Security of Tenure in Canada: Summary Report

C. L. Michel

Canadian Observatory on Homelessness

December 14, 2023

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

This report is part of a series of reports on security of tenure commissioned by the Office of the Federal Housing Advocate (OFHA). The other reports in the series can be found on the OFHA website and on the Homeless Hub at homelesshub.ca/OFHA.

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.

Le présent document existe également en version française sous le titre, La sécurité d'occupation au Canada : Rapport de synthèse. *Elle est disponible sur le site du Bureau de la défenseure fédérale du logement et sur le Rond-point de l'itinérance à rondpointdelitinerance.ca/BDFL.*

How to cite this report:
Michel, C. L. 2023. *Security of Tenure in Canada: Summary Report.* The Office of the Federal Housing Advocate.

Catalogue number: HR34-21/2023E-PDF
ISBN: 978-0-660-69279-1

Table of Contents

List of Abbreviations

CCBFC—Canadian Commission on Building and Fire Codes

CCHR—Canadian Centre for Housing Rights

CESCR—Committee on Economic, Social, and Cultural Rights

CMHC—Canadian Mortgage and Housing Corporation

ICESCR—*International Covenant on Economic, Social, and Cultural Rights*

NBC—National Building Code

NHS—National Housing Strategy

NHSA—*National Housing Strategy Act*

OFHA—Office of the Federal Housing Advocate

OP-ICESCR—Optional Protocol of the *International Covenant on Economic, Social, and Cultural Rights*

UNDRIP—*United Nations Declaration on the Rights of Indigenous Peoples*

Introduction

Everyone has a right to feel stable in their home, to know they can stay there long term without being displaced. This is known as security of tenure, and it is an essential part of the right to adequate housing. Raquel Rolnik, the former United Nations Special Rapporteur on the Right to Adequate Housing, defined security of tenure as "a set of relationships with respect to housing and land, established through statutory or customary law or informal or hybrid arrangements, that enables one to live in one's home in security, peace, and dignity."[1] Security of tenure is the foundation that makes possible all other elements of the right to housing—such as affordability, access to services, and habitability—and it also allows for the enjoyment of other human rights, such as the right to dignity and life.

For the first time in Canada, the passage of the *National Housing Strategy Act* (NHSA) in 2019 enshrined the human right to housing in domestic law. The government of Canada committed to progressively realize this right, bringing Canadian laws and regulations into line with its obligations under the *International Covenant on Economic, Social, and Cultural Rights*, among other documents. This should include security of tenure, but for people across the country, forced evictions are still common, in violation of international norms.

In response to the heightened risk of eviction during the COVID-19 pandemic, the Office of the Federal Housing Advocate (OFHA) launched the Security of Tenure, Evictions, and Arrears Project. This project has had two main parts: in 2020, the OFHA commissioned a series of seven reports on security of tenure in Canada, and then the recommendations from these reports were presented at an online symposium in March of 2022.[2] This summary report seeks to briefly present the arguments and recommendations from each report before discussing what participants said at the symposium with the goal of showing that security of tenure for everyone in Canada is both crucial and attainable.

First, this report will outline the international jurisprudence regarding security of tenure in order to understand Canada's obligations in more detail, relying on the report by the Canadian Centre for Housing Rights. It will then draw on Martin Gallié's report on evictions to show how the right to security of tenure is violated for tenants, before

---

[1] Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Raquel Rolnik, A /HRC/25/54 at 5 para 3, online: <https://undocs.org/A/HRC/25/54>.

[2] The Federal Housing Advocate is one of the accountability mechanisms established by the 2019 *National Housing Strategy Act*. The Advocate's mandate is to conduct research, receive submissions, engage with rights holders, review systemic housing issues, and make recommendations to the federal minister responsible for housing and to other government duty-bearers. The Office of the Federal Housing Advocate (OFHA) is based in the Canadian Human Rights Commission. The OFHA opened in November 2019 and launched this project along with other initiatives to prepare for the appointment of the Advocate. Canada's first Federal Housing Advocate, Marie-Josée Houle, was appointed in February 2022. To learn more about the Advocate's work, visit https://www.housingchrc.ca/en

discussing how a right to counsel for tenants facing eviction could help address this issue, using Sarah Buhler's work on the subject.

As Buhler notes, not all groups face the same risks to their right to security of tenure.[3] The security of tenure of First Nations people is undermined both on and off reserve by historical and present-day policies, as Alan Hanna explains in his report *Systemic Barriers for First Nations People*, and Canada has distinct responsibilities to realize their right to housing. As well, the tenants most vulnerable to eviction also are those most likely to experience poverty and intersecting forms of oppression on the basis of race, gender, and ability. To better understand this process, this report will consider Priya Gupta's report, entitled *Race and Security of Housing* and Luke Reid's report, *Issues for Persons with Disabilities*. Just as there is no singular problem with eviction facing all tenants, solutions to improve security of tenure will have to take into account race and ability if they are to actually improve conditions for those most impacted.

Finally, this report will draw on the work of Estair Van Wagner to consider an often overlooked group that experiences the most extreme violation of their rights to housing and security of tenure: those experiencing homelessness and living in encampments.

After summarizing the seven reports, this report will briefly present the subjects discussed at the Security of Tenure Symposium that was held online on March 2, 2022. This symposium, organized by the Office of the Federal Housing Advocate, brought together 78 participants from across the country and offered a glimpse into how security of tenure issues are playing out on the ground.

Although adequate housing with security of tenure is necessary for all people to thrive, this project demonstrates that this right is often disregarded, especially for Indigenous Peoples, tenants, and those who are marginalized. The NHSA requires the Government of Canada to progressively realize the human right to adequate housing for everyone in Canada, especially people experiencing homelessness, those in core housing need, and disadvantaged groups. Working with communities directly affected by violations of their right to security of tenure, the Federal Housing Advocate will build on this research to define actions that governments at all levels must take to uphold their human rights obligations.

[3] Sarah Buhler, The Right to Counsel for Tenants Facing Eviction: Security of Tenure in Canada (Office of the Federal Housing Advocate, 2022) at 8, online: *PDF* <https://www.homelesshub.ca/resource/right-counsel-tenants-facing-eviction-security-tenure-canada>.

Understanding Security of Tenure in International Law

Canada has ratified numerous international covenants that deal with the right to adequate housing, but the most comprehensive is the *International Covenant on Economic, Social, and Cultural Rights* (ICESCR), and this is the one the Canadian Centre for Housing Rights (CCHR) focuses on in their report for the Advocate.[4] International law identifies several aspects of security of tenure:

1. Forced evictions are prohibited, and those who experience them should receive compensation
2. National eviction law should comply with human rights norms
3. In cases of unpaid rent, eviction should be a last resort after exhausting other options for repaying the debt
4. States must implement measures to prevent evictions[5]

By adopting these standards, Canada could put in place protections that comply with international human rights norms which are presently often ignored.

The ICESCR comes with an important tool for ensuring implementation, known as the Optional Protocol (OP-ICESCR). The Optional Protocol allows individuals who feel their rights have been violated to bring complaints to the Committee on Economic, Social, and Cultural Rights (CESCR) for a hearing and also empowers the CESCR to conduct inquiries into systemic violations of rights by signatory nations.[6]

Although Canada has not ratified the OP-ICESCR, by ratifying the ICESCR, it committed to implementing the right to adequate housing, and the decisions made under the OP-ICESCR regarding other countries can help to better understand Canada's responsibilities. As well, because the right to adequate housing is now recognized in domestic law in the NHSA, the Federal Housing Advocate, review panels, and the National Housing Council can consider how the ICESCR applies to Canadian housing policy.[7] The ICESCR and the international jurisprudence that flows from it are powerful tools that can be used to identify weaknesses in Canada's implementation of the right to housing.

---

[4] The human right to adequate housing is also enshrined in other instruments such as the *International Covenant on Civil and Political Rights*, the *Convention on the Rights of People with Disabilities*, and the *Convention on the Elimination of Discrimination Against Women*. All three of these come with their own Optional Protocols which Canada has ratified.

[5] Canadian Centre for Housing Rights, International Jurisprudence: Security of Tenure in Canada (Office of the Federal Housing Advocate, 2022) at 9, online: *PDF* <https://www.homelesshub.ca/resource/international-jurisprudence-security-tenure-canada>.

[6] *Ibid* at 8.

[7] *Ibid*.

For instance, there are two cases in which Spain's legislative framework was found to have failed to ensure that evictions only occur when they are reasonable and proportional.[8] These are the cases of Hakima El Goumari and Ahmed Tidli[9] and of Rosario Gómez-Limón Pardo.[10] The courts were found to not have reviewed the proportionality of eviction, meaning they did not weigh the interests of the parties and of society as a whole and thereby take into account the harms caused by eviction.[11] The CESCR also found that measures were not taken to provide alternate housing, in violation of the complainants' human right to housing.[12]

In another case from Spain, that of Soraya Moreno Romero,[13] the CESCR lays out several criteria for security of tenure legislation. It takes as its starting point that eviction should not result in homelessness.[14] If the people being evicted cannot provide for themselves, then the state must support them to access alternative housing using a maximum of its available resources. If an eviction is to be granted without alternate housing being arranged, the state must demonstrate that it has taken all reasonable measures to protect their rights. Alternative housing must be adequate, in accordance with the elements of the right to housing, and any temporary housing provided must respect the dignity of the people involved, meets all safety requirements, and not become permanent.

---

[8] *Ibid* at 11.

[9] CESCR. *Views adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, concerning communication No. 85/2018*, Hakima El Goumari and Ahmed Tildi, E/C.12/69/D/85/2018.

[10] CESCR. *Views adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, concerning communication No. 52/2018*, Rosario Gomez-Limon Pardo, E/C.12/67/D/52/2018.

[11] Martin Gallié, Expulsions et obligations internationales : Sécurité d'occupation au Canada (Office of the Federal Housing Advocate, 2022) at 21, online: *PDF* <https://www.rondpointdelitinerance.ca/ressource/expulsions-et-obligations-internationales-la-s%C3%A9curit%C3%A9-d%E2%80%99occupation-au-canada>

[12] *Supra* note 5 at 11.

[13] CESCR. *Views adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, concerning communication No. 48/2018*, Soraya Moreno Romero, E/C.12/69/D/48/2018, online: <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1Xt9%2fAm48919J%2bLiF0hYPfcEvvoZ3Y%2bZXZlnkfBPqkkvvim06iWDYDpW5kVRE6ciJOf28wvoeaJvhjvMm4CaBgrII66LaehmQWx%2bq0VckkOuw1hwFOzHlwRMXB%2bnPFEAEl5jDBc2MV4SNZ%2b%2f7lpxoo%3d>

[14] *Supra* note 5 at 12.

Two more cases, *Liliana Assenova Naibidenova et al. v. Bulgaria*[15] and *Greorgopoulos et al. v. Greece*,[16] both heard by the Committee for Civil and Political Rights, deal with the evictions of Roma people from pieces of land.[17] In both, the state parties were found to have violated Article 17 of the *International Covenant on Civil and Political Rights* by failing to consider the consequences of the eviction, such as the risk of homelessness, and failed to make alternate housing available. As these cases deal with land and with protected groups, they may be relevant when considering Indigenous rights holders in Canada.

At first glance, this jurisprudence may seem of limited application, because it is the federal government that signs international treaties while housing is a provincial responsibility. However, in addition to this jurisprudence, the CESCR conducts periodic reviews of Canada to assess its compliance with the ICESCR. In these, it has repeatedly emphasized the need for federal leadership despite the fact that housing is the responsibility of the provinces,[18] and this is echoed in the 2019 report of the Special Rapporteur for the Right to Adequate Housing.[19] These perspectives are important because they make clear that the right to housing applies to all levels of government and that the division of powers in Canada's political system should not be an excuse for failing to uphold that right.

In their report to the Advocate, the CCHR summarizes the issue as follows: "Creating safeguards for security of tenure at the federal level and enhancing interjurisdictional collaboration, where federal standards for a baseline of security of tenure protections are adopted by provincial governments, could ensure equal protection for all tenants throughout Canada."[20] To achieve this, Canada has much it can learn from other countries with similar political systems that have adopted solutions to these problems. Each of the four countries discussed below has recognized the right to housing (or elements thereof) in domestic law, ratified the ICESCR, and received recommendations from the CESCR that it has responded to with an interjurisdictional approach.

---

[15] CCPR, *Views adopted by the Committee at its 106th session*, Liliana Assenova Naibidenova et. al. v. Bulgaria, /C/106/D/2073/2011, online: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/482/92/PDF/G1248292.pdf?OpenElement>

[16] CCPR, V*iews of the Human Rights Committee under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights (ninety-ninth session)* Greorgopoulos et al. v Greece, CCPR/C/99/D/1799/2008, online: <https://documents-dds-ny.un.org/doc/UNDOC/DER/G10/450/82/PDF/G1045082.pdf?OpenElement>

[17] *Supra* note 5 at 13.

[18] *Ibid*; CESCR, *List of Issues Prior to the Seventh Periodic Report of Canada*, E/C.12/CAN/QPR/7 (April 7, 2020).

[19] *Supra* note 5 at 14; Human Rights Council, *Report of the Special Rapporteur on adequate housing,* A/HRC/43/43 (26 December 2019), online: <https://undocs.org/A/HRC/43/43>

[20] *Supra* note 5 at 17.

In Scotland, housing programs protect security of tenure using a rights-based approach that relies on collaboration between national and local governments as well as housing providers.[21] Under Section 11 of the *Homelessness etc. (Scotland) Act 2003*, landlords must provide notice to the municipal government of their intention to evict a tenant, which allows wraparound supports to be provided to the tenants so they can re-establish security of tenure in long-term housing.[22] As well, municipal governments can apply to have the rent capped in areas where rents are increasing rapidly, which can last for five years. Social housing landlords have distinct obligations under the Scottish Social Housing Charter, which sets out standards for affordability and ensures that tenants have information and support to remain in their homes.[23] This exists alongside rapid rehousing plans that have, between 2018 and 2020, arranged 306 tenancies with a sustainment rate of 87%.[24]

Following comments from the CESCR in 2016[25] that recommended taking action to address affordability in the private rental market, the Scottish government introduced reforms to the *Private Housing (Tenancies) (Scotland) Act 2016* to regulate the private rental sector with the goal of increasing affordability and security of tenure.[26]

In the Netherlands, innovative housing programs requiring cooperation between levels of government have been successful at protecting people from eviction. For instance, the *Rent Tribunal Act* sets a maximum allowable rent increase each year in line with inflation and allows tenants to challenge unreasonable rent increases through a tribunal.[27] The rental market in the Netherlands is heavily dominated by the social housing sector, where rents are lower than the limits set for the private sector and where 80% of units are reserved for people with low incomes. As eviction is considered

---

[21] *Ibid* at 17.

[22] *Ibid* at 19.

[23] One Scotland. *The Scottish Social Housing Charter* (April 2017), online: *PDF* <https://www.gov.scot/binaries/content/documents/govscot/publications/regulation-directive-order/2017/03/scottish-social-housing-charter-april-2017/documents/00515058-pdf/00515058-pdf/govscot%3Adocument/00515058.pdf>.

[24] Scotland. *Ending Homelessness Together: Updated Action Plan* (October 2020) at 26, online: https://www.gov.scot/binaries/content/documents/govscot/publications/strategy-plan/2020/10/ending-homelessness-together-updated-action-plan-october-2020/documents/ending-homelessness-together-updated-action-plan-october-2020/ending-homelessness-together-updated-action-plan-october-2020/govscot%3Adocument/ending-homelessness-together-updated-action-plan-october-2020.pdf.

[25] CESCR. *Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland* (July 14, 2016), online: *PDF* <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW3XRinAE8KCBFogOHNz%2fvuCC%2bTxEKAI18bzE0UtfQhJkxxOSGuoMUxHGypYLjNFkwxnMR6GmqogLJF8BzscMe9zpGfTXBkZ4pEaigi44xqiL>.

[26] *Supra* note 5 at 20.

[27] *Ibid* at 21.

a severe interference with the recognized right to housing, everyone impacted has the right to a hearing before an independent court.[28]

Despite this, the CESCR noted a rise in homelessness among marginalized people in their 2017 review and recommended the state investigate the root causes of homelessness while taking all necessary measures to provide affordable housing to those who are disadvantaged. In response, the Dutch government launched the Multi-Annual Strategy for Protected Housing and Shelter, which seeks to increase social inclusion by providing integrated supports for stable housing and self-reliance.[29]

In New Zealand, the process of implementing the right to housing and protecting security of tenure is still in its early stages, but the government is trying to keep Indigenous Peoples at the heart of its approach.[30] Although New Zealand has not explicitly recognized the right to housing in domestic law, it has integrated seven elements of adequate housing, based on international human rights law, into their domestic policies. New Zealand was among the first countries to provide housing to low-income people, but this has meant the right to housing is mostly limited to those most marginalized. Assistance also takes the form of a supplement paid to low-income people to protect security of tenure, allowing them to remain in their housing long term.

When the CESCR reviewed New Zealand in 2018, they noted that Indigenous people, people with disabilities, and other disadvantaged groups were more likely to lack adequate housing.[31] They also expressed concern about rising housing costs and the shortage of social housing, which both contributed to homelessness. In response, the government of New Zealand passed an action plan to prevent homelessness where possible and ensure that it is "rare, brief, and non-recurring."[32] This involved empowering Indigenous communities to deliver housing supports, in accordance with the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP). A year later, in 2021, the act governing residential tenancies was reformed to protect tenants from eviction and to stop fixed term leases from expiring.[33]

---

[28] *Ibid*.

[29] *Ibid* at 22; Oostveen, ESPN Thematic Report on National Strategies to Fight Homelessness and Housing Exclusion: The Netherlands (2019), online: <https://ec.europa.eu/social/BlobServlet?docId=21607&langId=en>.

[30] *Supra* note 5 at 22.

[31] *Ibid* at 23.

[32] Ministry of Housing and Urban Development, Aeotearoa Homelessness Action Plan 2020–2023 (New Zealand Government), online: https://www.hud.govt.nz/community-and-public-housing/addressing-homelessness/aotearoa-homelessness-action-plan-2020-2023/.

[33] *Supra* note 5 at 23; Miriam Bell, "Tenancy Law Changes: What Do They Really Mean?" *Stuff Limited* (11 February 2021), online: <https://www.stuff.co.nz/life-style/homed/renting/124198085/tenancy-law-changes-what-do-they-really-mean>.

Finally, in Germany, the federal constitution contains a right to a minimum standard of living, which includes access to adequate housing.[34] A small number of core regulations are federal, but apart from that, the federal government simply provides funding, leaving the legislation to the states (as long as they follow the federal rules). The higher orders of government also work with municipalities. Most tenancies in Germany are indefinite, meaning they have no fixed end date, and the average tenancy lasts 11 years, evidence of their strong security of tenure protections.[35] Landlords must provide a legal reason for ending a tenancy along with a three-month notice period, and tenants can stay in their home if they are at risk of homelessness.[36] As well, Germany has put in place a "rent brake" policy, which caps rents at 10% of a defined local rate in certain markets.[37]

In response to the CESCR's comments regarding homelessness, Germany launched a campaign to increase housing supply while protecting affordability, which included investing in social housing, offering a housing allowance, and funding urban development. In 2021, the CESCR affirmed that Germany had made sufficient progress in recognizing the right to housing.[38]

To conclude, although Canada has committed to the progressive realization of the right to housing in the NHSA, because laws protecting tenant are a matter of provincial jurisdiction, protections are uneven across the country, resulting in a patchwork of security of tenure and eviction prevention policies.[39]

However, Article 28 of the ICESCR states that the rights outlined in it extend to all parts of federal states without exception. This is an area where the Advocate can act, using her authority under the NHSA to encourage collaboration between levels of government and federal leadership to improve protections for security of tenure. In this, the international jurisprudence and examples given above can serve as reference points.

---

[34] *Supra* note 5 at 25.

[35] *Ibid*; Bill Davies, Charlotte Snelling, Ed Turner, and Susanne Marquardt, "Lessons from Germany: Tenant Power in the Rental Market," *The Progressive Policy Think Tank* (12 May 2017), online: <https://www.ippr.org/publications/lessons-from-germany-tenant-power-in-the-rental-market>.

[36] *Supra* note 5 at 26; German Civil Code Section 573c, online: <http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html>; Julia Cornelius and Joanna Rzeznik. "National Report for Germany" TENLAW: Tenancy Law and Housing Policy in Multi-level Europe (2014), online: <http://www.iut.nu/wp-content/uploads/2017/03/National-Report-for-Germany.pdf>.

[37] Housing Rights Watch, "State of Housing Rights Germany," Housing Rights Watch (7 December 2016), online: <https://www.housingrightswatch.org/country/germany>.

[38] *Supra* note 5 at 26; CESCR, Follow up to concluding observations of the Committee on Economic, Social and Cultural Rights on the examination of the sixth periodic report of Germany at the Committee's sixty-fourth session (2018), online: <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCESCR%2FFUL%2FDEU%2F44142&Lang=en>.

[39] *Supra* note 5 at 27.

The report concludes that the Advocate should use an international human rights law lens when monitoring progress on the right to housing, and as this monitoring can occur at all levels of government, provincial tenancy legislation can be reviewed to ensure it complies with international norms.[40] The Advocate can conduct research on rental protections across Canada, identify gaps, and expose how these gaps affect marginalized groups in order to advise the minister of her findings. She can also advise the minister on international examples of states that have successfully implemented the right to housing.

[40] *Supra* note 5 at 27–29.

Eviction and Security of Tenure

As Martin Gallié notes in his report to the Advocate, the NHSA creates a presumption that Canadian legislation will comply with the right to housing as outlined in the ICESCR.[41] He focuses on four obligations stemming from that right:

1. Create an evictions prevention policy
2. Respect the right to a fair trial
3. Create a policy on the principle of proportionality
4. Ensure evicted tenants have access to new housing

These obligations have two things in common.[42] The first is that they are routinely either ignored or violated by governments in Canada or are only partially implemented. The second is that their implementation would not cost very much at any level of government. As we saw above, these obligations are implemented in a number of European countries, and they could be acted on here as well.

In creating an eviction prevention policy, the minimum requirement is for states to document evictions, conduct an evaluation of needs, identify the government agencies responsible, assess available resources, identify the target categories, revisit urban planning decisions, and allocate resources.[43] In short, it involves creating a genuine public policy for protecting security of tenure and preventing eviction by identifying specific measures to take.

Gallié draws on examples from France to illustrate what a Canadian eviction prevention policy could look like. Every French department is required to have an eviction prevention charter and a committee that takes coordinated action to prevent eviction and rehouse tenants.[44] This committee must be notified any time an eviction is requested, and it then sends a social worker to meet the tenant and create a social and financial report that can serve as a basis for providing supports.[45]

The second obligation related to the right to housing is the right to a fair trial. For the CESCR, this means three main things: tenants must be informed of the proceedings, they must have time to defend themselves, and they must have access to legal services.[46] All of these are important to the Canadian context, as the majority of tenants facing eviction do not attend the hearing. One way to combat the unfairness that results from this is to provide legal information and counsel; however, the available evidence shows the impact of this is limited. Another solution is to reduce the number of eviction applications by

[41] *Supra* note 11 at 6.

[42] *Ibid*.

[43] *Ibid* at 8.

[44] *Ibid*.

[45] *Ibid* at 9.

[46] *Ibid* at 10.

making the procedure costlier for landlords, not by increasing fees (which can be passed on to tenants) but by increasing the amount of time it takes to receive an eviction order.[47]

The basis of a fair trial in an evictions proceeding is that the tribunal must take into account the reasons for nonpayment as well as the social and health consequences of eviction.[48] This is, of course, impossible to do if, as in 90% of evictions cases in some jurisdictions, tenants do not attend the hearing. This makes the hearings into a "parody of justice," rushed through in a few minutes, hearing only from landlords and their representatives.[49] In Quebec, for instance, tribunals sometimes order 120 evictions in three-and-a-half hours of hearings.[50]

Although legal representation is generally held up as the solution to this problem, the French example shows that its usefulness is limited. The right to representation has existed in France since the 1970s, and yet there, too, tenants are generally absent from hearings.[51] And counter-intuitively, some research suggests that represented tenants are more likely to be evicted, probably due to the fact that only the poorest tenants have the right to a lawyer; however, as we will see in the next section, there is also reason to believe that representation is associated with better outcomes.

The third obligation involves implementing the principle of proportionality, which applies to tenants as well as to homeowners at risk of having their home repossessed and to "squatters," those without legal title.[52] Tribunals must consider the effects of granting (or not) an eviction order on both landlords and tenants (while keeping in mind that the effects on a corporate landlord are negligible), and they must be able to stop an eviction on this basis.[53] This obligation is clear from the CESCR jurisprudence discussed above.

Finally, that same jurisprudence contains a fourth obligation, that of ensuring new housing for those who experience eviction.[54] There is no policy or framework in place for this in Canada at this time. The committee is clear that simply offering shelter is not enough—it must be adequate housing that meets the needs of those involved: "Policies on alternative housing in cases of eviction should be commensurate with the need of those concerned and the urgency of the situation and should respect the dignity of the person."[55] It

---

[47] *Ibid* at 17.

[48] *Ibid* at 13.

[49] *Ibid* at 14.

[50] Martin Gallié and Marie-Claude Plessis-Bélair, La judiciarisation et le non-recours ou l'usurpation du droit du logement – le cas du contentieux locatif des HLM au Nunavik (2014) 55 *Les Cahiers de droit* 3.

[51] *Supra* note 11 at 15.

[52] *Ibid* at 21.

[53] *Ibid* at 22.

[54] *Ibid* at 25.

[55] *Fátima El Ayoubi and Mohamed El Azouan Azouz*, E/C.12/69/D/54/2018, 19 February 2021 at para 12.2.

recommends creating a legal obligation for the state to respect its commitment and provide either housing or payment.[56]

[56] *Supra* note 11 at 28.

The Right to Counsel for Tenants Facing Eviction

Sarah Buhler builds on these arguments to make clear that, under international human rights law, evictions should only occur as a last resort and that the human right to security of tenure therefore requires access to justice, including fair hearings and effective remedies.[57] She argues that the government can contribute to security of tenure by ensuring that vulnerable tenants facing eviction have access to legal representation, as representation reduces eviction rates: it will "save tenancies, promote dignity and equality, and animate the human right to housing."[58]

Although most evictions likely happen informally, outside the legal system, what happens in the formal legal process influences what happens informally.[59] If tenants know the system works in the landlord's favour, as is currently the case, then they may simply move away without waiting to have their case heard. There is a fundamental imbalance of power between landlords and tenants rooted in the landlord's power to evict, and access to representation is a step towards making this more equal.[60]

Despite the unequal power dynamic, the intimidating legal process, and the negative consequences of eviction, most tenants in Canada have no access to legal representation when faced with eviction.[61] Research has shown that representation impacts all types of legal processes, and this goes beyond the lawyer's knowledge and their ability to make arguments—they are crucially able to navigate the professional and interpersonal dynamics of the system, causing it to take their clients' needs more seriously.[62] As well, the presence of lawyers stops landlords from bringing baseless eviction cases.[63] Buhler agrees with Gallié that slowing down the system is key: "By simply requiring the system to follow the law, forcing landlords to prove their cases, and by raising defences for tenants, lawyers effectively slow down the system so that it is unable to 'steamroll' vulnerable tenants."[64]

---

[57] *Supra* note 3 at 4.

[58] *Ibid* at 5.

[59] *Ibid* at 6.

[60] *Ibid* at 7, 8.

[61] *Ibid* at 15.

[62] *Ibid* at 17; Rebecca Sandefur, Elements of Professional Expertise: Understanding Relational and Substantive Expertise through Lawyers' Impact (2015) 80 American Sociological Review 909 at 911–912.

[63] Erika Peterson, Building a House for Gideon: The Right to Counsel in Evictions (2020) 16 Stan JCR & CL 63 at 77-78; John Pollack, Right to Legal Representation in Eviction Cases in National Law Center on Homelessness and Poverty (2018) *Protect Tenants, Prevent Homelessness* at 24 online: *PDF* <https://homelesslaw.org/wp-content/uploads/2018/10/ProtectTenants2018.pdf>.

[64] *Supra* note 3 at 17.

Lawyers also have an impact because they help build case law, effectively shaping tenancy law by challenging illegal practices.[65] Without this, it is possible that tenants' rights can atrophy, meaning they are no longer enforced. Representation may also result in cost savings by reducing the social, economic, and health effects of eviction.

Any right to counsel must be grounded in a human rights framework, as part of promoting tenants' security of tenure, dignity, and well-being. Robin White emphasizes, "A right is different from a benefit or a privilege, because rights holders derive power from the right, which cannot be denied or terminated."[66] Now that Canada has enshrined the right to housing in the NHSA, implementing a right to legal aid for tenants facing eviction is a way of taking seriously the right to security of tenure.

In international law, there is a strong emphasis on access to justice and legal aid for all rights claimants, as part of ensuring that all persons are equal before courts and tribunals. The United Nations Human Rights Committee commented that Article 14 of the *International Covenant on Civil and Political Rights* that deals with this issue should apply to civil cases as well as criminal ones.[67] In a fact sheet about the right to adequate housing, the United Nations High Commission for Human Rights explained that security of tenure means the individual is ensured "legal protection against forced eviction, harassment, and other threats."[68] In another report, it concluded that all people threatened with eviction have a right to access legal counsel and legal aid for "free if necessary."[69]

Therefore, it is unsurprising that the civil legal aid system in Canada, and legal assistance for tenants specifically, has been critiqued by international human rights bodies, such as the Committee on the Elimination of Discrimination Against Women and the CESCR.[70] In domestic law, although the right to state-funded counsel is well established in criminal cases, courts have been reluctant to acknowledge a right under the constitution to representation in civil cases.[71] In one important case that acknowledged such a right,

---

[65] *Ibid* at 18, 19.

[66]Robin M White, Increasing Substantive Fairness and Mitigating Social Costs in Eviction Proceedings: Instituting a Civil Right to Counsel for Indigent Tenants in Pennsylvania (2021) 125 Dickinson L Rev 795 at 804 (emphasis in original).

[67] *Supra* note 3 at 21; UN General Assembly Human Rights Council, *Guidelines for the Implementation of the Right to Adequate Housing* (26 December 2019), A/HRC/43/43, online: *PDF* <https://www.make-the-shift.org/wp-content/uploads/2020/04/A_HRC_43_43_E-2.pdf>.

[68] UN Office of the High Commissioner for Human Rights, *The Right to Adequate Housing, Fact Sheet No. 21* (May 2014) at 4, online: <https://www.ohchr.org/documents/publications/fs21_rev_1_housing_en.pdf>.

[69]UN Human Rights Office of the High Commissioner, *Forced Evictions Fact Sheet No. 25 Rev 1* (New York and Geneva, 2014) at 31, online: <https://www.ohchr.org/Documents/Publications/FS25.Rev.1.pdf>.

[70] *Supra* note 3 at 23.

[71] *Ibid* at 24.

New Brunswick (Minister of Health and Community Services) v. G(J)[72], the court ordered state-funded counsel in a child apprehension proceeding because of the impacts of a potential removal.[73] The court ruled that a fair trial was not possible without representation, while acknowledging that the mother in the case could not afford a lawyer. This shows that a right to counsel might exist in some individual civil cases, including eviction cases.[74]

Although some researchers believe a claim on this basis could be successful, it is likely that given the courts' unwillingness to interpret the constitution as requiring counsel in civil cases, a claim through the mechanisms of the NHSA is likely to be a more fruitful approach.[75] Such a claim could require the government to consider the impacts of eviction, the deficiencies of the system, and the benefits of legal aid for tenants in eviction cases and urge it to adopt a human rights lens.

Security of tenure is a crucial part of the right to housing, and although legal representation at eviction hearings will not solve all the problems with security of tenure on its own, it would be a powerful step towards realizing that right.

[72] *New Brunswick (Minister of Health and Community Services) v. G(J)* [1999] 3 S.C.R. 46

[73] *Supra* note 3 at 26.

[74] *Ibid* at 27.

[75] *Ibid* at 29.

Systemic Barriers for First Nations People

Thus far, this summary report has outlined the human right and its implication for tenancy law in Canada. Although the right to security of tenure is not well protected for anyone in Canada, the problems faced by First Nations, Inuit and Métis, people are disproportionate. For Indigenous Peoples, displacement (including eviction) is rooted in colonialism, and respecting their security of tenure to realize their right to housing will require a holistic approach. Governments' legal responsibilities are also distinct, extending beyond the NHSA to include Indigenous rights under the *United Nations Declaration for the Rights of Indigenous Peoples Act*, as well as treaty commitments, court decisions, settlements, issues of jurisdiction, and other legal requirements.

As Alan Hanna explores in his report for the Advocate, First Nations people face systemic barriers across multiple jurisdictions that put them on a path from having some security of tenure in their home community to experiencing homelessness in urban centres.[76] Although the housing experiences of Inuit and Métis Peoples share many similarities with those of First Nations, the legislative frameworks applicable to them are different, so the observations in this section should not be generalized to Indigenous Peoples as a whole.[77]

When Europeans arrived in the territory now known as Canada, it was home to many Indigenous nations who occupied, used, and governed their lands according to their particular worldviews—in other words, the land belonged to these nations.[78] Most treaties between First Nations and the Crown served to remove their rights and title, and the negotiation process was marked by coercion, misrepresentation, and fraud.[79] The treaties removed First Nations from their Traditional Territories and interrupted their ways of living, including their use of traditional dwellings, and imposed a sedentary lifestyle on small pieces of land. This was followed by the passage of the *Indian Act* in 1876 in order to "expedite the assimilation of Indigenous Peoples in the dominant white society" through the implementation of measures like compulsory attendance in residential schools for Indigenous children.[80] It also delegated authority over housing to the First Nations bands it created.

Indigenous Peoples have been responsible for the construction and maintenance of their homes since time immemorial. Although, presently, housing conditions on reserves are

---

[76] Alan Hanna, Systemic Barriers for First Nations People: Security of Tenure in Canada (Office of the Federal Housing Advocate, 2023) at 5, online: *PDF* <https://www.homelesshub.ca/resource/systemic-barriers-first-nations-people-security-tenure-canada>.

[77] *Ibid* at 1.

[78] *Ibid* at 6.

[79] *Ibid* at 7.

[80] *Ibid* at 8.

often unsatisfactory, this is primarily due to the lack of adequate financing options.[81] The Crown holds title to reserve lands, meaning First Nations people are unable to access conventional mortgages—the banking system has never adapted to their unique circumstances. Although the CMHC provides funding for housing purposes, it often requires the borrower to have a certificate of possession, which has historically been denied to women. First Nations governments themselves may have similar issues securing funding to build rental housing, requiring a guarantee from the government that might not always be provided.

Low income is one of the most reliable predictors of housing insecurity, and according to a 2017 Statistics Canada survey, 24% of Indigenous people lack sufficient income to meet their basic needs.[82] These high rates of poverty can be explained by the impacts of the reserve system, residential schools, and a lack of economic opportunities on reserve. Leaving the reserve to seek employment opportunities may seem like a logical solution, but First Nations people face many barriers in doing so, and it involves sacrificing their often deep community ties. The lack of coordination between federal and provincial income supplement programs is one barrier to mobility, as First Nations people who leave reserve may have to go without support while they wait to transition to the provincial program.

Poor state of repair is another aspect of inadequate on-reserve housing. People on income assistance may be able to afford their monthly payments, but they may not be able to afford the cost of maintenance—especially if they were on a Canadian Mortgage and Housing Corporation (CMHC) rent-to-own agreement in which the First Nations government transfers ownership to them after the mortgage is paid.[83] First Nations governments may also not be able to finance repairs, leaving individuals to either finance the repairs themselves or live in inadequate housing. This dynamic is aggravated by poor planning and construction of on-reserve housing, as well as the fact that communities are often remote and face severe weather conditions. As a result, 37.3% of First Nations households live in homes that require major repairs, with all the health problems that come with it.[84]

Of course, this lack of resources is tied to the fact that First Nations' jurisdiction only extends to reserve lands and not to their whole traditional territories as these have been

---

[81] *Ibid* at 11; *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, on the Situation of Indigenous Peoples in Canada*, HRCOR, 27th Sess, Annex, Agenda Item 3, UN Doc GE.14-07508 (2014) at paras 1-28.

[82] *Supra* note 76 at 11, 12; Statistics Canada, Number of Persons in the Household and Meeting Basic Household Needs and Unexpected Expenses by Aboriginal Identity, Age Group and Sex, Table 41-10-0056-01 (Statistics Canada, 2021), online: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=4110005601>.

[83] *Supra* note 76 at 12.

[84] *Ibid*; Assembly of First Nations, *Fact Sheet – First Nations Housing On Reserve* (2013), online: <https://www.afn.ca/uploads/files/housing/factsheet-housing.pdf>.

claimed by the Canadian state.[85] Resources are taken from First Nations land without compensation, with wealth accumulating in non-Indigenous society. This creates dependency on federal assistance, exposing people to situations like the ones described above.

Despite this, it is often not clear which level of government has authority over First Nations housing.[86] Although the federal government has authority over land reserved for First Nations, the provincial and territorial governments are responsible for property and civil rights under the constitution, which includes matters relating to tenancy. Many provincial laws apply on reserve, but tenancy protections do not, leaving on-reserve rentals to be governed by a patchwork of regulations and lease agreements. For First Nations people living off reserve, no government has clear jurisdiction over their housing needs, so although they technically enjoy the same rights as any Canadian, they are left disadvantaged by the lack of resources on reserve.[87] Poor quality education on reserve leaves First Nations people who migrate to cities working disproportionately in minimum wage jobs and vulnerable to racism and exploitation. Despite the provinces occasionally providing housing services tailored to Indigenous Peoples, provincial governments have largely refused to accept specific responsibility for them, leaving off reserve First Nations people in a jurisdictional vacuum.

Though Indigenous people face higher rates of discrimination, they access human rights tribunals less often than do non-Indigenous people.[88] When they do use the system for a housing matter, it can be difficult to decide under which grounds to file a complaint, as only British Columbia and Nova Scotia specifically prohibit discrimination against Indigenous people. Many of the cases that have been brought highlight the gendered nature of housing discrimination both on and off reserve, such as *Raphael v. Conseil Des Montagnais du Lac Saint-Jean*.[89] In this case, the band council of an Innu band imposed a moratorium on women coming to live on reserve who regained Indian Status in 1985 after the removal of some explicitly sexist provisions from the *Indian Act*.

The housing conditions faced by First Nations are in clear violation of Canada's international responsibilities under the ICESCR and UNDRIP, which require Canada to actively protect their human rights while stopping actions that violate them.[90] UNDRIP

---

[85] *Supra* note 76 at 14.

[86] *Ibid* at 15.

[87] *Ibid* at 16.

[88] *Ibid* at 17; see for example Alberta Human Rights Commission, Indigenous Rights Strategy Backgrounder (June 2021), online: <https://albertahumanrights.ab.ca/publications/Documents/AHRC%20IHRS%20Backgrounder_23Apr2021.pdf>; British Columbia Human Rights Tribunal, *Expanding Our Vision: Cultural Equality & Indigenous Peoples' Human Rights* (BCHRT, 2020), online: <http://www.bchrt.bc.ca/shareddocs/indigenous/expanding-our-vision.pdf>.

[89] *Raphael v. Conseil Des Montagnais du Lac Saint-Jean* (1995) 23 CHRR D/259 (CHRT).

[90] *Supra* note 76 at 21.

was recognized in Canadian law by the *United Nations Declaration on the Rights of Indigenous Peoples Act* in 2021, meaning Canada has pledged to ensure that all federal laws are consistent with UNDRIP, which has four articles that speak directly to housing.

Article 1 recognizes Indigenous Peoples' right to all freedoms identified in international law, such as those in the ICESCR.[91] Article 3 involves self-determination. Article 21 identifies the right to improve their economic and social conditions, including housing, and requires states to take effective measures to ensure continuing improvement. Finally, Article 23 recognizes the right of Indigenous Peoples to be involved in housing and other programs that affect them.

This means the government of Canada must ensure that all measures taken under the National Housing Strategy (NHS) align with UNDRIP and must consult with Indigenous Peoples.[92] This will require the creation of an action plan that addresses the scope of the legislative review required to bring Canadian laws into alignment with the NHSA and UNDRIP. Other issues may arise during the consultation process, but Section 6.2 of the UNDRIP Act provides that any plan must address injustices, promote mutual respect and understanding, and contain accountability measures. Both domestic and international law require Canada to rectify the housing crisis for First Nations people both on and off reserve.

Security of tenure for First Nations people must be seen as a systemic problem created by a century of laws and policies that requires a holistic, systemic solution.[93] Some aspects of this solution could include:

- A long-term strategy with funding for revitalizing all housing on reserve and increasing the number of units
- Funding for education and skills training near communities
- Culturally appropriate healing programs
- Access to resources on First Nations' traditional territories

Even if these changes were implemented, many First Nations people will still choose to live in cities and will require additional supports to deal with the transition. This would in turn require the collaboration of all levels of government and consultation with First Nations, keeping in mind that no two First Nations are the same.

The report concludes that the Advocate could use her power under section 2(d) of the NHSA to undertake consultation and launch a systemic review into issues related to First Nations housing. The issues mentioned in this section—such as jurisdictional gaps, lack

---

[91] United Nations, *Declaration on the Rights of Indigenous Peoples* (2007) online: <https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf>.

[92] *Supra* note 76 at 21, 22.

[93] *Ibid* at 24.

of funding, and human rights concerns—could serve as starting points for the Advocate's work and eventual recommendations to the Minister of Justice.

Race and Security of Housing

Priya Gupta's report analyzes the displacement of racialized communities and racial discrimination, including while renting and during the eviction process, with the goal of making clearer the structural conditions racialized people face.[94] She outlines a number of recommendations the Federal Housing Advocate could make to contribute to security of tenure for racialized people in Canada, such as calling for the creation of race-based data on housing and of race-specific protections around development and displacement.

Racialized people have unique challenges in accessing and maintaining secure housing that implicate both households and communities as a whole. These include insecurity at the hands of the government, discrimination by landlords (and the difficulty in proving that discrimination), and overcrowded, poor quality housing.[95]

In terms of the role of government in creating insecurity for racialized communities, the history and ongoing reality of racialized displacement by public and private actors looms large. To understand the processes that lead to displacement requires considering the actors with power in housing finance and regulation, the various legal methods of displacement, and the particular histories of racialized communities.[96]

The actors involved in displacement include all three levels of government and private financial and industrial actors, such as real estate agents and banks.[97] The federal government has played a key role through the CMHC, which has financed mortgages and implemented development projects since 1946. In its role of financing and insuring mortgage-lending banks, the CMHC was complicit in the banks' refusal to lend to communities of colour, as banks either found them unworthy of credit or by assessed their properties as being low value.[98] The CMHC now also admits it funded the destruction of racialized communities in places like Hogan's Alley in Vancouver and Africville in Halifax through programs termed "urban renewal."[99]

There are a variety of legal tools that have undermined the security of tenure of racialized communities, making them vulnerable to displacement and to discrimination

---

[94] Priya Gupta, Race and Security of Housing: Security of Tenure in Canada (Office of the Federal Housing Advocate, 2022) at 4, online: *PDF* <https://www.homelesshub.ca/resource/race-and-security-housing-security-tenure-canada>.

[95] *Ibid* at 7.

[96] *Ibid*.

[97] *Ibid*.

[98] *Ibid* at 8.

[99] *Ibid*; Government of Canada, Rebuilding Vancouver's Black Community (23 February 2021), online: <https://www.placetocallhome.ca/en/stories/077-rebuilding-vancouver-black-community>; CMHC, Our Commitment: #BlackLivesMatter (12 June 2020), online: <https://www.cmhc-schl.gc.ca/en/media-newsroom/notices/2020/our-commitment-black-lives-matter>.

by landlords and financial actors.[100] Land use designations helped underpin the urban renewal policies discussed above. Zoning industrial or waste removal sites near racialized communities reduces property values, which allows residents to be expropriated more cheaply while also making it more difficult for residents to finance home improvements by refinancing their mortgage. This also obviously affects the health of racialized communities in the process. Another tool is denial of formal title, which allows neighbourhoods to be cleared with little or no compensation—this lack of title should be understood as a governance decision, since the state has discretion to formalize title. A final example is where to locate infrastructure, as this has affected racialized communities across the country, such as building highways through the Black community of Little Burgundy in Montréal or the displacement of the Kanien'kehá: ka, or Mohawk people, by the construction of the St. Lawrence Seaway.

These tools all impact specific communities and continue to be used in the present.[101] In addition to the examples of above, Africville in Halifax was cleared in the late 1960s after being deemed blighted due to its proximity to a waste disposal site, and residents were undercompensated under the justification that they lacked formal title. Hogan's Alley in Vancouver was cleared in 1967 by devaluing properties there and implementing an urban renewal program. And more recently, the predominately racialized Heron Gate community in Ottawa was purchased by a private developer who began mass evicting tenants (between 2015 and 2018) from units that had been allowed to fall into disrepair. We can see that patterns of legalized violation of security of tenure are ongoing, as is the material inequality racialized communities face. These issues are compounded over time and require active measures to address.

These large-scale displacements occur within a context of discrimination across the housing system. As Gupta puts it, "Whether at the point of rental, while renting, or in relation to eviction, anecdotal and survey evidence is that racial discrimination in housing is widespread in Canada."[102] However, discrimination is not usually overt. Studies in 2009 and 2012 by the CCHR have shown that racialized communities (as well as other marginalized groups) face added hurdles during the renting process. These hurdles often appear to be race-neutral policies, but they are not, for example, the requirement of Canadian credit and rental history (presenting challenges for newer immigrants) and requests for additional onerous paperwork such as more documentation or larger deposits (required only of racialized applicants).[103] These barriers are especially difficult for immigrants and refugees, as they are compounded by

[100] *Supra* note 94 at 9.

[101] *Ibid* at 10, 11.

[102] *Ibid* at 12.

[103] *Ibid* at 12, 13; CERA, *Sorry it's Rented* (2009); CERA, *Housing Equality for New Canadians: Measuring Discrimination in Toronto's Rental Housing Market* (2012). Note that the CCHR was formerly called the Centre for Equality Rights in Accomodation, or CERA.

an unfamiliar system, lack of language fluency, and added discrimination, which pushes them into lower-quality housing with more exploitative landlords.[104] As well, racialized tenants face higher rates of eviction than other communities, a fact that is compounded by increased rates of poverty.[105]

Racialized tenants are also more likely to live in unsuitable housing (three times more likely according to one study),[106] which further undermines their security of tenure. Black tenants in particular were more likely than other racialized tenants to live in units in need of repairs.[107] Unsuitability can also refer to overcrowding, in which more people live in a unit than the number of bedrooms allows. This has put racialized tenants at higher risk of infection with COVID-19, as well as other health risks.

These issues are difficult to address in part because the lack of race-based housing data makes it difficult to challenge them on human rights grounds, despite the protections that exist provincially against racial discrimination in housing.[108] The report concludes that the Federal Housing Advocate is empowered under the NHSA to conduct research on systemic housing issues, and could launch a study to gather race-specific data on housing, notably in relation to the issues of access, quality, discrimination, and displacement we have discussed in this section.

In addition to this, the Advocate can call on provinces and territories to improve access to housing for racialized communities, advocate for more affordable housing, establish race-specific assessments related to development to prevent displacement, and ensure fair lending practices by overseeing federal bodies like the CMHC while encouraging reparations where necessary.

---

[104] *Supra* note 94 at 13; Carlos Teixeira, Barriers and Outcomes in the Housing Searches of New Immigrants and Refugees: A Case Study of 'Black' Africans in Toronto's Rental Market (2008) 23:4 *Journal of Housing and the Built Environment* 253–276.

[105] *Supra* note 94 at 15.

[106] Beth Wilson, Naomi Lightman and Luann Good Gingrich, *Spaces and Places of Exclusion: Mapping Rental Housing Disparities for Toronto's Racialized and Immigrant Communities* (November 2020) at 50–57.

[107] *Ibid* at 58-65; *supra* note 93 at 16.

[108] *Supra* note 94 at 18, 19.

Security of Tenure for People with Disabilities

People with disabilities are frequently denied their right to housing, and this is particularly true regarding security of tenure. The reason for this is that their ability to access housing depends on the realization of several other rights, and violation of these rights can undermine their security of tenure.[109] Much of this comes down to the fact that too often physical and social environments are not adapted to meet the needs of people with disabilities, and these barriers effectively "disable them," which results in greater difficulty maintaining secure tenure.

This next section will draw on Luke Reid's report for the Advocate to consider the role of building codes in creating inaccessible home environments for people with disabilities, the role of residential tenancy legislation, and the failure to enforce human rights legislation.[110] These topics are not the whole picture (notably, they leave out the inadequacy of provincial disability support benefits), but these are all issues that are not well addressed in existing literature. As well, violations of security of tenure often look different for people with disabilities—for instance, they might lead to institutionalization rather than homelessness—and this can involve additional rights violations, as the Nova Scotia court of appeal has found.[111]

An inaccessible built environment is a major source of housing instability for people with disabilities. There is a shortage of accessible housing, which leaves many people living in housing that is not accessible for them, and this has significant economic, social, and health impacts.[112] These problems undermine security of tenure by effectively forcing those with newly acquired disabilities or decreasing mobility to move.

Building codes are the primary regulatory frameworks that set minimum accessibility standards in Canada. The National Building Code (NBC) is a model building code that provinces draw from when setting their own building standards. Most provinces or territories have adopted large portions of this model Code into their own building codes.[113] The NBC includes among its primary objectives the promotion of accessibility for people with disabilities, and it outlines a number of measures intended to meet these objectives.[114] However, these measures are inadequate in a number of ways. Notably, exemptions are given for all forms of housing except large residential buildings,

---

[109] Luke Reid, Issues for Persons with Disabilities: Security of Tenure in Canada (Office of the Federal Housing Advocate, 2022) at 5, online: *PDF* <https://homelesshub.ca/sites/default/files/attachments/Reid-issues_for_persons_with_disabilities-security_of_tenure.pdf>

[110] *Ibid*.

[111] *Disability Rights Coalition v Nova Scotia (Attorney General),* 2021 NSCA 70 (CanLII).

[112] *Supra* note 109 at 7.

[113] *Ibid* at 8.

[114] *Ibid* at 9; Canadian Commission on Building and Fire Codes, National Building Code of Canada 2020, online: <https://nrc-publications.canada.ca/eng/view/ft/?id=515340b5-f4e0-4798-be69-692e4ec423e8>.

and even then, a barrier-free path of travel is not required unless municipalities designate the building as being for people with disabilities.[115]

Despite the shortcomings of the NBC,[116] other jurisdictions implement stronger measures than those it lays out. Nova Scotia, for instance, despite mostly using the NBC, has replaced the exemption for detached homes and townhouses with accessibility requirements.[117] Beyond these measures, the Ontario Human Rights Commission has published an open letter calling for all multi-residential construction to be fully accessible.[118]

The failure to enforce human rights legislation also plays an important role in the inaccessibility of the built environment, and such legislation has not demonstrated itself to be well suited for dealing with accessibility issues.[119] The main reason for this is that the obligations in human rights legislation are reactive, meaning that barriers can only be challenged after they have been put in place, and even then, only one by one.[120] As the Honourable David Onley has pointed out, this is an impediment to wider systemic change.[121] This is demonstrated through the difficulty in challenging building codes on human rights grounds.[122] However, it is possible that some of the difficulties experienced in human rights tribunals would be avoided if a Charter challenge was brought against a provincial building code. This has the potential to create a real shift in the NBC and therefore in accessibility standards across Canada.[123]

Existing Charter jurisprudence supports the idea that the state should not unduly interfere with the right to choose where to make one's home and that it should avoid

---

[115] *Supra* note 109 at 9.

[116] Canadian Commission on Building and Fire Codes, National Building Code of Canada's 2015 Intent Statements, s. 3.8.2.3.

[117] *Supra* note 109 at 10; Government of Nova Scotia, Nova Scotia Building Code Regulations, N.S. Reg. 26/2017, s. 3.8.4.1.

[118] *Supra* note 109 at 10; Ontario Human Rights Commission, "Letter to the Minister of Municipal Affairs and Housing on the importance of accessible housing," online: <https://www.ohrc.on.ca/en/news_centre/letter-minister-municipal-affairs-and-housing-importance-accessible-housing>.

[119] *Supra* note 109 at 10.

[120] *Ibid* at 11.

[121] David Onley, Listening to Ontarians With Disabilities: Report of the Third Review of the Accessibility for Ontarians with Disabilities Act, 2005 (2019) at 5, online: <https://www.publications.gov.on.ca/CL29218>.

[122] *Ibid; Shuparski v Toronto (City)* 2010 HRTO 726 (CanLII) at para 26; *Malkowski v Ontario Human Rights Commission* 2006 CanLII 43415 (ON SCDC).

[123] *Supra* note 109 at 12.

actions that put people's health and safety at risk in relation to accessing housing.[124] One could argue that the NBC as it stands violates both these points.

The NHSA is another pathway for advancing the right to security of tenure for people with disabilities.[125] It commits Canada to realize the right to adequate housing by:

- Prioritizing vulnerable groups, including people with disabilities
- Meaningfully engaging with vulnerable populations, including people with disabilities
- Addressing discrimination and inequality as it affects the right to housing
- Using all appropriate means to promote the right to adequate housing and allocate sufficient resources
- Ensuring independent monitoring of the realization of the right to adequate housing

Altering the NBC is one obvious way the government could meet these obligations and improve accessibility in the housing market. Federal leadership in this would likely lead to the provinces adopting similar standards. This could be done through a directive to the Canadian Commission on Building and Fire Codes (CCBFC) to work with the provinces to improve accessibility standards, similar to the process undertaken to improve energy efficiency standards.[126] Another recommendation is to address the fact that the CCBFC currently has a limited mandate that does not take into account human rights obligations. The Federal Government could also increase the number of persons with disabilities on the CCBFC to ensure they have adequate voting power. If Canada truly recognizes that the right to adequate housing, this needs to be reflected in the CCBFC's mandate and in its composition.[127]

As for the role of the Advocate, the report suggests that she could fund independent research on the serious risks that current building standards present to people with disabilities, as there is little evidence available on this subject.[128]

There are already some initiatives from the federal government that are intended to improve accessibility. For instance, some of the CMHC's projects, such as the National Housing Co-Investment Fund, contain minimum accessibility requirements that follow the accessibility standards being developed by the CSA Group, a standards development

---

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

[125] *Supra* note 109 at 13.

[126] *Supra* note 109 at 15.

[127] *Ibid* at 16.

[128] *Ibid* at 17.

organization that works with Accessibility Standards Canada.[129] However, other CMHC programs, such as the Rental Construction Financing Initiative, require a lower percentage of units be accessible to qualify for funding and use less stringent standards. As of the end of 2020, NHS programs have helped create 16,000 accessible units, which is nowhere near enough to address the shortfall in accessible housing.[130]

An approach to improving accessibility that seeks changes to the building code is likely to be more effective than existing approaches, as it would apply to all construction and not just those project receiving funds through specific federal programs.[131] This is not without its complications, however. Although the federal government has broad spending powers, these cannot amount to direct regulation of areas under provincial jurisdiction.[132] Further analysis of the constitutional law surrounding such an approach would be warranted.

Inaccessible construction is not the only thing that undermines security of tenure for people with disabilities. In order to meet needs related to their disability, many people with disabilities live in some form of alternative housing, such as supported living or a retirement home. These arrangements offer varying levels of care, and there is little in the way of agreed upon terminology across the country, making comparisons difficult. However, in most provinces and territories, these arrangements are not covered under residential tenancy legislation, leaving their residents without the security of tenure protection afforded to tenants.[133]

These exemptions are often based on the idea of residents receiving "therapeutic or rehabilitative care," which providers have interpreted very broadly.[134] In Ontario, for instance, it has proven difficult to determine which providers qualify for the exemption, leaving courts to decide on a case-by-case basis.[135] Even without a court decision, when providers believe themselves to be exempt from residential tenancy legislation, tenants may be deprived of rights related to security of tenure that are afforded to residents of other types of housing (such as restrictions on eviction).[136]

People with disabilities who are ejected from their homes may be considered to have been "discharged" rather than evicted, or they may face restrictive rules or program requirements as a condition of tenancy.[137] Providers often argue this is necessary

---

[129] *Ibid*.

[130] *Ibid* at 18.

[131] *Ibid* at 19.

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

[133] *Supra* note 109 at 21.

[134] *Ibid* at 22.

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

[136] *Supra* note 109 at 24.

[137] *Ibid*.

because their programming is incompatible with security of tenure rights. Whether this is true is debatable—for instance, such arguments were made around care homes in Ontario, and these are now regulated under the *Residential Tenancy Act*.[138]

It is worth noting that people with disabilities are often not in these alternative living arrangements by choice.[139] Often, this is due to inadequate social assistance payments that make subsidized spaces in supportive environments the only option. Unfortunately, this is very much an area of provincial competence, so the federal government is likely unable to address it. However, the Advocate could commission research to describe the frequency of these violations of security of tenure which could then be used by advocates to close gaps in legislation.[140] Second, the federal government could stop giving money to service providers who lack a sufficiently rigorous dispute resolution process, which could involve imposing requirements on providers, such as a federal dispute mechanism or mandatory compliance with local residential tenancy law.[141]

Finally, the security of tenure of people with disabilities is further undermined by other human rights violations. This generally takes three different forms:

1. Landlords fail to provide tenants with disabilities with proper accommodations before evicting them
2. Courts and tribunals fail to apply human rights law in hearings related to security of tenure
3. The tribunal process itself fails to accommodate people with disabilities

In terms of accommodation to tenants, the case law in Ontario is clear that landlords have a responsibility to meet with tenants to discuss any disability-related accommodations before moving ahead with an eviction on behavioural grounds.[142] Similarly, it is clear that administrative tribunals have the ability to consider human rights law in their decisions.[143] However, in practice, these often do not occur, creating situations where a landlord fails to accommodate a tenant with a disability and then the tribunal fails to take into account this human rights violation.[144] This is compounded by barriers to accessing the tribunal hearings themselves, such as the move towards online hearings. Any response to these issues should focus on improving the implementation of

---

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

[139] *Supra* note 109 at 25.

[140] *Ibid*.

[141] *Ibid* at 26.

[142] *Ibid* at 28; *TEL-81015-17-RV (Re)*, 2018 CanLII 111868 (ON LTB).

[143] *Supra* note 109 at 28; *Tranchemontagne v. Ontario (Director, Disability Support Program)* [2006] 1 S.C.R. 513, 2006 SCC 14.

[144] *Supra* note 109 at 28; *SOL-51322-14 (Re)*, 2014 CanLII 57894 (ON LTB).

existing human rights frameworks. Education on the subject could be useful, but access to counsel, as discussed above, is probably the most important remedy.

Security of Tenure for Encampment Residents

As Estair Van Wagner writes in her report to the Advocate, "Encampments are a *prima facie* violation of the right to housing. Yet, they are simultaneously a way of claiming rights in the face of profound exclusion."[145] Because living in an encampment involves having no legally recognized property rights to the place one lives, encampment residents are seen as having no right to security of tenure. Across the country, they are routinely displaced using municipal bylaws and provincial trespass law, emphasizing the exclusionary nature of property rights.

However, as the UN Special Rapporteur has noted, security of tenure should not be restricted to those with formal title, and its absence does not justify forced eviction.[146] This has consequences in two areas of federal jurisdiction: federal lands and obligations towards Indigenous Peoples.[147]

When encampments are established on federal lands, the federal government has clear jurisdiction, and its obligations are engaged. The Supreme Court has rejected the Crown's arguments that government ownership of property includes the same right to exclude and control as does regular private property. Government lands are subject to the Charter.[148] Similarly, lower courts have found that public properties are held for the benefit of the public, which includes those experiencing homelessness.[149] However, governments have overwhelmingly prioritized their property interests over human rights.

In a number of cases about encampments, courts have considered arguments based on the Section 7 Charter rights to life, liberty, and security of the person.[150] Several decisions have found that encampment evictions violate the human rights of encampment residents where there is no adequate alternative shelter for residents. Most of the cases about encampments deal with municipally owned lands, but during the COVID-19 pandemic, two cases emerged in Vancouver that dealt with encampments

---

[145] Estair Van Wagner, Federal Obligations and Encampments: Security of Tenure in Canada (Office of the Federal Housing Advocate, 2022) at 4, online: *PDF* <https://www.rondpointdelitinerance.ca/sites/default/files/attachments/Van%20Wagner-federal_obligations_and_encampments-security_of_tenure_0.pdf> [*Van Wagner*]; UNGA, *Report of the Special Rapporteur on adequate housing as component of the right to an adequate standard of living, and on the right to non-discrimination in this context*, 73rd Sess, UN Doc A/73/310 (7 August 2018) at 6/23 [*SR Report 2019*].

[146] *Van Wagner supra* note 145; UNGA, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, 73rd Sess, UN Doc A/73/310 (7 August 2018) at 10/23.

[147] *Van Wagner supra* note 145 at 5.

[148] *Ibid* at 8; *Committee for the Commonwealth of Canada v Canada*, 1991 CanLII 119 (SCC).

[149] *Van Wagner supra* note 145 at 8; *Victoria (City) v Adams*, 2008 BCSC 1363 at para 131.

[150] *Van Wagner supra* note 145 at 11; *Vancouver Fraser Port Authority v Brett*, 2020 BCSC 876.

on lands owned by the Vancouver Fraser Port Authority, a Crown corporation: *Vancouver Fraser Port Authority v. Brett* and *Bamberger v. Vancouver (Board of Parks and Recreation)*.[151]

In *Brett*, the Port Authority was successful in their application for an injunction to displace encampment residents based on trespass law, arguing that the lands were private property.[152] In *Bamberger*, however, encampment residents applied for a judicial review of an order under Vancouver's parks bylaws. This resulted in the orders being sent back for reconsideration, with the injunction application paused in the meantime.[153]

Although the outcomes in the two cases are quite different, neither is informed by the progressive realization of the right to housing, as they should be under the NHSA.[154] Both cases show the importance of seeing the federal government's commercial and land transactions as part of its governing role with all the intendant human rights obligations, even when these lands are leased to another government or a Crown agency. There is a role for the federal government in protecting basic rights on all federal lands, regardless of the occupier.

In general, the federal government should engage in human rights due diligence in all decisions where encampments exist on federally owned lands to identify, prevent, and mitigate their impacts on human rights.[155] This could include requiring such diligence of lessees and purchasers, and would—at the very least—entail an end to forced evictions on federal lands. They should also engage in meaningful consultation with encampment residents, which entails actual participation in decision marking—this has particular significance when considered along with the responsibility to consult Indigenous Peoples.[156] The report suggests that the Advocate engage in advocacy in the courts during litigation about encampments on federal lands.

Indigenous people are overrepresented among encampment residents and face discriminatory conditions in shelters and the housing market. Under the Constitution, the federal government also has particular obligations to Indigenous Peoples who live in Canada. Although creating a holistic approach to Indigenous homelessness is not solely a federal responsibility, [157] the report notes that the Advocate could support the implementation of a rights-based approach to Indigenous housing and homelessness

[151] *Van Wagner supra* note 145 at 12.

[152] *Ibid* at 13.

[153] *Ibid*.

[154] *Ibid* at 14, 15.

[155] *Ibid* at 34.

[156] *Ibid* at 33.

[157] *Ibid* at 16.

that complies with the NHSA and UNDRIP by working in partnership with Indigenous Peoples to further their self-determination.

Although the federal government has emphasized self-determination around on-reserve housing since the mid 1990s, it has historically been directly involved in creating substandard housing in Indigenous communities.[158] Federal policies have not incorporated Indigenous perspectives, and Indigenous Peoples have been left without effective control, despite federal claims that housing on reserve lands is now under the jurisdiction of First Nations. By maintaining effective control, the federal government remains responsible for the provision of adequate housing for Indigenous Peoples, a responsibility that is only strengthened by the NHSA and the UNDRIP Implementation Act. These legislative commitments may create a statutory duty to realize the right to adequate housing for Indigenous Peoples through the federal government's role as a funder, including by placing conditions on funding for other governments and agencies.[159]

The report concludes that the Advocate should see Indigenous homelessness as a systemic issue related to the lack of safe and adequate housing on and off reserve. Her mandate to provide advice is not limited to federal jurisdiction, meaning she is not limited by narrow jurisdictional concerns and can consider the responsibilities of all orders of government.[160] She should initiate research into the constitutional, treaty, and nation-to-nation obligations of the federal government in relation to Indigenous housing need and homelessness, drawing on UNDRIP and the NHSA. Any research should include the self-determination of urban Indigenous people, which is currently under-examined.[161]

[158] *Ibid* at 18, 19.

[159] *Ibid* at 21.

[160] *Ibid* at 37.

[161] *Ibid*.

Security of Tenure Symposium

After the seven reports were completed, the Office of the Federal Housing Advocate organized an online symposium that was attended by 78 participants, all of them either tenants or members of other groups affected by evictions. The authors presented their reports to participants, who were then invited to separate into three breakout rooms: international human rights law, access to justice, and security of tenure; expanding the right to security of tenure through federal jurisdiction (First Nations and encampments); and evictions and security of tenure for tenants with disabilities and racialized tenants. Each group was asked how security of tenure issues were affecting their communities and how those issues could be resolved. In this section, we will summarize the key themes discussed during the symposium.

A theme that recurred throughout the symposium was data gaps. For instance, the lack of security of tenure is underestimated in Indigenous communities, and data is crucial for understanding how intersecting identities are related to security of tenure, as we have seen above. Where there is a lack of data, there is a lack of ability to represent the interests of the affected groups. Participants suggested that this is an area where the Advocate has the ability to act, as per her research mandate under the NHSA.

Indigenous housing issues were also discussed in all breakout groups, with one recurring factor being the implementation of UNDRIP and how it fits with the NHSA and the Charter. Some participants suggested that implementation could start with UNDRIP's housing-related provisions and that the NHSA could be used to fulfill Canada's commitments under Article 26—the right for Indigenous communities to benefit from utilizing their resources. It was also repeatedly mentioned that the various human rights obligations we have seen above impose a positive obligation on the government to ensure Indigenous people have adequate housing.

Other participants noted that Indigenous housing issues cannot be separated from issues of gendered violence. It was suggested that the Advocate make a recommendation to the minister responsible for housing to implement the *Convention on the Elimination of All Forms of Discrimination Against Women*, notably the recommendations from the Cecelia Kell case.[162] This involves training Indigenous women to provide legal advice to other Indigenous women.

The issue of Indigenous housing was seen as closely related to that of encampments, as a disproportionate number of encampment residents are Indigenous. One participant made a link between encampment evictions and federal money being provided to housing providers to open shelter hotels—they suggested the Advocate could recommend that a condition be attached to federal funding that it not contribute to human rights violations. Participants also emphasized the public nature of federal lands

[162] *Cecilia Kell v Canada*, CEDAW/C/51/D/19/2008, online: *PDF* <https://www2.ohchr.org/english/law/docs/CEDAW-C-51-D-19-2008_en.pdf>

and the need for more collaboration between the federal government and Indigenous communities within a nation-to-nation, rights-based approach.

The Advocate heard that, too often, the work being done on housing federally does not resonate with the unique conditions in the north. The three territories also have important differences from each other and should not be lumped together. For instance, in Yukon and the Northwest Territories, the territorial government is a major landlord, which means there are conflicting interests that interfere with passing human rights-based eviction prevention measures. As well, the majority of First Nations there are self-governing, meaning there are effectively four levels of government involved. Nunavut is quite a different context again. There are no reserves there, and eviction cases qualify for legal aid, but there is no comprehensive approach and there are fewer resources than for criminal cases. Overcrowding is a major issue across Nunavut, and it may not be adequately captured in the data. Participants suggested there may be a specifically Inuit right to housing, in that the ability to construct traditional housing is an integral part of traditional culture.

In all the breakout rooms, there was concern about the security of tenure rights of vulnerable populations. Participants indicated additional vulnerable populations beyond those discussed in the seven reports—for instance, they discussed youth aging out of care, students, and people in transitional housing. The security of tenure rights of people with disabilities were a particular focus. There were reports of landlords increasing rents for accessible properties or considering accessibility renovations (such as ramps) to be undesirable, and that inadequate disability benefits lead people to effectively "self-evict" from unaffordable situations.

Eviction prevention was another important subject. Participants agreed with the need to make evictions more difficult for landlords, but disagreed on whether the focus should be on tenancy protections in legislation or on funding for social housing. As well, informal evictions are underreported, as many tenants do not contest the issues they face and simply move out. One participant stated that there should be a federal minimum standard that deems all evictions into homelessness human rights violations that should never occur, even when the eviction is legal.

The limits of federal power over eviction lead us to the ever-present subject of jurisdiction. Participants noted that municipalities feel it is difficult to implement a rights-based approach because they take direction from the provincial or territorial government, and federal funds may not make it to them to implement evictions prevention programming. This limits the ability of local communities to respond to security of tenure issues.

This symposium, the reports summarized above, and submissions from the public will all advise the Advocate as she considers recommendations and further actions on the issue of security of tenure using her powers under the NHSA.

Conclusion

This summary report has provided an overview of the international human rights law around security of tenure, then discussed how eviction violates that right. It described how a right to counsel for tenants facing eviction could improve this situation, while recognizing that not all tenants are equally exposed to violations of their right to security of tenure. It then considered systemic barriers for First Nations people before discussing the relationship between race and security of tenure and the specific challenges faced by people with disabilities. Finally, It described the rights violations experienced by those who live in encampments.

Security of tenure is an essential part of the right to housing, and so denying it to tenants, Indigenous Peoples, racialized communities, people with disabilities, and encampment residents undermines Canada's commitment to the progressive realization of that right, as defined in the NHSA. The Federal Housing Advocate is in a unique position to commission research into this issue, intervene in hearings, and craft recommendations to the federal government—this opens the door for real change around respect for security of tenure in Canada.

To this end, the Advocate commissioned the seven reports on security of tenure summarized here. Those reports can be found on the Advocate's page on the Homeless Hub or individually at the addresses below:

- The Canadian Centre for Housing Rights: International Jurisprudence
- Martin Gallié: Evictions and International Obligations
- Sarah Buhler: The Right to Counsel for Tenants Facing Eviction
- Priya Gupta: Race and Security of Housing
- Alan Hanna: Systemic Barriers for First Nations People
- Luke Reid: Issues for Persons with Disabilities
- Estair Van Wagner: Federal Obligations and Encampments