

# Making the Invisible Visible

## The Case for Truth Commission on Poverty

### in Canada

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**Abstract:** Socio-economic conditions have received greater attention in recent years but remain a blindspot in transitional justice. So too do settler colonial contexts. A case in point is Canada. To wed the law and politics of poverty eradication and place victims of poverty at the center of this effort, this paper proposes the creation of a Truth Commission on Poverty (TCP). It proposes the creation of a truth commission to examine the root causes of poverty, take stock of the current climate for poverty reduction, and lay the groundwork for a coherent approach to poverty eradication in Canada. Not seeking to romanticize truth commissions, the paper assesses their strengths and weaknesses in addressing human rights violations before turning to what a TCP in Canada might offer. It offers six reasons to support such an initiative: (i) to address poverty as an ongoing human rights violation; (ii) to render visible the victims and survivors of poverty's violence; (iii) to interrogate and address the root causes of poverty in Canada; (iv) to assess the consequences of poverty in Canada; (v) to inform the language of social and economic inequalities; and (vi) to alter the political costs of addressing poverty in Canada by accepting social and economic rights as justiciable.

## **Making the Invisible Visible: The Case for Truth Commission on Poverty in Canada**

### **I. Introduction: Poverty Reduction as a Matter of Human Rights and Transitional Justice**

As the temperature dipped below zero degrees centigrade, Raphaël André had nowhere to go. Due to the COVID-19 pandemic, shelters in Montreal had instituted social distancing protocols. In some cases, that meant fewer beds for those trying to escape the bitter cold that is so typical of the city's winters. A fifty-one-year-old Innu man, André was a regular at a certain shelter. But the place where he typically sought refuge was closed due to provincial restrictions. On the streets, the Montreal police were on the lookout for anyone breaking the government's 8pm curfew. Those caught faced fines of up to \$6,000. At some point during the night of 18 January 2021, André sought shelter, warmth, and quite possibly protection from the authorities. He hunkered down in a portable toilet. That is where he died, just meters away from well-heated office buildings, universities, and businesses – all sitting empty due to the provincial lockdown measures.<sup>1</sup>

Unlike many people living in poverty, let alone many Indigenous people living in poverty, André's case received attention. How could a man perish in a portable toilet in a modern city like Montreal? Following André's death, Quebec Premier Francois Legault was asked whether he would amend the curfew to ensure that it did not apply to the homeless community. Legault's response was that he opposed such an amendment. Why? Because the Premier worried that people might otherwise abuse the exemption by pretending that they were homeless and therefore stay out after 8pm.<sup>2</sup> Why Legault believed that it was more important to prevent Quebecers with homes from pretending they were homeless than preventing those without shelter from dying in the cold was left unclear. The Premier's response is illustrative of the ease with which the lives of those living in poverty are rendered invisible, their safety and security made tangential to policy aims, and their right to life not worthy of the protections that many take for granted.

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<sup>1</sup> CBC, 'Quebec coroner to investigate how homeless man died outside, steps from closed shelter', (19 January 2021), at <https://www.cbc.ca/news/canada/montreal/death-homeless-man-montreal-1.5877205>

<sup>2</sup> See S. Ross, 'After man's death, Quebec premier says no to curfew exception, claiming others would pose as homeless', CTV, (19 January 2021), at <https://montreal.ctvnews.ca/after-man-s-death-quebec-premier-says-no-to-curfew-exception-claiming-others-would-pose-as-homeless-1.5272986?cache=ahlalmzxbsj%3FclipId%3D1930095>

While an injunction was eventually granted by the Quebec Superior Court, thereby exempting people experiencing homelessness from the government's curfew,<sup>3</sup> André's story is a product of the landscape of social and economic rights in Canada. The current constitutional order gives these rights secondary legal status to civil and political rights.<sup>4</sup> What happened to André was reflective of an approach to policy-making and rights that were designed for a world of the well-sheltered; there was no consideration for how they would affect those whose social and economic wellbeing is not guaranteed and whose access to shelter, food, and health is precarious.

I begin this paper with André's story, first and foremost, to situate the life of a victim of poverty and callous policy-making at the centre of this project and to cede ground to the experience of those living law and poverty's violence.<sup>5</sup> I likewise share details of André's last moments because, while policy-makers and courts may *prevent* people in his situation from suffering the sharp edge of the violence of poverty in the future, it is unlikely that *justice* for the harms committed against people like André will be delivered without a shift in the way that we view and imagine poverty. While Canadian courts have long been engaged in piecemeal efforts to recognize social and economic rights and this work is welcome, more must be done to wed the law and politics of poverty eradication and to place victims of poverty at the center of this effort and conversation. My proposal to achieve this or at the very least to move the proverbial ball forward, is through the establishment of a Truth Commission on Poverty (TCP).

This paper proceeds as follows. In the next section, section two, I discuss attempts to convince Canadian courts to recognize social and economic rights as justiciable under the *Canadian Charter of Rights and Freedoms*. While these efforts are incremental and piecemeal, they have successfully chipped away at the firewall between 'positive' social and economic rights and 'negative' civil and political rights, thereby exposing the fallacy of their juxtaposition. Still, as I argue, the *Charter* remains in both spirit and purpose an instrument of negative, civil and political rights; cases brought before the Supreme Court of Canada (SCC) relevant to socio-economic status under s.7 and s.15 have been highly circumscribed. I therefore put forward the creation of a TCP as a mechanism capable of looking

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<sup>3</sup> *Clinique Juridique Itinérante c. Procureur Général du Québec*, Court Supérieur, 500-17-115347-216, (26 January 2021).

<sup>4</sup> M. Jackman and B. Porter, 'Rights Based Strategies to Address Homelessness and Poverty in Canada: The Charter Framework', (pre-publication text of Chapter 2 of M. Jackman and B. Porter (eds.), *Advancing Social Rights in Canada* (Toronto: Irwin Law, 2014), pp.65-106.

<sup>5</sup> On law's violence, see R. Cover, 'Violence and the Word', 95 *The Yale Law Journal*, (1986), pp.1601-1629.

backwards to the root causes of poverty, taking stock of the current climate for poverty reduction, and laying the groundwork for a coherent and comprehensive approach to poverty eradication in Canada. While I put forward a truth commission as a valuable institution capable of contributing to poverty reduction efforts, I do not seek to romanticize such bodies. Section three outlines the key strengths and weaknesses of truth commissions in addressing human rights violations as well as lessons from past commissions that should be taken into consideration in creating a TCP in Canada. In section four, I turn to what a TCP in Canada might look like, and offer six reasons to support such an initiative: (i) to address poverty as an ongoing human rights violation; (ii) to render visible the victims and survivors of poverty's violence; (iii) to interrogate and address the root causes of poverty in Canada; (iv) to assess the consequences of poverty in Canada; (v) to inform the language and perception of social and economic inequalities; and (vi) to alter the political costs of addressing poverty in Canada, including via amendment of the *Charter* to include social and economic rights.

Before proceeding, and in response to Joshua Sealy-Harrington's call for greater transparency in the ideological motivations behind legal praxis and research, I offer three convictions that guide my analysis.<sup>6</sup> First, while I acknowledge that there is significant value in identifying the intersectionality of poverty with race, gender, age, etc., I also believe that poverty must also be addressed as a stand-alone harm and rights violation. In doing so, I subscribe to the following conclusion drawn by the United Nations Office of the High Commissioner for Human Rights:

No social phenomenon is as comprehensive in its assault on human rights as poverty. Poverty erodes economic and social rights such as the right to health, adequate housing, food and safe water, and the right to education. The same is true of civil and political rights, such as the right to a fair trial, political participation and security of the person.<sup>7</sup>

Given how marginalized communities experience poverty at disproportionate rates, tackling poverty as a human rights violation in-and-of-itself as well as one that undermines the ability of persons and communities to exercise their human rights is itself a commitment to intersectionality.

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<sup>6</sup> J. Sealy Harrington, 'The Alchemy of Equality Rights', 30(2) Constitutional Forum (2021) pp.54, 78.

<sup>7</sup> United Nations Office of the High Commissioner for Human Rights, 'OHCHR and the human rights dimension of poverty', (accessed 15 February 2023), at <https://www.ohchr.org/en/poverty>.

Second, I take David Kennedy's observation that not all scourges and sources of marginalization are best articulated through the lens of human rights.<sup>8</sup> Poverty will not and cannot be adequately addressed – in Canada or anywhere – through the application of human rights law and norms alone. Poverty is not a *failure* of policy or choice of those experiencing but is rather “constructed by the economic and social policies we choose, by which voices we choose to listen to, and by which rights we choose to support and which rights we choose to ignore.”<sup>9</sup> Poverty's eradication will therefore require radical, emancipatory, and re-distributing economic and political commitments. I nevertheless contend that human rights and transitional justice have a role to play. In this paper, I understand poverty as both a direct as well as a systemic and structural human rights violation that demands as much attention as any other such violation of human rights, even if doing so offers only a partial understanding of the issue.<sup>10</sup> Finally and relatedly, absent structural political and economic changes (which are currently not on the political horizon in Canada), I share in the conviction that recognizing social and economic rights as justiciable under Canada's constitutional architecture is perhaps the single most significant poverty reduction strategy available to legal scholars and advocates of human rights. A TCP can lead Canada in that direction.

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<sup>8</sup> David Kennedy, “International Human Rights Movement: Part of the Problem?” (2002) 15 *Harvard Human Rights Journal*, pp.101-125.

<sup>9</sup> Alan Broadbent, “Poverty is constructed – it can be un-constructed”, Maytree (25 April 2016), at <https://maytree.com/publications/poverty-constructed-can-un-constructed/>

<sup>10</sup> UN Office of the High Commissioner for Human Rights, ‘Guiding Principles on Extreme Poverty and Human Rights’, (accessed 2 April 2022), at <https://www.ohchr.org/en/publications/reference-publications/guiding-principles-extreme-poverty-and-human-rights>; Amnesty International, ‘Poverty is a Human Rights Issue’, (17 October 2021), at <https://www.amnestyusa.org/poverty-is-a-human-rights-issue/>

## II. Drops in the Bucket: The Current Legal Landscape

There have been numerous attempts to convince Canadian courts to recognize social and economic rights as justiciable, and therefore as rights that are judicially enforceable rather than merely rhetorical in value.<sup>11</sup> This section canvasses these efforts, arguing that while welcome and important, they remain piecemeal, limited, and primarily focused on alleviating immediate harm as opposed addressing the long-term, structural violence associated with poverty. Many of the relevant cases to date focus on the distinction between positive and negative rights. Briefly, negative rights create duties on the state to refrain from interfering in people's enjoyment of rights, such as one's freedom of expression or life.<sup>12</sup> Positive rights create obligations on the state to provide certain means to citizens so they can meet the necessities required for human life to flourish, such as the right to shelter, adequate sustenance, and work under fair conditions.<sup>13</sup> These two categories of rights diverge on how they view the role of the state in people's lives. In the case of negative rights, the state is an omnipotent threat to those who reside on its territory and within its jurisdiction; rights are recognized and enforced to prevent the state from interfering in their lives. A positive rights framework posits that the state is a more benign entity, obligated to guarantee basic necessities for its people and existing as an active contributor to the wellbeing of its people. Numerous cases and scholars have helped to destabilize erroneous distinctions and assumptions about the relationship between negative and positive rights. I touch on how they have done so in what follows. But first, it is useful to understand the *Charter* as an instrument that privileges civil and political rights over social and economic ones, thereby reifying an erroneous hierarchy that undermines efforts to address poverty's violence in Canada.

### II.i. *Background to the Charter*

Canada's *Charter of Rights and Freedoms* is an instrument that recognizes civil and political rights as enforceable and enumerates a series of these rights in a legal text that has had a tremendous impact on the rights of Canadians. However, under the *Charter*, social and economic rights are relegated to

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<sup>11</sup> A useful example of the latter, rhetoric use of human rights that provides no justiciable rights was the 2017 announcement by Canadian Prime Minister Justin Trudeau that housing was a human right. See John Paul Tasker, "Trudeau says housing is a human right — what does that mean exactly?", CBC (23 November 2017), at <https://www.cbc.ca/news/politics/trudeau-housing-rights-human-rights-1.4414854>

<sup>12</sup> The distinction between these rights is generally owed to Isaiah Berlin. See I. Berlin, 'Two Concepts of Liberty' (Oxford: Clarendon Press, 1958). For application to the *Charter*, see C. Wilkie and M.Z. Gary, 'Positive and Negative Rights under the Charter: Closing the Divide to Advance Equality', 30(37) *Windsor Rev. Legal & Soc. Issues* (2011), pp.37.

<sup>13</sup> *Ibid.*

secondary status, to be realized “progressively”.<sup>14</sup> The *Charter*’s development is indicative of this postulated hierarchy. Inspired by post-WWII international developments in international human rights law, successive Canadian governments pushed forward the idea of creating a constitutionally entrenched bill of rights that would articulate the necessary rights and freedoms required of a “free and democratic society”<sup>15</sup>. While Canada recognized and signed both the *International Covenant on Civil and Politics Rights* (ICCPR) as well as the *International Covenant on Economic, Social and Cultural Rights* (ICESR) in 1966, social and economic rights did not figure into the ultimate calculus of the rights to be enumerated in the *Charter*. In 1968, Pierre Trudeau echoed the view that any bill of rights ought to focus on negative civil and political rights that protected individuals from state interference:

The events of the Second World War were disturbing proof of the need to safeguard the rights of individuals... A constitutional bill of rights in Canada would *guarantee the fundamental freedoms of the individual from interference, whether federal or provincial*. It would as well establish that all Canadians, in every part of Canada, have equal rights.<sup>16</sup>

The final text of the *Charter* is reflective of the privileging of civil and political rights; social and economic rights are effectively absent, their role eschewed in favour of negative rights relating to political and civil protections. This did not go unnoticed by those who saw economic disparities and socio-economic inequalities, as opposed to state interference, as the most relevant driver of rights abuses. In the wake of the *Charter*’s adoption in 1982, for example, constitutional law scholar Andrew Petter wrote:

[W]hile sold to the public as part of a “people’s package,” the Canadian Charter of Rights and Freedoms is a regressive instrument more likely to undermine than to advance the interests of socially and economically disadvantaged Canadians... The rights in the *Charter* are founded upon the belief that the main enemies of freedom are not disparities in wealth nor concentrations of private power, but the state. Thus one finds in the *Charter* little reference to positive economic or social entitlements, such as rights to employment, shelter or social services. *Charter* rights are predominantly negative in nature, aimed at protecting individuals from state interference or control with respect to this matter or that.<sup>17</sup>

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<sup>14</sup> See M. Jackman, ‘One Step Forward and Two Steps Back: Poverty, the Charter and the Legacy of Gosselin’, 39 *National Journal of Constitutional Law* (2019) p.95.

<sup>15</sup> Per section 1 of the *Charter*: “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

<sup>16</sup> (emphasis added). The Honourable Pierre Elliott Trudeau, Minister of Justice, ‘A Canadian Charter of Human Rights’, (January 1968)

<sup>17</sup> Andrew Petter, ‘Immaculate Deception: The *Charter*’s Hidden Agenda’ (1987) 45 *Advocate* 857 at 857-63

The emphasis placed on civil and political rights in the *Charter* as well as the more general emphasis on autonomy, individualism, and liberty, might be described as arbitrary. But it is not. International human rights law rejects any hierarchy between civil and political rights, on the one hand, and social and economic rights, on the other, affirming as much in numerous international instruments – including a number of conventions signed and ratified by Canada.<sup>18</sup> To give but one example, the Vienna Declaration states clearly: “*All* human rights are universal, indivisible and interdependent and interrelated.”<sup>19</sup> The consecration of a rights hierarchy in Canada was therefore neither arbitrary nor accidental; it was purposeful and projects the political priorities of 20<sup>th</sup> century Canadian ideological convictions.<sup>20</sup> In the 20<sup>th</sup> century and Cold War division over whether civil and political rights should be privileged over social and economic rights, or vice versa, Canada sat firmly in the former camp. Socialist and communist states favoured social and economic rights and projected the state as an important actor in realizing the dignity of people and providing for citizens. Western, capitalist states focused on negative rights that would preserve the liberty of individuals and protect them from state unfettered interference in the lives of its people.

So dominant is the emphasis on negative rights in Canada that some legal scholars have argued that while positive rights may be exceptionally recognized, negative rights should invariably “prevail.”<sup>21</sup> But it could have been otherwise; other states whose constitutional orders developed later, such as South Africa, have chosen to enshrine enforceable social and economic rights in their constitutional order, including a right to housing.<sup>22</sup> Canadian jurists and political figures *chose* not to do so. That has left advocates of social and economic rights attempting to ‘smuggle in’ a recognition of these rights into the *Charter* and Canadian jurisprudence. As Bruce Porter writes with respect to attempts to bend

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<sup>18</sup> See Convention on the Rights of the Child, General Assembly resolution 44/25 (1989); the Convention on the Rights of Persons with Disabilities, Sixty-first session of the General Assembly by resolution A/RES/61/106 (2006).

<sup>19</sup> (emphasis added). *The Vienna Declaration and Programme of Action*, World Conference on Human Rights in Vienna (1993).

<sup>20</sup> See M. Pinto, ‘International Covenant on Economic, Social and Cultural Rights New York, 16 December 1966’, Audivisual Library of International Law, accessed 2 April 2022, at <https://legal.un.org/avl/ha/icescr/icescr.html>; UN Office of the High Commissioner for Human Rights, ‘Key concepts on ESCRs - Are economic, social and cultural rights fundamentally different from civil and political rights?’ (accessed 2 April 2022), at <https://www.ohchr.org/en/human-rights/economic-social-cultural-rights/escr-vs-civil-political-rights>

<sup>21</sup> L. David, ‘A Principled Approach to the Positive/Negative Rights Debate in Canadian Constitutional Adjudication’, 41 Constitutional Forum (2014), pp.41-46.

<sup>22</sup> Constitution of the Republic of South Africa [South Africa], 10 December 1996, available at: <https://www.refworld.org/docid/3ae6b5de4>; See also R.J. Goldstone, ‘A South African Perspective on Social and Economic Rights’, 13(2) Human Rights Brief (2006), pp.4-7 C.R. Sunstein, ‘Social and Economic Rights? Lessons from South Africa’, Coase-Sandor Working Paper Series in Law and Economics, Working Paper No.24 (2001).

the *Charter* towards a recognition of social and economic rights, “it is not a question of reading additional rights into the Charter that were excluded at the time of drafting, but of reading the rights that are there in a manner which is inclusive of the rights of the poor.”<sup>23</sup>

### **II.ii. Troubling the Distinction, bit by bit**

Scholars, like Porter, Martha Jackman, Joshua Sealy-Harrington, Gwen Brodsky and others, have traced and critically analyzed efforts to recognize social and economic rights as justiciable under the *Charter*.<sup>24</sup> I do not intend to replicate that work here. A cursory assessment suggests these efforts necessarily – and through no fault of their authors – remain invariably limited, piecemeal, and reactive; they address atomized contexts where socio-economic wellbeing is at risk and typically in response to immediate needs, as opposed to the structural causes of poverty. Yet even in their limited character, the cases brought forward to recognize social and economic rights have contributed to unsettling the distinction between positive and negative rights and troubling a constitutional order which privileges civil and political rights above others.

The door to recognizing positive rights was pried open in *Gosselin*, a s.7 (right to life, liberty and security) and 15 (equality) case brought before the Supreme Court of Canada claiming that a Quebec law which excluded persons under thirty years-old from accessing full social security provisions discriminated them on the basis of age and right to life, liberty, and security of the person.<sup>25</sup> The case encompassed an effort to have positive rights recognized by the SCC. While the majority in *Gosselin* rejected the claims put forward to read positive rights into the *Charter*, Chief Justice Beverley McLachlin noted that the *Charter*’s evolutionary nature meant that the door was not closed to doing so in the future: “I leave open the possibility that a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances.”<sup>26</sup>

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<sup>23</sup> B. Porter, “Social and Economic Rights and the Canadian Charter of Rights and Freedoms” (Paper delivered to the International Conference on Social and Economic Rights: Models of Enforcement, Dublin, Ireland, 10-11 December 2005) p.2

<sup>24</sup> Jackman and Porter *supra note* 4; Jackman *supra note* 10; G. Brodsky, ‘Gosselin v. Quebec (Attorney General): Autonomy with a Vengeance’, Canadian Journal of Women and the Law (2004); Sealy-Harrington, *supra note* 6.

<sup>25</sup> *Gosselin v. Québec (Attorney-General)* [Gosselin], 2002 SCC 84; for analysis see Brodsky *supra note* 18, Jackman, *supra note* 10.

<sup>26</sup> *Gosselin* para 82.

The case also included a powerful dissent from Louise Arbour, described by Brodsky as pointing to “a brighter future for anti-poverty litigation in the Supreme Court of Canada”.<sup>27</sup> Arbour highlighted the apparent intellectual dishonesty of bifurcating positive and negative rights and the self-denial required to present the *Charter* as only protecting negative rights. She observed that many of the rights already enumerated under the *Charter* required positive action on the part of the state and therefore constituted positive rights:

The rights to vote (s. 3), to trial within a reasonable time (s. 11(b)), to be presumed innocent (s. 11(d)), to trial by jury in certain cases (s. 11(f)), to an interpreter in penal proceedings (s. 14), and minority language education rights (s. 23) to name but some, all impose positive obligations of performance on the state and are therefore best viewed as positive rights.<sup>28</sup>

As Evelyne Schmid and Aoife Nolan observe, there exists “outdated notions of a ‘rights divide’”.<sup>29</sup> Arbour has likewise articulated why an approach that siloes civil and political rights and social economic rights is misleading. She observes how violations of both categories of rights are “intrinsically linked”.<sup>30</sup> Viewing social and economic rights as flowing logically from the guarantee of civil and political rights, and thus assuming that one set of rights can be realized independently and in isolation from the other, is “misguided, and supported neither by law nor by observed experience... The full realization of human rights is never achieved as a mere by-product, or fortuitous consequence, of some other developments, no matter how positive.”<sup>31</sup>

Arbour and others thus express concern over the intellectual frailty of arguments positing that social and economic rights are “aspirational goals whose achievement no one can be held accountable for”.<sup>32</sup> Nor are concerns about costs persuasive. Civil and political rights – like the right to a fair trial, and the quality of a justice system on which such a right rests – may require similar resources to guarantee as the right to shelter.<sup>33</sup> As Arbour concludes: “many aspects of economic, social and cultural rights are clearly as immediately realizable as many civil and political rights.”<sup>34</sup> This is echoed by others who

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<sup>27</sup> Brodsky *supra* note 18 p.6.

<sup>28</sup> *Gosselin* paras 307-400.

<sup>29</sup> E. Schmid and A. Nolan “Do No Harm”? Exploring the Scope of Economic and Social Rights in Transitional Justice’, 8 *The International Journal of Transitional Justice* (2014), p. 371.

<sup>30</sup> L. Arbour, ‘Economic and Social Justice for Societies in Transition’, Center for Human Rights and Global Justice Working Paper No 10(2006), p.5.

<sup>31</sup> *Ibid.* p.6

<sup>32</sup> *Ibid.* p.7

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

have articulate how social and economic rights are no less immediate, discrete, short-term, or pressing than civil and political rights.<sup>35</sup>

Efforts to recognize the inter-relationship between negative and positive rights in the *Charter* remains an uphill, Sisyphean task. Even where the Supreme Court has edged towards recognizing social and economic rights, it has done so in a circumscribed manner. *R v Fraser* is a notable and recent example of this, a case celebrated as move towards socio-economic equity, but which does so in a scenario far removed from the vast majority of people whose social and economic wellbeing is precarious.<sup>36</sup> *Fraser* pertained to pension buy-back benefits that were denied to Royal Canadian Mounted Police (RCMP) officers who accepted job-sharing opportunities. The three officers who brought the case were all women and mothers.<sup>37</sup> They argued that denying them the ability to enjoy full pension benefits constituted discrimination on the basis of and therefore violated their s.15(1) *Charter* right to equality.<sup>38</sup> The majority agreed, finding that the female officers' rights to equality had been violated by the RCMP's pension scheme.<sup>39</sup> The dissent disagreed, highlighting the denial of positive rights in Canada: "The state does not have a freestanding positive obligation to remedy social inequalities and it can act incrementally, by putting in place policies that narrow a gap without closing it."<sup>40</sup> *Fraser* has nevertheless been hailed as an important victory for gender equity and a recognition of the unequal social and economic status and discrimination that women continue to endure.<sup>41</sup>

While not explicitly framed as a case for social and economic rights, *Fraser* points to how restrictive approaches to recognizing positive rights remains. The case had nothing to do with poverty or those experiencing it. It did not have to do with anyone living in precarity, homelessness, or joblessness. While changes to the evidentiary burdens articulated by the majority may help spur new cases that pertain to those living in poverty,<sup>42</sup> it is notable that the SCC chose *Fraser*, a case involving white, employed women and their pensions, in order to address and clarify s.15 equality rights relating to

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<sup>35</sup> Schmid and Nolan *supra* note 24.

<sup>36</sup> *Fraser v. Canada (Attorney General) [Fraser]*, 2020 SCC 28; see also Sealy-Harrington, *supra* note 6.

<sup>37</sup> R. Safeer, 'Fraser v Canada: RCMP Employees, Mothers and the Question of Adverse Effect Discrimination', The Court.ca, (20 January 2020), at <http://www.thecourt.ca/fraser-v-canada-rcmp-employees-mothers-and-the-question-of-adverse-effect-discrimination/>

<sup>38</sup> *Fraser*.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*, dissent in headnote.

<sup>41</sup> See, e.g., C. D. Lella, 'Fraser v Canada: Paving the Road Towards Gender Equality' The Court.ca, (23 March 2021), at <http://www.thecourt.ca/fraser-v-canada-paving-the-road-towards-gender-equality/>

<sup>42</sup> *Ibid.*

socio-economic discrimination, and not claims pertaining to poverty or the lack of shelter and housing that many living in precarity face, including marginalized and racialized communities.<sup>43</sup>

Some cases have addressed poverty and homelessness more directly, including a series of cases in recent years on the possibility of recognizing a right to shelter and housing under s.7 of the *Charter*.<sup>44</sup> A number of these cases have dealt with encampments and shelters built in public parks, including during the COVID-19 pandemic.<sup>45</sup> Some have resulted in limited successes on the part of anti-poverty advocates, while others failed. There has been an evident reluctance among judges to recognize positive rights in the *Charter*. In *Abbotsford (City) v. Shantz*, Supreme Court of British Columbia Chief Justice Hinkson concluded that while city officers could not prohibit homeless people from erecting shelters in public spaces at night, “[t]here has been *no recognition by courts in Canada that the Charter creates positive obligations in relation to social and economic interests*” and he would not be the one to do otherwise.<sup>46</sup> The Ontario Superior Court of Justice also recently accepted that the denial or destruction of shelters by municipalities violates one’s right to life, liberty and security, but stopped short of articulating any positive obligation on the part of State institutions to provide shelter.<sup>47</sup> The facts contained within these cases, including the violent treatment of homeless persons by the police and the destruction of temporary shelters by law enforcement in Canadian cities, are as indicative of the criminalization of poverty by governing actors as they are illustrative of any progressive or justiciable recognition of social and economic rights. They are also symptomatic of the propensity of advocates to focus efforts on address the immediate experience of poverty’s violence, as opposed to its structural and systemic forces.

To be clear: these efforts are welcome. They may ultimately have the cumulative effect of breaking down the walls that divide the recognition of civil and political rights from social and economic rights in Canada. Perhaps each case will mark a swing of the hammer until the wall is breached and what is

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<sup>43</sup> As noted by the National Advisory Council on Poverty: “Certain populations, including Black Canadians, racialized Canadians, immigrants, refugees, Indigenous people, persons with disabilities, and 2SLGBTQ individuals, all face higher rates of poverty.” See National Advisory Council on Poverty, “Understanding Systems: The 2021 report of the National Advisory Council on Poverty”, (2021), at <https://www.canada.ca/en/employment-social-development/programs/poverty-reduction/national-advisory-council/reports/2021-annual.html>.

<sup>44</sup> See, e.g., *Victoria (City) v. Adams*, 2009 BCCA 563; *Federated Anti-Poverty Groups of BC v. Vancouver (City)*, 2002 BCSC 105; *Abbotsford (City) v. Shantz*, 2015 BCSC 1909; *Black et al. v. City of Toronto*, 2020 ONSC 6398

<sup>45</sup> *Black et al. v. City of Toronto*, 2020 ONSC 6398.

<sup>46</sup> *Abbotsford*, para. 177.

<sup>47</sup> *The Regional Municipality of Waterloo v. Persons Unknown and to be Ascertained* (2023) ONSC 670.

obvious to anti-poverty and human rights advocates becomes obvious to those in power: that social and economic rights should be recognized in and of themselves, that Canada has a positive obligation to fulfil these rights, and that civil and political rights can only be meaningfully exercised when one's baseline socio-economic wellbeing is satisfied. To borrow from a famous Canadian poet and songwriter, perhaps it is through the cracks in Canada's constitutional firewalls that the light of social and economic rights will come through.<sup>48</sup> Yet while these efforts are welcome and necessary, they are inadequate given the enormity of the task. They take time – and time is an unevenly distributed commodity. While the SCC in *Gosselin* spoke of the possibility of reading positive rights into the *Charter* “one day”<sup>49</sup>, as we wait, people will become sick from preventable diseases, will lose their homes when they should not have to, and will perish because of a lack of shelter. More attention needs to be paid to the structural and systemic causes of poverty and its violence. A Truth Commission on Poverty is one mechanism with which to achieve just that.

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<sup>48</sup> Leonard Cohen, *Anthem*, (1992): “There is a crack, a crack in everything That's how the light gets in”.

<sup>49</sup> *Gosselin* para 82.

### III. The Promise and Limitations of Truth Commissions

Truth commissions are a common transitional justice mechanism.<sup>50</sup> They are “official, nonjudicial bodies of a limited duration established to determine the facts, causes, and consequences of past human rights violations.”<sup>51</sup> Truth commissions have been convened on every populated continent of the world. They have been established at the state, regional, and local levels to interrogate past human rights violations and their causes.<sup>52</sup> Some are created by governments to confront past wrongs or as the product of peace negotiations between formerly warring parties.<sup>53</sup> Others are community initiatives and the result of settlements between disputing parties. In Canada and Turtle Island, for example, Truth and Reconciliation Commission (TRC) was established following the 2006 *Indian Residential Schools Settlement Agreement*.<sup>54</sup>

The successes and failures of past commissions offer lessons about what works and what does not. I do not wish to romanticize truth commissions; like all tools of justice, they are imperfect. This section therefore offers sober reflections on the strengths and weaknesses of truth commissions. Understanding these is crucial to devising a TCP that enhances chances of success and overcomes common limitations in the design and implementation of truth commissions. The reflections here lead to a more detailed conversation, in the next section, on how insights and lessons from previous commissions could define the contours of a TCP.

Linked to the emerging ‘right to truth’, the duty to inform communities victimized by atrocities about what happened to their loved ones, truth commissions are typically mandated to establish both the

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<sup>50</sup> According to the International Center for Transitional Justice: “Transitional justice is a response to systematic or widespread violations of human rights. It seeks recognition for victims and promotion of possibilities for peace, reconciliation and democracy. Transitional justice is not a special form of justice but justice adapted to societies transforming themselves after a period of pervasive human rights abuse. In some cases, these transformations happen suddenly; in others, they may take place over many decades.” See ICTJ, ‘What is Transitional Justice?’ (2009), at <https://www.ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf>

<sup>51</sup> International Center for Transitional Justice, ‘Truth Seeking – Elements of Creating an Effective Truth Commission’, Chapter 2 (2013), p.9.

<sup>52</sup> For an authoritative overview of truth commissions, see P.B. Hayner, ‘Unspeakable Truths – Transitional Justice and the Commissions’, 2<sup>nd</sup> Edition, (UK: Routledge 2011).

<sup>53</sup> M. Minow, ‘Making History or Making Peace: When Prosecutions Should Give Way to Truth Commissions and Peace Negotiations’, 7(2) Journal of Human Rights (2008), pp.174-185; The International Center for Transitional Justice, ‘Challenging the Conventional Can Truth Commissions Strengthen Peace Processes?’ (June 2014).

<sup>54</sup> Rosemary Nagy, ‘The Scope and Bounds of Transitional Justice and the Canadian Truth and Reconciliation Commission’, 7(1) International Journal of Transitional Justice (2013), pp. 52–73.

truth as well as to promote reconciliation between aggrieved parties.<sup>55</sup> Often, although not always, doing so requires the inclusion of victims *and* perpetrators.<sup>56</sup> There is no consensus on what ‘truth’ or ‘reconciliation’ mean or require. Donna Pankhurst has outlined at least five different meanings of ‘reconciliation’,<sup>57</sup> while Joanna Quinn has offered a typology of ‘truth’, including factual and forensic truths, personal and normative truths, and moral and historical truths.<sup>58</sup> In some cases, as with Canada’s TRC, tensions can emerge between those emphasizing the revelation and confrontation of truths and those focusing on moving forward and reconciliation.<sup>59</sup>

Both reconciliation and truth are inherently and invariably subjective. This presents both a strength and weakness of truth commissions: they can welcome a diversity of demands and views on truth and reconciliation, but they may also produce situations where people and communities speak the same language without sharing or accepting the same meaning(s). It may therefore be unadvisable to strictly define either ‘truth’ or ‘reconciliation’ at the outset, as these terms and their content may evolve over a truth commission’s lifespan. But it remains important to understand the intersubjectivity of these terms and to articulate a broad interest in what truths a commission intends to explore, the sources of those truths, as well as to articulate how a commission would endeavour to promote both *individual* reconciliation and *collective*, or national, reconciliation.

Truth commissions are often presented as alternatives to criminal prosecutions. They are aimed at restorative justice as opposed to the retributive justice inherent in (criminal) trial proceedings.<sup>60</sup> Commissions endeavour to restore relationships devastated by social, economic, and/or political

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<sup>55</sup> On the right to truth, see, *inter alia*, Yasmin Naqvi, ‘The right to the truth in international law: fact or fiction?’, *International review of the Red Cross*, Vol.88, No.862 (June 2006); Dermot Groome, ‘The Right to Truth in the Fight against Impunity’, *Berkeley Journal of International Law*, Vol. 29; James A. Sweeney, ‘The Elusive Right to Truth in Transitional Human Rights Jurisprudence’, *International & Comparative Law Quarterly*, Vol.67, No.2, pp.353-387; ‘Study on the right to truth: report of the Office of the United Nations High Commissioner for Human Rights’ E/CN.4/2006/91; Ludovic Hennebel, ‘The Inter-American Court of Human Rights: The Ambassador of Universalism’, Hors-série septembre 2011 *Révue québécoise de droit international*, Vol.7, 2011.

<sup>56</sup> L. Laplante, ‘On the Indivisibility of Rights: Truth Commissions, Reparations, and the Right to Develop’ (10) *Yale Human Rights & Development Law Journal*, pp.141-177.

<sup>57</sup> D. Pankhurst, ‘Issues of Justice and Reconciliation in Complex Political Emergencies: Conceptualizing Reconciliation, Justice and Peace’, 20(1) *Third World Quarterly* (1999), Vol.20, No.1, pp.239-256.

<sup>58</sup> J. Quinn, ‘Dealing with a Legacy of Mass Atrocity: Truth Commissions in Uganda and Chile’, 19(4) *Netherlands Quarterly of Human Rights*, (December 2001), pp.387-388.

<sup>59</sup> CBC, ‘Chairman quits troubled residential-school commission,’ (20 October 2008), at <https://www.cbc.ca/news/canada/chairman-quits-troubled-residential-school-commission-1.704043>

<sup>60</sup> M. Minow, ‘Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence’, (U.S.: Penguin, 1999); R. Mani, ‘Beyond Retribution – Seeking Justice in the Shadows of War’, (UK: Polity Press, 2002).

conflict, bringing communities together and repairing relations between them. For example, South Africa's Truth and Reconciliation Commission, the most famous truth commission to date, was not aimed at punishing the Apartheid regime, but at promoting healing between White and Black South Africans. Apartheid-era perpetrators of atrocities against Black South Africans were granted amnesty from prosecution if they offered genuine testimony of their crimes.<sup>61</sup> In order to foster healing, an accurate account of history is viewed as crucial: the truth of past rights violations and state violence must be established. By producing an authoritative narrative of violence, truth commissions can thus 'shrink the space of denial' and promote healing and recovery.<sup>62</sup>

This is not to say that truth commissions are wholly unrelated to criminal proceedings. CONADEP, the commission created to address atrocities committed in Argentina's Dirty War, shared collected evidence with prosecution authorities in the country.<sup>63</sup> In South Africa, if perpetrators did not testify genuinely at proceedings of the Truth and Reconciliation Commission, there was an expectation that they would be liable to prosecution. Nevertheless, the mandated focus for truth commissions is on establishing the truth, as opposed to punishment, retribution, or the attribution of individual responsibility for human rights violations. A TCP would therefore have to quell the desire for vengeance against persons and institutions responsible for the violence of poverty and, instead, endeavour to welcome them as part of the process of truth-telling and reconciliation.

It is all too common in transitional justice efforts that TJ processes addressing past rights violations minimize the role of victims rather than seeing them as active participants in accountability efforts.<sup>64</sup> However, truth commissions can centre affected persons and communities, especially victims and survivors of human rights violations, at the heart of proceedings. While the impartiality and integrity of appointed Commissioners is critical to the process, it is affected communities that are in the driver's

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<sup>61</sup> See A. Boraine, 'A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission' (UK: Oxford University Press 2000)

<sup>62</sup> I borrow this phrasing from D. Orentlicher, Diane, 'Shrinking Space for Denial – The Impact of the ICTY in Serbia', Open Society Justice Initiative, (2008).

<sup>63</sup> In some instances, truth commissions and tribunals pursuing criminal justice have been in tension, however. In Sierra Leone, for example, the Truth and Reconciliation Commission was wary of establishing a close relationship with the Special Court for Sierra Leone, a hybrid court established to investigate and prosecute war crimes and crimes against humanity in the country, because of concerns that perpetrators of atrocities in the country would not testify genuinely if they feared subsequent prosecution for international crimes. CITE

<sup>64</sup> S. Robins and E. Wilson, 'Participatory Methodologies with Victims: An Emancipatory Approach to Transitional Justice Research' 30(2) Canadian Journal of Law and Society / La Revue Canadienne Droit et Société (2015), pp.219-236.

seat of the justice pursued and meted out by truth commissions. They offer space for testimony and the sharing of lived experiences which can subsequently be embedded into an authoritative account and history of past rights violations. As a result, victims and the harms they have endured receive recognition, something typically denied them during periods of oppression and marginalization. As explored further below, active participation and testimony from survivors of poverty in a TCP would shine light on the harms they experience and form the central impetus between the commission's work.

As part of their role in elaborating and articulating past harms, truth commissions typically travel across affected areas to engage with communities and encourage interested citizens to attend and consume proceedings. Properly funded commissions can also have specialized outreach units and relationships with dedicated civil society groups that disseminate key developments in the commission's proceedings. This was the case with The Gambia's Truth, Reconciliation and Reparations Commission, which broadcasted its proceedings online and publicized them through regular digests disseminated by an NGO, the African Network Against Extrajudicial Killings and Enforced Disappearances.<sup>65</sup> Canada's TRC had similar arrangements with the National Centre for Truth and Reconciliation (NCTR).<sup>66</sup> A successful TCP would require more than preaching to the converted. Canadians neglectful or outright hostile towards those experiencing poverty will also need to be engaged, either through direct participation in the Commission's work or through the dissemination of targeted awareness-raising campaigns.

Among the greatest strengths of truth commissions is their potential to investigate and establish the root causes of violence and human rights violations.<sup>67</sup> Where trial proceedings are primarily concerned with the immediacy and the consequences of rights violations, truth commissions can examine the underlying body of structural, institutional, and systemic forces that produce violence in the first place. If so mandated, truth commissions can interrogate the entirety of a social, political and economic context as well as the state apparatus and its role in perpetrating and perpetuating systemic violence. For example, rather than only focusing on the harms committed during the Sierra Leonean civil war,

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<sup>65</sup> African Network Against Extrajudicial Killings and Enforced Disappearances, The Truth, Reconciliation and Reparations Commission, at <https://www.anekd.org/trrc>

<sup>66</sup> See National Centre for Truth and Reconciliation, University of Manitoba, at <https://nctr.ca>

<sup>67</sup> J. Paulson and M.J. Bellino, 'Truth commissions, education, and positive peace: an analysis of truth commission final reports (1980–2015)' 43(3) Comparative Education (2017), p.355.

the country's Truth and Reconciliation Commission also established that the "central cause of the war was endemic greed, corruption and nepotism that deprived the nation of its dignity and reduced most people to a state of poverty," in addition to resource plundering, and an absence of government accountability.<sup>68</sup> Peru's Truth and Reconciliation commission likewise investigated and illuminated the contribution of social and economic inequalities in the country to the onset of political violence.<sup>69</sup> A TCP would have to be mandated to similarly investigate the multiple causes of poverty in Canada, an essential step before articulating specific, implementable recommendations on how to alleviate and eradicate poverty in Canada.

At this point in the analysis, the primary prerequisites for a truth commission's 'success' should be clear. A few more important characteristics are relevant. Commissions need to enjoy adequate funding and powers, such as the power of subpoena when and if necessary.<sup>70</sup> They require strong political support but also independence in order to preserve their impartiality and legitimacy among victims and survivors. There must likewise be an explicit commitment on the part of governing authorities to recognize the outcomes and recommendations issued by truth commissions. Commission outcomes generally take the form of a report replete with personal narratives, testimonies, historical accounts, and recommendations on how to achieve reconciliation. These reports can play a significant role in shaping future discourse on rights violations. Some, like *Nunca Mas* ("Never Again"), the report of Argentina's truth commission, become wildly popular best-sellers.<sup>71</sup> Others emerge as common literature in high school and university syllabi.<sup>72</sup> These reports represent a recognition of the harms experienced by victims and survivors as well as a mechanism by which to push reluctant segments of a population to confront abuses in their own communities. They serve as a cornerstone of acknowledgement, a testament to harms committed against vulnerable and marginalized people and communities as well as an authoritative account of rights violations. The adoption of a commissions' recommendations may likewise be ground-breaking. In Morocco, for example, government

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<sup>68</sup> Sierra Leone Truth and Reconciliation Commission, 'Witness to Truth: Final Report of the TRC' Chapter 2 – Finding, (2002) p.27.

<sup>69</sup> Laplante *supra note* 47.

<sup>70</sup> M. Freeman, 'Truth Commissions and Procedural Fairness, (UK: Cambridge University Press, 2009), pp.188-204.

<sup>71</sup> E. Crenzel, 'Genesis, Uses, and Significations of the "Nunca Más" Report in Argentina', 42(3) Latin American Perspectives (2015), p.20; A. Stepan, 'War on the People, New York Times (23 November 1986), at <https://www.nytimes.com/1986/11/23/books/war-on-the-people.html>. The report is available here: 'Nunca Más, Report of Conadep (National Commission on the Disappearance of Persons)', (1984), at [http://www.nuncamas.org/english/library/nevagain/nevagain\\_000.htm](http://www.nuncamas.org/english/library/nevagain/nevagain_000.htm).

<sup>72</sup> This is true of the TRC's Final Report and Calls to Action, which are taught in many law schools, including McGill.

implemented the recommendation of the Equity and Reconciliation Commission to secure equal pay for men and women in the country.<sup>73</sup>

A commitment on the part of governing authorities to implement a commission's recommendations is therefore crucial. Poorly financed and supported, some TCs have slipped into irrelevance. In cases like the Democratic Republic of Congo, truth commissions have simply concluded with a recommendation that a new, adequately resourced commission should be created.<sup>74</sup> A truth commission is no more than a venting exercise if its conclusions and recommendations are not adopted. This does not, however, require wholesale, immediate adoption of all recommendations; some may require special care, progressive realization, time, and planning. While the Canadian government has pledged to implement all of the *Calls to Action* of the TRC relating to abuses against Indigenous peoples, it has been criticized for its failure to follow through.<sup>75</sup> Even where governments falter, however, the publication of recommendations and the pledge of governments to realize them is important. As is the case with the TRC's *Final Report*, recommendations re-orientate expectations of what actions are possible and necessary, offer a baseline from which to measure progress, and act as a touchstone by which Indigenous communities, leaders, and their allies in Canada can press and hold the government to account.

This canvassing of strengths and potential pitfalls is important to consider when thinking through the creation of a TCP. So too is timing and context. Truth commissions are not advisable in each and every situation. They need 'ripe moments' to succeed.<sup>76</sup> For reasons explored in the next section, a TCP should be created in Canada – and now is the right time to do it.

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<sup>73</sup> Hayner, *supra note 44*, p.173.

<sup>74</sup> R. Kerr and E. Mobekk, 'Peace & Justice – Seeking Accountability After War' (UK: Polity, 2007) p.147.

<sup>75</sup> K. Martens, 'Canada has made 'dreadful progress' in fulfilling TRC's calls to action', APTN News (17 December 2019) at <https://www.aptnnews.ca/national-news/canada-has-made-dreadful-progress-in-fulfilling-trcs-calls-to-action/>

<sup>76</sup> I borrow the term "ripe moment" from I. William Zartman. See I.W. Zartman, 'Ripe for Resolution', (UK: Oxford University Press, 1989) I.W. Zartman, 'Ripeness: The Hurting Stalemate and Beyond', in Paul C. Stern and Daniel Druckman (eds.), *International Conflict Management after the Cold War*, (US: National Academy Press, 2000), pp.225-250.

#### IV. Why a Canadian Truth Commission on Poverty?

As mechanisms of transitional justice, truth commissions have historically been utilized to interrogate and address mass rights violations with respect to past armed conflicts or periods of authoritarian rule.<sup>77</sup> Bodies like Canada's TRC, however, have illustrated how commissions can be used to address other systemic and historical abuses, including those perpetrated by the policies of ongoing colonial state- and nation-building in settler-colonial contexts. Still, indirect, economic, and structural violence has often been a 'blind spot' or transitional justice.<sup>78</sup> For example, despite the weaponization of poverty and precarity against Black communities in Apartheid South Africa, the country's Truth and Reconciliation Commission situated "the everyday violence of poverty... in the background of truth and reconciliation and featured the daily life experience of apartheid as the context to violations of civil and political rights rather than as the crime itself."<sup>79</sup> There is no reason why truth commissions cannot be adapted to directly address structural wrongs such as poverty. In recent years, truth commissions have been adopted by numerous European states to investigate the 2007/08 financial crisis, albeit with mixed effects.<sup>80</sup> Addressing poverty is not outside of the (transitional) justice landscape given that poverty is a human rights issue and violation, one which implicates other human rights – including social and economic rights, as well as civil and political rights.

The idea of a truth commission on poverty is not unprecedented. The city of Leeds has created a Poverty Truth Commission, an outcome of which was a 'HuManifesto' that seeks to address the "scandal that a wealthy city like Leeds has so many inhabitants who experience poverty."<sup>81</sup> In 2021, it was announced that the Council for North Northamptonshire, England, would establish a Poverty Truth Commission to identify means to end poverty.<sup>82</sup> The region is governed at the council-level by a Conservative government and, of its approximately 355,000 residents, an estimated 37,400

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<sup>77</sup> See Hayner, *supra note* 44.

<sup>78</sup> B. Sander, 'Addressing the Economic Dimensions of Mass Atrocities: International Criminal Law's Business or Blind Spot?', *Justice in Conflict* (8 June 2015), at <https://justiceinconflict.org/2015/06/08/addressing-the-economic-dimensions-of-mass-atrocities-international-criminal-laws-business-or-blind-spot/>

<sup>79</sup> R. Nagy, 'Transitional Justice as Global Project: Critical Reflections,' 29(2) *Third World Quarterly* (2008), p.284; see also Schmid and Nolan, *supra note* 24, p.376.

<sup>80</sup> I. Kovras, 'Truth Commissions after Economic Crises: Political Learning or Blame Game?' 66(1) *Political Studies* (2018), pp.173-191.

<sup>81</sup> See Leeds Poverty Truth Commission, 'Humanifesto' (accessed 11 April 2022), at <https://www.leedspovertytruth.org.uk/humanifesto/>

<sup>82</sup> See Poverty Truth Commission, West Northamptonshire Council, (accessed 15 March 2022), at <https://poverty-truth.org.uk>

households are experiencing income deprivation, with 2,600 adults experiencing homelessness.<sup>83</sup> A central goal of the North Northamptonshire Commission is to elevate the voices of those experiencing poverty.<sup>84</sup>

The possibility of poverty-focused truth commissions and their role in recognizing economic, social, and cultural rights (ESCRs) has also received some attention from legal scholars. In a recent study of the potential of a truth commission examining poverty in the U.K., Amanda Cahill-Ripley and Luke David Graham conclude that

[T]he combination of ESCRs and the transformative justice of the [Poverty Truth Commission] has further potential to empower the most vulnerable and marginalized in our communities, to tackle the structural violence of poverty and to create an enabling local transformative space where the PTCs can ‘speak truth to power’ but also ‘speak rights’ to power.<sup>85</sup>

As Canada emerges from the devastating consequences of the COVID-19 pandemic, the resulting economic lockdown and fierce socio-economic effects on marginalized communities, and the effects of both on people experiencing poverty and precarity, it is an opportune time to create a TCP in Canada.<sup>86</sup> The pandemic and its response also showed what is possible when government policy is aimed at securing people’s livelihood. During the pandemic, for example, the Canada Emergency Response Benefit, prevented millions of Canadians from falling into poverty. Poverty reduction is possible when sufficient political will and interest is manifest.

There are (at least) six reasons to support the creation a TCP. Each is discussed in turn below. While they touch on issues of procedure and structure, the ultimate design of an TCP’s mandate and procedure would be the purview of experts and those with lived experience of poverty.

i. *Poverty is a significant a human rights violation*

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<sup>83</sup> *Ibid.*

<sup>84</sup> BBC ‘North Northamptonshire Truth Commission will seek to find end to poverty’ (10 March 2022), at <https://www.bbc.com/news/uk-england-northamptonshire-59700130>

<sup>85</sup> A. Cahill-Ripley and L. D. Graham, ‘Using Community-Based Truth Commissions to Address Poverty and Related Economic, Social and Cultural Rights Violations: The UK Poverty Truth Commissions as Transformative Justice’, *Journal of Human Rights Practice* (2021), p.243.

<sup>86</sup> See D. Béland, S. Dinan, P. Rocco, and A. Waddan, ‘COVID-19, poverty reduction, and partisanship in Canada and the United States’, *Policy and Society* (2022), pp.1-15; M. Malhas, ‘The Impact of Covid-19 on Poverty in Canada’, The Borgen Project (24 March 2022) at <https://borgenproject.org/covid-19-on-poverty-in-canada/>

Poverty is no less violent than many mass atrocities. According to the National Advisory Council on Poverty's 2020 report, one in nine Canadians live in poverty.<sup>87</sup> That translates into almost 4 million people living in Canada.<sup>88</sup> The numbers have likely increased since the onset of the pandemic, bearing in mind the economic turmoil that lockdowns have wrought and their disproportionate effects on marginalized communities.<sup>89</sup> The adverse effects of poverty on quality of life indicators, on the risk of being a victim of violent crime, and on mental and physical health issues, are well-documented.<sup>90</sup> So too is the fact that people from marginalized communities, including recent immigrants, Indigenous people, and persons living with disabilities, are more likely to face poverty than other Canadians.<sup>91</sup> The breadth and depth of poverty and its impacts on people living in Canada are significant and amount to a systemic violation of people's social and economic rights, rights that Canada recognizes as obligations under international human rights law, but not in its constitutional order. Poverty at the levels experienced by people in Canada can wreak tremendous violence and constitutes a significant violation of the country's commitment to international human rights law, particularly given its wealth and ability to realize these rights. Together, these are grounds for a TCP, not dissimilar from other contexts where truth commissions have been used to address past human rights violations.

#### *ii. Making poverty's victims and survivors visible*

Like other victims of human rights violations, those experiencing poverty are often rendered 'invisible'.<sup>92</sup> They are not *seen* in the same way as other communities with respect to policy-making. The example of Quebec's COVID-19 curfew, detailed in the introduction, is instructive. The effects of lockdowns of public spaces for those experiencing homelessness appears to have earned little-to-no attention from government policymakers, rendering them effectively invisible to those determining pandemic response measures in Quebec City.

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<sup>87</sup> National Advisory Council on Poverty, 'Building Understanding: The First Report of the National Advisory Council on Poverty', Employment and Social Development Canada (2020), p.2.

<sup>88</sup> *Ibid.* p.16

<sup>89</sup> See, e.g., National Advisory Council on Poverty, 'Understanding Systems: The 2021 report of the National Advisory Council on Poverty' (2021), pp.38-61.

<sup>90</sup> *Ibid.*

<sup>91</sup> In 2020, 26% of migrants lived in poverty in their first 4 years after arrival in Canada. The number is 14.4% for the subsequent 5 years. 19.5% for Indigenous people living off reserve live in poverty; 16.6% of people living with disabilities live in poverty. See National Advisory Council on Poverty *supra note* 80, p.16.

<sup>92</sup> D. Macdonald, 'Our Invisible Poor', *The New Yorker* (1963), at <https://www.newyorker.com/magazine/1963/01/19/our-invisible-poor>

As with mass atrocities and violence, it can be hard to ‘look’ at poverty. The abject material poverty that people suffer in a country as wealthy as Canada is jarring, and difficult to bear witness to. Seeing victims of mass violence, be it physical or structural, can be uncomfortable and overwhelming. But confronting this violence is essential to recognizing and acknowledging the problem. Acknowledgement is among the very few, perhaps even only, universally accepted ingredient for justice.<sup>93</sup> Different people and communities may have divergent views about what justice requires, at the very least, harms must be *acknowledged* for any justice to be realized.<sup>94</sup> A strength of truth commissions is their focus on the experiences of victims and survivors. A TCP would place victims and survivors of poverty at the centre of its work. Its fuel would be the testimony of those who live poverty’s violence and the recognition of harms they suffer(ed).

To be sure, this alone is not enough. Consider the TRC in Canada/Turtle Island. Despite 6,750 survivors of Indian Residential Schools testifying at the TRC, numerous community and regional hearings, outreach programming, and a significant digital archive stored by the NCTR, Rosemary Nagy observes that “many settler Canadians continue to downplay the nature and extent of the harms of residential schools and deny subsequent obligations to redress historic and ongoing colonialism as the prerequisite for reconciliation”.<sup>95</sup> In addition to putting victims and survivors – and their lived experience – front and centre, justice requires that the wider public take the harms seriously the harms experienced and develop what Quinn calls “thin sympathy”, an understanding and appreciation among non-affected populations of harms committed against others and the need for justice.<sup>96</sup> A TCP could do the work of making poverty and those experiencing it seen and their voices heard while encouraging those sectors of society that turn a blind eye to poverty’s violence to *look* – and then *act*.

### *iii. Interrogating and addressing the root causes of poverty*

As noted above, courts typically take reactive approach to the harms they adjudicate and thus deal with the *effects* of discrimination and structural violence as opposed to the *causes* of such violence. In

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<sup>93</sup> J. Quinn, ‘The Politics of Acknowledgement Truth Commissions in Uganda and Haiti?’ (Canada: UBC Press, 2011).

<sup>94</sup> Paloma Aguilar writes, for example, that “When the past is pushed aside before it has been clarified, discussed and dealt with, sooner or later it will invade a nation’s political life, forcing governments to face it, though not always under the most favourable conditions.” P. Aguilar, ‘Transitional Justice in the Spanish, Argentinian and Chilean Case Study’ Workshop 10 – Alternative Approaches to Dealing with the Past, Crisis Management Initiative, (June 2007), p.22.

<sup>95</sup> R. Nagy, ‘Settler Witnessing at the Truth and Reconciliation Commission of Canada’, *Human Rights Review* (2020) Vol. 21, p.221.

<sup>96</sup> J. Quinn, ‘Thin Sympathy: A Strategy to Thicken Transitional Justice’ (University of Pennsylvania Press, 2021).

contrast, truth commissions can examine rights violations and sources of violence such as poverty as a consequence of systemic forces in which all branches of the state and economy are implicated. No one in Canada is ‘destined’ to live in poverty. It is not an immutable or intrinsic attribute of anyone living in Canada.<sup>97</sup> Neither is poverty a matter of choice; if it were, it would not be possible to explain why certain marginalized groups experience it at such persistently high levels. Rather, it is the logical outcome of specific and sustained political and economic decisions and policies that neglect poverty and/or benefit from its persistence. As Jackman and Porter observe, insofar as there is any ‘identity’ to poverty and homelessness, it is one constructed by those not experiencing homeless or poverty as a means to stigmatize those who do.<sup>98</sup>

In addition to establishing the structural factors behind rights violations, truth commissions can be effective tools in determining and articulating State responsibility for rights violations as well as remedies. This is important in the context of poverty, given that no single individual is responsible for its persistence or the violence it inflicts. The State and its branches are responsible. Truth commissions are well situated to interrogate the ways in which state apparatuses are both responsible for violence as well as to identify what institutions of governance can do to repair the harm of rights violations and prevent their commission in the future. A well-supported TCP would be able to establish a coherent and authoritative account of how state-building, colonialism, systemic racism, market and capitalist forces, and the form of liberal democratic governance have sustained poverty in Canada. Crucially, it would also be able to lay down stones on the path toward remedying the causes of poverty’s violence.

*iv. Address the consequences of poverty*

Just as the root causes of poverty must be interrogated, so too must poverty’s consequences. Poverty is not abstract. Its harms are visible for those willing to look and its structural and systemic causes reverberate. Like bio-amplification, the process by which certain chemical compounds such as mercury increase in concentration up the marine food chain, the effects of poverty are amplified through the processes by which poverty is governed and controlled by the State. Perhaps no clearer example of this exists than the interplay between people experiencing poverty and the criminal justice system.

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<sup>97</sup> Such views have been posited by, for example, C. Sarlo, ‘The Causes of Poverty’ Fraser Institute (2019), and I. Sawhill and R. Ron Haskins, ‘Work and Marriage: The Way to End Poverty and Welfare: Welfare Reform and Beyond, no. 28. Brookings Institution (2003).

<sup>98</sup> Jackman and Porter *supra note 4*, p.20.

Before it was dismantled by the Conservative government of Stephen Harper, the National Council on Welfare issued a report, *Justice and the Poor*, observing how the experience of poverty exacerbated the likelihood of unequal and disproportionate punishment at every step along the criminal justice pathway:

For the same criminal behaviour, the poor are more likely to be arrested; if arrested, they are more likely to be charged; if charged, more likely to be convicted; if convicted more likely to be sentenced to prison; and if sentenced, more likely to be given longer prison terms than members of the middle and upperclasses [sic]. In other words, the image of the criminal population one sees in our nation's jails and prisons is an image distorted by the shape of the criminal justice system itself. It is the face of evil reflected in a carnival mirror, but it is no laughing matter.<sup>99</sup>

The Council noted that these effects were not due to overt sentiments but systemic factors:

Very few of these negative effects are produced by evil people doing evil things. Yes, there are bigoted police officers, bigoted judges and bigoted parole officers, but they are a small minority and the harm they cause is almost insignificant compared to the tremendous damage inflicted by law enforcement policies that appear to be impartial and fair, but have a disproportionately harsh impact on the poor, especially on poor young men.<sup>100</sup>

People living in poverty in Canada continue to be more likely to engage in criminal behaviour as well as being victims of crime.<sup>101</sup> Poverty is also criminalized. As Emily Knox observes in the context of Montreal police fining unhoused people for the fact of their homelessness, “the justice system can’t solve poverty... The problem isn’t just bad law enforcement and profiling. It’s bad laws that are harming marginalized community members.”<sup>102</sup>

In addition to the nexus between crime and poverty and the systemic violence behind it, a TCP could explore a number of other consequences of poverty’s violence, including: the continuous production of humiliation and shame evident in the current welfare system;<sup>103</sup> the treatment of people

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<sup>99</sup> National Council of Welfare, *Justice and the Poor* (Spring 2000), p.3

<sup>100</sup> *Ibid.*, pp.3-4.

<sup>101</sup> See S. Novac et al, ‘More Sinned Against than Sinning? Homeless People as Victims of Crime and Harassment’, in J. Hulchanski, et al (eds.) *Finding Home: Policy Options for Addressing Homelessness in Canada* (e-book), Chapter 7.2 B. Roebuck, ‘Homelessness, Victimization and crime: Knowledge and Actionable Recommendations’, Institute for the Prevention of Crime, University of Ottawa (2008), pp.14-17

<sup>102</sup> E. Knox, ‘Poverty is not a crime — so why is Montreal still ticketing the unhoused?’ CBC (27 October 2021), at <https://www.cbc.ca/news/canada/montreal/first-person-bylaw-infraction-unhoused-poverty-tickets-1.6221531>

<sup>103</sup> See C.L. Goudjo, ‘Don’t call me poor: The hidden burden of social assistance’, Social Protection (14 July 2020), at <https://socialprotection.org/discover/blog/don-t-call-me-poor-hidden-burden-social-assistance>; D. Calnitsky, ‘Basic

experiencing poverty by the healthcare system;<sup>104</sup> the treatment of poverty by the Canadian justice system more broadly; the gendered nature of poverty;<sup>105</sup> and widely held attitudes and discriminatory practices towards poverty and precarity within governing structures and among the Canadian society more generally.

v. *Finding the space to find our tongues – the language of social and economic equality*

Sealy-Harrington observes that “we need a constitutional vocabulary that can reckon with the politics inherent in the legal adjudication of equality to properly understand and critique legal institutions.”<sup>106</sup> Linguistic and political space is likewise needed to address poverty in Canada – language and politics that extend beyond the courtroom and into living rooms. Precisely because people living in poverty are rendered invisible is a truth commission well placed to develop, house and hone the language and politics of poverty alleviation. Through testimony and truth-telling, truth commissions can elevate the voices of victims and survivors. They can also hear those of perpetrators – actors and agents who bear a degree of responsibility for crafting or implementing policies that harm vulnerable people(s). Truth commissions can create spaces of healing, restoration, and trust, while identifying key recommendations to be adopted by governing authorities to redress past harms and forge a new future. If Canada is to move towards the recognition and adoption of social and economic rights – and not only when they are attached to conventional civil and political rights – creating the space in which victims and survivors of poverty can craft their own vernacular is essential. So too is dispelling notions of poverty as the result of choice, as opposed to a rationally constructed form of violence that benefits some through the perpetuation of inequality and destitution. Perpetrators can be confronted with a new, persuasive and authoritative language. *Together* with victims, they can then move towards genuine recognition of, and redress for, the causes and violent dynamics of poverty in Canada

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income: social assistance without the stigma’, *The Star*, (30 May 2016), at

<https://www.thestar.com/opinion/commentary/2016/05/30/basic-income-social-assistance-without-the-stigma.html>  
<sup>104</sup> C. Loignon et al, ‘Perceived barriers to healthcare for persons living in poverty in Quebec, Canada: the

EQUIhealThY project’, 14(4) *International Journal for Equity in Health* (2015), pp.1-11; A. Skosireva et al, ‘Different faces of discrimination: perceived discrimination among homeless adults with mental illness in healthcare settings’, 14(376), *BMC Health Services Research* (2014), 1-11; B. Goldman, ‘The health cost of being poor’, *White Coat, Black Art*, CBC (3 February 2020), at <https://www.cbc.ca/radio/whitecoat/the-health-cost-of-being-poor-1.5449683>

<sup>105</sup> Canadian Women’s Foundation, ‘Fact Sheet: Women and Poverty in Canada’ (2018), at  
<https://canadianwomen.org/wp-content/uploads/2018/09/Fact-Sheet-WOMEN-POVERTY-September-2018.pdf>; Leaf, ‘Women and Poverty’ (2009), at <https://www.leaf.ca/wp-content/uploads/2011/01/WomenPovertyFactSheet.pdf>; M. Townsend, ‘A Report Card on Women and Poverty’ Policy Alternatives (April 2000), at  
[https://policyalternatives.ca/sites/default/files/uploads/publications/National\\_Office\\_Pubs/women\\_poverty.pdf](https://policyalternatives.ca/sites/default/files/uploads/publications/National_Office_Pubs/women_poverty.pdf)

<sup>106</sup> J. Sealy-Harrington, *supra note 6*, p.82.

vi. *Decreasing and increasing political costs*

For many reasons, no political party in Canada is currently and seriously advocating that the Constitution be amended and perhaps the most significant *Charter*-related debate today is not about social and economic rights, but rather the pre-emptive use of the “notwithstanding clause” by certain provinces to avoid *Charter* scrutiny. *Charter* change is periodically raised as a threat to unsettle federal politics; but given the sensitivity of Canadian federalism, amending it would likely be seen as too politically costly to parties and too risky for the electorate.<sup>107</sup> This puts anti-poverty advocates in somewhat of a bind, as the *Charter* remains, in spirit and form, a document privileging civil and political rights. The recognition of the justiciable right to housing, shelter, employment, and other social and economic rights would require amendments to the *Charter*. Otherwise, advocates may be left doing the piecemeal work articulated above in the hopes that with each progressive articulation of rights by Canadian courts, Canada will move a bit closer to that “one day” promised by the Supreme Court, that positive social and economic rights would be recognized.

In the meantime, a TCP can help. By outsourcing the best means and methods of recognizing social and economic rights to mandated experts, a well-designed TCP could take the proverbial edge off constitutional amendments for the government and political parties. Critically, and as stressed above, the government could (and should) attach its commitment to the TCP’s findings and recommendations from the outset. The work of such a commission would be far from simple and would have to sensitively and diligently make proposals on how to achieve recognition of social and economic rights as justiciable while avoiding partisan mudslinging. But attaching political commitment to the TCP, as opposed to political authorities proposing constitutional reform on their own, could help ally political actors with what is essential to reduce poverty in this country: the inclusion of social and economic rights in the *Charter*.

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<sup>107</sup> As Raymond B. Blake and John Donaldson Whyte write, there remain ongoing tensions with respect to the Charter: “Québec has not forgotten its exclusion from Canada’s constitutional renewal. The dominant Canadian trope of two nations becoming one was destroyed. Instead, Canada returned to being two nations, and Québec’s unique manner of engaging in national politics since then underscores the growing difficulty of managing the Canadian state.” See R.B. Blake and J.D. Whyte, ‘Canada inked a landmark constitutional accord 40 years ago — and it’s still causing problems’ The Conversation (2 November 2021), at <https://theconversation.com/canada-inked-a-landmark-constitutional-accord-40-years-ago-and-its-still-causing-problems-170619>; See also E. Macfarlane, ‘Quebec’s attempt to unilaterally amend the Canadian Constitution won’t fly’, Policy Options (14 May 2021), at <https://policyoptions.irpp.org/magazines/may-2021/quebecs-attempt-to-unilaterally-amend-the-canadian-constitution-wont-fly/>

## V. Conclusion: Towards a Truth Commission on Poverty

A TCP would not and could not offer no silver bullet to alleviate or eradicate poverty. No such panacea exists and, as noted above, human rights are limited in their ability to address systemic and structural violence like poverty. But the idea of a TCP proposed in this paper and the analysis put forward above can offer new entry points into a conversation about poverty reduction. While the precise mandate of a TCP must be devised through consultation with survivors of poverty, experts, and civil society, its basic shape can be sketched out from the above analysis. Among other things, the Commission might be mandated to:

- Recognize poverty as a matter of human rights affecting millions of people and families living in Canada.
- Collect testimonies of victims and survivors of poverty in Canada.
- Identify the historical, economic, political, legal and social root causes of poverty in Canada.
- Interview ‘perpetrators’ of poverty, leaders of public and private institutions that have historically benefitted from a portion of the population living in poverty.
- Interview experts on poverty and poverty reduction strategies.
- Assess the current legal landscape in Canada and propose amendments to Canadian law that would move the country towards a recognition of social and economic rights as justiciable under constitutional law.
- Offer recommendations to public and private institutions across Canada including, but not limited to, the media, educational institutions, municipal, provincial, and federal governments, healthcare institutions, and the justice system on how to address and respect social and economic rights, actively work to alleviate poverty, and interact with those experiencing poverty or precarity with respect.
- Offer recommendations on how state institutions and those experiencing poverty can achieve reconciliation.
- Ascertain whether collective reparations would be feasible and advisable and, if so, what form they should take.

We will never hear from those, like Raphaël André, who died at the hands of a state that renders invisible and unworthy those living in poverty. André will never have the opportunity to testify before a committee or truth commission. But if Canada is to protect others from the fate André met on that freezing January night and help bring meaningful justice to victims of poverty, it should recognize social and economic rights as justiciable human rights within its constitutional landscape. A TCP can move this agenda forward. By elevating the voices of poverty's victims, harnessing the language of social and economic well-being, and interrogating and redressing the root causes of endemic poverty, a TCP could drag Canada into a recognition befitting the 21<sup>st</sup> century: that poverty's violence can, and should be, a thing of the past.