



The Right to Counsel for Tenants Facing Eviction: Security of Tenure in Canada

Sarah Buhler, March 10, 2022

Office of the Federal Housing Advocate, Canadian Human Rights Commission

344 Slater Street, 8th Floor, Ottawa, Ontario K1A 1E1

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

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INTRODUCTION

Stable and secure housing is foundational to human life and flourishing. This is why security of tenure is an essential component of the right to housing in international human rights law. Eviction cuts to the heart of security of tenure and unleashes far-reaching harms for tenants, including the destruction of relationships, disruption of schooling and employment, and negative physical and mental health outcomes.¹ Eviction can also lead to homelessness. It is unsurprising, then, that international human rights law establishes that evictions should only occur as a last resort, only after a full exploration of alternatives, and only following a fair legal process.² In other words, the human right to security of tenure requires access to justice, including access to “fair hearings and effective remedies.”³ Indeed, the United Nations Special Rapporteur on the Right to Adequate Housing stated that “access to justice for the right to housing is inseparable from the right itself.”⁴

Canadian provincial and territorial residential tenancy laws officially prohibit arbitrary evictions and provide systems for the adjudication of evictions. However, as the UN Special Rapporteur on Extreme Poverty and Human Rights has noted, simply “guaranteeing *de jure* access to judicial and adjudicatory mechanisms is not sufficient to ensure that all individuals have *de facto* access to justice.”⁵ This observation rings true in Canada, where, as Bruce Porter has written, legal processes relating to eviction are often “reduced to procedures designed for expeditious eviction for landlords.”⁶ Tenants in Canada are routinely evicted without a full and fair legal process, and eviction adjudicators too often ignore human rights and other legal considerations. Changes to

¹ The impacts of eviction are discussed below.

² See UN Office of the High Commissioner for Human Rights (OHCHR), *Fact Sheet No. 21, The Human Right to Adequate Housing*, November 2009, Fact Sheet No. 21/Rev.1 at 5. Available at: <https://www.refworld.org/docid/479477400.html>

³ UN General Assembly Human Rights Council, *Access to Justice for the Right to Housing: 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*, 15 January 2019, A/HRC/40/61 at 4. Available at: <http://unhousingrapp.org/user/pages/04.resources/Access%20to%20justice%20Report.pdf>

⁴ *Ibid* at 18.

⁵ UN General Assembly, *Report of the Special Rapporteur on Extreme Poverty and Human Rights*, 9 August 2012, A/67/278, available at: <https://digitallibrary.un.org/record/734338?ln=en> at 5 [accessed on March 11, 2022].

⁶ Bruce Porter, “Homelessness, Human Rights, Litigation and Law Reform: A View from Canada” (2004) 10 *Australian J of Human Rights*. Available at: <https://www8.austlii.edu.au/cgi-bin/viewdoc/au/journals/AJHR/2004/7.html>.

eviction hearing processes made in response to the COVID-19 pandemic have further exacerbated access to justice problems for many tenants.⁷

This report argues that governments can advance security of tenure by ensuring that vulnerable tenants facing eviction have access to legal representation. Research has strongly established that legal representation significantly reduces eviction rates and is associated with other benefits for tenants and society. Legal representation for tenants facing eviction will save tenancies, promote dignity and equality, and animate the human right to housing. The report proceeds as follows. It first provides background information and definitions. It discusses research about the devastating impacts of eviction on tenants, with a focus on how the COVID-19 pandemic has worsened these impacts. It then turns to a discussion about the access to justice landscape for tenants facing eviction in Canada. The report then describes the research that establishes that legal representation reduces eviction rates and provides other benefits to vulnerable tenants and to society. It then considers international human rights, establishing that access to legal assistance for vulnerable tenants facing evictions is a component of the right to housing within international human rights jurisprudence and commentary. The next section discusses constitutional principles and values that support the proposition that governments have a responsibility to ensure that vulnerable tenants facing eviction have access to legal assistance. Throughout, the paper draws on quotes and observations by people with lived experience of housing precarity and eviction.

EVICTION: DEFINITIONS, CONTEXTS, IMPACTS

DEFINITIONS: FORMAL AND INFORMAL EVICTION

Evictions can be “formal” or “informal.” It is likely that most evictions are “informal,” meaning that the tenant is evicted outside of the formal legal process.⁸ That is, informal evictions involve tenants moving out before a formal legal process is initiated or completed. Zell and McCullough explain that informal evictions include situations where tenants leave their housing “following a range of actions, from a simple landlord request that a tenant vacate their unit to actions by a landlord that effectively force a tenant to

⁷ See, for example, Advocacy Centre for Tenants Ontario, “Digital Evictions: the Landlord and Tenant Board’s Experiment in Online Hearings” (Advocacy Centre for Tenants Ontario). Available at: <https://www.acto.ca/production/wp-content/uploads/2021/06/Digital-Evictions-ACTO.pdf> [accessed March 11, 2022].

⁸ Sarah Zell & Scott McCullough, “Housing Research Report: Evictions and Eviction Prevention in Canada” (Winnipeg: University of Winnipeg, 2020) at iii.

leave.”⁹ These landlord actions can include things like unaffordable rent increases, harassment, and illegal lock changes.¹⁰

In contrast, formal evictions are evictions that are enacted through a legal process, involving a landlord making an application to an administrative tribunal or court and a decision maker issuing an enforceable eviction order. Although there is still little comprehensive data on evictions in Canada, it seems clear from existing research and widespread experience that the formal eviction system typically works in landlords’ favour. For example, the Ontario Landlord and Tenant Board has been referred to as an “eviction factory”¹¹ and an “eviction machine.”¹² A recent Saskatchewan study showed that landlords were successful in receiving eviction orders in over 90% of cases.¹³ The COVID-19 pandemic added additional barriers for many tenants with the move of many tribunals to online hearings. For example, an Ontario study showed that the move to an online hearing system during the COVID-19 pandemic created barriers for tenants, who were often unable to access their online hearings.¹⁴ This paper will elaborate further on formal evictions and the operation of the residential tenancies legal system below.

It is important to emphasize that what happens in the formal legal system influences informal evictions that happen outside the purview of the formal system. Because tenants know that the formal system typically works in landlords’ favour, many simply give up or move out before the formal system can adjudicate their case.¹⁵ As one tenant in Saskatchewan stated, “As soon as I get an eviction notice... I’m already packing.”¹⁶ Thus, informal and formal evictions are interconnected: when landlords’ power goes

⁹ *Ibid* at iii-iv.

¹⁰ *Ibid* at v.

¹¹ Tom Cardoso & Shane Dingman, “Eviction Factories: How Ontario’s Tenants Get Trapped in a Never-ending Cycle with Landlords” (Globe and Mail, December 19, 2019). Available online: <https://www.theglobeandmail.com/canada/toronto/article-toronto-ontario-housing-rental-eviction-data-landlords-tenants/>

¹² Ron Ellis, *Unjust by Design: Canada’s Administrative Justice System* (Vancouver: UBC Press, 2013) at 107.

¹³ Sarah Buhler, “Pandemic Evictions: An Analysis of the 2020 Eviction Decisions of Saskatchewan’s Office of Residential Tenancies.” (2021) 35 J of L and Soc Policy 68 at 83.

¹⁴ Advocacy Centre for Tenants Ontario, *supra* note 7.

¹⁵ See discussion in Emily Paradis & Tracy Heffernan, “Preventing Homelessness by Preventing Eviction” (Homeless Hub, 24 November 2016). Available online: <https://www.homelesshub.ca/blog/preventing-homelessness-preventing-eviction>.

¹⁶ Sarah Buhler & Rachel Tang, “Navigating Power and Claiming Justice: Tenant Experiences at Saskatchewan’s Housing Law Tribunal” (2019) 36 Windsor YB Access Just 210 at 216.

unchecked in the formal system, tenants are more likely to be vulnerable to informal and illegal evictions.¹⁷

CONTEXT: LANDLORD POWER AND TENANT VULNERABILITY

Both formal and informal evictions are enacted within a context characterized by a fundamental power imbalance. By definition, all landlords are property owners. Most wield much greater economic, social, and political capital than their tenants.¹⁸ Most benefit from societal norms that tend to position property owners as being more desirable citizens than those who do not own property.¹⁹ In this era of the deep financialization of rental housing, more and more landlords are large corporations making significant profits.²⁰ The financialization of housing is implicated in rising costs of housing and the corresponding affordability crisis and growing vulnerability of many tenants.²¹ Compounding this situation even further, many tenants find themselves in increasingly precarious situations as a result of the COVID-19 pandemic.²²

The power imbalance described above can lead to exploitation. Research studies, task force reports, and the lived experience of tenants underscores this point. For example, British Columbia's Rental Housing Task Force reported that the problem of "difficult and abusive" landlords was one of the top issues facing tenants in cities across that province.²³ In another example, a report by the Saskatchewan Human Rights Commission documented tenant stories about discrimination and harassment by landlords or their agents.²⁴ Tenants reported fearing retaliation by landlords if they tried to assert their rights.²⁵

Eviction is perhaps the most potent symbol of the asymmetrical relationship between landlords and tenants. Property law scholar A. J. van der Walt states that the "most

¹⁷ See discussion of this phenomenon in Buhler, *supra* note 13 at 74.

¹⁸ See Buhler, *supra* note 13 at 73.

¹⁹ See generally, Emma R Power & Charles Gillon "Performing the 'Good Tenant'" (2020) 35 Housing Studies 1.

²⁰ Zell and McCullough, *supra* note 8 at 7–8.

²¹ *Ibid* at 9.

²² See Brenda Parker & Catherine Leviten-Reid, "Pandemic Precarity and Everyday Disparity: Gendered Housing Needs in North America" (2022) 49 Housing and Society 10.

²³ British Columbia Rental Housing Task Force, "Rental Housing Review: Recommendations and Findings" (2018) at 33. Available online: https://engage.gov.bc.ca/app/uploads/sites/121/2018/12/RHTF-Recommendations-and-WWH-Report_Dec2018_FINAL.pdf

²⁴ Saskatchewan Human Rights Commission, "Access and Equality for Renters in Receipt of Public Assistance: A Report to Stakeholders" (Saskatoon: Saskatchewan Human Rights Commission, May 2018) at 9 and 22.

²⁵ *Ibid* at 14.

striking characteristic of the right to evict is the way in which it illustrates the presumptive power of ownership.”²⁶ Sabbeth explains that the power to evict gives landlords both “physical and psychological power” over their tenants because, “The tenant’s access to a basic necessity of life hinges on the landlord’s willingness to provide it. The landlord controls the tenant’s ability to access her home and reside there in peace and security.”²⁷ Tenants live with a constant awareness of this power, which saturates all aspects of the landlord-tenant relationship. In other words, even the “threat” of eviction can operate to fundamentally affect the landlord-tenant relationship. This is why Garboden and Rosen posit that eviction should therefore be thought of not only as a “moment of expulsion, but also as an ongoing set of relations between landlord and tenant.”²⁸ A tenant in Saskatchewan described the dynamic this way: “[Landlords] really like to push, push their weight around and know that they will get away with it basically.... Because you get fed up with it and then you want to move.”²⁹

Although the landlord-tenant relationship is inherently unequal, the risk of eviction is not distributed equally among tenants. In Canada, the groups most vulnerable to eviction are those who are most likely to experience higher rates of poverty than the general population and those most likely to face discrimination based on intersecting grounds of disadvantage and oppression including race, gender, income, and disability. As reported by Schwan and her co-authors in a recent report,

those living at the cross sections of oppression and discrimination, including Indigenous women, girls, and Two-Spirit people; Black women, trans and gender diverse peoples; persons with disabilities; poor women; 2SLGBTQ+ persons; newcomer women; and older and younger women and gender diverse people ... [are] experiencing some of the worst socio-economic effects and facing unprecedented levels of eviction.³⁰

²⁶ A J van der Walt, “Housing Rights in the Intersection between Expropriation and Eviction Law” in Lorna Fox O’Mahony and James A Sweeney, *The Idea of Home in Law: Displacement and Dispossession* (Farnham, Surrey: Ashgate, 2011) 55 at 55.

²⁷ Kathryn A Sabbeth, “Housing Defense as the New Gideon” (2018) 41 *Harv J of L and Gender* 55 at 99.

²⁸ Philip ME Garboden and Eva Rosen, “Serial Filing: How Landlords Use the Threat of Eviction” (2019) 18 *City & Community* 638. Available online: <https://onlinelibrary.wiley.com/doi/10.1111/cico.12387>

²⁹ Buhler & Tang, *supra* note 16 at 221.

³⁰ Kaitlin Schwan, Mary-Elizabeth Vaccaro, Luke Reid & Nadia Ali, “Implementation of the Right to Housing for Women, Girls, and Gender Diverse People in Canada” (WNHHN, May, 2021) at 15. Available online: <https://housingrights.ca/wp-content/uploads/CHRC-WNHHN-Schwan-4-May-2021.pdf>. See also Scott Leon and James Iveniuk, “Forced Out: Evictions, Race, and Poverty in Toronto” (Wellesley Institute, August, 2020). Available online: <https://www.wellesleyinstitute.com/wp-content/uploads/2020/08/Forced-Out-Evictions-Race-and-Poverty-in-Toronto-.pdf>.

According to an Ontario study by Emily Paradis, most tenants facing eviction were individuals experiencing deep poverty and disability, and people with past experiences of homelessness.³¹ Paradis describes the “astonishing depth of vulnerability” among tenants facing eviction and the intersectional nature of oppression faced by these tenants: more than one third of tenants facing eviction in her study reported that they or someone in their household had a disability, three quarters lived in poverty, half identified as racialized, and one fifth were single parents.³² Furthermore, many tenants had previous negative experiences with the justice system, causing them to be hesitant to interact with it.³³

This section has described the power disparities between landlords and tenants, showing that both formal and informal evictions play out on a deeply uneven field. As sociologist Matthew Desmond pointed out (speaking about the American context but applicable in Canada), “It comes down to a system that provides landlords with a lot of power over low-income tenants.”³⁴ This report argues that legal representation for tenants can help level the playing field. The following section turns to a review of the impacts of eviction on tenants, their families, and their communities.

IMPACTS OF EVICTION

Given the centrality of housing and home to human life, the loss of housing through eviction can have devastating and long-lasting consequences. Research and lived experience have established that eviction can lead to the loss of employment, disruption of schooling, and loss of personal possessions.³⁵ Eviction is associated with specific suffering for children and parents because it can trigger child apprehension proceedings by child welfare officials.³⁶ Eviction can also make it more difficult for tenants to find housing in the future, effectively haunting tenants for years.³⁷ One tenant who shared their experience with Zell and McCullough explained that they were still “living through the ramifications of this [eviction],” months after they had moved.³⁸

³¹ Emily Paradis, “Access to Justice: The Case for Ontario Tenants: Final Report of the Tenant Duty Counsel Review” (Advocacy Centre for Tenants Ontario, October 2016) at 55.

³² *Ibid* at 57.

³³ *Ibid* at 58.

³⁴ Quoted in Kevin Nance, “Matthew Desmond’s ‘Evicted’ Details Costs of Evictions on Milwaukee’s Poor”, *Chicago Tribune* (10 March 2016). Available online: <https://www.chicagotribune.com/lifestyles/books/ct-prj-evicted-matthew-desmond-20160310-story.html>.

³⁵ See Sabbeth, *supra* note 27 at 66.

³⁶ Sabbeth, *supra* note 27 at 67; L Berg & L Brannstrom, “Evicted Children and Subsequent Placement in Out-of-home Care: A Cohort Study” (2018) 13(4) PLOS ONE; Zell and McCullough, *supra* note 8 at 37–38.

³⁷ See Zell and McCollough, *supra* note 8 at 43 (referring to the work of Matthew Desmond).

³⁸ *Supra* note 8 at 79.

Substantial research has established that eviction is associated with negative physical and mental health outcomes for tenants. Eviction is associated with poor self-reported health, higher rates of cardiovascular disease, poor maternal and child health outcomes, and higher mortality rates.³⁹ Research has shown that people who are evicted have higher rates of emergency room visits as compared to members of non-evicted households.⁴⁰ Eviction is also associated with negative mental health outcomes for those who experience it, including depression, anxiety, psychological distress, and suicide.⁴¹ In a recent Canadian study, tenants speaking about their experience of eviction used the language of trauma to describe their experience, attributing anxiety, fear, feelings of loss, and depression to their eviction.⁴² Of course, eviction can also lead to homelessness, with all its attendant harms.⁴³

Eviction also impacts communities more broadly. Kathryn Sabbeth writes that the “impacts [of eviction] on health, education, employment, and economic security reverberate throughout the community.”⁴⁴ Neighbourhoods with high eviction rates can be detrimentally impacted in terms of community cohesion.⁴⁵ Eviction is associated with high health and other public expenditures.⁴⁶ In sum, eviction is damaging and costly to those who experience it (keeping in mind that those targeted with eviction most often are those who are members of communities already facing multiple and intersecting oppressions) and to the community as a whole.

The COVID-19 pandemic compounded the harms facing tenants who experienced eviction. Research has shown that tenants who were evicted during the pandemic faced

³⁹Hugo Vasquez-Vera et al, “The Threat of Home Eviction and Its Effects on Health through the Equity Lens: A Systemic Review” (2017) 175 *Social Science & Medicine* 199; Gracie Himmelstein & Matthew Desmond, “Eviction and Health: A Vicious Cycle Exacerbated by a Pandemic” (*Health Affairs*, April 1, 2021), available online: <https://www.healthaffairs.org/doi/10.1377/hpb20210315.747908/full/>; Joey Dobson, “Housing Is Healthcare: How Preventing Evictions Keeps People Alive” (2021) 90 *Hennepin Law* 13.

⁴⁰ Robert Collinson & Davin Reed, “The Effects of Eviction on Low-Income Households” (*NYU Law*) at 25–26. Available online at https://www.law.nyu.edu/sites/default/files/upload_documents/evictions_collinson_reed.pdf.

⁴¹ *Ibid.*

⁴² Zell & McCullough, *supra* note 8 at 102.

⁴³ Paradis & Heffernan, *supra* note 15.

⁴⁴ *Supra* note 27 at 69.

⁴⁵ *Ibid* at 87.

⁴⁶ *Ibid* at 68–69. See also Canadian Forum on Civil Justice, “The Cost of Experiencing Everyday Legal Problems Relating to Loss of Employment and Loss of Housing” (Toronto: Canadian Forum on Civil Justice, 2017).

higher risks of contracting the virus as compared to the general population.⁴⁷ This is because tenants who were evicted during the pandemic were less likely to be able to self-isolate or practice social distancing, and were more likely to find themselves couchsurfing, moving into crowded situations, or becoming homeless.⁴⁸ Scientific modelling shows that higher eviction rates lead to a greater risk of transmission of COVID across the population as a whole.⁴⁹ These realities led public health experts and advocates to call for eviction prevention as a critical component of mitigating the spread of COVID-19.⁵⁰ The United Nations Special Rapporteur on the Right to Adequate Housing summed it up as follows: “Home has rarely been more of a life or death situation.”⁵¹

EVICTION LAW SYSTEMS AND ACCESS TO JUSTICE IN FORMAL EVICTION PROCEEDINGS : THE LANDSCAPE IN CANADA

EVICTION LAWS AND PROCEDURES

This paper defines “eviction law systems” as comprising the legislation and policies that set out provincial and territorial frameworks for eviction and the courts and tribunals that adjudicate eviction applications. Housing is an area of provincial and territorial jurisdiction, and each province and territory has enacted laws to regulate landlord-tenant relationships, including evictions. While each jurisdiction takes a slightly different approach when it comes to the details of eviction law and procedures, it is possible to make some general observations about the way the systems work across Canada.

As noted, all jurisdictions have enacted residential tenancy legislation to regulate evictions. This legislation always defines the circumstances that justify landlord applications to evict tenants, including for late or nonpayment of rent, tenant

⁴⁷ See Yael Cannon, “Injustice Is an Underlying Condition” (2020) 6 U Pennsylvania J L & Public Affairs 201 at 240–242; Emily Benfer et al, “Eviction, Health Inequality, and the Spread of Covid-19: Housing Policy as a Primary Mitigation Strategy for Covid-19” (2021) 98 J Urb Health 1.

⁴⁸ See Himmelstein and Desmond, *supra* note 39.

⁴⁹ Anjalika Nande et al, “The Effect of Eviction Moratoria on the Transmission of SARS-CoV-2” MedRxiv (January 19, 2021), available online: <https://www.medrxiv.org/content/10.1101/2020.10.27.20220897v2>.

⁵⁰ See Benfer et al, *supra* note 47 at 2; Nicoletta Lanese, “Evictions Would Raise COVID-19 Risk for Everyone” Live Science (10 November 2020). Available online: <https://www.livescience.com/eviction-moratoriums-coronavirus-spread.html>.

⁵¹ United Nations Human Rights Office of the High Commissioner, “‘Housing, the Front Line Defence Against the COVID-19 Outbreak,’ Says UN Expert,” United Nations Human Rights Office of the High Commissioner (18 March, 2020). Available online: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25727&LangID=E>.

behaviours, or landlord applications to remove the tenant due to the landlord's desire to renovate or use the property.⁵² In some jurisdictions, legislation requires that decision makers consider the fairness of the eviction beyond merely determining whether technical requirements have been met.⁵³

The legislation in each jurisdiction also creates a process that landlords can use to seek the eviction of tenants. Typically, this process mandates that the landlord give notice to the tenant and provides for a dispute resolution process or a formal hearing wherein an independent adjudicator can determine the legality and fairness of the eviction. These processes are designed to meet administrative law requirements of natural justice and procedural fairness. This typically means that landlords and tenants have the right to present their cases to an independent, impartial decision maker, to test the evidence of the opposing party, and to receive a fair decision (usually in writing). Most include a limited right of review or appeal to a higher-level decision maker.⁵⁴

Eviction law is sometimes considered to be a realm of “non-complex” administrative law. Indeed, the administrative tribunals that handle eviction applications are designed to provide efficient and accessible resolution to housing-related disputes. However, it is important to keep in mind how deeply consequential the outcomes of eviction hearings are for tenants and their families and to consider that hearings may require the presentation and testing of evidence as well as the interpretation and application of legal principles (including legislation, regulations, and case law) to individual circumstances. From the point of view of many tenants, the process is daunting and intimidating (this is discussed further below). As Lorne Sossin points out, “The rule of law is no less significant in an administrative hearing room ... than in a courtroom, and arguably ... it may be more so.”⁵⁵

LANDLORDS' ACCESS TO JUSTICE IN EVICTION MATTERS

Some landlords are “mom and pop”-type operations, where an individual or family rents out a basement suite or revenue property to earn some modest income. Some of these landlords may struggle to navigate the eviction law system. However, as noted above, landlords in Canada are increasingly large corporate landlords that are focused on

⁵² See, for example: *Residential Tenancies Act*, [SBC 2002] C78; *Residential Tenancies Act*, RSNWT (Nu) 1988, c.R-5; *Residential Tenancies Act, 2006*, SO, c17; *Rental of Residential Property Act*, RSPEI 1988, CR-13.1; *Residential Landlord and Tenant Act*, SY 2021, c.20; *Residential Tenancies Act*, AL 2004, cR-17.1.

⁵³ See *Residential Tenancies Act, 2006*, Ch R-22.001 of the *Statutes of Saskatchewan, 2006*, s.70(6).

⁵⁴ See for example, *Residential Tenancies Act, 2006*, CH R-22.001 of the *Statutes of Saskatchewan, 2006*, s.72; *Residential Tenancies Act*, AL 2004 CR-17.1, s.53.

⁵⁵ Lorne Sossin, “Access to Administrative Justice and Other Worries” in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context (2nd edition)* (Toronto: Emond Montgomery Press, 2012) at 211–212.

making profits through the financialization of rental housing.⁵⁶ In Saskatchewan, for example, most eviction applications in 2020 were brought by corporate landlords.⁵⁷ Because of the high rates of financialization of housing across the country, it is reasonable to conclude that corporate landlords are major players in the eviction system throughout Canada.

In some jurisdictions (Ontario, for example), landlords are often represented by lawyers or paralegals in eviction processes.⁵⁸ In others, such as Saskatchewan, landlords are rarely represented by legal counsel but are often represented by agents who have experience before the tribunal.⁵⁹ Regardless of whether landlords have legal representation, the fact that many are repeat players gives them advantages, including knowledge of the system, credibility, and informal relationships with decision makers and tribunal staff.⁶⁰ Further, as described earlier in this paper, landlords tend to come to the tribunal with economic, social, and political capital and the benefits of societal attitudes that deem property owners to be responsible and desirable citizens. As Engler found in his American-based research, these compounding systemic factors tip outcomes in favour of landlords in eviction proceedings regardless of whether landlords are represented by lawyers.⁶¹

American research has shown that housing courts too often show systemic bias in favour of landlords and, in fact, may amplify the power differential between landlords and tenants. There are multiple explanations for this phenomenon. First, as Sabbeth points out, eviction decision makers are familiar with applying the law as presented by landlords and their representatives; in contrast, many decision makers “appear unfamiliar with the rights of tenants, even those laid out in the plain language of governing statutes.”⁶² According to Jessica Steinberg, a passive approach to adjudication can lead to “systemic partiality towards represented, or more skilled,

⁵⁶ See discussion in Zell & McCullough, *supra* note 8 at 7–8.

⁵⁷ Buhler, *supra* note 13 at 94.

⁵⁸ See Advocacy Centre for Tenants Ontario, *supra* note 7; and see David Wiseman, “Paralegals and Access to Justice for Tenants: a Case Study” in Trevor CW Farrow and Lesley A Jacobs, eds., *The Justice Crisis: the Cost and Value of Accessing Law* (Vancouver: UBC Press, 2020) 173.

⁵⁹ This is the case in Saskatchewan where a review of decisions of the Office of Residential Tenancies (Saskatchewan’s residential tenancies tribunal) shows that most corporate landlords are not represented by lawyers but instead are represented by experienced agents.

⁶⁰ See Sabbeth, *supra* note 27 at 78; and Marc Galanter, “Why the ‘Haves’ Come out Ahead: Speculation on the Limits of Legal Change” (1974) 9 *Law and Soc Pol Rev* 95 at 114, 119.

⁶¹ Russell Engler, “Connecting Self-Representation to Civil Gideon: What Existing Data Reveal about When Counsel is Most Needed” (2010) 37 *Fordham Urban LJ* 37 at 48.

⁶² *Supra* note 27 at 78.

parties.”⁶³ In an influential early study, Barbara Bezdek showed that housing court judges often did not require landlords to prove the elements of their case, sometimes eliciting information necessary to find in the landlord’s favour without doing the same for tenants.⁶⁴ In this way, Bezdek showed that tenants’ voices and stories were subordinated, while housing courts delivered the rights of landlords “with smooth and speedy dispatch.”⁶⁵ Subsequent researchers confirmed that housing judges tended to engage in practices that effectively silence tenants in an effort to find in favour of landlords.⁶⁶ Furthermore, the speed at which eviction processes take place is part of the systemic problem for tenants. Kathryn Ramsey Mason notes that the speed of eviction legal processes makes it difficult for tenants to assert their rights.⁶⁷ Engler agrees, noting that where “unrepresented litigants are steamrolled in housing court, slowing down the system is an important goal.”⁶⁸

Although empirical research about the practices of housing tribunals in Canada is limited, the American research described above resonates in our context. A Saskatchewan study showed that many written eviction decisions evidenced a failure to undertake a legislatively required analysis of whether an eviction order would be “just and equitable.”⁶⁹ This study also showed a tendency by eviction decision makers to accept landlord evidence sometimes without apparent need for documentary or other proof and to discount or ignore tenant evidence.⁷⁰

TENANTS’ ACCESS TO JUSTICE IN EVICTION MATTERS

As noted, tenants tend to approach the residential tenancy law system with less power than landlords, and the system is stacked against them in a variety of ways. It is unsurprising then that so many tenants find the prospect of trying to assert their rights in an eviction hearing to be utterly discouraging. A tenant who shared their experiences with Zell and McCullough noted that, “It’s an us versus them mentality in a tribunal. This

⁶³Jessica Steinberg, “Adversary Breakdown and Judicial Role Confusion in ‘Small Case’ Civil Justice” (2016) *BYU Rev* 899 at 957.

⁶⁴ Barbara Bezdek, “Silence in the Court: Participation and Subordination of Poor Tenants’ Voices in Legal Process” (1992) 20 *Hofstra L Rev* 533 at 570.

⁶⁵ *Ibid* at 533, 564.

⁶⁶ See Sabbeth, *supra* note 27 at 79; and Paris Baldacci, “Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating their Cases in New York City’s Housing Court” (2006) 3 *Cardozo Pub L Pol’y and Ethics J* 659 at 661-2.

⁶⁷ Kathryn Ramsey Mason, “Housing Injustice and the Summary Eviction Process: Beyond *Lindsey v Normet*” (2022) 74 *Oklahoma L Rev* 1 at 23.

⁶⁸ Engler, quoted in Kathryn Sabbeth, “Simplicity as Justice” (2018) *Wisconsin L Rev* 287 at 294.

⁶⁹ Buhler, *supra* note 13 at 89.

⁷⁰ *Ibid*.

big, scary, rich-cat landlord is going to say his piece. And then here's little us. We somehow have to go up against that. It's adversarial. It's extremely intimidating."⁷¹ In their research, Paradis and Heffernan spoke to a community worker who explained that the high level of stress experienced by tenants "impedes [tenants'] ability to represent themselves in the intimidating environment" of the hearing.⁷² Zell and McCullough noted that tenants commonly observed that they experienced a "lack of dignified treatment" during the housing tribunal process.⁷³

For the most part, tenants in Canada do not have access to legal assistance or representation for eviction hearings. Ontario has a legal clinic system that provides representation for some tenants across the province.⁷⁴ Ontario also has a duty counsel program that provides some assistance to tenants facing eviction. However, the program rarely provides full representation at eviction hearings and is inconsistent across sites.⁷⁵ Other provinces and territories (including Quebec, Nova Scotia and Manitoba and the Yukon) provide limited legal advice and representation to tenants.⁷⁶ Other jurisdictions, including British Columbia, Alberta, Saskatchewan, British Columbia, New Brunswick, Prince Edward Island, and Newfoundland, do not provide legal representation to tenants through their civil Legal Aid programs.⁷⁷ Non-profit, law school, and community-based clinics and programs operate in some of these jurisdictions in order to try to address the gaps in assistance and advocacy, but these programs are unable to reach large numbers of tenants.⁷⁸ In sum, it seems clear that despite the devastating consequences of eviction, the intimidating legal processes, and the unequal power dynamic between landlords and tenants, most tenants across the country are unable to access legal representation when they are faced with an eviction process.

⁷¹ *Supra* note 8 at 74.

⁷² *Supra* note 15.

⁷³ *Supra* note 8 at 75.

⁷⁴ See Legal Aid Ontario, "Legal Clinics." Available online: <https://www.legalaid.on.ca/services/legal-clinics/>

⁷⁵ Paradis, *supra* note 31 at 54.

⁷⁶ See overview in Standing Committee on Justice and Human Rights, "Access to Justice Part 2 Legal Aid: Report of the Standing Committee on Justice and Human Rights" (House of Commons Canada: October 2017) 32–40. Available online: <https://www.ourcommons.ca/Content/Committee/421/JUST/Reports/RP9186121/justrp06/justrp06-e.pdf>

⁷⁷ *Ibid.*

⁷⁸ See overview of many of these programs at: University of Winnipeg Institute of Urban Studies, "Eviction Prevention Programs, Policies, and Laws in Canada, 2019 (Database)." Available online: <https://www.uwinnipeg.ca/ius/project-archive-by-topic/eviction-prevention.html>.

THE IMPACTS OF LEGAL REPRESENTATION IN EVICTION HEARINGS

The discussion thus far has established that eviction can unleash multiple hardships that affect the health and security of those impacted. It has shown that the tenants who are at highest risk of eviction are those who experience multiple, intersecting forms of oppression and disadvantage. It has further emphasized that vulnerable tenants do not have adequate access to justice in provincial and territorial eviction law systems, while these same systems too often tilt in favour of landlords, who come to the system with pre-existing advantages. In response, this paper argues that the government should fund legal aid representation for vulnerable tenants who face eviction. But what is the evidence that legal representation for tenants would make a difference? This section will canvass the research that shows that legal representation reduces eviction rates and therefore strengthens security of tenure.

Research has consistently shown that legal representation impacts outcomes of all types of legal processes, usually significantly.⁷⁹ In a meta-analysis of dozens of empirical studies, Rebecca Sandefur concluded that “lawyer-represented people are more likely to prevail than people who appear unrepresented, on average.”⁸⁰ A body of mostly American research has focused specifically on the impacts of legal representation in eviction cases. This body of research shows that legal representation has a startling impact on the outcomes of eviction proceedings, establishing that tenants who have lawyers are up to nineteen times more likely to avoid eviction than tenants who are unrepresented.⁸¹ For example, Carroll Seron’s study concluded that twenty-two percent of represented tenants received final judgments against them, as compared to fifty-one percent of tenants without representation.⁸² While fewer studies have been undertaken in Canada, this research resonates in the Canadian context. For example, Emily Paradis

⁷⁹ See for example: Emily S Taylor Poppe and Jeffrey J Rachlinski, “Do Lawyers Matter? The effect of legal representation in civil disputes” (2016) 43 4 Pepp L Rev 881; Sean Rehaag “The Role of Counsel in Canada’s Refugee Determination System: An Empirical Assessment” (2011) 49 Osgoode Hall LJ 71 at 92.

⁸⁰ Rebecca L Sandefur, “The Impact of Counsel: An Analysis of Empirical Evidence” (2010) 9 Seattle Journal for Social Justice 59 at 69.

⁸¹ Russell Engler, *supra* note 61 at 48–49; Marieke Holl et al, “Interventions to Prevent Tenant Evictions: A Systematic Review” (2016) 24 Health, Soc Care Community 532; Erika Peterson, “Building a House for Gideon: The Right to Counsel in Evictions” (2020) 16 Stan JCR & CL 63 at 76–77.

⁸² See Carroll Seron et al., “The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City’s Housing Court: Results of a Randomized Experiment” (2001) 35 Law & Soc’y Rev 419 at 419. See also: D James Greiner, Cassandra Wolos Pattanayak and Jonathan Hennessey, “The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future” (2013) 126 Harv L Rev 901.

found, in an Ontario study, that assistance by duty counsel contributed to positive outcomes in eviction cases.⁸³

The reasons why legal representation has such an impact in eviction hearings goes beyond lawyers' knowledge of law and procedure and their ability to make legal arguments (although this is crucial).⁸⁴ Sandefur notes that lawyers have a surprisingly large impact because of their abilities to navigate the professional and interpersonal dynamics of the systems and to lend weight to the claims of clients who would otherwise be marginalized within those systems.⁸⁵ In other words, lawyers help balance power, translate elite and inaccessible systems to tenants, and translate tenants' claims in a vernacular that resonates more clearly with decision makers.⁸⁶

Researchers point out other reasons why lawyers have an impact in eviction cases. Peterson notes that the very presence of lawyers deters landlords from bringing meritless eviction cases.⁸⁷ Pollock agrees, writing that "if landlords know that tenants will be routinely represented ... they may not choose to file unlawful evictions in the first place."⁸⁸ By simply requiring the system to follow the law, forcing landlords to prove their cases, and by raising defences for tenants, lawyers effectively slow down the system so that it is unable to "steamroll" vulnerable tenants.⁸⁹ As Sabbeth argues, "For a poor tenant facing eviction ... slowing down the process has particular value. It can provide time to scrape together money to pay the rent, to accumulate evidence in her defence, or to locate alternate housing if ultimately she is forced out of her home. The possibility of delay can also convince a landlord to settle on terms that account for tenants' rights and interests."⁹⁰

Another key impact of lawyers is that they help increase the legitimacy of the system for tenants and provide moral, emotional, and logistical support for tenants in addition to

⁸³Paradis, *supra* note at 31 at 63.

⁸⁴John Pollack, "Right to Legal Representation in Eviction Cases" in National Law Center on Homelessness and Poverty, *Protect Tenants, Prevent Homelessness* (2018) 24 at 24, online: <https://homelesslaw.org/wp-content/uploads/2018/10/ProtectTenants2018.pdf>; Rachel Kleinman, "Housing Gideon: The Right to Counsel in Eviction Cases" (2004) 31 *Fordham Urb LJ* 1507 at 1515.

⁸⁵ See Rebecca Sandefur, "Elements of Professional Expertise: Understanding Relational and Substantive Expertise through Lawyers' Impact" (2015) 80 *American Sociological Review* 909 at 911–912.

⁸⁶ See discussion in Nancy Cook, "Looking for Justice on a Two-Way Street" (2006) 20 *Wash U J of Law & Pol'y* 169 at 170.

⁸⁷ Peterson, *supra* note 81 at 77–78.

⁸⁸ Pollock, *supra* note 84 at 24.

⁸⁹ Sabbeth, *supra* note 68 at 294, quoting Russell Engler.

⁹⁰ *Ibid* at 295.

legal support.⁹¹ Fulk argues that lawyers therefore help provide “dignified participation” in hearings for tenants.⁹² Qualitative research has shown that tenants felt empowered when they were assisted by lawyers.⁹³ In a Saskatchewan study, tenants who navigated the housing justice system without lawyers were asked about whether they thought having a lawyer would have made a difference. Their comments underscore many of the observations above about the impacts of lawyers. One tenant said that “Getting a lawyer probably would have made it look more professional.”⁹⁴ Another tenant echoed this perception about the relational or professional expertise of lawyers, saying that “[lawyers] have a sense of gravitas or whatever and that, you know, a regular person doesn’t have”.⁹⁵ Similarly, another tenant stated: “To have legal representation, that proves to a person that you’re taking this seriously and that you want to resolve your issues but you also have the resources that will help you do that.”⁹⁶ Another tenant said that lawyers would “know the right words to use.... They would know the actual, what to do and where to exactly say this or that.”⁹⁷ Another tenant commented that they thought a lawyer would have helped the hearing officer to actually listen to their story: “Maybe, maybe [the adjudicator] would have heard more or listened or maybe I would have been given time to pay the rent.”⁹⁸ Similarly, another participant explained that lawyers would “Help the other side listen, too. They can be a bigger voice for the smaller voice.”⁹⁹ Finally, tenants emphasized the moral and emotional support that lawyers could provide in a stressful process: one tenant said a lawyer would be “someone who would have got my back for what I say.”¹⁰⁰ And another participant simply stated that lawyers are “moral support and someone so you don’t feel like you are alone.”¹⁰¹

Lawyers also have an impact because they build the law through their cases and arguments. As Sabbeth points out, the area of tenants’ rights in eviction is vastly

⁹¹ See Paradis, *supra* note 31 at 68–70.

⁹² Natalie D Fulk, “The Rising Popularity of the Right to Counsel in Eviction Cases: Rationales Supporting It and Legislation Providing It” (2021) 35 *Notre Dame JL Ethics & Pub Pol’y* 325 at 335.

⁹³ See Paradis, *supra* note 31 at 65.

⁹⁴ These quotes are unpublished quotes (kept on file by author) from a qualitative study of tenants who represented themselves at Saskatchewan’s Office of Residential Tenancies conducted by the author. A description of the study and its methodology can be found in Buhler & Tang, *supra* note 16, at 216–217.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

undeveloped because of the historical and systemic lack of legal representation for tenants. She writes: “We can only imagine how the law and court culture might look if [tenants] had enjoyed decades of equality of representation.”¹⁰² Without representation and ongoing work to challenge illegal practices and shape the law, it is possible to argue that tenants’ rights “atrophy.”¹⁰³ This observation is vitally important when it comes to building legal frameworks for the human right to housing. Working with their clients, lawyers can help “to start to unravel the system as we know it and create something new built on the belief that housing is a human right.”¹⁰⁴ They can help tenants claim the right to housing and thereby shift housing law tribunals from places that process evictions to places where the right to housing can be claimed.¹⁰⁵

Research shows that legal representation for tenants also saves money. Because eviction has such devastating social, economic, and health costs for those impacted by it, it may be unsurprising that “return on investment” research has shown that reducing evictions leads to public cost savings. For example, a New York City study showed that legal representation for tenants would save the city \$230 million net.¹⁰⁶ A Philadelphia study providing legal assistance for eviction led to a “return on investment” of over \$12 for every dollar spent.¹⁰⁷ Savings to the city included reduced emergency shelter costs, reduced inpatient hospital costs, and reduced mental health costs.¹⁰⁸ While economic arguments are often persuasive to various stakeholders, it is worth emphasizing the “savings” in terms of human suffering and hardship when eviction can be avoided are priceless.

¹⁰² Kathryn A Sabbeth, “(Under) Enforcement of Poor Tenants’ Rights” (2019) 27 *Georgetown J on Pov & Human Rights* 97 at 136.

¹⁰³ *Ibid* at 137.

¹⁰⁴ Erica Braudy & Kim Hawkins, “Power and Possibility in the Era of Right to Counsel, Robust Rent Laws & COVID-19” (2021) 28 *Georgetown Journal on Poverty Law and Policy* 117 at 158.

¹⁰⁵ See UN General Assembly Human Rights Council, *Guidelines for the Implementation of the Right to Adequate Housing* (26 December 2019), A/HRC/43/43. Available online: https://www.make-the-shift.org/wp-content/uploads/2020/04/A_HRC_43_43_E-2.pdf at 21.

¹⁰⁶ Discussed in Pollock, *supra* note 84 at 24; and see discussion in Lisa Moore and Trevor Farrow, “Investing in Justice: A Literature Review in Support of the Case for Improved Access” (Canadian Forum on Civil Justice, August, 2019). Available online: <https://cfcj-fcjc.org/wp-content/uploads/Investing-in-Justice-A-Literature-Review-in-Support-of-the-Case-for-Improved-Access-by-Lisa-Moore-and-Trevor-C-W-Farrow.pdf> at 18.

¹⁰⁷ Moore and Farrow, *supra* note 106 at 20.

¹⁰⁸ *Ibid*.

In recent years, a robust right-to-counsel movement for tenants has arisen in the United States.¹⁰⁹ Several American jurisdictions have responded by implementing programs that provide legal representation to tenants in eviction matters. New York City, San Francisco, and Newark, New Jersey, have implemented right-to-counsel programs for tenants, and other jurisdictions are likely to do the same.¹¹⁰ Erika Peterson concludes that in the United States, “it is an exciting moment for jurisdictions looking to establish a right to counsel in evictions.”¹¹¹ Can the same happen in Canada?

EXPLORING TENANTS’ RIGHT TO COUNSEL AND THE GOVERNMENT’S RESPONSIBILITY TO PROVIDE COUNSEL IN EVICTION MATTERS

The above discussion argued that tenants face serious access-to-justice barriers in Canadian eviction law systems. It argued that legal representation for tenants can reduce evictions and thereby address the personal, social, and economic costs of eviction and also promote tenants’ security of tenure, dignity, and well-being. This section turns to legal arguments and principles that support the proposition that tenants facing eviction should have the right to legal representation. Ultimately, grounding the right to representation in a human-rights framework is important. As Robin White emphasizes, “A right is different from a benefit or a privilege, because rights holders derive *power* from the right, which cannot be denied or terminated.”¹¹² Given the reality that Canada has now recognized housing as a human right through the enactment of the *National Housing Strategy Act*,¹¹³ it is time to embrace the right to legal aid for tenants facing eviction as one way to animate the right to housing and take seriously tenants’ human rights to security of tenure. This section discusses international human rights law and commentary on the right to counsel for tenants in eviction matters as well as the existing Canadian law on the right to counsel in civil cases. It argues that an approach informed by human rights as well as existing

¹⁰⁹ See, e.g., Rachel Kleinman, “Housing Gideon: The Right to Counsel in Eviction Cases,” (2004) 31 *Fordham Urb LJ* 1507; Raymond H Brescia, “Sheltering Counsel: Towards a Right to a Lawyer in Eviction Proceedings” (2009) 25 *Touro L Rev* 187; Shelby R King, “Right to Counsel Movement Gains Traction” (Shelterforce, July 16, 2021). Available online: <https://shelterforce.org/2021/07/16/right-to-counsel-movement-gains-traction/>.

¹¹⁰ See Peterson, *supra* note 81 at 80; Fulk, *supra* note 92 at 343–344.

¹¹¹ Peterson, *supra* note 81 at 98.

¹¹² Robin M White, “Increasing Substantive Fairness and Mitigating Social Costs in Eviction Proceedings: Instituting a Civil Right to Counsel for Indigent Tenants in Pennsylvania” (2021) 125 *Dickinson L Rev* 795 at 804 (emphasis in original).

¹¹³ SC 2019, c.29, s.313.

preoccupations and values in constitutional law on the right to counsel provide a framework to support the proposition that tenants facing eviction have a right to legal aid.

INTERNATIONAL HUMAN RIGHTS

CIVIL LEGAL AID AND INTERNATIONAL HUMAN RIGHTS

There is a strong emphasis in international human rights law on access to justice and legal aid for rights claimants as foundations for the realization of human rights. Article 14 of the *International Covenant on Civil and Political Rights* states that, “All persons shall be equal before the courts and tribunals.”¹¹⁴ While the subsequent text of the article focuses primarily on criminal law proceedings, Article 14 has been interpreted to apply to civil law proceedings. Indeed, the United Nations Human Rights Committee commented that Article 14 encourages (and may oblige) states to provide free legal aid in civil cases for those who cannot afford to pay for it. The Committee stated that, “States are encouraged to provide free legal aid in [non-criminal cases], for individuals who do not have sufficient means to pay for it. In some cases, they may even be obliged to do so.”¹¹⁵ Similarly, in 2013, the United Nations Special Rapporteur on the Independence of Judges and Lawyers emphasized the fundamental connection between legal aid and human rights, stating that “legal aid is both a right in itself and an essential precondition for the exercise and enjoyment of a number of human rights, including the rights to a fair trial and to an effective remedy.... [Legal aid] represents an important safeguard that contributes to ensuring the fairness and public trust in the administration of justice.”¹¹⁶

LEGAL AID FOR TENANTS FACING EVICTION AND INTERNATIONAL HUMAN RIGHTS

As noted at the outset, international human rights law has specific guidance on evictions. For an eviction to comply with international human rights law, several criteria must be satisfied. These include “meaningful engagement with those affected” and a full exploration of alternatives to eviction—for example, through the implementation of debt repayment plans for tenants who are in rental arrears.¹¹⁷ Evictions must only occur as a last resort and must not render tenants homeless: any eviction that does so is

¹¹⁴ International Covenant on Civil and Political Rights, art 14, Mar. 23, 999 UNTS 171 [ICCPR].

¹¹⁵ UN Human Rights Comm, “General Comment 32: Article 14, Right to Equality before Courts and Tribunals and To a Fair Trial” UN Doc. CCPR/C/GC/32 (Aug 23, 2007) General Comment no 32 (2007) at para 10.

¹¹⁶ UN Human Rights Office of the High Commissioner, “Legal Aid: A Right in Itself—UN Special Rapporteur” (UN Human Rights Office of the High Commissioner, 30 May 2013). Available online: <https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13382&LangID=E>.

¹¹⁷ *Supra* note 105 at 8 and 9.

considered a “gross violation” of the human right to housing.¹¹⁸ This requires the state to protect tenants from arbitrary evictions and includes the imposition on states of an obligation to ensure that private landlords do not carry out illegal, forced evictions.¹¹⁹ Crucially, international human rights law mandates that tenants facing eviction have access to justice “to ensure procedural fairness and compliance with all human rights.”¹²⁰

Thus, ensuring meaningful access to justice for tenants is an indelible component of implementing and protecting the human right to housing in international human rights law.¹²¹ In a fact sheet about the right to adequate housing, the United Nations High Commission for Human Rights explained that security of tenure means the individual is ensured “legal protection against forced eviction, harassment, and other threats.”¹²² In another report, the United Nations High Commission for Human rights concluded that all people threatened with eviction have a right to access legal counsel and legal aid for “free if, necessary.”¹²³ Similarly, the United Nations Special Rapporteur on the Right to Adequate Housing explained that “access to justice for the right to housing should be ensured by all appropriate means.... Hearings and other procedures should be timely, accessible, procedurally fair, enable full participation of affected individuals and groups and ensure effective remedies within a reasonable time frame.”¹²⁴ The Special Rapporteur emphasized that this requires “access to legal aid or other necessary assistance” to enable tenants to participate in legal processes.¹²⁵

Likewise, The United Nations Special Rapporteur on Extreme Poverty and Human Rights emphasized that free legal aid is often a human rights requirement in eviction cases. In a report dealing with many issues that affect people living in poverty, including evictions, the Special Rapporteur wrote that “provision of free and competent legal advice and

¹¹⁸ Committee on Economic, Social and Cultural Rights, General Comment No. 7, *The Right to Adequate Housing: Forced Evictions* (20 May, 1997) paras. 10 and 13; UN Human Rights Office of the High Commissioner, *Forced Evictions Fact Sheet No. 25 Rev 1*. (New York and Geneva, 2014) 31, online: <https://www.ohchr.org/Documents/Publications/FS25.Rev.1.pdf>

¹¹⁹ UN Human Rights Office of the High Commissioner, *supra* note 118 at 24.

¹²⁰ UN General Assembly Human Rights Council, *supra* note 105 at 8; UN Human Rights Office of the High Commissioner, *supra* note 118 at 33.

¹²¹ CESCR General Comment 7, *supra* note 118 at para 8. See also Risa Kaufman, Martha David & Heidi Wegleitner, “The Interdependence of Rights: Protecting the Human Right to Housing by Promoting the Right to Counsel” (2014) 45 Columbia HR L Rev 772 at 788.

¹²² UN Office of the High Commissioner for Human Rights, *The Right to Adequate Housing, Fact Sheet No. 21* (May 2014) at 4, online: https://www.ohchr.org/documents/publications/fs21_rev_1_housing_en.pdf.

¹²³ *Forced Evictions*, *supra* note 118 at 31.

¹²⁴ *Supra* note 105 at 21.

¹²⁵ *Ibid.*

assistance to those who are otherwise unable to afford it is a *fundamental prerequisite* for ensuring that all individuals have fair and equal access to judicial and adjudicatory mechanisms.”¹²⁶ Highlighting the underlying context of socioeconomic inequality, the Special Rapporteur stated that the “lack of legal aid for civil matters can seriously prejudice the rights and interests of persons living in poverty *for example when they are unable to contest tenancy disputes [and] eviction decisions.*”¹²⁷ The report notes that the “exclusion of certain categories of claims from the scope of free legal aid, such as housing ... discriminates against the poor.”¹²⁸ The Special Rapporteur concluded by urging governments to “ensure that persons living in poverty have practical and effective access to competent legal advice and assistance when needed for the protection of their human rights, including by making available sufficient resources to provide high-quality legal aid.”¹²⁹

Canada’s practices with respect to civil legal aid generally, and legal assistance for tenants specifically, has been the subject of some scrutiny and critique over the years by international human rights bodies. In 2008, the Committee on the Elimination of Discrimination Against Women considered a human rights complaint brought by Cecilia Kell, an Indigenous woman who lived in the Northwest Territories. The Committee noted that legal aid in relation to housing matters was inadequate and was discriminatory in its application.¹³⁰ In 2016, the Committee recommended that legal aid systems in Canada be reviewed and improved.¹³¹ Also in 2016, concluding observations on Canada by the Committee on Economic, Social and Cultural Rights included an exhortation to “ensure that civil legal aid with regard to economic, social and cultural rights is provided to poor people in the provinces and territories, and that it be adequate with respect to coverage, eligibility and services provided.”¹³² This

¹²⁶ UN General Assembly, *Report of the Special Rapporteur on Extreme Poverty and Human Rights* (9 August 2012), A/67/278 at 14 [Emphasis added]. Available online: <https://digitallibrary.un.org/record/734338?ln=en>.

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ *Ibid* at 23.

¹³⁰ Committee on the Elimination of Discrimination Against Women, “Views of the Committee on the Elimination of Discrimination against Women under Article 7, Paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (Fifty-first Session) Concerning Communication No. 19/2008,” CEDAW /C/ 51/D/19/2008 (28 February 2012) at 15–16. Available online: https://www2.ohchr.org/english/law/docs/CEDAW-C-51-D-19-2008_en.pdf

¹³¹ Committee on the Elimination of Discrimination Against Women, “Concluding Observations on the Combined Eighth and Ninth Periodic Reports of Canada” (25 November 2016), CEDAW/C/CAN/CO/8-9 at 4–5.

¹³² Committee on Economic, Social, and Cultural Rights, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social, and Cultural Rights – Canada* (March 23, 2016) E/C.12CAN/CO/4, E/C.12CAN/CO/5 at 7.

recommendation was not new: in 1998 the same committee had recommended improved legal aid for civil legal proceedings.¹³³

CONSTITUTIONAL PRINCIPLES AND CONCERNS

The above discussion has demonstrated that international human rights law supports the provision of legal aid to tenants facing eviction. Natalie Fulk concludes that “counsel protect the right to housing, which would create fairer and more just eviction procedures that align with international standards.”¹³⁴ What about Canadian domestic law? This section provides a brief overview of the law on the right to state-funded counsel in Canadian law and considers its application in eviction matters.

The Canadian law on the constitutional right to state-funded counsel is well established in the criminal law context. In *R v. Rowbotham*, the Supreme Court of Canada held that courts may order state-funded counsel where an accused person cannot afford a lawyer and representation is essential to a fair trial.¹³⁵ In determining whether counsel is essential for a fair trial, courts consider factors including the seriousness of the charges, the length and complexity of proceedings, and the ability of the accused person to defend themselves without assistance.¹³⁶ However, courts have been reluctant to open the door more than a crack to constitutional rights to state-funded legal representation in civil cases. This section will briefly set out the current right-to-counsel legal terrain, arguing that even though courts have been reluctant to order governments to provide counsel to vulnerable litigants in civil cases, there are several key preoccupations in the case law that support the idea that governments have a responsibility to provide legal aid to vulnerable tenants in eviction matters.

Canadian courts to date have rejected systemic claims relating to the constitutional right to state-funded counsel. These claims have taken different tacks. For example, in *British Columbia [Attorney General] v. Christie*, the Supreme Court of Canada considered arguments that legal representation is a necessary precondition to the rule of law.¹³⁷ While recognizing that lawyers contribute to the rule of law by “working to ensure that unlawful private and unlawful state action in particular do not go unaddressed,”¹³⁸ the Court concluded that “a review of the constitutional text, the jurisprudence and the

¹³³ Committee on Economic, Social, and Cultural Rights, *Consideration of reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding observations of the Committee on Economic, Social, and Cultural Rights – Canada* (10 December 1998), E/ C.12/Add.3 at 7. Available online: <https://www.refworld.org/type,CONCOBSERVATIONS,,CAN,3f6cb5d37,0.html>

¹³⁴ *Supra* note 92 at 332.

¹³⁵ [1988] 41 C.C.C. (3d) 1 (SCC) at para 156.

¹³⁶ See *R v Rushlow* [2009] ONCA 461 at para 19.

¹³⁷ [2007] 1 S.C.R. 873, 2007 SCC 21.

¹³⁸ *Ibid* at para 22.

history of the concept does not support the ... contention that there is a broad general right to counsel as an aspect of, or precondition to, the rule of law.”¹³⁹ The Court stated that there is no “general right to legal assistance whenever a matter of rights and obligations is before a court or tribunal.”¹⁴⁰

Another approach by advocates has been to challenge the constitutional adequacy of provincial legal aid systems. However, in *Canadian Bar Association v. British Columbia*, the courts rejected a systemic claim that the civil legal aid regime in British Columbia violated the constitutional rights of poor people. The British Columbia Supreme Court struck the action at the pleadings stage, concluding that the applicants had no reasonable cause of action.¹⁴¹ The decision was upheld by the British Columbia Court of Appeal, and leave to appeal to the Supreme Court of Canada was denied.¹⁴² A more recent case survived an application to strike.¹⁴³ This case, *Single Mothers’ Alliance of BC Society v. British Columbia*, involves another constitutional challenge to British Columbia’s legal aid regime, arguing in part that the denial of legal aid to a single mother in a family law matter violated her Section 7 rights to security of the person.¹⁴⁴ The claim asserts that the legal aid regime constitutes law that is subject to the Charter and argues that the current legal aid system discriminates against women and children and that it violates their right to security of the person by increasing their risk of exposure to violence.¹⁴⁵ The plaintiffs are seeking an order that eligibility for legal aid in family law matters be determined in accordance with the Charter.¹⁴⁶ The Court refused to strike the claim at the pleadings stage, stating: “Erring on the side of permitting a novel but arguable case to proceed to trial.... I am unable to say that the plaintiffs’ claims ... have no prospect of success.”¹⁴⁷ The case will go to trial in 2023.¹⁴⁸

While the *Single Mothers* case may lead to a breakthrough, the current reality in Canada is that courts have not found that the constitution requires a general right to state-funded legal representation in civil cases, even for the most vulnerable members of society facing the most egregious losses. However, the Supreme Court of Canada has

¹³⁹ *Ibid* at para 23.

¹⁴⁰ *Ibid* at para 25.

¹⁴¹ 2006 BCSC 1342.

¹⁴² 2008 BCCA 92, [2008] S.C.C.A. No. 185.

¹⁴³ 2019 BCSC 1427.

¹⁴⁴ *Ibid* at para 25.

¹⁴⁵ *Ibid* at 76; West Coast LEAF, “Legal Aid Test Case” (West Coast Leaf), online: <https://www.westcoastleaf.org/our-work/legal-aid-test-case/>.

¹⁴⁶ *Supra* note 143 at para 27

¹⁴⁷ *Supra* note 143 at para 174.

¹⁴⁸ West Coast LEAF, *supra* note 145.

held that some individual civil cases may trigger the constitutional right to counsel in civil matters on a case-by-case basis. In *New Brunswick (Minister of Health and Community Services) v. G(J)*¹⁴⁹, the Supreme Court of Canada ordered state-funded counsel for a mother who risked losing her child in a child apprehension proceeding. The Court found that the child protection proceedings engaged mother's Section 7 right to security of the person because the removal of a child would have a serious and profound effect on her "psychological integrity" and would be a "gross intrusion into a private and intimate sphere."¹⁵⁰ Essentially, the Court ruled that a fair hearing could not take place if the mother, who could not afford a lawyer, did not have legal representation. The Court noted that,

Without the benefit of counsel, the appellant would not have been able to participate effectively at the hearing, creating an unacceptable risk of error in determining the children's best interests and thereby threatening to violate both the appellant's and her children's Section 7 right to security of the person.¹⁵¹

However, the Court emphasized the "unusual circumstances of the case" which, according to the court, included the complexity of the case and the particular vulnerability of the mother in this specific case.¹⁵²

Could the *G(J)* case support the case of an individual tenant asking for state-funded counsel to assist in an eviction matter? Lorne Sossin has argued that *G(J)* could potentially have application in the administrative tribunal context in cases where Charter rights are at stake.¹⁵³ Megan Parisotto agrees, arguing that individual tenants whose landlords are public housing providers might have success claiming a right to counsel pursuant to the principles in *G(J)*. Parisotto argues that eviction is a circumstance that clearly engages security of the person interests within the meaning of Section 7 of the Charter. She writes that a court could "find that a tenant's right to security of the person is breached if the tenant is able to demonstrate that they would suffer serious state-imposed psychological stress from being evicted."¹⁵⁴ She notes that administrative hearings like eviction hearings are still adversarial and involve the

¹⁴⁹ [1999] 3 S.C.R. 46

¹⁵⁰ *Ibid* at paras 60 and 61

¹⁵¹ *Ibid* at para 81.

¹⁵² *Ibid* at para 75. Subsequent decisions have illustrated a narrow reading taken by Courts of the *G(J)* case. See *D(P) v British Columbia*, 2010 BCSC 290; *B.F. v Prince Alberta Victoria Hospital*, 2015 SKQB 237; *GNWT v Portman*, 2018 NWTCA 4

¹⁵³ *Supra* note 55 at 225.

¹⁵⁴ Megan Parisotto, "Expanding the Constitutional Right to State-Funded Legal Counsel to Address the British Columbia Housing Crisis" (2019) 24 Appeal 79 at 96.

interpretation of law and the presentation and testing of evidence, and therefore a court could find that a lawyer is required in order for the tenant to have a fair hearing.

Parisotto's analysis is focused on the right to counsel for tenants who live in public or government housing programs. This is because it could be possible to argue that eviction applications by public housing providers are "government" action. This is important because the Charter applies to government action rather than to private entities.¹⁵⁵ In other words, according to *G(J)*, state-funded counsel can only be ordered in cases where "government action" triggered the legal proceeding where a party is claiming the right to counsel and that threatens the party's security of the person interests.¹⁵⁶

This requirement throws up a barrier in most eviction cases where private landlords trigger the legal proceeding. Of course, government action is deeply involved in eviction infrastructure. Governments legislate the rules for eviction, create the tribunals, and authorize sheriffs to enforce eviction orders. As Sabbeth argues,

Ultimately, the state's force is at play in all adjudication. The state requires the parties to appear or else face the penalty of a default judgment and execution of that judgment. The state literally *enforces* those judgments.... If a landlord wins an eviction case, an agent of the state will forcibly remove any tenant who remains in possession of the property. The violence of economic force can be as important as violence to the physical body.¹⁵⁷

We live in an age of the ascendance of corporate power and growing inequality. Indeed, as Sabbeth notes, "Individuals require protection from private actors who exert control over their everyday lives, and [lawyers] have a role to play in providing that protection."¹⁵⁸ However, current jurisprudence remains reluctant to expand the application of the Charter to acknowledge the ways that state action provides the infrastructure for the exercise of private or corporate power, including actions like evictions that profoundly impact physical and psychological security and human rights.

Overall, a few conclusions can be drawn from the case law. Systemic claims for state-funded legal counsel have for the most part been rejected by courts. A constitutional right to counsel might, however, exist in individual civil cases (including eviction cases). However, the burden of claiming such a right is on already burdened claimants who face systemic inequities at every turn. In other words, the existing case law sets up barriers

¹⁵⁵ *RWDSU v Dolphin Delivery*, [1986] 2 SCR 573.

¹⁵⁶ See also *P.D. v British Columbia* [2010] BCSC 290. In this case the Court held there is "no authority which supports a right to state-funded counsel in private disputes."

¹⁵⁷ Sabbeth, *supra* note 68 at 297-8.

¹⁵⁸ *Supra* note 27 at 97.

to claimants seeking a right to state-funded counsel in eviction cases. That said, a few values and key concerns can be drawn from the case law. These key points can be brought into dialogue with international human rights obligations to urge that governments have an obligation to provide legal aid to vulnerable tenants facing eviction.

The first key theme in the case law described above is the idea that access to the legal system is a component of the meaningful rule of law, and the recognition that some individuals are unable to meaningfully access the system without assistance. As Parisotto writes, the law recognizes that some litigants may require legal representation in order to “assert their rights within the justice system on a relatively equal footing, regardless of socioeconomic status.”¹⁵⁹ Another key preoccupation in the case law is a recognition that access to counsel is more important in cases where fundamental issues going to the heart of an individual’s physical and psychological security are at stake. Eviction is such an event, as discussed earlier in this report. Finally, the cases show that courts are aware of the massive power and resources of the state and understand that this power must be subject to the Charter. This notion can be expanded to evidence a concern about the advantages of powerful actors generally (such as private landlords) and an idea that significant power between parties should be balanced for the justice system to be fair.

Canada has enacted the *National Housing Strategy Act* (NHTSA) in which it explicitly recognizes housing as a human right.¹⁶⁰ The above discussion has shown that access to justice is an indelible component of security of tenure in international human rights law, and that access to justice often requires the provision of legal aid to vulnerable tenants. Furthermore, even though domestic courts have been reluctant to recognize a right to state-funded counsel, this is related to a historic judicial reluctance to enforce social and economic rights, rather than a lack of recognition of the importance of access to justice and access to counsel for vulnerable rights claimants.

In light of the above, governments must take a new reading of their obligations to ensure vulnerable tenants facing eviction have access to justice. The NHTSA, with its “novel mechanisms” which are designed to be more accessible and to enable systemic remedies as compared to individual rights claims before courts, provides an ideal path forward.¹⁶¹ The NHTSA envisions a dialogic, participatory approach whereby the right to housing is given effect through “enhanced participation by affected groups, constructive dialogue with governments and other actors, and engagement with systemic issues through collaborative, multi-dimensional strategies” rather than reliance on traditional

¹⁵⁹ *Supra* note 154 at 85.

¹⁶⁰ *Supra* note 113.

¹⁶¹ See Bruce Porter, “Implementing the Right to Adequate Housing Under the National Housing Strategy Act: The International Human Rights Framework” (National Right to Housing Network, October 2021) at 9.

litigation in courts.¹⁶² Indeed, as Bruce Porter notes, the NHTA is “designed to enhance access to justice for dimensions of the right to housing that have previously been denied effective remedies through more formal judicial processes.”¹⁶³

Given the limitations identified above in the constitutional right-to-counsel cases, a claim through the mechanisms of the NHTA could open up a more productive venue for the consideration of tenants’ rights and government obligations. A systemic claim could be brought forward through these mechanisms obliging the federal government to consider in good faith the empirical data about the impacts of eviction, the current systemic deficiencies and imbalances in Canada’s eviction law systems, and the evidence about the benefits of legal aid for tenants in eviction matters. It should urge the government to see that both international human rights law and core values reflected in domestic constitutional law support the proposition that access to legal representation is a necessity and a right for tenants facing eviction in Canada.

CONCLUSIONS AND THE PATH FORWARD

This report has argued that the lived reality of eviction, the practices of eviction law systems, and principles from international human rights and domestic law support the proposition that tenants facing eviction should have a right to state-funded legal representation to protect and promote security of tenure.

The best way for the federal government to advance access to justice and access to counsel for tenants facing eviction is through targeted funding to provincial and territorial legal aid programs. Currently, the federal government supports provincial and territorial legal aid programs through the Canada Social Transfer, with no real conditions attached to this funding.¹⁶⁴ However, it is possible for the federal government to introduce conditions for targeted funding. As Bruce Porter writes, “It is always within federal jurisdiction to act in a leadership capacity to ensure a co-ordinated, collaborative approach to progressively realizing the right to housing in areas of provincial jurisdiction.”¹⁶⁵ Thus, even though legal aid for civil matters falls under provincial and territorial jurisdiction, the federal government can play a role by providing targeted funding for legal aid for eligible tenants facing eviction.

¹⁶² *Ibid* at 12.

¹⁶³ *Ibid*.

¹⁶⁴ See Melina Buckley, *Moving Forward on Legal Aid: Research on Needs and Innovative Approaches* (Canadian Bar Association, June 2010) at 120. See also Porter, *supra* note 161 at 89.

¹⁶⁵ Porter, *supra* note 161 at 89.

Ideally, federal funding should support legal aid programs that are immersed in the realities and contexts of client communities.¹⁶⁶ Indeed, such an approach would align well with the recommendation of the United Nations Committee on the Elimination of Discrimination Against Women in the case of Cecilia Kell (discussed earlier in this paper). The Committee’s recommendations included an exhortation for the Canadian government to improve its legal aid system in civil matters but also, more specifically, to ensure that legal aid programs recruit and train Indigenous women to provide legal aid to members of their own communities.¹⁶⁷ It is also aligned with research that has emphasized the vital importance of community-based legal practice.¹⁶⁸

This paper has advocated for full legal representation for tenants, agreeing with Russell Engler that “we must accept as a starting point that, particularly where basic human needs are at stake, vulnerable litigants on the wrong end of power imbalances should be presumed to need full representation by a skilled representative.”¹⁶⁹ However, given some of the differences across the country in terms of eviction law processes, as well as the diverse needs and experiences of client communities, it is important that there be flexibility in terms of how legal aid programs address the issue of representation and assistance for tenants facing eviction. The solutions that are likely going to be most effective are those that are built from the bottom up, rather than from the top down.

While legal representation for tenants in eviction hearings will not on its own solve the housing crisis, it can make a difference in the realization of the right to housing in Canada. Legal representation for tenants can help prevent “individual tragedies” associated with eviction.¹⁷⁰ As discussed in this report, this impact on individual cases can have a larger stabilizing impact on families and communities more generally. Legal representation for tenants can help bring justice into eviction law systems by ensuring that tenant’s claims are heard, basic laws are followed, and power imbalances are mitigated. Legal representation in eviction matters can also start building the law in this vitally important area. As Peterson writes, “When all tenants can and do assert their rights, the cultural and institutional structures which allow the housing crisis to persist

¹⁶⁶ See Standing Committee, *supra* note 76 at 18. For a discussion of qualitative research that suggests that relationality, cultural humility, respect, compassion, critical reflection, and attention to context are essential attributes of lawyers who work effectively with members of marginalized communities, see also Sarah Marsden and Sarah Buhler, “Lawyer Competencies for Access to Justice: Two Empirical Studies” (2017) 34 Windsor YB Access Justice 186.

¹⁶⁷ See discussion in Porter, *supra* note 161 at 82.

¹⁶⁸ See, for example, Marsden and Buhler, *supra* note 166.

¹⁶⁹ Russell Engler, “When Does Representation Matter?” in Samuel Estreicher & Joy Radice, *Beyond Elite Law: Access to Civil Justice in America* (New York: Cambridge University Press, 2016) 71 at 86.

¹⁷⁰ Peterson, *supra* note 81 at 112.

will finally weaken.”¹⁷¹ As we work to build the right to housing in Canada, legal representation for tenants facing eviction constitutes one building block.

¹⁷¹ Braudy and Hawkins, *supra* note 158 at 112.