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Introduction to the Special Issue on Housing Precarity and Human Rights

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Introduction to the Special Issue on Housing Precarity and Human Rights

ALEXANDRA FLYNN & ESTAIR VAN WAGNER

> "Homeless encampments threaten many human rights … . Encampments are thus instances of both human rights *violations* of those who are forced to rely on them for their homes, as well as human rights *claims,* advanced in response to violations of the right to housing. Ultimately, encampments are a reflection of Canadian governments' failure to successfully implement the right to adequate housing." — Leilani Farha and Kaitlin Schwan in *A National Protocol for Homeless Encampments in Canada*[1]

This special issue brings together a collection of papers examining the legal dimensions of housing precarity. While we originally imagined a special issue focused on homelessness and human rights, we agree with our contributors that housing precarity sits along a disparate spectrum, with homelessness at one end.[2] People weave in and out of living situations, whether in shelters, apartments, rooming houses, and encampments.[3] Human rights, and their violation, are engaged at all stages of this spectrum. Yet this relationship has been underexamined in Canadian legal scholarship. The pieces in this issue contribute to an important conversation about the intersection of housing, human rights, and homelessness.

Special issue authors live, or have lived, on the territories of various Indigenous nations across what some call Turtle Island, in what is now known as Canada. We believe it is crucial to understand colonialism as integral to the production and maintenance of housing precarity. In particular, how colonial legal and political structures have been, and continue to be, instruments of dispossession, violence, and disconnection from territory, place, culture, community, and family. The articles in this issue largely focus on colonial legal and political structures rather than the enduring Indigenous systems of law and governance across this territory. Our hope is that this work supports ongoing and future dialogues about decolonizing housing law and policy and upholding Indigenous jurisdiction.

Before the COVID-19 pandemic and the associated economic downturn, many Canadian cities were experiencing housing and homelessness crises. The onset of the COVID-19 pandemic powerfully illustrated the life and death consequences of having a safe and stable place to call home. Across Canada, unhoused people were unable to comply with "stay-at-home" orders when the pandemic began. Shelters in many communities were already at or over capacity and overcrowding led to COVID-19 outbreaks. Despite the increasing prevalence of homeless encampments across Canada and the impacts of the pandemic, few governments have adopted and implemented human rights-based responses. While at the start of the pandemic some Canadian cities imposed moratoriums on encampment evictions, they later resumed this long-standing practice, contrary to public health advice. Cities went to court asserting their rights to evict

[1] Leilani Farha & Kaitlin Schwan, (30 April 2020) at 2 [emphasis in original], online (PDF): The Shift <https://make-the-shift.org/wp-content/uploads/2020/04/A-National-Protocol-for-Homeless-Encampments-in-Canada.pdf> [perma.cc/ZEM7-VGDH] [Farha & Schwan, "National Protocol"].

[2] Anna Lund, "Intersections between Precarious Housing and Residential Tenancy Law: A Review of *A Complex Exile* and Recent Legal Scholarship on Residential Tenancies" in this volume.

[3] Nicholas Blomley, Alexandra Flynn & Marie-Eve Sylvestre, "Governing the Belongings of the Precariously Housed: A Critical Legal Geography" (2020) 16 *Annual Review of Law and Social Science* 165-181.

encampment residents, even where deaths later ensued from the lack of adequate shelter space. High profile conflicts with police and private security saw encampment residents and their allies violently removed from public spaces from Victoria to Halifax, sometimes facing fines or charges.

The ramifications of the housing crisis are vast and urgent. As the pandemic raged, more and more reports came through our community contacts regarding the urgency of safe housing for unhoused people. Both of us became connected with local advocates struggling to address decampments and displacement of those forced into encampments as a result of lack of safe, secure housing. In the midst of one of the worst economic and social crises in recent history we saw punitive measures play out in our respective communities and local governments and media perpetuate stereotypes about our unhoused neighbours.

Encampment residents and housing advocates are seeking to mobilize a human rights approach to tent encampments in the absence of provincial and municipal commitments to implement the right to adequate housing for all. Legal and community advocates advised us that legal scholarship examining the context of homelessness and encampments in Canada was essential to the development of arguments advancing human rights in the courts and with all levels of government. As researchers fortunate enough to shelter at home, we decided that gathering scholars for a special issue on homelessness and human rights was one small way we could support efforts on the ground. We hope the articles will provide concrete support to those working to protect the basic human rights of precariously housed and unhoused people.

I. HOMELESSNESS AND HOUSING PRECARITY

Homelessness describes the "situation of an individual, family or community without stable, safe, permanent, appropriate housing, or the immediate prospect, means and ability of acquiring it."[4] The United Nations refers to two types of homelessness: *primary homelessness*, when someone is homeless without shelter; and *secondary homelessness*, when someone relocates between different types of accommodation.[5] Métis scholar Jesse Thistle notes that "Indigenous homelessness" expands past the four ranges of experiences outlined above because it is rooted in ongoing settler colonization, racism, displacement, and the dispossession of "First Nations, Métis and Inuit Peoples from their traditional governance systems and laws, territories, histories, worldviews, ancestors and stories."[6] The continuous displacement of Indigenous individuals and dispossession of land is an act of cultural destabilization, ongoing colonialism, and intergenerational trauma,[7] and the perpetuation of colonial practices within policies, programs, legislation, as well as governance structures and systems create "impenetrable systemic and societal barriers."[8] These barriers further impede access to adequate and affordable housing. Indeed, Indigenous Peoples are

[4] Canadian Observatory on Homelessness, "Canadian Definition of Homelessness" (2012) at 1, online (pdf): *HomelessHub* <https://www.homelesshub.ca/sites/default/files/attachments/COHhomelessdefinition-1pager.pdf> [perma.cc/XNT6-SG69].

[5] Canadian Observatory on Homelessness, "Canadian Definition of Homelessness: What's being done in Canada and elsewhere?" (n.d.), online (pdf): *HomelessHub* <https://www.homelesshub.ca/sites/default/files/attachments/BackgroundCOHhomelessdefinition.pdf> [perma.cc/B687-4CYZ].

[6] "Definition of Indigenous Homelessness in Canada" (Toronto: Canadian Observatory on Homelessness Press, 2017) at 6, online (pdf): <www.homelesshub.ca/sites/default/files/COHIndigenousHomelessnessDefinition.pdf> [perma.cc/6C42-R8EA]

[7] *Ibid* at 8.

[8] *Ibid.*

not only overrepresented in the population experiencing homelessness; they are also disproportionately unsheltered and living in encampments compared to non-Indigenous people experiencing homelessness.[9]

We note the different ways some of our authors engage with the meaning of "home," "homelessness" and "encampments" in their contributions. For example, Sarah Buhler and Patricia Barkaskas centre Indigenous conceptions of "home" as crucial for moving beyond property-based conceptions.[10] They note that in Indigenous worldviews, "home" is "not merely a structure, but rather has to do with a sense of emplaced connection to land, traditions, ancestors, family, and community."[11] They advance that eviction of Indigenous tenants is a manifestation of settler colonialism's claims and performance of property.[12] Terry Skolnik also notes the shortcomings with existing definitions, adding that homelessness is a legal condition where individuals lack private property rights, resulting in "unfreedom" and "legal subordination."[13] Jessica Braimoh, Erin Dej and Carrie Sanders define encampments as an area where a group of people erect tents or temporary structures, but point out there are nuances in encampments themselves, with some operating informally and others have clearly defined rules and resource sharing.[14]

Remedying the effects of housing precarity and homelessness is urgent. Research indicates that the life expectancy of someone who experiences homelessness is about 50 years, compared with the national average life expectancy of 70–80 years.[15] Those who experience homelessness are more susceptible to health concerns: they are 29 times more likely to have Hepatitis C, 5 times more likely to have heart disease, and 4 times more likely to have cancer.[16] As a result, pandemics and other infectious disease epidemics disproportionately affect people experiencing poverty and homelessness.[17] A retrospective cohort study conducted from January to July 2020 confirmed that people experiencing homelessness are at a higher risk of contracting COVID-19.[18] Shared spaces in shelters are an optimal breeding environment for illnesses due to "crowding, difficulty achieving physical distancing and high population turnover."[19]

II. THE RIGHT TO HOUSING IN CANADIAN LAW

[9] Employment and Social Development Canada, "Everyone Counts 2018: Highlights – Preliminary Results from the Second Nationally Coordinated Point-in-Time Count of Homelessness in Canadian Communities" (2019), online: Government of Canada <https://publications.gc.ca/collections/collection_2019/edsc-esdc/Em12-25-2018-eng.pdf> [perma.cc/G9GT-3PSQ].

[10] "The Colonialism of Eviction" in this volume.

[11] *Ibid*.

[12] *Ibid*.

[13] "Homeless Encampments: A Philosophical Justification" in this volume [Skolnik, "Homeless Encampments"]; Christopher Essert, "Property and Homelessness" (2016) 44 Phil & Pub Aff 266. See also Terry Skolnik, "Homelessness and Unconstitutional Discrimination" (2019) 15 J L & Equality 69.

[14] "'Somebody's street': Eviction of Homeless Encampments as a Reflection of Interlocking Colonial and Class Relations" in this volume.

[15] Admin, "Remembering Those Lost to Homelessness" (21 December 2018), online: National Coalition for the Homeless <https://nationalhomeless.org/category/mortality/> [perma.cc/AR7E-TPEZ].

[16] Erika Khandor & Kate Mason, "The Street Health Report" (Toronto: Street Health, 2007) at 4, online (pdf): *The Wellesley Institute* <https://www.wellesleyinstitute.com/wp-content/uploads/2007/09/Street-Health-Report-2007.pdf> [perma.cc/3ZHE-8ZGQ].

[17] Melissa Perri, Naheed Dosani & Stephen W. Hwang, "COVID-19 and People Experiencing Homelessness: Challenges and Mitigation Strategies" (2020) 192:26 Canadian Medical Assoc J E716.

[18] Lucie Richard *et al*, "Testing, Infection and Compliance Rates of COVID-19 Among People with a Recent History of Homelessness In Ontario, Canada: A Retrospective Cohort Study" (2021) 9:1 CMAJ Open E1 at E6.

[19] Perri, Dosani & Hwang, *supra* note 17 at E716.

In 2019, the federal government enshrined the right to adequate housing in federal law in the *National Housing Strategy Act*.[20] Section 4 of the Act states:

> It is declared to be the housing policy of the Government of Canada to
>
> a) recognize that the right to adequate housing is a fundamental human right affirmed in international law;
> b) recognize that housing is essential to the inherent dignity and well-being of the person and to building sustainable and inclusive communities;
> c) support improved housing outcomes for the people of Canada; and
> d) further the progressive realization of the right to adequate housing as recognized in the International Covenant on Economic, Social and Cultural Rights.

Other governments, including municipalities, have been reluctant to adopt similar rights-based approaches. Given that many elements of housing policy fall under provincial jurisdiction, and are often then delegated to municipal governments, this lack of corresponding legal and policy frameworks to implement the right to housing is significant. In practice, other levels of government have also failed to secure access to permanent, adequate housing for the most vulnerable, including encampment residents. Even though officials actively acknowledge the lack of available housing, they nonetheless engage in displacement through ticketing, arrest, forced eviction, and the destruction of tents and personal property. Relying on inadequate, unsafe, and often full, temporary shelters, governments justify clear human rights violation as balancing competing public interests. Yet the human rights at stake–the right to life, security of the person, and to live a dignified life–are the most basic rights on which all other *Charter* rights depend.[21] The complexity of the problem, the polarization of views amongst stakeholders, the cross-departmental and inter-jurisdictional issues raised in the housing context, and the absence of inter-governmental coordination have entrenched a largely punitive response to encampments across Canada.

The tools to adopt a human rights framework and implement a different response to encampments are readily available to governments. The *National Protocol on Homeless Encampments in Canada*, released in April 2020 by Dr Kaitlin Schwan and then United Nations Special Rapporteur on the right to adequate housing Leilani Farha, includes eight principles for a rights-based approach to encampments.[22]

> **"Principle 1: Recognize residents of homeless encampments as rights holders"[23]**
> All government action is "guided by a commitment to upholding the human rights and human dignity of their residents."[24] A rights-based approach re-directs criminalization and penalization of residents toward an approach that includes residents in decision-making.[25]

[20] SC 2019, c 29 s 313 [*National Housing Strategy Act*].
[21] Martha Jackman, "The Protection of Welfare Rights Under the Charter" (1988) 20 Ottawa L Rev 257 at 326.
[22] "National Protocol", *supra* note 1 at 2.
[23] *Ibid*.
[24] *Ibid.*
[25] *Ibid.*

"Principle 2: Meaningful engagement and effective participation of homeless encampment residents"[26]

All people experiencing homelessness should be included in discussions regarding "the design and implementation of policies, programs, and practices" that may affect their lives.[27] Meaningful engagement and participation should begin when an encampment is established and continue throughout the process of securing housing. Ongoing support, services, resources, and access to information pertaining to their rights must be provided to anyone experiencing homelessness.[28]

"Principle 3: Prohibit forced evictions of homeless encampments"[29]

Pursuant to international law, the forced eviction and obstruction of an encampment resident is not permitted. Any forced eviction of a temporary shelter "is considered a gross violation of human rights." Laws and policies that sanction evictions and penalize encampment residents must be repealed.[30]

"Principle 4: Explore all viable alternatives to eviction"[31]

Governments must meaningfully engage with residents about the future of an encampment. Options for relocation must be discussed with residents prior to eviction and must be done in a way that respects and considers the rights of residents. "[A]dequate alternative housing, with all necessary amenities, must be provided to all residents prior to any eviction."[32]

"Principle 5: Ensure that relocation is human rights compliant"[33]

Relocation must be rooted in the "principle that the right to remain in one's home and community is central to the right to housing."[34]

"Principle 6: Ensure encampments meet basic needs of residents consistent with human rights"[35]

Basic and minimum standards for encampments include:

1. "access to safe and clean drinking water,
2. access to hygiene and sanitation facilities,
3. resources and support to ensure fire safety,
4. waste management systems,
5. social supports and services, and guarantee of personal safety of residents,

[26] *Ibid*.
[27] *Ibid.*
[28] *Ibid* at 3.
[29] Ibid.
[30] *Ibid.*
[31] *Ibid*.
[32] *Ibid.*
[33] *Ibid*.
[34] Leilani Farha, 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, UNGAOR, 73d Sess, UN Doc A/73/310/Rev.1, (2018) at para 26, cited in *ibid.*
[35] "National Protocol", *supra* note 1 at 3.

6. facilities and resources that support food safety,
7. resources to support harm reduction, and
8. rodent and pest prevention."[36]

"Principle 7: Ensure human rights-based goals and outcomes, and the preservation of dignity for homeless encampment residents"[37]
"Governments have an obligation to bring about positive human rights outcomes in all of their activities and decisions concerning homeless encampments".[38] Each level of government must prioritize "the full enjoyment of the right to housing for encampment residents."[39] Any decision that does not ensure or protect the dignity and rights of an encampment resident is contrary to human rights law.[40]

"Principle 8: Respect, protect, and fulfill the distinct rights of Indigenous Peoples in all engagements with homeless encampments"[41]
There must be "recognition of the distinct relationship that Indigenous Peoples have to their lands and territories, and their right to construct shelter in ways that are culturally, historically, and spiritually significant."[42] There must be meaningful engagement, participation and consultation with Indigenous encampment residents that recognizes "their right to self-determination and self-governance."[43] Moreover, "[i]nternational human rights law strictly forbids the forced eviction, displacement, and relocation of Indigenous Peoples in the absence of free, prior, and informed consent."[44]

Encampment residents have rarely been treated as rights holders by Canadian cities. They have had their rights to housing violated through the forced evictions of residents from encampments, the lack of meaningful and effective participation in decision making, and from the lack of vital service provision.[45] Further, evictions of encampments in Canadian cities have not addressed the underlying problem: a lack of secure shelter, including social and affordable housing.

III. ENCAMPMENTS, HUMAN RIGHTS, AND THE COURTS

Issues related to encampments are often addressed in the day-to-day operations of by-law enforcement at the local level. However, a number of significant cases have gone before the courts both pre- and post-pandemic. These cases have shaped the way cities engage with encampment residents and have influenced the forms of advocacy residents engage in to defend their human

[36] *Ibid* at 4 [correcting misnumbering in original].
[37] *Ibid*.
[38] *Ibid*.
[39] *Ibid.*
[40] *Ibid.*
[41] *Ibid*.
[42] *Ibid.*
[43] *Ibid.*
[44] *Ibid.*
[45] Alexandra Flynn *et al*, "Overview of Encampments Across Canada: A Right to Housing Approach" (2022), online (pdf): *Homeless Hub* <www.homelesshub.ca/resource/overview-encampments-across-canada-right-housing-approach > [perma.cc/SLL7-82S7].

rights in precarious housing situations and when unhoused.

The landmark decision in *Victoria (City) v Adams*[46] has profoundly shaped the cases that have followed, including those decided during the pandemic. In October 2005, an encampment of roughly 70 residents in Cridge Park became the target of a City of Victoria injunction application. The City sought an interlocutory injunction against the residents loitering and "taking up temporary abode overnight" in the park.[47] Though the injunction was granted and the encampment disbanded, the residents opposed the injunction in court and a trial was required.[48] We note the willingness and ability of the *Adams* claimants to persist in challenging the City in court for over four years and fund and participate in a full hearing of the merits is unique. Most encampment cases are decided at the injunction stage and the *Charter* claims are thus never fully articulated or addressed.

The British Columbia Supreme Court found in favour of the defendants. Justice Ross' decision found sections of the municipal *Parks Regulation Bylaw* and the *Streets and Traffic Bylaw* had breached the defendants' section 7 rights to life, liberty and security of the person and were not saved under section 1 of the *Charter*. It declared the infringing sections of the bylaws "of no force and effect insofar and only insofar as they apply to prevent homeless people from erecting temporary shelter."[49] *Adams* was not hugely dissimilar from earlier cases, but unlike those cases the defendants' section 7 arguments were fully argued and considered. This included acutely framing the issue around the shortfall of shelter beds relative to the number of people experiencing homelessness, demonstrating that camping outside was indeed the only available option to survive.[50]

The Court of Appeal upheld the trial decision with a modified declaration to narrow its application.[51] The bylaws were found to be "inoperative insofar and only insofar as they apply to prevent homeless people from erecting temporary overnight shelter in parks when the number of homeless people exceeds the number of available shelter beds in the City of Victoria."[52] This narrowing has significantly limited the protection provided by subsequent court decision. As we discuss below, the link between shelter availability and the right to erect temporary shelter is one of the most enduring features of the case law both within and outside British Columbia. Indeed, we have argued elsewhere that it has been used to weaponize the shelter system against unhoused persons even where there are significant capacity, accessibility, and adequacy issues with temporary shelters.[53]

During the pandemic, several new cases were brought before courts in Ontario and British Columbia.[54] Some novel arguments were successful in protecting shelter and encampment

[46] 2008 BCSC 1363 [*Adams I*].
[47] *Ibid* at paras 7-10.
[48] See *ibid* at paras 11-14.
[49] *Ibid* at para 239.
[50] See *ibid* at paras 37-66.
[51] See *Victoria (City) v Adams*, 2009 BCCA 563 at paras 160-166 [*Adams II*].
[52] *Ibid* at para 166.
[53] See Delaney McCarten *et al*, "*Trespassing on the Right to Housing: A Human Rights Analysis of the City of Toronto's Response to Encampments During COVID-19*" (December 2021) at 41, online: Environmental Justice and Sustainability Clinic, Osgoode Hall Law School <https://ejsclinic.info.yorku.ca> [perma.cc/B4MX-X9FU].
[54] See *Sanctuary et al v Toronto (City) et al*, 2020 ONSC 6207 [*Sanctuary*]; *Black et al v City of Toronto*, 2020 ONSC 6398; *Poff v City of Hamilton*, 2021 ONSC 7224; *Bamberger v Vancouver (Board of Parks and Recreation)*, 2022 BCSC 49; *Prince George (City) v Stewart*, 2021 BCSC 2089; *Vancouver Fraser Port Authority v Brett*, 2020 BCSC 1368; *Clinique Juridique Itinérante c. Procureur Général du Québec*, 2021 QCCS 182 [*Clinique*].

residents, although none engaged with the right to housing or the *National Housing Strategy Act*.[55] In the 2020 *Sanctuary* decisions, a coalition of advocacy groups successfully brought an injunction prohibiting the City from operating shelters which did not adhere to rules surrounding distancing of beds. In May 2020, the motion was adjourned as the two sides composed an Interim Settlement Agreement which required regular reports to the coalition.[56] The court ultimately found the City had breached the Interim Settlement Agreement and was obligated to continue reporting to the coalition on its progress in implementing physical distancing across their shelters.[57] The decision emphasized the need for accountability, especially among the already-vulnerable homeless population.[58] The *Sanctuary* decision was a victory in terms of accountability and revealed some of the shortcomings of the City's shelters, which is important given the continued efforts to move encampment residents into shelters and shelter hotels.

In Quebec, *Clinique Juridique Itinérante* challenged the provincial curfew imposed on January 6, 2021 (décret gouvernemental 2-2021) on the grounds that it infringed on the section 7 *Charter* rights (as well as provincial charter rights) of people experiencing homelessness.[59] Having been decided after the peak of the second wave, the decision took into account the outbreaks at shelters as a valid reason for people to not utilize them on top of the issues raised about shelters denying admittance based on various factors.[60]

In *Bamberger*, encampment residents succeeded in challenging the lack of consultation before Orders prohibiting overnight shelter at a long-standing encampment in CRAB Park and the reasonableness of the Park Board's decision to issue the Orders. While it was not a *Charter*-based claim, the court was live to the *Charter* issues and found they were relevant to the conclusion that residents had a right to notice and to an opportunity to be heard before being ordered to leave. The court also decided that the Park Board decision was unreasonable because it did not have accurate information regarding the availability of alternative housing for those living in CRAB Park. The Order was set aside and remitted for reconsideration.[61] Notably though the Order was implemented during the third wave of the pandemic, the pandemic itself was not an independent consideration for the Court. Rather, the petition succeeded because of a lack of a reasonable factual basis to conclude there were sufficient and appropriate indoor options for those who sought shelter at the park in question.[62]

The lack of sufficient and appropriate indoor options was also an important factor in *Prince George (City) v Stewart.*[63] This case involved a municipality seeking two statutory injunctions (and a police enforcement order) against the occupants of encampments at two sites. Though one encampment site was permitted to be cleared, the other encampment site was not due to a lack of

[55] It is worth noting that though it did not culminate in a major decision on the issue, in Hamilton the combined efforts of Keeping Six, HAMSMaRT, the Hamilton Community Legal Clinic and Wade Poziomka successfully received a temporary injunction against an encampment clearing in July/August 2020. "Community updates" (2020), online: Hamilton Justice <hamiltonjustice.ca/en/encampment-advocacy/> [perma.cc/5JPL-DWYS]. The City reached an agreement with these groups to end the injunction in October. Dan Taekema & Samantha Craggs, "Court battle over Hamilton tent encampments expected to drag on for days" (19 October 2021), online: CBC News <cbc.ca/news/canada/hamilton/encampments-1.6215671> [perma.cc/85TN-X2R4].
[56] See *Sanctuary*, *supra* note 55 at paras 6-7.
[57] See *ibid* at paras 214-216.
[58] *Ibid* at paras 68-75.
[59] See *Clinique*, *supra* note 55 at para 9.
[60] See *ibid* at para 10.
[61] See *Bamberger v Vancouver (Board of Parks and Recreation)*, 2022 BCSC 49 at paras 63-64.
[62] See *ibid* at para 150.
[63] *George (City) v Stewart*, 2021 BCSC 2089 [*Stewart*].

viable alternatives.[64] The court held the existing shelter beds were not "low barrier" enough to ensure accessibility.[65] For example, the shelters imposed eligibility criteria which often excluded those with substance abuse or mental health issues from accessing these spaces. Other barriers mentioned by the Court included a lack of identification and lack of bank accounts or records.[66] Notably, Hinkson CJ briefly considered the role of the pandemic in contributing to the lack of normally accessible shelter spaces.[67] The decision is also important because the judge considered both the harsh local climate and the context of colonization. Taking notice of the ongoing impacts of colonization such as residential schools, the judge noted the disproportionate number of Indigenous individuals in the encampment. Several times in the decision the judge also noted the cold climate and the lack of both suitable housing and daytime facilities. This may imply that *Charter* protections regarding overnight sheltering could be extended to daytime situations where cold weather is a significant threat.[68]

There is considerable disparity in the way courts across the country have understood and engaged with the human rights dimensions of encampments. In Ontario the approach has been markedly different from that in British Columbia. Decisions made in Toronto and Hamilton during the pandemic adopted a framework for balancing the uses of public space in the context of protest encampments engaging section 2(b) expressive rights, incorrectly applying this to section 7 claims in our view. While these are crucial *Charter*-protected rights, they do not import the same considerations as the right to life and security of the person at stake in homelessness encampment cases. The Ontario cases have thus far emphasized the property rights of municipalities without appropriate consideration of the social context of encampments, the reality of precarious housing, and the barriers to the use of the shelter system. These cases also demonstrate that the unique facts of each court action are important, rather than broader questions of housing availability for vulnerable people. They also illustrate the limitations of addressing the housing crisis through injunctions necessitated by municipalities' reliance on trespass law.

IV. CONTRIBUTIONS IN THE SPECIAL ISSUE

It is against this dotted landscape of slow and qualified legislative and judicial change that this collection emerged. The articles in this special issue focus on two broad themes: the manner in which colonialism and socio-legal processes reinforce displacement of precariously housed people, including those who are unhoused; and the way conceptions of "public" and "private" law (especially property law) are mobilized and justified in relation to encampments.

The collection opens with Jessica Braimoh, Erin Dej & Carrie Sanders' article examining the socio-legal processes that undermine human rights and perpetuate inequity and the oppression of unhoused populations.[69] The authors draw from fifty-four interviews with people experiencing homelessness, law enforcement, officials, and community members, together with policy materials, to understand encampments regulation in a mid-sized Canadian city. They argue public property is maintained as a commodity for housed people through the use of three tactics: 1) the invisibilization of Indigenous Peoples, and Indigenous women specifically, experiencing

[64] *Ibid* at para 84.
[65] *Ibid* at para 81.
[66] See *ibid* at paras 67-68, 73.
[67] See *ibid* at para 73.
[68] *Prince George (City) v Johnny*, 2022 BCSC 282 [*Johnny*].
[69] Braimoh, Dej & Sanders, *supra* note 14.

homelessness; 2) the construction of fire safety in the encampment as a public concern; and, 3) the prioritization of perceptions of safety among the general public to the detriment of the safety of encampment residents. These tactics work together to justify the displacement of unhoused people and deny encampment residents as rights holders. The authors argue that governance of encampments is reinforced through colonial and class-based regimes.

Sarah Buhler and Patricia Barkaskas next examine eviction as a colonial process through a thorough examination of what they refer to as the "eviction legal system," comprising eviction legislation and policy, and courts and administrative tribunals that adjudicate eviction applications.[70] They conclude that evictions reproduce colonial structures and relations as an active site of displacement and traumatization, including that Indigenous tenants are more likely than non-Indigenous people to live in inadequate and unsafe housing,[71] often located in marginalized or dangerous neighbourhoods,[72] and more likely than non-Indigenous people to be living in homes requiring major repairs in some cities.[73] They argue that the eviction legal system must urgently centre Indigenous laws and concepts of home with the leadership of Indigenous communities and Indigenous legal experts.

In the third contribution, Anna Lund analyzes Erin Dej's book, *A Complex Exile,*[74] to urge us to think beyond "siloed thinking" when examining complex problems like housing precarity.[75] Given that precariously housed people move between different types of shelter, each of which have their own formal and informal rules, Lund argues in favour of bringing areas of law that may be compartmentalized into categories like foreclosure, eviction, and encampment into conversation with one another. Doing so enables the identification of common themes, and ultimately, reform. Lund provides the example of emergency shelters, urging a re-examination through the lens of housing, while also acknowledging existing challenges for tenants.

The next three articles focus on the role of public and private law, particularly property law, in encampment decisions. Stepan Wood urges against recent decisions in British Columbia which have expanded the category of "private" government-owned property in two recent decisions.[76] He argues that these decisions capture property spaces that have been recognized as "public" for *Charter* purposes, with concerning impacts for marginalized populations. Wood argues that the decisions collapse a nuanced public-private spectrum of government-owned property into a flawed view that any state-owned property not formally open to the public is "private property" for purposes of civil and constitutional law. In such cases, the *Charter* will not apply, and will further marginalize encampment residents.

Next, Terry Skolnik explores the justification of encampments when individuals lack access to housing, arguing that encampments are only partially justifiable as they are a response to public and private law's failure to alleviate homelessness, informally accommodate people experiencing homelessness, informally redistribute the property system's benefits and burdens, and bear some

[70] *Supra* note 10.
[71] National Collaborating Centre for Aboriginal Health, "Housing as a Social Determinant of First Nations, Inuit and Metis Health" (2017), online (pdf): <www.ccnsa-nccah.ca/docs/determinants/FS-Housing-SDOH2017-EN.pdf> [perma.cc/WB4H-CPZC] at 1.
[72] Thistle, *supra* note 6 at 26.
[73] Alan B. Anderson, "Socio-Demographic Profile of the Aboriginal Population of Saskatoon" in Anderson ed, *Home in the City: Urban Aboriginal Housing and Living Conditions* (Toronto: University of Toronto Press, 2013) 43 at 74.
[74] *A Complex Exile: Homelessness and Social Exclusion in Canada* (Vancouver: UBC Press, 2020).
[75] *Supra* note 2.
[76] "When Should Publicly Owned Land Be Considered Private in Homeless Encampment Cases? A Critique of Recent Developments in BC" in this volume.

hallmarks of justificatory defences in the criminal law.[77] However, in the eyes of the courts, encampments are only partially justifiable. There is no lawful right to establish permanent encampments in the absence of housing, there is instead a justification to establish temporary ones in certain circumstances. Skolnik concludes that the right to housing obligates state action and should be understood as a right to be protected against the legal condition of homelessness.

The special issue concludes with Sarah Hamill's article, which explains the foundational role played by property law.[78] She suggests that property law "trumps" human rights and formal equality through deference to property rights themselves rather than individuals.[79] She argues that property law does not manifest any inherent normative commitment to recognize the individual as an autonomous person worthy of respect. Hamill's review of encampment cases demonstrates that this deference to property rights is evident in the continual protection of property rights from harm. Hamill's postscript provides a hopeful conclusion to the article and this collection, noting how the decisions in *Stewart* and *Johnny* recognize the harm caused by the dismantling of the encampment, as well as the dignity and worth of encampment residents.[80]

The articles in this special issue link housing precarity and human rights. Missing are the lived experiences of those who often struggle to have their voices heard. These struggles are legal and institutional, as the academic pieces here reveal, and are rooted in basic belonging and survival. We acknowledge the tens of thousands of unhoused people and their advocates who endured–and continue to experience–immense hardship, oppression, and displacement. We hope that this special issue will help in supporting and protecting human rights, currently being denied in many contexts. Our thanks as well to the *Journal of Law and Social Policy* – especially Adrian Smith – and to Osgoode Hall Law School for housing this collection.

[77] "Homeless Encampments", *supra* note 13.

[78] **"Property Says No: Relational (In)Equality, Encampments, and Property Rights" in this volume.**

[79] *Ibid*.

[80] *Ibid*.