

The Law is Leaving Us All Out in the Cold: *Revisiting the Legal Right to Housing*

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Introduction

What is a legal right to housing?

Homelessness is not just about shelter, or someone's experience with a range of physical living situations, but also an infringement of a bundle of legal and human rights, a deprivation of one's connection to their community, and the manifestation of blatantly flawed and discriminatory societal systems. Housing rights are not a right to be given a house. Instead, a legal right to housing addresses government actions or laws which may discriminate against someone because of their housing status, or which endanger one's life, or which even may breach international human rights obligations.

Approaches to asserting a legal right to housing:



Section 7



Human Rights



Section 15

- Section 7:** The Supreme Court of Canada determined housing rights engage Section 7 of the *Charter*, which protects the Right to Life, Liberty, and Security of the Person, in *Victoria (City) v Adams*. However, this right only applies when a law or government action has directly put someone's life at risk by depriving them of shelter, and thus is a narrower legal right.
- Human Rights:** Since 2019, the Federal Government has undertaken a human right approach to housing rights pursuant to United Nations declarations in the *National Housing Strategy* (NHS). Although helpful at guiding policy, international law is not justiciable domestically. Further, the NHS was criticized for lacking meaningful legal accountability, including by not providing for hearings. Thus, this approach is insufficient for addressing inadequate housing laws.
- Section 15:** Homelessness as an analogous ground under section 15 was addressed, but ultimately failed, before the Ontario Superior Court in *Tanudjaja v Canada (Attorney General)*. Establishing this right would better protect Canadians from being discriminated against due to their housing status.

Section 15 of the *Charter of Rights and Freedoms*

Provision: 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Legal Test: Following *Andrews*, when determining whether there has been a *prima facie* violation of equality rights, Courts must determine that there has been:

- a distinction, defined therein as actual differential treatment,
- based on one of the enumerated prohibited grounds in s. 15 or one that is analogous to those grounds, which
- because of an imposed burden or denied benefit,
- is discriminatory, whether intentionally or in its effects.

This latter element has faced great uncertainty in the jurisprudence. Recently in *Fraser*, it was interpreted as "reinforcing, perpetuating, or exacerbating disadvantage."

"Of all the rights, this is the most difficult."

- The Right Honourable Beverly McLachlin, former Chief Justice of Canada

Homelessness as an Analogous Ground

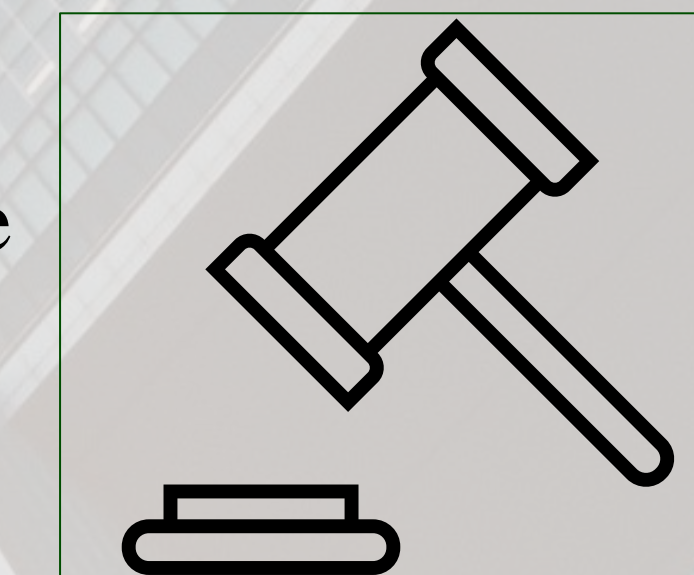
In *Tanudjaja v Canada (Attorney General)*. Lederer J in *obiter dictum* stated that homelessness is impossible to define and that "[i]n these circumstances, it is impossible to come to a substantive understanding of what the analogous ground is." At the heart of the issue, Lederer J determined it was impossible to give legal meaning to "affordable, adequate and accessible" housing.

Lederer J's analysis, as it restrictedly understands homelessness as unsheltered or 'rooflessness,' is a fundamental error. Advocates must move away from strict categorical approaches and should instead prefer a community-focused approach to understanding adequate housing which has been recommended by esteemed academics and which aligns with the underlying legislative purpose of section 15. A "home," at minimum, is the standard accommodation which people require to live as part of a community. Chamberlain and Mackenzie, Australian scholars, understood this minimum community standard to be a small, rented one-bedroom apartment with basic amenities such as a bathroom and kitchen.

Tanudjaja v Canada (Attorney General), 2013 ONSC 5410

General summary of *Tanudjaja*: This case concerned the argument that homelessness should be an analogous ground under Section 15. In their application, the plaintiffs sought a declaration that both provincial and federal governments have obligations to implement effective national and provincial strategies to reduce and eventually eliminate homelessness and inadequate housing. The advocates brought a novel argument to Charter advocacy, asserting that government action and inaction were responsible for the progression and continuation of homelessness and the status of inadequate housing in Canada.

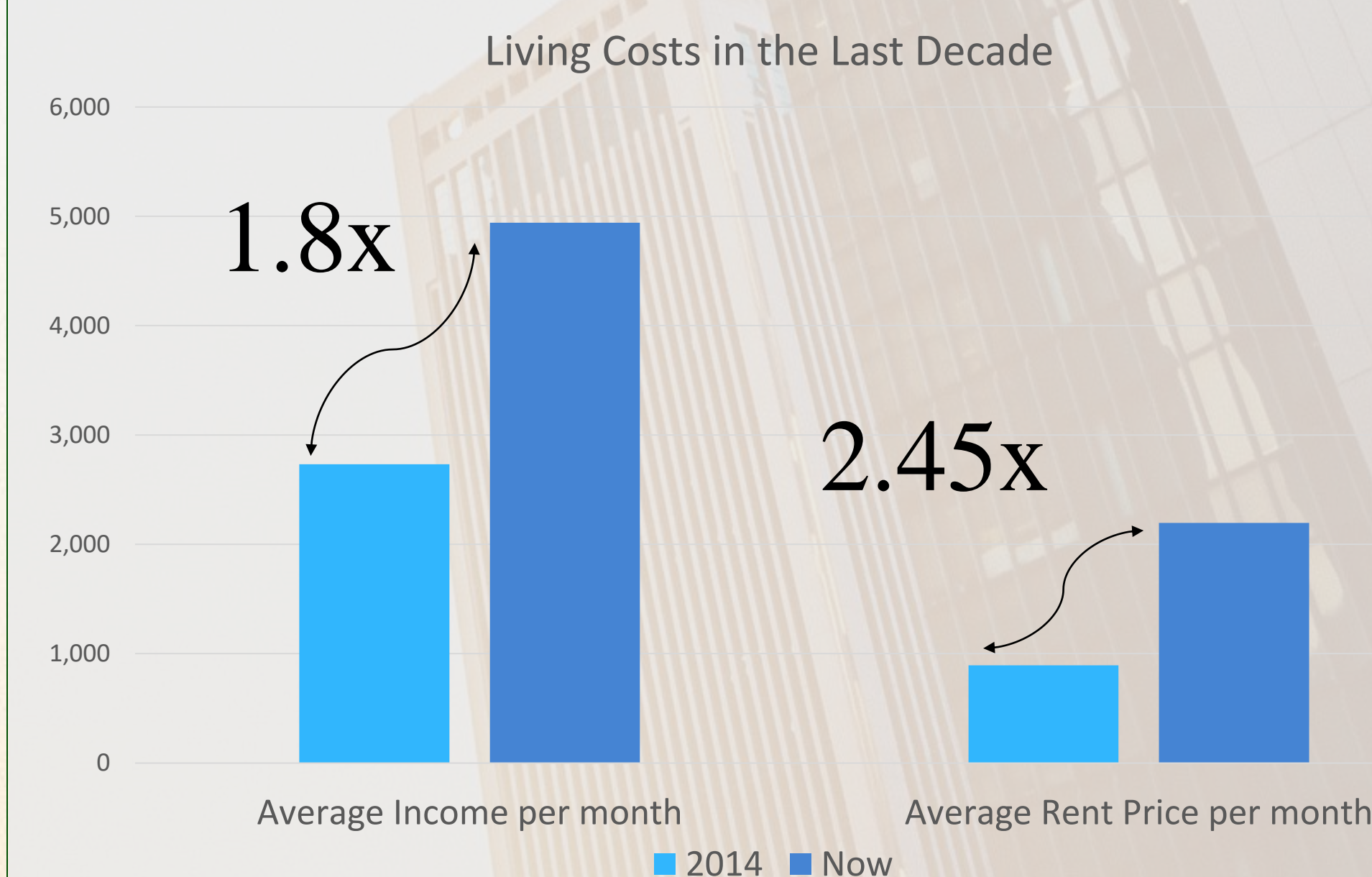
Decision: In a 2-1 majority, the Ontario Court of Appeal upheld the lower court's decision to strike the claim, deciding that this argument failed to disclose a cause of action because the *Charter* does not impose positive obligations on the state, and further, that homelessness is not an analogous ground for the purposes of section 15.



Dissent: The lone dissenter, Feldman JA decided that "[t]he applicants' approach to Charter claims was novel, but given the jurisprudential journey of the Charter's development to date, it was neither plain nor obvious that the applicants' claims were doomed to fail." The dissent by Feldman JA suggests a hope that novel arguments such as the Plaintiffs' may be permitted in time.

A Decade Since *Tanudjaja*

Research suggests that as many as **1.3 million** Canadians have experienced homelessness or extremely insecure housing at some point during the past **five years**. The effects of homelessness have been exacerbated by the COVID-19 pandemic and current Housing Crisis.



A Significant Development in Circumstances

The principle of *stare decisis* (Latin for "stand by things decided") refers to the requirement that when a legal issue has been determined and decided by a higher court, thereby establishing binding precedent, other courts should follow the decision. This means that to overrule *Tanudjaja*, a case will likely have to reach the Supreme Court to establish homelessness as an analogous ground. However, the Supreme Court in *Canada (Attorney General) v Bedford* stated that a court can deviate from this principle where either:

- 1) new legal issues are raised as a product of significant developments in the law, or
- 2) where there have been changes in the circumstances or evidence that fundamentally changes the debate surrounding the legal issues at hand.

First, there have been developments in the law. Since 2013 when *Tanudjaja* was decided, the Supreme Court has expanded the Section 15 test. Second, in the last decade, there has been fundamental changes in the debate on the legal right to housing. The Canadian government has undertaken human rights obligations to housing following the adoption of several international agreements into Canadian law and has put forth efforts towards reconciliation within Indigenous communities. In consideration of these commitments, the National Housing Strategy (NHS) has been put forward. This modern context has an impact on the section 15 legal analysis.

Conclusions

- Definability, unbalancing societal interests, an ever-changing and onerous test, and the overwhelming financial burden of Charter challenges all contribute to the legal right to equality being almost impossible to assert for analogous grounds, and explains why advocacy in this area has seemingly gone cold in the last decade.
- It is essential to the legal advocacy of homeless Canadians to revisit the debate of whether homelessness can be established as an analogous ground.
- The right to equality is better equipped to advocate for Canadians who are homeless because it is designed to eliminate discriminatory laws, not just those that trigger the right to life through deprivation of shelter, or a general human right to housing.
- Homelessness is not an isolated event. It is clear that government misaction is leaving us all out in the cold.