Issues for Persons with Disabilities: Security of Tenure in Canada

Luke Reid, JD, MSW, PhD(c) – March 31, 2022

Office of the Federal Housing Advocate, Canadian Human Rights Commission
344 Slater Street, 8th Floor, Ottawa, Ontario K1A 1E1

Toll Free: 1-888-214-1090 | **TTY:** 1-888-643-3304 | **Fax:** 613-996-9661 | www.housingchrc.ca

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The opinions, findings, and conclusions or recommendations expressed in this document are those of the author and do not necessarily reflect the views of the Canadian Human Rights Commission or the Federal Housing Advocate.

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List of Abbreviations

ACA — Accessible Canada Act

ACTO — Advocacy Centre for Tenants Ontario

AODA — Accessibility for Ontariens with Disabilities Act

ASL — American Sign Language

CCBFC — Canadian Commission on Building and Fire Codes

CMHC — Canada Mortgage and Housing Corporation

CRPD — Convention on the Rights of Persons with Disabilities

LTB — Landlord and Tenant Board

OFHA — Office of the Federal Housing Advocate

NBC — National Building Code

NHCF — National Housing Co-Investment Fund

NHSA — National Housing Strategy Act

RCFI — Rental Construction Financing Initiative

Introduction

In 2019, the federal government passed the *National Housing Strategy Act*, S.C. 2019, c. 29, s. 313 (NHSA), which states that the housing policy of Canada is to recognize “that the right to adequate housing is a fundamental human right affirmed in international law.” The NHSA commits Canada to the progressive realization of that right, particularly as it relates to vulnerable groups like persons with disabilities.[1]

Persons with disabilities face many distinct challenges when it comes to securing their right to adequate housing. This is particularly true when it comes to **security of tenure**, a fundamental aspect of the right to adequate housing.[2] Persons with disabilities often experience challenges in this arena because their right to security of tenure depends on the realization of several other interrelated rights, which are improperly enforced, ignored, or narrowly interpreted. This means that while persons with disabilities may technically enjoy the same security of tenure rights as everyone else (e.g., Part V—Security of Tenure and Termination of Tenancies*, Residential Tenancies Act*, 2006, S.O. 2006, c. 17 [the RTA]), these rights are often effectively undermined by other rights violations, which can contribute to the eviction or expulsion of people with disabilities from their homes.

Ultimately, the source of much of this discrimination comes from the fact that the physical and social environment in which persons with disabilities live is not suited to meet their unique needs. As the social model of disability suggests, these environmental and social barriers effectively “disable” people and ensure that they have greater difficulty maintaining a tenancy or a residence.

This report describes several of these barriers, and the role that our legal system plays in constructing them. It then briefly describes the federal government’s obligations under the NHSA as they relate to these obstacles and will present several potential strategies that the federal government could use to both remediate the barriers and meet its obligations under the NHSA. The specific issues that this report will explore include:

1) The role **building codes** play in constructing a dangerous home environment for persons with disabilities, and the effect that this can have on their ability to maintain a residence.
2) The role that **residential tenancy legislation** plays in limiting the availability of security of tenure rights among persons with disabilities.
3) How common violations of **human rights legislation**, and the failure to apply such legislation, can undermine the security of tenure of persons with disabilities.

Before moving on, it is important to emphasize a few points. The first is that because persons with disabilities face such a vast range of issues in this area, this report will only be able to cover

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[1] *National Housing Strategy Act*, S.C. 2019, c. 29, s. 313 at ss. 4, 5(2), and 13(a).

[2] 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, E/1992/23, available at: https://www.refworld.org/docid/47a7079a1.html [accessed 26 February 2022]

the limited selection of security of tenure issues described above. Unfortunately, this means that several other important and highly relevant issues are not addressed (e.g., the inadequacy of existing disability benefits). The issues that are selected for coverage generally represent problems that are not well described in existing literature on security of tenure and disability, and as such, the following discussion represents an attempt to highlight these issues as candidates for further research and advocacy.

Second, it is important to keep in mind that violations of the right to security of tenure and the consequences that flow from these violations often look different for persons with disabilities, particularly in comparison with the experiences of other populations. For example, while violations of the right to security of tenure can lead to homelessness, for many persons with disabilities it can also lead to problems like inappropriate institutionalization (e.g., in a hospital, long-term care home, or psychiatric institution) and a denial of their right to live in the community.[3] Indeed, this was the very issue in a recent ruling by the Nova Scotia Court of Appeal which found that the human rights of several individuals with intellectual disabilities had been violated after they had been evicted from their homes during an extensive hospitalization. In this case, instead of rendering them homeless, these rights violations led to a decades-long stay in a psychiatric facility while they awaited placement in new supportive housing.[4]

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[3] See: UN General Assembly, *Convention on the Rights of Persons with Disabilities: resolution/adopted by the General Assembly*, 24 January 2007, A/RES/61/106 at art 19, available at: https://www.refworld.org/docid/45f973632.html [accessed 24 November 2021].

[4] *Disability Rights Coalition v. Nova Scotia (Attorney General),* 2021 NSCA 70 (CanLII) [leave for appeal filed to the Supreme Court of Canada on December 6, 2021]

1. Accessibility as a Barrier to Security of Tenure

Inaccessibility in the built environment is a significant source of housing instability among persons with disabilities. Due to a shortage of accessible housing, many individuals with disabilities must live in inaccessible environments—a fact that has significant economic, social, and health-related consequences for these individuals.[5] Living in inaccessible environments has been directly linked to significant increases in the risk of injury or falls[6,7,8,9] which itself represents one of the leading causes of hospitalization and loss of function in older adults.[10] This in turn has been found to predict greater unwanted institutionalization (e.g., long-term care) and the inability to live in or transition back to their homes.[11,12]

While few people see this as a security of tenure issue, it is in fact an example of how the built environment can effectively render a right to security of tenure meaningless. Persons with newly acquired disabilities, or those with worsening mobility issues, are essentially forced to "self-evict" because they cannot navigate the physical environment.

This problem is compounded by the fact that a majority of housing in Canada was built before accessibility was recognized as an important design consideration for residential housing. According to the Canadian Commission on Building and Fire Codes, approximately half (49%) of households were built before 1980[13], a time when there were effectively no accessibility standards for most forms of residential housing.[14] Even since that time, accessibility standards for residential housing remain extremely limited, perpetuating what many call an accessibility crisis in housing.[15]

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[5] Ilan Wiesel, "Living With Disability in Inaccessible Housing: Social, Health and Economic Impacts" (2020), online (pdf): University of Melbourne.

[6] *Ibid*.

[7] Jacqueline Close et al, "Prevention of Falls in the Elderly Trial (PROFET): A Randomised Controlled Trial" (1999) 353:9147 The Lancet 93–97.

[8] Public Health Agency of Canada, "Report on Seniors' Falls in Canada" (2005), online at: Minister of Public Works and Government Services Canada.

[9] Burns, Suzanne Perea, Rochelle Mendonca, Noralyn Davel Pickens, and Roger O Smith. "America's Housing Affordability Crisis: Perpetuating Disparities Among People with Disability." Disability & Society (2021): 1–6.

[10] Public Health Agency of Canada, "Seniors' Falls in Canada: Second Report" (2014) (Government of Canada), online: https://www.canada.ca/en/public-health/services/health-promotion/aging-seniors/publications/publications-general-public/seniors-falls-canada-second-report.html

[11] Scuffham, Paul, Stephen Chaplin, and Rosa Legood. "Incidence and Costs of Unintentional Falls in Older People in the United Kingdom." Journal of Epidemiology & Community Health 57, no. 9 (2003): 740–744.

[12] Lantz, S., and D. Fenn. "Re-Shaping the Housing Market for Aging in Place and Home Modifications." (2017), online at: Canadian Home Builders' Association.

[13] Canadian Commission on Building and Fire Codes, *Final Report — Alterations to Existing Buildings: Joint CCBFC/PTPACC Task Group on Alterations to Existing Buildings* (National Research Council, 2020).

[14] Canadian Commission on Building and Fire Codes (CCBFC), "Policy Paper: Accessibility in Buildings" (2021), online at: CCBFC.

[15] Plouin, Marissa, Willem Adema, Pauline Fron, and Paul-Marie Roth. "A crisis on the horizon: Ensuring affordable, accessible housing for people with disabilities." (2021).

In this context, it is perhaps unsurprising that many seniors and people with physical disabilities fear that they will be forced out of their residence for accessibility-related reasons. One study in Australia noted that 68.0% of individuals with high support needs feared that they would be forced to leave their current residence because it was not sufficiently accessible[16]—an outcome not out of the realm of possibility in Canada (see examples: Kitchener-Waterloo, Ontario, St. Catharines, Ontario, Toronto, Ontario).

Legal Regulation of Accessibility in Housing

Broadly speaking, building codes are the primary piece of legislation or regulation responsible for setting minimum accessibility standards for the buildings in Canada. However, in addition to these minimum standards, human rights legislation also imposes additional obligations on housing providers to make their housing more accessible to persons with disabilities. This section will examine each of these frameworks in some detail in order to understand how and why they have been ineffective at promoting accessibility in the built environment in residential spaces. It will then briefly discuss the implications of the *Canadian Charter of Rights and Freedoms* (the Charter) for this regulatory framework.[17]

A) The National Building Code

The *Constitution Act* gives jurisdiction over the construction and design of buildings to the provinces.[18] However, for a large portion of Canada's history, the provinces generally refrained from exercising this jurisdiction—tending to delegate this authority directly to municipalities. Generally speaking, this delegation resulted in a patchwork of municipal building codes, many of which were of suspect quality. In response to this concern, in 1941 the Government of Canada endeavoured to create a model *National Building Code* (NBC) which was designed to be suitable for adoption *in toto* by municipalities.[19,20] Although the NBC was not technically binding, by the 1970s most jurisdictions had adopted some form of it.[21]

While the provinces have since begun taking a far more active role in the design and implementation of building codes, the NBC still plays a prominent role in setting basic building standards across the country. In fact, nine provinces and territories (New Brunswick, Nova Scotia, Manitoba, Saskatchewan, Newfoundland and Labrador, Northwest Territories, Nunavut, Yukon, and Prince Edward Island) have largely foregone the development of their own building standards and simply implemented the NBC within their own jurisdiction (with some modifications in certain circumstances).[22] Furthermore, out of the four provinces that create

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[16] Wiesel, *supra* note 5.
[17] *Canadian Charter of Rights and Freedoms*, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[18] See: *Oshawa (City) v. 536813 Ontario Limited*, 2016 ONCJ 287 (CanLII) at para 71; *Mississauga (City) v. Greater Toronto Airports Authority*, 2000 CanLII 16948 (ON CA) at para 38.
[19] National Housing Administration & National Research Council, "National Building Code" (1941), at p. 10, online at: National Research Council of Canada.
[20] J.W Archer, "A Brief History of the National Building Code of Canada" (2003) , online at: National Research Council of Canada.
[21] *Ibid.*
[22] National Research Council, "Model code adoption across Canada" (2020), online at: NRC.

and publish their own building codes, three of them substantially mirror the NBC in terms of its content (Quebec, Alberta, British Columbia)—a fact which speaks to the overall influence of the model code.[23]

Problems in the NBC

The *NBC* sets out five primary objectives that the standards within it are designed to achieve—one of which is the promotion of accessibility for persons with disabilities (OA1, Barrier-Free Path of Travel, and OA2, Barrier-Free Facilities). In furtherance of this objective, the current version of the NBC[24] outlines a number of measures to promote accessibility in the built environment. However, the breadth and scope of these measures are heavily circumscribed in several problematic ways.

For example, Sections 2.1.1.2.(5), 3.1.1.2.(3), and 3.8.2.1.(1) all specifically limit the application of accessibility standards (contained in section 3.8).[25] These sections state that accessibility standards do not apply to "detached houses, semi-detached houses, houses with a secondary suite, duplexes, triplexes, townhouses, row houses and boarding houses"—an exception that effectively renders a large part of Canada's housing stock inaccessible to persons with physical disabilities.[26]

Even in larger residential buildings, the NBC has few mandatory accessibility requirements. Section 3.8.2.3.(2) states that barrier-free paths of travel are not required in larger buildings unless an "authority having jurisdiction" has designated it as a building which is to "be accessible for use by persons with physical disabilities." This provision effectively means that a local municipality must actively designate a building as being "for" persons with disabilities as opposed to having accessibility requirements that automatically apply. The intent of these exemptions, as it is described in the *National Building Code of Canada's 2015—Intent Statements*, is to exempt "certain areas of buildings … on the basis that it is impractical and onerous to provide barrier-free access" (see: ss.3.8.2.3 [2]).[27]

However, there is little to suggest that providing higher levels of accessibility in these environments is impractical or overly onerous. This is evident based on the fact that several jurisdictions in Canada have endeavoured to provide more robust accessibility standards and have specifically abrogated or altered some of the limitations described above. For example, under Section 3.8.2.1 (5) of Ontario's Building Code, 15% of all units in apartment buildings

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[23] *Ibid*

[24] See: Canadian Commission on Building and Fire Codes, "National Building Code of Canada 2020," online at: CCBFC. Note that despite the 2020 date, this version of the code was released on March 28, 2022.

[25] Sections 2.1.1.2.(5), 3.1.1.2.(3) technically relate to the "accessibility objective" and not the building standards themselves.

[26] Admittedly, because of the presence of these exemptions, many aspects of Section 3.8 are not designed to be implemented in these types of structures. Eliminating these exemptions would therefore require some revisions to the accessibility standards themselves to ensure that they applied properly.

[27] These obviously represent just two problems among many in the *National Building Code.* A number of other notable problems exist. For example, one critique of the current standards is that they only address a portion of persons with disabilities, as these requirements are primarily based on the dimensions required for people who use manual wheelchairs (See: *supra* note 14).

("Group C major occupancy apartment building") are required to have a barrier-free path of travel within them (as compared with only those that have been designated by a municipality).

Furthermore, Nova Scotia, despite the fact that it has broadly adopted the NBC, has also made several modifications to improve accessibility. It has replaced the exemption for detached homes and townhouses (etc.) with several additional accessibility requirements (adaptable housing requirements—see: 3.8.4.1 of *Nova Scotia Building Code Regulations* N.S. Reg. 26/2017).[28] Other foreign jurisdictions have gone even further. For example, *The Building Regulations 2010* in the United Kingdom have long required that new dwellings of this type meet minimum visitability standards.[29] All of this is to say that even by the conservative standards of many provinces and foreign jurisdictions, improvements in the NBC are certainly possible—and would almost definitely lead to more stringent accessibility requirements across Canada.

Beyond this, it is important to note that many advocates (including the author of this report) have pushed for even more robust alterations to current accessibility standards than those described above, given Canada's vast stock of inaccessible housing. For example, Ontario's Human Rights Commission recently published an open letter to the Province of Ontario calling for all units in multi-residential construction to be fully accessible, in accordance with the principles of Universal Design.[30]

B) Human Rights Legislation

In addition to building codes, human rights legislation has significant legal importance when it comes to inaccessibility in the built environment.[31] Housing providers have incurred significant liability in a number of different situations as a result of a failure to properly accommodate tenants by providing physically accessible housing.[32] However, despite the potential for liability, human rights law in Canada has proven to be ill suited for dealing with accessibility issues.

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[28] Adaptable housing is housing that can be easily renovated to improve accessibility at minimal cost. As noted above, one of the primary housing challenges many persons with physical disabilities experience is related to the evolution of their disability and the potential that they will experience increased accessibility needs. In many cases, they may be in housing that is either expensive or impossible to renovate. Adaptable housing is designed to address this issue by including structural features within the housing that minimize the cost of renovation and maximizes the type of accessibility-related features that could be implemented.

[29] HM Government, *The Building Regulations 2010, Access to and Use of Dwellings – Approved Document M.* For a brief description of visitability standards, see: Manitoba Housing.

[30] Ontario Human Rights Commission, "Letter to the Minister of Municipal Affairs and Housing on the importance of accessible housing," online at: OHRC.

[31] *Council of Canadians with Disabilities v. VIA Rail Canada Inc.,* [2007] 1 S.C.R. 650, 2007 SCC 15.

[32] See: *Jacobsen v. Strata Plan SP1773 (No. 2)*, 2020 BCHRT 170 (CanLII); *Devoe v. Haran*, 2012 HRTO 1507 (CanLII); *Manning v. Stoykovich*, 2021 HRTO 5 (CanLII); *DiSalvo v. Halton Condominium Corporation No. 186*, 2009 HRTO 2120 (CanLII); *Di Marco v. Fabcic*, 2003 HRTO 4 (CanLII); *Biggings obo Walsh v. Pink and others*, 2018 BCHRT 174 (CanLII).

One of the primary reasons for this is the reactive nature of many of the obligations contained in human rights legislation across Canada—particularly when it comes to issues of disability.[33] Numerous commentators, as well as some human rights tribunals, have all confirmed that human rights legislation is generally "retrospective and remedial,"[34] meaning that accessibility barriers often have to be challenged after they have been erected and even then, these barriers can generally only be challenged one by one, on a piecemeal basis.[35] As the Honourable David C. Only reported, in his review of the *Accessibility for Ontarians with Disabilities Act, 2005,* S.O. 2005, c. 11 (the AODA):

> "Rights under … the Code are enforced on a case-by-case basis … [and] legal proceedings of this type … have proven very cumbersome, costly and time consuming…. Removing barriers one at a time has been extremely frustrating for those seeking wider and faster systemic change."[36]

This trend is vividly demonstrated in the limited human rights case law addressing accessibility problems in provincial building codes. In both *Shuparski v. Toronto (City)*[37] and *Malkowski v. Ontario Human Rights Commission,*[38] two individual applicants attempted to challenge Ontario's building code[39] on the basis that it failed to incorporate sufficiently rigorous accessibility standards into its guidelines and, as a result, effectively authorized discriminatory conduct by others on a widespread basis (i.e., the construction of inaccessible buildings). In dismissing these complaints, both the Tribunal and the Divisional Court stated that the enactment of legislation was not a service within the meaning of Section 1 of the Code and was, in any event, a policy exercise that was protected by legislative privilege.[40] In doing so, these adjudicative bodies radically limited the potential of human rights legislation when it comes to challenging widespread accessibility barriers in residential housing (at least in Ontario).[41,42] Unfortunately, at the moment, these cases represent the totality of the jurisprudence on the compliance of building codes with human rights legislation—although it appears that a challenge to the NBC*,*

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[33] For an excellent discussion of these limitations, see: Chipeur, Stephanie. *Inaccessibility and the Law of the Built Environment: Understanding People with Disabilities as Members of the Public* (dissertation, 2021) [unpublished].

[34] *Shuparski v. Toronto (City)* 2010 HRTO 726 (CanLII) at para 37.

[35] Judith Mosoff, "Is the Human Rights Paradigm 'Able' to Include Disability: Who's In? Who Wins? What? Why?" (2000) 26 Queen's Law Journal 225 [Mosoff]; M David Lepofsky, "The Long, Arduous Road to a Barrier-Free Ontario for People with Disabilities: The History of the Ontarians With Disabilities Act — The First Chapter" (2004) 15 National J Constitutional L 125 [Lepofsky, 2004].

[36] David Onley, "Listening to Ontarians With Disabilities: Report of the Third Review of the Accessibility for Ontarians with Disabilities Act, 2005" (2019) at p 5, online: Government of Ontario.

[37] *Ibid.*

[38] 2006 CanLII 43415 (ON SCDC).

[39] O. Reg. 332/12.

[40] *Supra* note 34 at para 26.

[41] It is worth emphasizing here that the same is unlikely to be true of the Charter in this circumstance. Indeed, the author has previously done work which suggests that a Charter challenge on the basis of Sections 7 and 15 has the potential to broadly challenge some of the accessibility barriers currently embedded in the NBC*.*

[42] Indeed, this is a pattern seen in most other Canadian jurisdictions as well (See: *supra* note 33).

which was dismissed by the Canadian Human Rights Commission, is currently before the Federal Courts on judicial review.

C) The Charter and Building Codes

No building code-related Charter jurisprudence has emerged in Canada. However, it is worth emphasizing that some of the challenges that litigants have experienced before human rights tribunals (i.e., arguments about legislative privilege and the definition of a service) would be avoided by bringing a Charter challenge. Indeed, there is good reason to believe that the Charter could be successfully utilized to challenge existing provincial building codes, leading to an overall shift in the NBC and accessibility standards across Canada.

While a full and detailed legal analysis of this issue is beyond the scope of this report, it seems clear that existing building code provisions (in provincial codes) may be vulnerable to a Charter challenge both because of their discriminatory impact on persons with disabilities (Section 15) and because of the significant negative repercussions they have on their health, well-being, and autonomy (Section 7).

Indeed, existing Charter case law has already confirmed the potential relevance of Section 7, where it has been invoked to support the proposition that:

1) The state should strive to ensure that it is not unduly interfering with the *right to choose* where to make one's home (a fundamental right under Section 7);[43] and
2) That the state should generally avoid engaging in actions that prevent individuals from locating shelter if those actions put the individuals' *health and safety* at risk and when reasonable alternative housing is sparse.[44]

As illustrated in the introduction, a case could be made that current building code provisions violate both of the above points by giving state sanction to the construction of inaccessible housing on a mass scale. Inaccessibility in the built environment substantially restricts where persons with disabilities can choose to live, both because of the extremely limited accessible housing stock and because it places them at heightened risk of forced institutionalization.

Living in inaccessible environments is also directly linked with a variety of negative health and safety consequences, including an increased risk of injury and hospitalization. Furthermore, the absence of accessible housing also means that persons with disabilities are often forced to live in hazardous and inaccessible environments.

Given the appropriate client, each of the consequences described above could in theory be directly linked to a specific set of building code provisions (e.g., limitations on the scope of

[43] *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 at para 51.
[44] *Victoria (City) v. Adams*, 2008 BCSC 1363 (CanLII); *Bamberger v Vancouver (Board of Parks and Recreation)*, 2022 BCSC 49 (CanLII)

accessibility standards in 3.8.2.1 [1] of the NBC etc.), meaning that there is at the very least an arguable case that they violate the Charter.[45]

Accessibility Under the National Housing Strategy Act

Beyond potential Charter litigation, it is worth emphasizing that the NHSA represents an important tool for addressing inaccessibility in housing as well. As discussed in the introduction, the NHSA commits the Government of Canada to progressively realize the right to adequate housing. While limited international jurisprudence has emerged discussing the unique content of the right to adequate housing as it pertains to persons with disabilities specifically, the Committee on Social, Economic, and Cultural Rights has repeatedly emphasized that accessibility, along with security of tenure, are fundamental aspects of this right.[46]

This is reinforced by the Special Rapporteur on the Right to Adequate Housing, who states that this right, when properly interpreted in concert with Article 9 of the *Convention on the Rights of Persons with Disabilities* (CRPD), required states like Canada "to ensure that all housing available to the public, including social and private rental housing, takes into account all aspects of accessibility for persons with disabilities."[47] The CRPD goes further, stating that state parties are responsible for identifying and eliminating barriers to accessibility in housing.[48] Taken together these statements effectively mean that the federal government's commitment to progressively realize the right to adequate housing must include a robust strategy to make the housing market accessible for persons with disabilities.

While the precise steps that the Government may take to realize this objective are not set out in the NHSA, some commentators have emphasized that the NHSA does impose a number of broad obligations on government when it comes to developing and executing strategies to promote the right to adequate housing. These include the obligations to:

- Create a strategy that **prioritizes vulnerable groups**, including persons with disabilities, in the realization of the right to adequate housing.
- **Meaningfully engage** with vulnerable populations, including persons with disabilities, when developing strategies to realize the right to adequate housing.
- Address the **systemic discrimination and socio-economic inequality** inhibiting the realization of the right to adequate housing.

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[45] Admittedly, one of the fundamental challenges with such an argument is the limited research available establishing the links between provisions in the building code and the harms experienced by persons with disabilities. This highlights the importance of generating research on this issue, as described below on pages 13–14.
[46] 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, E/1992/23 at paras 8(a) and 8(e)
[47] Special Rapporteur on the Right to Adequate Housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, 12 July 2017, A/72/128 at para 40.
[48] Committee on the Rights of Persons with Disabilities, General Comment No. 2: Article 9 Accessibility, 22 May 2014 CRPD/C/GC/2 at para 17.

- Foster **co-operation and exercise national leadership** among all orders of government, to progressively realize the right to adequate housing, including via intergovernmental agreements and funding mechanisms.
- Ensure and promote **access to justice and accountability** in the housing sector.
- Use **all appropriate means**, including legislative and regulatory actions, to promote the right to adequate housing.
- **Allocate sufficient budgetary resources** to the promotion of the right to adequate housing, based on the "maximum available resources" standard in international law.
- Ensure **independent monitoring** and assessment of the right to adequate housing is undertaken.[49]

The following discussion will explore some of the reasonable steps that the federal government could take to meet some of these obligations under the NHSA in the context of accessible housing.

How Can the Federal Government Meet These Obligations?

Given the broad influence of the NBC and the government's obligation to use all appropriate regulatory means to promote accessibility, alterations to this code represent an obvious potential lever for the federal government to intervene to improve accessibility in the housing market. The development of a more robust accessibility standard would provide an exemplary model for building code reform in provincial jurisdictions—and if history is any guide, many provinces will either adopt or incorporate these improvements into their own building regulations.

However, a cautionary note may be warranted. While the federal government may have the ability to influence the shape of the NBC through the National Research Council's Canadian Commission on Building and Fire Codes (CCBFC), it should be emphasized that this organization has traditionally been viewed as a deliberative body that develops the NBC in consultation with a variety of groups and stakeholders, including industry experts, private business, public interest groups,[50] and the provinces themselves. Of particular importance is the Provincial/Territorial Policy Advisory Committee on Codes,[51] a body which history suggests has extensive influence over the final shape of the NBC, if not an outright veto over proposed changes.[52]

The process run by the CCBFC has been termed the "coordinated code development system"—a system which allows the provinces to rely on many of the resources of the federal government

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[49] Michèle Biss, Bruce Porter, Sahar Raza, & David Desbaillets, "Progressive Realization of the Right to Adequate Housing: A Literature Review" (2021) online at: The National Right to Housing Network.
[50] Presumably, the public consultation process undertaken for changes to the NBC includes persons with disabilities at some stage, although there does not appear to be a formal outreach process designed specifically to consult with persons with disabilities on potential changes to the building code.
[51] Canadian Commission on Building and Fire Codes, "National Building Code" (2020) online at: CCBFC.
[52] Canadian Commission on Building and Fire Codes, "Review of the Code Development System: Phase 1 – The System" online at: Government of Canada at p. 17

to help them fulfill their constitutional responsibilities when it comes to developing their local building codes.[53] The fact that this system relies largely on consensus-based decision-making[54] may be one of the features that inhibits the adoption of more rigorous accessibility standards in the NBC. A requirement for near unanimity would suggest that whatever standards are published usually speak to the lowest common denominator in terms of their rigour. However, it may be this very feature of the NBC that accounts for its influence. It may be that a federal directive to the CCBFC to change any particular aspects of the NBC would be received poorly by provincial governments and industry, leading to a failure to adopt the revised standards across the country.

A) Criticism of the CCBFC Process

This arrangement has been critiqued by legal scholars, who have criticized the fact that delegating the creation of the NBC to the National Research Council and industry specialists and bureaucrats treats the process as a technical exercise rather than an elaboration of social policy.[55] As J.W. Archer points out, building codes very much are social policy:

> A quick scan of Canada's National Building Code could lead one to the conclusion that building codes are entirely technical. This would be wrong, however. Building codes articulate social policy. They set out what we, as a society, agree are limitations that should be placed on the private use of property in the context of acceptable levels of risk from hazards in and around buildings.[56]

Leaving such an elaboration of social policy entirely to a research body, which has traditionally treated accessibility considerations as an afterthought,[57] does seem like an abandonment of federal leadership on this issue. This is evident in the CCBFC's recent *Policy Paper: Accessibility in Buildings*, which acknowledged the importance of accessibility and the legal commitments Canada has made to improve accessibility in the built environment but made few concrete suggestions about strong new accessibility features that could be implemented in future revisions of the NBC.[58]

B) Actions and Solutions

This is not to say that the federal government has no influence over the shape of the NBC. In fact, it has played a leading role when it comes to the adoption of more stringent energy efficiency standards in the NBC as part of its climate change strategy. This suggests that a directive to the CCBFC to work with the provinces to improve accessibility standards still has

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[53] Canadian Commission on Building and Fire Codes, Review of the Coordinated Code Development System: Report on Phase 1: The System (Joint CCBFC/PTPACC Task Group), online: NRC.
[54] *Ibid* at p. 16.
[55] *Supra* note 33.
[56] J.W. Archer (2003) *Building Codes — Why Are They Developed?* online: National Research Council Archives.
[57] *Supra* note 33.
[58] Note that a revised National Building Code was supposed to come out in 2020. However, as a result of the pandemic, this was delayed for an indeterminate amount of time.

some merit, provided that these efforts retain some of the consultative elements in the current process.

Indeed, a recent bilateral agreement between the provinces and the federal government illustrates that mechanisms have been developed to facilitate this type of collaboration. In 2020, the federal government and the provinces implemented an agreement titled the "Reconciliation Agreement on Construction Codes" which obliges the provinces to, among other things, attempt to reduce variation in local building codes across Canada, largely in the service of reducing trade barriers between the provinces. The existence of such a mechanism suggests that a similar effort focused on promoting increased accessibility is not only possible but in fact required under the NHSA, which obliges the federal government to exercise national leadership and cooperate with other levels of government to improve accessibility standards across Canada.

In addition to this, as part of its efforts to improve accessibility standards, the federal government should also update the governance structures of the CCBFC to ensure: that the objectives of the NHSA are clearly incorporated into its processes and mandate; and that persons with disabilities and their interests are better represented in this body.

At present, the mandate of the CCBFC primarily focuses on "encourag[ing] uniformity of building and facility regulations throughout Canada,"[59] a limited ambition that marginalizes the role of Canada's international human rights commitments in the development of accessibility regulation. In light of Canada's recognition of the right to adequate housing under the NHSA and its ratification of the CRPD, such a limited mandate is manifestly inappropriate. If Canada's housing policy truly "recognize[s] that the right to adequate housing is a fundamental human right" (Section 4), then it should be reflected in the mandate of the CCBFC.

Further modifications can be made to bolster the voting power of representatives of the disability community on the CCFBC. Under the current framework, industry (as a whole) has twelve voting members on the Commission, while the groups that represent persons with disabilities are consigned to vie for the four seats designated for the "Public Interest/Others."[60] Based on its current membership, the CCBFC includes only one representative with an explicit tie to the disability community.[61] More robust representation and a shift in governance model could help change the consensus on accessibility standards, which would help to ensure that the government meets its obligation to meaningfully engage with persons with disabilities on their right to adequate housing.

In addition to revising the governance structure of the CCBFC, an additional action that both the federal government and the Office of the Federal Housing Advocate (OFHA) could prioritize is funding independent and impartial research to better describe the serious risks that current building standards present for persons with disabilities (see Section 13[d] NHSA). At present, the research available on this subject is surprisingly limited. Such research could be used to great effect, particularly when one considers the fact that all proposed changes to the NBC go through

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[59] Canadian Commission on Building and Fire Codes, "Policies and Procedures" (2016) online at: CCBFC.
[60] *Ibid.*
[61] Canadian Commission of Building and Fire Codes, "Members" (2021) online at: CCBFC.

an impact analysis, which explicitly considers the costs and benefits of proposed changes in terms of both their health and safety implications, as well as some of their other socio-economic consequences.[62] Given the comparatively limited research on this topic, particularly in Canada, presumably many proposals to improve accessibility standards are being assessed without a full understanding of the costs that inaccessibility imposes on persons with disabilities.

In this context, this type of research would help to ensure that the CCBFC fully engages with the actual impact that many of the discriminatory requirements in the NBC have on persons with disabilities. This would in turn help to ensure that Canada prioritizes the experiences of a vulnerable population in its process for developing housing and accessibility policy, as it is required to do under the NHSA*,* and that this aspect of the right to adequate housing was being effectively monitored.

Current Efforts to Improve Accessibility

It is worth emphasizing certain efforts within the federal government to address accessibility in housing. For example, Accessibility Standards Canada has begun to develop a new model standard for housing with the CSA Group, a standards development organization. While this standard is unlikely to be as influential as one integrated directly into the NBC, this may nevertheless represent a fruitful approach, provided that it is accompanied with strong efforts to encourage or require compliance with its standards. Such an effort could include issuing regulations under Section 117 (c) of the *Accessible Canada Act* (ACA), which mandated that *all* federal expenditures related to housing must be directed towards projects that meet this standard.

Indeed, this type of approach is already used on a piecemeal basis in the National Housing Strategy. The Canada Mortgage and Housing Corporation (CMHC) directly distributes funds for housing construction and renovation through a variety of mechanisms. These include the National Housing Co-Investment Fund (NHCF), the Rental Construction Financing Initiative (RCFI), the Federal Lands Initiative, and the Rapid Housing Initiative. Some of these initiatives already include basic accessibility requirements that organizations must meet in order to access funding.

For example, the NHCF and the Federal Lands Initiative both contain several minimum accessibility requirements for new construction and renewals of social housing. [63] For new constructions and renewals, a minimum of 20% of units must meet a number of key standards outlined in the current *Accessible Design Standards for the Built Environment* published by the

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[62] Canadian Commission on Building and Fire Codes, "Appendix G: Guidelines for Impact Analysis for CCBFC Committees" (2016) online at: CCFBC.

[63] Note that the NHCF funds the construction or renewal of community and affordable housing, urban Indigenous community housing, mixed-use market and affordable rental housing, shelters, and transitional housing, all of which must have a minimum of five units. The funding stream is open to not-for-profit community housing providers, municipalities, provinces and territories, Indigenous governments and organizations, and the private sector.

CSA Group.[64,65] Unfortunately, these two programs represent something of a high-water mark in terms of the accessibility requirements offered through the National Housing Strategy. Other programs, like the RCFI, set markedly lower accessibility requirements. The eligibility requirements for this funding state that:

> Projects will be expected to meet a minimum accessibility requirement of 10% of units within the project meet or exceed the local accessibility standards as prescribed by the Municipality or Province/Territory, or in the absence of the aforementioned, the accessibility requirements of the 2015 *National Building Code*.[66]

This requirement has the unfortunate distinction of both reducing the absolute number of accessible units and also judging the accessibility of those units on the basis of a much less stringent standard (i.e., the national or local building code, instead of the *Accessible Design Standards for the Built Environment*, published by the CSA Group).

For cities being funded under the Rapid Housing Initiative, housing providers are expected to provide even fewer accessible units (5%), and these again are considered accessible if they meet local building code accessibility requirements.[67]

As of December 31, 2020, these programs collectively had funded the creation of 16,000 accessible units—a helpful number, but nowhere near what is required to address the overall shortage of accessible housing units.[68] This leaves the federal government with ample opportunity to create more stringent accessibility standards in many of the programs it is already delivering and to apply them more rigorously across the various programs it administers.

This is particularly true when it comes to the bilateral funding agreements the federal government has reached with the provinces related to the disbursement of funds under the National Housing Strategy. Although these agreements contain requirements that the provinces track the number of accessible units they create, there do not appear to be any binding targets for the number of accessible units that must be created.[69] While some provinces have adopted targets of their own accord (e.g., Alberta requires 10% of all new units to be accessible according to their local definition of accessibility), these standards vary from province to province. This leaves ample scope for a more systematic approach to the accessibility requirements attached to federal funds—by either mandating it through the ACA or even just by more thoroughly implementing accessibility mandates in existing programs/mechanisms. Such

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[64] CMHC, "National Housing Strategy: Minimum Environmental and Accessibility Requirements — New Construction" (undated) online at: Government of Canada.
[65] CMHC, "National Housing Strategy: Minimum Environmental & Accessibility Requirements — Repairs and Renewals" online at: Government of Canada.
[66] CMHC, "National Housing Strategy: Rental Construction Financing" (undated) online at: Government of Canada.
[67] CMHC, "National Housing Strategy: Rapid Housing Initiative" (undated) online at: Government of Canada.
[68] CMHC, "Building the Future Together: 2020 National Housing Strategy Progress Report" (2021).
[69] See for example, Ontario's Bilateral Agreement.

an approach could help better align the National Housing Strategy with the NHSA and Canada's international human rights obligations as they pertain to accessibility.

A More Ambitious Approach: National Accessibility Standards

A more ambitious legal strategy to incentivize the adoption of more robust accessibility standards across Canada would involve using the federal government's spending power to incentivize provinces to adopt more rigorous accessibility standards in their building codes as a condition of the receipt of federal funds (perhaps under the National Housing Strategy). This would perhaps involve using a legislative scheme similar to the *Canada Health Act* R.S.C., 1985, c. C-6. Such an approach might involve the federal government setting broad accessibility parameters or objectives that each province's building code must meet in order to receive certain types of funding.

To be clear, this approach is broader than that described in the previous section, as it requires broad changes to provincial building codes, as opposed to limiting federal accessibility requirements only to those projects that receive federal funds. In doing so, the federal government would be encouraging the creation of national accessibility standards, much like how the *Canada Health Act* creates national health care standards.

Such an approach would likely represent one of the more effective strategies that the federal government could use to meet its human rights obligations under the NHSA, particularly as it relates to the Government of Canada's obligations to demonstrate national leadership and to deploy all appropriate legislative and regulatory mechanisms to promote the right to adequate housing. That said, this particular initiative is unlikely to emerge from existing regulatory mechanisms, and much like the *Canada Health Act* (and its legislative predecessors), a larger social/political movement would likely be required to spur the development of such an initiative. The tools in the NHSA could be used to spur support for such a movement, perhaps through the initiation of an inquiry into accessibility in housing by the National Housing Council (Section 13.1 [2]). Such an inquiry could provide a rallying point for advocacy groups and could help these groups cohere around larger coordinated policy initiatives, like national accessibility standards.

Complications

It is worth emphasizing that enacting national accessibility standards may involve some constitutional complications. Parliament's spending power, while broad, does have limits. The case law is very limited in this area, but the courts have generally held that an exercise of the spending power will be permissible only so long as it "do [es] not amount in fact to … regulation or control of a matter outside federal authority."[70] That is, some case law suggests that the

[70] *Winterhaven Stables Limited v Canada (Attorney General),* 1988 ABCA 334 (CanLII) at para 23.

conditions attached to federal funds may, at some point, become so onerous that they essentially become direct regulation.[71,72]

While the distinction between a permissible and impermissible exercise of federal spending powers may be difficult to draw, the Ontario Court of Appeal in *Canada Mortgage and Housing Corp. v. Iness*, 2004 CanLII 15104 (ON CA) highlighted two factors with possible relevance:

1) Whether the condition is voluntary or not, in the sense that it can be avoided by declining the funding[73]; and
2) Whether the condition is linked or rationally connected to an exercise of Parliament's spending power (paragraph 35). In the context of the *Iness* decision, this appears to mean that the conditions were directed towards the program or priorities being funded. That is, they were related to a program upon which federal dollars were being spent.[74]

The problem with a scheme like the one described above might arise when one considers the second factor—the linkage between the condition and Parliament's exercise of its spending power. Any funds advanced to the province under such a scheme would likely be related to specific housing projects (e.g., creating or implementing supportive housing programs or housing construction and renovation within the province). However, the scope of the proposed accessibility conditions would be much broader—namely, they would require changes to the building codes that would affect all housing construction. This means that private construction, with no discernable connection to the federal funds being advanced, would be impacted by this condition. The "overbreadth" of these conditions may push a scheme of this nature into uncharted constitutional territory and render it vulnerable to a constitutional challenge.

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[71] See: *Canada Mortgage and Housing Corp. v Iness*, 2004 CanLII 15104 (ON CA); *Central Mortgage and Housing Corp. v Co-operative College Residences, Inc. et al.*, 1975 CanLII 636 (ON CA)

[72] S. Choudhry, "Recasting Social Canada: A Reconsideration of Federal Jurisdiction over Social Policy" (2002) 52 UTLJ 3,163-252.

[73] See also: *Winterhaven* at para 19.

[74] To be clear, the above is not a legal test in the traditional sense—it is more of a description of the factors the court found were relevant when characterizing an exercise of federal spending power.

2. Gaps in the Right to Security of Tenure for Persons with Disabilities

This report will now move on to a discussion of some of the gaps that persons with disabilities experience when it comes to the application of their security of tenure rights. In doing so, it will describe these gaps and will then briefly discuss how the NHSA could be used to address this issue.

Gaps in the Right to Security of Tenure

By virtue of their specific disability-related needs, persons with disabilities often live in a wide range of alternative residential arrangements. These include group homes, supported living residences, supported independent living arrangements, assisted living, intensive support residences, transitional housing, care homes, retirement homes, and residential treatment centres.

These different types of residences span a continuum from those that offer higher levels of care, support, and treatment to those that offer minimal levels. There is very little in the way of common terminology across Canada that can be used to describe these residences. Ultimately, this means that direct, cross-jurisdictional comparisons of the legal frameworks in different provinces is quite difficult.

However, what is clear is the fact that, in many provinces, a large proportion of these residential arrangements are not covered under residential tenancy legislation. For instance, in the case of assisted living residences for the elderly, a 2013 report by the British Columbia Law Institute noted that:

> A review of the legislation of other Canadian provinces reveals that only Ontario and Quebec extend their residential tenancy legislation to equivalents of assisted living. In other provinces, residential arrangements similar to British Columbia assisted living facilities either fall outside of the scope of residential tenancies legislation or exist in a grey area of uncertainty as to whether residential tenancy law applies to them.[75,76]

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[75] British Columbia Law Institute & Canadian Centre for Elder Law, "Report on Assisted Living in British Columbia" (2013) at p. 23.

[76] It should be emphasized that this statement also applies to British Columbia as well. While the report emphasizes that the relationship in assisted living is a landlord-tenant relationship, assisted living arrangements “are not currently governed by the *Residential Tenancy Act*, which governs most rentals of living accommodations in British Columbia” (p. 23).

Indeed, a review of the current legislation broadly confirms this point and further indicates that a large number of other residential arrangements often utilized by persons with disabilities are excluded from the application of residential tenancy legislation (See Appendix A for a review of the legislation). Section 3(1)(d) of *The Residential Tenancies Act*, CCSM c R119 in the Northwest Territories provides a typical example, stating that:

> 3.(1) This Act does not apply to…
>
> (d) living accommodation occupied by a person for penal or correctional purposes or for the purpose of receiving in-patient or resident-based therapeutic or rehabilitative care;
>
> (e) living accommodation established to temporarily shelter persons in need;

While the language of this section may seem limited to hospital-like settings, as will be illustrated below, a variety of service and housing providers have invoked similar provisions to escape legal obligations under residential tenancy acts. While exemption may be appropriate in some cases (e.g., in hospitals), in many other settings these exemptions have contributed to two problems for persons with disabilities. The first is related to the complexity of determining whether their residence is covered by residential tenancy legislation—a judgment that often eludes housing and service providers themselves. The second relates to the fact that if their residence is in fact exempt, they are denied many of the protections typically afforded to other tenants.

A) Is Housing Exempt or Not?

Given the broad range of residential options and the vagueness of the statutory language surrounding different types of exempt tenancies, it is difficult if not impossible for many tenants to determine whether these exemptions apply to their tenancy. Ontario's current landlord tenant regime provides a good example of this phenomenon. In a report on transitional housing, the Ministry of Housing notes that decisions by Ontario's Landlord and Tenant Board and the courts have provided very limited clarity regarding the proper interpretation of a "rehabilitative" or "therapeutic" place of residence under the *Residential Tenancies Act*, 2006, S.O. 2006, c. 17, and they specifically note that several lines of conflicting jurisprudence have emerged. [77]

The primary source of the dispute often appears to be related to the type (and frequency) of the services offered by the landlord and whether these qualify for the exemption. For example, in the past, Ontario's Landlord and Tenant Board has found that "mere 'assistance with activities of daily living' is not [a] 'rehabilitative or therapeutic service' and that evidence of on-site treatment is required in order to qualify for the … exemption."[78] However, other decisions have suggested that rehabilitative services include "providing health care or 'conditions of support' and services need not be specifically 'rehabilitative' but can include other supports, for example

[77] Ministry of Housing, "Legislative Framework for Transitional Housing Under the Residential Tenancies Act, 2006" (2016), Government of Ontario.
[78] *Ibid*. at p. 11.

supportive counselling and case management."[79] In practice, it can be difficult to determine which service and housing providers actually qualify for the exemption. Both the Ministry of Housing and Ontario's Divisional Court have both stated that this is ultimately a factual issue that must be decided on a case-by-case basis.[80]

This confusion is also evident in other jurisdictions. For example, in the Northwest Territories, a dispute arose regarding whether an exemption for "in-patient or resident-based therapeutic or rehabilitative care" applied to a transitional housing provider. Although the adjudicator found that it did not, this decision was subsequently overturned by the Supreme Court of the Northwest Territories (on questionable grounds, in this author's opinion).[81]

The confusion over these definitions is perhaps a natural consequence of the fact that many of these exemptions were introduced in a time where the range of housing options for persons with disabilities was significantly less complex than it currently is. For instance, Ontario's exemption was originally introduced in *The Residential Tenancies Act, 1979,* SO 1979, c 78[82] at a time well before the deinstitutionalization of persons with disabilities had reached its apex and when therapeutic, supportive, and rehabilitative community placements were more limited in scope. This point was emphasized by the adjudicator in the Northwest Territories. At paragraph 14, the adjudicator states that:

> "The Act was written and discussed by the Legislative Assembly between 1985 and 1987, and then enacted in 1988. During the preliminary consultations, committee reviews, and legislative debate, there were no public discussions regarding the exemption from the Act of what is known today as transitional housing. It is clear that transitional housing was not a program that existed when the Act was written."

B) Persons with Disabilities Have Limited Protection in Exempt Housing

The second problem occurs when housing providers are found to be exempt or believe themselves to be exempt under residential tenancies legislation—situations that are not uncommon among different types of housing providers.[83,84] Both situations result in "tenants"

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[79] *Smith v Youthlink Youth Services*, 2020 ONSC 7624 (CanLII) at para 37, affirmed in: Smith v. Youthlink Youth Services, 2022 ONCA 313 (CanLII).

[80] *Smith v Youthlink Youth Services*, 2020 ONSC 7624 (CanLII) at para 47.

[81] *YWCA NWT v Hashi,* 2021 NWTSC 15 (CanLII

[82] It is instructive to see the language of this enactment. Section 4(e) states that: "This Act does not apply to … living accommodation occupied by a person for penal, correctional, rehabilitative, or therapeutic purposes or for the purpose of receiving care." This essentially represents a duplication the language currently found in the exemptions in New Brunswick, Manitoba, Newfoundland and Labrador, the Northwest Territories, and Nunavut. As can be seen in Appendix A, Ontario has since modified this definition somewhat.

[83] Ministry of Housing, *supra* note 77.

[84] See also: *Smith v Youthlink Youth Services*, 2020 ONSC 7624 (CanLII); *TET-58815-15 (Re)*, 2015 CanLII 94893 (ON LTB); *TST-01778 (Re)*, 2010 CanLII 67970 (ON LTB); *SOL-45003-14 (Re)*, 2014 CanLII 52441 (ON LTB); *Murray v Salvation Army Bailey House*, 2011 CanLII 94390 (NWT RO); *Grenadier (Tenants of) v We-Care Retirement Homes of Canada Ltd*., [1993] O.J. No. 1550; *YWCA NWT v Hashi*, 2021 NWTSC 15 (CanLII); *NOT-18915-15-RV (Re)*, 2015 CanLII 35176 (ON LTB); *CET-70982-17 (Re)*, 2018 CanLII 41842 (ON

being deprived of the type of security of tenure rights afforded to other individuals in other types of housing (e.g., quiet enjoyment of the premises, restrictions on evictions, etc.). This deprivation results in a number of problematic practices on the part of certain landlords (both public and private), like the imposition of overly restrictive rules or programmatic requirements as a condition of tenancy[85] or situations where a person with a disability is ejected from their housing because their needs have been summarily "assessed" as being too high for a particular housing provider (what some might consider a *de facto* eviction that's characterized as a "discharge" instead).[86,87,88]

Many housing providers argue that these exemptions are necessary because the programming they offer is incompatible with various security of tenure rights. For example, transitional housing providers have stated that their programs require tenants to abide by rules related to curfews, chores, guests, substance use, and behaviour and safety requirements—all of which, they allege, are incompatible with a right to the reasonable enjoyment of the premises or the right to privacy. Others note that they must be able to unilaterally end tenancies to promote compliance with program objectives.[89] The degree to which this is true is debatable and highly dependent on the particular program. Indeed, similar arguments were raised regarding care homes in Ontario in the 1990s, and they have gone on since to be successfully regulated under the *Residential Tenancy Act.*[90]

These arguments sidestep the most important drawback of these exemptions for many persons with disabilities, namely the absence of an effective and independent forum through which to raise complaints about evictions in these homes. Absent landlord-tenant tribunals, there are very few expeditious places that persons with disabilities can go when they are being evicted by a service or housing provider.

Other Complaint Mechanisms

For certain types of housing, other regulatory frameworks may be relevant to regulating certain aspects of a housing provider's conduct and acting as a forum to hear complaints. For example, in British Columbia, assisted living residences and certain forms of residential care are dealt with under the *Assisted Living Regulation*, BC Reg. 189/2019, made under the *Community Care and*

LTB); *PHS Community Services Society v Swait*, 2018 BCSC 824 (CanLII); Decision No. 1696 RTB (BC) (2012); Decision No. 6472 RTB (BC) 2015; Decision No. 2161 RTB (BC) (2011)

[85] *PHS Community Services Society v Swait*, 2018 BCSC 824 (CanLII); Decision No. 6472 RTB (BC) 2015;

[86] Natalie Spagnuolo, "Building Backwards in a 'Post' Institutional era: Hospital Confinement, Group Home Eviction, and Ontario's Treatment of People Labelled with Intellectual Disabilities" (2016) 36:4 Disability Studies Quarterly.

[87] At times, this type of eviction may result not in an individual becoming homeless, but instead in more restrictive forms of institutionalization. Persons with disabilities may be "discharged" from a more inclusive community-based setting to a more institutional setting based on their perceived level of need (e.g., a nursing home). Meghan P Carter, "How Evictions From Subsidized Housing Routinely Violate the Rights of Persons With Mental Illness" (2010) 5 Nw JL & Soc Pol'y 118.

[88] Mahoney, Elinor. "Disabling Tenants' Rights." Osgoode Hall LJ 35 (1997): 711.

[89] Ministry of Housing, *supra* note 77.

[90] Lightman, E. S. "A Community of Interests: The Report of the Commission of Inquiry Into Unregulated Residential Accommodation" (1990) (Government of Ontario)

Assisted Living Act SBC 2002, c 75. In Alberta, a similar framework exists under the *Supportive Living Accommodation Licensing Regulation,* Alta Reg 40/2010. However, while these frameworks may be helpful when it comes to complaints about certain issues, they are largely devoid of the type of security of tenure rights enshrined in residential tenancy legislation. They often characterize evictions as "discharges" and typically only deal with quality of care issues (and even the standards they do prescribe with respect to quality of care have been criticized as toothless, vague, and open to interpretation).[91]

C) The Main Message

Ultimately, the above analysis suggests that if a person with disabilities resides in a living environment characterized as supportive or therapeutic, there is a significant chance this person will be denied many of the protections that others receive as a matter of course. Indeed, this is part of a more general pattern among persons with disabilities, where they are "placed" in environments where they are both simultaneously overregulated and under protected.[92]

It is also worth emphasizing here that persons with disabilities are often not in these environments by choice. Frequently, they are in these environments largely because of the limited social assistance they receive from all levels of government, meaning that subsidized placements in so-called supportive environments are their only real option for adequate housing. This means that summary or unregulated evictions from these environments can be particularly devastating, as it means that they must pay market rent—something which many persons with disabilities cannot afford.[93]

The National Housing Strategy Act and Exemptions to Security of Tenure

Unfortunately, these exemptions are enacted by the provinces and represent a subject matter that falls solidly within the realm of provincial competence,[94] meaning that any efforts by the federal government to address this situation directly via legislation run the risk of being *ultra vires.* However, there may be some steps that both the federal government and the OFHA could take, under the NHSA, to fill the gaps in the right to security of tenure.

First, very limited research exists describing the extent to which persons with disabilities are evicted outside of the formal, legal eviction processes under provincial residential tenancy legislation. Both the federal government and the OFHA could commission research geared towards describing the frequency of the phenomena described above as well as the full range of housing situations where it may occur. Research of this nature could be utilized by advocates at the provincial level to close the gaps in residential tenancy legislation and would help the

[91] For example, see: Auditor General of Ontario, "The 2014 annual report" (2014).
[92] Kerri Joffe, "Enforcing the Rights of People With Disabilities in Ontario's Developmental Services System" (2010) The Law as It Affects Persons With Disabilities, online: https://www.lco-cdo.org/wp-content/uploads/2010/11/disabilities_joffe.pdf.
[93] Montgomery, Ann Elizabeth, et al. "Factors Contributing to Eviction from Permanent Supportive Housing: Lessons from HUD-VASH." Evaluation and Program Planning 61 (2017): 55–63.
[94] Re *Residential Tenancies Act, 1979,* [1981] 1 SCR 714 at p. 720.

federal government ensure that this aspect of the right to adequate housing was being adequately and independently monitored.

Second, another potential, if incomplete, response is to simply stop giving money to service providers who do not have a sufficiently rigorous and independent dispute resolution processes in place to handle decisions involving security of tenure or evictions. This may involve imposing requirements on service providers (under the National Housing Strategy or otherwise) which would oblige them to:

1) Confirm the application of local residential tenancy legislation;
2) Accept the jurisdictions of a federal dispute resolution mechanism as a condition of their funding agreements; or
3) At the very least, incorporate specific requirements in tenancy agreements regarding enhanced internal dispute resolution processes (admittedly a less than ideal solution, given the lack of independence of internal processes).

Through the CMHC, the federal government could impose these requirements pursuant to Sections 51 and 95 of the *National Housing Act* R.S.C., 1985, c. N-11, which allows the CMHC to extend loans to housing providers for the construction and repair of various types of housing projects and impose “conditions with respect to the operation or occupancy of a housing project.” This particular provision has been used a number of times in the past to validly impose terms on the residential tenancy agreements of housing providers who have accepted federal funds (See: *Canada Mortgage and Housing Corp. v. Iness*, 2004 CanLII 15104 [ON CA]) and could feasibly be used to insert dispute resolution clauses into each organization’s tenancy agreements. Such provisions would effectively be contractual in nature and may, in a sense, operate like arbitration clauses in other commercial contracts.

Ontario has actually taken a similar approach to dispute resolution in transitional housing. Section 5.1 of the *Residential Tenancies Act* lays out a number of specific requirements for tenancy agreements for transitional housing providers. These include provisions related to dispute resolution which require organizations to have internal dispute resolution mechanisms that meet certain criteria. However, the primary drawback of Ontario’s approach is that this type of dispute resolution mechanism lacks independence from the housing provider.

3. Human Rights Violations Undermine the Right to Security of Tenure

One of the predominant forms of discrimination faced by many persons with disabilities in the landlord-tenant context is related to a persistent failure to properly apply human rights guarantees in these settings—a failure which can often lead to evictions or other violations of the right to security of tenure. This problem generally takes three separate forms:

A. Landlords failing to properly accommodate persons with disabilities before attempting to evict them;

B. Quasi-judicial bodies failing to apply human rights law in decisions related to evictions and security of tenure; and

C. Failures to properly accommodate persons with disabilities during the tribunal process itself.

Landlords Failing to Properly Accommodate Persons with Disabilities

Tenants with disabilities and their advocates have long complained about the fact that landlords rarely attempt to provide them with reasonable accommodation and that landlords, faced with a disability-related problem, often try eviction before accommodation.[95] One of the most common manifestations of this problem usually involves a failure to inquire about accommodation needs prior to eviction or to properly engage in the accommodation process itself.[96] That is, landlords are often quick to prioritize their rights, as well as those of other tenants (e.g., reasonable enjoyment of the premises), over those of a tenant with a disability instead of attempting to reconcile these rights through a proper accommodation process.

TEL-81015-17-RV (Re), 2018 CanLII 111868 (ON LTB) provides a typical example. In that case, a landlord attempted to evict a tenant with multiple disabilities, including fetal alcohol syndrome and sleep apnea, as a result of noise disturbances caused by the tenant staying up late at night playing online games. In describing the situation, the Tribunal noted that:

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[95] Carter, *supra* note 87.

[96] For example, see: *SOL-94702-18-RV (Re),* 2018 CanLII 141507 (ON LTB) (failure to inquire about accommodation needs prior to applying for eviction); *Erika v. David*, 2003 HRTO 13 (CanLII) (imposition of extra conditions on tenancy because of disability); *Devoe v. Haran*, 2012 HRTO 1507 (CanLII) (failure to properly engage in accommodation process); *Cityviews Village Inc. v. [tenant]*, RTB (BC) Decision No. 6020 (2021) (landlord pressuring tenant with disability to move out); *TEL-92935-18 (Re),* 2019 CanLII 86868 (ON LTB) (landlord not engaging in accommodation process); TEL-81015-17-RV (Re), 2018 CanLII 111868 (ON LTB) (landlord failed to inquire about accommodation needs prior to applying for eviction); SOL-66034-15-SA (Re), 2016 CanLII 44564 (ON LTB) (landlord failure to provide accommodation to the point of undue hardship); *SWT-97811-16 (Re)*, 2017 CanLII 48795 (ON LTB) (landlord failed to inquire about accommodation needs).

> The evidence does not support the conclusion that the Tenant is deliberately causing excessive noise. Rather, the evidence indicates that a symptom of the Tenant's disability is a loud voice which he is often unaware of. Because playing interactive games online can involve speaking into a microphone to other players, the Tenant's voice can become louder than normal.

The Landlord and Tenant Board (LTB) denied the landlord's eviction application, specifically noting that "the Landlord did not meet with or talk to the Tenant about other steps that might help [resolve the noise issue]" and therefore had not discharged their duty to properly accommodate the tenant. This failure to engage in the accommodation process is extremely common among landlords and is perhaps a key reason why many eviction applications are brought against persons with disabilities.

Application of Human Rights Law to Landlord-Tenant Decisions

Ever since *Tranchemontagne v. Ontario (Director, Disability Support Program)*,[97] it has been clear that administrative tribunals have the ability to consider human rights law in their administrative decisions. However, this discretion is often either ignored or improperly exercised. Indeed, the case law is rife with examples where landlord and tenant tribunals have failed to either properly apply human rights legislation or have ignored it entirely.[98]

SOL-51322-14 (Re), 2014 CanLII 57894 (ON LTB) illustrates this issue well. In that case, a tenant with clear disability-related needs was evicted from their home with seemingly little to no inquiry into whether accommodations would have been possible. The Tribunal, in evicting the tenant, made no reference to the Code or the landlord's duty to inquire about disability-related needs (*Lane v. ADGA Group Consultants Inc.*, 2007 HRTO 34 [CanLII]) (See footnote 96 for further examples).

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[97] [2006] 1 S.C.R. 513, 2006 SCC 14

[98] Examples: *TSL-46861-13 (Re)*, 2014 CanLII 23631 (ON LTB) (no reference by LTB to factors to be considered in undue hardship analysis in eviction hearing); *McKenzie v. Supportive Housing in Peel*, 2005 CanLII 12858 (ON SCDC) (LTB decision did not consider Code obligations in eviction hearing); *Bronson v. Kingston and Frontenac Housing Corporation*, 2014 HRTO 619 (CanLII) (LTB did not consider accommodation issue regarding a rental subsidy in eviction hearing); *Walmer Developments v.* Wolch, 2003 CanLII 42163 (ON SCDC) (LTB failed to consider landlords obligation to accommodate in eviction hearing); *Ramadhin v. Chavali*, 2014 HRTO 866 (CanLII) (LTB mediator advised applicant he could not raise human rights issues at LTB eviction hearing); *N.K. v. The Owners, Strata Plan LMS YYYY*, 2018 BCCRT 108 (CanLII) (refusal to allow occupant to keep support animal—failure to apply test for discrimination); *Sharp v. The Owners, Strata Plan* BCS 435, 2020 BCCRT 1142 (CanLII) (failure to properly apply test for discrimination and burden of proof); *Metro Vancouver Housing Corporation v. [tenant]*, RTB (BC) Decision No. 6022 (2020) (no human rights analysis—tenants evicted because of noise from child with a disability); *TST-32086-12-RV (Re)*, 2015 CanLII 71788 (ON LTB) (failure of LTB to consider Code-related issues at eviction hearing); *SWL-13871-18 (Re*), 2018 CanLII 42924 (ON LTB) (failure to consider Code-related obligations in LTB eviction decision); *TSL-67255-15-RV2 (Re)*, 2016 CanLII 39865 (ON LTB) (failure to reference Code obligations for procedural accommodations).

Accommodations at Landlord and Tenant Tribunals

For many persons with disabilities, access to justice hinges on their ability to obtain appropriate accommodations during the administrative tribunal context. In the last two years, this issue has taken on increasing importance due to the pandemic, when most administrative tribunals shifted to an all-digital format. With respect to landlord and tenant tribunals specifically, numerous organizations have raised significant concerns regarding the degree to which this process is accessible to tenants with disabilities. For instance, a recent report by the Advocacy Centre for Tenants Ontario (ACTO) has highlighted a number of significant accessibility challenges persons with disabilities currently face before Ontario's Landlord and Tenant Board. These included problems with existing accommodations, such as lapses in ASL translation and inaccessible or complicated technologies.

The report further noted that participation by persons with mental health disabilities was almost non-existent in the tribunal hearing processes.[99] The report's conclusions specifically question the accessibility of the LTB's process for persons with mental health disabilities and note that in cases where tenants did not show up, adjudicators inquired about their absence in only 30.5% of cases. This is extremely problematic given the numerous challenges that many tenants face when attempting to participate in a hearing (e.g., the absence of proper notice[100], difficulty arranging access to technology, etc.).

What Could the Federal Government Do About This?

Unfortunately, in many ways the problems described above could be described less as legal or policy barriers and more as a failure to properly apply existing human rights principles in practice. In fact, the failure to consistently apply human rights principles within the context of landlord and tenant board hearings seems so pervasive that it becomes difficult to assess whether or not human rights law itself is inadequate in this setting.

As such potential remedies for this issue should focus more heavily on improving the uptake of human rights principles in this environment. Measures to achieve this could include efforts to promote better human rights education among landlords, tenants, and adjudicators. However, the most effective remedy in these circumstances is likely to involve promoting the right to access to counsel, a topic which is more extensively covered in the report in this series "The Right to Counsel for Tenants Facing Eviction," by Sarah Buhler.

Conclusion

This report has surveyed a number of the unique challenges that persons with disabilities experience when it comes to realizing a substantive right to security of tenure. It has illustrated the role that building codes, residential tenancy legislation, and pervasive human rights violations play in undermining the enjoyment of this right, largely by helping to construct an

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[99] Advocacy Centre for Tenants Ontario, *Digital Evictions: The Landlord and Tenant Board's experiment in online hearings* (ACTO, 2021).
[100] *SOL-94702-18-RV (Re)*, 2018 CanLII 141507 (ON LTB) at paras 3–6

environment where these rights either do not apply to persons with disabilities or where the rights themselves are meaningless.

In addition to highlighting these barriers, this report has also attempted to sketch out several potential responses the federal government could undertake to address these barriers and meet its obligations under the NHSA. In doing so, this report has described some of the ways that new legislation can help the federal government fulfill the right to adequate housing for persons with disabilities.

Appendix A—Exemption Provisions in Provincial Residential Tenancies Legislation

Province	Exemption Provisions	Statutory Language
Alberta	*Residential Tenancies Act,* SA 2004, c R-17.1, s. 2(1)	(2) This Act does not apply to (f) a nursing home as defined in the *Nursing Homes Act*, (g) **lodge accommodation** as defined in the ***Alberta Housing Act*** that is operated (i) by a management body under a ministerial order under section 5 of that Act, or (ii) under an agreement with the Minister responsible for that Act, (h.1**) a supportive living accommodation licensed under the *Supportive Living Accommodation Licensing Act***, (i) a correctional institution, or (j) any other prescribed premises. 2004 cR-17.1 s2; 2009 cS-23.5 s26; 2013 cS-19.3 s25 *Alberta Housing Act* reapplies *Residential Tenancies Act*, with some exceptions: https://www.canlii.org/en/ab/laws/regu/alta-reg-242-1994/latest/alta-reg-242-1994.html
British Columbia	*Residential Tenancy Act* [SBC 2002] c. 78, s. 4(f), (g)	This Act does not apply to… (f) **living accommodation provided for emergency shelter or transitional housing**, (g) living accommodation (i) in a community care facility under the *Community Care and Assisted Living Act*, (ii) in a continuing care facility under the *Continuing Care Act*, (iii) in a public or private hospital under the *Hospital Act*,

		(iv) if designated under the *Mental Health Act*, in a provincial mental health facility, an observation unit, or a psychiatric unit, (v) in a housing-based health facility that provides hospitality support services and personal health care, or (vi) **that is made available in the course of providing rehabilitative or therapeutic treatment or services**. See regulations for further definition of transitional housing and emergency COVID housing. BC Reg 477/2003 | Residential Tenancy Regulation | CanLII Policy Guideline 46: Emergency Shelters, Transitional Housing, Supportive Housing (gov.bc.ca)
Manitoba	*The Residential Tenancies Act,* CCSM c R119 s. 3(1)	3.(1) This Act does not apply to (d) living accommodation occupied by a person for penal or correctional purposes or for the purpose of **receiving in-patient or resident-based therapeutic or rehabilitative care**; (e) living accommodation provided to temporarily shelter persons in need; (f) living accommodation provided in a hospital, a hospice for persons in the late stages of a life-threatening illness, **a personal care home or a residential care facility**;
New Brunswick	*Residential Tenancies Act*, S.N.B. 1975, c. R-10.2, s. 1(1)(b)(xiii)	1. (1) … (b) but does not include (vii) living accommodations provided in a nursing home as defined in the *Nursing Homes Act*, (viii) living accommodations located in a community placement resource as defined in Section 23 of the *Family Services Act*, (ix) living accommodations occupied by a person for penal, correctional, **rehabilitative, or therapeutic purposes or for the purpose of receiving care**, … (xi) living accommodations provided in a hospital facility operated under the Hospital Act, (xii) living accommodations provided in a psychiatric facility as defined in the Mental Health Act, (xiii) short-term living accommodations provided as emergency shelter,
Newfoundland and Labrador	*Residential Tenancies Act, 2000*, SNL 2000,	3. (4) This Act does not apply to (c) living accommodation occupied by a person for penal, correctional, **rehabilitative or therapeutic purposes or for the purpose of receiving care**;

	c R-14.1, s 3(4)	(d) living accommodation provided to temporarily shelter persons in need; (e) living accommodation provided in a hospital, nursing home or a home established to provide personal care for the aged; (g) living accommodation provided by a religious, charitable or non-profit organization for the purpose for which it is established;
Nova Scotia	*Residential Tenancies Act,* RSNS 1989, c 401	2. (h) "residential premises" includes any house, dwelling, apartment, flat, tenement, manufactured home, land-lease community, manufactured home space or other place that is occupied or may be occupied by an individual as a residence or that part of any such place that is or may be occupied by an individual as a residence**, but does not include** (i) a university, college or institution of learning**, a hospital, psychiatric hospital or maternity hospital, a municipal home,** or a jail, prison, **or reformatory,** **(iii) a nursing home to which the *Homes for Special Care Act* applies,** **(v) a residential care facility licensed under the *Homes for Special Care Act*, or** (vi) any other class of premises prescribed by regulation**;**
Northwest Territories	*The Residential Tenancies Act,* CCSM c R119 s. 3(1)	3.(1) This Act does not apply to (d) living accommodation occupied by a person for penal or correctional purposes **or for the purpose of receiving in-patient or resident-based therapeutic or rehabilitative care**; (e) living accommodation provided to temporarily shelter persons in need; (f) living accommodation provided in a hospital, a hospice for persons in the late stages of a life-threatening illness, a personal care home or a residential care facility;
Nunavut	*Residential Tenancies Act,* RSNWT (Nu) 1988, c R-5	6. (2) This Act does not apply to… (d) living accommodation occupied by a person for penal, correctional, **rehabilitative or therapeutic purposes or for the purpose of receiving care**; (f) living accommodation provided by a hospital, a nursing home or a home for the aged to its patients; (g) living accommodation provided by a hospital, a nursing home or a home for the aged to its staff unless the living accommodation has its own self-contained bathroom and kitchen facilities and is

		intended for year-round occupation by full-time staff or members of their household;
Ontario	*Residential Tenancies Act*, 2006, S.O. 2006, c. 17 ss. 5. (k) & 5.1	5. This Act does not apply with respect to, (e) living accommodation that is subject to the *Public Hospitals Act*, the *Private Hospitals Act*, the *Long-Term Care Homes Act, 2007*, the *Ministry of Correctional Services Act* or the *Child, Youth and Family Services Act, 2017*; … (f) short-term living accommodation provided as emergency shelter; (k) living accommodation occupied by a **person for the purpose of receiving rehabilitative or therapeutic services** agreed upon by the person and the provider of the living accommodation, where, (i) the parties have agreed that, (A) the period of occupancy will be of a specified duration, or (B) the occupancy will terminate when the objectives of the services have been met or will not be met, and (ii) the living accommodation is intended to be provided for no more than a one-year period; 2. (1) ….“care home” means a residential complex that is occupied or intended to be occupied by persons for the purpose of receiving care services, whether or not receiving the services is the primary purpose of the occupancy; (“maison de soins”) **See also s. 5.1—Revised Transitional Housing Section**
Prince Edward Island	*PEI Reg* EC10/89 s. 1	1. The following premises are exempt from the provisions of the Act: (b) premises licensed under the *Community Care Facilities and Nursing Homes Act* R.S.P.E.I. 1988, Cap. C-13; … (d) premises which **provide therapeutic or rehabilitative services or temporary shelter such as transition houses** and hostels **and other such premises which have supervisory services** as that term is defined in the *Community Care Facilities and Nursing Homes Act*;

		(e) **premises provided as group homes** under the Welfare Assistance Act R.S.P.E.I. 1988, Cap. W-3;
Québec	*Civil Code of Québec,* CQLR c CCQ-1991	The provisions of this section do not apply to (1) the lease of a dwelling leased as a vacation resort; (2) the lease of a dwelling in which over one third of the total floor area is used for purposes other than residential purposes; (3) the lease of a room situated in a hotel establishment; (4) the lease of a room situated in the principal residence of the lessor, if not more than two rooms are rented or offered for rent and if the room has neither a separate entrance from the outside nor sanitary facilities separate from those used by the lessor; (5) **the lease of a room situated in a health or social services institution,** except pursuant to Article 1974.
Saskatchewan	*Residential Tenancies Act*, 2006, SS 2006, c R-22.0001 s. 5(c)—(d)	5 This Act does not apply to: (c) living accommodation provided for crisis or emergency shelters; (d) living accommodation: (i) in a hospital, health centre, addiction treatment centre, special-care home, residential treatment centre or other facility that is designated pursuant to the *Provincial Health Authority Act*; (ii) **in a personal care home that is licensed pursuant to the *Personal Care Homes Act***; or (iii) in a facility or an approved home as defined in the *Mental Health Services Act*;
Yukon	*Residential Landlord and Tenant Act,* SY 2012, c 20	3. This Act does not apply to (d) **living accommodation provided for emergency shelter or transitional housing** if the person resides there for less than six consecutive months; (f) living accommodation (i) **in a residential care and treatment facility or continuing care residential facility where 24-hour care**, support or supervision is provided on-site to the residents, (ii) in a community health centre or other facility for supplying medical or health services and programs that is owned and operated by the Government of Yukon, or

		(iii) in a hospital or other facility for supplying medical services and programs that is established and maintained by the Yukon Hospital Corporation under the Hospital Act (g) living accommodation in a residence or other similar facility owned by the Yukon Hospital Corporation under the Hospital Act for persons involved in the provision of medical or health services and programs;