-for-rental-housing-in-canada-now-outpacing-home-ownership/> (accessed 20 March 2020).

<sup>100</sup> Office of the Parliamentary Budget Officer, *Federal Program Spending on Housing Affordability* (Ottawa, 2019), 41, para 54; Statistics Canada, Population size and growth in Canada: Key Results from the 2016 Census, <https://www150.statcan.gc.ca/n1/daily-quotidien/170208/dq170208a-eng.htm> (accessed 15 January 2021).

households in Canada had at least one member on a waiting list for social and affordable housing.<sup>101</sup> As such, the numbers living in or eligible for social housing in Canada are much smaller than Finland.

In addition to greater eligibility for social housing, the Finnish constitution explicitly references the right to housing. Section 19 states “[t]he public authorities shall promote the right of everyone to housing and the opportunity to arrange their own housing.”<sup>102</sup> Scheinin described section 19 as “relatively unambitious,”<sup>103</sup> with others noting its “relatively faint” positive legal effects.<sup>104</sup> Writing a few years after Finland’s mid-1990s constitutional overhaul, Ilveskivi noted that “the right to housing is neither protected as an individual right by the Constitution nor by ordinary legislation.”<sup>105</sup>

While section 19 of the Finnish constitution is not legally enforceable, its importance was long noted. Ilveskivi observed that the right to housing has been “stressed as a prerequisite for the enjoyment of other fundamental rights such as the right to privacy.”<sup>106</sup> In addition, section 19 is related to other welfare rights which *are* legally enforceable through the courts. One example of this is section 7 of the Finnish constitution, which guarantees the right to life, and, given the severity of the Finnish climate, the right to life includes the right to emergency shelter.<sup>107</sup>

Despite its generous social security system and a constitutional reference to the right to housing,<sup>108</sup> Finland, in the early 2000s, saw increasing concerns about homelessness.<sup>109</sup> The concern centred on the long-term homeless, who made up almost half of the total homeless population.<sup>110</sup> Tainio and Fredriksson note that the elimination of homelessness has been a government objective in Finland since 1987.<sup>111</sup> They point out that this involved “enhanced” cooperation between “the housing, social welfare and health authorities.”<sup>112</sup> Nonetheless, the approach adopted in the 1980s and 1990s was the “staircase” model, which was less effective

<sup>101</sup> Jeannine Claveau, “The Canadian Housing Survey, 2018: Core Housing Need of Renter Households Living in Social and Affordable Housing,” *Income Research Paper Series*, Statistics Canada, <https://www150.statcan.gc.ca/n1/pub/75f0002m/75f0002m2020003-eng.htm> (accessed 15 January 2021); see, also, e.g., Heffernan, Faraday, and Rosenthal, “Fighting,” 19.

<sup>102</sup> Constitution of Finland, s 19.

<sup>103</sup> Martin Scheinin, “The Protection of the Right to Housing in Finland,” in *National Perspectives on Housing Rights*, ed. Scott Leckie (The Hague: Kluwer Law International/Martinus Nijhoff, 2003), 243.

<sup>104</sup> Peter Fredriksson and Juho Pätäri (eds.), *Right to Housing in Europe—Need for a Comprehensive Strategy* (2006), 36.

<sup>105</sup> Paula Ilveskivi, “Fundamental Social Rights in the Finnish Constitution, with Special Reference to their Enforcement by the Administration,” in *The Welfare State and Constitutionalism in the Nordic Countries*, ed. Martin Scheinin (Copenhagen: Nordic Council of Ministers, 2001), 228.

<sup>106</sup> Ilveskivi, “Fundamental Social Rights,” 228.

<sup>107</sup> Scheinin, “Protection,” 243–44.

<sup>108</sup> Constitution of Finland, s 19.

<sup>109</sup> Nicholas Pleace *et al.*, “The Strategic Response to Homelessness in Finland: Exploring Innovation and Coordination within a National Plan to Reduce and Prevent Homelessness,” in *Exploring Effective Systems Responses to Homelessness*, ed. Naomi Nichols and Carey Doberstein (Toronto: Homeless Hub Press), 426.

<sup>110</sup> *Ibid.*

<sup>111</sup> Hannele Tainio and Peter Fredriksson, “The Finnish Homelessness Strategy: From a ‘Staircase’ Model to a ‘Housing First’ Approach to Tackling Long-Term Homelessness,” *European Journal of Homelessness* 2 (2009): 184.

<sup>112</sup> *Ibid.*, 184.

at targeting specific sub-categories of homeless individuals.<sup>113</sup> At a housing rights conference in 2006, participants noted that the continued existence of homelessness indicated that “a clearer legal regulation is to be desired.”<sup>114</sup>

In response, Finland developed a two-stage national program known as *Paavo I* and *II*.<sup>115</sup> The first part of the program aimed at halving homelessness while the second aimed to eliminate it altogether, and both relied on an adapted HF approach. Crucially, *Paavo I* involved multiple national ministries and several local governments so that the resulting strategy would be “coherent [and] integrated.”<sup>116</sup> Those involved included “the Ministry of Social Affairs [and Health], the Housing Finance and Development Centre,” commonly known by its Finnish acronym ARA, and the “slot machine association.”<sup>117</sup> The high level of cooperation speaks to a significant political and national will to address the issue.

The Finnish solution differs from other HF programs in a few key ways. The first is its focus on long-term homelessness. In this respect, as Pleace *et al.* noted, *Paavo I* and *II* adapted HF to the Finnish situation.<sup>118</sup> Finland also opted to follow a “single-site” rather than “scattered-site” approach to housing those who had been homeless for a long time,<sup>119</sup> converting existing homeless shelters and temporary accommodation into self-contained apartments.<sup>120</sup>

The single-site approach in HF strategies is often criticized. Studies from Australia and Denmark suggest that single-site approaches are less successful than scattered-site approaches.<sup>121</sup> Single-site approaches also run counter to individual choice, on which HF is predicated. As such, single-site approaches seem to undermine the core features of the right to housing. Yet the single-site approach can address the social isolation and hostility of others that can be seen under a scattered-site approach, in particular the phenomenon of *nimbyism*.<sup>122</sup> The Finnish experience has been more positive than that of Australia or Denmark, though not a universal success.<sup>123</sup> Overall, the Finnish experience of HF has proven to be effective, and while, as yet, there has not been a complete eradication of homelessness, there was a significant reduction, particularly among the long-term homeless.<sup>124</sup> The number of people who were suffering from long-term homelessness decreased by 36% under *Paavo*.<sup>125</sup>

<sup>113</sup> Ibid., 185–88.

<sup>114</sup> Fredriksson and Pätärai, *Right to Housing*, 41.

<sup>115</sup> Pleace *et al.*, “Strategic Response,” 427.

<sup>116</sup> Ibid.

<sup>117</sup> Ibid.; Juha Kaakinen, “The Programme to Reduce Long-Term Homelessness 2008–2011: Final Report” (3 October 2012), [https://housingfirsteurope.eu/assets/files/2017/02/Final\\_report\\_PAAVO\\_I\\_2008-2011.pdf](https://housingfirsteurope.eu/assets/files/2017/02/Final_report_PAAVO_I_2008-2011.pdf), at 3. In Finland, the state operates any gambling games with proceeds going to social welfare, see <https://www.veikkaus.fi/fi/yritys?lang=en> (accessed 13 July 2021).

<sup>118</sup> Pleace *et al.*, “Strategic Response,” 430.

<sup>119</sup> Ibid., 431, 433.

<sup>120</sup> Ibid., 432.

<sup>121</sup> Ibid., 433.

<sup>122</sup> Michael Gerrard, “The Victims of NIMBY,” *Fordham Urban Law Journal* 21 (1994): 496.

<sup>123</sup> Pleace *et al.*, “Strategic Response,” 433.

<sup>124</sup> Ibid., 435–36.

<sup>125</sup> Ibid., 432.

Based on a report on *Paavo I*, there are links between the success of HF and the rental market more generally. For example, Tampere was the most successful city in reaching its targets for reducing homelessness. Tampere's success is attributed to the continued production of rental housing, funded by ARA, in the city.<sup>126</sup> Conversely, Helsinki, while exceeding its targets vis-à-vis reducing long-term homelessness, saw increases in temporary and recurrent homelessness. These increases were due to migration to Helsinki, the declining economic situation, and "the lack of an affordable rental dwelling."<sup>127</sup> As such, the principles underlying HF cry out for integration into a broader strategy for housing in general in order to address the limitations seen above.

*Paavo I* also saw some cities in Finland extend and entrench housing advice services.<sup>128</sup> Such an initiative reflects efforts seen in other jurisdictions, such as the United Kingdom, to *prevent* evictions and thus address homelessness before it occurs.<sup>129</sup> It also illustrates the interlocking nature of HF as implemented in Finland. The resulting program focused on much more than simply housing those who were homeless. Again, the support offered by housing advice services reflects the ways in which homelessness is a systemic issue which requires shifts in thinking about housing more generally. The Finnish experience suggests that measures which respect the right to housing for all, such as housing support services, are a key component in preventing and reducing homelessness.

## V. Scotland's Anti-Homelessness Measures: An Alternative to HF and Programmatic Rights

Since the late 1970s, certain categories of homeless people in Great Britain have had a legal right to "long-term rehousing."<sup>130</sup> Unusually in the transnational context, these rights were and remain enforceable through the courts. As housing is one of the devolved powers of the Scottish government, Scotland was able to change the statutory duty in 2012 so that it applied to virtually all categories of homeless people.<sup>131</sup>

The proportion of Scottish owner-occupation is similar to that of Finland and Canada, and, again, the levels of owner-occupation vary from region to region.<sup>132</sup> About 14% of the Scottish population lives in the PRS,<sup>133</sup> with roughly 24% of the population living in some form of social housing.<sup>134</sup> It is these elevated levels of social housing which set Scotland apart from Canada.

<sup>126</sup> Kaakinen, "Final Report," 22.

<sup>127</sup> *Ibid.*, 13.

<sup>128</sup> *Ibid.*, 13, 17; Pleace et al., "Strategic Response," 429.

<sup>129</sup> See King, "Scotland," 160; Fitzpatrick and Pawson, "Fifty Years."

<sup>130</sup> The relevant statute was only extended to Northern Ireland in 1988, Fitzpatrick and Pawson, "Fifty Years," 544.

<sup>131</sup> Beth Watts, "Homelessness, Empowerment and Self-Reliance in Scotland and Ireland: The Impact of Legal Rights to Housing for Homeless People," *Journal of Social Policy* 43, no. 4 (2014): 798.

<sup>132</sup> "Housing statistics 2018," <https://www.gov.scot/publications/housing-statistics-scotland-2018-key-trends-summary/pages/5/>.

<sup>133</sup> "Scottish household survey," <https://www.gov.scot/publications/scotlands-people-annual-report-results-2018-scottish-household-survey/pages/3/>.

<sup>134</sup> *Ibid.*



In 2003, the *Homelessness etc. (Scotland) Act* allowed for the abolition of the “priority need category” in assessing whether a local authority had a duty to house a person.<sup>135</sup> The goal was to give local authorities warning that their responsibilities were about to change. The priority need test was abolished as of 31 December 2012.<sup>136</sup> As a result, anyone who is assessed as being *unintentionally* homeless has the right to settled accommodation, typically provided by the more secure tenancies seen in social housing. “Unintentionally homeless” is defined by the *Housing (Scotland) Act 1987*, s 24, which states that a person is homeless if they have no accommodation, and that a person “shall not be treated as having accommodation unless it is accommodation which it would be reasonable for him to continue to occupy”; accommodation which leaves a person at risk of abuse is excluded from accommodation for the purposes of this section.<sup>137</sup> As with Finland’s preventive provisions under *Paavo*, Scotland has a program known as Housing Options, which seeks to prevent homelessness by finding solutions for those threatened with homelessness.<sup>138</sup> Housing Options is also seen in the rest of the United Kingdom, and has been credited with causing a reduction in homelessness in England and Wales.<sup>139</sup>

One weakness of Scotland’s statutory scheme is the question of defining whether a person is unintentionally homeless.<sup>140</sup> In the English context, scholars have hypothesized that the definitional aspect is one reason why the numbers of homeless people decreased when they might have otherwise been expected to increase.<sup>141</sup> So, too, must the claimant prove links with the relevant local authority, which, again, leaves scope for discretion. For example, figures produced by Shelter Scotland—a leading homelessness charity—illustrate that 36,855 applied to be declared unintentionally homeless in 2019–2020 but only 31,333 were assessed as homeless.<sup>142</sup> Admittedly, the emphasis on rehousing in the social sector reduces choice, though it will be more affordable and offer a more secure tenure. Consequently, Scotland’s measures respect several core features of the right to housing but not all. Nonetheless, the granting of a legal right arguably respects homeless people as rights-holders in a manner that fits with a human-rights-based approach.

Weaknesses aside, the Scottish measures have proven successful. In 2010–2011, 41,530 were assessed as homeless and this dropped to 28,226 in 2015–2016.<sup>143</sup> Strikingly, a study by Watts suggests that Scotland’s measures have also had a psychological impact. Watts argues that granting a clearly defined legal right to homeless people empowers them and promotes self-reliance.<sup>144</sup> Given Watts’s

<sup>135</sup> *Homelessness etc. (Scotland) Act* 2003, s 2; King, “Scotland,” 158.

<sup>136</sup> “Homelessness in Scotland: 2017 to 2018,” Scottish Government, <https://www.gov.scot/publications/homelessness-scotland-2017-18/pages/9/>.

<sup>137</sup> *Housing (Scotland) Act 1987*, s 24.

<sup>138</sup> King, “Scotland,” 160.

<sup>139</sup> Fitzpatrick and Pawson, “Fifty Years,” 547–48, 551.

<sup>140</sup> King, “Scotland,” 158.

<sup>141</sup> Fitzpatrick and Pawson, “Fifty Years,” 551–52.

<sup>142</sup> “Housing and Homelessness Statistics,” Shelter Scotland, [https://scotland.shelter.org.uk/housing\\_policy/key\\_statistics/homelessness\\_facts\\_and\\_research](https://scotland.shelter.org.uk/housing_policy/key_statistics/homelessness_facts_and_research) (accessed 2 December 2020).

<sup>143</sup> *Ibid.*

<sup>144</sup> Watts, “Homelessness,” 806–807.

small sample size, there is an urgent need for further study to see whether this holds more broadly. Watts also cautions that the Scottish legal right to housing is successful because of its form: “simpl[e] and blunt[.]”<sup>145</sup>

It is clear that Scotland’s statutory innovations go hand-in-hand with other programs such as Housing Options. Admittedly, the numbers assessed as homeless have increased since 2015–2016, to 31,333 in 2019–2020.<sup>146</sup> The increase suggests that Scotland’s anti-homelessness initiatives are not going far enough. The rise in homelessness may be related to recent changes in welfare payments, known as Universal Credit, which have resulted in delays in payments and have forced recipients to rely on food banks and other support services.<sup>147</sup> The roll-out of Universal Credit for new welfare claimants in Scotland was completed in late 2018, and, while the increase in homelessness after 2018 may be coincidental, it is reasonable to assume at least some cases are linked.<sup>148</sup> In an echo of Ilveskivi’s point about Finland’s right to housing, Scotland’s right to housing is connected with welfare programs.

## VI. Lessons for Canada

The first and most obvious lesson for Canada from Finland and Scotland is that homelessness *can* be reduced. However, existing experiences with realizing the right to housing in Canada, as set out in parts II and III, suggest there are issues which may yet prevent the NHS from eliminating chronic homelessness and realizing the right to housing. In this section we set out both the barriers Canada faces in addressing chronic homelessness and the lessons it could learn from the Finnish and Scottish experiences.

The first, and perhaps most obvious, barrier is Canada’s constitutional and political structure. Unlike Finland, which is a unitary state, and Scotland, which has a devolved government with statutory powers derived from legislation enacted by the central government, Canada is a federal state. As such, it is harder to gather the sort of national political will that prompted *Paavo* I and II in Finland, and which saw the abolition of priority need in Scotland. The NHS requires bilateral agreements with provincial governments to collaborate and coordinate on housing policies and, given the lack of unanimity amongst provincial, territorial, municipal and Indigenous governments, the NHS cannot hope to be as coherent and unified as Finland and Scotland’s anti-homelessness strategies are. To give one example,

<sup>145</sup> *Ibid.*, 807.

<sup>146</sup> “Housing and Homelessness Statistics,” Shelter Scotland; see, also, the situation in England, Fitzpatrick and Pawson, “Fifty Years,” 549–52.

<sup>147</sup> Peter Walker, “Universal Credit Rollout Linked to Rising Food Bank Use, Rudd Admits,” *The Guardian*, 11 February 2019, <https://www.theguardian.com/society/2019/feb/11/universal-credit-rollout-linked-to-rising-food-bank-use-amber-rudd-admits> (accessed 20 March 2020); see, also, Rachel Loopstra, “Financial insecurity, food insecurity, and disability: the profile of people receiving emergency food assistance from the Trussell Trust Foodbank Network in Britain,” [https://wirral.foodbank.org.uk/wp-content/uploads/sites/198/2017/09/LoopstraR\\_WirralFoodBankPresentation\\_21Sep17.pdf](https://wirral.foodbank.org.uk/wp-content/uploads/sites/198/2017/09/LoopstraR_WirralFoodBankPresentation_21Sep17.pdf) (accessed 20 March 2020).

<sup>148</sup> See Suzanne Fitzpatrick et al., *The Homelessness Monitor: Scotland 2019*, xiv, [https://www.crisis.org.uk/media/240002/the\\_homelessness\\_monitor\\_scotland\\_2019.pdf](https://www.crisis.org.uk/media/240002/the_homelessness_monitor_scotland_2019.pdf); see, also, King, “Scotland,” 155.

under the Federal/Provincial/Territorial (FPT) Partnership in Housing “each province and territory can design and implement its own programs,” but “there is some uncertainty regarding the design of initiatives” due to “ongoing bilateral negotiations.”<sup>149</sup> Admittedly, it is unlikely that a one-size-fits all approach would work for Canada given the variation across the country, but the ongoing discussions further reinforce that the federal government still does not have consensus in the way that Finland had for *Paavo*.

The second barrier is Canada’s lack of social housing and minimal welfare supports. Finland and Scotland have more robust supplies of social housing and more people who are eligible for social housing and welfare than Canada and these supports were crucial in reducing homelessness in both countries. The dearth of affordable housing is a recurring theme on studies of HF’s implementation in Canada,<sup>150</sup> and its shortage undermines the security of tenure and affordability essential to the right to housing. Given the evidence suggesting social housing has a key role to play in reducing and preventing homelessness,<sup>151</sup> Canada cannot hope to realize the right to housing for all Canadians without a stronger social housing sector. Disappointingly, despite the NHS’s promises in 2016 of increased funding for social or other forms of affordable housing in Canada, the Parliamentary Budget Officer’s (PBO) 2019 report suggests that there will be less funding than expected.<sup>152</sup>

Tied to the need for social housing is the need for better welfare programs. Scotland’s recent experiences provide a stark example of this, as it seems to be changes to welfare payments which have prompted an increase in homelessness. Yet, Canada’s experiences with HF also illustrate the shortcomings of its welfare system. In Alberta, for example, an issue with HF is that the housing payments to welfare claimants fall far short of the average rents in Alberta.<sup>153</sup> This over-reliance on the PRS is a weakness because “it leaves HF programs vulnerable to rising rents and low vacancy rates.”<sup>154</sup> One option is to increase the amount available via housing support, and in March 2020, the government announced a new rent subsidy program, the Canada Housing Benefit, applicable against housing in the PRS for specific categories of people, with the costs to be shared with the provinces so that each province may tailor the program for its needs.<sup>155</sup> As heartening as this is, a study from the United Kingdom indicates that social housing is cheaper than rental subsidies.<sup>156</sup> This study was prompted by media reports that significant numbers of former council houses (i.e., social housing) were owned by landlords.<sup>157</sup>

<sup>149</sup> Parliamentary Budget Officer, *Federal Program Spending*, 14–15.

<sup>150</sup> See, e.g., Anderson-Baron and Collins, “Practicing Housing First,” 1300.

<sup>151</sup> O’Donnell, “Does Social Housing?”

<sup>152</sup> Parliamentary Budget Officer, *Federal Program Spending*, 15.

<sup>153</sup> Anderson-Baron and Collins, “Practicing Housing First,” 1295.

<sup>154</sup> *Ibid.*, 1291.

<sup>155</sup> Jordan Press, “Feds, Alberta Set to Clash over Cash for New Rent Supplement,” *CBC News*, 26 December 2019, <https://www.cbc.ca/news/canada/edmonton/alberta-ottawa-housing-benefit-rent-supplement-funding-1.5408759> (accessed 20 March 2020).

<sup>156</sup> See, e.g., Tom Copley, AM, *Right to Buy: Wrong for London* (London Assembly Labour, 2014), 10.

<sup>157</sup> *Ibid.* 1, n 1.

Hence, rent subsidies should not be a replacement for increased levels of funding for social housing.

The Canada Housing Benefit could function as a stopgap measure until additional social housing becomes available. However, the funding for social housing could actually be reduced under the NHS's cost-matching provisions,<sup>158</sup> and under the FPT Partnership, funding may be used for "construction, renovation, or affordability supports."<sup>159</sup> As such, there is no guarantee that additional units of social housing will become available.

There is also concern among Indigenous communities about the unequal distribution of funding under the NHS. The PBO's report notes that "total spending on Indigenous housing is expected to be substantially lower than over the prior 10 years."<sup>160</sup> This is particularly concerning given the racism noted in Lethbridge's PRS and the importance of culturally appropriate housing for a full realization of the right to housing, particularly for Indigenous communities.<sup>161</sup>

All of this suggests that if Canada is serious about the right to housing, the NHS needs to go much further. In 2000, Harris described Canadian housing policy as "more American than the United States,"<sup>162</sup> because, rather than walk a middle line between the more interventionist British approach and the American individualistic approach, Canadian housing policy was "highly individualistic."<sup>163</sup> While the NHS is a break with that traditional preference for the private sector to meet housing needs, it is not as ambitious a break as it needs to be to realize the right to housing, particularly in the context of affordability and security of tenure.

A further point which should be borne in mind is whether or not the NHS's accountability mechanisms will prove effective. Given that the *NHS Act* was only passed in 2019, it is too early to tell whether the National Housing Council or Federal Advocate will have much of an effect. However, the NHS's explicit commitment to the progressive realization of the right to housing risks leaving homeless people with no effective redress for the violation of their right should they remain homeless. Indeed, it should be noted that HF, Canada's preferred policy in reducing homelessness, fails to grant homeless people any form of redress should they remain unhoused. Given its reliance on the PRS, HF *cannot* grant the sort of legal right to housing seen in Scotland, as this could conflict with landlords' rights. While HF succeeds in housing some, it cannot guarantee security of tenure, affordability, or even choice. As such, HF, as it is practised across Canada, addresses the *prima facie* violation of the right to housing that homelessness represents without fully realizing the right to housing itself. Arguably, until Canada increases its stocks of social housing, the NHS likely cannot grant the sort of right seen in Scotland, though it would be desirable to have some clear, enforceable rights for homeless people and corresponding duties for government.

<sup>158</sup> Parliamentary Budget Officer, *Federal Program Spending*, 8, 15.

<sup>159</sup> *Ibid.*, 14–15.

<sup>160</sup> *Ibid.*, 17.

<sup>161</sup> For an overview of the issues here, see Hohmann, *Right to Housing*, 189–96.

<sup>162</sup> Richard Harris, "More American than the United States: Housing in Urban Canada in the Twentieth Century," *Journal of Urban History*, 26, no. 4 (2000): 456.

<sup>163</sup> *Ibid.*, 456–57.

That being said, addressing the *prima facie* violation of the right to housing, albeit tentatively, is better than nothing. To this end, there are additional steps which Canada could take under the NHS to begin to realize the right to housing for homeless Canadians. For example, Finland converted its homeless shelters into long-term housing, an option Canada could follow, provided all levels of government cooperate. However, flowing from the S2H experiment in Toronto,<sup>164</sup> and given the harsh climate in much of Canada, it is likely that some form of emergency accommodation will continue to be needed.

A further initiative under the NHS which could be implemented sooner is the “Community Based Tenant Initiative.”<sup>165</sup> This initiative seems comparable to the housing advice offered in Finland<sup>166</sup> and to the Housing Options program which has proven effective in the United Kingdom. Notably, *Paavo* created legal instruments designed specifically to protect tenants from hasty or unlawful evictions.<sup>167</sup> Such protections for tenants are sorely needed in Canada’s PRS and could prevent homelessness before it happens. Such a measure could also provide relief for tenants until more affordable housing is developed.

The NHS’s target to eliminate chronic homelessness is an ambitious but achievable goal. By exploring how Finland and Scotland have reduced homelessness—but also how their efforts have sometimes fallen short—we have illustrated the centrality of a commitment to the right to housing, the links this right has with broader welfare issues and pressures on housing supply, and the importance of political will and clear, legal commitments to providing housing. Canada has the opportunity to learn these lessons, apply them in Canada, and achieve the NHS’s laudable goal of eliminating chronic homelessness.

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<sup>164</sup> See Part III, above.

<sup>165</sup> This initiative “will provide funding to local organizations which assist people in housing need, so that they are better represented and able to participate in housing policy and housing project decision-making,” Government of Canada, *Canada’s National Housing Strategy*, 9.

<sup>166</sup> Pleave et al., “Strategic Response,” 427.

<sup>167</sup> *Ibid.*, 429.