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A Roof Over Our Stomachs: The Right to Housing in Canada and Its Implications for the Right to Food

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A Roof Over Our Stomachs: The Right to Housing in Canada and its Implications for the Right to Food

Tasha Stansbury*

Abstract

In 2019, the Canadian government passed the National Housing Strategy Act, legislating for the first time a human right to housing in Canada. This was largely the result of pressure from housing advocates to align Canada’s legislation with the right to housing embedded in international human rights instruments. Despite similar efforts, food rights advocates have not had the same success in having the right to food recognized in Canadian law. This paper considers the question of whether, and how, food rights advocates can use the process of achieving a legislated right to housing as a model in pursuing the legislation of the right to food in Canada. It observes how the right to housing was obtained, while drawing parallels and distinctions to right-to-food advocacy, to identify possibilities and potential hurdles for the achievement of a legislated right to food.

Keywords

Right to housing; right to food; international law; human rights; Canada

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1. Introduction

Since the 1980s, access to food in Canada has been largely addressed through a charity-based model, relying heavily on non-profit and community-based groups like food banks, soup kitchens, and meal sharing organizations to supplement government social assistance programs and help vulnerable individuals access food in Canada.¹ However, data shows that more people are food insecure than are accessing food charities.² According to Statistics Canada, as of May 2020, one in seven Canadian households were living in food insecurity,³ but most food insecure households in Canada do not use food banks.⁴ Vulnerable communities in northern and remote communities, for example, have lower levels of access to food banks in general, and often depend on private and other charitable aid for food support.⁵

This paper, based on a research question assigned to the author by Food Secure Canada, explores how a shift from a charity-based to a rights-based model to address food insecurity might practically be achieved in Canada. In particular, the process recently used to get the right to housing legislated will be analyzed and I will explore the possibilities for applying it in the effort to get the right to food legislated in Canada.⁶

¹ Marc Fawcett-Atkinson, “Food banks aren’t the answer to hunger, researchers say”, Canada’s National Observer (8 December 2020), online: <www.nationalobserver.com>.

² Rachel Loopstra and Valerie Tarasuk, “The Relationship between Food Banks and Household Food Insecurity among Low-Income Toronto Families” (2012) 38:4 Canadian Public Policy 497 at 498.

³ Statistics Canada, “Food insecurity and mental health during the COVID-19 pandemic” (16 December 2020), online: <www150.statcan.gc.ca>.

⁴ *Supra* note 2.

⁵ *Report of the Special Rapporteur on the right to food*, Olivier de Schutter, UNHRCOR, 22nd Sess, UN Doc A/HRC/22/50 Add.1 at para 7.

⁶ Although there are arguments against the recognition of the right to food, these are not discussed at length in this paper as these questions are outside the scope of the research question. For more on this debate, see Food and Agriculture Organization of the United States, “Ten Debates on the Right to Food and Social Protection: Learning from India’s experience” (2015), online: <<http://www.fao.org/3/i4987e/i4987e.pdf>>

The rights to food and housing are both embedded in several international human rights treaties to which Canada is a party. For example, both are recognized in the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁷ and the Convention on the Rights of the Child (CRC).⁸ Until recently, Canada had not explicitly embedded these rights in its domestic legislation.

In 2019, however, Canada passed the *National Housing Strategy Act* (NHTSA), legislating a right to housing in Canada.⁹ This was largely the result of pressure from housing advocates, including the UN Special Rapporteur on the Right to Adequate Housing, to align Canada's domestic system with the right to housing embedded in several international human rights instruments binding on Canada.

This paper considers the question of whether, and how, food rights advocates can look to the process of getting the right to housing on the books as a model to pursue in seeking the legislation of the right to food in Canada. It will observe how the right to housing was achieved and its consequent impacts on housing policy. It will also explore potential hurdles to be overcome due to the division of responsibilities between federal and provincial governments.

2. The Achievement of the Right to Housing in Canada

The Right to Housing Campaign recognizes that the achievement of the right to housing in Canada was based on over 30 years of grassroots advocacy, engagement with UN human rights bodies, and court challenges.¹⁰ This paper will deal only with the series of events from 2017-2019 directly surrounding and leading up to the enactment of the *National Housing Strategy Act*.

2.1 Timeline

- May 2017:** UN Special Rapporteur Communication #1¹¹
November 2017: National Housing Strategy unveiled, including a commitment to enact federal legislation supporting the Strategy¹²

and Samuel R Wiseman, "The Dangerous Right to Food Choice" (2015) 38:12 Seattle University Law Review 1299-1315.

⁷ *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 13 (entered into force 3 January 1976) at art 11.

⁸ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol 1577, p 3 at art 24(1)(c).

⁹ *National Housing Strategy Act*, SC 2019, c 29, s 313.

¹⁰ National Right to Housing Network, "Right to Housing Legislation in Canada", online: <www.housingrights.ca>.

¹¹ *Mandates of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context; the Special Rapporteur on the rights of indigenous peoples; and the Special Rapporteur on extreme poverty and human rights*, UNHRCOR, 16 May 2017, AL CAN 1/2017.

¹² Canada, Minister of Families, Children, and Social Development, *Canada's National Housing Strategy*, (Ottawa: Canada Mortgage and Housing Corporation, 2018) at 8.

- June 2018:** UN Special Rapporteur Communication #2 (follow up to #1)¹³
- August 2018:** Open letter to Justin Trudeau¹⁴ and Draft National Housing Strategy Act¹⁵ released
- September 2018:** Canadian Government response to UN Special Rapporteur Communication 1 & 2¹⁶
- July 2019:** *National Housing Strategy Act* entered into force, recognizing the human right to housing¹⁷

2.2 Communication from UN Special Rapporteurs

On 16 May 2017, a formal Communication¹⁸ was sent to the Government of Canada by the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (Dainius Puras), the UN Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context (Leilani Farha), the UN Special Rapporteur on the rights of Indigenous peoples (Victoria Lucia Tauli-Corpuz), and the UN Special Rapporteur on extreme poverty and human rights (Philip Alston).

This Communication was a response to information submitted to the Special Rapporteurs by members of civil society on homelessness in Canada and homeless camps and vulnerable households facing evictions in British Columbia.¹⁹ The Communication noted that although the problem of homelessness is not unique to Canada, two factors raised particular concerns. First, Canada is an affluent country which has the resources to end homelessness. Second, increasing homelessness, including during times of economic prosperity, appeared to be at least partially caused by a failure to recognize housing as a fundamental right.²⁰ It noted that Canada had failed to respond to several recommendations from international human rights bodies, including a recommendation to develop and implement a national housing strategy.²¹

The Communication referred to past recommendations made by a previous UN Special Rapporteur on the right to adequate housing who, in 2007, had made similar observations, and had also commented on the particular vulnerability of Indigenous

¹³ *Mandate of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context*, UNHRCOR, 22 June 2018, OL CAN 2/2018.

¹⁴ Canadian Alliance to End Homelessness, "Open letter urges Prime Minister to make good on his commitment to the right to housing", *NewsWire* (18 August 2018), online: <www.newswire.ca>.

¹⁵ Leilani Farha et al, "National Right to Housing Strategy Act – Draft Legislation for Discussion" (20 July 2018), Social Rights Advocacy Centre, online: <www.socialrights.ca>.

¹⁶ Letter from the Permanent Mission of Canada to the United Nations and the World Trade Organization to the mandates of The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; The Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context; The Special Rapporteur on the rights of indigenous peoples; The Special Rapporteur on extreme poverty and human rights (28 September 2018), online: <www.spcommreports.ohchr.org>

¹⁷ *Supra* note 8.

¹⁸ *Supra* note 10.

¹⁹ *Ibid* at 1.

²⁰ *Ibid* at 2.

²¹ *Ibid*.

women to homelessness and its associated risks.²² It additionally referred to a 2016 UN Human Rights Committee review of Canada, which expressed similar concerns and made similar recommendations.²³

The Communication also drew attention to calls for national rights-based housing and anti-poverty strategies in Canada which, along with UN recommendations, had been largely ignored by the Canadian government.²⁴ This included references to reports by the Senate Subcommittee on Cities (2007-2009), the House of Commons Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities (HUMA Committee) (2010), and the Mental Health Commission of Canada (2012).²⁵ It then referenced the outcomes of litigation in two cases: *Tanudjaja et al v Canada et al* (2013 ONCA 852) and *Victoria (City) v Adams* (2008 BCSC 1363).

In the *Adams* case, the Government of Canada argued that claims by homeless people that their lack of adequate housing infringed their rights under s. 7 of the *Canadian Charter of Rights and Freedoms (Charter)* should be dismissed because Canada is not bound by any international agreements that have not been implemented into its domestic law.²⁶ The BC Supreme Court found that “while the various international instruments do not form part of the domestic law in Canada, they should inform the interpretation of the *Charter*”.²⁷ The Ontario Court of Appeal dismissed the *Tanudjaja* case, finding that the appellant’s claims, based on Canada’s failure to take effective action on homelessness, did not amount to a justiciable *Charter* section 7 challenge due, since there is no justiciable right to housing in Canada and therefore no “sufficient legal component to anchor the analysis.”²⁸

The remainder of the 2017 Special Rapporteurs’ Communication briefly profiled three communities facing homeless in BC. It then outlined Canada’s obligations under international human rights law on the right to housing, particularly under the *International Covenant on Economic, Social, and Cultural Rights*,²⁹ to which Canada is a party, and related General Comments on the fundamental characteristics of the right to adequate housing, forced evictions, and demolitions and destructions of property.³⁰

Finally, the Communication commended the Canadian government for committing to implementing a national housing strategy, but requested its commentary on the contents of the Communication, including a clarification on whether the strategy would “explicitly recognize the right to adequate housing, reference Canada’s international human rights obligations, and include goals and timelines for the elimination of homelessness, independent and transparent accountability mechanisms, and a complaints mechanism to provide access to justice for violations of the right to housing”.³¹

²² *Ibid* at 3.

²³ *Ibid* at 4.

²⁴ *Ibid*.

²⁵ *Ibid* at 5.

²⁶ *Ibid* at 6.

²⁷ *Victoria (City) v Adams*, 2008 BCSC 1363 at para 100.

²⁸ *Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852 at para 35.

²⁹ *Supra* note 10 at 13.

³⁰ *Ibid*.

³¹ *Ibid* at 17.

2.3 Response of the Canadian Government

At the time of the Communication, the Canadian government had already committed to implementing a National Housing Strategy.³² However, it was unclear whether the right to housing would be the basis for the Strategy, and whether it would include effective methods of remediation and enforceability as well as explicit reference to international legal obligations, which was the main question regarding the Strategy in the UN Special Rapporteurs' Communication.

The National Housing Strategy was unveiled in November 2017. The Strategy document made several mentions of a human rights-based approach but didn't explicitly say that Canada would recognize and legislate the right to housing based on international human rights law. This was somewhat clarified in an announcement made by Prime Minister Justin Trudeau on November 22, 2017, when he said that "housing rights are human rights [...] and we will introduce legislation to ensure that future governments continue to take steps to ensure access to affordable housing."³³

Despite the fact that plans such as the Strategy were already underway, the Canadian Government at this time had still not responded to the Special Rapporteurs' Communication. It was not until Ms. Farha sent another Communication, dated 22 June 2018, reiterating the questions outlined in the initial Communication and noting that she had not yet received a response, that the Canadian Government finally responded to the UN.

In a rather short response dated September 28, 2018, the Canadian government finally stated that it was "taking definitive steps to progressively realize the right to adequate housing."³⁴

2.4 Writing & Submission of Draft Legislation

Meanwhile, throughout 2018, a team of key individuals came together to draft a National Housing Strategy legislation which incorporated the right to housing, in order to press the Canadian Government to take more immediate and concrete action on putting the right to housing into law. This team included Leilani Farha; Alex Neve, the former Secretary General of Amnesty International; Bruce Porter, the Executive Director of the Social Rights Advocacy Centre; Anita Khanna, the National Director of Public Policy and Government Relations at United Way Centraide Canada; Emily Paradis, an academic, activist and researcher on issues of housing and homelessness at the University of Toronto; and Tim Richter, the President and CEO of the Canadian Alliance to End Homelessness.³⁵ In August of 2018, this draft legislation³⁶ was released along with an open letter to Prime Minister Trudeau, signed by over 170 organizations and prominent Canadians, urging the Prime Minister to follow through on his commitment.

³² *Supra* note 10 at 7.

³³ Prime Minister of Canada, Media Release, "Prime Minister Trudeau unveils Canada's first ever National Housing Strategy" (22 November 2018), online: <www.pm.gc.ca>.

³⁴ *Supra* note 15.

³⁵ *Supra* note 14.

³⁶ *Supra* note 13.

Ms. Farha supported this open letter and drafted legislation in her capacity as UN Special Rapporteur on the Right to Housing and was able to get it into the hands of the Minister of Families, Children and Social Development, who had been assigned responsibility for the National Housing Strategy.³⁷

2.5 The National Housing Strategy Act

Although the exact draft submitted by Ms. Farha and her associates was not adopted, the ultimate NHTSA included key elements of the draft, including the recognition of the right to adequate housing as a fundamental human right as well as explicit reference to international human rights law to inform its interpretation and application, particularly the International Covenant on Economic, Social and Cultural Rights³⁸ – an exceptional occurrence in Canadian legislation.

However, there are concerns that the NHTSA does not sufficiently address the right to housing as it is outlined in the ICESCR. In all forms of international human rights law, States parties have three levels of obligations: to respect, to protect, and to fulfil human rights.³⁹ General Comment No. 9 on the domestic application of the ICESCR clarifies that this includes an obligation to make available appropriate remedies to “any aggrieved individual or group, and appropriate means of ensuring governmental accountability”.⁴⁰

Although the *National Housing Strategy Act* creates a Review Panel,⁴¹ this Panel will not hear complaints from individuals about housing rights; only selected systemic issues referred by the Housing Advocate will be considered for review. This system is designed to be efficient and targeted to the most important systemic issues but does not fulfil the obligation under international human rights law to make avenues of redress available to individuals claiming violations of their rights.

3. The Process of Legislating the Right to Housing as a Model to Legislate the Right to Food

According to Ms. Farha, the process of legislating the right to housing had a lot to do with the right person being in the right place at the right time, standing on the tremendous foundation of work laid by many domestic advocates over many years. The political climate at the time was also ideal for change: the Special Rapporteurs’ Communications appealed to the fairly new Trudeau government, who had already committed to forming a National Housing Strategy. At the same time, Canada also had an interest in getting on the UN Security Council and getting more engaged in international human rights.⁴² Ms. Farha noted that the process of legislating the right to housing was “a real combination of

³⁷ Alex Neve and Leilani Farha, “ESC Rights in Focus, Housing and Health”, class lecture (2 March 2021), University of Ottawa.

³⁸ *Supra* note 8 at s 4.

³⁹ United Nations Office of the High Commissioner for Human Rights, “International Human Rights Law”, online: <www.ohchr.org>.

⁴⁰ *CESCR General Comment 9*, UNESCOR, 1998, UN Doc E/C.12/1998/24 at para 2.

⁴¹ *Supra* note 8 at s 16.1.

⁴² Prime Minister of Canada, Media Release, “Prime Minister announces Canada’s big for a non-permanent seat on the United Nations Security Council (16 March 2016), online: <www.pm.gc.ca>.

grassroots and local advocacy efforts and a few key people in political positions who were game to try it”.⁴³

3.1 A Canadian UN Special Rapporteur

The fact that Special Rapporteur Farha is Canadian may have been instrumental in this process. She was able to communicate directly with the Canadian Government based on her past involvement with Canadian organizations working on housing issues, as an extension of her work as the Special Rapporteur but also outside of its particular parameters. She was also able to participate directly in drafting legislation and then in advocating for the draft Act to government representatives.

Coincidentally, now might be the perfect time to act on legislating the right to food in Canada. The current UN Special Rapporteur on the Right to Food, Michael Fakhri, is a professor at the University of Oregon School of Law but is Lebanese-Canadian and holds degrees from three Canadian institutions.⁴⁴ Although currently working at the UN, Mr. Fakhri continues to write on Canadian issues, including Canada’s delay in adopting the UN Declaration on the Rights of Indigenous Peoples.⁴⁵

Former UN Special Rapporteur on the Right to Food, Olivier de Schutter, visited Canada in 2012. In his report to the UN, the Special Rapporteur recommended that Canada formulate a rights-based national food strategy and adopt a framework law on the right to food.⁴⁶ According to Food Secure Canada, Mr. de Schutter’s recommendations were “undiplomatically dismissed” by the Canadian government after the end of his official mission and report.⁴⁷

This visit was followed by other attempts to push for food rights in Canada. Around 2015, Sasha McNicoll (formerly of Food Secure Canada) drafted a *National Food Policy Council of Canada Act*,⁴⁸ with an executive summary for FSC arguing in favour of a national food policy council.⁴⁹ In 2017, during consultations for the first ever Food Policy for Canada, the Government of Canada received submissions from an Ad Hoc Working Group on the Right to Food in the form of an open letter.⁵⁰ The Working Group recommended a recognition of a human right to food, a rights-based approach in all areas of implementation of the Food Policy for Canada, benchmarks towards ensuring the realization of the right to food, monitoring and accountability measures, and clear steps toward enshrining the right to food in law. A subsequent report by the Canadian Government on the results of the Food Policy consultations recognized that participants supported the recognition of food as a human rights issue and the development of right-to-

⁴³ *Supra* note 36.

⁴⁴ A Doctorate from the University of Toronto, a Bachelor of Laws from Queen’s University, and a Bachelor of Science in Ecology from Western University.

⁴⁵ Michael Fakhri, “Canada Avoids Indigenous Reconciliation and the UN Declaration on the Rights of Indigenous Peoples” (3 July 2019), *EJIL:Talk!* (blog), online: <www.ejiltalk.org>.

⁴⁶ *Supra* note 5 at para 69.

⁴⁷ “The Right to Food in Canada” (2013), Food Secure Canada, online: <www.foodsecurecanada.org>.

⁴⁸ Sasha McNicoll, “National Food Policy Council of Canada Act”, online: <www.foodsecurecanada.org>.

⁴⁹ Sasha McNicoll, “More Voices at the Table: The Case for a National Food Policy for Canada”, Food Secure Canada, online: <www.foodsecurecanada.org>.

⁵⁰ Nadia Lambek et al, “Ensuring the Human Right to Food Through *A Food Policy for Canada*: Submissions to the Government of Canada” (30 September 2017), online: <www.foodsecurecanada.org>.

food legislation in Canada.⁵¹ However, Food Policy for Canada, when finally released, was silent on the issue of the right to food.⁵²

At the time of the 2012 visit from Special Rapporteur de Schutter, Canada had a Conservative Party government under former Prime Minister Stephen Harper. The Liberal Trudeau government's interest in becoming more involved in international human rights, and commitment to doing so in various ways, was instrumental in achieving the right to housing, as mentioned previously. By contrast, the Trudeau government's apparent resistance to also implementing right to food legislation, despite multiple recommendations, is discouraging. Well-timed international pressure in the form of a UN Special Rapporteur Communication could be an important factor in current attempts to have the right to food legislated.

The visit of a UN Special Rapporteur to a country on a regular mission circuit does not preclude members of civil society from submitting additional information to the Rapporteur, even after that country's government has already dismissed UN findings. Indeed, the previous UN Special Rapporteur on the Right to Housing, Miloon Kothari, conducted a mission to Canada in 2007 and made similar recommendations as were repeated in the 2017 Communication, including the recognition of the right to housing.⁵³ That report was also largely ignored by the former Conservative federal government.

On a more encouraging note, the current Liberal government recently proposed amendments to the *Canadian Environmental Protection Act, 1999* (CEPA) to formally recognize the human right to a healthy environment.⁵⁴ Bill C-28 went through its first reading at the House of Commons on April 21, 2021. The introduction of Bill C-28 is also the result of years of work by several actors and organizations pushing for this right to a healthy environment, including as part of the comprehensive review of CEPA by the Standing Committee on Environmental and Sustainable Development.⁵⁵ This review included extensive testimony by David Boyd, the current UN Special Rapporteur on Human Rights and the Environment,⁵⁶ whose work also largely formed the basis for Ecojustice's advocacy on the matter.⁵⁷ This could be another good sign strong precedent for the

⁵¹ Agriculture and Agri-Food Canada, "What We Heard: Consultations on *A Food Policy for Canada*" (2018), online: <www.agr.gc.ca>.

⁵² Agriculture and Agri-Food Canada, "A Food Policy for Canada: Everyone at the Table" (2019), online: <www.agr.gc.ca>.

⁵³ *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Miloon Kothari*, UNHRCOR, 10th Sess, UN Doc A/HRC/10/7 Add.3 (2009) at para 88.

⁵⁴ Canada Bill C-28, *An Act to amend the Canadian Environmental Protection Act, 1999, to make related amendments to the Food and Drugs Act and to repeal the Perfluorooctane Sulfonate Virtual Elimination Act*, 2nd Sess, 43rd Parl, 2021.

⁵⁵ Canada, Minister of the Environment and Climate Change, "Canadian Environmental Protection Act Review" (2018), online: <www.canada.ca>.

⁵⁶ Canada, Standing Committee on Environment and Sustainable Development, "Healthy Environment, Healthy Canadians, Healthy Economy: Strengthening the *Canadian Environmental Protection Act, 1999*" (Ottawa: House of Commons Canada, 2017).

⁵⁷ Ecojustice has been campaigning for a constitutionally recognized right to a healthy environment in Canada since 2012. See their full timeline at <<https://ecojustice.ca/case/right-to-a-healthy-environment/>>. See also Kaitlyn Mitchell, Pierre Sadik, and Margot Venton, "Right to a Healthy Environment" Ecojustice, online: <www.ecojustice.ca>, which acknowledges David Boyd's contributions.

potential of Canadian UN Special Rapporteurs to influence the advancement of human rights in Canada, including the right to food.

3.2 Political Climate for Change

In Canada, we are now at a comparable stage regarding the right to food as we were regarding the right to housing at the time of the Special Rapporteurs' Communication. The current Liberal government has committed to addressing the issue of food security by creating the first ever Food Policy for Canada. However, while the Policy addresses some pressing issues, it makes no specific reference to the human right to food as it is understood in international human rights law.⁵⁸

The COVID 19 pandemic has starkly highlighted the food insecurity and vulnerability of many people in Canada. This might be an excellent time for significant change. Since the beginning of the pandemic, the Government of Canada provided \$200 million to the Emergency Food Security Fund to help food banks and food security organizations.⁵⁹ Statistics Canada also released a health report on the impact of the COVID-19 pandemic on food security and mental health, one of the first studies to examine food insecurity in the context of stressful events.⁶⁰ A study by Community Food Centres Canada found that the number of food insecure households increased by 39% in the first two months of the pandemic.⁶¹ The issue has also been discussed internationally: for example, the ILO, FAO, IFAD, and WHO released a joint statement on the impact of COVID-19 on food security and food systems.⁶²

Most of the discussion around COVID-19 and food insecurity has not included any mention of the implementation of the right to food. However, in September 2020, Special Rapporteur on the Right to Food Michael Fakhri's released his first thematic report to the UN.⁶³ He highlights how the COVID-19 pandemic has exacerbated conditions of food insecurity, examines the relationship between agricultural trade policy and the human right to food, and suggests a new framework that could synthesize the two historically conflicting doctrines. In a follow-up interview to the report, he stated that "[the] pandemic is creating a profound effect on the right to food and may push us into a global hunger crisis".⁶⁴

⁵⁸ "The launch of the first 'Food Policy for Canada – Everyone At the Table'" (2019), Food Secure Canada, online: <<https://foodsecurecanada.org>>.

⁵⁹ Agriculture and Agri-Food Canada, "Government of Canada rolling out \$100M in added support to food security organizations during COVID-10 pandemic", Newswire (18 December 2020), online: <www.newswire.ca>.

⁶⁰ Jane Y Polsky and Heather Gilmour, "Food insecurity and mental health during the COVID-19 pandemic", Statistics Canada (16 December 2020), online: <www150.statcan.gc.ca>.

⁶¹ Community Food Centres Canada, "Beyond Hunger: the hidden impacts of food insecurity in Canada" (29 September 2020), online: <www.cfccanada.ca>.

⁶² ILO, FAO, IFAD and WHO (joint statement), "Impact of COVID-19 on people's livelihoods, their health and our food systems", International Labour Organization (13 October 2020), online: <www.ilo.org>.

⁶³ *Interim Report of the Special Rapporteur on the right to food*, UNGAOR, 75th Sess, UN Doc A/75/219 (2020).

⁶⁴ Food and Agriculture Organization, "UN right to food expert: COVID-19 is pushing the world into a global hunger crisis (summary interview)" (21 September 2020), online: <www.fao.org>.

3.3 Potential Paths Forward

Although previous attempts at using UN influence to persuade the Canadian government to adopt the right to food have largely failed, now may be an ideal time to try again by a slightly different route, echoing the process that was followed in securing the right to housing in Canada.

Advocates for the right to food in Canada could submit an information to the UN Special Rapporteur on the Right to Food for his consideration in the near future. Although it is difficult to predict to what extent, Special Rapporteur Fakhri's ties to Canada could be helpful in his ability to propel a relevant Communication further, including in further discussions with key actors in the government, as Special Rapporteur Farha was able to do.

This information to the Special Rapporteur should contain as many details as possible regarding:

- The vulnerability faced by particular communities, especially Indigenous communities, due to the lack of a legislated right to food;
- Any weaknesses in the Food Policy for Canada that could be strengthened by a legislated right to food;
- Any past failures by Canada to guarantee the right to food, including but not limited to cases that have been argued in Canadian courts;
- Any international human rights instruments to which Canada is a party that includes the right to food, including:
 - The Convention on the Rights of the Child (Article 6);⁶⁵
 - The Convention on the Elimination of All Forms of Discrimination Against Women (Article 14(2)(h));⁶⁶
 - The International Covenant on Economic, Social, and Cultural Rights (Article 11);⁶⁷ and
- Canada's failure to take significant action on the 2012 UN Special Rapporteur report, and the consequences thereof, noting particularly any aspects of food insecurity which have worsened since 2012.⁶⁸

Right to food advocates and organizations could also begin to organize individuals able and willing to draft legislation on the right to food as soon as possible. Ideally, in order to mirror the process for achieving the right to housing as closely as possible, this would include individuals with connections to the government, particularly within the new

⁶⁵ *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 at art 6 (entered into force 2 September 1990).

⁶⁶ UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution I adopted by the General Assembly*, 2 October 2007, A/RES/61/295 at Art 7.

⁶⁷ *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 13 at art 11 (entered into force 3 January 1976).

⁶⁸ This should include the impacts of COVID-19 on food security. In addition to the Statistics Canada report cited at note 3, see for example discussion of the impact of COVID-19 on food security for low-income workers and people of colour in Toronto Foundation, *The Toronto Fall Out Report: Half a year in the life of COVID-19(2020)*, online: < <https://torontofoundation.ca/wp-content/uploads/2020/11/Toronto-Fallout-Report-2020.pdf>>.

Canada Food Policy Advisory Council.⁶⁹ This could be inspired by the draft legislation created by Sasha McNicoll,⁷⁰ which fully recognizes the right to food and creates methods for implementation and accountability.

4. How Would a Federal Right to Food Affect Provincial/Territorial Legislation and Policy?

Other than rights guaranteed by the *Canadian Charter of Rights and Freedoms*, which apply everywhere in Canada, rights recognized by federal legislation do not automatically apply to matters falling under provincial jurisdiction. Federal legislation is only applicable to areas of federal jurisdiction: for example, federal Crown land, First Nations reserves, military bases, and the national zone around Ottawa. This division of powers is governed by sections 91 and 92 of the *Constitution Act, 1982*.⁷¹

A federal Act can introduce or be attached to a National Strategy, which can include opportunities for provinces and territories to make agreements with the federal government regarding the rights at issue. Signing an agreement with the federal government does not mean that provinces and territories become bound by the relevant federal Act, or bound to guarantee the rights within in. However, agreements between provincial/territorial and federal governments can include clauses which, on a practical basis, will embody the delivery of those rights through the delivery of particular services or programs. For the sake of clarity, let us continue using the right to housing in Canada as an example.

4.1 The National Housing Strategy

The National Housing Strategy contains several elements of partnerships between the federal government and provinces, territories, and by extension, their municipalities. This includes cooperation on the National Housing Council,⁷² co-investment funds that require both federal and provincial commitments,⁷³ and federal investments with provincial cost matching.⁷⁴ The NHS also requires regular reporting back to the federal government by the provinces to ensure that each is meeting the requirements agreed upon in their respective bilateral agreements.

Bilateral agreements are made between the Canada Mortgage and Housing Corporation (CMHC) and each of the provinces and territories individually. These agreements are not mandatory under the NHSA, but elements are incorporated into the NHS to incentivize provinces to participate. Each province and territory in Canada have signed a bilateral agreement with the CMHC.⁷⁵

⁶⁹ Agriculture and Agri-Food Canada, “The Canadian Food Policy Advisory Council” (Ottawa: Government of Canada, 2021), online: <www.agr.gc.ca>.

⁷⁰ *Supra* note 46.

⁷¹ *Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), c 11 at ss 91–92.

⁷² *Supra* note 11 at 9.

⁷³ *Ibid* at 10.

⁷⁴ *Ibid* at 16.

⁷⁵ National Housing Strategy, “Federal/Provincial/Territorial housing agreements” (Ottawa: Canada Mortgage and Housing Corporation), online: <www.cmhc-schl.gc.ca>.

Each of the bilateral agreements between the CMHC and the respective province or territory, except the one between the CMHC and Quebec, includes the following passage on the realization of the right to housing via Action Plans, which outline specific steps to be taken in the implementation of the Strategy:

[The] Action Plan will include support for those in greatest need, will be consistent with the principles of participation and inclusion; equality and non-discrimination; and accountability, and will speak to the federal human rights-based approach to housing. In so doing, the Action Plan will complement the NHS goal of helping advance the progressive realization of Canada's obligations in relation to housing under the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁷⁶

Whether this amounts to an actual guarantee of that right under provincial legislation is unclear. The clause addresses specifically the content of the Action Plan, but not necessarily its delivery. Therefore, although programs and services under the Action Plan must be *designed* in a way that forwards Canada's commitment to the right to housing, a failure to deliver those designed programs and services correctly may not be challengeable based specifically on a claimed violation of the federal right to housing.

Practically, this may not be a very significant issue. If programs and services under a provincial or territorial Action Plan must be designed in a way that forwards Canada's commitment to the right to housing, it follows logically that the correct delivery of those programs and services would functionally do so as well. Incorrect or unjust delivery of programs or services can typically be challenged internally by a complaint or decision appeal process within the relevant program or service. However, a strictly rights-based claim, such as ones addressed by provincial Human Rights Tribunals, could not be advanced by relying solely on the commitment in the Action Plans.

Another potential hurdle, of course, is that bilateral agreements can be terminated, meaning that the effective delivery of the rights is not permanently guaranteed or enshrined into provincial or territorial law solely by virtue of the province or territory having signed a bilateral agreement with the CMHC.⁷⁷ It would take a separate provincial Act to permanently adopt the right into provincial law and make it justiciable on the provincial and municipal levels.

Therefore, any failures by Canada and/or the CMHC to abide by the NHSA could be challenged based on the right to housing, but provincial failures could not, barring a provincial Act legislating the same right. However, regular reports and audits to the federal authority of the province's performance required under the bilateral agreement, as well as complaints and appeals mechanisms within each particular program or service, should theoretically be sufficient to practically deliver, if not wholly protect, the federally recognized right to housing.

Another concern is that there are housing rights under the ICESCR that are not covered by the NHSA due to jurisdictional issues. According to the National Right to Housing Network, "[protections] from evictions, rent increases, health and safety

⁷⁶ *Bilateral Agreement under the 2017 National Housing Strategy*, Canada Mortgage Housing Corporation and the Minister of Housing of Ontario, 1 April 2018, online: <www.cmhc-schl.gc.ca> at C-1.

⁷⁷ *Ibid* at s 13.

requirements, from development-based displacement, discrimination, inclusive zoning and planning and many other components of the right to housing fall under other laws, many of them provincial or municipal.”⁷⁸ This means that the NHSA alone is not sufficient to guarantee all the rights associated with housing, as each province would have to independently amend their relevant laws (for example, Ontario’s *Residential Tenancies Act*) to recognize and protect the right to adequate housing.

4.2 Application to the Right to Food

Jurisdiction has long been an issue in right to food advocacy and may be part of the reason why the right to housing has been recognized while the right to food has not, despite similar and multiple attempts. Arguments for the legal recognition of the right to food have been countered by those supporting the expansion of markets and improvement of economic outcomes.⁷⁹ In other words, some feel that increasing food trade to strengthen the economy should take precedence over rights-based strategies, which could neutralize competitive markets if equal access to food is guaranteed to everyone. These market-based principles largely form the basis of the current food system in Canada.⁸⁰ Unlike the National Housing Strategy, the Food Policy for Canada does not create or enable partnerships with provinces to ensure government-organized access to food, except in the creation of a National School Food Program.⁸¹ Instead, the Food Policy aims to strengthen existing community-based food accessibility projects, like food banks and soup kitchens, by investing in them and providing additional funding.⁸² This is reflective of the market-based system: it may be difficult to convince the federal and provincial governments to reduce their interests in agricultural market expansion and exports for the sake of realizing a domestic right to food. This is not a challenge in the context of housing.

The 2012 report of the Special Rapporteur on the Right to Food clearly acknowledges the vital role of national strategies in achieving a federally guaranteed right to food. The Report’s recommendations are largely centered around recognizing the right to food and the necessary steps to achieve it. Mr. de Schutter’s first recommendation is that the Canadian government formulate a comprehensive rights-based strategy that clearly outlines the responsibilities of public officials at all levels of government.⁸³ This includes a duty on federal government to ensure that all initiatives adopted at municipal and provincial levels are adequately supported.

Food Secure Canada’s primer article commenting on the Food Policy for Canada notes that the right to food is not included in the Policy. Although there are references throughout the Policy to food security, “they are not pulled together as a specific priority outcome.”⁸⁴ Based on existing right to food advocacy, including from Mr. de Schutter and Food Secure Canada, the consideration – and subsequent recognition – of a human right to food is clearly necessary in order to conduct a full analysis of what services are needed to

⁷⁸ *Supra* note 12.

⁷⁹ Nadia Lambek, “Social Justice and the Food System” in Heather McLeod-Kilmurray, Angela Lee and Nathalie Chalifour, eds, *Food Law and Policy in Canada* (Toronto: Thomson Reuters, 2019) 325 at 326.

⁸⁰ *Ibid* at 339.

⁸¹ *Supra* note 51 at 9.

⁸² *Ibid*.

⁸³ *Supra* note 5 at para 69(a).

⁸⁴ *Supra* note 56.

guarantee it, including drawing in other areas of law such as social assistance, living wage, Indigenous rights, and agricultural production,⁸⁵ and to create a cohesive policy that addresses all aspects, causes, and perpetuating factors of food insecurity.

In summary, a right to food legislated at the federal level cannot be guaranteed independently at the provincial and municipal levels unless provincial legislation is also enacted recognizing the same right. However, National Strategies may help bridge that gap by implementing supplementary policies which, in practice, deliver the services and programs necessary for the realization of the right.

Another important factor that differentiates the campaigns for the right to food and the right to housing that may be a significant hurdle is the fact that the Food Policy for Canada has already been fully formed and enacted, whereas the *National Housing Strategy Act* had not yet even been written at the time of the strong advocacy push discussed in this paper. However, the Food Policy is so new that its implementation is ongoing, and there is potential for amendment of the Policy. Just as the National Housing Strategy was strengthened by the Act, the Food Policy could be hugely influenced by a legislated right to food in Canada. Additionally, the Food Policy creates opportunities for the exploration of further “sub-targets” by the Canadian Food Policy Advisory Council, implying that there is room to introduce other commitments within the scope of the Food Policy for Canada.⁸⁶

3. Conclusion

The achievement of a legislated right to housing in Canada was a collaborative effort between grassroots activists, civil society, and UN and government representatives. A key element was a well-timed UN Special Rapporteur Communication concerning violations of housing rights in BC and Canada’s continued failure to legislate the right to housing per their obligations under international human rights law. When the Special Rapporteurs’ Communication was released in 2017, Canada had recently transitioned to a new Liberal government since the previous UN Special Rapporteur on the Right to Housing’s mission to Canada. Canada had a growing interest in becoming more involved in international human rights law and had already made a commitment to putting together a National Housing Strategy.

Then-UN Special Rapporteur and Canadian, Leilani Farha, wrote Communications to the Canadian Government and worked on the ground with Canadian housing organizations and politicians, using her influence to help draft and champion legislation. Another example of a Canadian UN Special Rapporteur, David Boyd, helping to advance human rights in Canada is the tabling of Bill C-28 to amend CEPA 1999 to recognize the right to a healthy environment. These two victories are inspiring for right to food advocates.

The Food Policy for Canada addresses some concerns previously expressed by the UN Special Rapporteur on the Right to Food but does not acknowledge a human right to food in Canada, similar to the original National Housing Strategy document. The current UN Special Rapporteur on the Right to Food is also a Canadian, and may be able to follow Ms. Farha’s example in the process of achieving a Canadian right to housing. Advocates for the right to food could write an information to the Special Rapporteur Michael Fakhri, reopening the

⁸⁵ *Supra* note 5 at para 69.

⁸⁶ *Supra* note 51 at 13.

conversation on the right to food with the UN and exerting internal and external pressure on the Canadian government to make change.

Although there are many potential barriers to legislating the right to food in Canada, such as jurisdictional complications and resistance to the right to food due to the prioritization of market expansion, there are several reasons to be hopeful. Observing the process for achieving the right to housing in Canada as a model could be a promising starting point. However, there are significant factors differentiating the history of the push for the right to food, as well as the nature of the current legislation that exists adjacent to it. These must be taken into consideration in future advocacy for the recognition of the human right to food in Canada, as clear parallels and differential contexts can each make or break the success of future advocacy.