Federal Obligations and Encampments: Security of Tenure in Canada

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Summary

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.[1] As the former UN Special Rapporteur noted, such informal settlements are "a response to exclusionary formal systems."[2] Encampment residents are often depicted as having no security of tenure by definition, as they do not have "housing" in the traditional legal sense and no formally recognized property rights to the places they live. Governments in Canada have used this lack of judicially enforceable property rights to justify the removal of encampments, characterizing encampment residents as "trespassers" and emphasizing the exclusionary nature of their property rights.[3] However, as the UN Special Rapporteur has noted, "Lack of security of tenure can never justify forced evictions."[4] Further, "Security of tenure under domestic law should not, therefore, be restricted to those with formal title or contractual rights to their land and housing."[5] A more expansive definition of security of tenure includes informal arrangements, but recognizes a wider diversity of tenures: "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."[6]

This reorientation of security of tenure clarifies that failures to actively protect the rights of encampment residents are violations of the right to housing. It requires formal recognition that the eviction of individuals from their homes and communities in informal settlements means leaving people without shelter and their belongings, which violates the dignity and security of unhoused people. Further, encampment residents are

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[1] 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 6/23 [SR Report 2019].

[2] *Ibid* at 4/23.

[3] Environmental Justice & Sustainability Clinic, "Trespassing on the Right to Housing: a human rights analysis of the City of Toronto's response to encampments during COVID-19" (December 2021), online (pdf): *Osgoode Hall Law School* <ejsclinic.info.yorku.ca/files/2021/12/trespassing-on-the-right-to-housing-city-of-toronto-report-20-december-2021.pdf?x86560>; Alexander McClelland & Alex Luscombe, "Policing the Pandemic: Tracking the Policing of COVID-19 Across Canada" (2020), online: *Scholars Portal Dataverse* <doi.org/10.5683/SP2/KNJLWS>.

[4] *SR Report 2019, supra* note 1 at 10/23.

[5] *Ibid*.

[6] Raquel Rolnik, 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, UNHCR, 25th Sess, UN Doc A/HRC/25/54 (30 December 2013) at 3.

disproportionately members of protected groups, including racialized communities, Indigenous Peoples, and people with disabilities.[7] Women and gender-diverse folks also face unique challenges within housing and shelter systems and are uniquely at risk of being unhoused and unsheltered.[8] Thus, violations of the rights of encampment residents often compound other human rights violations.

Governments should not use the absence of formal housing or recognized tenure to justify forced evictions or the lack of meaningful engagement and basic services for encampment residents. To do so compounds the pre-existing violation of the right to housing and other human rights violations. This has particular significance in two key areas of federal jurisdiction: federal lands and federal obligations to Indigenous Peoples.

Federal Jurisdiction and Encampments

Federal Lands

Where encampments are established on federal lands, the federal government has clear jurisdiction and corresponding obligations. Thus, the Federal Housing Advocate's mandate is directly triggered under the *National Housing Strategy Act (NHSA*) with respect to both Parliament's jurisdiction and systemic housing issues that impact vulnerable groups and people with lived experience of housing need and homelessness.[9] However, the nature of federal powers and obligations will be different in relation to different categories of federal lands, and the nature of federal jurisdiction and obligations may differ depending on how a particular parcel of land is categorized and used as well as by whom it is used and occupied.

What Are Federal Lands?

The federal government has constitutional authority over public property under Section 91(1A), excluding provincially owned public lands under Section 109 and

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[7] Caryl Patrick, "Aboriginal Homelessness in Canada: A Literature Review" (2014), online (pdf): *Canadian Homelessness Research Network Press* <www.homelesshub.ca/sites/default/files/AboriginalLiteratureReview.pdf> [*Patrick*]*;* Cameron Crawford, "Looking Into Poverty: Income Sources of Poor People with Disabilities in Canada" (2013), online (pdf): *Institute for Research and Development on Inclusion and Society* <www.homelesshub.ca/sites/default/files/attachments/Income%20Sources%20Report%20IRIS%20CCD.pdf>; UNGA, *The Right to Adequate Housing*, 69th Sess, UN Doc A/69/274 (7 August 2014) at 10/20 [*SR Report 2014*].

[8] *Ibid*; Kaitlin Schwan et al, "The State of Women's Housing Need & Homelessness in Canada: Key Findings" (2020), online: *Canadian Observatory on Homelessness* <www.homelesshub.ca/StateofWomenHomelessness> [*Schwan*].

[9] *National Housing Strategy Act,* SC 2019, c 29, s 313, s 13 (c)—(h) [*NHSA*].

Section 92(5).[10] Thus, federal jurisdiction over public property is limited to federally owned public property.

The *Federal Real Property Act* broadly defines *federal real property* as "any real property belonging to Her Majesty, and includes any real property of which Her Majesty has the power to dispose."[11] Other federal statutes also use the *Federal Real Property Act* to define categories of property, such as the *Canada Marine Act* which regulates port authorities.[12] Federal property is also defined in the *Payments in Lieu of Taxes Act.*[13] In this context, federal property is also broadly defined and includes the property of Crown corporations.[14] However, there are significant exemptions relevant to areas that might be

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[10] *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Constitution Act*].

[11] The Act governs the types of interests in federal land that can be granted and the process through which this must be done. *Real Property* is defined as "land in any province other than Quebec, and land outside Canada, including mines and minerals, and buildings, structures, improvements and other fixtures on, above or below the surface of the land, and includes an interest therein." In the context of the civil law system in Quebec, the Act defines *federal immovables* as "an immovable belonging to Her Majesty and includes an immovable of which Her Majesty has the power to dispose."

[12] SC 1998, c 10. However, notably, some federal body instruments, such as letters patent, may designate specific property "other than Federal Real Property," in which case the federal body is expressly not operating as "an agent of Canada" in relation to those lands. See for example, Vancouver Fraser Port Authority Letters Patent, schedule C. See *British Columbia (Attorney General) v Lafarge Canada Inc*, 2008 SCC 23 for a discussion of different areas of the port lands.

[13] RSC 1985, c M-13, [*PILT*]. The Federal government is exempt from paying local and provincial property taxes per s 125 of the *Constitution Act*, but nonetheless makes discretionary payments in lieu of taxes in recognition of the services provided by other governments to federal properties. The Act defines federal property for the purpose of such payments to other levels of government.

[14] Section 2(1) of *PILT* defines federal property as:

> (a) real property and immovables owned by Her Majesty in right of Canada that are under the administration of a minister of the Crown,
>
> (b) real property and immovables owned by Her Majesty in right of Canada that are, by virtue of a lease to a corporation included in Schedule III or IV, under the management, charge and direction of that corporation,
>
> (c) immovables held under emphyteusis by Her Majesty in right of Canada that are under the administration of a minister of the Crown,
>
> (d) a building owned by Her Majesty in right of Canada that is under the administration of a minister of the Crown and that is situated on tax-exempt land owned by a person other than Her Majesty in right of Canada or administered and controlled by Her Majesty in right of a province, and
>
> (e) real property and immovables occupied or used by a minister of the Crown and administered and controlled by Her Majesty in right of a province …
>
> subject to exceptions laid out in section 2(3) and section 3 of the Payments in Lieu of Taxes Regulations.

See SOR/81-29.

used by encampment residents, such as sidewalks, railway tracks, or tunnels.[15] Furthermore, the scheme differentiates between federal lands held by the federal government as both owner and occupier, where land is used directly by government departments and Crown corporations, and lands where the federal government acts as an owner and lessor, where the land is leased to a third party, such as to an airport authority or to a municipality for a park.[16] The *Payments in Lieu of Taxes Act* defines federal property for a very specific discretionary regime that is quite distinct from the context of the NHSA and thus should not be used as a framework to limit federal obligations. However, the distinction based on third-party interests in federal land is likely relevant to the context of encampments on federally owned lands, as a third-party occupier may have significant property rights that would need to be considered, such as the right to control the uses of the property and exclude others. Further, for the application of the Charter, actions taken in relation to the encampment would need to be "governmental."[17] Notably, however, while the *Payments in Lieu of Taxes Act* points to an attenuated government role on some federally owned lands on this basis, the regime nonetheless recognizes the Crown's underlying ownership jurisdiction, even where exclusive possession is granted to a third party through a lease.[18] Thus, while other interests may be relevant to decisions about federal lands in the context of encampments, decisions about use and access to federally owned lands are nonetheless governmental in nature and attract the associated duties.

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[15] Section 2(3)(g) excludes lands "used as a public highway that, in the opinion of the Minister, does not provide, as its primary function, immediate access to" federal lands, and Section 2(3)(b) excludes a range of "structures and work" per Schedule II, Sections 11–12, including "roads, sidewalks, aircraft runways, paving, railway tracks, snow sheds, tunnels, bridges, dams."

[16] Section 2(3)(h) narrows the definition of federal property *for the purposes* of payments, most importantly with regard to federal lands "leased or occupied by a person or body, whether incorporated or not, that is not a department," unless otherwise prescribed. The courts have interpreted this to mean, where the federal Crown leases the lands to a third party, the minister has no authority to pay the other level of government in lieu of the taxes associated with the tenant's occupancy, which is subject to provincial and/or municipal taxation. However, there are regulations exempting leases to designated airport authorities occupying federal lands, which are nonetheless considered federal property. See *Corporation of the City of Mississauga v Canada (Public Works and Government Services)*, 2011 FC 162 [*Mississauga*], where a lease of an airport by the federal government to an airport authority was held to not be a cessation of federal property only because airport authorities were prescribed in the regulations as set out in section 2(3)(h) of the *PILT*. The ruling builds on the Supreme Court's decision in *Montréal (City) v Montreal Port Authority*, 2010 SCC 14.

[17] This includes more than actions by government entities because entities that perform governmental activities are subject to the Charter. See *Eldridge v British Columbia (Attorney General),* 1997 CanLII 327 (SCC); Greater *Vancouver Transportation Authority v Canadian Federation of Students—British Columbia Component*, [2009] 2 SCR 295.

[18] For example, it accounts for the difficulties municipalities face where a lessee fails to pay taxes, but the property cannot be sold because it is owned by the federal Crown. It affirms the underlying ownership jurisdiction to step in to make payments where all reasonable efforts to enforce tax liability against the lessee have failed.

Further, the discretionary nature of payments in lieu of taxes, from which governments are constitutionally exempt, is also quite distinct from the context of human rights obligations. The federal government has expressly bound itself by international human rights instruments, including under the NHSA, and is bound by the Constitution, including Section 35 and the *Charter of Rights and Freedoms*. These obligations are relevant to land transactions, and it cannot be presumed that third-party interests would be prioritized. Notably, the Charter and human rights instruments also apply to all other levels of government that may be occupiers of federal lands, as discussed below. Thus, they would apply not only to lands where the federal government is the owner and has jurisdiction, including conditions included in land transactions, but also to the actions of government occupiers in their exercise of property rights associated with a lease of federal lands. Thus, federal lands should be broadly defined, including all federal real property and federal immovables, for the purposes of the application of the NHSA and the Advocate's mandate, as well as for a review of systemic housing issues that arise on government-owned property more generally.

Are Federal Lands "Public" Property?

The government is not just any property holder. It holds its property as a government rather than as a private individual, business, or corporation. The Supreme Court of Canada has expressly rejected Crown arguments that government ownership of property presumptively includes the same broad right to exclude and control that attaches to private property.[19] Contextual limitations attach to government property because the owner holds it pursuant to its government functions and obligations and is subject to the requirements of the Charter.[20] The Charter applies to government ownership of property to uphold the "crucial function of government and the responsibility it bears to its constituents."[21] This acknowledgment of the public character of public property has important implications for the choices governments make when responding to encampments. Indeed, this was expressly noted in *Victoria (City) v. Adams*, where Justice Ross noted, "Public properties are held for the benefit of the public, which includes the homeless."[22] Yet, Canadian law also demonstrates significant deference to the role of government as an owner, to the detriment of conceptions of public property and the primacy of human rights over property interests.[23]

However, in some cases, the public character of government-owned lands has also been interpreted in relation to the use they are put to rather than the ownership of land by a

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[19] This analysis has been applied in the context of all levels of government in Canada. See, *Committee for the Commonwealth of Canada v Canada*, 1991 CanLII 119 (SCC) [*Commonwealth*].

[20] *Ibid*.

[21] *Ibid*, per L'Heureux-Dube J. and in discussion by Lamer J. concurring in result.

[22] *Victoria (City) v Adams*, 2008 BCSC 1363 at para 131.

[23] Sarah Hamill, "Private Rights to Public Property: The Evolution of Common Property in Canada" (2012) 58:2 [*Hamill 2012*]. See also Stepan Wood, "When Should Land Be Considered Private Property in Homeless Encampment Litigation: A Critique of Recent Developments in BC" (forthcoming) JLSP 2022.

government. Depending on the use and nature of the occupation by the owner or a third party, the property may be seen to have a more private character.[24] This deference to the owner (here the government) has direct implications for the kinds of limitations on the exercise of human rights that will be justified under a Charter analysis or under a reasonableness analysis of compliance with the right to housing and systemic issues. On this basis, federal lands being used for particular purposes might be considered "essentially private" if the purpose for which they are being used necessitates exclusivity.[25] For example, an air traffic control tower, a designated railway, or a military base is likely to be considered akin to private land because the "actual function" requires limitations on access.[26] Thus, limitations on the exercise of Charter rights may be justified in this context because they could "undermine democracy and efficient governance."[27] On the other hand, a park or a public square is likely to be seen as more public in nature and thus attract a higher level of protection for public use and access. While the case law does not provide for unfettered public access to government lands, as Justice L'Heureux Dube observed in *Committee for the Commonwealth of Canada*: "The distinctive nature of government property whittles away at the application of a trespass law."[28] How a particular property should be characterized requires a nuanced analysis of the nature and function of the property *and* of the nature and purposes of the implicated rights. Yet, we have nonetheless seen courts presumptively and deferentially accept the exclusivity of government ownership and the resulting powers to enforce exclusion and trespass laws as analogous to private property ownership.[29]

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[24] While there were several sets of reasons in *Committee for the Commonwealth of Canada v Canada* (concurring in result), the subsequent decision in *Montréal (City) v 2952-1366 Québec Inc, 2005 SCC 62 (CanLII)* [*Montreal (City*)] noted the majority (6 of 7 judges) agreed that the "*type* of property" was essential to whether freedom of expression would be protected on government-owned property. Nonetheless, they adopted a test although considering the "historical or actual function of the place" emphasizes the purposes for which expression has been protected under the Charter. Further, as discussed below the "type of property" analysis has been applied without attention to the distinction between Section 2(b) and Section 7, and without application of the *Montréal (City)* analysis about the purpose of Charter protection of particular activities.

[25] *Commonwealth*, *supra* note 19; *Montréal (City), supra* note 24 at para 76. In the context of the Section 2(b) expression case law, this is often discussed in terms of the need for "privacy" but is fundamentally linked to the purposes of the 2(b) protection: democratic discourse, truth finding, and self-fulfillment.

[26] As well, the Supreme Court has found "federally controlled property," held by Crown bodies but not in their role as a Crown agent, to be distinct from lands in which the federal government has a "proprietary interest." Such lands, are not, for the purposes of Section 91(1A) of the Constitution "public property." See *British Columbia (Attorney General) v Lafarge Canada Inc*, 2008 SCC 23, at para 61 where the Vancouver Fraser Port Authority was managing lands expressly deemed "not federal land" in their letters patent.

[27] *Montréal (City), supra* note 24 at para 76.

[28] *Commonwealth*, *supra* note 19.

[29] See Vancouver Fraser Port Authority v Brett, 2020 BCSC 876 [Brett]. In Ontario, see Black v City of Toronto, 2020 ONSC 6398 [Black]; Poff v City of Hamilton, 2021 ONSC 7224 [Poff].

This narrow view of public property arises in part because the public character of the property in question has limited explicit treatment in the case law surrounding encampments in Canada. Much of the case law examining when and in what circumstances infringements on Charter rights on public land can be justified has taken place in the context of expressive rights protected by Section 2(b) of the Charter, following from the Supreme Court's analysis in *Committee for the Commonwealth of Canada*.[30] While expressive rights are vitally important fundamental freedoms, the rights implicated in the context of encampments have a different character. Encampment residents face violations of the most fundamental human rights protected by both the Charter and international human rights law, including the Section 7 rights to life, liberty, and security of the person. Yet, we have seen government responses to encampments on all types of public property be overwhelmingly characterized by trespass law grounded in property ownership rights. This has also served as the basis of evictions, criminal charges, and injunctions, and it has featured in harmful narratives about unhoused people and their use of public space. Thus, the case law tends to foreground the government's right to exclude at the expense of the core public interest in being able to survive and protect oneself from the elements and to not be excluded, even in the context of the classic form of common public space such as parks.[31] Even where public property is expressly considered government-owned, it has sometimes been treated as "private property" without application of even the nuanced analysis adopted for expressive rights.[32] In other cases, balancing exercises have troublingly treated Section 7 rights and the interests of the general public in access for leisure and amenity purposes as being equal, highlighting the imbalance between members of the public who hold recognized property rights and encampment residents.[33]

As noted in the recent decision from Prince George, encampments established for shelter by homeless individuals "must be distinguished" from encampments motivated by expressive activity and advocacy for economic and political change.[34] Indeed, as Martha Jackman points out, all other Charter rights depend on the protection of one's life, liberty, and security of the person and "presuppose a person who has moved beyond the basic struggle for existence."[35] Thus, analysis of the limits of Section 2(b) expressive rights should not be used to withhold protection where "one of the most basic and fundamental

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[30] *Commonwealth*, *supra* note 19; *Montréal (City)*, *supra* note 24.

[31] *Batty v City of Toronto*, 2011 ONSC 6862; *Black*, *supra* note 29; Hamilton. See *Hamill 2012*, *supra* note 23 at 385.

[32] *Brett*, *supra* note 29.

[33] Abbotsford v Shantz, 2015 BCSC 1909 at paras 197–199; *Black*, *supra* note 29 at paras 142–143; *Poff*, *supra* note 29 at para 229.

[34] Prince George (City) v Stewart, 2021 BCSC 2089 at para 83.

[35] Martha Jackman, "The Protection of Welfare Rights Under the Charter" (1988) 20 Ottawa L Rev 257 at 326.

human rights guaranteed by our Constitution" is at stake.[36] Notably, the British Columbia Court of Appeal rejected the argument that the "historical and functional uses analysis from the Section 2(b) case law should be imported into Section 7 analysis" in the context of a homeless encampment.[37] Thus, the fact that a particular public place has not been historically used for encampments or analogous uses and that there may be competing public uses does not necessarily make it incompatible with the exercise of Section 7 rights by encampment residents. Indeed, it would not even necessarily justify the exclusion of Section 2(b) protected expressive activity. The question is whether the exclusion of unhoused people from that property, facilitated by government decisions about use, violates their Charter protected rights and whether this is a reasonable and justifiable limit under Section 1. Nonetheless, we have subsequently seen a narrow Section 2(b) analysis applied by courts to justify the eviction of encampment residents on federally owned lands as recently as 2020.[38] Not only is this inconsistent with the Section 2(b) case law itself, which requires a nuanced analysis of government property and the activity in question, it is inappropriate for the context of other Charter rights, particularly Section 7.

While the boundaries of the public character of the land is an important issue and requires a contextual analysis, the human rights obligations of governments should not be ignored or inappropriately narrowed on the basis of presumed exclusivity of government ownership. Nor should the presumed equivalence of the broader public interest and the rights of unhoused people sheltering in public space justify exclusion-based responses to encampments. The federal government should proactively adopt an expansive definition of federal property, including where there is a third-party occupant or user. It should avoid characterizing publicly owned land as private property outside of serious and demonstrable concerns about the function of government property *and* the potential to undermine the values protected by Charter itself, which notably do not include private property rights. If a use genuinely requires exclusivity, it should be justified and weighed against the importance of protecting the most basic and fundamental human rights protected by the Charter, particularly Section 7 rights. The Advocate should continue to develop a robust analysis of the public character of federal lands and its importance to the protection of Sections 7 rights, human dignity, and the security of tenure of unhoused people. While the development of this analysis has specific significance for the context of encampments, it is also important to broader decision-making around the use and transfer of federal lands. Thus, the Advocate's research and recommendations should consider how the characterization of federal land engages issues around security of tenure and the realization of the right to housing more broadly. As discussed below, this analysis suggests that the federal government should move away from exclusionary strategies in response to encampments, such as the use of trespass laws, and centre meaningful

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[36] *Victoria v Adams,* 2009 BCCA 563 [*Victoria v Adams, BCCA*], at 75; *Ibid* at 326, cited in *Victoria (City) v Adams, supra* note 22 at para 75.

[37] *Ibid* at paras 75, 79.

[38] *Brett*, *supra* note 29.

engagement. Further, it can inform the role of the Advocate as a friend of the court when litigation arises about encampments.

Case Study of Federally Owned Property: Vancouver Port Lands Encampments

While encampment litigation has often featured municipal lands, two cases about federally owned land in Vancouver arose during the COVID-19 pandemic: *Vancouver Fraser Port Authority v. Brett* and *Bamberger v. Vancouver (Board of Parks and Recreation)*.[39] Both cases feature adjacent lands owned by the Vancouver Fraser Port Authority, a federally incorporated Crown agency whose mandate includes the operation of the port and the activities in its letters patent.[40] The *Canada Marine Act* defines federal real property using the definition in the *Federal Real Property and Federal Immovables Act* set out above. The land at issue in *Bamberger* is leased by Vancouver from Canada for the purposes of maintaining a park; thus the federal government retains ownership of the lands, though it is controlled by the Vancouver Parks and Recreation Board. Provincial and municipal land use frameworks apply to the space in its role as a public park, and relevant provincial and municipal human rights frameworks apply to government actions in addition to the Charter.

In *Brett*, the encampment at issue was established at the start of the COVID-19 pandemic in an unfenced portion of the Port Authority lands, including a parking lot area and an open field. These areas were licenced to third parties for cruise ship and parking operations but were unused at the time. The Port Authority argued the lands were not used by, nor intended for use by, the general public and were thus distinguishable from the parks in other encampment cases. The *Port Authorities Operations Regulations* under the *Canada Marine Act* expressly restrict access to people authorized to "conduct legitimate business" and "access the area" except where "access is not restricted by a sign, a device or in some other way such as a fence."[41] However, as noted above, the encampment was established in an unfenced portion of the Port Authority lands, including a parking lot area and an open field that were unused by either the Port Authority or the licensees.[42] The licensees were not a party to the case and took no action to exclude the encampment during the relevant period. The Authority attempted to post signs and distribute notices to vacate after the establishment of the encampment. As the decision indicates, the Regulations prohibit "building" or "placing" any "structure or

[39] Bamberger v Vancouver (Board of Parks and Recreation), 2022 BCSC 49.

[40] *Canada Marine Act*, SC 1998, c 10, s 28.

[41] SOR/2000-55, s 7.

[42] For a detailed history of the lands, including prior consideration of public uses, and the pattern of limited use of these areas, see Stepan Wood, *forthcoming* 2022, *supra* note 23.

work" on the Vancouver port lands.[43] As noted by the court, residential use is also expressly excluded in the letters patent.[44] The Port Authority successfully brought an application for an injunction to evict the encampment based on the common law of trespass and, alternatively, violation of the Regulations, arguing that the lands were "private property."

In *Bamberger v. Vancouver (Board of Parks and Recreation)*, the lands in question were also owned by the Port Authority but were leased to the City of Vancouver as parklands and are known as CRAB Park. The CRAB Park encampment is adjacent to the Port Authority encampment area and arose after other encampments were evicted throughout Vancouver in 2020 and 2021. Orders under the city parks bylaws closed the park to overnight sheltering as of July 8, 2021. Notably, while not the focus of this report, the movement of unhoused people from one public space to another following forced clearances demonstrates the profound limitations of eviction strategies to address homelessness. This cycle of displacement has been noted in recent cases in British Columbia, including in the *Bamberger* case.[45] As Justice Kirchner notes, CRAB Park was one of the "few remaining public spaces in or around the Downtown Eastside where persons experiencing homelessness could shelter."[46] Further, CRAB Park is relatively distant from residential areas compared to other parks used for encampments in Vancouver. Encampment residents brought an application for judicial review of the orders and the Vancouver Board of Parks and Recreation applied for an injunction to remove the encampment. The orders were set aside and remitted for reconsideration, and the injunction application was adjourned in the interim.[47]

The court in *Brett* accepted the Port Authority's characterization of the lands as "private property" intended for public use only by licence and expressly rejected the need to distinguish the Section 7 analysis from the Section 2(b) cases.[48] In a narrow and arguably incorrect application of *Committee for the Commonwealth of Canada*, the judge agreed with the federal agency that, on the basis of the common law of trespass and the breach of the *Canada Marine Act* regulations, the encampment should be removed. However, encampments consistently fall outside the regulatory and zoning restrictions applicable to the relevant lands. Parks bylaws and other regulations applicable to other forms of public space often expressly exclude residential uses or camping on what are nonetheless public lands.[49] Thus, while port lands may be distinct in their intended use from a public park,

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[43] SOR/2000-55, Part 17, Sch 1. The regulations also prohibit releasing "refuse" or "causing a fire," which the Port Authority raised in relation to the activities of encampment residents.

[44] *Brett*, *supra* note 29 at para 51.

[45] *Bamberger, supra* note 39 at para 184; *British Columbia v Adamson,* 2016 BCSC 584 at para 185; *Black*, *supra* note 29.

[46] *Ibid* at para 32.

[47] *Ibid* at para 10.

[48] *Supra*, note 29 at paras 98–99.

[49] Some BC cities now permit temporary overnight sheltering by unhoused people in specified public parks after the decision in *Victoria (City) v Adams*, which concluded that prohibitions on overnight sheltering

the *Canada Marine Act* regulations do not themselves convert the character of the property from public to private.

Establishing an encampment falls outside the permitted or established uses of most, if not all, public lands and is not grounded in any formally recognized form of title or property rights in Canadian law. Indeed, the courts have generally expressly distinguished the claims to space made by encampment residents from the property rights associated with residential property holders.[50] Further, the analysis required for a Section 7 claim requires the court to consider whether the exclusion effected through the regulations deprived encampment residents of their fundamental right to life, liberty, and security of the person. Instead, the court in *Brett* finds the Authority is "entitled to the use of its land" with no analysis of any human rights obligations and no justification for any rights violation.[51] In circular logic, the residents' claims are dismissed because of the lack of an underlying right to access this form of federal property. Uninformed by a human rights analysis or by the NHSA, the decision emphasizes the government as owner, rather than as first and foremost a guardian of the public interest. The government's exclusionary interest becomes divorced from the public interest, serving only the government as owner in accordance with its own agenda and priorities. In contrast to the parks from which other encampments had been cleared in Vancouver in order to protect public access, these were unused, vacant industrial lands with few, if any, competing public uses. Yet, residents' human rights and corresponding federal obligations are rendered irrelevant once the lands are deemed to be effectively private property.

In *Bamberger*, there is mention of federal ownership of the property, but otherwise, the land is treated as municipal land without regard to any underlying federal interest or associated obligations. In that case, there was no federal party involved in the litigation. The residents did not raise a Section 7 claim, focusing instead on procedural issues about the lack of consultation with residents before the orders. However, the court was live to the Section 7 issues, which informed the conclusion that residents had a right to notice and an opportunity to be heard before being ordered to leave. The nature of the CRAB Park lands is not explored, but they are implicitly characterized as having a substantial public component, which necessitates the protection of Charter rights. However, in the absence of a federal party, this is defined by the nature of municipal bylaws and not federal interests and obligations.

The outcome in *Bamberger* is very different from that in *Brett*, and the recognition of procedural rights is significant. Nonetheless, the findings and, therefore, the basis for the

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were a violation of Section 7 *where no alternatives were available*. However, permitted sheltering in public space has been very narrowly construed to overnight hours, specific locations, and where shelters are full. Cities nonetheless regularly dismantle encampments and limit which public spaces are available, as was the case in the Downtown Eastside prior to the establishment of the encampments in *Brett* and *Bamberger*. *Adams* and subsequent cases have not been followed in other jurisdictions. See *Black*, *supra* note 29; *Poff*, *supra* note 29.

[50] *Victoria v Adams, BCCA*, *supra* note 36 at para 74; *Johnston v Victoria (City),* 2011 BCCA 400 at para 11.

[51] *Supra,* note 29 at para 107.

Board's reconsideration are not informed by the NHSA and the progressive realization of the right to housing. This is a missed opportunity, particularly in light of the more robust discussion of engagement in the context of international human rights law. This is particularly true in the context of the order for reconsideration, which could have been informed by the concept of meaningful engagement and the robust participation called for under the NHSA and by the role of the Advocate.[52]

Both cases demonstrate, albeit in different ways, the importance of ensuring the federal government does not conduct itself as if its commercial and land transactions fall outside of its role as a government and therefore outside the reach of its human rights obligations. Public lands are not private lands, and human rights obligations attach to all government actions, including as a landowner. Even where a lessee of federal lands is another government and although the intersection of municipal bylaws and federal ownership may be complex, provincial laws cannot impair the core of federal property interests, which includes human rights obligations vis-à-vis federal lands. Thus, there is a role for federal jurisdiction to ensure that basic and fundamental rights are protected on federal lands, whether they are directly occupied or there is a third-party occupier involved. Further, where the third-party rights holder is another level of government, the Advocate's advice and recommendations could inform responses to encampments more broadly to address systemic issues arising from residents' lack of security of tenure.

[52] See *Grootboom and Others v Government of the Republic of South Africa and Others*—Constitutional Court Order (CCT38/00), 2000 ZACC 14 and Michèle Biss et al, "Progressive Realization of the Right to Adequate Housing: a Literature Review" (2022) at 7, online (pdf): <housingrights.ca/wp-content/uploads/NHC-Progressive-Realization-Paper_EN.pdf>.

Indigenous Housing & Homelessness: Federal Obligations

Indigenous people are not only overrepresented in the population experiencing homelessness, but they are also disproportionately unsheltered and living in encampments compared to non-Indigenous people experiencing homelessness.[53] The factors leading to homelessness for Indigenous people are complex and deeply rooted in a range of ongoing colonial policies and systemic barriers, including but not limited to land dispossession, residential schools, loss of language, criminalization, removal of children to foster care, broken treaty promises, and discrimination in employment and housing. Therefore, Indigenous homelessness must be considered in the context of the separation from land, family, culture, and kinship that have been traditionally associated with Indigenous homes and relations with place.[54] For Indigenous people, homelessness includes "spiritual homelessness": a separation from one's community and cultural and social networks, which Jesse Thistle describes as "being without All My Relations."[55] Thus, for Indigenous Peoples, addressing homelessness "requires a holistic approach that reconstructs the links between the individual, family, community and Aboriginal nation."[56] While not every aspect of this holistic approach is within federal jurisdiction, there is a strong link to areas of federal responsibility within the Advocate's mandate for investigation and recommendations under Section 13. Further, federal leadership is particularly important to realizing the necessary transformation of the relationship between colonial governments and Indigenous Peoples, including with regard to unhoused Indigenous people and to Indigenous Nations as rights holders with respect to housing.

Nearly 25 years ago, the 1996 Report of the Royal Commission on Aboriginal Peoples (RCAP) examined both domestic and international law and concluded, "The particular duties of governments to Aboriginal people and the notion of housing as a fundamental social right impose an obligation on governments to ensure that Aboriginal people have

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[53] Employment and Social Development Canada, "Everyone Counts 2018: Highlights—Preliminary Results from the Second Nationally Coordinated Point-in-Time Count of Homelessness in Canadian Communities" (last modified 21 May 2021), online: *Government of Canada* <www.canada.ca/en/employment-social-development/programs/homelessness/reports/highlights-2018-point-in-time-count.html#3.4> [*Everybody Counts 2018*].

[54] Jino Distasio, Gina Sylvestre, & Susan Mulligan, "Home Is Where the Heart Is, and Right Now that Is Nowhere: An Examination of Hidden Homelessness Among Aboriginal Persons in Prairie Cities" (2005); Paul Memmott & Catherine Chambers, Indigenous Homelessness in Australia: An Introduction, (2010) 23:9 Parity 8.

[55] Jesse Thistle, "Definition of Indigenous Homelessness in Canada" (2017) at 16, online (pdf): *Canadian Observatory on Homelessness Press* <www.homelesshub.ca/IndigenousHomelessness> [*Thistle*].

[56] Peter Menzies, Developing an Aboriginal Healing Model for Intergenerational Trauma, (2008) 46:2 Intl J of Hlth Promotion & Edu 41 at 47.

adequate shelter."[57] Since the RCAP report, the domestic recognition of the right to housing in the NHSA and the Implementing the United Nations Declaration on the Rights of Indigenous Peoples Act provides renewed statutory grounding for federal obligations in Indigenous housing and addressing Indigenous homelessness more broadly.[58] As the Special Rapporteur noted, the right to housing under the International Covenant on Economic, Social, and Cultural Rights must be understood as "interdependent with and indivisible from the rights and legal principles set out in the United Nations Declaration on the Rights of Indigenous Peoples."[59] Yet, the federal government has continued to take the position that the provision of housing is a matter of social policy and not an enforceable right pursuant to treaties or Section 35 of the Charter.[60]

A crucial role for the Advocate is to clarify and support the implementation of a rights-based approach to Indigenous housing and homelessness in Canada consistent with the NHSA and United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) through research and recommendations developed in partnership with Indigenous Nations and in furtherance of Indigenous self-determination.

Federal Involvement in Indigenous Housing

The federal government has clear and distinct responsibilities for reserve lands and Indigenous Peoples, pursuant to Section 91(24) of the Indian Act, treaties, and Section 35. While the Crown holds legal title to reserve lands, they are not federal lands in the sense discussed above. They are held for the "use and benefit" of the band collectively, and the First Nation has a collective and inalienable interest in the land.[61] The Indian Act provides for band councils to be empowered to "borrow money for band projects of housing purposes" and "making of loans out of moneys so borrowed to members of the band for housing purposes" and to take action related to overcrowding and sanitary conditions in relation to housing.[62] However, the Crown has substantial power in relation to reserve land, including with respect to most land transactions, and tenurial relationships on reserve are complex because of the Indian Act.[63] Most

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[57] House of Commons, Report of the Royal Commission on Aboriginal Peoples, (October 1996) [RCAP].

[58] SC 2021, c 14 [*Implementing UNDRIP*].

[59] 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, 74th Sess, UN Doc A/74/183 (2019) at 5 [SR Report 2019].

[60] This is noted in the *RCAP Report, supra* note 57 and was recently articulated by senior civil servant Daniel Leclair, Director General, Community Infrastructure Branch, Aboriginal Affairs and Northern Development Canada, before the Senate Committee Senate Standing Committee on Aboriginal Peoples, Issue 9, Evidence, 5 November 2014.

[61] *Indian Act*, RSC 1985, c I-5, s 18.

[62] *Ibid,* s 73(1)(i)—(m).

[63] Note that some First Nations have more substantial control over lands, including with respect to housing, pursuant to the *First Nations Land Management Act*, modern treaties or self-government

importantly, the federal government maintains substantial control over funding for Indigenous housing both on and off reserve. While not the focus of this report, the federal role in housing on reserve has significant implications for the high levels of Indigenous homelessness and housing insecurity. The lack of security of tenure on reserve due to housing conditions and shortages leads to housing insecurity off reserve for Indigenous people, including high levels of homelessness and disproportionate representation in encampments. Further, the federal government is the primary funder of Indigenous housing programs, through the Canada Mortgage and Housing Corporation, it contributes to addressing Indigenous homelessness through Employment and Social Development Canada, and it implements Metis and Inuit housing strategies through Crown Indigenous Relations and Northern Affairs Canada.[64] These roles all indicate that Indigenous homelessness falls within federal jurisdiction, though not exclusively, given the important roles for provinces and municipalities. Therefore, elements of the Advocate's mandate related to systemic housing issues, vulnerable populations, and federal jurisdiction are all triggered by Indigenous housing and homelessness on and off reserve.

Federal Responsibility and Liability for Indigenous Housing: Federal Policy Failures as the Backdrop to Indigenous Homelessness

The federal government's role with respect to Indigenous housing is the foundation of its responsibility for addressing Indigenous homelessness. Historically, the federal government was directly involved in the provision of housing on reserves. However, such housing was provided as a "temporary measure" and was neither properly funded nor built to meet minimum standards.[65] Further, as some scholars have argued, the imposition of standard "suburban-style" housing, entirely divorced from the local climate, culture, and geography, was yet another manifestation of the colonial desire to assimilate Indigenous Peoples into a settler way of life through confinement on reserve and separation from territory and Indigenous economies and ways of life. [66] Thus, housing policy for reserves has long been defined by a "paternalistic approach of dictating

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agreements, though it does not change the underlying ownership of land. This is discussed in more detail in the report provided by Dr. Alan Hanna for this series.

[64] For a detailed examination of the funding structures for Indigenous Housing see, Officer of the Parliamentary Budget Officer, "Urban Rural, and Northern Indigenous Housing" (11 February 2021) at 17, online (pdf): <pbo-dpb.s3.ca-central-1.amazonaws.com/artefacts/5b2407108abe40544f4c66d4a7fe08c47aecce914911c2f7e3bbcad23a2070fc>.

[65] Shelagh McCartney, Jeffrey Herskovits & Lara Hintelmann, "Failure by Design: The on-Reserve First Nations' Housing Crisis and Its Roots in Canadian Evaluation Frameworks" (2018) 38:2 The Canadian Journal of Native Studies at 113 [*McCartney et al*]; Shelagh McCartney, Jeffrey Herskovits & Lara Hintelmann, "Developing Occupant-Based Understandings of Crowding: A Study of Residential Self-Assessment in Eabametoong First Nation" (2021) 36:2 Journal of Housing and the Built Environment 645–662 at 646.

[66] *Ibid* at 115.

housing design and underfunding housing—creating conditions of enforced poverty."[67] These conditions have contributed to high rates of Indigenous homelessness.

Policy shifts since the mid-1990s have consistently emphasized self-determination with respect to on-reserve housing. However, in practice, federal policy has failed to incorporate Indigenous perspectives and, crucially, has not effectively shifted control and funding to Indigenous communities.[68] The government's own 2017 internal evaluation concluded the existing approach had failed to provide "strategic support for capacity development" and lacked a clearly articulated policy to inform relationships between First Nations and Canada and thus failed to realize the stated goals of First Nations control, expertise, shared responsibilities, and increased access to private financing.[69] As McCartney et al. conclude, "the recognition of First Nations control in housing was little more than a shifting of the burden."[70] Similar issues with the inadequacy of funding for Indigenous-led and controlled off-reserve housing solutions have been identified by Indigenous leaders and housing providers, including within the National Housing Strategy.[71] Indeed, a core issue identified by the 2021 House of Commons committee report on Indigenous housing was the lack of "adequate, long-term, and sustainable funding" for Indigenous organizations to realize control over housing.[72] Further, recent efforts to improve access to the private sector and market-based support for housing development ignores, and may conflict with, distinctive Indigenous approaches to housing as part of a holistic conception of home as "emplacement" within a "web of relationships and responsibilities" rather than a built environment that can be commodified.[73] In doing so, private sector approaches may contribute to rather than address the separation from land, family, culture, and kinship at the core of Indigenous homelessness.

Thus, while the federal government contends that "the provision and management of housing on reserve lands is under the jurisdiction of First Nations, with support provided

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[67] *Ibid*.

[68] *Ibid*.

[69] Canada Performance Measurement and Review Branch Audit and Evaluation Sector, "Evaluation of On-Reserve Housing" (2017) Project Number: 1570-7/15109 at 16–18 [*Evaluation of On-Reserve Housing]*.

[70] *McCartney et al, supra* note 65.

[71] Indigenous National Housing Strategy developed by the Indigenous Housing Caucus Working Group, Canadian Housing and Renewal Association (2018), online (pdf): <chra-achru.ca/wp-content/uploads/2015/09/2018-06-05_for-indigenous-by-indigenous-national-housing-strategy.pdf>.

[72] House of Commons, Standing Committee on Human Resources and Social Development and the Status of Persons with Disabilities, "Indigenous Housing: The Direction Home" (2021) at 60, online (pdf): <www.ourcommons.ca/Content/Committee/432/HUMA/Reports/RP11348049/humarp05/humarp05-e.pdf> [*Indigenous Housing: The Direction Home]*.

[73] *Thistle*, *supra* note 55 at 14–15; See also *SR Report 2019*, *supra* note 59 at 10; *Ibid*.

by the Government of Canada,"[74] they have maintained effective control over decision-making. They therefore retain responsibility and liability in relation to the provision of adequate housing for Indigenous Peoples, both on and off reserve. This responsibility has been strengthened by the enactment of the NHSA and the UNDRIP Implementation Act, which incorporate the right to housing into federal law and impose obligations to bring federal law into compliance with international human rights law.[75] The UNDRIP Implementation Act commits the government to ensuring all federal laws are UNDRIP compliant, including with respect to the right to self-determination, involvement in housing programs, and the responsibility of states to take positive actions to improve economic and social conditions.[76]

Federal Responsibility for Indigenous Housing: Canadian Case Law

Canadian case law also points to an ongoing relationship between federal jurisdiction and Indigenous housing decisions. As the Supreme Court noted in *Just v. British Columbia*, "Where the government has made a policy decision to provide a service, a negligent failure to implement that policy at the operational level may be actionable when an individual member of the public suffers loss."[77] In *Grant v. Canada (Attorney General)*, a class proceeding was certified for the relocation of an Indigenous community into houses with significant mould issues. The court relied on this principle to find a cause of action for negligence had been made out: "I am not aware of any authority, principle or policy that would immunize the Crown from the private law consequences of its operational conduct on reserve lands."[78] Further, the court rejected the Crown's argument that it could not be considered an "occupier" with respect to reserve land under the *Ontario* Occupier's Liability Act.[79] While the case never went to trial, these preliminary decisions underscore the ongoing relationship between the federal government and on-reserve housing conditions. As noted above, on-reserve housing conditions are inextricably linked to Indigenous homelessness off reserve and in encampments.

The federal government's relationship to off-reserve housing and homelessness is primarily as a funder for other levels of government or agencies delivering housing,

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[74] Daniel Leclair, Director General, Community Infrastructure Branch, Aboriginal Affairs and Northern Development Canada, before the Senate Committee Senate Standing Committee on Aboriginal Peoples, Issue 9, Evidence, 5 November 2014.

[75] *Implementing UNDRIP*, *supra* note 58.

[76] See relevant articles in UNDRIP: United Nations, *Declaration on the Rights of Indigenous Peoples*, 2007, articles 1, 3, 21, 23, online (pdf): <www.un.org/development/desa/indigenouspeoples/wpcontent/uploads/sites/19/2018/11/UNDRIP_E_web.pdf>.

[77] [1989] 2 SCR 1228 at para 21.

[78] *Grant v Canada (Attorney General),* 2009 CanLII 68179 (ON SC) at para 67.

[79] Occupiers' Liability Act, RSO 1990, c O.2.

shelters, and outreach programs.[80] Housing outside of reserves is generally understood to be an area of provincial jurisdiction under Section 92 of the Constitution through which provinces regulate landlord-tenant relationships as part of their property and civil rights jurisdiction.[81] However, until the 1990s, the federal government historically played a strong and active role in housing affordability.[82] While the government now describes itself as playing a supportive role with respect to housing, a funding relationship can nonetheless constitute a service for the purposes of private law liability and human rights law. As the Canadian Human Rights Tribunal found in the *Caring Society* case, "funding can constitute a service" where it is "a benefit or assistance offered to the public" in the context of a "public relationship."[83] In that case, a funding relationship for culturally appropriate child and family services is "reasonably comparable to services provided to other provincial residents in similar circumstances" and was held to be subject to the jurisdiction of the Canadian Human Rights Act even where the federal government was not itself delivering the service operationally.[84] The Tribunal concluded, "the manner and extent" of ministerial funding "significantly shapes the child and family services provided" by agencies and other levels of government, and the government could not avoid statutory and constitutional responsibilities to Indigenous Peoples through a "delegation and programming/funding approach."[85] Indeed, as the Tribunal in *Caring Society* noted, as the funder, the Ministry "has the power to remedy inadequacies."[86]

The legislative commitments made in the UNDRIP Implementation Act and the NHSA may create statutory duties to realize the right to adequate housing for Indigenous Peoples in the federal government's role as a funder, including by placing conditions on any funding agreements with other governments or agencies.[87] In *Canada (Commissioner of Official Languages) v. Canada (Employment and Social Development)*, the Federal Court of Appeal found a funding agreement that did not comply with the federal obligations under the *Official Languages Act* had to be terminated or renegotiated to comply with the statutory obligations to "enhance the vitality of the linguistic minority

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[80] The funding streams and structures are laid out in detail in the HOC report, the Senate report, and the PBO report.

[81] *Constitution Act, supra* note 10, s 92(13).

[82] Tracey Heffernan, Fay Faraday & Peter Rosenthal, "Fighting for the Right to Housing in Canada" (2015) 24:1 JLSP 10 at 18.

[83] *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada* (for the Minister of Indian and Northern Affairs Canada), 2016 CHRT 2 at para 40–45 [*Caring Society*].

[84] *Canadian Human Rights Act*, RSC 1985, c H-6.

[85] *Caring Society*, *supra* note 83 at para 71.

[86] *Ibid*, at para 84.

[87] *Canada (Commissioner of Official Languages) v Canada (Employment and Social Development)*, 2022 FCA 14 [Commissioner v ESD]; On conditional grants and the division of powers, see, *Finlay v Canada (Minister of Finance)*, [1993] 1 SCR 1080; Reference Re Canada Assistance Plan (BC), [1991] 2 SCR 525.

and not to hinder it."[88] The NHSA commits the government to support improved housing outcomes, furthering the progressive realization of the right to adequate housing, and to develop a National Housing Strategy that must specifically focus on "improving housing outcomes for people in the greatest need."[89] These commitments provide a strong basis for funding conditions on transfers to provincial and territorial governments to ensure funding specifically addresses Indigenous housing needs and homelessness, which can lead to better accountability for funding priorities under the National Housing Strategy. Further, just as the *Official Languages Act* is closely linked to the constitutional protection of language rights in the Charter,[90] Canada's constitutional obligations to Indigenous Peoples and its UNDRIP obligations give these statutory commitments additional meaning in the context of Indigenous housing and homelessness. In this context, a rights-based approach to all federal involvement in Indigenous housing and homelessness is consistent with the NHSA, UNDRIP, and the Constitution. However, despite repeated calls for an Indigenous housing strategy, including most recently from the 2021 House of Commons Committee Report, Canada has not formally recognized the right to housing for Indigenous Peoples in the context of Section 35 and treaty relationships. Rather than adopting a rights-based approach, Canada has continued downloading responsibility without the necessary support and recognition for Indigenous self-determination. In the government's words, "housing is the responsibility of First Nations with some support from" the ministry.[91] Yet, federal failures regarding both on- and off-reserve housing are directly linked to the disproportionate rate of Indigenous homelessness.

Federal Failures to Provide Safe and Adequate Housing on Reserves Are Linked to Indigenous Homelessness

The failure to provide safe, healthy, and accessible housing in Indigenous communities has been well documented for decades.[92] As Table 1 illustrates, 74% of housing on

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[88] *Ibid*, at para 88.

[89] NHSA, *supra* note 9, ss 4–5.

[90] *Commissioner v ESD*, *supra* note 87 at para 110.

[91] See the description of the on-reserve housing policy in *Evaluation of On-Reserve Housing,* supra note 69 at 16.

[92] RCAP, supra note 57 at 365; Canada, Minister of Indian and Northern Affairs, *Government Response to the Seventh Report of the Standing Committee on Aboriginal Affairs and Northern Development*; *Aboriginal Housing*, Parliament of Canada (17 October 2007); Canada, Truth and Reconciliation Commission, *Canada's Residential Schools: The Legacy*, vol 5 (Kingston & Montreal: McGill-Queen's University Press, 2015) at 163 [TRC];
SR Report 2014, supra note 7; Canada, The National Inquiry Into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry Into Missing and Murdered Indigenous Women and Girls*, Vol. 1a (Ottawa: 2019) [MMIWG Report]; Indigenous Housing: The Direction Home, *supra* note 72.

reserve was in need of repair in 2016, compared to 51% for housing off reserve.[93] Various authors have pointed to correlations between reserve housing and a higher risk of respiratory tract infections and asthma,[94] due to higher instances of overcrowding and mould within reserve dwelling houses.[95] Increased risk (up to 20 times higher) of tuberculosis has also been observed, and some researchers likewise point to a correlation between overcrowding and poor mental health outcomes.[96] Optis et al. note that nearly half of the homes on reserves across Canada contain mould "at levels of contamination associated with high rates of respiratory and other illnesses to residents" and argue that without government intervention the problem will continue to worsen.[97] Chambers also points to a direct correlation between fires and inadequate funding for housing improvements, noting unsafe heating sources, lack of water for fire suppression, and "dilapidated" (i.e., more flammable) structures, which can all lead to a material increase in fire risk.[98] Indeed, federal and provincial reports have clearly identified increased risk of death from fire for on-reserve populations. In 2007, the Canadian Mortgage and Housing Corporation found that the death rate from fire for First Nations members living on reserve was 10.4 times higher than for the non-First Nation population.[99] While the 1996 RCAP report found it to be "possible and desirable to achieve adequate housing for Aboriginal people in ten years," the 2015 Senate Committee on Aboriginal Peoples report on on-reserve housing and infrastructure found "severe housing shortages and overcrowding; poorly constructed housing that is in serious disrepair" and barriers to First Nations meeting their housing needs.[100] The Senate report linked these risks directly to federal government decisions, particularly inadequate funding but also the lack of a

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[93] Statistics Canada, "Aboriginal Community Data Initiative Portrait, 2016 Census—Canada" (Ottawa: Statistics Canada, last modified 14 January 2020), online: <www12.statcan.gc.ca/census-recensement/2016/dp-pd/abpopprof/infogrph/infgrph.cfm?LANG=E&DGUID=2016A000011124&PR=01>

[94] Gisèle M Carrière, Rochelle Garner & Claudia Sanmartin, "Housing conditions and respiratory hospitalizations among First Nations people in Canada" (2017) 28:4 Health Reports 9.

[95] Paul C Webster, "Housing triggers health problems for Canada's First Nations" (2015) 385:9967 The Lancet 495.

[96] Ibid.

[97] Michael Optis et al, "Mold Growth in On-Reserve Homes in Canada: The Need for Research, Education, Policy, and Funding" (2012) 74:6 J Envtl Hlth 14.

[98] Lori Chambers*, "*Fanning the Flames: Racism in Government Recommendations for the Prevention of Deaths by Fire on First Nations Reserves" (2018) 38:2 *The Canadian Journal of Native Studies* 25–42, at 28.

[99] Canada Mortgage and Housing Corporation, *Fire Prevention in Aboriginal Communities* (2007 October); see also provincial Coroner's Reports, British Columbia Coroner Service. *Residential structure fire deaths in BC, 2007–2011* (2012 Mar 28); Ontario Chief Coroner. *Report of the Table on Understanding Fire Deaths in First Nations* (2021 July).

[100] RCAP, supra note 57 at 377; Senate Standing Committee on Aboriginal Peoples, On-Reserve Housing and Infrastructure: Recommendations for Change (June 2015) (Chair: Dennis Glen Patterson) at 1.

federal framework for enforceable fire or building codes and ill-suited federal guidelines for planning and design for on reserve houses.[101]

Table 1: Housing Conditions on Reserve, Statistics Canada 2016 Census[102]

Location	Year of Data	Dwellings Overcrowded	Dwellings with Major Repairs Needed	Dwellings with Major or Minor Repairs Needed
Canada	2016	27%	44%	74%
Newfoundland and Labrador	2016	30%	34%	64%
PEI	2016	8%	29%	73%
Nova Scotia	2016	10%	31%	64%
New Brunswick	2016	5%	34%	66%
Quebec	2016	22%	36%	66%
Ontario	2016	19%	42%	72%
Manitoba	2016	41%	51%	80%
Saskatchewan	2016	36%	51%	80%
Alberta	2016	33%	49%	78%
British Columbia	2016	11%	35%	68%
Yukon	2016	4%	20%	53%
NWT	2016	17%	29%	63%

[101] *Senate Standing Committee* 2015; *Ibid* at 13–14, 16–18, 23–25.

[102] Statistics Canada, "Aboriginal Community Data Initiative Portraits, 2016 Census" (Ottawa: Statistics Canada, last modified 14 January 2020), online: <www12.statcan.gc.ca/census-recensement/2016/dp-pd/abpopprof/infogrph/select.cfm?Lang=E&PR=11>. Data for the 2021 census is expected to be released in September 2022, which would allow for a contemporary temporal analysis of this data and determine whether housing outcomes have improved; Statistics Canada, "Release plans - 2021 Census dissemination planning" (Ottawa: Statistics Canada, last modified 12 May 2021), online: <www12.statcan.gc.ca/census-recensement/2021/ref/prodserv/release-diffusion-eng.cfm>.

Research has also shown a chronic shortage of housing units, which also contributes to the need for off-reserve Indigenous housing.[103] Indeed, most Indigenous people live off reserve, where they face significant systemic discrimination in the housing market.[104] Indigenous households off reserve are more likely to be in core housing need and to live below adequacy and suitability standards, putting them at increased risk of homelessness.[105]

As Metis scholar Jesse Thistle sets out, "Indigenous homelessness in Canada today can be explained, and solutions to it envisioned, only if we pay attention to the broader legacy of marginalization and displacement created by settler colonialism."[106] The loss of "home" has related to the active displacement of Indigenous people from their communities.[107] The lack of adequate housing on reserve is compounded by lack of education and barriers to employment, the removal of children from families, as well as physical and mental health outcomes and the lack of health and social services, all of which increase the risk of homelessness.[108] Thus, the lack of adequate housing on reserve directly contributes to the overrepresentation of Indigenous people in the homeless population in Canada.[109] Indeed, the 2021 House of Commons report on off-reserve housing noted the roots of Indigenous homelessness in the failures of federal housing policy for northern communities and the withdrawal of federal support for social housing.[110] They heard evidence from multiple witnesses that housing shortages and poor housing conditions on reserve were reasons people relocate to urban centres from home communities, as well as reasons they are unable to return.[111]

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[103] Christopher Alcantara, "Certificates of Possession and First Nations Housing: A Case Study of the Six Nations Housing Program" (2005) 20:2 CJLS 183; *TRC*, *supra* note 92 at 165; Indigenous National Housing Strategy developed by the Indigenous Housing Caucus Working Group, Canadian Housing and Renewal Association (2018) at 14, online (pdf): <chra-achru.ca/wp-content/uploads/2015/09/2018-06-05_for-indigenous-by-indigenous-national-housing-strategy.pdf>.

[104] *Patrick*, supra note 8 at 12.

[105] Jeannine Claveau, "The Canadian Housing Survey, 2018" (Ottawa: Statistics Canada, last modified 2 October 2020), online: <www.150.statcan.gc.ca/n1/pub/75f0002m/75f0002m2020003-eng.htm>.

[106] Jesse Thistle, "Definition of Indigenous Homelessness in Canada" (2017) at 14, online: *Canadian Observatory on Homelessness Press* <www.homelesshub.ca/IndigenousHomelessness> [*Thistle*].

[107] Helene Berman et al, Uprooted and Displaced: A Critical Narrative Study of Homeless, Aboriginal, and Newcomer Girls in Canada, (2009) 30:7 Issues in Mental Hlth Nursing 418.

[108] *Schwan*, *supra* note 8.

[109] Evelyn J. Peters, Vince Robillard, "'Everything You Want Is There': The Place of the Reserve in First Nations' Homeless Mobility" (2009), 30:6 *Urban Geography* 652; *Thistle*, *supra* note 55; *MMIWG Report*, *supra* note 92 at 445.

[110] *Indigenous Housing: The Direction Home, supra* note 72.

[111] *Ibid* at 41, 43.

The Overrepresentation of Indigenous People in Homeless and Unsheltered Populations

The last federal point-in-time count of homelessness in Canada found Indigenous people were significantly overrepresented.[112] Indigenous people make up 5% of the population but made up 30% of respondents in the 2018 count. This is consistent with past counts, which ranged between 29% and 37%.[113] Indigenous overrepresentation in the homeless population is even more striking when broken down by gender. In Winnipeg, 80% of women experiencing homelessness were Indigenous. In Vancouver, 45% of women experiencing homelessness were Indigenous. Indigenous women are 15 times more likely to use a shelter than non-Indigenous women, they remain overrepresented in domestic violence shelters, they are six times more likely to be the victims of sexual assault than Indigenous men, and they are more likely to experience post-traumatic stress disorder.[114] The final report of the National Inquiry into Missing and Murdered Indigenous Women and Girls heard detailed testimony about the link between inadequate and unsafe housing in Indigenous communities, homelessness, and violence.[115]

Although Indigenous people are more likely to experience homelessness than non-Indigenous people, Indigenous people were less likely to use shelters. As the UN Special Rapporteur found, homeless services "replicate colonial oppression" and thus are inaccessible to Indigenous people.[116] Therefore, not only are Indigenous people overrepresented in the population experiencing homelessness, but they are also disproportionately unsheltered and living in encampments compared to non-Indigenous people experiencing homelessness. Nationally, Indigenous people made up 37% of those staying in unsheltered locations and 43% of those staying with others, therefore the point-

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[112] *Everybody Counts 2018*, *supra* note 53; Everyone Counts 2021 was launched in spring of 2021. Preliminary results were made available in mid-fall of 2021, but full results including data on race and ethnic origin will be available in spring 2022, see online: <https://www.canada.ca/en/employment-social-development/programs/homelessness/resources/point-in-time.html>.

[113] *Ibid*; Employment and Social Development Canada, "Everyone Counts 2016" (last modified 31 August 2020), online: <https://www.canada.ca/en/employment-social-development/programs/homelessness/reports/highlights-2016-point-in-time-count.html>; Yale D Belanger, Olu Awosoga, Gabrielle Weasel Head, "Homelessness, Urban Aboriginal People, and the Need for a National Enumeration" (2013) 2:2 Aboriginal Pol'y Stud 4.

[114] Nick Falvo, "The Use of Homeless Shelters by Indigenous Peoples in Canada" (2019), online: *Canadian Observatory on Homelessness Press* <www.homelesshub.ca/blog/use-homeless-shelters-indigenous-peoples-canada>; Employment and Social Development Canada, "Highlights of the National Shelter Study 2005 to 2016" (last modified 8 August 2019), online: *Government of Canada* <www.canada.ca/en/employment-social-development/programs/homelessness/reports-shelter-2016.html>; Brittany Bingham et al, Gender differences among Indigenous Canadians experiencing homelessness and mental illness, (2019) 57:7 BMC Psychology 1.

[115] *MMIWG Report*, *supra* note 92 at 537–545.

[116] *SR Report 2019*, *supra* note 1 at 10.

in-time counts are likely an underestimate.[117] In Toronto, while 15% of people experiencing homelessness were Indigenous, 23% of those who were living outside in 2021 and 38% in 2018 were Indigenous.[118] A 2020 BC survey of people experiencing homelessness in Metro Vancouver found that 51% of those unsheltered were Indigenous.[119] A street census in Winnipeg found 79.8% of unsheltered respondents were Indigenous.[120] Statistics Canada and the City of Toronto both acknowledged that their data likely underestimates Indigenous homelessness because of barriers to shelters and hidden forms of homelessness.[121]

This is particularly acute for Indigenous women who may avoid shelters for fear of violence and because of the lack of culturally appropriate services or who may simply not have accessible options in rural or remote areas.[122] They remain the group most likely to experience hidden or concealed homelessness.[123] The lack of funding and services for Indigenous shelters systemically places Indigenous women in vulnerable positions.[124] Without culturally sensitive shelters, Indigenous women continue to face discrimination when attempting to access emergency housing.[125] Martina and Walia assert that current shelter systems are inherently paternalistic, as they position Indigenous women as "clients" of shelters and undermine Indigenous women's right to safety and shelter.[126] Indigenous women are often expected to be polite, civil, and express gratitude to receive basic services.[127] Furthermore, while Indigenous women do experience higher rates of

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[117] *Everybody Counts 2018*, *supra* note 53.

[118] City of Toronto, "Street Needs Assessment 2021" (2021), online (pdf): <www.toronto.ca/legdocs/mmis/2021/ec/bgrd/backgroundfile-171729.pdf>.

[119] BC Non-Profit Housing Association, "2020 Indigenous Homeless Count: Results in Metro Vancouver" (2020), online (pdf): <infocusconsulting.ca/wp-content/uploads/Homeless-Count-Infographic-2020-FINAL.pdf>.

[120] Josh Brandon & Christina Maes Nino, Winnipeg Street Census 2018, online (pdf): <streetcensuswpg.ca/wp-content/uploads/2018/10/2018_FinalReport_Web.pdf>.

[121] *Everybody Counts 2018, supra* note 53*;* City of Toronto, "Street Needs Assessment 2021" (2021) at 25., online (pdf): <www.toronto.ca/legdocs/mmis/2021/ec/bgrd/backgroundfile-171729.pdf>

[122] *Schwan*, *supra* note 8; *MMIWG Report*, *supra* note 92.

[123] Julia Christensen, "'Our Home, Our Way of Life': Spiritual Homelessness and the Socio-Cultural Dimensions of Indigenous Homelessness in the Northwest Territories (NWT), Canada" (2013) 14:7 Social Cultural Geography 804.

[124] *Schwan*, *supra* note 8.

[125] Native Housing for First Nations, Inuit, and Métis Women. Native Women's Association of Canada, (2018), online (pdf): *Native Women's Association of Canada* <www.nwac.ca/resource/fact-sheet-housing-2018/?wpdmdl=1976&refresh=61fcd9fb588291643960827>.

[126] *Ibid* at 44.

[127] *Ibid*.

violence, narratives portraying them as victims contribute to marginalization while ignoring Indigenous women's resilience and resistance to colonialism.[128]

These issues are also amplified for gender-diverse Indigenous people who often experience discrimination when accessing a gender-segregated shelter system.[129] There is limited data on the experience of homelessness of LGBTQ2S+ women and gender-diverse people. However, a recent 2019 study affirms that Indigenous LGBTQ2S+ youth experience homelessness earlier than their peers and have higher rates of mental health and addiction challenges.[130] Culturally sensitive services are important for Indigenous youth generally, who are disproportionately dislocated or displaced from their families by colonial child welfare systems.[131] When the youth return to their communities as adults, they may be cultural outsiders, leading to housing precarity with either no home to stay in or feeling unable to stay in their family home.[132]

Limited Judicial Commentary on Indigenous Homelessness

Despite the overrepresentation of Indigenous people in encampments, there is very little judicial commentary on Indigenous homelessness or Indigenous experiences in encampments. In *Prince George (City) v. Stewart*, Chief Justice Hinkson noted the disproportionate representation of Indigenous people in the encampments in question. Drawing on case law about the overrepresentation of Indigenous people in the criminal justice system, he takes judicial notice of the context of colonialism, discrimination, racism, and the "impacts of trauma from residential schools on the Indigenous homeless population of the City and occupants of the encampments."[133] In that case, the court denied the City's application to remove the encampment until sufficient accessible housing and daytime facilities were provided to protect encampment residents from serious harm.[134] Notably, Chief Justice Hinkson accepted evidence that existing supportive housing was not accessible to encampment residents because of a complex intersection of social issues related to substance abuse, mental health issues, trauma, and disabilities.[135] The City nonetheless cleared the encampment in breach of the decision

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[128] *Ibid.*

[129] Carol Muree Martin & Harsha Walia, "Red Women Rising: Indigenous Women Survivors in Vancouver's Downtown Eastside" (2019), online (pdf): *Downtown Eastside Women's Centre* <dewc.ca/wp-content/uploads/2019/03/MMIW-Report-Final-March-10-WEB.pdf>

[130] Sean Kidd et al, "A National Study of Indigenous Youth Homelessness in Canada" (2018) 176 Royal Soc'y for Public Hlth 16 at 169.

[131] *Patrick*, *supra* note 7 at 32.

[132] Jeffrey Paul Ansloos, Amanda Claudia Wagner, & Nicole Santos Dunn, "Preventing Indigenous Youth Homelessness in Canada: A Qualitative Study on Structural Challenges and Upstream Prevention in Education" (2021) J Community Psychology 1 at 9.

[133] *Prince George (City) v Stewart*, 2021 BCSC 2089.

[134] *Ibid* at 74.

[135] *Ibid* at 69.

and sought an interlocutory injunction to close the space to camping. The City's application was denied in *Prince George (City) v. Johnny*, and the breach of Justice Hinkson's order was found to have "inflicted serious harm on vulnerable people."[136] The encampment was allowed to stay "unless and until the City demonstrated available and accessible housing and daytime facilities for its occupants."[137] Crucially the *Stewart* and *Johnny* decisions recognize the significant and complex barriers to existing housing options and shelters faced by Indigenous encampment residents and reject simplistic, quantitative approaches to the analysis of shelter availability put forward by governments. However, we have not seen this type of nuanced analysis in most encampment decisions. In Ontario, courts have been reluctant to question claims about shelter adequacy at all, and it is difficult for residents to access the data to rebut government claims.[138]

In *Black v. Toronto*, the court denied encampment residents an interim injunction against the City's enforcement of anti-camping bylaws. However, Justice Schabas did find that the applicants had raised a serious issue to be tried relating to a potential breach of Section 15 of the Charter and the *Ontario Human Rights Code* if encampments were cleared, specifically noting the disproportionate number of Indigenous and gender diverse people among encampment populations.[139] Notably, the test for a serious issue to be tried is a low bar and does not indicate the likelihood of success, particularly given the potential of a Charter violation to be saved by Section 1 reasonable limits. In *Tanudjaja v. Canada*, the motions judge held that "homelessness" was not an analogous ground under Section 15. However, the Ontario Court of Appeal left this question open as the majority dismissed the case on the issue of justiciability. Notably in *Black*, Justice Schabas specifically rejected applying the motion judge's analysis to the context of encampments.[140] Future claims could be based directly in other grounds, such as Indigeneity, gender, race, or disability, in addition to revisiting the question of whether homelessness is an analogous ground.[141] This will require significant evidence about the demographics of encampments and the overrepresentation of Indigenous people or other protected groups. The Advocate's research capacity to examine systemic issues could be engaged to serve as a friend of the court in such cases and ensure there is accurate and timely data, which is often a challenge for litigants experiencing homelessness.

Other related case law and litigation are relevant to Indigenous homelessness. In a recent motion decision in an ongoing challenge to Ontario's *Safe Streets Act*, the court granted intervenor status to Aboriginal Legal Services who will argue colonial policies have led to an overrepresentation of Indigenous people experiencing homelessness, poverty,

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[136] *Prince George (City) v Johnny,* 2022 BCSC 282.

[137] *Ibid* at 82.

[138] *Black*, *supra* note 29; *Poff*, *supra* note 29.

[139] *Ibid* at paras 60–61; *Human Rights Code*, RSO 1990, c H 19.

[140] *Ibid* at para 62.

[141] 2014 ONCA 852, at para 37.

addiction, and trauma-related mental illness.[142] As well, Canadian courts have recognized the right to self-determination applies to urban Indigenous people and communities.[143] Urban Indigenous communities have the right to equal agency over social programs and decisions that affect them. Indeed, UNDRIP does not differentiate between urban, rural, or remote Indigenous populations in recognizing the right to self-determination. Thus, the duty to consult and accommodate Indigenous Peoples is relevant to encampments with respect to encampment residents and also to the role of Indigenous governments whose territory the encampment is within. Such governments have the right to be involved in the development of policy and responses to encampments and homelessness and may increasingly be housing providers and developers themselves.[144]

While the duty to consult and accommodate Indigenous peoples is sometimes invoked in the context of encampment evictions, its application is complex because of the collective and territorial nature of the doctrine.[145] Governments have distinct obligations to Indigenous Peoples grounded in historic or modern treaty relationships, Canadian constitutional law, and international law, all of which are relevant to encampments. In the context of specific encampments, relevant government actors will have legal duties to consult and engage with the current treaty holders as governments, as well as with regional Indigenous organizations, in relation to policies and priorities related to housing and homelessness policy. As noted above, these groups are increasingly also housing developers and providers of both housing and homelessness programs.[146]

Further, Canadian courts have recognized the right to self-determination applies to urban Indigenous people and communities.[147] Therefore, while there is limited case law on the meaning of the duty to consult in this context, forced evictions of Indigenous people do not comply with requirements for meaningful good faith consultation about and involvement in the development and delivery of social programs, nor are they consistent with the recognition of Indigenous self-determination in accordance with UNDRIP.

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[142] *Fair Change v Her Majesty the Queen,* 2021 ONSC 2108 at para 28.

[143] *Canada (AG) v Misquadis*, [2002] FCA 370 [*Misquadis*]; *Ardoch Algonquin First Nation v Canada* (AG), [2004] 2 FCR 108, [2003] FCA 473 at para 36 [Ardoch].

[144] See for example the Musqueam Community Rental Complex project in Vancouver: musqueamcapital.ca/development-projects/lelem/. See also the Indigenous National Housing Strategy developed by the Indigenous Housing Caucus Working Group, Canadian Housing and Renewal Association (2018), online (pdf): <chra-achru.ca/wp-content/uploads/2015/09/2018-06-05_for-indigenous-by-indigenous-national-housing-strategy.pdf>.

[145] *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511, 2004 SCC 73; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 SCR 550, 2004 SCC 74.

[146] See for example, the Mississaugas of the New Credit First Nation, "Trailblazers: The Mississaugas of the New Credit First Nation Strategic Plan" (September 2017) at 39, 48, online (pdf): *MNCFN* <mncfn.ca/wp-content/uploads/2019/11/MCFN-Strategic-Plan-Final.pdf>; and the Musqueam Community Rental Complex project in Vancouver: musqueamcapital.ca/development-projects/lelem/.

[147] *Misquadis, supra* note 143; *Ardoch, supra* note 143 at para 36.

Recommendations

Review Policies and Practices Related to Federal Land

The NHSA empowers the Advocate to initiate studies into areas of federal jurisdiction and report findings, advice and recommendations to Parliament.[148] This offers a non-adversarial process through which the government can provide information about policies and practices for federally owned land to inform recommendations and advice. This includes the potential to provide details about the uses of different types of federal lands and the relative need for exclusionary powers for particular land use. This type of information can inform a robust review of policies about federal lands to ensure they are human rights compliant.

Federal property occupied by the federal government and regulated by federal regulatory frameworks, such as national parks or port authority lands, must be governed in accordance with human rights obligations, including the recognition of the right to housing as a fundamental right in international law and the commitment to the progressive realization of the right to housing.

Where federal land is occupied by third parties with property or contractual rights, the federal government should ensure that all transactions include safeguards for federal human rights obligations through a human rights due diligence process applied to all land transactions and all activities of state-owned enterprises.[149] The federal government and the Advocate should monitor any disputes that arise between third party occupants and encampment residents and take a leadership role in ensuring that parties comply with human rights obligations. Where other levels of government are occupants of federal lands, they should be subject to mandatory conditions to uphold their own human rights obligations, consistent with the NHSA and the Charter.

The Advocate should review applicable regulatory frameworks, policy instruments, and practice guidelines for different types of federal lands and land transactions to ensure compliance with the progressive realization of the right to housing, including but not limited to the prohibition of forced evictions and requirements for meaningful engagement with residents of encampments.

No Forced Evictions on Federal Lands

A particularly important area for review is the practice of evicting encampment residents from state-owned property and the use of trespass laws to criminalize or penalize unhoused people. Forced evictions of informal settlements are clearly and expressly

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[148] *NHSA, supra* note 9, ss 13(d), (g), (h).

[149] OECD, *OECD Guidelines on Corporate Governance of State-Owned Enterprises* (Paris: OECD, 2015) <https://doi.org/10.1787/9789264244160-en>. State-owned enterprises are business enterprises in which the state holds ownership or control over the business rather than a private corporation and, thus, the state is the beneficial owner.

prohibited under international law. Article 17 of the *International Covenant on Economic, Social, and Cultural Rights* declares that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, [or] home."[150] This is not limited to formal settlements.

Further, given the disproportionate representation of Indigenous people in encampments, evictions may violate both domestic and international protections for Indigenous rights. In the context of the link between homelessness and community disconnection noted by Thistle and others, forced evictions are also likely to exacerbate displacement for Indigenous people who have found supports and a sense of community within encampments. While urban Indigenous people may or may not be residing within their home territory, whether as defined by Indigenous Nations themselves or in the sense of territorially based Section 35 treaty and Aboriginal title claims, the right to self-determination applies to urban Indigenous people and communities.[151] Article 7 of UNDRIP protects the right to life, physical and mental integrity, liberty, and security of the person, which is a right Canadian courts have recognized as engaged by encampment evictions. Further, Indigenous Nations must be consulted regarding housing and homelessness policy within their territory, including responses to encampments.

Notably, the then UN Special Rapporteur on the right to adequate housing called on member states to end evictions of informal settlements at the start of COVID-19 and instead to create emergency plans to assist encampment residents.[152] The federal government has not done so, even with respect to federal property. Recent decisions about federal lands demonstrate that a trespass and exclusion framework is still being relied upon by federal actors. The Advocate should ensure the federal government develops a human rights-based plan for encampments on federal lands and take a leadership role in ensuring other levels of government do so as well. Part of such plans must be the provision of services and supports to meet the basic needs of encampment residents. The Advocate should consult with people with lived experience about how to address issues including but not limited to access to drinking water, sanitation, electricity, safe heating options, and social supports and services, including culturally appropriate services and supports for Indigenous people and accessible services and supports for people with disabilities.

Meaningful Engagement on Federal Lands

Positive obligations in responding to encampments on public lands include meaningful engagement with residents. Notably, the recent decision in *Bamberger v. Vancouver (Board of Parks and Recreation)* expressly notes the very different interests at stake for

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[150] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights, 16 December 1966, A/RES/2200*.

[151] *Misquadis, supra* note 143; *Ardoch, supra* note 143 at para 36.

[152] UNGA, Adequate housing as a component of the right to an adequate standard of living, 75th Sess, UN Doc A/75/148 (27 July 2020).

encampment residents and other park users and the "particular impact" of evictions on those living in the encampment. This is found to attract the right to notice and an opportunity to be heard before being ordered to leave the public property.[153] This is consistent with interpretations of meaningful engagement, part of the reasonableness analysis in international case law on the right to housing,[154] and also with participatory alternatives to mechanisms implemented under the NHSA. However, it will be important to advocate for a robust framework for meaningful engagement and resist its narrowing to purely procedurally focused analysis, such as the duty of procedural fairness in Canadian administrative law. As Bruce Porter notes, meaningful engagement requires "actual partnership in decision-making" and requires a process to "achieve compliance with the right to housing."[155] The Advocate is well placed to lead this discussion and ensure a participatory process informs the analysis of the meaning, content, and form of meaningful engagement, in light of best practices internationally.[156] This should be directly applied in the context of federal lands, but can also provide a national standard for all levels of government responding to encampments. As noted above, this has particular significance in the context of legal duties to consult and accommodate Indigenous Peoples, and meaningful engagement should be defined with and by Indigenous Peoples.

Third-Party Occupiers on Federal Lands

Federal lands leased or licenced to third parties will also be defined by the terms of the instrument, such as a lease agreement. Under the NHSA, the Advocate can recommend and inform a human rights due diligence process for federal real estate transactions, as discussed below. This should be developed through a participatory process inclusive of people with lived experience of encampments and homelessness. As with a policy review, this process should address not only freedom from government violations of human rights through evictions but also positive obligations the government might have which would impact the third party's activities. Special attention should be paid to situations in which federal lands are leased to other levels of government due to the potential for jurisdictional arguments that impede the protection of encampment residents on federal lands.

Human Rights Due Diligence in Federal Land Transactions

One of the ten components of the domestic right-to-housing strategies set out by the UN Special Rapporteur on the right to adequate housing is a requirement that private actors

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[153] *Bamberger*, *supra* note 39.

[154] See note 52.

[155] Bruce Porter, "Implementing the Right to Adequate Housing Under the National Housing Strategy Act: The International Human Rights Framework" (March 2021) at 43–44, online (pdf): <www.socialrights.ca/2021/Porter%20-%20NHSA%20&%20IHRL.pdf> [*Porter*].

[156] *NHSA, supra* note 9, ss 13 (c), (d), (e).

both protect and fulfill the right to housing.[157] Further, the UN working group on the issue of human rights, transnational corporations, and other business enterprises has called on states to take "additional steps to protect against human rights abuses by business enterprises" they own or control.[158] The state should act as a role model, lead by example, and take necessary steps to ensure respect for human rights. The working group suggests that state-owned enterprises establish and monitor explicit human rights targets, akin to the type of sustainability targets already established in many jurisdictions.[159] This should include protecting the security of tenure of all residents, including those living in encampments without formally recognized tenure.

In addition to building regulatory frameworks and enforcement mechanisms to protect human rights and encourage compliance by private actors, the *United Nations Guiding Principles on Business and Human Rights* require states to take additional steps to protect against human rights abuses where the state is engaged in business transactions, such as where a state is a lessor.[160] These include human rights due diligence and the incorporation of contractual terms regarding the protection of human rights. While a detailed discussion of human rights due diligence is beyond the scope of this brief report, it generally refers to processes that all business enterprises should undertake to identify, prevent, mitigate, and account for potential and actual impacts on human rights caused by or contributed to through their own activities, or directly linked to their operations, products, or services by their business relationships.[161] Thus, while the federal government cannot infringe on the exclusive possession of a lessee, they could require human rights due diligence for parties to property transactions on relevant federal lands, such as lands with vacant lots, lands to be used for parklands or green space, and bridges, roadways, and railway lands. Article 6 specifically sets out that states should promote respect for human rights with third parties involved in commercial transactions.[162] While the role of human rights due diligence in domestic law is controversial, a 2018 United Nations Human Rights Council working group assessed Canada's efforts to prevent, mitigate, and address the adverse human rights impact of business-related activities, at the invitation of the government.[163] While the resulting report was focused on human

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[157] UNHRC, 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, UNBHCR, 37th Sess, UN Doc A/HRC/37/53 (15 January 2018).

[158] UNHRC, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy" Framework, 11th Sess, Supp No 4, UN HR/Pub/11/04 (2011) [UN Guiding Principles].

[159] UNHRC, Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises on its Mission to Canada, 38th Sess, Supp No 48, UN Doc A/HRC/38/48/Add.1 (22 April 2018) [UN Working Group 2018].

[160] *UN Guiding Principles, supra* note 158, art 4, 5.

[161] *Ibid*.

[162] *Ibid*, art 6.

[163] *UN Working Group 2018, supra* note 159 at 3.

rights abuses in foreign jurisdictions, it noted "a low level of awareness among government officials, the private sector and State-owned enterprises" of their "respective duties and responsibilities under the *Guiding Principles on Business and Human Rights*."[164] The recommendations include ensuring state-owned enterprises or crown corporations respect the Guiding Principles, especially principles 4 and 6, and encouraging Canadian businesses within Canada to improve human rights by applying the Guiding Principles, including by establishing meaningful stakeholder engagement processes and human rights due diligence.[165] Notably, the report specifically commented on the importance of ensuring compliance with protections for the rights of Indigenous Peoples in Canada.

The incorporation of human rights due diligence is particularly important, but also uniquely possible, where both parties to a lease (or another contract for property interests) are levels of government, such as the lease of federal land for parks by municipalities at issue in *Bamberger*. In this case, both parties are expressly bound by human rights obligations with respect to the treatment of encampment residents and unhoused people. Transactions should reflect the best practices both parties have committed to under domestic and international human rights law, including the standards set out above.

Further research about human rights due diligence requirements with respect to the sale of federal land is suggested. While the government cannot bind future owners as to the use of the land as they no longer have any interest in the land, human rights due diligence could inform the decision-making processes about whether and how to sell federal lands, including whether the land is to be sold for the development of affordable or social housing. Any post-sale limitations and restrictions would be through zoning and planning regulation, which is an area of provincial and often municipal responsibility. Thus, consideration of existing land-use controls, restrictions, and permissions for residential use and types of housing could be a consideration prior to the sale of federal lands. Further, where land is to be sold to a third party for these purposes, there may be opportunities for the federal government to apply for and obtain necessary permissions and approvals to ensure the land can be used for the intended purpose of the sale.

Federal Funding: Conditions for Housing and Homelessness Transfers

The primary role of the federal government with respect to Indigenous homelessness is as a funder, largely through the Reaching Home program. The 2021 House of Commons committee report, based on evidence about the benefits and shortcomings of the program, recommended a review of access to the funds and a shift to a national Indigenous housing organization led by Indigenous people, communities, service providers, and housing agencies.[166] The Advocate is well positioned to play a role in a review process under Section 13 and ensure it is developed through a participatory and Indigenous-led process.

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[164] *Ibid* at 4.

[165] *Ibid*.

[166] Indigenous Housing: The Direction Home, *supra* note 71 at 79–80.

The federal government's significant role in funding Indigenous housing on and off reserve is directly linked to the gaps and failures in Indigenous housing policy that lead to Indigenous homelessness. The Advocate can make inquiries and recommendations about these funding agreements to ensure they are NHSA and UNDRIP compliant and meaningfully uphold the right to self-determination. The Advocate can also make recommendations about appropriate conditions on any funding, such as those discussed below, and assess the adequacy of existing commitments.

Funding to other levels of government should be conditional on prohibitions of forced encampment evictions and of laws and policies that criminalize or penalize encampment residents in the funded jurisdiction. This will contribute to strengthening the security of tenure of people without formally recognized property rights. Further, agreements could contain a range of conditions to ensure NHSA and UNDRIP compliance with respect to encampments and people experiencing homelessness. These could include requirements for basic services for encampment residents, as required under international law. Funding transfers to other levels of government could have conditions about culturally appropriate housing options and shelter services for Indigenous people and require Indigenous housing initiatives to be Indigenous-led (as defined by Indigenous Peoples themselves) and accountable to Indigenous Peoples.

Litigation About Encampments: Advocacy in the Courts

Federal interests in encampments on federal lands could also inform a practice of intervention in litigation about encampments. Bruce Porter has suggested two roles for the Advocate that are highly relevant to this context. First, they could call for a review of federal litigation strategies in cases related to housing and homelessness, which should include issues related to encampments. Second, where litigation arises, the Advocate could take on an *amicus* role to inform the analysis from a human rights perspective, particularly on the right to housing, and to advocate for attention to systemic issues, including appropriate remedies.[167] While this role has particular relevance in the context of litigation about federal lands, such as *Brett* or *Bamberger*, it would not necessarily be limited to such cases. Given the systemic issues at play in encampment litigation more broadly, the Advocate might have a role in those matters to ensure they are informed by the NHSA and international human rights law. Overall, the case law does not demonstrate that judges have a strong understanding of the nature of public property, the right to housing (including its intersection with a range of Charter-protected rights), and the importance of systemic remedies for housing-related issues. Indeed, as discussed above, federal lands have been the site of evictions during the COVID-19 pandemic. Yet, apart from the Port Authority, no federal government department or body took part in the litigation process in these cases.

Given recent or ongoing cases in which Indigenous homelessness and representation in encampments are directly raised, the Advocate should research and clarify the systemic issues related to the disproportionate representation of Indigenous people in

[167] *Porter, supra* note 155.

encampments and discriminatory conditions in shelter services, which may lead to a Section 15 claim. Any such research and recommendations should be informed by the right of urban Indigenous people to self-determination, which is currently underexamined in both scholarship and case law.

Indigenous Homelessness as a Systemic Issue

The Advocate is empowered to "initiate studies … into economic, institutional or industry conditions" in relation to federal parliamentary jurisdiction and to submit a report to the Minister on matters within federal jurisdiction.[168] However, the mandate to provide advice under Section 13(g) of the NHSA is not limited to federal jurisdiction, and this provides an important opening to ensure advice can address the systemic aspects of Indigenous homelessness, without being limited by narrow jurisdictional concerns. Crucially, advice can define areas in which the federal government may not have jurisdiction, but on which it can and should take a leadership role through funding conditions, policy coordination, and other interjurisdictional initiatives.

Indigenous homelessness is clearly a systemic issue in need of a systemic response. Given the broader context of Indigenous homelessness noted by Thistle and others, research and recommendations related to Indigenous homelessness are best situated as part of a broader, holistic approach to Indigenous housing issues that is developed in collaboration and consultation with Indigenous partners under the Advocate's Section 13 powers. Section 13(c) provides for research on systemic housing issues and specifically notes barriers faced by vulnerable groups. The Advocate is empowered to consult with Indigenous people, as well as Indigenous organizations, on systemic housing issues.[169] Submissions to the Advocate can lead to a review of any systemic housing issue, not limited to only those matters under federal jurisdiction. Notably, the Advocate can request a review panel for systemic issues within federal jurisdiction even where there has been no submission.[170] Thus, there are a number of avenues through which the Advocate can initiate research, engage with Indigenous communities and organizations, and make recommendations to Parliament regarding Indigenous homelessness.

Federal Indigenous Housing Strategy

Section 13(a) provides a specific mandate for the Advocate to "monitor the implementation of the housing policy and assess its impact on people who are members of vulnerable groups." Thus, the Advocate should have a role in informing both the process and the content of any Indigenous housing strategy, in partnership with Indigenous communities, governments, organizations, and individuals with lived experience, including monitoring the process to ensure progress is made.

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[168] *NHSA, supra* note 9, s 13(d), (h).

[169] *NHSA, supra* note 9, s 13 (e) (f).

[170] *Ibid*, s 13.2(1).

The 2021 House of Commons committee report not only recommended "sustained progress towards to the development of an urban, rural, and northern Indigenous housing strategy," it noted that the strategy is an opportunity for federal leadership and intergovernmental collaboration and coordination. Further, it noted that this initiative should be led by Indigenous Peoples.[171] The Advocate is well placed to advise the government on this and to facilitate and support an Indigenous-led participatory process.

Taking a Rights-Based Approach to Indigenous Homelessness

As noted above, the federal government has consistently taken the position that Indigenous housing is a matter of policy and not a right. This has laid the foundation for the failure to meaningfully support Indigenous self-determination in relation to housing. However, Indigenous Peoples have long asserted the right to housing as part of the nation-to-nation relationship, as recognized by the RCAP report. Moving forward, federal Indigenous housing policy should be grounded in a renewed relationship consistent with a rights-based approach and informed by the interrelated commitments in the NHSA and the UNDRIP to self-determination and the right to housing. Indeed, the UNDRIP Implementation Act requires the NHSA to comply with the UNDRIP once the process and framework to do so are in place.

The Advocate should initiate research to clarify the specific constitutional, treaty, and nation-to-nation obligations of the federal government to address Indigenous housing need and homelessness in light of the intersection of the NHSA and the UNDRIP, in accordance with Indigenous laws and protocols. This work should be undertaken through a participatory process and guided by Indigenous laws and protocols, which the Advocate is empowered to do under Section 13 of the NHSA.[172] While the specifics of the content and format of this work must be defined by Indigenous Peoples, it could include working with particular Nations to clarify duties arising under specific treaties, territorial relationships, and urban Indigenous relations, as well as considering how the NHSA should broadly inform the federal government's position on the right to housing for Indigenous Peoples, on and off reserve, in rural, urban, and remote communities. It can address how to best support ongoing work by Indigenous Nations and organizations to address housing needs and homelessness holistically and realize self-determination with respect to housing.[173]

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[171] *Indigenous Housing: The Direction Home, supra* note 72 at 60.

[172] See for example, the Home in the City Project: homeinthecityproject.wordpress.com/about/.

[173] See for example, Yunesîit'in Housing Ecosystem Overview and Strategy Development (2020), online (pdf): ecotrust.ca/wp-content/uploads/2021/02/YunesitinHousingEcosytemReport_November2020_Final_WEB.pdf.