

Caught Between Deference and Indifference: The Right to Housing in Canada

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*This article explores two recent cases where the right to housing was mentioned and sets out their links with property. Discussions of the right to housing usually focus strictly on public law. The focus on public law, while useful, fails to consider the ways in which understandings of property law affect those claiming a right to housing. Property rights, like the Charter rights more commonly discussed in conjunction with the right to housing, speak to the relationship of the individual and the state. However, property rights often offer a different account of why an individual should have the claimed rights than what is implicit in the right to housing. The right to housing rests on the claim of an individual qua individual whereas property rights often invoke implicit questions of desert. This article sets out how the individualism of property rights also exists in current Charter jurisprudence as well as the history of social housing in Canada. The article also explores how this individualism affected attempts to claim the right to housing in *Tanudjaja v Canada* and *Abbotsford v Shantz*. As this article will demonstrate, property law appears tacitly in these cases, as well as in discussions around the right to housing as a way of shaping the ideal citizen and renders the right to housing nearly impossible to hear, let alone realize.*

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*Cet article explore deux causes récentes faisant mention du droit au logement et expose leurs liens avec la notion de propriété. Généralement, les discussions sur le droit au logement sont axées strictement sur le droit public. Bien qu'utile, le fait de mettre l'accent sur le droit public omet de tenir compte des façons dont les interprétations du droit des biens affectent ceux et celles qui revendiquent leur droit au logement. Les droits de propriété, comme ceux de la Charte qu'on associe le plus souvent au droit au logement, traitent de la relation entre l'individu et l'État. Cependant, leur perspective quant à la raison pour laquelle un individu devrait se voir accorder les droits qu'il revendique est souvent différente de ce qui est implicite dans le droit au logement. Ce droit repose sur l'affirmation d'un individu en tant qu'individu alors que les droits de propriété invoquent souvent des questions implicites d'abandon volontaire. Le présent article expose comment l'individualisme des droits de propriété existe aussi dans la jurisprudence actuelle de la Charte ainsi que dans l'histoire du logement social au Canada. Il explore également comment cet individualisme a nui aux tentatives de revendication du droit au logement dans les arrêts *Tanudjaja c Canada* et *Abbotsford c Shantz*. Comme le montre l'article, le droit des biens apparaît implicitement dans ces arrêts, ainsi que dans les discussions sur le droit au logement comme moyen de façonner le citoyen idéal et de rendre le droit au logement presque impossible à entendre par les tribunaux, sans parler de le réaliser.*

On November 22, 2016, the federal government released a report based on their consultations for the National Housing Strategy.¹ The purpose of these cross-country consultations was to determine the principles that should inform the 2017 housing strategy.² While there is much in the report that is worth discussing, there are two points in particular which stand out in the context of the current housing crisis. The first is the report's discussion of "realizing the right to housing" which includes ending homelessness, forced evictions, and discrimination in accessing "adequate housing."³ The second is the suggestion that funding for social housing should be decoupled from electoral cycles,⁴ which would be one way of addressing the issues listed in the first point. These two points illustrate that at present, despite significant discussion, the "right to housing" is more a question of politics than a right which is legally enforceable.⁵

In this respect, the right to housing has much in common with other socio-economic rights. For several decades, Canadian scholars and activists have sought to find ways to use the courts to fight the discriminatory and damaging effects of poverty.⁶ Typically scholars and activists invoke article 11 of the *International Covenant on Economic, Social, and Cultural Rights* (ICESCR) to inform the interpretation of the *Canadian Charter of Rights and Freedoms* with the goal of realizing socio-economic rights.⁷ The two key *Charter* rights in the

¹ Emily Mathieu, "Report on Canada's National Housing Strategy Released" *Toronto Star* (22 November 2016), online: <<https://www.thestar.com>>.

² The federal housing strategy was released after this paper was accepted. Hence the focus of this paper is the consultative report. See the post-script for a brief discussion on the strategy itself.

³ The Conference Board of Canada, *What We Heard: Shaping Canada's National Housing Strategy* (2016) at 5, 20, 47, 66 [*What We Heard*].

⁴ *Ibid* at 26.

⁵ For specific examples of works that discuss the right to housing at national and international levels, see Margot Young, "Charter Eviction: Litigating Out of House and Home" (2015) 24 *JL Soc Pol'y* 46; Leilani Farha, "Is There a Woman in the House? Re/conceiving the Human Right to Housing" (2002) 14 *Can J Women & L* 118.

⁶ David Wiseman, "The Charter and Poverty: Beyond Injusticiability" (2001) 51 *UTLJ* 425 [Wiseman, "Charter and Poverty"]; David Wiseman, "Competence Concerns in Charter Adjudication: Countering the Anti-Poverty Incompetence Argument" (2005-06) 51 *McGill LJ* 503 [Wiseman, "Competence Concerns"]; Martha Jackman, "From National Standards to Justiciable Rights: Enforcing International Social and Economic Guarantees through Charter of Rights Review" (1999) 14 *JL & Soc Pol'y* 69 [Jackman, "National Standards"]; Martha Jackman, "Poor Rights: Using the Charter to Support Social Welfare Claims" (1993-94) 19 *Queen's LJ* 65; Martha Jackman, "Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination Under the Canadian Charter and Human Rights Law" (1994-95) 2:1 *Rev Const Stud* 76 [Jackman, "Poor Rights"]; Martha Jackman, "Constitutional Castaways: Poverty and the McLachlin Court" (2010) 50 *SCLR* (2d) 297 [Jackman, "Constitutional Castaways"]; Bruce Porter, "Claiming Adjudicative Space: Social Rights, Equality, and Citizenship" in Margot Young, Susan B Boyd, Gwen Brodsky & Shelagh Day, eds, *Poverty: Rights, Social Citizenship, and Legal Activism* (Vancouver: UBC Press, 2007) 77 [Porter, "Claiming Adjudicative Space"]; Bruce Porter, "Judging Poverty: Using International Human Rights Law to Refine the Scope of Charter Rights" (2000) 15 *JL & Soc Pol'y* 117 [Porter, "Judging Poverty"].

⁷ *International Covenant on Economic, Social and Cultural Rights*, GA res. 2200A (XXI), 21 UN GAOR, Supp. No. 16, UN Doc. A/6316 (1966) 49 (entered into force 3 January 1976, accession by Canada 19 May 1976) at part 11 [ICESCR]. See also *What We Heard*, *supra* note 3 at 20.

anti-poverty struggle are the right to life, liberty and security of the person, and the right to equality, guaranteed by sections 7 and 15 respectively.⁸ In theory, Canadian courts are required to interpret domestic law consistently with international human rights law⁹; however, in practice the story is quite different, as socio-economic rights remain largely unenforceable in the Canadian context.¹⁰ As Alana Klein noted, socio-economic rights pose something of a paradox given that “people cannot participate in a democracy if their basic needs are not met, but judicial enforcement of S[ocio-]E[conomic] R[ights] threatens democracy by taking social policy-making out of the hands of the people.”¹¹

In response to this paradox, Canadian courts have proven deferential to politicians as they craft or fail to craft responses to poverty, including the issue of accessing adequate housing. In two recent cases where the right to housing was mentioned, *Tanudjaja v Canada* and *Abbotsford v Shantz*,¹² courts in Ontario and British Columbia cleaved to the deferential approach and refused to find that section 7 of the *Charter* could guarantee a right to housing. There is, however, an additional layer of complexity in the context of the right to housing: the relationship of this right to property law. By its very nature, the right to housing disrupts the dominant property law narrative of individual, private ownership.

There are numerous studies illustrating the ways in which welfare initiatives have sought to shape recipients.¹³ Yet, in the context of the right to housing, few scholars have sought to make explicit links between the right to housing and common understandings of property law. The absence of references to property law is understandable given that the majority of those who write about housing rights are primarily public law scholars who are seeking to argue that social welfare rights are protected by the *Charter*. The *Charter*, famously, does not protect any property rights and so scholars might not see the utility in examining how the right to housing interacts with

⁸ See e.g. Jackman, “National Standards”, *supra* note 6 at 79; Jackman, “Poor Rights”, *supra* note 6 at 76; Porter, “Judging Poverty”, *supra* note 6; Wiseman, “Charter and Poverty”, *supra* note 6. For the *Charter*, see *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982*, c11 [*Charter*].

⁹ Porter, “Judging Poverty”, *supra* note 6 at 145; Jackman, “National Standards”, *supra* note 6.

¹⁰ Porter, “Judging Poverty”, *supra* note 6 at 118-23.

¹¹ Alana Klein, “Judging as Nudging: New Governance Approaches for the Enforcement of Constitutional Social and Economic Rights” (2007) 39 *Colum HRL Rev* 351 at 374.

¹² *Tanudjaja v Canada (AG)*, 2014 ONCA 852 [*Tanudjaja*]; *Abbotsford v Shantz*, 2015 BCSC 1909 [*Shantz*].

¹³ See e.g. James Struthers, *The Limits of Affluence: Welfare in Ontario, 1920-1970* (Toronto: University of Toronto Press, 1994); Margaret Jane Hillyard Little, ‘No Car, No Radio, No Liquor Permit’: *The Moral Regulation of Single Mothers in Ontario, 1920-1997* (Toronto: Oxford University Press, 1998) [Little]. For an American perspective see Felice Batlan, “Gender and the Rise of the Welfare State in Fin-de-Siecle New York City: The Case of Tenement Regulation” in Shelley AM Gavigan & Dorothy E Chunn, eds, *The Legal Tender of Gender: Welfare, Law and the Regulation of Women’s Poverty* (Oxford: Hart Publishing, 2010) 75 [Batlan].

property rights.¹⁴ However, simply because the *Charter* is silent on property rights does not mean that property is silent in the battle for housing rights. Therefore, by paying attention to how property law interacts with the right to housing it is possible to shed additional light on how attempts to win the right to housing may proceed in Canada.

Much like the right to housing, property rights speak to the relationship of the individual to the state. Where they differ is in their account of *why* individuals ought to have such rights. Justifying property rights is one of property theory's more vexing questions and it is not one with which every property theorist always engages.¹⁵ The assumption of many property theorists is that property already exists and that we do not need to explain *how* it came into existence. Where theorists do engage with how property came to be and is thus justified, there is a tendency to understand property to pre-date the state and to result from individual action.¹⁶ In this scenario, the state occupies the difficult role of being both the main protector and the main threat to property rights.¹⁷ The classic example of such an account being John Locke's argument as set out in his *Two Treatises of Government*.¹⁸

In contrast, the right to housing suggests that individuals are entitled to housing by virtue of being individuals. The individuals envisaged by the right to housing are much more dependent than those seen in discussions of property rights. Moreover, the kind of individualism seen in discussions of property rights is echoed by the kind of individualism seen in other *Charter* rights cases. Other *Charter* cases reveal a preference for independent individuals who make only limited claims to public space.¹⁹ Even as the consultative report speaks of recognizing the right to housing "through laws and policies designed to ensure accountability, participation and inclusion, and non-discrimination," it immediately follows that with "[d]eveloping a fluid housing continuum or spectrum where *homeownership is encouraged* and Canadians transition between renting and homeownership."²⁰ This creates

¹⁴ For other routes by which property rights can be protected, see Bruce Ziff, "'Taking' Liberties: Protections for Private Property in Canada" in E Cooke, ed, *Modern Studies in Property Law*, Vol. III (Oxford: Hart, 2005) 341.

¹⁵ For some exceptions see Margaret Davies, *Property: Meanings, histories, theories* (Abingdon: Routledge-Cavendish, 2007) at 85–113; Jeremy Waldron, *The Right to Private Property* (Oxford: Oxford University Press, 1988); JW Harris, *Property and Justice* (Oxford: Oxford University Press, 1996) at 165–369 [Waldron, *The Right to Private Property*]; Stephen R Munzer, *A Theory of Property* (Cambridge: Cambridge University Press, 1990). But see Lisa M Austin, "Possession and the Distractions of Philosophy" in James Penner & Henry Smith, eds, *Philosophical Foundations of Property Law* (Oxford: Oxford University Press, 2013) 182; JE Penner, "Misled by 'Property'" (2005) 18:1 Can JL & Juris 75 at 78.

¹⁶ See e.g. Thomas W Merrill, "The Property Strategy" (2012) 160 U Pa L Rev 2061 [Merrill, "Property Strategy"] at 2076.

¹⁷ See Part II for a full discussion.

¹⁸ John Locke, *Two Treatises of Government* (New York: Hafner Publishing Co, 1947).

¹⁹ See e.g. Benjamin L Berger, *Law's Religion: Religious Difference and the Claims of Constitutionalism* (Toronto: University of Toronto Press, 2015) at 45–52, 91–98.

²⁰ *What We Heard*, *supra* note 3 at 20 [emphasis in original].

a hierarchy between homeownership and renting, as well as between the private and public housing sectors. Such a hierarchy will only hinder attempts to realize the right to housing.

This article will argue that the tacit hierarchy of the consultative report is well-fitted both to a particular understanding of property and within Canadian constitutional culture. It also fits with the history of social housing in Canada, which has been accused of attempting to shape particular kinds of citizens through particular kinds of housing.²¹ Encouraging homeownership supports a particular kind of independence which is in tension with the dependence assumed by the right to housing. In such contexts, the right to housing is at best an awkward fit and, at worst, all but impossible to realize. As *Shantz* and *Tanudjaja* make clear, the right to housing is understood as a policy choice rather than an enforceable right. Consequently, those without adequate housing find themselves caught between judicial deference and political indifference.

In order to make this argument, this article begins by setting out the standard reading of Locke's thesis and its account of the individual-state relationship. The reason for relying on Locke is that most modern property theorists do not explain *how* a person becomes entitled to property. Where relevant, this article highlights more modern accounts of property entitlement. This section also contains a brief outline of Canadian constitutional culture to show how it echoes Lockean ideas. The second section provides a short overview of social housing in Canada, which illustrates the long-standing preference for individual, private ownership as the solution to Canada's housing woes. Part three examines the implications of *Tanudjaja* and *Shantz* for housing rights in Canada. Each case is shown to share a particular understanding of the individual-state relationship, which undermines attempts to realize the right to housing. In addition, both cases highlight that the appropriate battleground for the right to housing is the political process even as they show that political lobbying is not working and, indeed, may never work. Admittedly, comments in the report on consultations suggest some room for optimism that the National Housing Strategy could result in the right to housing; however, as noted, the report also contains evidence of the existing bias towards ownership. The fourth section of this article suggests requirements to fully realize the right to housing.

I. Private Property, the Citizen and the State

One of the trickier questions facing property theorists is how to justify private property.²² In fact, many theorists do not explain how a person comes to

²¹ Matt Sendbuehler & Jason Gilliland, "...to produce the highest type of manhood and womanhood": The Ontario Housing Act, 1919 and a New Suburban Ideal" (1998) 26:2 *Urban History Rev* 42; Adele Perry, "From 'the hot-bed of vice' to the 'good and well-ordered Christian home': First Nations Housing and Reform in Nineteenth-Century British Columbia" (2003) 50:4 *Ethnohistory* 587 at 589-90.

²² For some attempts, see e.g. Waldron, *The Right to Private Property*, *supra* note 15. But see JE Penner, *The Idea*

have property at all; property seems to be a given, even to pre-date the state.²³ Locke's account of the origins of property is useful in this case, because he too understands property as something that pre-dates the state. As such, his account is not just about why an individual has property but also about the individual-state relationship. This section first sets out Locke's theory with references, where relevant, to modern property theory. This is followed by an examination of what Canadian constitutional culture has to say about the citizen-state relationship and shows that there is significant overlap with Locke's work.

A. The Paradox of Lockean Property

John Locke did not write his *Two Treatises of Government* in a vacuum. Numerous studies of his work exist which seek to place it in its appropriate context.²⁴ The focus of this section is not to fully tease out all of the nuances in Locke's work, but instead to focus on his discussion of property as found in his *Second Treatise of Government*.²⁵ Here Locke sets out the role of property in the transition from the state of nature to civil society. For Locke, property was not a creation of the state but something that pre-dated the state, an idea that continues to have significant traction among property theorists.²⁶ While there may have been no government in the state of nature, it was not the lawless war of all against all as depicted by Thomas Hobbes.²⁷ Locke argued that there was a law of nature but that it was poorly enforced.²⁸ According to Locke, everyone in this state of nature was free to possess whatever they could hold and free do with their possessions as they pleased. However, a person's possessions in the state of nature were constantly under threat from others; so to preserve their property, people joined together and formed society. As Locke put it:

the enjoyment of the property [a man] has in this state is very unsafe, very unsecure. This makes him willing to quit a condition, which, however free, is full of fears and continual dangers: and it is not without reason, that he seeks out, and is willing to join in society with others who are already united, or have a mind to unite for the mutual preservation of their lives, liberties and estates, which I call by the general name – property.²⁹

of Property in Law (Oxford: Oxford University Press, 2000) at 5–6, 202–19 (arguing against focusing on the 'distributional aspect' of property).

²³ See e.g. Merrill, "Property Strategy", *supra* note 16 at 2076.

²⁴ See e.g. James Tully, *A Discourse on Property: John Locke and His Adversaries* (Cambridge: Cambridge University Press, 1982); CB Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford: Clarendon Press, 1962). See also Douglas Sturm, "Property: A Relational Perspective" (1986) 4 *JL & Religion* 353.

²⁵ Locke, *supra* note 18.

²⁶ See e.g. Merrill, "Property Strategy", *supra* note 16 at 2076; Hanoch Dagan & Avihay Dorfman, "The Human Right to Private Property" (2017) *Theor Inq L* (forthcoming) cited to SSRN id 2624428 at 3–4.

²⁷ Thomas Hobbes, *Leviathan* (1660) c XIII.

²⁸ Locke, *supra* note 18 at §123–29.

²⁹ *Ibid* at § 123.

There is much to be unpacked in this brief statement about the transition from the state of nature to civil society. Crucially, it suggests a particular kind of relationship between the state and the citizen: the state grants *protections* to rights that pre-date the state; it does not *create* the rights itself. Thus, according to Lockean theory, we do not come together to get more than we have but, rather, to *maintain* the rights we have and to ensure that others cannot take our rights from us. There is a paradox here because, on the one hand, the very purpose of joining with others is to protect property, but these are the same “others” who also form(ed) the biggest threat to a person’s property. In other words, the purpose of the state is to protect property, yet the state is but a reluctant protector. Intriguingly, the coming together does not result in much of a gain for the propertied; it is merely a way of safeguarding what you already have. The state certainly has no duty to give you more than this and may well take some away.

The key point, echoed by modern theorists such as Merrill, is that the existence of a state makes property rights stronger.³⁰ Katz argues that private property rights can actually enhance state power, which illustrates property theorists’ ongoing suspicion of the state.³¹ Katz’s preference is for some degree of self-help or informal private property as opposed to the formalized rights of the state.³² However, she concludes that “[m]utual dependence of state and owners, by contrast, serves as a simple form of constraint on the arbitrary or predatory exercise of power by the state over owners.”³³ The point being that owners are essential to how the state governs and so the state ought to be respectful of them,³⁴ and perhaps even encourage and support owners.

However, Locke’s reference to “lives, liberties and estates” shows that his definition of property was much broader than mere private property. His definition included a sense of propriety: maintaining a kind of social order by guaranteeing what was proper to each person, such as their lives and liberties.³⁵ The idea of property-as-propriety fits with Locke’s argument that entitlement to *private* property stemmed from a person mixing their labour with it, known as the labour-desert thesis.³⁶ Such an argument was central to his claim that property was not simply a creation of the state and thus that

³⁰ Merrill, “Property Strategy”, *supra* note 16 at 2077.

³¹ Larissa Katz, “Governing Through Owners: How and Why Formal Private Property Rights Enhance State Power” (2011-12) 160 U Pa L Rev 2029.

³² *Ibid* at 2033–35, 2057–58. Compare Henry E Smith, “Self-Help and the Nature of Property” (2005) 1 JL Econ & Pol’y 69.

³³ Katz, “Governing Through Owners”, *supra* note 31 at 2056.

³⁴ Here Katz is arguably correct. See e.g. Douglas W Allen, “Homesteading and Property Rights; or, ‘How the West was Really Won’” (1991) 34 J L Econ 1.

³⁵ Gregory S Alexander, *Commodity and Propriety: Competing Visions of Property in American Legal Thought, 1776-1970* (Chicago: University of Chicago Press, 1999) at 1 [Alexander, *Commodity and Propriety*].

³⁶ For a recent discussion of this thesis see Eric R Claeys, “Productive Use in Acquisition, Accession, and Labour Theory” in JE Penner & Henry E Smith, eds, *Philosophical Foundations of Property Law* (Oxford: Oxford University Press, 2013) 13.

the state was or ought to be limited in what it could do to property. When Locke's broader definition of property is recalled, it is clear his theory overlaps significantly with natural law theory. His argument that certain liberties and a person's life pre-date the state could (and does) function as a powerful limit to the state's claims of power.³⁷ Locke's theory offered a persuasive counter-balance to claims of the Crown, particularly in the context of the seventeenth century battles over absolutist monarchs in England. Locke's theory denies any divinely-appointed socio-political hierarchy – in this sense it is deeply Calvinist – and invokes the idea of a social contract, which in turn suggests men are born equal.³⁸

It is this idea of equality that informs Avihay Dorfman's recent re-reading of property doctrines. He argues that the strictness of trespass doctrine is best explained as a duty to respect the judgment of others, rather than any explanation grounded in exclusion.³⁹ In a conceptual sense, this means that we respect others' autonomy by respecting the boundaries of legal things; thus, the legal thing becomes a proxy for its owner. Such an understanding raises questions about the unequal distribution of private property and what this might mean for individual autonomy.⁴⁰ Dorfman's solution is that everyone should have some private property.⁴¹ His reasoning behind granting everyone some private property appears to be that everyone needs some property by fact of being an individual and no one can be fully autonomous without some private property.⁴² As laudable as such an argument is, it too seeks to avoid creating dependent individuals and thus fits well with the individualism seen in other property theories.

Locke also attempted to guard against the potential inequities of private property. His work contains prohibitions on taking more than a person needs,⁴³ but this comment seems to create a tension with his labour-desert thesis. Of the two ideas, the latter has certainly proven more popular with property theorists as they too attempt to show that property is more than just a creation

³⁷ Though compare Katz's argument in "Governing Through Owners", *supra* note 31.

³⁸ For reference to Locke's Calvinism see Sturm, *supra* note 24 at 382.

³⁹ Avihay Dorfman & Assaf Jacob, "The Fault of Trespass" (2015) 65:1 UTLJ 48 at 59–61.

⁴⁰ Avihay Dorfman, "The Normativity of the Private Ownership Form" (2012) 75:6 Mod L Rev 981 at 1007. Not all property theorists are concerned about the fact of the poor. See James Penner, "The State Duty to Support the Poor in Kant's Doctrine of Right" (2010) 12 British J Pol & IR 88 at 103–05 [Penner, "The State Duty"].

⁴¹ Dorfman, "Normativity", *supra* note 40 at 1007; Avihay Dorfman, "Private Ownership" (2010) 16 Leg Theory 1 at 35.

⁴² See his joint work with Hanoch Dagan in Dagan & Dorfman, "The Human Right", *supra* note 26 at 4–12. See also Christopher Essert, "Property and Homelessness" (2016) 44:4 Philosophy & Public Affairs 266 at 289. These arguments should be contrasted with those who argue for a welfare state as a solution to the inequalities of property. See e.g. Ernest J Weinrib, *Corrective Justice* (Oxford: Oxford University Press, 2012) at 263–96.

⁴³ Locke, *supra* note 18 at § 33.

of the state.⁴⁴ The labour-desert thesis, in addition to offering a counter-weight to the claims of the state, also grants private ownership a certain kind of moral heft.⁴⁵ A person had property because they worked hard to get it and therefore they deserved it, or so the theory goes. However, this also seems to suggest that the state results from the actions of the propertied, which raises questions about how those without property relate to the state.

The labour-desert thesis also suggests a particular kind of relationship to land; namely, a relationship of domination as evidenced through productive use such as farming which, in turn, suggests a degree of permanency. The idea that a nomadic or semi-nomadic people could have property rights over land is one that has only very recently found traction in common law countries such as Canada.⁴⁶ Under the doctrine of adverse possession, a lack of permanency or, indeed, the permanency of someone who did not in fact hold title to the land can be fatal to the true title-holder's claim. Of course, a key component of adverse possession cases is how the property is used. As Kate Green argues, courts in England shifted between "adverse possessor" and "squatter" as a way of negating the claims of those deemed to be squatting.⁴⁷ As Green points out, this relationship matters for questions of citizenship because the ideal citizen has a stake in the land and intends to remain there permanently.⁴⁸

The ideal citizen, as structured by property law, is the one who strives to own and improve land by working on it, or at least by actually living on the land – more commonly, in the house or condo – they own. Under Lockean theory, the state exists to protect what the citizen already has but does not grant property to those without. Locke's argument contains a paradox in that the state was both the protector of and a threat to private property. Locke may have suggested that in the state of nature there was a duty to leave "enough, and as good" for others, but once the propertied have formed civil society,⁴⁹ those without private property seem to have no way to redress their situation, at least not legally. As such, those without private property seem to be outside of the state and society.⁵⁰

⁴⁴ See e.g. Merrill, "Property Strategy", *supra* note 16.

⁴⁵ Jeremy Waldron, "'To Bestow Stability upon Possession': Hume's Alternative to Locke" in Penner & Smith, *supra* note 36, 1 at 7-12.

⁴⁶ See e.g. *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at paras 2, 32, [2014] 2 SCR 256.

⁴⁷ See generally Kate Green, "Citizens and Squatters: Under the Surfaces of Land Law" in Susan Bright & John Dewar, *Land Law: Themes and Perspectives* (Oxford: Oxford University Press, 1998) 229.

⁴⁸ *Ibid* at 252

⁴⁹ Locke, *supra* note 18 at § 27

⁵⁰ See e.g. Anna Grear, "A tale of land, the insider, the outside and human rights (an exploration of some problems and possibilities in the relationship between the English common law property concept, human rights law, and discourses of exclusion and inclusion)" (2003) 23 *Legal Stud* 33. My point is not that there is no financial or social mobility, but more that such mobility will not be achievable for everyone who might need it.

B. Free and Equal(ish): The State and Its Citizens

The constitutional relationship between the Canadian state and its citizens is perhaps best represented by the *Charter*. The *Charter* has been criticized by right-wing scholars for giving judges too much power,⁵¹ while left-wing scholars criticize its emphasis on negative freedom and its problematic understanding of the public-private divide.⁵² Nonetheless, the *Charter* does depict a society of formally equal individuals who have a range of political rights including free expression, freedom of religion, a right to life, guarantees about trial procedure, and voting rights for citizens. Such sections are also in line with bills of rights elsewhere and the guarantees offered in international human rights documents.

Charter jurisprudence has also made some other facets of the relationship between the state and the individual clear. For one thing, the doctrine of the separation of powers remains important for understanding the interplay between citizens and the different branches of government. In practical terms, courts tend to show a high degree of deference to certain kinds of government decisions, particularly those relating to how governments spend their money.⁵³ In theory such deference fits with the separation of powers and with democratic ideals given that unelected judges cannot rewrite the decisions of elected officials. Yet, at the same time, a high degree of deference towards decisions over socio-economic rights fits well with the concept of negative freedom as well as helping to bolster a particular kind of independent individual.

Despite the judicial preference for negative freedom, the *Charter* does contain some positive rights such as section 3's right to vote.⁵⁴ Benjamin Oliphant recently criticized the Supreme Court's approach to section 3 and accused the Court of greatly expanding this right.⁵⁵ The text of section 3 is relatively clear: "the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein."⁵⁶ However, in keeping with a purposive interpretive approach, the Supreme Court also understands itself as being required to also consider

⁵¹ See e.g. John Finnis, "Patriation and Patrimony: The Path to the *Charter*" (2015) 28:1 Can JL & Juris 51.

⁵² Allan C Hutchinson, *Waiting for Coraf: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995) at 131-36, 143; Patricia Hughes, "The Intersection of Public and Private Under the *Charter*" (2003) 52 UNBLJ 201.

⁵³ Carissima Mathen, "What Religious Freedom Jurisprudence Reveals About Equality" (2009) 6:2 JL & Equality 163 at 193; Porter, "Judging Poverty", *supra* note 6 at 147.

⁵⁴ Vanessa A MacDonnell, "The Constitution as Framework for Governance" (2013) 63 UTLJ 624 at 629; See also Klein, *supra* note 11 at 361 (noting how civil and political rights can impose costs). See also Arbour J's dissent in *Gosselin v Quebec (AG)*, 2002 SCC 84 at paras 319-29, 350, 359-61, [2002] 4 SCR 429.

⁵⁵ Benjamin J Oliphant, "Taking Purposes Seriously: The Purposive Scope and Textual Bounds of Interpretation Under the *Canadian Charter of Rights and Freedoms*" (2015) 65 UTLJ 239.

⁵⁶ *Charter*, *supra* note 8, s 3.

section 3's animating purposes and understands these purposes – which include “effective representation” and “meaningful participation”⁵⁷ – “to be *independently enforceable*” regardless of whether a person's ability to vote has actually been affected.⁵⁸ For Oliphant, such an approach extends the scope of section 3 beyond that which can be supported by a purposive reading of the text. He argues that section 3's wording and its exclusion from the notwithstanding clause strongly suggest that the right to vote was meant to be interpreted narrowly and as it was drafted.⁵⁹ While we might cheer the Court's concern for democracy, Oliphant argues that such an expansive approach undermines legal certainty and renders the scope of *Charter* rights subject to judicial discretion. Ironically this is itself undemocratic and undermines the idea of the separation of powers.

Oliphant's critique of the section 3 jurisprudence is instructive of the kind of backlash courts can face with respect to upholding positive rights; namely, that judicial support of such rights can err on the side of policy-making and thus usurp elected governments. It is arguable that the procedural turn in Canadian constitutional rights jurisprudence is evidence of courts mandating particular kinds of government action by “framing constitutional rights and freedoms in terms of the process and practices they require rather than in terms of specifically-mandated substantive outcomes.”⁶⁰ Again, such a turn reflects the courts' vigorous protection of democracy as seen in the section 3 jurisprudence while also showing significant deference towards democratic processes. As laudable as this might be, “there is a considerable risk that, in many contexts, process-based entitlements may be insufficient to reverse the continued effects of past abuses.”⁶¹ The procedural turn might offer one way to counter-balance claims of judicial overreach but it too suggests a particular kind of active and engaged individual. That is to say by mandating particular processes, *Charter* jurisprudence assumes that individuals will have the capacity to engage with these processes.⁶²

In addition, the procedural turn does little to address the line-drawing between public and private. The division between public and private does not just relate to particular sources of power, it also maintains a distinction between public and private spaces as well as the kinds of behaviour acceptable in each.⁶³ The point being that the *Charter* and its jurisprudence socialize individuals

⁵⁷ Yasmin Dawood, “Democracy and the Right to Vote: Rethinking Democratic Rights under the *Charter*” (2013) 51 Osgoode Hall LJ 251 at 259.

⁵⁸ Oliphant, *supra* note 55 at 268–69 [emphasis in original].

⁵⁹ *Ibid* at 242–43, 270–80.

⁶⁰ Colleen Sheppard, “Inclusion, Voice, and Process-Based Constitutionalism” (2013) 50:3 Osgoode Hall LJ 547 at 548.

⁶¹ *Ibid* at 560.

⁶² By capacity I mean not just in their ability to understand the processes and how to engage with them but that they will have the time and the money to do so.

⁶³ Berger, *supra* note 19 at 91–98.

into appropriate behaviours just as much as they direct governmental action. Such socialization is made clear by the jurisprudence on *Charter* rights which also tacitly invokes questions of property; in particular the use of public property. For example, section 2(b) jurisprudence has shown a preference for expression that imposes minimal limits on public resources, including the use of public property.⁶⁴ In fact, scholars have long-standing concerns about the limited property available for section 2(b) claims.⁶⁵ Even though the *Charter* does not explicitly protect private property, the jurisprudence seems to assume that citizens will have some as they exercise their *Charter* rights.⁶⁶ Of course, an individual can use public property for the exercise of these rights; however, as public property is heavily regulated so too is the exercise of *Charter* rights in such locations. As yet, the government is not required to offer locations for the exercise of section 2(b) rights nor is it required to offer locations for the exercise of other section 2 rights. Section 2 rights are rights that the individual, or the citizen, has *ab initio* (from the beginning). Much as with the Lockean vision of society, these are not rights which emerge from the state but which government exists to protect, even though the government is the only one who can actually infringe *Charter* rights.

Section 7's protection of "life, liberty and security of the person" is also a right that the individual has *ab initio*. Yet, it is also a right that could impose positive obligations on governments. Early judicial commentary on the scope of section 7 suggested that it might include socio-economic rights,⁶⁷ though the Supreme Court has never confirmed whether this is in fact the case. Such a reading of section 7 would challenge the judicial preference for independent individuals as well as raise questions about the role of property and its relationship to the *Charter*. At the present time, however, Canadian constitutional culture, much like Lockean theory, seems to understand the individual as pre-dating the state. While it is not the case that those without private property of their own are completely without rights, the right to housing is not yet one of these rights as two recent cases make clear. Before looking at these two cases, it is helpful to set the Canadian struggle for a right to housing in the context of Canadian social housing to illustrate the preference for private ownership.

⁶⁴ Sarah E Hamill, "Location Matters: How Nuisance Governs Access to Property for Free Expression" (2014) 47:1 UBCL Rev 129.

⁶⁵ Brian Slattery, "Freedom of Expression and Location: Are There Constitutional Dead Zones?" (2010) 51 Sup Ct L Rev 245; Richard Moon, "Access to Public and Private Property Under Freedom of Expression" (1988) 20 Ottawa L Rev 339; Richard Moon, "Freedom of Expression and Property Rights" (1988) 52 Sask L Rev 243.

⁶⁶ They cannot use another's private property, for example. See *Michelin v CAW*, [1997] 2 FCR 306, 1996 CanLII 11755 (FC)

⁶⁷ *Irwin Toy Ltd v Quebec (AG)*, [1989] 1 SCR 927 at 1003-04, 58 DLR (4th) 577.

II. Social Housing in Canada: A Brief Overview

Canada has had its share of housing crises in its short history. In fact, it is arguable that some parts of the country, particularly the more remote communities, exist in a perpetual state of housing crisis.⁶⁸ In other areas, housing crises echo the boom-and-bust cycle of the local economy.⁶⁹ Not surprisingly some industries have offered housing along with employment; the Hudson's Bay Company's forts for its fur traders offer a historic example, while logging camps and tar sands outposts offer more recent examples.⁷⁰ Company housing is a localized solution to the need to house people, but it highlights the fact that Canadian governments have had and continue to have extraordinary faith that the private market will fill gaps in housing.⁷¹ Historians of Canadian housing have shown that when it comes to the provision of public housing, Canada did not adopt a third way between British and American practices as might typically be expected, but proved to be "more American than the United States;" meaning Canada placed even greater faith in the private market than was seen in the U.S.⁷² The goal of Canadian federal housing programs has largely been to support *private homeownership* rather than to provide social housing.⁷³ The consultative report recently issued by the federal government includes specific references to social housing and the need to support and develop it further, but it also

⁶⁸ Sean Purdy, "It Was Tough on Everybody": Low-Income Families and Housing Hardship in Post-World War II Toronto" (2003) 37:2 J Soc Hist 457 at 457 (noting that in the urban context low-income families exist in a permanent housing crisis).

⁶⁹ Richard Harris, "The Flexible House: The Housing Backlog and the Persistence of Lodging, 1891-1951" (1994) 18:1 Social Science History 31 at 42, 46-48 [Harris, "Flexible House"]; Brian P Melnyk, *Calgary Builds: The Emergence of an Urban Landscape, 1905-1914* (Regina: Canadian Plains Research Centre, 1985) at 46.

⁷⁰ Peter Ennals & Deryck W Holdsworth, *Homeplace: The Making of the Canadian Dwelling over Three Centuries* (Toronto: University of Toronto Press, 1998) at 121-44; Nancy M Forestell, "Bachelors, Boarding-Houses, and Blind Pigs: Gender Construction in a Multi-Ethnic Mining Camp, 1909-1920," in Franca Iacovetta, Paula Draper and Robert Ventresca, eds, *A Nation of Immigrants: Women, Workers, and Communities in Canadian History, 1840s-1960s* (Toronto: University of Toronto Press, 1998) 251; For the modern tar sands camps, see Brent Wittmeier, "Life in a northern work camp: Huge 'shadow population' of oil workers flies in, flies out" *Edmonton Journal* (26 November 2013) online: < <http://edmontonjournal.com/business/life-in-a-northern-work-camp-huge-shadow-population-of-oil-workers-flies-in-flies-out/wcm/76433000-2960-453c-a6bd-0284e2e87bd7>>.

⁷¹ In the twentieth century one man had a remarkable influence on the shape of housing policy. See John Bacher, "W.C. Clark and the Politics of Canadian Housing Policy, 1935-1952" (1988) 17:1 Urban History Rev 4; Kevin Brushett, "'Where will the People Go?': Toronto's Emergency Housing Program and the Limits of Canadian Social Housing Policy, 1944-1957" (2007) 33:3 Journal of Urban History 375 at 377; Richard Harris, "More American than the United States: Housing in Urban Canada in the Twentieth Century" (2000) 26:4 Journal of Urban History 456 at 456-57, 469 [Harris, "More American"].

⁷² Harris, "More American", *supra* note 71 at 456-57.

⁷³ Sean Purdy, "'Ripped off' by the System: Housing Policy, Poverty, and Territorial Stigmatization in Regent Park Housing Project, 1951-91" (2003) 52 Labour/Le Travail 45 at 80; Barbara Wake Carroll & Ruth JE Jones, "The Road to Innovation, Convergence or Inertia: Devolution in Housing Policy in Canada" (2000) 26:3 Can Pub Pol 277 at 278. See also the inter-war housing policy in Jill Wade, "The 'Sting' of Vancouver's Better Housing 'Spree', 1919-1949" (1993) 21:2 Urban History Rev 92.

includes multiple references to the need for private ownership and ways to support that.⁷⁴ It remains to be seen what the exact shape of the National Housing Strategy will be, but, if it is anything like past housing strategies, we can expect an emphasis on paths to private ownership.⁷⁵

The accepted history of Canadian social housing is that it properly began in 1949 with the building of Toronto's Regent Park.⁷⁶ Earlier housing programs such as the post-World War One program aimed primarily at securing funding to build private homes, rather than providing much-needed social housing.⁷⁷ The problem with the accepted history of social housing in Canada is that it ignores the experiences of Indigenous Peoples. The assertion that Toronto's Regent Park was Canada's first example of public housing fails to acknowledge that much of the housing on many of Canada's First Nation reserves was (and still is) a kind of social housing.⁷⁸ Historically, the *type* of housing on reserves or used by Indigenous Peoples was of particular concern to the federal government as they viewed English-style, single-family dwellings as being vital markers of assimilation and thus civilization. Not surprisingly, Indian agents and others encouraged the adoption of such housing.⁷⁹ That being said, Perry's study of First Nations' housing in British Columbia makes clear that certain motifs of Indigenous housing were incorporated into the new styles of housing both at the behest of Indigenous Peoples themselves and of those trying to "civilize" them.⁸⁰ As such, housing is as much about the community it creates as it is about its effect on the individual. Admittedly, reserve land falls under a significantly different governance scheme than non-reserve land. The point of referencing reserve housing is to highlight that social housing in Canada has a longer history than is usually explicitly discussed, even by scholars of such housing.⁸¹

⁷⁴ *What We Heard*, *supra* note 3 at 17–18, 20, 29, 33–36, 38–39, 65.

⁷⁵ Though the strategy has now been released, it is still too premature to have a firm sense of what it will actually deliver and how. For example, the report talks of new legislation and improving access to homeownership <<https://www.placetocallhome.ca/pdfs/Canada-National-Housing-Strategy.pdf>> at 9, 22–23.

⁷⁶ Harris, "More American", *supra* note 71 at 469. See also Ryan K James, "From 'slum clearance' to 'revitalisation': planning, expertise and moral regulation in Toronto's Regent Park" (2010) 25:1 *Planning Perspectives* 69 at 73. James qualifies the primacy of Regent Park by calling it the first "large scale" public housing project. Yet Regent Park was built with "minimal higher-level government funding"; see Richard White, "Urban Renewal Revisited: Toronto, 1950 to 1970" (2016) 97:1 *Can Hist Rev* 1 at 9.

⁷⁷ See e.g. Wade, *supra* note 73; Sendbuehler & Gilliland, *supra* note 21; Sean Purdy, "Building Homes, Building Citizens: Housing Reform and Nation Formation in Canada, 1900–20" (1998) 79:3 *Can Hist Rev* 492 at 494.

⁷⁸ I say 'many' rather than 'all' as some reserves, particularly in parts of British Columbia, are not where the actual community lives. See e.g. Daniel Sims, "'Not That Kind of Indian': The Problem with Generalizing Indigenous Peoples in Contemporary Scholarship and Pedagogy", *Activehistory.ca* (12 January 2016), online: <<http://activehistory.ca/2016/01/not-that-kind-of-indian-the-problem-with-generalizing-indigenous-peoples-in-contemporary-scholarship-and-pedagogy/>>.

⁷⁹ Perry, *supra* note 21 at 589–90.

⁸⁰ *Ibid* at 603–04.

⁸¹ The absence of on-reserve housing may be because Canadian urbanists, who form the bulk of scholars of

The rhetoric which historically surrounded on-reserve housing – the importance of the single-family dwelling, concerns about over-crowding, concerns about cleanliness, and the role of good housing in creating virtuous citizens – was echoed in housing debates in off-reserve spaces.⁸² In off-reserve Canada, housing crises tended to be more noticeable and cause more concern in urban centres.⁸³ That is not to say there were no such crises outside the cities; rural areas, particularly during the rush to settle the Prairies, faced housing pressures, but these were pressures which could be more easily addressed by temporary shelter in hotels,⁸⁴ or by the individuals in question building their own homes on their own land.⁸⁵ Both of these rural solutions placed the onus on the individual to house themselves and both echo the myth of individual self-reliance.

In the major cities, or soon to be major cities, land was not always so readily available or affordable for newcomers. From the mid-nineteenth century until its razing in the mid-twentieth century, The Ward in downtown Toronto offered the classic example of an urban slum; a slum which was all the more problematic given the tendency of “foreign,” which, at the time meant non-British, immigrants to settle there.⁸⁶ Even in cities such as Winnipeg, Edmonton and Calgary, where land was more readily available than in Toronto, the demand for housing often outstripped the pace of building in the early twentieth century. In order to meet demand, there was a brief flurry of apartment building in the 1910s in Western Canada, though single-family dwellings remained the ideal.⁸⁷ The reason apartment buildings never became entirely accepted for early twentieth-century social reformers was because

social housing, have been slow to acknowledge Indigenous peoples either within or without the city. See e.g. Penelope Edmonds, “Unpacking Settler Colonialism’s Urban Strategies: Indigenous Peoples in Victoria, British Columbia, and the Transition to a Settler-Colonial City” (2010) 38:2 *Urban History Rev* 4 at 4.

⁸² For the rhetoric re Indigenous housing see eg Perry, *supra* note 21 at 588–95; Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal: McGill-Queen’s University Press, 1990) at 179–80. For the off-reserve rhetoric, see Brushett, *supra* note 71 at 377, 383–92; Purdy, “Building Homes”, *supra* note 77 at 498.

⁸³ Richard Harris, “Slum-Free: The Suburban Ideal” in John Loring et al, eds, *The Ward: The Life and Loss of Toronto’s First Immigrant Neighbourhood* (NP: Coach House Books, 2015) 233 (discussing the example of a suburb where British immigrants settled and noting how it was also poverty-stricken) [Harris, “Slum-Free”].

⁸⁴ Sarah E Hamill, “Prohibition Plebiscites on the Prairies: (Not-So) Direct Legislation and Liquor Control in Alberta, 1915 to 1932” (2015) 33:2 *L & Hist Rev* 377 at 405–06. For an American perspective see AK Sandoval-Strausz, *Hotel: An American History* (New Haven: Yale University Press, 2007) at 95.

⁸⁵ As was envisaged by the homesteading legislation which required proof of settlement or cultivation: *Dominion Lands Act*, 35 Vict, c 23 (1872), s 33(11) and (16).

⁸⁶ Richard Dennis, “Private Landlords and Redevelopment: ‘The Ward’ in Toronto, 1890-1920” (1995) 24:1 *Urban History Rev* 21 at 23; Harris, “Slum-Free”, *supra* note 83; Nicholas Lombardo, “White-Collar Workers and Neighbourhood Change: Jarvis Street in Toronto, 1880-1920” (2014) 43:1 *Urban History Rev* 5 at 16 (noting how Jarvis Street had many boarding houses but because Jarvis Street was mainly Anglo-Canadian it caused much less concern than The Ward).

⁸⁷ Richard Dennis, “Apartment Housing in Canadian Cities, 1900-1940” (1998) 26:2 *Urban History Rev* 17 at 18–19 [Dennis, “Apartment Housing”]; Sean Purdy, “Industrial Efficiency, Social Order and Moral Purity: Housing Reform Thought in English Canada, 1900-1950” (1997) 25:2 *Urban History Rev* 30 at 35.

such buildings caused concern due to the forced proximity of different people and the belief that immorality could result from such proximity.⁸⁸

The housing crisis that finally prompted the development of social housing in off-reserve Canada came at the end of the Second World War.⁸⁹ While many cities across Canada saw the use of former barracks as temporary housing, the problem seemed particularly acute and persistent in Toronto.⁹⁰ The standard of urban housing had long been a concern to Canada's army of social reformers. Much like related campaigns surrounding temperance and other sources of vice, social reformers understood the home and morality as having a relationship akin to that of the chicken and the egg; they were related to be sure, it was just not clear which came first.⁹¹ Adequate housing led to virtuous people but, at the same time, poorly maintained housing reflected the lack of virtue of its inhabitants.⁹² As with a great many things, the need to protect children offered an escape from the circular reasoning of social reformers and a justification for the provision of social housing.⁹³

The boom period for social housing in Canada came in the 1950s and 60s.⁹⁴ Since then remarkably little new social housing has been built which has resulted in lengthy waiting lists for existing social housing units. In some parts of Canada, the wait times can run to ten years,⁹⁵ while some First Nations communities face wait times of a quarter-century for on-reserve housing.⁹⁶ In addition to the shortage of social housing in Canada, there is also the issue of quality, as the housing that is available is often in disrepair. This situation is particularly dire in some First Nations communities. As well as being in a poor state of repair, social housing, including Toronto's Regent Park, quickly became beset by the very societal ills that they were meant to solve.⁹⁷ At present, a significant number of Toronto's social housing units have deteriorated to the point that they are no longer habitable.⁹⁸ Thus no sooner

⁸⁸ Dennis, "Apartment Housing" *supra* note 87 at 19–20. Similar concerns were seen in the US: Batlan, *supra* note 13 at 76, 78–79.

⁸⁹ See Brushett, *supra* note 71. See also, Babara Wake Carroll, "Post-War Trends in Canadian Housing Policy" (1989) 18:1 *Urban History Rev* 64 at 64–65. For some discussion of the post-World War I housing crisis and responses to it, see Wade, *supra* note 73.

⁹⁰ See Brushett, *supra* note 71.

⁹¹ See e.g. Batlan, *supra* note 13; Little, *supra* note 13 at 47, 62–63, 79.

⁹² Brushett, *supra* note 71 at 383–84, 392; Little, *supra* note 13 at 62–63.

⁹³ Brushett, *supra* note 71 at 390; Little, *supra* note 13 at 55.

⁹⁴ See Wake Carroll, *supra* note 89 at 64–67; Jonathan Greene, "Urban Restructuring, Homelessness, and Collective Action in Toronto, 1980–2003" (2014) 43:1 *Urban History Rev* 21 at 24.

⁹⁵ Laurie Monsebraaten, "Ontario's affordable housing wait list hits record high", *Toronto Star* (4 May 2015). Online: <www.thestar.com>.

⁹⁶ See e.g. *Tsilqot'in Nation v British Columbia*, 2007 BCSC 1700 at para 25 (noting lengthy waits for housing on Tsilqot'in reserves).

⁹⁷ James, *supra* note 76 at 70–71; Purdy, "Ripped Off", *supra* note 73.

⁹⁸ See Ontario, Mayor's Task Force on Toronto Community Housing, *Transformative Change for TCHC: A Report from the Mayor's Task Force on Toronto Community Housing* (Chair: Art Eggleton), (Toronto: City of Toronto, 26 January 2016) at 18, online: <<https://www.toronto.ca/legdocs/mmis/2016/ex/bgrd/backgroundfile-88607.pdf>>; Michelle Cheung, "Toronto Community Housing: Thousands of units could

was social housing promoted as the solution to urban slum housing than it became urban slum housing itself.

The problem with social housing is that it tended to and continues to ignore the voices of the people who live in it.⁹⁹ Admittedly, the consultative report around the National Housing Strategy did include low-income and other marginalized voices in its report.¹⁰⁰ Whether or not their input actually helps shape the actual housing strategy remains to be seen. Historically speaking, social housing is a solution that has been imposed upon people, not one they were always allowed a say in.

Although the federal government remains involved in the Canadian housing market, scholars have noted that federal policy has tended to benefit middle-class people more than anyone else and has “a long history of focusing more on ‘market welfare’ than on ‘social welfare’ approaches to housing problems.”¹⁰¹ The potential for this bias remains as the *Let's Talk Housing* website states: “The Government of Canada believes that housing is an essential part of our approach to strengthen the middle class, fuel our economy and improve lives across the country.”¹⁰² At best this statement can be read as a mix of the market welfare and social welfare ideals. Scholars elsewhere have noted that from the 1970s onwards government welfare shifted from the poor to the wealthy;¹⁰³ however, in the context of Canadian social housing, the consensus among historians of housing in Canada is that the federal government has shown a marked preference for encouraging individual, private ownership. The disagreement lies in the reasons why. Some believe that it resulted from a desire to create particular kinds of citizens,¹⁰⁴ while others argue that, particularly in the inter-war period, the federal and provincial governments’ preferences for helping middle-class people is best explained by its desire to avoid financial risks.¹⁰⁵ As the next section makes clear, the status quo remains as it has always been: governments, particularly at the federal level, continue to believe that the private market will fill the gap which leaves housing provision to provincial or municipal governments, who are often equally reluctant or unable to offer assistance without federal funding. Before moving on to examine the continued silencing of those

close due to lack of cash for repairs” *CBC News* (11 March 2016) online: < <http://www.cbc.ca/news/canada/toronto/subsidized-housing-tch-federal-budget-1.3487070> >.

⁹⁹ Worryingly, this patterns holds at the UN as well. See Farha, *supra* note 5 at 120 (noting how the UN ignored women’s needs in its discussion of housing). But see White, *supra* note 76 arguing that at least in urban renewal contexts Toronto did show some sensitivity to the concerns of residents.

¹⁰⁰ For a summary of the consultation process, see *What We Heard*, *supra* note 3 at 43–44.

¹⁰¹ J David Hulchanski, “The 1935 Dominion Housing Act: Setting the Stage for a Permanent Federal Presence in Canada’s Housing Sector” (1986) 15:1 *Urban History Rev* 19 at 35, 38; Bacher, *supra* note 71; Purdy, “Building Homes”, *supra* note 77 at 514–15

¹⁰² See front page, <https://www.letstalkhousing.ca/> (accessed 16 December 2016).

¹⁰³ Massimo De Angelis, “Crises, Movements and Commons” (2012) 11:2 *Borderlands* 1 at 2.

¹⁰⁴ Purdy, “Building Homes”, *supra* note 77 at 493, 505, 514–15

¹⁰⁵ Sendbuehler & Gilliland, *supra* note 21 at 43.

without private property, it is helpful to draw some explicit links between questions of housing and property.

Given the importance of property to Lockean theory and the fact that houses function as a key example of private property, a right to housing is an awkward fit with Lockean theory. Under Lockean theory, property seems to be something a person already has prior to entering civil society; the state does not grant or create property, it simply protects property. Yet a right to housing suggests that a person ought to be given some kind of property right by virtue of being an individual. Secondly, a right to housing is a positive-rights claim that runs counter to the negative rights focus of both Lockean theory and Canadian constitutional culture. In effect, social housing takes the paradigmatic example of private property and makes it public. Consequently, the claim for a right to housing could be understood as a demand for the distribution of property in a way that undermines, even inverts the Lockean view of the individual-state relationship. Instead of individuals coming together to protect their property, the right to housing could be understood as a claim to property made after individuals have come together to form civil society. More troublingly, given the links between private ownership and moral worthiness, a right to housing is heard as a claim for something that the individual does not deserve.

III. A Right to Housing: Two Recent Cases

At first glance, *Tanudjaja* and *Shantz* might seem quite different but the decisions in both cases argue that questions of housing rights are properly political while illustrating the limits of political discourse in addressing the issues raised by a lack of housing. As part 2 made clear, successive Canadian governments have followed a housing policy which encourages private ownership rather than one which helps those most in need of housing. *Tanudjaja* and *Shantz* highlight the longstanding assumption that it is *individuals* and *private property* that are the appropriate solutions to housing crises, meaning that both courts and politicians are deaf to the claimed rights. For ease of analysis each case is examined separately and then a summary is provided which references the recommendations and suggestions included in the consultative report on the National Housing Strategy.

A. *Tanudjaja*: Politics Versus Law

The plaintiffs in *Tanudjaja* hoped it would be a case alleging breaches of sections 7 and 15 of the *Charter* caused by Canada and Ontario's action and inaction on social housing. However, the claim that there had been a *Charter* violation was never heard. Both the Ontario Superior Court and a majority

of the Court of Appeal found that the appellants “did not disclose a viable cause of action and the application had no reasonable prospect of success.”¹⁰⁶ As such, *Tanudjaja* did not even advance to a hearing, the reported decisions being about a procedural issue rather than the substance of the plaintiffs’ claims. Had it been heard, the case would have been a broad one centred on “the social conditions created by the overall approach of the federal and provincial governments” and how these conditions “violate their rights to adequate housing” rather than one challenging a particular law or policy.¹⁰⁷

Given the historic tendency to blame the poor for their own predicament, as set out above, the individual appellants in *Tanudjaja* seem to have been deliberately chosen to challenge such tendencies. Each of the plaintiffs’ stories are striking in how they exemplify Canada’s lack of a social safety net: one appellant lost his housing after illness left him unable to work; another became homeless after her husband died suddenly and was spending over sixty percent of her monthly income on rent; one became disabled after an accident at work and lived in an inaccessible apartment; while the fourth was a single mother on social assistance whose rent was double the shelter allowance granted by social assistance.¹⁰⁸ Of the four, three were on the waitlist for subsidized housing at the time of the decision.

A majority at the Court of Appeal found that the appellants’ claim was properly a political one and so was not justiciable.¹⁰⁹ The case lacked a sufficiently *legal* component to engage the *Charter*. In theory, the *Charter* applies to government action rather than just the content of laws and legislation, a fact Justice Pardu seemed to recognize by quoting and emphasizing the Supreme Court’s comments that “when a policy is translated *into law or state action*, those *laws and actions* are subject to scrutiny under the *Charter*.”¹¹⁰ However, Canada’s various cancellations and withdrawals from funding housing, along with Ontario’s various terminations of funding and delegations of authority to municipalities did not seem to count as the translation of policy into law or state action.¹¹¹ Justice Pardu’s line-drawing also emphasized the politics-versus-law distinction. Justice Pardu’s distinction appears to turn on the fact that the Court could not give a decision because simply declaring that the government “was required to develop a housing policy... would be so devoid of content as to be effectively meaningless.”¹¹² For Justice Pardu, then, legal questions are narrow and political questions are broad. Justice

¹⁰⁶ *Tanudjaja*, *supra* note 12 at paras 1-9.

¹⁰⁷ *Ibid* at para 10.

¹⁰⁸ *Ibid* at paras 2-7.

¹⁰⁹ *Ibid* at paras 23-27.

¹¹⁰ *Ibid* at para 24, quoting *Canada (AG) v PHS Community Services Society*, 2011 SCC 44 at para 105, [2011] 3 SCR 134 [emphasis added by Justice Pardu].

¹¹¹ *Tanudjaja*, *supra* note 12 at paras 11-12.

¹¹² *Ibid* at para 33.

Pardu's comments about developing a housing policy seem strange, given that the proposed remedies were described as "strategies" by the appellants, which suggest something more tangible than the policy outlined by Justice Pardu.¹¹³

Justice Pardu also observed that section 7 created no "freestanding" right to housing.¹¹⁴ Section 7 does not require governments to provide the necessities of life; it simply requires governments to refrain from limiting an individual's attempt to stay alive, as *Shantz* makes clear.¹¹⁵ As much as the appellants in *Tanudjaja* may have suffered as a result of inadequate housing, the law could give them no remedy; it could not even hear their case. In terms of housing policy, the government treats healthy Canadians and severely disabled Canadians equally, and does nothing to infringe anyone's ability to keep themselves alive. That some people cannot afford the necessities of life is an accident of the market, not a result of government policy and so the government is *Charter* compliant.

In dissent, Justice Feldman argued that the appellants should at least get their day in court.¹¹⁶ She noted that even though the case presented a novel approach to the *Charter* it was an approach that might yet be successful.¹¹⁷ She argued that many now accepted legal principles first came to be after attempts to strike them and that if novelty was always fatal to a claim then the law would never develop.¹¹⁸ Furthermore, she noted that section 7 of the *Charter* does not yet have settled parameters and, even if it did, the motion judge had misunderstood the appellant's claim.¹¹⁹ With respect to section 7 and positive obligations, Justice Feldman noted that the Supreme Court had left it open as to whether it could impose positive obligations.¹²⁰ Justice Feldman also emphasized that this was a serious claim that was supported by "a number of credible intervening institutions."¹²¹ Here, Justice Feldman emphasized that the appellants and their counsel were not seeking to waste the court's time but were genuinely engaged in advancing the *law*.

B. *Shantz*: The Status Quo

Although commentators sympathetic to the homeless litigants in *Shantz* heralded the case as a victory, it does not represent much, if any, advance in

¹¹³ *Ibid* at para 15.

¹¹⁴ *Ibid* at paras 30–31.

¹¹⁵ *Shantz*, *supra* note 12.

¹¹⁶ For a discussion of the difficulty of getting poverty issues to court, see Porter, "Claiming Adjudicative Space" *supra* note 6.

¹¹⁷ *Tanudjaja*, *supra* note 12 at para 43.

¹¹⁸ *Ibid* at paras 45–49.

¹¹⁹ *Ibid* at paras 52–53.

¹²⁰ *Ibid* at para 56.

¹²¹ *Ibid* at para 88.

the law. In effect, *Shantz* echoes the earlier decision in *Victoria (City) v Adams*,¹²² and, as with *Adams*, *Shantz* held that municipal bylaws that sought to limit or prevent overnight ‘camping’ in urban parks were unconstitutional because they violated section 7 of the *Charter*.¹²³ Like *Adams*, such a holding ignores that the nature of the claim was not necessarily about overnight camping but about a tent city, or as they were called in *Shantz*, “tent camps.”¹²⁴

Unlike *Adams*, the homeless in *Shantz* also attempted to challenge Abbotsford’s failure to develop adequate housing.¹²⁵ Echoing Justice Pardu’s decision of the previous year, Chief Justice Hinkson declared that “[i]t is not for this Court to wade into the political arena to assess the City’s reaction to the need for housing.”¹²⁶ Nonetheless, he referenced various initiatives by Abbotsford such as a new shelter and new support services for homeless people as evidence that “a number of the City employees...have shown compassion and understanding for the City’s homeless.”¹²⁷ Such references make sense given that, as with *Adams*, the alleged *Charter* breach only existed when the number of homeless people exceeded the number of available shelter beds.¹²⁸ Chief Justice Hinkson’s echoing of Justice Pardu’s judgement in *Tanudjaja* suggests that he too believes that homeless individuals should lobby politicians for adequate housing instead of going to court to force Abbotsford to provide such housing.

Shantz’s *Charter* arguments were not, however, limited to section 7 even though that is the only section that the court found the city to have breached. The group representing the homeless, known as Drug War Survivors (DWS), argued that Abbotsford had violated their section 2(c) and 2(d) *Charter* rights to peaceful assembly and free association, respectively. Chief Justice Hinkson held that if the homeless could rely on section 2(c) to ‘live’ in parks, this would violate other people’s right to use parks for peaceful assembly, while the very fact that they had formed DWS negated their section 2(d) claim.¹²⁹ Similarly, the section 15 argument failed because homelessness is not an analogous ground. On that point, Chief Justice Hinkson cited the decision of the Ontario Superior Court in *Tanudjaja*, which observed that it was impossible to identify who was homeless, what counted as “adequate housing” would differ from person to person, and “[b]eing without adequate housing is not a personal

¹²² *Victoria (City) v Adams*, 2009 BCCA 563, 313 DLR (4th) 29 [*Adams*]. For commentary on this case see Sarah E Hamill, “Private Property Rights and Public Responsibility: Leaving Room for the Homeless” (2011) 30 Windsor Rev Leg Soc Iss 91–114.

¹²³ *Shantz*, *supra* note 12 at para 285.

¹²⁴ *Ibid* at paras 26–32.

¹²⁵ *Ibid* at para 120.

¹²⁶ *Ibid* at para 123.

¹²⁷ *Ibid* at paras 120–22.

¹²⁸ *Ibid* at para 123.

¹²⁹ *Ibid* at paras 150, 160, 168.

characteristic...or a fact that can be determined on objective criteria.”¹³⁰ To put it differently, a person’s poverty is changeable and adequate housing is too individualized to be definable.¹³¹

Accordingly, the homeless in *Shantz* could only challenge Abbotsford’s by-laws by the fact of being alive. It is not that they did not have other *Charter* rights but that these rights were not and could not be infringed by Abbotsford’s by-laws. This is because homelessness is not an analogous ground under section 15 and the bylaws represented a balancing of DWS’s section 2 rights with everyone else’s section 2 rights. The very fact of the homeless being alive did not require the city to take steps to keep them alive; it merely prevented Abbotsford from interfering with homeless people’s own attempts to keep themselves alive by erecting shelter *at night*. During the day, at least in a strictly legal sense, homeless people are not allowed to build shelter.¹³² The duty to keep oneself alive, if such a duty can be said to exist, falls to the individual; the government’s task is to leave individuals with the space to do so. That being said, the space left must also balance the rights of the homeless with the rights of everyone else to use parks. Taking *Shantz* and *Adams* to their logical conclusions means that while tent camps or tent cities are increasingly common in Canadian cities, they are only legal at night.

C. Summary

The argument that “adequate housing” and the government’s role in providing such housing is a policy decision and is not required by law runs throughout these two cases. It is not that the decisions ignore the ways in which inadequate housing has a devastating impact upon people, but that they are much more comfortable with the narrative of individual striving. The courts do recognize various factors which can prevent people from bettering themselves – disability, poverty, abuse, unemployment, a lack of affordable housing, and so on – but there is a nagging sense that these are misfortunes which do not impose any duties upon the state, other than to prosecute any related crimes. Instead, the onus is on the individual to lobby governments for adequate housing, even though it is clear that such tactics have not worked in the past, as shown in section 2. Based on the cases discussed above, it would seem the courts place extraordinary faith in the political process to remedy a lack of adequate housing, just as governments have faith that the private market will fill the housing gap.¹³³

¹³⁰ *Ibid* at para 231, citing *Tanudjaja v Canada (AG)* 2013 ONSC 5410 at paras 129–30, 134–35, 116 OR (3d) 574.

¹³¹ That said, the United Nations has managed to come up with a definition. See United Nations Human Rights Office of the High Commissioner, online: <www.ohchr.org/EN/Issues/Housing/toolkit/Pages/RighttoAdequateHousingToolkit.aspx>.

¹³² *Johnston v Victoria (City)*, 2011 BCCA 400.

¹³³ See section 2, *supra*.

It may be that the imminent federal housing strategy will redeem the courts' faith in the political process to cure housing ills, but a close reading of the consultative report illustrates a potential weakness of lobbying efforts. One suggestion made in the report is that funding for housing should be decoupled from the "electoral cycle."¹³⁴ Such a recommendation speaks to the ways in which housing policy has, historically, been vulnerable to shifts in political will. Yet without some kind of explicit constitutional recognition that there is a right to housing it is hard to imagine a way that funding could be completely decoupled from the electoral cycle. More worryingly, the consultative report suggests that the federal government continues to view social housing and rented accommodation as transitional with the ultimate goal being one of home ownership.¹³⁵ Such a statement suggests that the imminent housing strategy will retain much of the faith in the private market that has always shaped federal housing policy.

Despite over twenty years of argument that a right to housing could be protected by the *Charter*, *Tanudjaja* and *Shantz* illustrate the gulf between such claims and the reality. Insofar as the *Charter* claim in *Shantz* was successful, it was only successful in terms of the section 7 claim. What *Shantz* did not make explicit is that a right to life is not much use without space in which to live. Section 7 claims will not always invoke the need for a physical location but in *Shantz*, as in other homelessness cases, the success of the claim hinged on the fact that the homeless have nowhere else to go and need some form of (nighttime) shelter to survive. Perhaps ironically, the section 2 claims, particularly those of free expression and free assembly, failed. Their failure was partially due to the fact that non-homeless individuals also needed the parks for such rights.¹³⁶ Here the decision in *Shantz* echoes the argument made by the City of Victoria in the earlier *Adams* case; namely that, by building a tent city, the homeless were effectively appropriating public space for private use.¹³⁷

Tanudjaja's Charter claim would have been much broader and subtler had it been heard. I say subtler because *Shantz's* right to life claim was much more immediate in that homeless people can and do die of exposure where they do not have adequate shelter. In contrast, the litigants in *Tanudjaja* aimed at the overall effect of governments' laws and policies as infringing their section 7 rights, they did not single out a particular law or policy as violating the *Charter* and there was no immediate threat of death or serious illness. The style of rights-enforcement *Tanudjaja* aimed at was not the negative-rights model seen

¹³⁴ *What We Heard*, *supra* note 3 at 26.

¹³⁵ *Ibid* at 20.

¹³⁶ *Shantz*, *supra* note 12 at paras 162–68.

¹³⁷ *Adams*, *supra* note 122 at paras 98–101.

in *Shantz* but a more administrative-review style.¹³⁸ *Tanudjaja*, had it advanced to a hearing of the issues, would have been an attempt to hold the federal and provincial governments accountable for their housing strategies or lack thereof. As Klein noted, such administrative-review style attempts at rights-enforcement are more common in states where the constitution explicitly recognizes social and economic rights.¹³⁹ Nonetheless, even if *Tanudjaja* had advanced to a full hearing the litigants would have had no guarantee of success.

IV. How to Realize the Right to Housing

The argument that adequate housing is a policy decision renders courts deaf to the claim that there is a right to housing. Politicians suffer from a similar form of deafness; ironically it was the politicians' deafness and refusal to act that prompted the appellants in *Tanudjaja* and *Shantz* to turn to the *Charter* to try to obtain adequate housing. Such deafness has a long history, and residents of public housing or future residents of public housing are often silenced in the discussions that surround it.¹⁴⁰ The preference for private ownership as the best (if not the only) solution to Canada's many housing crises – even as private ownership exacerbates the housing crises in cities such as Vancouver and Toronto by driving up prices beyond that which are readily affordable – suggests that those without adequate housing will continue to be caught between the refusal of judges to interfere with policy and politicians' unwillingness to listen to marginal voices. Admittedly, the summary of consultations for the National Housing Strategy suggests some room for optimism, not least because the federal government took the time to include marginal voices in the consultation process. Yet, the history of federal involvement in housing cautions against such optimism. The report might reference a right to housing but until that receives explicit constitutional recognition, that right is hostage to political will and the vagaries of funding based on electoral cycles rather than need. Moreover, as noted, the report continues to assume that moving people towards private ownership is the ideal which suggests that, for all the optimism, the housing strategy will not depart too far from the status quo. For all of the political references to the right to housing,¹⁴¹ it seems doubtful that such a right will be achieved

¹³⁸ For more on this style of review see Klein, *supra* note 11 at 363.

¹³⁹ Klein, *supra* note 11.

¹⁴⁰ James, *supra* note 76 at 71, 74. But see *ibid* at 80.

¹⁴¹ See e.g. the recent reference by Federal Finance Minister, Hon Bill Morneau to "every Canadian's right to a safe and affordable place to call home" *House of Commons Debates*, 42nd Parl, 1st Sess, No 155 (22 March 2017) at 1640 (Hon Bill Moreau), online: <www.parl.gc.ca/HousePublications/Publication.aspx?Pub=hansard&Mode=1&Parl=42&Ses=1&DocId=8841563>. See also David Desbaillets, "Federal Budget 2017: When They Substitute Social Housing with Affordable Housing" (8 April 2017) *Forget the Box*, online: <www.forgetthebox.net/federal-budget-2017>.

under the law as it currently stands. The question is what would be needed to realize the right to housing?

The first and most obvious answer is a change in the law, especially one that recognizes the right to housing. However, realizing the right to housing is not just a matter of changing one law; it would require a significant change in the way the individual-state relationship is understood in Canada. Many social justice scholars emphasize the idea of substantive equality with the goal of replacing the usual judicial approach of formal equality. As laudable as this may be, it has not found much traction among judges, nor does it necessarily challenge the independent individual inherent in both Canadian constitutional culture and dominant understandings of property. The lawyers who argued *Tanudjaja* admit to mounting a challenge to systemic issues and a web of laws and policies but, in reality, their claim is even bigger.¹⁴² Their challenge is really to an entire way of thinking, to a particular kind of legal culture, which emphasizes a certain type of independent individual.

An alternative solution is perhaps found in DWS's failure in its section 2(c) and 2(d) arguments. Here Chief Justice Hinkson pointed out that public parks needed to be shared so that everyone else could exercise their section 2 rights. What he did not comment on was whether or not the government was obliged to provide spaces for the exercise of such rights or if whether once such spaces are provided they must be kept open for all. Either way, these comments and similar comments in earlier cases¹⁴³ suggest a positive obligation on the part of the government to at least balance or consider competing rights in their regulation of public spaces. Deliberately or not, such balancing or consideration locates specific rights' claims in a community of other rights' holders albeit in an abstract, formally equal way. It also suggests that the government is responsible for ensuring that one group does not ride roughshod over the rights of others to use particular spaces for the exercise of certain rights.

The idea that the state can work to protect individuals from each other calls to mind Lockean theory once more.¹⁴⁴ Locke's broader definition of property went beyond property-in-land and included "lives [and] liberties."¹⁴⁵ What Locke did not account for is that a person without property in land will still necessarily make some claim to space by virtue of their body. It is not the case, however, that the landless can make claim to land owned by others. Locke may be concerned about leaving enough and as good for others but this idea is not fully fleshed out. Some modern property theorists have

¹⁴² See Tracy Heffernan, Fay Faraday & Peter Rosenthal, "Fighting for the Right to Housing in Canada" (2015) 24: JL & Soc Pol'y at 10.

¹⁴³ See e.g. *Adams*, *supra* note 122 at para 122; *Batty v Toronto (City)*, 2011 ONSC 6862 at paras 111–13, 120.

¹⁴⁴ See *supra* section 2(a).

¹⁴⁵ Locke, *supra* note 18 at §123.

attempted to reconcile private property with poverty by arguing that the state has a duty to provide for the poor.¹⁴⁶ This argument typically rests on Kantian freedom as being “the requirement that no one gets to tell anyone else what purposes to pursue.”¹⁴⁷ By arguing for a system of welfare they hope to free individuals from dependence on other individuals.¹⁴⁸ This solution should be contrasted with another solution common amongst Anglo-common law scholars: granting everyone some private property.¹⁴⁹ The argument in favour of the latter solution is much the same as the Kantian-based argument about welfare in that it would also prevent a person from being dependent on another’s choice. Yet the latter solution echoes the tacit ranking of property relationships seen in both the history of social housing in Canada and the consultative report.

The consultative report for the National Housing Strategy maintains the idea that private ownership is the end goal, which creates a hierarchy between ownership and renting and between the private and public housing sectors. It is this hierarchy which is one of the most problematic aspects of the report and which suggests that the right to housing will not be realized by the actual strategy itself. The tacit hierarchy seen in the consultative report undermines both the formal and substantive equality of individuals. A better approach would be to recognize that the end goal of the National Housing Strategy should be adequate housing rather than home ownership. Only then could the right to housing be fully realized.

V. Conclusion

Much like property theory, Canadian housing policy has largely focused on encouraging and supporting private ownership. This implies a hierarchy of property relationships where ownership is valued over renting and where people are expected to house themselves with limited help from government. By reading two recent attempts to realize the right to housing in Canada with the history of social housing and private property theory, I have shown how those without private property struggle to make their claims heard. *Tanudjaja* and *Shantz* illustrate that Canadian governments continue to expect that the private market will respond to any housing crises and that courts understand access to housing as a policy decision in which they ought not to interfere. The end result is that it is for the individual to redress their lack

¹⁴⁶ Ernest Weinrib, “Poverty and Property Rights in Kant’s system of rights” (2002-03) 78 *NDL Rev* 795 at 810-21; Arthur Ripstein, *Force and Freedom: Kant’s Legal and Political Philosophy* (Cambridge MA: Harvard University Press, 2009) at 270-86.

¹⁴⁷ Hanoach Dagan, “The Public Dimension of Private Property” (2013) 24 *King’s LJ* 260 at 264, citing Ripstein, *supra* note 146 at 14, 34, 45.

¹⁴⁸ But see Penner, “The State Duty”, *supra* note 40; Dagan, *supra* note 147.

¹⁴⁹ See e.g. Dorfman, “Normativity”, *supra* note 40 at 1008; Dagan & Avihay Dorfman, *supra* note 26.

of housing but, crucially, this redress must be one achieved via the political process rather than through court challenges. Such a stance reflects the same kind of independent individual seen in property theory and in Canadian constitutional culture. Accordingly the right to housing, which implies a very different kind of dependent individual, is one that is difficult if not impossible to realize. One step towards making the right to housing more achievable is to abandon the preference for encouraging private ownership with its tacit hierarchy of property relationships and thus of individuals.

VI. Postscript

Shortly after this article was accepted, the federal government released the National Housing Strategy.¹⁵⁰ The strategy recognizes that housing rights are human rights and affirms “the right of every Canadian to access adequate housing.”¹⁵¹ It sets out ways to ensure that those who live in public housing will have their voices included in decision-making process about public housing.¹⁵² It also promises to find ways to tackle the “stigma” associated with public housing.¹⁵³ The strategy promises ample funding for additional shelter spaces, community housing and the like.¹⁵⁴ The strategy also commits the government to funding research into housing issues, which will help further refine and shape the National Housing Strategy.¹⁵⁵ Such an explicit commitment on the part of the federal government is heartening and suggests a willingness to listen.

However, there remains some cause for concern. For one, the strategy suggests that the promised new affordable units will only be affordable for a set number of years. For example, it talks about rents of less than 80% of market value for a minimum of 20 years.¹⁵⁶ The Strategy also talks about “Improving Homeownership Options for Canadians” which, despite a commitment to ending the stigma of social housing, suggests that a tacit hierarchy of housing will remain.¹⁵⁷ For example, in the chapter devoted to improving homeownership, the strategy speaks of ensuring more people can access mortgages, suggesting a continued preference for homeownership over and above social housing.¹⁵⁸

¹⁵⁰ Jean-Yves Duclos, Minister of Families Children and Social Development, “National Housing Strategy”, online: <<https://www.placetocallhome.ca/pdfs/Canada-National-Housing-Strategy.pdf>>.

¹⁵¹ *Ibid* at 8.

¹⁵² *Ibid* at 8–9, 19.

¹⁵³ *Ibid* at 8–9.

¹⁵⁴ *Ibid* at 10–14.

¹⁵⁵ *Ibid* at 20–21, 24–27.

¹⁵⁶ *Ibid* at 12.

¹⁵⁷ *Ibid* at 22–23.

¹⁵⁸ *Ibid*.

It is clear from reading the strategy that the overall National Housing Strategy remains a work in progress. The Strategy as released in November 2017 uses future-oriented language throughout. When coupled with the explicit commitment to listening to those without adequate housing as well as to funding research into housing issues, this future-oriented language offers good reasons for optimism. It also suggests that perhaps there is scope for Canada to abandon homeownership as the ideal form of housing, and to recognize that, whether it is privately-owned, privately-rented, or public housing, the ideal form of housing is adequate housing.

