

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

CHARLAS MACKENZIE

Applicant
(Appellant)

and

**OTTAWA COMMUNITY HOUSING CORPORATION
and THE CITY OF OTTAWA**

Respondents
(Respondents in Appeal)

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PART I - OVERVIEW

4. The intervenor, Centre for Equality Rights in Accommodation (CERA), is a national non-profit organization that promotes human rights in housing for vulnerable and disadvantaged groups. Advocating for respect for international human rights in Canadian housing law and policy is a key aspect of CERA's mandate.

5. Rent subsidies for low-income tenants are one way that governments achieve compliance with international human rights obligations. Subsidies assure access to safe and affordable homes and have the effect of promoting substantive equality for communities that are over-represented in poverty.

6. This appeal concerns a social housing provider's statutory discretion under Ontario's *Housing Services Act* to maintain a tenant's housing subsidy in circumstances in which the subsidy might otherwise be terminated. Termination of a housing subsidy can have serious repercussions for low-income tenants, including loss of access to adequate housing, separation from their children and deepening marginalization.

7. Statutes are presumed to be consistent with international law. In this case, multiple international human rights instruments, including the *International Covenant on Social, Economic and Cultural Rights*, to which Canada is a signatory, support a statutory interpretation that requires housing providers to consider international human rights principles in deciding whether and how to exercise discretion to maintain a housing subsidy.

PART II - SUMMARY OF FACTS

8. CERA adopts the facts set out by Mr. MacKenzie.

PART III - ISSUES AND THE LAW

9. CERA addresses the role that international law must play in answering two issues:

- (a) Whether international law supports an interpretation of the *Housing Services Regulation* requiring service managers to turn their minds to whether to exercise their “exceptional circumstances” discretion to maintain a rent-geared-to-income housing subsidy;
- (b) Whether, when deciding how to exercise their “exceptional circumstances” discretion to maintain a rent-geared-to-income subsidy, service managers must consider international human rights principles.

A. International human rights principles inform statutory interpretation and administrative decision-making

10. The “modern principle” of statutory interpretation requires a purposive and contextual analysis of laws that engages international human rights principles. There is a presumption that the Legislature intends conformity with Canada’s international obligations and their underlying values and principles.

11. Where relevant, international treaties and conventions should inform administrative decision-making, even where those treaties and conventions have not been implemented domestically by statute.¹⁸ Failing to take relevant international law into account in administrative decision-making, and to explain why an interpretation consistent with international law has not been chosen, can constitute a reviewable error.¹⁹

B. International law recognizes a fundamental right to adequate housing

12. International human rights law recognizes that every person has the right to adequate housing for themselves and their family,²⁰ including the right to live in security,

¹⁸ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019 SCC 65](#) [“Vavilov”], Book of Authorities of the Intervenor [“BOA”], Tab 1, paras 114, 117-118, 120-122.

¹⁹ *Vavilov*, BOA, Tab 1, para 182.

²⁰ International Covenant on Economic, Social, and Cultural Rights [“ICESCR”], [Article 11\(1\)](#) (Acceded to by Canada on 19 May 1976); United Nations Universal Declaration on Human Rights [“UDHR”], [Article 25](#); *Victoria (City) v. Adams*, [2009 BCCA 563 \(CanLII\)](#), BOA, Tab 2, para 33. This right is also recognized in federal legislation: [National Housing Strategy Act](#), SC 2019, c 29, s 313, s 4.

peace and dignity.²¹ “Adequate” housing is more than a roof over one’s head. It includes security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy.²² Any actions that may deprive a person of adequate housing must be necessary and proportional.²³

13. States are obligated not only to respect and protect international human rights, but to fulfil them by providing the conditions for the realization of rights through legislation and regulation. In the context of the right to housing, fulfilment can include establishing “housing subsidies for those unable to afford affordable housing” and protection against “unreasonable rent increases.”²⁴

14. The human right to adequate housing is of central importance to the enjoyment of all economic, social and cultural rights and is integrally linked to other human rights. Indeed, all human rights “are universal, indivisible, interrelated, interdependent and mutually reinforcing and must be treated in a fair and equal manner”.²⁵ The right to housing is connected to and reinforces other fundamental international rights.²⁶

²¹ UN Committee on Economic, Social and Cultural Rights (CESCR), [General Comment No. 4: The Right to Adequate Housing \(Art.11 \(1\) of the Covenant\)](#), 13 December 1991, OHCHR, 6th sess of the Committee on Economic, Social and Cultural Rights, E/1992/23 [“General Comment No. 4”], BOA, Tab 8, para 7.

²² CESCR, [General Comment No. 4](#), BOA, Tab 8, para 8.

²³ CESCR, [General Comment No. 7: The right to adequate housing \(Art.11.1\): forced evictions](#), 20 May 1997, E/1998/22 [accessed 6 June 2022] [“General Comment No. 7”], BOA, Tab 9, paras 10, 14; CESCR, [Gómez-Limón Pardo v. Spain \(No. 52/2018\)](#) [“Gómez-Limón Pardo v. Spain 52/2018”], BOA, Tab 10; CESCR, [Walters v. Belgium \(No. 61/2018\)](#) [“Walters v. Belgium (61/2018)”], BOA, Tab 11, paras 9.1-9.4.; CESCR, [El Ayoubi and Azouz v. Spain \(No. 54/2018\)](#) [“El Ayoubi and Azouz v. Spain (54/2018)”], BOA, Tab 12, paras 11.1 – 11.4, 14.6.

²⁴ International Covenant on Economic, Social, and Cultural Rights, [Article 2\(1\)](#); CESCR [General Comment No.4](#), BOA, Tab 8, para 8(c); Office of the United Nations High Commissioner for Human Rights, [Fact Sheet No. 21: The Right to Adequate Housing](#), BOA, Tab 13, p. 33; [Gómez-Limón Pardo v. Spain \(52/2018\)](#), BOA, Tab 10, paras 8.1 – 9.4.

²⁵ United Nations General Assembly, [Resolution 60/251 - Human Rights Council](#) (15 March 2006), BOA, Tab 14.

²⁶ CESCR [General Comment No.4](#), BOA, Tab 8, para 9

15. For example, where a decision might result in a person's being deprived of access to adequate housing, States must ensure that no form of discrimination is involved for groups such as women, children, youth, older persons, Indigenous people, ethnic and other minorities.²⁷

16. Equality-seeking groups are more likely to be living in poverty and more likely to be involved with the criminal justice and child protection systems.²⁸ As noted by the Supreme Court, issues involving parents who are poor "necessarily disproportionately affect women and therefore raise equality concerns", but also have particular importance for "members of other disadvantaged and vulnerable groups", particularly racialized communities, Indigenous people and persons with disabilities.²⁹ Links between inadequate housing and poverty is driving, in part, the over-representation of Indigenous and Black children in care.³⁰

17. As a result, rules that terminate rent subsidies for those caught up in the criminal justice and child protection systems may have the effect of perpetuating inequality because they imperil access to housing and undermine family reunification, thus engaging the following additional international human rights:

- (a) **Rights of the Child:** Children have the right to preserve their family relations.³¹ States are required to take appropriate measures to assist

²⁷ CESCR, [General Comment No. 7](#), BOA, Tab 9, paras 10,14; [Gómez-Limón Pardo v. Spain \(52/2018\)](#), BOA, Tab 10.

²⁸ *New Brunswick (Minister of Health and Community Services) v. G.(J.)* ["New Brunswick"], [1999 CanLII 653 \(SCC\)](#), [1999] 3 S.C.R. 46, BOA, Tab 3, paras 112, 115; *R. v. Williams*, [1998] 1 SCR 1128, BOA, Tab 4, paras 48-49; *R. v. Ipeelee*, [2012 SCC 13 \(CanLII\)](#), BOA, Tab 5, paras 57-63; *R. v. Golden*, [2001 SCC 83 \(CanLII\)](#), BOA, Tab 6, para 83; *R. v. Wu*, [2003 SCC 73 \(CanLII\)](#), [2003] 3 SCR 530, BOA, Tab 7, paras 34-35.

²⁹ *New Brunswick*, BOA, Tab 3, paras 113-114.

³⁰ Truth and Reconciliation Commission, ["Final Report of the Truth and Reconciliation Commission of Canada \(Volume 5\): Canada's Residential Schools: The Legacy"](#) (2015), BOA, Tab 15, at pp. 33-35; Ontario Human Rights Commission, ["Interrupted Childhoods: Over-representation of Indigenous and Black children in Ontario child welfare"](#) (2018), BOA, Tab 16, pp. 7-8, 18-19, 43, 50

³¹ Convention on the Rights of the Child, [Article 8\(1\)](#) (Ratified by Canada on 13 December 1991).

parents to secure the conditions of living necessary for the child's development, including housing.³²

- (b) **Elimination of Racial Discrimination:** All people have the right to enjoyment of rights and freedoms “without distinction of any kind”. States are obligated to eliminate racial discrimination in all its forms and to guarantee the equal right to housing.³³
- (c) **Rights of Indigenous Peoples:** Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including in the area of housing. States are obligated to pay particular attention to the rights and special needs of Indigenous Elders, women, youth, children and persons with disabilities.³⁴
- (d) **Persons with disabilities:** Persons with disabilities have the right to adequate housing and full and equal enjoyment of the right to live in the community. States must take appropriate steps to safeguard and promote the realization of this rights, including through social protection, poverty reduction programs and access to public housing programs.³⁵

C. International law supports an interpretation of the *Housing Services Regulation* requiring service managers to turn their minds to whether to exercise discretion to maintain a rent-geared-to-income housing subsidy

18. Ontario’s *Housing Services Act* requires municipalities to provide rent-geared-to-income assistance to improve access to housing for people living in poverty.³⁶ The legislation also sets out the circumstances in which service managers can terminate rent subsidies.³⁷ Of particular relevance to this case, where a person ceases to be eligible for failure to give notice of a “material change in their circumstances”, the service manager

³² Convention on the Rights of the Child, [Article 27](#).

³³ International Convention on the Elimination of All Forms of Racial Discrimination, [Article 5](#) (Ratified by Canada on 14 October 1970).

³⁴ United Nations Declaration on the Rights of Indigenous Peoples, [Article 21\(1\)](#) (Endorsed by Canada, without objection, on 10 May 2016).

³⁵ Convention on the Rights of Persons with Disabilities, [Articles 19, 28](#) (Ratified by Canada 11 March 2010).

³⁶ [Housing Services Act, 2011](#), SO 2011, c 6, Sch 1, s 40, retrieved on 2022-06-02

³⁷ General, [O Reg 367/11](#), ss 27-32.2.

“may determine that the household remains eligible if the service manager is satisfied that there are extenuating circumstances.”³⁸

19. The legislation also allows for local service providers to establish local housing subsidy rules, including with respect to absences from a subsidized unit.³⁹ If the local service manager establishes such a rule, they must allow for absences of at least 60 consecutive days and/or at least 90 days per year.⁴⁰ Time away from a unit for medical reasons cannot be treated as an “absence.” Contrary to the submission of the City of Ottawa, apart from these two specifications, the legislation does not prohibit a local service manager from permitting absences for non-medical reasons nor from exercising discretion to permit absences in extenuating circumstances.⁴¹ In any event, the local service manager’s rules include a discretion to extend a permitted absence in extenuating circumstances.⁴²

20. Although the legislation states that the service manager “may determine” that “there are extenuating circumstances,” the Divisional Court interpreted the legislation as “placing no obligation on the service manager to engage in [the] exercise of [discretion]; it is entirely permissive.”⁴³

21. Such an interpretation is inconsistent with international law, which requires States to adopt legislative measures “to promote all the rights protected under the Covenant”

³⁸ General, [O. Reg. 367/11](#), s. 28(7).

³⁹ General, [O Reg 367/11](#), ss 33-38.

⁴⁰ General, [O Reg 367/11](#), s 37.

⁴¹ See Factum of the Respondent, City of Ottawa [“City”], paras 54-55.

⁴² City of Ottawa, Service Manager Directive 17-02 (October 2017), p. 3. [Book of Authorities of the City [“City BoA”], Tab 2, p. 14]; City of Ottawa, Service Manager Directive 21-01 (December 2020), p.3. [City BoA, Tab 3, p.19]

⁴³ Divisional Court Reasons, Appellant’s Appeal Book and Compendium [“ABCO”], Tab 3, p. 24, para 38.

and that reflect the general principles of reasonableness and proportionality.⁴⁴ To assess “reasonableness” and “proportionality” requires decision-makers to consider a tenant’s particular circumstances before making a decision that will deprive them of access to adequate housing.⁴⁵

22. A statutory discretion “normally authorizes a decision-maker to decide whether or not to exercise it”.⁴⁶ Further to this principle, the phrase “may determine that the household remains eligible if the service manager is satisfied that there are extenuating circumstances” is not “permissive”, but rather, requires housing providers to consider whether to exercise their discretion in every case. This “normal” interpretation is also consistent with international human rights principles.

D. When deciding how to exercise their “exceptional circumstances” discretion to maintain a rent-geared-to-income subsidy, service managers must consider international human rights principles

23. Rent-geared-to-income subsidies are one way in which States can fulfill their obligation to ensure access to adequate housing.

24. Lack of access to affordable housing is lack of access to adequate housing. For a single parent in receipt of disability benefits, like Mr. MacKenzie, loss of a housing subsidy is tantamount to a loss of access to adequate housing. Without the subsidy, the cost of housing increases significantly with the likely result of a forced eviction. In Mr.

⁴⁴ CESCR, [General Comment No. 7](#), BOA, Tab 9, paras. 9, 14; CESCR, [Djazia and Bellili v. Spain \(No. 5/2015\)](#) [*“Djazia and Bellili v. Spain (5/2015)”*], BOA, Tab 17, paras 13.4, 14.2; CESCR, [López Albán v. Spain \(No. 37/2018\)](#) [*“López Albán v. Spain (37/2018)”*], BOA, Tab 18, paras 8.2-8.3

⁴⁵ [Walters v. Belgium \(61/2018\)](#), BOA, Tab 11, paras 9.1-9.4.; [El Ayoubi and Azouz v. Spain \(54/2018\)](#), BOA, Tab 12, paras 11.1 – 11.4, 14.6

⁴⁶ Donald J. M. Brown & The Honourable John M. Evans, *Judicial Review of Administrative Action Volume 2* (Toronto, ON: Thomson Reuters, 2022), BOA, Tab 19, para 15:26

MacKenzie's case, his rent increased from \$222 to \$1,279 per month.⁴⁷ His monthly income is \$1,014.⁴⁸

25. The UN Committee on the *International Covenant on Economic, Social and Cultural* rights has established a number of international human rights principles that govern forced evictions. These principles are just as applicable in the context of a decision to terminate a housing subsidy. Housing managers should take these principles into account when determining whether to terminate a housing subsidy:

- (a) Ensure that any decision to terminate a subsidy is necessary to achieve legitimate aims, reasonable and proportional to the particular circumstances, including the personal circumstances of dependants;⁴⁹
- (b) Explore all feasible alternatives to termination of the subsidy and whether a less restrictive approach, including one that will protect a family unit and dependent children, is appropriate;⁵⁰
- (c) Ensure that no discrimination is involved,⁵¹ including the risk of an adverse impact upon equality-seeking groups.⁵² In this case, the local service provider has established rules prohibiting absences from a unit that – absent the exercise of discretion – are likely to result in the loss of a housing subsidy for individuals caught up in the criminal justice system or child protection system. The risk that such a rule will have a disproportionate impact upon equality-seeking groups must be considered in the discretionary exercise;

⁴⁷ City of Ottawa Review Panel Decision, ABCO, Tab 4, p. 28.

⁴⁸ ODSP Payment Summary, ABCO, Tab 9: Ottawa Community Housing Internal Review Submissions, p. 64.

⁴⁹ CESCR, [General Comment No. 7](#), BOA, Tab 9, paras 10-13 (Emphasis added), 16; [Gómez-Limón Pardo v. Spain \(52/2018\)](#), BOA, Tab 10, para 9.5; [Djazia and Bellili v. Spain \(5/2015\)](#), BOA, Tab 17, para 13.4; [López Albán v. Spain \(37/2018\)](#), BOA, Tab 18, para 12.2; [Walters v. Belgium \(61/2018\)](#), BOA, Tab 11, paras 9.1-9.4.

⁵⁰ CESCR, [General Comment No. 7](#), BOA, Tab 9, paras 10-13; [Djazia and Bellili v. Spain \(5/2015\)](#), BOA, Tab 17, paras 15.4, 17.7; [Walters v. Belgium \(61/2018\)](#), BOA, Tab 11, paras 9.1-9.4.

⁵¹ CESCR, [General Comment No. 7](#), BOA, Tab 9, paras 10-13.

⁵² [Djazia and Bellili v. Spain \(5/2015\)](#), BOA, Tab 17, para 15; [Walters v. Belgium \(61/2018\)](#), BOA, Tab 11, para 11.6.

- (d) Ensure that the decision to terminate the subsidy is not being imposed for punitive reasons. Punishment is not a legitimate aim for denial of the right to adequate housing;⁵³

26. In addition, where children are involved, service managers have an added obligation to consider the best interests of the child.⁵⁴ The UN Committee on the Rights of the Children describes the “child’s best interests” as a “threefold concept”:⁵⁵

- (a) A substantive right: The right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child.
- (b) A fundamental, interpretive principle: If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child’s best interests should be chosen.
- (c) A rule of procedure: Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account. In this regard, States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child’s best interests; what criteria it is based on; and how the child’s interests have been weighed against other consideration, be they broad issues of policy or individual cases.

27. The UN Committee, in a recent report on Canada, recommended that Canada “ensure that the best interests of the child are given primary consideration in all eviction matters, and that all avenues for eviction prevention are pursued prior to termination of tenancy.”⁵⁶

⁵³ CESCR, [General Comment No. 7](#), BOA, Tab 9, at paras. 12-13.

⁵⁴ UN Convention on the Rights of the Child, [Article 3\(1\)](#).

⁵⁵ UN Convention on the Rights of the Child, [Article 3\(1\)](#); UN Committee on the Rights of the Children, [“General Comment No. 14: On the right of the child to have his or her best interests taken as a primary consideration”](#) (29 May 2013), BOA, Tab 20, para 6.

⁵⁶ UN Committee on the Rights of the Child, [“Concluding observations on the combined fifth and sixth reports of Canada”](#) (9 June 2022), BOA, Tab 21, para 39.

28. Poverty, including lack of access to adequate housing, contributes to the disproportionate involvement of equality-seeking groups in the child welfare system.⁵⁷

Poverty contributes to the separation of children from their families.⁵⁸

29. Where a housing subsidy is at risk because children are in care, service managers should consider whether the situation is temporary, and if so, how long it is likely to continue and whether termination of the subsidy would contribute to the separation of children from their parents.

30. In sum, social housing providers must ensure that international human rights principles lie at the foundation of their discretionary exercise. Failure to do so can result in a denial of the fundamental international right to adequate housing and is an error of law.

PART IV - ORDER REQUESTED

31. CERA seeks no costs and respectfully requests that no costs be ordered against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22 day of June, 2022.



Danielle Bisnar, Aminah Hanif and
Jackie Esmonde

⁵⁷ UN Committee on the Rights of the Child, "[Concluding observations on the combined fifth and sixth reports of Canada](#)" (9 June 2022) BOA, Tab 21, paras 31, 39.

⁵⁸ UN Committee on the Rights of the Child, "[Concluding observations on the combined fifth and sixth reports of Canada](#)" (9 June 2022), BOA, Tab 21, paras 30, 38, 39.

SCHEDULE “A”

LIST OF AUTHORITIES

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7. [R. v. Wu, \[2003\] 3 S.C.R. 530](#)

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