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Housing

Systemic Barriers for First Nations People: Security of Tenure in Canada

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

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List of Abbreviations

NHS — National Housing Strategy

DIA — Department of Indian Affairs

CMHC — Canadian Mortgage and Housing Corporation

CP — Certificate of Possession

FHRMIRA — Family Homes on Reserves and Matrimonial Interests or Rights Act

ICESCR — International Covenant on Economic, Social and Cultural Rights

UNDRIP — United Nations Declaration on the Rights of Indigenous Peoples

NHSA — National Housing Strategy Act

UNDRIPA — United Nations Declaration of the Rights of Indigenous Peoples Act

SCC — Supreme Court of Canada

Introduction

Although the web of jurisdictions pertaining to security of tenure for First Nations people is complex, there is a paucity of legislation relating to the specific subject of First Nations housing. This paper discusses the complex, multiple jurisdictions First Nations people face regarding housing and the systemic barriers that lead people on a path from some sense of security of tenure on home reserves to homelessness in urban centres. As with most matters subject to legal analysis, context is important for understanding the problem with a view to suggesting possible solutions. Context in the matter of security of tenure for First Nations is no different. The problems do not begin in the present. They stem from a long colonial history with which Canada is only now beginning to grapple.

This paper begins by sketching out the legal landscape underpinning First Nations housing on reserve through a brief review of the legal history of Canada's relationship with Indigenous Peoples, including First Nations. Canada's legal legacy with its underlying goal of assimilation has created significant barriers for First Nations people to access and maintain adequate housing, both on and off reserve. Beyond the background of the colonial legacy leading to the current barriers to securing housing, the paper identifies the jurisdictional quagmire First Nations people face when leaving their home reserves to seek better opportunities in urban centres. The paper concludes with a few recommendations which may offer some direction for the Office of the Federal Housing Advocate to facilitate systemic changes toward improved housing conditions for First Nations people on and off reserve.

While Inuit and Métis people also experience similar housing issues, the legal relationships between these Indigenous Peoples and Canada differs from those between First Nations and Canada because of the different legislative frameworks applicable to them. As such, the scope of this paper is housing issues as experienced by First Nations persons, both on and off reserve. While some of the observations in this paper may be applicable to other Indigenous Peoples, care should be taken not to extrapolate general conclusions to formulate a one-size-fits-all solution. As this paper intends to demonstrate, First Nations housing issues vary from community to community, and resolving them will require a high level of attention to context.

Jurisdiction: The Colonial Legacy

Land

Jurisdiction, or legal authority to govern, applies generally to two fundamental subjects: persons and geographic spaces.[1] Jurisdiction is further subdivided within these two subject matters, but for the purposes of this paper, the discussion will consider jurisdiction divided among different governments. This section begins by looking at with whom jurisdiction resided at the arrival of Europeans, how that jurisdiction shifted over time, and the impacts this has had on First Nations.

When Europeans arrived on the northern part of this continent, now known as Canada, various Indigenous nations occupied, used, and governed their lands through both sacred and secular relationships, according to their particular worldviews.[2] In other words, at that moment in time, the land belonged to these various nations. The possession and use of the lands are what gave rise to the legal status of Indian (now Aboriginal) title.[3] The Crown overtly recognized this particular legal interest in the *Royal Proclamation* of 1763, which recognized that all lands not ceded or sold to the Crown are reserved to the various "Indian tribes."[4] This interest, called *title* to the land, however, was not recognized as a legal interest until 1973.

In 1888, the first Aboriginal title case was decided in *St. Catharine's Milling and Lumber v. Ontario*, in which the Judicial Committee of the Privy Council held that "the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign."[5] In other words, the interest did not necessarily enjoy the benefit of legal status and protection, but rather was an interest the Crown was willing to tolerate as a "burden" on its underlying legal title, created at its assertion of sovereignty.[6] This ruling stood as defining the status of Indian title for 85 years, until 1973, when the Supreme Court of Canada held in *Calder* that Indian title was a legal interest, only capable of being extinguished by legislation with clear and plain intent.[7]

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[1] Kent McNeil, "The Jurisdiction of Inherent Right Aboriginal Governments" (Research Paper for the National Centre for First Nations Governance, 11 Oct 2007), online: <https://fngovernance.org/wp-content/uploads/2020/05/kent_mcneil.pdf>.

[2] *R v Calder*, [1973] SCR 313, 34 DLR (3d) 145 at para 26, "the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries." [*Calder*]

[3] I use the term "Indian" in reference to and in the context of its historic use by the Crown in Canadian legislation and jurisprudence.

[4] *The Royal Proclamation*—October 7, 1763, online: <https://avalon.law.yale.edu/18th_century/proc1763.asp>.

[5] *St. Catharine's Milling and Lumber v Ontario* [1888] JCJ No 1 at para 6.

[6] *Ibid* at para 12.

[7] *Calder*, *supra* note 2 at paras 150, 151.

Separation of People from Land

In 1867, the British Parliament passed its *British North America Act*, Canada's first constitution, which divided the legislative powers between the federal and provincial governments of the new Dominion.[8] With some manner of legal fiction, England legislated authority over "Indians and Lands Reserved for Indians" to the federal government of Canada under Section 91(24) without discussion, negotiation or consent of the Indigenous peoples who would now be subject to the Act. Although the authority to govern Indigenous peoples was assigned to the federal government, land (not disposed of for federal purposes) rested with the provinces under Sections 109 and 117. Although Canada's courts recognized First Nations as having some manner of interest in the land, English legislation effectively removed people from their lands through legal incantation.[9] As the federal government settled into the business of developing and running a new country, one of the processes to which it turned for legally settling the land was the negotiation of treaties.

Treaties

Most Canadian treaties with First Nations served to extinguish Aboriginal rights and title from the Crown's perspective. The negotiation process for historical treaties was marked by coercion, misrepresentation, and, at times, by outright fraud.[10] It should be noted that not all of Canada's territory was acquired by treaty. In some cases, treaties were concluded for the formation of alliances, without cession of land. In other cases, land was simply taken without treaty. As McLachlin C.J.C. remarked, "Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so."[11]

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[8] *Constitution Act, 1867* 30 & 31 Victoria, c. 3 (UK).

[9] For more on this perspective, see John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v British Columbia*" (1999) 37:3 Osgoode Hall LJ 537.

[10] See for example Peter Cooke et al, eds, *To Share, Not Surrender: Indigenous and Settler Visions of Treaty Making in the Colonies of Vancouver Island and British Columbia* (Vancouver: UBC Press, 2021); James Daschuk, *Clearing the Plains: Disease, Politics of Starvation, and the Loss of Aboriginal Life* (Regina: University of Regina Press, 2013). Treaty relationships are also shaped by Canada's failure to implement the terms of the treaties: D.N. Sprague, "Canada's Treaties with Aboriginal People" (1995) 23 Manitoba LJ 341. This history has shaped relationships between Canada and First Nations more broadly and is acknowledged in the reports of various commissions of inquiry: see *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 1 (Ottawa: Supply and Services Canada, 1996) chapters 3 and 6; *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol 2 (Ottawa: Supply and Services Canada, 1996) chapter 2; *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: Truth and Reconciliation Commission of Canada, 2016) at 1; *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol 1a (Ottawa: Public Works and Government Services Canada) at 135, 213-215, 245-249 [*MMIWG Report*, vol 1a].

[11] *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511 at para 25.

Treaties served to entrench Crown decision-making authority by removing people from their traditional land and ways of living, including the use of traditional dwellings. People were relocated to small parcels of lands reserved for them (i.e., Indian reserves). Generally, reserves in the Prairies were created based on a section of 640 acres per family of five, as set out in the specific treaty, which works out to 128 acres per person. This reduction of land available for living imposed a sedentary lifestyle from a formerly mobile way of living and placed people in what was commonly known as DIA (Department of Indian Affairs) houses. DIA houses were small, poorly built, poorly ventilated structures that could be built quickly to get people situated on their reserves. Some people continue to live in these inadequate structures. The federal government's efforts to improve these dwellings has fallen short of being satisfactory or healthy.[12]

People

Historically, Canadian policy and legislation has been crafted upon the assumption that Indigenous Peoples are destined to extinction, lest they assimilate into the "Canadian" (Euro-centric) society. While popular opinion on the matter has shifted thanks to initiatives such as the Truth and Reconciliation Commission, Canadian policy and legislation is slow to follow suit. This section examines the dominant attitude of the Canadian state towards Indigenous persons since Confederation and its impact on contemporary First Nations housing policy.

In 1876, the Canadian government passed the *Indian Act* to create political units called Indian bands, which it could effectively control. The *Indian Act* consolidated a number of previous statutes and policies pertaining to the management of Indigenous people. Two of the main statutes consolidated were the *Gradual Civilization Act, 1857* and the *Gradual Enfranchisement Act, 1869*.[13] The primary function of these statutes, and of the *Indian Act*, was to expedite the assimilation of Indigenous Peoples into the dominant white society, which the federal government at the time believed to be an inevitable result of European settlement. The *Indian Act* is one of the most oppressive pieces of legislation imposed on First Nations people. In 1884, the *Indian Act* gave the Governor in Council the authority to make regulations regarding the attendance of Indigenous children in residential schools.[14] An amendment to the Act in 1920

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[12] See for example the facts set out in *Grant v Canada (Attorney General),* [2009] O.J. No. 5232, where a band member seeks certification of a class action suit against the Crown for a serious mold problem in newer housing constructed to relocate members from one part of their reserve to another.

[13] Proper title of the *Gradual Civilization Act* is "An Act to Encourage the Gradual Civilization of the Indian Tribes in this Province, and to Amend the Laws Respecting Indians."

[14] *Indian Act*, RS, c 43, s 1, 1884.

made that attendance compulsory.[15] One of the reasons for compulsory attendance was the poor attendance numbers in these schools. Another reason was to ensure the assimilation of Indigenous people into the dominant society, as the Deputy Superintendent of the Department of Indian Affairs stated at a Canadian Senate hearing:

> I want to get rid of the Indian problem. I do not think as a matter of fact, that this country ought to continuously protect a class of people who are able to stand alone. That is my whole point…. Our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic, and there is no Indian question, and no Indian department, that is the whole object of this Bill.[16]

The bill was passed, rendering compulsory the attendance of Indigenous children at residential schools.

In 1922, Dr. Peter Bryce wrote of the poor health conditions in some of the residential schools in the Prairies. Bryce was removed from his post as Chief Medical Officer for the Department of Indian Affairs for speaking out against the unwillingness of the federal government to do anything to improve conditions.[17] His primary concern was the high prevalence of tuberculosis among Indigenous children in the schools. One fact that tends to remain relatively obscure is while the schools' poor ventilation and damp, cold conditions exacerbated tuberculosis, Bryce identified that the majority of students were bringing the disease in into the schools after contracting it in their homes on the reserve.[18] Bryce reported that 24% of children who attended residential school died prematurely and that 75% of the students of one school "were dead at the end of the 16 years since the school opened."[19] This indicates that at least some of the unmarked graves presently being discovered at residential schools contain the remains of children who got sick because of the unhealthy housing conditions at home before being taken to the residential school. This is a direct causal link between on-reserve housing in the past and the discoveries of the graves of Indigenous children that mainstream Canadian society is finally having to confront today. The lapse of one hundred years has shown inadequate improvement to unhealthy homes on reserve, as is discussed subsequently in this paper.

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[15] "Report of the Deputy Superintendent General" Sessional Paper No 27, online: <https://www.bac-lac.gc.ca/eng/discover/aboriginal-heritage/first-nations/indian-affairs-annual-reports/Pages/item.aspx?IdNumber=29211>.

[16] National Archives of Canada, Record Group 10, vol. 6810, file 470-2-3, vol. 7, 55 (L-3) and 63 (N-3).

[17] Peter Bryce, *The Story of a National Crime: Being an Appeal for Justice to the Indians of Canada* (Ottawa: James Hope and Sons, 1922).

[18] *Ibid* at 5.

[19] *Ibid* at 4.

In 1927, the *Indian Act* was once again amended, banning lawyers from working for Indigenous Peoples. The purpose was to prohibit Indigenous Peoples from pursuing land claims, essentially keeping First Nations people on reserves. This amendment came down around the same time that the first on-reserve housing programs were implemented. Much like social welfare and other relief programs of the Great Depression era, the *Indian Act* and Canada's Indigenous housing policies were never intended to be a permanent function of government, as it was widely assumed Indigenous peoples would not exist much longer as distinct polities.[20]

In the 1960s, the federal government began to divest itself of its responsibilities towards First Nations along the model of devolution. It is in this context that it transferred the management of on-reserve housing to *Indian Act* bands.[21] In 1969, the federal government once again attempted to impose the final stage of assimilation when it drafted its Statement of the Government of Canada on Indian Policy, 1969, more commonly referred to as the White Paper. The White Paper contained a plan to repeal the *Indian Act*, convert all reserve lands to fee simple lands, and transfer those lands to bands or individuals.[22] The repeal of the Act would have removed Indian status and the minimal protections it provided in recognizing Aboriginal rights for First Nations. The conversion of lands to fee simple would have facilitated the loss of community-based lands to non-Indigenous people. The backdrop of this colonial legacy leads us to the present-day situation on First Nation reserves across the country.

The relevance of this colonial history to housing is that, based on the beliefs and assumptions of federal authorities about assimilation, housing on reserve did not need to be permanent. Houses did not need to be structurally sound, enduring, or of any particular good quality, as the so-called "Indian problem" was expected to go away when assimilation was complete.

On-reserve Housing

Indigenous peoples have been responsible for the construction and maintenance of their dwellings since time immemorial. After the creation of Canada, the federal government delegated legal authority over housing to First Nations under Section 73(1)(m) of the *Indian Act*. Many First Nations have since entered into agreements with Canada under the *First Nations Land Management Act* to create land codes setting out a band's authority, including over housing.[23]

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[20] Sylvia Olsen, *Making Poverty: A History of On-reserve Housing Programs* (PhD Thesis, University of Victoria Department of History, 2016) [unpublished] at 235-243 [Olsen]; Government of Canada, "Statement of the Government of Canada on Indian Policy, 1969" [The White Paper].

[21] Olson, *supra* note 20.

[22] The White Paper, *supra* note 20 at 6.

[23] SC 1999, c 24.

A lack of financing options for the development of on-reserve housing is reportedly the primary cause for the unsatisfactory housing situation.[24] As neither bands nor their members hold title to reserve land, First Nations individuals on reserve are unable to access conventional commercial mortgages due to issues with collateral. Banking systems have never adapted to the unique circumstances produced by Canada's reserve system, and no significant, systematic efforts to address the banking system have occurred. While Canadian Mortgage Housing Corporation (CMHC) does provide funding for housing purposes, it often requires that the borrower have a certificate of possession (CP), or, without a CP, a guarantee from the First Nation to secure the mortgage. Historically, women were excluded from obtaining CPs, which unfairly disadvantages women to this day. In the case where a band decides to build rental housing, it may have similar issues securing financing. In the case of both individuals and bands as borrower, a Ministerial Loan Guarantee is typically required from Indigenous Services Canada to make up for the borrower's lack of access to collateral. Guarantees are not always provided.

A personal anecdote serves to illustrate these difficulties. My wife grew up in a DIA house, built in the 1950s. It was small and poorly insulated. She lived there until the 1990s when she agreed to enter into an agreement with the band to take a CMHC mortgage to build a new house.[25] Many people in the community took these loan agreements in the 1990s. The mortgages helped community members gain access to newly built houses which could be paid for over twenty years, and the ownership of the CMHC house could then be transferred to the tenant named in the agreement with the band. Although the individual band member owns the house, they do not own the land. Band housing policies set out the ownership qualifications to own a house on reserve land, primarily that one must be a member of the band. This limits the market of potential purchasers in the event the owner wishes to sell. In other words, equity is limited in these reserve homes despite being privately owned, as the land is not part of the asset. Not all bands have clear policies, and the legal status of home ownership on reserve is uncertain.[26]

Generally speaking, low income is one of the greater barriers to the maintenance of adequate housing. In 2017, Statistics Canada surveyed 998,520 Indigenous persons regarding the sufficiency of their household income to meet basic household needs, including transportation, housing, food, clothing, and other necessary expenses. Over 24% of respondents said their

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

[25] Under Section 95 of the *National Housing Act*, RSC, 1985, c N-11.

[26] See for example *Jimmie v Council of the Squiala First Nation*, 2018 FC 190; *Kwikwetlem Indian Band v Cunningham* [2009] 4 CLNR 137.

household income did not meet those needs. When asked if they could cover an unexpected expense of $500, 37% of respondents indicated they could not, even if they took into account their ability to borrow on credit cards or overdraft.[27]

Poverty on First Nations reserves is a multifaceted issue. A person's need for income assistance might be attributable to a range of factors, including the historical and ongoing impacts of the reserve system, the legacy of residential schools, and a lack of economic opportunities on reserve. In 2011, the labour market participation rate was 47.4% among those with Indian status on reserve, in contrast to 66% of non-Indigenous persons. While leaving the reserve to pursue job opportunities might appear to be the most logical solution for some individuals, for others it is a daunting prospect, given cultural, historical, kinship and linguistic ties to their communities.[28] Further, racism, discrimination, and the delay to transition from on-reserve income assistance (administered by the band or the federal government, depending on the community) to provincially administered income assistance, among other things, act as a disincentive to seeking job opportunities off reserve.[29] The lack of coordination between federal and provincial income assistance programs is such that a First Nations individual may be forced to go weeks, even months, without assistance if they leave the reserve in search of work.[30] The lack of integration between systems acts as a barrier to employment and to mobility between urban centres and reserves. Ultimately, First Nations people often find themselves with few options regarding their preferred place of residence on or off reserve.

While income assistance recipients living on-reserve might apply for a shelter allowance benefit, not everyone qualifies. Income assistance recipients living in social housing or band-owned homes may qualify, but those who live in privately owned homes in communities with no universal rental regime are not eligible. A similar problem arises when, as is often the case, people who rent-to-own under agreements with their band and CMHC are on income assistance.[31] They can afford the monthly payment, occasionally band-subsidised, and because

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

[28] Indigenous Services Canada, *Evaluation of the On-Reserve Income Assistance Program*, by Evaluation, Performance Measurement and Review Branch (Ottawa: ISC, 2018) at 11, online: <https://www.sac-isc.gc.ca/eng/1557321693588/1557321741537> [*Evaluation of On-Reserve IAP*].

[29] *Ibid* at 13-14.

[30] *Ibid* at 14.

[31] Consider that the median income of a registered Indian on reserve in 2015 was $20,357. Almost half of registered Indians on reserve (47.7%) were living in low-income situations, whereas only 13.8% of non-Indigenous people in Canada lived with such economic precarity: Indigenous Services Canada, *Annual Report to Parliament 2020*, online: <https://www.sac-isc.gc.ca/eng/1602010609492/1602010631711>; Regarding income and unemployment

the band owns the house until the CMHC mortgage is paid out, the band pays for maintenance costs. Once the house is paid and ownership is transferred, people on income assistance cannot afford the cost of maintaining the house in addition to their regular bills, particularly when significant upkeep is required, for example, replacing a hot water heater or replacing or repairing kitchen appliances or the roof. These homes can and do quickly fall into disrepair, and the homeowner has few options to reduce the financial burden. Even in social housing or band-owned housing, the band cannot always afford to repair a major problem, so individuals must often choose to either assume the financial burden themselves or continue living in inadequate housing.[32]

While financing is a major barrier to improved housing on reserve, inadequate planning and construction also contribute to the problem. In 1996, the federal government handed bands the responsibility of ensuring building codes were met in housing developments on reserve. Generally, there was a lack of funding and training to build up First Nations' capacity to fulfill this responsibility. While the federal government requires reporting on administrative matters relating to housing, it requires little to no reporting on the quality of homes. Inspections are routinely conducted today, but they are superficial and serve primarily to fulfill CMHC requirements for the disbursement of funds rather than for the purpose of quality assurance.[33] Further, remoteness and extreme weather conditions render construction difficult in many northern communities. Shipping materials is costly and time-consuming. Once materials do arrive on site, they might be left exposed to the elements while waiting for construction to begin.[34]

Several limitations lead people to vacate their home reserves for better prospects in a big city. A significant proportion of housing available on reserve is overcrowded, poorly ventilated, and in need of major repairs. Many homes do not have access to clean drinking water or appropriate sewage systems.[35]

Although the information is becoming dated, consider the following data from 2013:

- 37.3% of First Nation households live in homes that require major repairs, 33.5% minor repairs and 29.2%

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statistics and other economic data related to status First Nations people, see also: Statistics Canada and Assembly of First Nations, *A Snapshot: First Nations People in Canada* (Ottawa: Statistics Canada, 2021), online: <https://www150.statcan.gc.ca/n1/pub/41-20-0002/412000022021001-eng.htm>.

[32] *Evaluation of On-Reserve IAP*, *supra* note 28 at 24.

[33] Olsen, *supra* note 20.

[34] *Report of the Special Rapporteur*, *supra* note 24.

[35] David R. Boyd, "No Taps, No Toilets: First Nations and the Constitutional Right to Water in Canada" (2011) 57:1 McGill LJ 81.

regular maintenance. Among First Nation adults, 50.9% reported mold and mildew present in their homes.

- 43.5% of adults with asthma and 52% of those with chronic bronchitis are living with mold in their homes.
- 52.3% of First Nations utilize band funding to finance new constructions while 20.7% use lending institutions.
- 94.1% of First Nations have waiting lists for housing, while 30.4% of those have waitlists between four to six years for housing.
- First Nations people are now recognized as the youngest and fastest growing segment of the Canadian population, which only highlights the ever-growing demand for better housing on reserve.[36]

These conditions contribute to higher rates of respiratory illness, depression, sleep deprivation, family violence, poor educational achievement, and an inability to retain skilled and professional members in the community.[37] Inadequate housing on reserve is a significant part of a larger complex problem on reserves leading to the diaspora from reserves to urban centres.

Additionally, First Nations jurisdiction extends only to the boundaries of their reserve. They have no jurisdiction (beyond claims of collective Aboriginal rights and title) outside of the reserve. For the last 150 years or more, resources have been taken from First Nations' traditional territories without compensation. First Nations have been precluded from accessing and benefitting from the resources on their own lands, while non-Indigenous society has reaped the benefits and accumulated the wealth.[38] This has created a state of dependency on federal assistance.[39] A lack of access to adequate jobs, education, and skills training is magnified in remote communities, emphasizing the importance of accessing resources on home territories.

Under-funded band administrations deal with high poverty rates, lack of capacity, and sub-standard education and skills training. These conditions are undoubtedly connected to Canada's colonial legacy, the dispossession of people from their lands, and compulsory attendance in residential schools. Residential school survivors and their children suffer from state-imposed

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

[37] *Report of the Special Rapporteur*, *supra* note 24.

[38] Consider, for example, that, in 2010, Canada agreed to pay the Mississaugas of the New Credit a settlement of $145 million. Compare this to Toronto's GDP for 2011, estimated at 154,196 million dollars in chained 2012 dollars. Of that amount, real estate rental and leasing alone accounted for over 30,350 million dollars: City of Toronto, *Gross Domestic Product per City*, by Economic Development and Culture Division (2017), online: <https://www.toronto.ca/city-government/data-research-maps/toronto-economy-labour-force-demographics/>.

[39] See Calvin Helin, *Dances with Dependency: Out of Poverty Through Self-Reliance* (Lax Kw'alaams, BC: Orca Spirit, 2006).

breakdown of families. They try to manage the debilitating and lasting effects of trauma attendees experienced. The last residential school was closed in 1996. As such 82.4% of First Nations adults alive in 2018 had themselves attended or had at least one family member who attended residential school.[40] The trauma survivors carry has been passed down to subsequent generations. Despair, depression, and suffering have led many Indigenous people to substance use and abuse. Many flee their reserves to escape the cycle of trauma, poverty, and poor living conditions in the hopes of a better life in Canada's major cities.

Jurisdictional issues further complicate housing on reserve. As mentioned earlier, the federal government has the power to legislate over "Indians and lands reserved for Indians." However, the provincial governments have constitutional authority over property and civil rights in the province under Section 92(13) of the Constitution, which is a broad head of power, under which they exercise authority over matters relating to tenancy. While provincial laws of general application apply on reserve by virtue of Section 88 of the *Indian Act*, provincial real property and tenancy laws do not apply on reserve.[41] Leasing matters on reserve are governed by a legal patchwork of lease agreements, band tenancy policies, and common law.[42]

This legislative gap has had a particularly detrimental impact on First Nations women, given the *Indian Act*'s silence on the division of property upon the death of a spouse or the breakdown of a marriage or common law relationship. Indigenous women are more likely to experience intimate partner violence (66%, compared to 44% of non-Indigenous women), including physical or sexual abuse by an intimate partner (44% compared to 22% of non-Indigenous women).[43] Women are most frequently killed by men within their own homes: 44% of Indigenous women who were victims of homicide were killed in the home they shared with the offender.[44] Women are even more at risk of being killed by their partner upon the breakdown of the relationship.[45]

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[40] *Evaluation of On-Reserve IAP*, *supra* note 28 at 13.

[41] *Derrickson v Derrickson*, [1986] 1 SCR 285; *Paul v Paul*, [1986] 1 SCR 306.

[42] In many band administrations, there is a housing department on reserve that can assist with the allocation of housing and tenancy matters. CMHC funding provides for a housing manager; however, there is no dedicated funding form Indigenous Services Canada to do the same. Therefore, in communities with no substantial CMHC programming, there is no housing manager.

[43] Loanna Heidinger, *Intimate Partner Violence: Experiences of First Nations, Métis and Inuit Women in Canada, 2018* (Ottawa: Statistics Canada, 2021) at 5.

[44] Royal Canadian Mounted Police, Missing and Murdered Aboriginal Women: 2015 Update to the National Operational Overview (Ottawa: RCMP, 2015), online: https://www.rcmp-grc.gc.ca/wam/media/455/original/c3561a284cfbb9c244bef57750941439.pdf.

[45] Maire Sinha, "Family Violence in Canada : A Statistical Profile, 2011," for the Canadian Centre for Justice Statistics (Ottawa: Statistics Canada, 2013), online: <https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2013001/article/11805-eng.pdf?st=YSDD-sy4>.

The legislative gap for the division of property among former partners may exacerbate this risk, as it may keep women dependent on an abusive spouse for housing.[46]

The federal *Family Homes on Reserves and Matrimonial Interests or Rights Act* (FHRMIRA) was enacted in 2013 in response to this issue.[47] Among other things, the FHRMIRA allows a First Nations person to seek an emergency protection order upon the occurrence of family violence and apply for an exclusive occupation order of the family home. While the FHRMIRA allows provinces to designate judges from various levels of court to hear emergency protection orders, thus increasing access to justice in remote communities, most jurisdictions have yet to designate judges for that purpose.[48] This means victims of family violence must travel outside of their communities to a court of competent jurisdiction to seek a protection order. Combined with a lack of legal knowledge and the insufficiency of some victims' financial resources to initiate legal proceedings while maintaining the family home on their own, this affects First Nations women's security of tenure.

Off-reserve Housing

Generally, there is no specific jurisdiction over off-reserve housing for First Nations peoples that I could locate. Although the federal government has constitutional authority over First Nations people and the lands reserved for them and First Nations governments have some authority under the *Indian Act* and more authority under a land code and through the developing area of inherent jurisdiction, no government has clear unilateral jurisdiction off reserve.[49] First Nations people living in cities have the same rights and privileges as any other Canadian. Yet, the lack of resources on reserves leaves many ill-equipped for the transition from reserve life to city life.

Upon finding themselves in Vancouver, Edmonton, Toronto, Montreal, etc., some First Nations people quickly discover shortcomings created by growing up on a reserve. Poor quality or lack of education and skills training find First Nations youth working menial jobs at minimum wage. Vulnerable in these imposing centres, youth face racism and exploitation, often through the drug and alcohol use rampant on the streets of our cities. In little time, some of these individuals find

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[46] MMIWG vol 1a, *supra* note 10 at 330.

[47] SC 2013, c 20.

[48] Indigenous Services Canada, "First Nations with Matrimonial Property Laws Under the Family Homes on Reserves and Matrimonial Interests or Rights Act," online: <https://www.sac-isc.gc.ca/eng/1408981855429/1581783888815>.

[49] A discussion around the potential for a Section 35 right to housing is omitted here, as any such attempt would be speculative at best. The jurisprudence shows that Aboriginal rights are narrowly construed on a case-by-case basis: *R v Van der Peet*, [1996] 2 SCR 507; *R v Pamajewon*, [1996] 2 SCR 821. For example, in 2006, the Supreme Court found the Mi'kmaq and the Maliseet have an Aboriginal right to harvest wood for "domestic" uses on Crown lands, including for shelter: *R v Sappier; R v Gray*, [2006] 2 SCR 686.

themselves homeless and living (and dying) on the street. While this is not the story for all First Nations people, the point I wish to make is that First Nations people face significant barriers to securing tenure in urban centres, attributed to conditions both on and off reserve. On reserve, access to education limits First Nations people's income potential. Off reserve, low wages, intermittent employment, and systemic racism are a common part of many First Nations people's experience. Human rights issues incident to tenure are discussed at greater length in the following section.

As explained above, provincial governments have constitutional authority over property and civil rights in the province, which is a broad head of power under which they exercise authority over matters relating to tenancy. Residential tenancy acts set out the provisions managing relationships between tenants and landlords. These statutes do not address First Nations people specifically, as First Nations people fall within federal legislative authority. While they have not accepted specific responsibilities for Indigenous Peoples, the provinces also occasionally provide some services to off reserve Indigenous people, including housing. Although the provinces manage tenancy, often, municipal governments administer zoning, determining specific types of buildings and land uses in various locations throughout a municipality.

The complexity of jurisdictions—with the federal government responsible for Indigenous people, provincial governments for Crown lands and tenancy matters, and municipalities for land-use—leaves urban First Nations people largely outside of the dominant state administrations with little support and assistance to get a fair start at securing safe and adequate tenure. The Supreme Court of Canada has referred to the lack of clarity between federal and provincial jurisdictions in regard to Indigenous Peoples as a "jurisdictional wasteland," as both levels of government deny responsibility.[50] As federal services are typically only available on reserves and provincial governments view service provision for Indigenous Peoples as a federal matter, displaced and non-status Indigenous people exist at times in a jurisdictional vacuum. Federal and provincial funding disputes continue today, denying or inhibiting Indigenous people's access to public services.[51]

Federal and Provincial Human Rights Legislation

It appears few cases before human rights tribunals in Canada concern housing. This is possibly owing in part to the tribunals' unwillingness to find a general, freestanding right to adequate

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[50] *Daniels v Canada (Indian Affairs and Northern Development)*, [2016] 1 SCR 99 at para 14.

[51] See for example *First Nations Child and Family Caring Society of Canada v Canada (Attorney General)*, 2016 CHRT 2 [*Caring Society*].

housing.[52] This is just one of many issues with human rights law that impacts First Nations people's ability to access justice in housing matters.

As discussed above, federal and provincial jurisdictions at times overlap with respect to First Nations' housing, resulting in confusion over which level of government has authority. The same holds true for human rights law as it applies to First Nations housing.[53] Matters are more certain when it comes to on-reserve housing (federal jurisdiction) and off-reserve private tenancy (provincial jurisdiction).

That said, it wasn't until the repeal of Ssection 67 of the *Canadian Human Rights Act* in 2008, which prohibited complaints arising from or pursuant to the *Indian Act*, including with respect to housing, that First Nations individuals have been able to file complaints against the federal government with respect to on-reserve housing. Since 2008, the application of the legislation to band councils and related agencies was delayed until 2011.

Despite the current availability of the human rights complaints mechanism to First Nations persons living both on and off reserve, systemic barriers continue to impede access to justice for First Nations people in housing matters. Even though First Nations people face higher rates of discrimination, they access human rights tribunals at a lower rate than their non-Indigenous counterparts.[54] Respondents to various studies on First Nations' access to justice to enforce their human rights have provided insight into the systemic barriers endemic in the human rights process. Cost is an obvious barrier. Moreover, complainants are usually expected to take steps to resolve the dispute before applying to a tribunal, which is intimidating and even impractical for some.[55] Further, the statutory limitation period to file a claim (usually 12 months after the

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[52] *Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852; see also Centre for Equality Rights in Accommodation et al, *Submission to the UN Special Rapporteur on Adequate Housing: Housing Discrimination & Spatial Segregation in Canada* (2021) at 8, online: <https://www.ohchr.org/Documents/Issues/Housing/SubmissionsCFIhousingdiscrimin/CERA-NRHN-SRAC.pdf>.

[53] There is a body of jurisprudence examining the issue of whether federal or provincial legislation applies to First Nations social housing in a variety of contexts: see e.g., *Kluane First Nation v Johnson*, 2015 YKTC 20 (applicability of *Landlord and Tenant Act* to settlement lands in the Yukon); *Davey v Phillips and O'Neil*, 2004 BCHRT 45 (applicability of the *BCHRA* to social housing off-reserve serving Indigenous persons exclusively).

[54] See for example Alberta Human Rights Commission, "Indigenous Rights Strategy Backgrounder", June 2021, online: <https://albertahumanrights.ab.ca/publications/Documents/AHRC%20IHRS%20Backgrounder_23Apr2021.pdf>; British Columbia Human Rights Tribunal, *Expanding Our Vision: Cultural Equality & Indigenous Peoples' Human Rights* (Vancouver: BCHRT, 2020), online: <http://www.bchrt.bc.ca/shareddocs/indigenous/expanding-our-vision.pdf> [*BCHRT Report*]. While the results of these surveys are specific to human rights tribunals in British Columbia and Alberta, we see no reason to assume that the barriers to access to justice identified do not exist at the federal level.

[55] *MMIWG Report*, vol 1a, *supra* note 10 at 208.

occurrence of discrimination) renders the process inaccessible to some.[56] When individuals are able to proceed with a complaint, many report experiencing discrimination during interactions with tribunals and staff.[57]

All human rights legislation in Canada prohibits discrimination, yet difficulties occasionally arise in defining the prohibited grounds for discrimination in housing matters. For First Nations persons, difficulties may arise in deciding on which grounds to proceed with a complaint. Nova Scotia and British Columbia are the only Canadian jurisdictions that currently prohibit discrimination against Indigenous persons specifically (the prohibited grounds in these two jurisdictions are “Aboriginal origin” and “Indigenous identity,” respectively). Indigenous persons have successfully brought human rights claims for discrimination relying on other grounds, including race, nationality, ethnicity, and ancestry. However, many First Nations people do not identify with these specific categories, and the separation of one’s identity into such narrow categories is foreign to those who espouse holistic views of identity.[58] Other grounds that may also be relevant in cases involving First Nations persons include family status, religion,[59] disability (including addiction), prior and pardoned conviction of a criminal offense, or social disadvantage or condition.

Many of the cases concerning discrimination against First Nations persons in housing highlight the specific forms of gendered violence which disproportionately affect First Nations women. Both jurisprudence and studies involving First Nations women and discrimination in housing reveal that potential landlords often refuse housing to First Nations women based on negative stereotypes of Indigenous women.[60] On reserve, some cases show men using their position of power (either in band politics or within housing agencies) to refuse housing to current or former partners as part of a pattern of abuse.

Kell v. Canada[61] is a prime example of the political workings in some communities that affect the security of tenure of First Nations women who find themselves in abusive relationships. In this case, the complainant had difficulty getting approval for housing for herself and her children on reserve. The housing board advised her to apply together with her common law partner, who

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[56] *Ibid*.

[57] *BCHRT Report* at 36-42.

[58] *MMIWG Report*, vol 1a, *supra* note 10 at 209; *BCHRT Report* at 9.

[59] In 2013, the BCHRT found a landlord had discriminated against an Indigenous tenant by attempting to evict her for smudging, relying on the lease’s “no smoking” clause: *Smith v Mohan (No 2)*, 2020 BCHRT 52.

[60] *Flamand* v *DGN Investments*, (2005) 52 C.H.R.R. D/142 (HRTO). See also Ontario Human Rights Commission, *Human Rights and Rental Housing in Ontario: Background Paper* (2007), online: <https://www.ohrc.on.ca/en/human-rights-and-rental-housing-ontario-background-paper>.

[61] CEDAWOR, 51st Sess, UN Doc CEDAW/C/51/D/19/2008.

was also the director of the housing board. Kell's partner was physically abusive towards her. Upon the dissolution of their relationship, Kell's partner abused his position on the housing board to remove her from the title of the family home. She struggled for over a decade to regain her home. After the Canadian legal system failed her, the UN Committee on the Elimination of Discrimination Against Women found that Canada violated the *Convention on the Elimination of All Forms of Discrimination Against Women*. While Kell was able to obtain some measure of justice through international law, it came at great cost to her. Many First Nations people fail to avail themselves of the legal recourses available to them for fear of reprisals if they complain about the behaviour of people who hold positions of political power.[62]

The facts in *Raphael v. Conseil Des Montagnais du Lac Saint-Jean*[63] illustrate the vulnerability of First Nations women as a class. In 1985, Parliament passed Bill C-31 to reinstate status for First Nations women who had been either stripped of status by marrying non-status men or whose female ancestors had been stripped of status for the same reason. Shortly following the legislative change and in anticipation of an influx of new or restored members, the band council of the Innu band known today as Pekuakamiulnuatsh imposed a moratorium on services to women who gained status under Bill C-31, including permission to live on reserve. Four women who had regained their status under Bill C-31 filed a complaint under the *Canadian Human Rights Act*. The Canadian Human Rights Tribunal found that the band council had discriminated against the women on the basis of sex by denying them housing and other services on the reserve. While the facts of the case provide a glimpse of sexism in First Nations communities, it also begs the question of how First Nations women specifically are impacted by sexism under the *Indian Act* and how that plays out in the realm of housing.

I have heard several accounts from First Nations people who were denied a rental unit without reason and saw the unit remained unrented until, subsequently, a non-Indigenous tenant moved in. These experiences have occurred despite Sections 10(1) of British Columbia's *Human Rights Code*, which prohibits discrimination in tenancy "because of the Indigenous identity" of a person.[64] While data on housing discrimination specific to First Nations persons is scarce, two studies conducted in Alberta and Manitoba support the assertion that discrimination affects the security of tenure for First Nations persons living off reserve.[65] One study conducted among

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[62] *MMIWG Report*, vol 1a, *supra* note 10 at 209.

[63] (1995) 23 CHRR D/259 (CHRT).

[64] [RSBC 1996] CHAPTER 210.

[65] See for example Irwin M. Cohen and Raymond R. Corrado, "Housing Discrimination among a Sample of Aboriginal People in Winnipeg and Thompson, Manitoba" in J.P. White et al, eds, *Aboriginal Policy Research: Setting the Agenda for Change*, vol 1 (Toronto: Thompson Educational Publishing, Inc. 2004) 113; Takara A. Motz

Indigenous students at the University of Lethbridge found that 44% of respondents had experienced racially-motivated discrimination in housing at least once in their lifetime.[66]

International Law

Canada is a member state to a number of international human rights instruments that directly relate to Indigenous Peoples and housing, including the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)[67] and the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).[68] These statements of rights in international law compel Canada to act proactively toward protecting the identified rights while addressing and eliminating actions that violate them. Canada's obligations under the ICESCR are to "implement the measures of the treaty."[69] Specifically, Canada recognizes people's right to adequate housing under Article 11. In 2019, the *National Housing Strategy Act* (NHSA) was enacted to implement Canada's right to housing commitments under the ICESCR. Canada contributes financially to improve First Nations housing.

Canada's *United Nations Declaration of the Rights of Indigenous Peoples Act* (UNDRIPA) received Royal Assent on 21 June 2021. Under this Act, Canada has committed to a framework for ensuring all federal laws are consistent with UNDRIP. This is a significant step if full implementation can be achieved, as UNDRIP speaks directly to housing under four important articles. First, Article 1 recognizes Indigenous people's right to the freedoms identified under international law, which includes UNDRIP and ICESCR, re-affirming Canada's commitment to its obligations under the latter. Second, Article 3 recognizes the right to self-determination, embodying the right to "freely pursue their economic, social and cultural development." Third, Article 21 identifies Indigenous Peoples' right to improve "economic and social conditions, including, inter alia … housing, sanitation, health and social security." Article 21 also asserts that states bear an obligation to "take effective measures … to ensure continuing improvement of

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and Cheryl L. Currie, "Racially-Motivated Housing Discrimination Experienced by Indigenous Postsecondary Students in Canada: Impacts on PTSD Symptomology and Perceptions of University Stress" (2019) 176 Public Health 59 [Motz and Currie].

[66] Motz and Currie, *supra* note 65 at 62.

[67] United Nations Committee on Economic, Social and Cultural Rights, *International Covenant on Economic, Social and Cultural Rights*, coming into force 3 January 1976. Online: https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx.

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

[69] Government of Canada, *Canada's appearance at the United Nations committee on Economic, Social and Cultural Rights*, 2017, online: https://www.canada.ca/en/canadian-heritage/services/canada-united-nations-system/reports-united-nations-treaties/commitments-economic-social-cultural-rights/canada-appearance.html.

their [Indigenous Peoples'] economic and social conditions." Fourth, Article 23 recognizes the "right to be actively involved in developing and determining health, housing and other economic and social programmes affecting" Indigenous Peoples.

The enactment of UNDRIPA has two main implications for the implementation of the NHS. First, section 5 of UNDRIPA provides that the Government of Canada must, in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure that the laws of Canada are consistent with UNDRIP. Therefore, the government has an obligation to consult and cooperate with Indigenous Peoples to ensure that any laws enacted to further the NHS align with UNDRIP. Second, under Section 6(1), the Minister of Justice must, in consultation and cooperation with Indigenous Peoples and with other federal ministers, prepare and implement an action plan to achieve the objectives of UNDRIP. In order to fully implement UNDRIP, a plan of action needs to be prepared for the NHS. Predictably, such a plan would address the scope of any legislative review required to bring Canadian laws in alignment with both the NHS and UNDRIP and specify the role of the Advocate. Further, the plan would shape the Advocate's consultation process as well as the way in which the NHS is implemented. Other implications may arise in consultation with Indigenous Peoples. Section 6(2) provides that the plan must include measures to address injustices (including systemic racism and discrimination), promote mutual respect, understanding, and good relations, and contain accountability measures regarding implementation, which can include monitoring, oversight, recourse, or remedy.

The obligations Canada recognizes and assumes under international law demand the utmost commitment to upholding these rights in a manner that would eliminate the appalling conditions in which many First Nations people currently find themselves living. In addition to its international commitment, Canada also has obligations to rectify the housing crisis on and off reserve under its domestic law. Canada's federal jurisdiction under Section 91(24) is a double-edged sword. Where it once gave Canada the authority to administer and manage First Nations Peoples under statutes such as the *Indian Act*, it has a present-day corollary responsibility to protect and empower First Nations to meet a respectable standard of living compared to non-Indigenous Canadian society.

Fiduciary Duty

The Supreme Court of Canada identified that the Crown owed First Nations a fiduciary duty in certain circumstances. In 1984, the Court in *Guerin* held the Crown's duty to Indigenous peoples as being *sui generis*, as it is not fully a private or public law duty. Rather, the duty arises because of "the unique character both of the Indians' interest in land and of their historical relationship with the Crown."[70] Although there is subsequent case law further defining the scope of this

[70] *Guerin v Canada*, [1984] 2 SCR 335 at para 104.

duty,[71] the historical relationship with, including constitutional authority over, Indigenous peoples combines with the dispossession of land to underscore the significance of the Crown's fiduciary duty. Arguably, the Crown owes a fiduciary duty when it comes to ensuring safe and sanitary living conditions for First Nations on the reserves to which Canada relegated them.

It does not appear to have been argued that Section 91(24) obliges the federal government to legislate or provide services. Rather, fiduciary obligations are triggered when the government chooses to exercise its powers under Section 91(24), as this section must be read together with Section 35. The government must exercise its powers in respect to First Nations in a way that is compatible with its fiduciary obligations.[72]

In this respect, a novel argument has been put forward in *Grant*,[73] an ongoing case in which a class action is suing the Crown for the housing conditions on reserve. The plaintiffs are arguing that the Crown has a fiduciary duty to take reasonable measures to protect the health and safety of First Nations persons living on reserve.[74] While the class action was certified to pursue that issue, the court held that it is not plain and obvious that the Crown has a fiduciary duty to provide a level of resources, health and welfare, and housing accommodations that meet minimal national standards or better, and struck those particulars from the claim.[75]

There may also be room to argue that the Crown owes First Nations a fiduciary duty in the manner in which it implements policy. In *Lafrance Estate v. Canada*,[76] the Ontario Court of Appeal indicated that, in the context of implementing the residential school policy, the Crown assumed a fiduciary duty with respect to the education of the children they forcibly removed from families.

In the 2017 and 2018 federal budget, Canada committed $600 million over three years to support on reserve housing as part of the launch of the National Housing Strategy.[77] Considering this funding is intended for the roughly 630 First Nation communities across Canada, the sum

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[71] *Wewaykum Indian Band v Canada*, [2002] 4 SCR 245.

[72] *R v Sparrow*, [1990] 1 SCR 1075.

[73] See *supra* note 12.

[74] A similar line of reasoning was pursued in a class action commenced by Tataskweyak Cree Nation and others concerning the lack of clean drinking water on reserve. The court did not decide on the merits of this argument as the parties entered into a settlement agreement on December 22, 2021: *Tataskweyak Cree Nation et al v Canada (Attorney General)*, 2021 FC 1415. The Tsuu T'ina, Ermineskin, Sucker Creek and Blood First Nations are also suing the Canadian government on the same basis and the case is currently pending.

[75] *Ibid*. at para 50.

[76] *Lafrance Estate v Canada (Attorney General)*, (2003), 64 OR (3d) 1 (CA).

[77] Government of Canada, *Budget 2018,* online: <https://www.budget.gc.ca/2018/docs/plan/chap-03-en.html#Achieving-Better-Results-for-Indigenous-Peoples>.

constitutes an even distribution of roughly $317,000 per community per year. This continues the trend of insufficient funding allocated towards First Nations housing and other connected issues. In the absence of any contractual obligation to fund a specific program, First Nations unfortunately do not appear to have any recourse under constitutional law to remedy the shortfall. Lower courts have found that the Crown has no fiduciary duty to fund any specific program in any specific amount.[78] In other words, while a failure to adequately fund First Nations housing programs might be morally unjustifiable, it has yet to be successfully argued that such a failure is unconstitutional. While this is true, recent developments in human rights jurisprudence may open the door for First Nations to argue that Canada has an obligation to fund housing programs for First Nations peoples equally or even equitably as compared to the funding granted to housing programs for the general population.[79]

Conclusion and Suggestions

The path to security of tenure for First Nations people is pocked with a history of systemic intervention from Canada's governments. The jurisdiction over First Nation people changes when First Nations people leave their reserve and become subject to provincial or territorial laws. Jurisdictions are further divided by subject matter and municipal land-use zoning bylaws, creating a complicated legal landscape for First Nations Peoples.

One suggestion to rectify security of tenure for First Nations is to consider the matter in its entirety as a systemic problem. More than a century of laws and policies have systematically eroded Indigenous connections to land, family, security, and ways of life, with a primary goal of assimilation into mainstream Canadian societies. Common logic indicates that a problem rooted in a history of systemic intervention and violence will require holistic, systemic solutions. The federal government, under its domestic and international commitments, should consider an integrated approach to improving life on reserves that would give First Nations valid options regarding whether to remain in their home communities or leave for different opportunities in urban centres.

An integrated approach may include a comprehensive package of funding and resources for programs that could include:

- A proper long-term strategy and funding for revitalizing all housing on reserves, including for expanding the number of housing units;

[78] *Southeast Child & Family Services v Canada (Attorney General)*, [1997] 9 WWR 236 (Man. Q.B.).

[79] Regarding discrimination and failure to fund programs equally, see *Caring Society*, *supra* note 51. In *Ewert v Canada*, [2018] 2 SCR 165, the Supreme Court found that treating Indigenous people in the exact same way as non-Indigenous people may produce a discriminatory outcome.

- Funding for education and skills training on or near communities to prepare youth for securing long-term careers;
- Continued and improved commitment to culturally appropriate healing programs to empower First Nations to continue to support healing from residential school trauma and other forms of colonial violence;
- Ensuring access to vital resources on traditional territories to allow First Nations to benefit from their own lands and establish self-sufficiency.

Given these suggestions, many First Nations people will continue to choose to relocate to an urban centre for any number of reasons. Addressing systemic problems on reserve will help reduce the number of inadequately prepared First Nations people arriving in cities. Nevertheless, people who transition from remote communities to urban centres may be overwhelmed by the change and would benefit from support. One possible solution may come from other similar programs, such as the work of the Homes for Heroes Foundation in Canada which is designed to provide housing for veterans. Homes for Heroes funds the construction of tiny communities in Canada's major cities.[80] The initiative tackles an issue that also involves jurisdictional overlap, as veterans' affairs fall under federal jurisdiction while housing is a provincial concern. This has potential as a model for First Nations people as, in addition to providing housing during transition, it may offer community support through locally oriented services and the support of other tenants in a community setting.

Any such solutions would require collaborative efforts involving all levels of government and the expertise of specialized groups, including especially First Nations steering committees. No two First Nations are the same, and likewise, their circumstances will also vary, sometimes significantly. Whatever strides are made towards addressing the abysmal shortcoming in Canada's relationship with First Nations Peoples, solutions will require conversations with First Nations at the local level. Implementing effective solutions will require political will, proper planning, and significant financial commitments implemented over the long term.

Under Section 2(d) of the NHSA, the National Housing Strategy is to provide for participatory processes to ensure the ongoing inclusion and engagement of civil society, stakeholders, vulnerable groups, and persons who have experienced housing need and homelessness. The Federal Housing Advocate is well positioned to undertake the consultative work required to address First Nations housing issues. Under Section 13 of the NHSA, part of the Advocate's mandate is to consult with persons who are members of vulnerable groups, persons with lived experience of housing need, and persons with lived experience of homelessness, as well as with civil society organizations with respect to systemic housing issues. The Advocate is to receive

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[80] Homes for Heroes Foundation, online: <https://homesforheroesfoundation.ca/>.

submissions with respect to systemic housing issues. They may choose to review the systemic housing issue raised and establish a review panel to hold hearings under Section 13.1. If no submission is received, the Advocate can still compel the National Housing Council to establish a review panel under Sections 13.2 and 16.1. The Advocate is also tasked with providing advice, reports, and recommendations to the Minister of Justice to further the implementation of the National Housing Strategy. The Minister must then table the report in Parliament. The issues highlighted in this paper, including jurisdictional gaps, lack of funding, and specific human rights concerns, are relevant for inclusion in such reports, and solutions should be further explored in consultation with First Nations through the Advocate's activities, including by conducting hearings with a review panel. Further, under Section 8 of the NHSA, the National Housing Council is made up of at least nine members appointed by the Minister of Justice. It would be advisable that at least one of the members of the Council be knowledgeable about and representative of First Nations' experience.