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The Colonialism of Eviction

SARAH BUHLER & PATRICIA BARKASKAS*

Very little scholarship has specifically considered the phenomenon of eviction as a colonial process, or examined the role of the eviction legal system in reproducing colonial structures and relations. Our aim in this article is to address this gap and thereby extend to the eviction legal system context the work of scholars who have theorized the colonialism of the criminal justice, child welfare, and carceral systems. This article begins with an overview of current issues relating to urban Indigenous housing in Canada. The next section introduces Indigenous concepts of home and homelessness, which are distinct from dominant understandings. We then place the discussion within the larger context of settler colonialism and critiques of this relation of power. We look specifically at Indigenous conceptions of home and homelessness, as well as how settler colonialism has shaped dominant ideas about property and ownership that underlie the right to evict in Canadian law. The paper then turns to a discussion of how the eviction legal system functions in a “classical” colonial sense to both destabilize and dispossess Indigenous families, and to reinscribe settler claims to property. Fundamentally, we believe there is a need for research and storytelling about the relationship between Indigenous peoples and eviction legal systems in Canada, and we think there is room to imagine decolonizing the eviction legal system.

Eviction from rental housing is often a devastating experience for tenants, “a sudden and traumatic loss.”¹ Eviction can lead to fragmentation of families, disruption of education and work, and adverse mental and physical health outcomes for those affected.² It can also lead to homelessness.³ Evictions have “ripple effects on society,” impacting individual tenants, entire families, and, ultimately, the health and wellbeing of entire communities.⁴ But eviction and its consequent harms are not visited equally upon tenants. Evidence suggests that in Canada, Indigenous tenants are

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¹ Financial Security Program & Dyvonne Body, “A Glimpse into the Eviction Crisis: Why Housing Stability Deserves Greater Attention” (24 July 2019), online: <www.aspeninstitute.org/blog-posts/a-glimpse-into-the-eviction-crisis-why-housing-stability-deserves-greater-attention> [perma.cc/8T84-NQTR].

² See Sarah Zell & Scott McCullough, “Evictions and Eviction Prevention in Canada” (Winnipeg: Institute of Urban Studies, The University of Winnipeg, 2020) at 37–39; Kathryn A Sabbeth, “Housing Defense as the New Gideon” (2018) 41:1 *Harv JL & Gender* 55 at 64–69; Matthew Desmond & Rachel T Kimbro, “Eviction’s Fallout: Housing, Hardship, and Health” (2015) 94:1 *Soc Forces* 295; Chester Hartman & David Robinson, “Evictions: the Hidden Housing Problem” (2003) 14:4 *Housing Policy Debate* 461 at 468; Alexandra B Collins *et al*, “Surviving the Housing Crisis: Social Violence and the Production of Evictions among Women who use Drugs in Vancouver, Canada” (2018) 51 *Health & Place* 174; Rebecca Zivanovic *et al*, “Eviction and Loss of Income Assistance Among Street-involved Youth in Canada” (2016) 37 *J Public Health Policy* 244.

³ See Emily Paradis & Tracy Heffernan, “Preventing Homelessness by Preventing Eviction,” (24 November 2016), online: <www.homelesshub.ca/blog/preventing-homelessness-preventing-eviction> [perma.cc/NN3C-9GX8].

⁴ See Sabbeth, *supra* note 2; Sabbeth notes that “[l]oss of housing visits ripple effects on society” (*ibid* at 64).

evicted from rental housing at a higher rate than non-Indigenous tenants.⁵ Indigenous women and children are particularly impacted by unstable housing and loss of housing.⁶

Indigenous housing scholars and advocates have linked the current housing experiences of Indigenous communities with past and ongoing manifestations of settler colonialism. For example, the Native Women's Association of Canada has stated that “[c]hallenges related to housing in Indigenous communities are underpinned by the histories of colonization of Indigenous peoples in Canada and continuing marginalization of Indigenous people through existing systemic and institutionalized barriers.”⁷ Similarly, Jesse A Thistle writes that “[t]oday’s exclusion of Indigenous people from housing has its roots in ... early and ongoing purposeful destabilization of culture.”⁸ He explains that issues relating to Indigenous housing and homelessness in Canada “can be explained, and solutions ... envisioned, only if we pay attention to the broader legacy of marginalization and displacement created by settler colonialism.”⁹

However, very little scholarship has specifically considered the phenomenon of eviction as a colonial process, or examined the role of the eviction legal system (which we define as eviction legislation and policy, and courts and administrative tribunals that adjudicate eviction applications) in reproducing colonial structures and relations.¹⁰ Our aim in this article is to address this gap and thereby extend to the eviction legal system context the work of scholars who have theorized the

⁵ See Silas Xuereb, Andrea Craig & Craig Jones, “Understanding Evictions in Canada through the Canadian Housing Survey”, *Housing Research Collaborative, University of British Columbia* (September 2021) at 11, online (pdf): <https://housingresearch.ubc.ca/sites/default/files/documents/understanding_evictions_in_canada_2021.pdf> [https://perma.cc/48VD-BKK5]; Acacia Consulting and Research, “Policy Discussion Paper on Eviction and Homelessness: Stakeholder perspectives on a role for human resources & social development Canada” (30 November 2006) at 3, online (pdf): <homelesshub.ca/sites/default/files/policy_discussion_paper_on_eviction_and_homlessness.pdf> [perma.cc/WM27-R6AH]; John Ecker, Sarah Holden & Kaitlin Schwan, “An Evaluation of the Eviction Prevention in the Community (EPIC) Program” (2018) at 5, online (pdf): <www.toronto.ca/wp-content/uploads/2018/10/8ea4-EPIC_Summary_Report_AODA.pdf> [perma.cc/F2KF-VX28]; Emily Paradis, “Access to Justice: The Case for Ontario Tenants Final Report of the Tenant Duty Counsel Review,” (2016) at 32, online (pdf): *Advocacy Centre for Tenants Ontario* <www.acto.ca/production/wp-content/uploads/2017/07/TDCP_Report_2016.pdf> [perma.cc/QP7F-D8PN]; Ephraim Vecina, “Lack of Housing Places Indigenous peoples at Extreme Risk” (23 Oct 2019) online: *Canadian Mortgage Professional* <www.mortgagebrokernews.ca/news/lack-of-housing-places-indigenous-peoples-at-extreme-risk-321150.aspx> [perma.cc/NEU8-4Z8F]. As well, see discussion below.

⁶ See generally Native Women's Association of Canada, “Indigenous Housing: Policy and Engagement. Final Report to Indigenous Services Canada” (30 March 2020) at 4, online (pdf): <www.nwac.ca/assets-knowledge-centre/Indigenous-Housing-Policy-and-Engagement-%E2%80%93-Final-Report-to-Indigenous-Services-Canada.pdf> [perma.cc/HL73-6HTB].

⁷ *Ibid* at 6.

⁸ Thistle, “Definition of Indigenous Homelessness in Canada” (Toronto: Canadian Observatory on Homelessness Press, 2017) at 14, online (pdf): www.homelesshub.ca/sites/default/files/COHIndigenousHomelessnessDefinition.pdf [perma.cc/6C42-R8EA].

⁹ *Ibid*.

¹⁰ Azeezah Kanji and AJ Withers provide a recent exception to this general observation, discussing the links between colonialism and eviction. See Kanji & Withers, “Encampment Evictions: Another face of colonial violence of colonial violence in Canada” *Al Jazeera* (20 July 2021), online: <www.aljazeera.com/opinions/2021/7/20/encampment-evictions-another-face-of-colonial-violence-in-canada> [perma.cc/S3ET-XL45]. Note that we borrow the term “eviction legal system” from Nicole Summers. See Summers, “Civil Probation” 75 *Stan L Rev* [forthcoming in 2023]. However, it is important to note that there is not one homogenous eviction legal system in Canada. Each province and territory has its own eviction legislation and processes.

colonialism of the criminal justice,¹¹ child welfare,¹² and carceral systems.¹³ Because of the power that the eviction legal system wields when it comes to who loses housing and who maintains housing, it is important to critically examine its foundations, practices, and outcomes. Furthermore, a critical decolonial lens on the eviction legal system helps create a different normativity: it helps us recognize that the way things are is not necessarily the way they should be.¹⁴

We begin with an overview of current issues relating to urban Indigenous housing in Canada. We are focused in this article on urban rental housing and the eviction legal system off-reserve: although hugely significant housing issues exist on reserves (and indeed are often connected to housing issues in urban areas), that is outside the scope of our current project.¹⁵ The next section introduces Indigenous concepts of home and homelessness, which are distinct from dominant understandings. We then place the discussion within the larger context of settler colonialism and critiques of this relation of power. We look specifically at Indigenous conceptions of home and homelessness, as well as how settler colonialism has shaped dominant ideas about property and ownership that underlie the right to evict in Canadian law. The paper then turns to a discussion of how the eviction legal system functions in a “classical” colonial sense¹⁶ to both destabilize and dispossess Indigenous families, and to reinscribe settler claims to property.¹⁷ As Michelle Stewart and Corey La Berge write, “[a]t the centre of settler colonialism are the material practices that actively traumatize and displace.”¹⁸ Eviction, we argue, is one such material practice of active displacement and traumatization. By drawing attention to the colonial dimensions of the eviction legal system, this work contributes to the scholarship about Indigenous housing and homelessness, and also adds to the critical scholarship about colonialism within Canadian law and legal systems more broadly. Fundamentally, we believe there is a need for research and storytelling about the relationship between Indigenous peoples and eviction legal systems in Canada, and we think there is room to imagine decolonizing the eviction legal system. Decolonizing eviction could transform housing experiences for all tenants, Indigenous and non-Indigenous alike.

Our intention in this work is to resist the perpetuation of what Eve Tuck calls “damage-centered narratives.”¹⁹ These narratives are prevalent in discourses about homelessness and housing insecurity. They focus on poverty, addictions, or violence, and explicitly or implicitly blame Indigenous people for evictions, housing insecurity, or homelessness.²⁰ These kinds of

¹¹See e.g. Lisa Monchalin, *The Colonial Problem: An Indigenous Perspective on Crime and Injustice in Canada* (Toronto: University of Toronto Press, 2016).

¹² See Michelle Stewart & Corey La Berge, “Care-to-Prison Pipeline: Indigenous Children in Twenty-First Century Settler Colonial Economies” in Heather Dorries *et al.*, eds, *Settler City Limits: Indigenous Resurgence and Colonial Violence in the Urban Prairie West* (Winnipeg: University of Manitoba Press, 2019) 196; Allyson D Stevenson, *Intimate Integration: A History of the Sixties Scoop and the Colonization of Indigenous Kinship* (Toronto: University of Toronto Press, 2021).

¹³ See Robert Nichols, “The Colonialism of Incarceration” (2014) 17:2 *Radical Philosophy Rev* 435. Our article’s title is inspired by Nichols’ article.

¹⁴ We are paraphrasing Nichols’ phrase about alternative normativities and applying the concept to the housing justice system. See Nichols, *ibid* at 445.

¹⁵ See Evelyn Peters & Vince Robillard, “Urban Hidden Homelessness and Reserve Housing” Aboriginal Policy Research Consortium International (2007), online: <ir.lib.uwo.ca/aprci/104> [perma.cc/N7EX-LGDE].

¹⁶ Nichols, *supra* note 13 at 454.

¹⁷ *Ibid* at 451–52.

¹⁸ *Supra* note 12 at 202.

¹⁹ “Suspending Damage: A Letter to Communities” (2009) 79:3 *Harvard Educational Review* 409 at 415.

²⁰ See Thistle, *supra* note 8 at 7.

stories also dwell on “tragedy, and victimry” rather than on resurgence and strength.²¹ Our goal instead is to turn attention to the role of the eviction legal system in producing and maintaining Indigenous housing insecurity and homelessness. Indigenous peoples have long been resisting colonialism and colonial structures—including in the realm of housing.²² Stories of “strength, resiliency and survivance”²³ abound and powerful, life-sustaining Indigenous practices of home and homemaking continue on.²⁴ As Leanne Betasamosake Simpson writes, “Everyday acts of resurgence are taking place as they always have, on both individual and collective scales on Indigenous lands irrespective of whether those lands are urban, rural, or reserve.”²⁵

We define “eviction” as a tenant’s involuntary loss of their home because of a change to the conditions of occupancy made, or threatened, by the landlord. In this way, we borrow Hartman and Robinson’s expansive definition, and agree with them that it is important to “take into account all the ways tenants leave their homes involuntarily.”²⁶ Indeed, as we will discuss below, current legal frameworks sustain conditions where tenants may feel compelled to leave their homes due to landlord threats or actions, even where there is no official legal process underway. Thus, a tenant may lose their home as a result of a landlord’s implicit or explicit threat of eviction, or as a result of a landlord locking them out of their rental unit or shutting off their power. This is “informal eviction”—eviction that happens outside of any official legal process.²⁷ Of course, in many other cases, eviction is the result of a formal legal process where a tribunal or court orders a tenant to move out of their home upon application by a landlord. Formal evictions can occur for a variety of reasons, including non-payment or late-payment of rent, violations of conditions of a lease agreement, alleged illegal activities, and more. Whether enacted formally or informally, eviction is always a reminder of the landlord’s power as the property owner.²⁸ It is a reification and visceral reminder of private property rights in an ongoing context of settler colonialism.

I. INDIGENOUS TENANTS, URBAN RENTAL HOUSING, AND EVICTIONS

Cities are particular sites of Indigenous displacement and dispossession.²⁹ Cities are home to large Indigenous populations. For example, according to the Minister of Indigenous Services’ Annual

²¹ See Leanne Betasamosake Simpson, *As We Have Always Done: Indigenous Freedom through Racial Resistance* (Minneapolis: University of Minnesota Press, 2017) at 196.

²² See e.g. Geoff Dembicki, “Indigenous Housing Solutions, Built on Empowerment” (18 Dec 2020), online: <theyee.ca/News/2020/12/18/Indigenous-Housing-Solutions-Empowerment> [perma.cc/DG3Z-DPCH].

²³ Natalie Clark, “Red Intersectionality and Violence-informed Witnessing Praxis with Indigenous Girls” (2016) 9:2 *Girlhood Studies* 46 at 54.

²⁴ See e.g. Evelyn Peters & Carol Lafond, “‘I Basically Mostly Stick with My Own Kind’: First Nations Appropriation of Urban Space in Saskatoon, Saskatchewan” in Evelyn Peters & Chris Anderson, eds, *Indigenous in the City: Contemporary Identities and Cultural Innovation* (Vancouver: UBC Press, 2013) 88 at 105.

²⁵ *Supra* note 21 at 195.

²⁶ Hartman & Robinson, *supra* note 2 at 466.

²⁷ Sarah Zell & Scott McCullough, “Housing Research Report: Evictions and Eviction Prevention in Canada” (May 2020) at 42 (and throughout), online (pdf): *Canada Mortgage and Housing Corporation* <epddscrmssa01.blob.core.windows.net/cmhcprodcontainer/sf/project/archive/research_6/evictions-and-eviction-prevention-in-canada.pdf> [perma.cc/KRX2-9T3Q].

²⁸ See discussion in AJ van der Walt, *Property in the Margins* (Oxford: Hart Publishing, 2009) at 56.

²⁹ See Cindy Holmes, Sarah Hunt & Amy Piedalue, “Violence, Colonialism, and Space: Towards a Decolonizing Dialogue” (2014) 14:2 *ACME: An International Journal for Critical Geographies* 539 at 550. See also Yale D Belanger, Gabrielle Weasel Head & Olu Awosoga, “Assessing Urban Aboriginal Housing and Homelessness in

Report to Parliament 2020, 45% of status First Nations report residing in urban centres.³⁰ Likewise, Statistics Canada's "Indigenous people in urban areas: Vulnerabilities to the socioeconomic impacts of COVID-19," indicates that 970,000 Indigenous people in Canada are living in urban areas—of those, about one quarter are living in poverty.³¹

Gabrielle Weasel Head and Yale D. Belanger write that cities are "located within the traditional homeland that is largely occupied by a settler population whose policies forced economic hardships on the reserves the participants were forced to flee."³² Weasel Head and Belanger describe cities as colonial environments where Indigenous peoples are often constructed as "outsiders."³³ Similarly, Liza Kim Jackson writes that Indigenous peoples have "historically been seen by settler society to *not* belong in the modern city."³⁴ On the other hand, Indigenous peoples have always resisted the colonial constructions and conditions outlined above and have created vibrant and thriving networks and homeplaces in cities. Simpson writes that Indigenous people constantly challenge "settler colonial dissections of our territories and our bodies into reserve/ city or rural/ urban dichotomies."³⁵ Urban reserves, urban Indigenous housing providers, urban Indigenous cultural and ceremonial practices, and ongoing Indigenous presence in cities show that cities are indeed Indigenous spaces.³⁶ Indigenous families and communities persist in creating homeplaces, even in the face of forces of dispossession.

Indigenous tenants face disproportionate and often extraordinary barriers and challenges in all aspects of rental housing. First, multiple studies and reports have documented discrimination faced by Indigenous individuals and families who are trying to secure rental accommodation. As Thistle has stated, "Finding a place to live in ... Canada can be extremely difficult if you are Indigenous."³⁷ The Ontario Human Rights Commission has noted that discrimination and racist stereotypes operate in decisions by landlords to deny housing to Indigenous tenants. For example, Indigenous applicants reported being asked discriminatory questions about their family composition and being asked to provide written references or significant deposits when these things were not required for non-Indigenous applicants.³⁸ They also faced increased discrimination

Canada" (30 March 2012), online (pdf): *Urban Aboriginal Knowledge Network* <uakn.org/wp-content/uploads/2014/08/2012-UAKN-Research-Paper-Series_Assessing-Urban-Aboriginal-Housing-and-Homelessness-in-Canada_Dr.-Yale-Belanger-1.pdf> [perma.cc/AB2Z-PH74] at 4.

³⁰ Minister of Indigenous Services, "Annual Report to Parliament" (2020), Indigenous Services Canada, online (pdf): <sac-isc.gc.ca/DAM/DAM-ISC-SAC/DAM-TRNSPRCY/STAGING/texte-text/annual-report-parliament-arp-report2020_1648059621383_eng.pdf> at 12.

³¹ (26 May 2020), online: <www150.statcan.gc.ca/n1/pub/45-28-0001/2020001/article/00023-eng.htm> [perma.cc/K6UG-4RGE].

³² "'All We Need is Our Land': Exploring Southern Alberta Aboriginal Homelessness" at 25, online (pdf): <ion.uwinnipeg.ca/~epeters/Workshop%20Papers/Belanger.pdf> [perma.cc/VPZ4-3E32].

³³ *Ibid* at 10.

³⁴ "The Complications of Colonialism for Gentrification Theory and Marxist Geography" (2017) 27 *J L & Soc Pol'y* 43 at 46 [emphasis in original].

³⁵ *Supra* note 21 at 173.

³⁶ See Weasel Head & Belanger, *supra* note 32 at 10.

³⁷ *Supra* note 8 at 26.

³⁸ See Ontario Human Rights Commission, "Housing Discrimination and the Individual" online: <www.ohrc.on.ca/en/right-home-report-consultation-human-rights-and-rental-housing-ontario/housing-discrimination-and-individual> [perma.cc/NYS5-Y5DD]. See also Josh Brandon & Evelyn Peters, "Moving to the City: Housing and Aboriginal Migration to Winnipeg" (November 2014) at 24–25, online (pdf): *Canadian Centre for Policy Alternatives Manitoba* <policyalternatives.ca/sites/default/files/uploads/publications/Manitoba%20Office/2014/12/Aboriginal_Migration.pdf> [perma.cc/4XQ6-F77W].

when they engaged in Indigenous-specific activities. In a ruling from the BC Human Rights Tribunal in 2020,³⁹ Crystal Smith, a Tsimshian and Haisla woman, was found to have been discriminated against for her traditional cultural practice of smudging.⁴⁰ The BCHRT found that in addition to the discrimination Ms. Smith faced for smudging in particular, she was also subjected to a pattern of unwelcome comments from the landlord based on recognized stereotypes about Indigenous peoples.⁴¹ A report by the Saskatchewan Human Rights Commission documented similar issues. It noted a widespread perception that landlords were less likely to rent to Indigenous applicants due to racism and “stereotypes about Indigenous people and about recipients of public assistance.”⁴² Focusing specifically on discrimination faced by Indigenous women who seek to secure rental housing, the Native Women’s Association of Canada (NWAC) has pointed out that the experience of many Indigenous women “continue[s] to be that landlords find ways to deny them leases.”⁴³ This is echoed by Deanna Yerichuk et al, who write that “Aboriginal women face wide-spread racism from landlords and often experience extraordinary difficulty in securing rental housing.”⁴⁴

Once they secure rental housing, Indigenous tenants are more likely than non-Indigenous people to live in inadequate and unsafe housing.⁴⁵ As Thistle writes, “the housing that Indigenous people do manage to secure is often without secure tenure, unfit for human habitation, or is found located in marginalized or dangerous neighbourhoods.”⁴⁶ Alan Anderson’s Saskatoon-based research showed that Indigenous peoples are almost three times more likely than non-Indigenous people to be living in homes requiring major repairs.⁴⁷ Deficiencies noted in this research included structural damage, broken doors and windows, damaged flooring, leaking plumbing systems, and inadequate heating systems.⁴⁸

³⁹ *Smith v Mohan* (No. 2), 2020 BCHRT 52 [*Smith*].

⁴⁰ *Ibid* at para 1.

⁴¹ *Ibid*.

⁴² Saskatchewan Human Rights Commission, *Access and Equality for Renters in Receipt of Public Assistance: A Report to Stakeholders* (Saskatoon: Saskatchewan Human Rights Commission, 2018) at 22, online (pdf): <https://saskatchewanhumanrights.ca/wp-content/uploads/2020/03/SHRC_RIRPA_web.pdf> [perma.cc/5RQ9-693X].

⁴³ Native Women’s Association of Canada, “Background Document on Aboriginal Women and Housing for the Canada-Aboriginal Peoples Roundtable Sectoral Follow-up Session on Housing” (November 2004) at 10, online (pdf): <[web.archive.org/web/20150430135940/http://www.nwac.ca/sites/default/files/reports/NWAC_BgPaper_e.pdf](http://www.nwac.ca/sites/default/files/reports/NWAC_BgPaper_e.pdf)> [perma.cc/5B7M-3JLE] [Native Women’s Association of Canada, “Background Document”]. See also Native Women’s Association of Canada, “Indigenous Housing: Policy and Engagement: Final Report to Indigenous Services Canada” (31 March 2020) at 79, online (pdf): <www.nwac.ca/assets-knowledge-centre/Indigenous-Housing-Policy-and-Engagement-%E2%80%93-Final-Report-to-Indigenous-Services-Canada.pdf> [perma.cc/8HEP-NLF9] [Native Women’s Association of Canada, “Indigenous Housing”].

⁴⁴ “Housing and Homelessness Policy Recommendations for Indigenous Women Affected by Domestic Violence: A Scoping Review” (30 September 2016), online (pdf): *PolicyWise for Children & Families* <policywise.com/wp-content/uploads/2016/11/2016-11NOV-01-Scoping-Review-Indigenous-Women-DV-Homelessness.pdf> [perma.cc/83J7-RQS9] at 30.

⁴⁵ National Collaborating Centre for Aboriginal Health, “Housing as a Social Determinant of First Nations, Inuit and Metis Health” (2017), online (pdf): <www.cnsa-nccah.ca/docs/determinants/FS-Housing-SDOH2017-EN.pdf> [perma.cc/WB4H-CPZC] at 1.

⁴⁶ *Supra* note 8 at 26.

⁴⁷ Alan B Anderson, “Socio-demographic Profile of the Aboriginal Population of Saskatoon” in Alan B Anderson, ed, *Home in the City: Urban Aboriginal Housing and Living Conditions* (Toronto: University of Toronto Press, 2013) 43 at 74.

⁴⁸ *Ibid* at 255.

Indigenous women face compounded challenges when it comes to safe and adequate housing. NWAC reported that Indigenous women are more likely to live in “precarious, temporary, transitional or over-crowded housing situations without adequate, permanent and safe conditions.”⁴⁹ The report notes that “[w]hen Aboriginal women find rental accommodations, they and their children frequently experience poor quality premises and poor upkeep by the landlord of fundamental things like heating systems, the stove and refrigerator, carpets and curtains, windows, and doors.”⁵⁰

Indigenous tenants, and particularly Indigenous women, also experience high levels of harassment and violence by landlords or their agents.⁵¹ Landlords may demand sex in exchange for housing or interfere with tenants’ privacy by claiming the right to enter rental units at will.⁵² Harassment by landlords leaves tenants with a sense of risk and precariousness within their own homes. As Ingrid Westerndorp points out, the “notion of home as a safe haven where a person can live in peace and dignity is totally shattered if a woman has to be vigilant all the time and regularly becomes a victim of violence.”⁵³ This calls to mind Julia Christensen’s observation that Indigenous tenants may not “feel at home” in their own homes due to landlord surveillance and control.⁵⁴

Another barrier for many Indigenous tenants is the affordability of rental housing. Yale Belanger, Gabrielle Weasel Head and Olu Awosoga explain that affordability is a “primary concern” for Indigenous peoples with respect to housing. They state:

At levels more than twice that of non-Aboriginal households affordability is a serious problem confronting Aboriginal renters...This is compounded by the fact that non-reserve Aboriginal incomes are much lower, coming in at on average only 83% that of non-Aboriginal households.⁵⁵

Indigenous tenants who rely on social assistance income face extreme challenges when it comes to affordability: many social assistance programs do not cover the actual cost of rent. This means some tenants have to choose between meeting the basic needs of their families (food, clothing, etc.), or paying rent.⁵⁶ Affordable public housing is limited in most urban centres; this means that tenants must often try to find housing in profit-driven private rental markets.⁵⁷

Research therefore establishes that Indigenous tenants have worse rental housing experiences and outcomes than other groups in Canada. Interestingly, there has not been significant empirical research exploring the issue of evictions.⁵⁸ Indeed, unlike the United States, where

⁴⁹ “Indigenous Housing,” *supra* note 43 at 13.

⁵⁰ “Background Document,” *supra* note 43 at 10.

⁵¹ See Ontario Human Rights Commission, *supra* note 38.

⁵² See Allison Groening *et al*, “Housing Needs of Indigenous Women Leaving Intimate Partner Violence in Northern Communities” (June 2019), online (pdf): Canadian Centre for Policy Alternatives Manitoba Office <mra-mb.ca/wp-content/uploads/Housing-Needs-of-Indigenous-Women-Leaving.pdf> [perma.cc/5U93-EWMP] at 11.

⁵³ “Women’s Housing Rights: Is Anything Wrong with the International Norm?” in Patricia Kennett & Chan Kam Wah, eds, *Women and Housing: An International Analysis* (New York: Routledge, 2011) 11 at 17.

⁵⁴ *No Home in a Homeland: Indigenous peoples and Homelessness in the Canadian North* (Vancouver: UBC Press, 2017) at 119.

⁵⁵ Belanger, Weasel Head & Awosoga, *supra* note 29 at 27.

⁵⁶ Saskatchewan Human Rights Commission, *supra* note 42 at 7. See also Anderson, *supra* note 47 at 104.

⁵⁷ See Margot Young, “Charter Eviction: Litigating out of House and Home” (2015) 24 J L & Soc Pol’y 46 at 51. Young notes that Canada has proportionately the largest private-sector housing market of any Western nation.

⁵⁸ Some of the limited available research is discussed in this section. See also Xuereb, Craig & Jones, *supra* note 5 and Zell & McCullough, *supra* note 2.

extensive data about evictions has been published and analyzed,⁵⁹ there is little detailed or comprehensive empirical research in Canada about evictions. We know that over 330,000 Canadians moved in the five years prior to 2019 because of eviction or mortgage foreclosure.⁶⁰ Several reports have indicated that Indigenous tenants are at a higher risk of eviction than other tenants.⁶¹ We know also that Indigenous peoples experience about twice the rate of “residential mobility” within cities than non-Indigenous people, meaning they move more often.⁶² Indeed, although Indigenous tenants move for a multitude of reasons, including the “quest for suitable housing in a satisfactory neighbourhood”⁶³ to enable better cultural connections and economic opportunities,⁶⁴ or even as a form of resistance to settler colonialism,⁶⁵ it is not unreasonable to suggest that the high rate of residential “mobility” may be in part due to evictions. Indeed, Peters and Kern suggest this in their discussion of mobility of renters in a Winnipeg study. They suggest that “landlord issues” as well as “conflicts with public housing regulations” are all reasons for higher residential mobility experienced by Indigenous tenants.⁶⁶

Finally, we know that Indigenous people experience homelessness at a massively disproportionate rate compared to non-Indigenous people. Indeed, Indigenous people are up to eight times more likely to experience homelessness than non-Indigenous people.⁶⁷ Since eviction can be an antecedent of homelessness,⁶⁸ higher rates of eviction for Indigenous tenants may be an underlying factor when it comes to high rates of homelessness. Certainly, there is a need for quantitative and qualitative research about evictions and Indigenous tenants; we note that qualitative interviews of Indigenous people who have experienced homelessness often hint at formal or informal evictions by landlords but often do not deeply explore these themes.⁶⁹

⁵⁹ See *e.g.* Eviction Lab, online: <evictionlab.org> [perma.cc/BH8Z-7HKV].

⁶⁰ See Statistics Canada, “Indicators Related to Moving” (Statistics Canada, 2019) online: <www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=4610004401> [perma.cc/WVE6-92GC].

⁶¹ See *supra* note 5 for some sources.

⁶² See Monchalín, *supra* note 11 at 150; Anderson, *supra* note 47 at 40.

⁶³ Anderson, *supra* note 43 at 41. See also Evelyn Peters and Selena Kern, “The Importance of Hidden Homelessness in the Housing Strategies of Urban Indigenous People” in Evelyn Peters and Julia Christensen, eds, *Indigenous Homelessness: Perspectives from Canada, Australia, and New Zealand* (Winnipeg: University of Manitoba Press, 2016) 49 at 53.

⁶⁴ Belanger, Weasel Head & Awosoga, *supra* note 29 at 6.

⁶⁵ See Simpson, *supra* note 21. Simpson writes that Indigenous mobility can be a

response to colonialism as resistance. ... Indigenous peoples and our mobility can certainly be an expression of agency and self-determination within even shattered grounded normativity. Given the reality of settler colonialism, many of us continually re-evaluate where we live, whether it is a city or a reserve, in our own territory or not, as a process to figure out how to live with as much dignity as possible ... I see this as using our mobility as a flight path out of settler colonialism and into Indigeneity. I see mobility imbued with agency as resurgence (*ibid* at 196–197).

See also Nicholas Peterson, “Myth of the ‘Walkabout’: Movement in the Aboriginal Domain” in John Taylor and Martin Bell, eds, *Population Mobility and Indigenous Peoples in Australasia and North America* (London: Routledge 2004) 223.

⁶⁶ Peters & Kern, *supra* note 63 at 57.

⁶⁷ Yale Belanger, Olu Awosoga & Gabrielle Weasel Head, “Homelessness, Urban Aboriginal People, and the Need for a National Enumeration” (2013) 2:2 *Aboriginal Policy Studies* 4 at 14.

⁶⁸ See Paradis & Heffernan, *supra* note 3.

⁶⁹ See *e.g.* Marleny M Bonnycastle, Maureen Simpkins & Annette Siddle, “The Inclusion of Indigenous Voices in Co-Constructing ‘Home’: Indigenous Homelessness in a Northern Semi-Urban Community in Manitoba” in Evelyn J

II. SETTLER COLONIALISM, LAW, PROPERTY, AND THE MAKING AND UNMAKING OF “HOME”

Indigenous concepts of home are unique and differ from settler understandings, which are often tangled up in logics of property ownership.⁷⁰ 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. Jesse Thistle explains that Indigenous conceptions of home encompass “a web of relationships and responsibilities involving connections to human kinship networks; relationships with animals, plants, spirits, and elements; relationships with the Earth, lands, waters, and territories; and connections to traditional stories, songs, teachings, names and ancestors.”⁷¹ Similarly, Julia Christensen’s research with Indigenous communities in Northern Canada showed that home has to do with “positive, healthy relationships with family and friends, physical and mental health and well-being, strong cultural ties, personal safety, material security, independence, and self-determination.”⁷² Similarly, Gail MacKay found that Indigenous youth in Saskatoon conceptualized home as “a place of belonging ... as a community first, a neighbourhood second, and a physical structure last.”⁷³ Home is therefore multi-scalar, relational, holistic, and tied to land and histories: it is inseparable from “homeland that contains ... stories, history, and identity.”⁷⁴ In other words, personal and collective connections to land and community are central to Indigenous conceptions of home.

These understandings transcend dominant approaches that connect notions of home to physical shelter and property rights. They suggest “home” for Indigenous communities goes far beyond four walls and a roof and is deeply connected to relationships with “homeland.” They also draw attention to the colonial disruptions that underpin Indigenous homelessness, housing precarity, and eviction in Canada. These disruptions have been experienced by many Indigenous communities as a “source of a profound and sustained collective trauma, an attack on home at its farthest reaches.”⁷⁵ Gabrielle Weasel Head and Yale Belanger have pointed out the profound and heartbreaking irony for Indigenous peoples of “being homeless in one’s homeland.”⁷⁶ They write that “territorial displacement, among other risk factors, likewise propels Indigenous homelessness.”⁷⁷ Similarly, Bonita Lawrence and Kim Anderson write that “[i]n contemporary

Peters & Julia Christensen, eds, *Indigenous Homelessness: Perspectives from Canada, Australia, and New Zealand* (Winnipeg: University of Manitoba Press, 2016) 116 at 136.

⁷⁰ See Thistle, *supra* note 8 at 15.

⁷¹ *Ibid* at 14.

⁷² *Supra* note 54 at 168.

⁷³ Gail MacKay, “The City as Home: the Sense of Belonging among Aboriginal Youth” in Alan B Anderson, ed, *Home in the City: Urban Aboriginal Housing and Living Conditions* (Toronto: University of Toronto Press, 2013) 173 at 182.

⁷⁴ Gabriel Weasel Head & Yale D Belanger, *supra* note 32 at 24. The term “multi-scalar” is borrowed from Christensen, who writes about the complexity and importance of conceptions of home “both at the intimate, proximal scale and at the ontological, or distal, scale,” *supra* note 54 at 35.

⁷⁵ Christensen, *supra* note 54 at 171.

⁷⁶ *Supra* note 32 at 3. See also Jesse Thistle & Helen Knott, “What does it mean to be Homeless as an Indigenous Person? Discuss,” *The Globe and Mail* (11 October 2019), online: <www.theglobeandmail.com/opinion/article-what-does-it-mean-to-be-homeless-as-an-indigenous-person-discuss/?utm_source=Shared+Article+Sent+to+User&utm_medium=E-mail:+Newsletters+/-E-Blasts+/-etc.&utm_campaign=Shared+Web+Article+Links> [perma.cc/BG3Z-B4GD].

⁷⁷ Weasel Head & Belanger, *supra* note 32 at 3.

times there are increasing numbers of us who, on a daily basis, live with no community or no land base—and in that sense we have no home.”⁷⁸ Julia Christensen writes:

Colonialism has, in myriad cross-generational ways, disrupted Indigenous homemaking practices by displacing Indigenous people from their ancestral lands, separating children from their families, and implementing exclusionary socio-spatial structures, all of which have undermined social determinants of Indigenous health, ranging from proximal determinants like housing and poverty to the distal determinants of cultural continuity, self-determination, and an Indigenous sense of home.⁷⁹

Thus, individual experiences of housing, evictions, and homelessness are connected to systemic processes of dispossession. As Margaret Kohn has observed, “[d]ispossession is not something that happens at one moment that is fixed in time; it makes life more precarious in a way that renders people subject to ongoing practices of dispossession.”⁸⁰

In order to understand this collective dispossession, we turn to theories of settler colonialism. This body of scholarship describes settler colonialism as a specific structure and relation of power predicated on the taking of Indigenous lands, and replacing “existing (Indigenous) social orders with another (settler) social order through means of violence, coercion, dispossession, and control.”⁸¹ In other words, settler colonialism is founded upon the eviction of Indigenous peoples from their homelands: it “aims to force Indigenous people out of place, temporally and spatially.”⁸² Scholars of settler colonialism show that it is a “structure not an event,”⁸³ and that the process of “settling” Indigenous lands is “contemporary, persistent, and present.”⁸⁴ It is a process that must be continually re-enacted,⁸⁵ in part because its “logic of erasure” is constantly “abridged by continued Indigenous presence and resurgence.”⁸⁶

Thistle points to *The Gradual Civilization Act*, *The Indian Act*, enfranchisement, and the residential school system as examples of Canadian laws and policies designed to “achieve disintegration” of Indigenous nations and displacement from their lands.⁸⁷ In the case of residential schools, Indigenous children were removed from their families and placed in church-run schools. Christensen points out that one objective of residential schools was “to facilitate the displacement of Indigenous people from their lands.”⁸⁸ A new wave of displacement occurred with the Sixties

⁷⁸ “Introduction: for the Betterment of Our Nations” in Kim Anderson & Bonita Lawrence, eds, *Strong Women Stories: Native Vision and Community Survival* (Toronto: Sumach Press, 2003) 11 at 12.

⁷⁹ *Supra* note 54 at 34.

⁸⁰ Margaret Kohn, *The Death and Life of the Urban Commonwealth* (New York: Oxford University Press, 2016) at 84.

⁸¹ Naama Blatman-Thomas & Libby Porter, “Placing Property: Theorizing the Urban from Settler Colonial Cities” (2018) 43:1 *Int J Urban Regional Research* 30 at 32.

⁸² Lisa Slater, *Anxieties of Belonging in Settler Colonialism: Australia, Race and Place* (New York: Routledge, 2019) at 43.

⁸³ Patrick Wolfe, “Settler Colonialism and the Elimination of the Native” (2006) 8:4 *J Genocide Research* 387 at 388.

⁸⁴ Blatman-Thomas & Porter, *supra* note 81 at 31.

⁸⁵ See discussion in Jackson, *supra* note 34 at 68.

⁸⁶ Blatman-Thomas & Porter, *supra* note 81 at 31.

⁸⁷ Thistle, *supra* note 8 at 14.

⁸⁸ “Indigenous Homelessness: Canadian Context” in Evelyn J Peters & Julia Christensen, eds, *Indigenous Homelessness: Perspectives from Canada, Australia, and New Zealand* (Winnipeg: University of Manitoba Press, 2016) 15 at 16.

Scoop, where large numbers of Indigenous children were taken from their families and homes and were placed for adoption with non-Indigenous families.⁸⁹ Removal from families and placement in the foster care system has been identified as a contributing factor to Indigenous homelessness.⁹⁰ This systemic practice of the removal of children has continued through the current child welfare system. Indeed, advocates point out that there are more Indigenous children in care now than at the height of the residential school era.⁹¹ Other institutions, such as the criminal justice and carceral systems, also continually remove Indigenous peoples from their homes, communities, and lands. Jerome Nichols argues that incarceration “facilitates dispossession, in this time, in this place.”⁹² He explains:

the contemporary carceral system colonizes and re-colonizes in a classical sense: by providing a solution to that which exceeds and destabilizes sovereignty via a spatial reorganization of populations and a depoliticization of that process.⁹³

Nichols argues that incarceration thus functions to “maintain a system of state violence, racialized hierarchy, and ... continuous colonial reterritorialization.”⁹⁴

Canadian law has played a key role in the settler colonial project and the systems and processes of dispossession described above.⁹⁵ According to Stacy Douglas and Suzanne Lenon, law has created the framework and justifications for the “systematic [erasing] of Indigenous bodies and communities from the land in order to make room for colonial wealth.”⁹⁶ In this way, Canadian law has both justified and constituted a form of violence towards Indigenous peoples.⁹⁷ Extensive work has been done by Indigenous legal scholars to describe the colonial contours and functions of Canadian law.⁹⁸ For the purposes of this article, we are particularly interested in the ways that Canadian law and colonial discourses entrench and naturalize conceptions of private property: these conceptions create the foundation for the phenomenon of eviction. As Naama Blatman-Thomas and Libby Porter point out,

“Property” generally conjures a mental image of ownership and housing ... this mental alignment of property with real estate is so powerful that the whole concept has come to encapsulate a common-sense, mundane bundle of rights that people

⁸⁹ *Ibid* at 16–17. See also Stevenson, *supra* note 12.

⁹⁰ *Ibid* at 17.

⁹¹ See Emerald Bensadoun, “More Indigenous Family Separations Now than During Residential Schools, Advocate Says,” *Global News* (27 June 2021), online: <globalnews.ca/news/7983112/indigenous-family-separations-advocate> [perma.cc/SV6X-GW2W].

⁹² Nichols, *supra* note 13 at 452.

⁹³ *Ibid* at 454.

⁹⁴ *Ibid* at 442.

⁹⁵ See further discussion in Patricia Barkaskas & Sarah Hunt, “Access to Justice for Indigenous Adult Victims of Sexual Assault” (October 2017) at 15, online (pdf): *Department of Justice Canada* <publications.gc.ca/collections/collection_2018/jus/J2-484-2017-eng.pdf> [perma.cc/WH9V-B3KJ].

⁹⁶ “Introduction” (2014) 29:2 C.J.L.S. 141 at 142.

⁹⁷ See discussion in Sarah Hunt, “Representing Colonial Violence: Trafficking, Sex Work, and the Violence of Law” (2015-2016) 37:2 *Atlantis* 25.

⁹⁸ See e.g. Patricia Monture-Angus, *Journeying Forward: Dreaming First Nations' Independence* (Halifax: Fernwood, 1999); James (Sa'ke'j) Youngblood Henderson, “The Split Head Resistance: Using Imperial Law to Contradict Colonial Law for Aboriginal Justice” in Elaine Coburn, ed, *More Will Sing their Way to Freedom: Indigenous Resistance and Resurgence* (Halifax: Fernwood, 2015) 50.

hold toward an estate. In these cases, property is both depoliticized and normalized; it is aimed at no-one in particular and available, in theory, to anyone.⁹⁹

Property thus becomes the “object in relation to settler subjects, emerging as the stable, severable thing that activates the familiar categories of ownership, exchange, control and belonging.”¹⁰⁰ However, scholars have pointed out that property in North America is foundationally predicated on dispossession. As Jodi Byrd et al write, “dispossession ... presupposes and configures possession itself.”¹⁰¹ Similarly, Robert Nichols argues that systematic theft of Indigenous lands is a key mechanism by which contemporary property relations are produced.¹⁰² Ideas about private property are foundational to the logic of settler colonialism, for it is “through property that dispossession and settlement are performed and creatively enacted every day.”¹⁰³ Yet, everyday notions about property and legal rules about property relations elide this colonial backdrop.

Thus, current conceptions, practices, and laws pertaining to private property are not inevitable and natural, but rather are constructed and connected to specific goals within settler colonial societies. One of the tasks of critical decolonial scholarship is to question what is naturalized and interrogate underlying assumptions. As Blatman-Thomas and Porter write, “[a]nalyzing how property is performed and materialized reveals the potent work of settler colonialism in the urban context.”¹⁰⁴ We argue that eviction of Indigenous tenants is one way that settler colonialism’s claims about property are continually performed and maintained in our current context. We turn now to this discussion.

III. EVICTIONS, COLONIALISM, AND THE EVICTION LEGAL SYSTEM

The eviction legal system in Canada varies across provincial and territorial jurisdictions, but all provinces and territories have enacted legislation to govern the relationship between landlords and tenants, and all have tribunals or courts that adjudicate evictions. In the first part of this section, we consider residential tenancies legislation. We argue that while this legislation creates frameworks of rights and responsibilities for both landlords and tenants, and regulates landlords’ powers of eviction, it ultimately reproduces dominant ideas about property and the power of property owners. When we consider histories of colonialism and the realities of social and economic power imbalances between landlords and Indigenous tenants, we see that residential tenancies legislation casts “shadows”¹⁰⁵ that can further amplify landlord power and further entrench colonial property relations. We then look at eviction hearings that take place in housing law tribunals or courts. We argue again that without an acknowledgement of history and context, these hearing processes tend to replicate existing power relations and subordinate the voices and experiences of tenants. Significantly, housing law and legal processes exist and operate in the larger context of a colonial legal system that has often been hostile and harmful to Indigenous

⁹⁹ *Supra* note 81 at 35.

¹⁰⁰ *Ibid.*

¹⁰¹ “Predatory Value: Economies of Dispossession and Disturbed Relationalities,” (2018) 36:2 Social Text 1 at 3.

¹⁰² See *Theft is Property!: Dispossession and Critical Theory* (Durham: Duke University Press, 2020).

¹⁰³ Blatman-Thomas & Porter, *supra* note 81 at 42.

¹⁰⁴ *Ibid* at 32.

¹⁰⁵ The idea of laws casting “shadows” will be explained and explored later in the paper.

peoples in Canada. We conclude the section by discussing the ways that the eviction legal system intersects with other systems to maintain colonial relations.

A. EVICTION LEGISLATION AND ITS SHADOWS

Provincial and territorial residential tenancies legislation set out the rights and responsibilities of landlords and tenants, including rules around payment of rent, maintenance obligations of landlords, tenants' right of privacy, and evictions. It is not uncommon to see claims by governments or other proponents that the purpose of landlord-tenant legislation is to "balance" the interests of landlords and tenants. For example, the Government of Saskatchewan states on its website that the *Residential Tenancies Act* seeks to "balance ... the needs of tenants for safe, secure, and habitable living accommodations, and the needs of landlords to conduct a viable business and protect their property investment."¹⁰⁶ Such statements may give the impression that the purpose of the law is to resolve disputes between otherwise similarly situated individuals. In addition, tenancy agreements are often portrayed as mutually beneficial business arrangements that are entered into by freely contracting agents. For example, in an information handbook for landlords and tenants, the Government of Alberta states that "Renting residential premises is a business agreement between the landlord(s) and the tenant(s). Landlords and tenants agree to the terms of their business agreement in a contract called a residential tenancy agreement."¹⁰⁷ In other words, the business interest of a landlord in profiting from the lease of their property and the interest of a tenant in securing shelter, which is a basic and fundamental human need, are treated as equivalent interests. While Ontario's legislation explicitly notes that one of its purposes is to "protect tenants from unlawful rent increases and unlawful eviction," it continues by noting that its purpose is also to "balance the rights and interests" of landlords and tenants.¹⁰⁸ Thus, profit from commodified property and the ability of people to have a place to live are made commensurate in the legislation, and this commensurability is made to appear neutral and rational.

While portraying landlords and tenants as freely contracting parties who enter into mutually beneficial agreements, residential tenancies legislation also always takes for granted the underlying superior property rights of landlords. Indeed, the hierarchical power of landlords is captured in plain sight in the feudal terminology of "landlord" and "tenant" itself. Key here is the landlord's right to evict tenants. As AJ van der Walt points out, the "most striking characteristic of the right to evict is the way in which it illustrates the presumptive power of ownership."¹⁰⁹

Residential tenancies legislation creates a framework that regulates how and when eviction can occur, for example for non-payment or late payment of rent, or for breaching conditions of the rental contract. Legislation provides rules about procedure as well, for example, the obligation for landlords to give notice to tenants and the requirement for a hearing before a court or tribunal.¹¹⁰ While these measures are designed to protect tenants from arbitrary eviction and create certainty for parties, the observation of van der Walt rings true: "eviction is still largely based on the

¹⁰⁶ See Government of Saskatchewan, "Rights and Responsibilities of Landlords and Tenants," online: <www.saskatchewan.ca/business/housing-development-construction-and-property-management/landlords-and-rental-properties/landlord-and-tenant-rights-and-responsibilities> [perma.cc/8TQ8-TBCU].

¹⁰⁷ Government of Alberta, "RTA Handbook for Landlords and Tenants: Residential Tenancies Act and Regulations" at 24, online (pdf): <open.alberta.ca/dataset/a2767396-099f-43d0-932e-1ec75bf458f3/resource/15cc7bf1-89c6-4baf-9393-ce82d28f3850/download/rta-handbook-bw.pdf> [perma.cc/WX4J-TJML].

¹⁰⁸ *Residential Tenancies Act*, 2006, SO 2006, c 17, s 1.

¹⁰⁹ *Property in the Margins* (Oxford: Hart Publishing, 2009) at 55.

¹¹⁰ See e.g. *Residential Tenancies Act*, *supra* note 108, ss 58, 174.

hierarchical power of the landowner's superior right to possession."¹¹¹ As discussed earlier, this superior right to possession is created through colonial logics about the nature of property and ownership, and is naturalized in the legislation. As Ezra Rosser points out, "Landlords enjoy the benefits of rules that privilege their position vis-à-vis their tenants—benefits that are made all the more powerful because these rules are treated by landlords, tenants, and courts alike as the natural way the landlord-tenant relationship should be governed."¹¹²

In contrast to the neutral landscape imagined by the drafters of the legislation, residential tenancies legislation in fact operates within an economic and social context where landlords and tenants almost never approach their contract with one another with equivalent economic or social power. In societies like ours that hold up property and home ownership as being connected with good citizenship,¹¹³ landlords tend to approach the relationship positioned in the public consciousness as being responsible citizens, while renters may be perceived as "failed consumers" lacking the responsibility or will to achieve home ownership."¹¹⁴ As discussed above, Indigenous tenants approach rental contracts with the significant added reality of racism to contend with, which positions them in dominant racist discourses as "riskier" than other prospective tenants.¹¹⁵

Furthermore, it is not always a matter of two human beings negotiating a tenancy agreement: in our era of the financialization of the capitalist rental housing market, landlords are increasingly large, profit-motivated entities, and rental housing is increasingly a commodity bought and sold by investors.¹¹⁶ According to a recent United Nations report, "housing is treated as a commodity, a means of accumulating wealth and often as security for financial instruments that are traded and sold on global markets."¹¹⁷ The effects of the financialization of rental housing include increasing housing costs, resulting in unaffordability, housing precarity and homelessness.¹¹⁸ As Matthew Desmond's American research has found, landlords are able to extract significant profits from low-income tenants: "Rent is only modestly cheaper in poorer areas, but landlord expenses are much lower. Profit margins are not small. The system allows people to pull a lot of money from these folks."¹¹⁹

Borrowing Desmond's concept, we argue that this broader context permits residential tenancies legislation to cast a "shadow" that impacts day-to-day interactions between landlords and tenants as well as landlords' decisions to evict tenants.¹²⁰ Desmond's research about evictions

¹¹¹ *Supra* note 109 at 56.

¹¹² "Exploiting the Poor: Housing, Markets, and Vulnerability," Book Review of *Evicted: Poverty and Profit in the American City* by Matthew Desmond, (2016-2017) 126 Yale LJ 458 at 467.

¹¹³ See Stephanie M Stern, "Reassessing the Citizen Virtues of Homeownership" (2011) 111:4 Colum L Rev 890 at 890.

¹¹⁴ Emma R Power & Charles Gillon, "Performing the 'Good Tenant'" (2020) 37:3 Housing Studies 459 at 459.

¹¹⁵ *Ibid* at 460. See also discussion above about discrimination faced by Indigenous tenants seeking rental housing.

¹¹⁶ Joshua Ackers & Eric Seymour, "Instrumental Exploitation: Predatory Property Relations at City's End" (2018) 91 Geoforum 121 at 128.

¹¹⁷ United Nations General Assembly, "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" (March 2017) at 3, online: <undocs.org/A/HRC/34/51> [perma.cc/UVK7-VESZ].

¹¹⁸ See *ibid* at 5.

¹¹⁹ Interview of Matthew Desmond "How our Housing System Perpetuates Poverty" (22 March 2016) on *Spotlight on Poverty & Opportunity*, online: <spotlightonpoverty.org/spotlight-exclusives/how-housing-perpetuates-poverty> [perma.cc/RAK8-4G2M].

¹²⁰ "No Place Like Home: America's Eviction Epidemic," *The Guardian* (12 Feb 2017), online: <www.theguardian.com/society/2017/feb/12/americas-eviction-epidemic-matthew-desmond-housing-crisis> [perma.cc/Q5XF-L3W9].

in Milwaukee showed that many evictions are informal, happening in the “shadow of the law.”¹²¹ There are rules around eviction, but the structure of the market and pre-existing power inequities give landlords a remarkable degree of power and control over their tenants’ housing security.¹²² The underlying power of landlords to evict, as set out and regulated by residential tenancies legislation, hangs over the landlord-tenant relationship, which is already saturated with power imbalances.

Kathryn A Sabbath explores this dynamic when she identifies the power of landlords as being “physical and psychological” in that “[t]he tenant’s access to a basic necessity of life hinges on the landlord’s willingness to provide it. The landlord controls the tenant’s ability to access her home and reside there in peace and security.”¹²³ Similarly, Maggie Reed points out that power is derived from the fact that the landlord ultimately controls the resource (the rental unit). She writes: “those who control these resources become increasingly powerful and those who lack them become correspondingly more vulnerable.”¹²⁴ Some landlords “remind” their tenants of their power through sexual harassment and violation of tenants’ privacy; others do so through subtle or explicit threats of eviction. Desmond observed that many landlords “keep a basis for eviction in their back pockets.”¹²⁵ In many cases, tenants navigate the situation by not complaining to the landlord about deficiencies or problems with their housing for fear of retaliation in the form of eviction. The Saskatchewan Human Rights Commission stated that the “lack of affordability of available housing combined with the vulnerability of [tenants] makes them hesitant to complain about any conflict with landlords, including the quality of the housing.”¹²⁶ As noted above, researchers have established that Indigenous women report high levels of harassment by landlords, and Indigenous tenants are more likely to live in precarious housing.¹²⁷

The above discussion demonstrates that although residential tenancies legislation purports to balance rights and responsibilities of landlords and tenants, and to treat landlords and tenants as equal partners entering into mutually beneficial contracts, it in fact consistently entrenches the underlying superior possessory and ownership rights of landlords. This is symbolized most powerfully by the landlord’s right to evict. Significantly, this legislation ignores the broader social context within which it operates. As discussed above, this context is one where settler colonialism and the dispossession of Indigenous peoples of their land has produced contemporary property relations, and where landlords, whether corporate or individual, almost always possess significantly more social and economic power than tenants (this power is of course manifested in their status as property owners).

Sarah Morales and Brian Thom suggest another kind of “shadow” that is cast by Canadian eviction legislation. Morales and Thom write about Hul’qumi’num property law and its central principle of sharing, explaining that while Hul’qumi’num laws continue to exist, colonial property law has come to cast an overbearing “shadow” on the legal landscape, making it difficult “for these

¹²¹ *Ibid.*

¹²² See Rosser, *supra* note 112 at 472.

¹²³ “Housing Defense as the New *Gideon*” (2018) 41:1 Harv JL & Gender 55 at 99.

¹²⁴ Maggie E Reed *et al.*, “There’s No Place Like Home: Sexual Harassment of Low Income Women in Housing” (2005) 11 Psychol Pub Pol’y & L 439 at 440.

¹²⁵ Matthew Desmond, *Evicted: Poverty and Profit in the American City* (New York: Crown Publishers, 2016) at 129.

¹²⁶ *Supra* note 42 at 14.

¹²⁷ See Matthew Desmond & Carl Gershenson “Who gets Evicted? Assessing Individual, Neighborhood, and Network Factors” (2017) 62 Social Science Research (2017) 362 at 374. See also Alexandra Collins *et al.*, “Surviving the Housing Crisis: Social Violence and the Production of Evictions among Women who use Drugs in Vancouver, Canada” (2018) 51 Health & Place 174.

[Hul’quami’num] principles to be seen and exercised.”¹²⁸ The task then, is to learn how to see that Indigenous property laws are “not entirely subordinated ... and indeed deeply inform their exercise of property relations—whether state-based or Indigenous—to this day.”¹²⁹ We will return to this idea in the conclusion, but it is important to highlight here that the existing legal eviction system, tied up as it is with colonial property laws and relations, currently overshadows existing Indigenous laws and legal orders that apprehend issues of property, land, home, and belonging much differently.

B. HOUSING TRIBUNALS AND DISPOSSESSION

Researchers who have studied the processes of housing law courts and tribunals have argued that these institutions often perpetuate and amplify power imbalances between landlords and tenants and show a systemic bias against tenants and in favour of landlords. In an influential American study, Barbara Bezdek found that the Baltimore rent court approached the claims of landlords and tenants very differently. The court tended to dismiss tenants’ claims. In contrast, the court responded to landlord claims with “smooth and speedy dispatch.”¹³⁰ Bezdek concluded that the “the operational premise of the rent court as an institution is to enforce the entitlement of the landlord to payment and possession, while it obscures the entitlement of tenants under the same governing law.”¹³¹ More recent research in both the United States and Canada has demonstrated that tenants continue to experience worse outcomes as compared to landlords in housing court and tribunal proceedings.¹³²

Scholars have suggested multiple reasons for these outcomes. Sabbeth notes that one of the reasons for the power differential in housing court is that landlords are often repeat players who have amassed expertise in housing law processes. Sabbeth notes that advantages for “repeat players” include “specialized expertise, bargaining credibility, informal relationships with institutional representatives, the ability to play for rules instead of individual results, and savings from economies of scale.”¹³³ Sabbeth also notes that decision makers in housing court tend to be white, male, and property owners “which ... increases the potential for judicial bias” in favour of property owners who are situated more closely to these decision makers.¹³⁴ Michele Cotton’s research has also shown that tenants have difficulty enforcing their rights in housing courts, and suggests that housing court judges may hold an “underlying belief that poor litigants are morally less worthy than others.”¹³⁵ Perhaps, at some level, decisionmakers (and landlords) are also influenced by the processes of dispossession that have always characterized settler colonialism.

¹²⁸ “The Principle of Sharing and the Shadow of Canadian Property Law” in Angela Cameron *et al*, eds, *Creating Indigenous Property: Power, Rights, and Relationships* (Toronto: University of Toronto, 2020) 120 at 122.

¹²⁹ *Ibid*.

¹³⁰ Barbara Bezdek, “Silence in the Court: Participation and Subordination of Poor Tenants’ Voices in Legal Process” (1991-1992) 20:3 Hofstra L Rev 533 at 533.

¹³¹ *Ibid* at 540.

¹³² See *e.g.* Nicole Summers, “The Limits of Good Law: A Study of Housing Court Outcomes” (2020) 87:1 U Chicago L Rev 145; Michele Cotton, “A Case Study on Access to Justice and How to Improve it” (2014) 16:1 JL in Soc’y 61; Sarah Buhler, “Pandemic Evictions: An Analysis of the 2020 Eviction Decisions of Saskatchewan’s Office of Residential Tenancies” (2021) 35 J L & Soc Pol’y 68.

¹³³ *Supra* note 123 at 78–79.

¹³⁴ *Ibid* at 79.

¹³⁵ Cotton, *supra* note 132 at 87.

As Hagar Kotof argues, settler subjectivities are formed through attachments to dispossession.¹³⁶ Thus, individual attitudes may be produced by larger colonial structures.

In Canada, housing law tribunals are bound by administrative law principles that officially require them to accord fairness to both parties. However, a review of eviction decisions reveal similar patterns to those identified in American research. Landlords are overwhelmingly successful in eviction applications. It is reasonable to speculate that housing law decision makers are more likely to be property owners and to be closer in life experience to landlords than to tenants: this reality may make them more likely to identify with landlords than tenants.¹³⁷ A review of the housing law decisions of one jurisdiction, Saskatchewan, revealed that landlords almost always win their applications for eviction, calling to mind Hartman and Robinson's description of American housing court process which they characterize as a "one-sided, factory-like process in favor of landlords."¹³⁸

Missing from these tribunal decisions and processes are any serious contextual considerations. Eviction decisions are dealt with quickly and sometimes mechanistically, with references to unpaid rent, specific tenant behaviours, and neighbour complaints. Yet, as Emily Paradis has pointed out, "[i]t is impossible to ignore the extent to which [housing law troubles] are structurally determined."¹³⁹ She writes that for most tenants who come before housing law tribunals, their situation is the "product of multiple, intersecting inequities, injustices, and experiences of discrimination and marginalization."¹⁴⁰ As we have noted above, Indigenous tenants face disproportionate barriers in all aspects of housing, and carry these experiences with them when they appear before housing law tribunals. When housing tribunals do not account for this larger context, they risk favouring those with power and burdening those who do not, and replicating patterns of dispossession over and over again. As Barkaskas and Hunt argue, "A fundamental issue with the Canadian justice system's ability to address and deal with institutionalized, systemic racism and sexism lies in the individualized nature of the justice process."¹⁴¹ Housing law tribunals and their processes are no exception.

C. EVICTION AND INTERLOCKING SYSTEMS

In her writing about Indigenous homelessness in Canada's north, Julia Christensen shares the story of an Indigenous mother, Mona, whose children were apprehended by child welfare authorities following an assault on Mona by her common law partner.¹⁴² Mona was eventually evicted from the family-sized public housing unit where she lived because she no longer had children in her custody. Christensen noted that once Mona was evicted and became homeless, it was impossible for Mona to regain custody of her children. In this way, Christensen notes that the "child welfare system plays a complex role in the reproduction of homelessness."¹⁴³ Mona's story also powerfully illustrates the ways that the eviction legal system interlocks with other colonial systems and laws to produce negative and harmful outcomes for Indigenous people. Thinking through the

¹³⁶ See Hagar Kotof, *The Colonizing Self: Or, Home and Homelessness in Israel/ Palestine* (Durham: Duke University Press, 2020).

¹³⁷ See discussion in Sabbeth, *supra* note 123 at 79.

¹³⁸ Hartman & Robinson, *supra* note 2 at 478. See also Buhler, *supra* note 132.

¹³⁹ Paradis, *supra* note 5 at 82.

¹⁴⁰ *Ibid.*

¹⁴¹ *Supra* note 95 at 24.

¹⁴² *Supra* note 88 at 39.

¹⁴³ *Ibid.*

colonialism of eviction requires us to look beyond the eviction legal system to also consider the ways that other systems produce eviction, and the ways that eviction activates other systems. In other words, it requires us to try to see the ways that eviction is structurally linked to other colonial systems and processes.

As Mona's story illustrates, one of these interlocking systems is the child welfare system. The deep colonialism of Canadian child welfare systems has been extensively documented.¹⁴⁴ Indigenous children are forcibly removed from their families at massively greater rates than non-Indigenous children, and there may be three times more Indigenous children in foster care today than were placed in residential schools at the height of the residential school era.¹⁴⁵ When Indigenous families are under the gaze of child welfare authorities, the impacts of precarious housing and eviction become even more pronounced. Eviction can lead to the apprehension of children and can make it far more difficult for parents to regain custody of their children.¹⁴⁶ We know that involvement with the child welfare system is a predictor of homelessness.¹⁴⁷ A report by the Canadian Centre for Policy Alternatives documented the multiple barriers that Indigenous mothers face when trying to gain custody of their children: safe and secure housing was central, and precious housing and the risk of eviction was a significant barrier.¹⁴⁸ Because Indigenous concepts of home include connections to kin and children, the loss of children is a loss of home in itself. Eviction further compounds the loss.¹⁴⁹

The eviction legal system and evictions also interact with policing and the criminal legal system. For example, the Elizabeth Fry Society has documented the mutually reinforcing links between the criminal justice system and housing insecurity for women.¹⁵⁰ Housing policies, such as "crime-free housing" policies where landlords work with local police to create "crime-free" rental properties, can lead to increased police surveillance on tenants. Deborah N Archer notes that such programs "trade on criminal legal system contacts and effectively expel people of colour. ... [and] are an engine for racial and economic inequality."¹⁵¹ Similarly, Leora Smith argues that when police and landlords share information via these kinds of programs, the result can be the active displacement of certain tenants who are deemed undesirable by police. She writes: "[S]ometimes, housing cases can accomplish what criminal cases—with their slow timelines, presumptions of innocence, and exacting standards—cannot."¹⁵² Specifically, the involvement of police (even where charges are not laid) in tenants' lives can lead to the eviction of tenants, even where the tenant has been the victim of criminal activity.¹⁵³ We know that Indigenous people face increased

¹⁴⁴ See Stewart & La Berge, *supra* note 12; Stevenson, *supra* note 12.

¹⁴⁵ See Cindy Blackstock & Nico Trocme "Community-Based Child Welfare for Aboriginal Children: Supporting Resilience through Structural Change" (2005) 24 Soc Policy J New Zealand 12 at 13.

¹⁴⁶ See Groening *et al*, *supra* note 52 at 20. See also Lisa Berg & Lars Brännström, "Evicted Children and Subsequent Placement in out-of-home care: A Cohort Study" (2018) 13:4 PLoS ONE 1.

¹⁴⁷ See Stephen Gaetz *et al*, "Report 4: Eviction Prevention for Youth" (Toronto: Canadian Observatory on Homelessness Press, 2018).

¹⁴⁸ See Groening *et al*, *supra* note 52.

¹⁴⁹ See Christensen, *No Home in a Homeland*, *supra* note 54 at 201.

¹⁵⁰ Nancy Poon, "Housing Situations of Women Prior and Post Incarceration in Canada" (Canadian Association of Elizabeth Fry Societies, 2015) at 8.

¹⁵¹ "The New Housing Segregation: the Jim Crow Effects of Crime-Free Housing Ordinances" (2019) 118:2 Mich L Rev 173 at 231.

¹⁵² Leora Smith, "When Police Call Your Landlord," *The Atlantic* (13 March 2020), online: <www.theatlantic.com/politics/archive/2020/03/crime-free-housing-lets-police-influence-landlords/605728> [perma.cc/WB5C-NB8U].

¹⁵³ *Ibid.*

risks of violent policing and incarceration.¹⁵⁴ This can translate into an increased risk of eviction. Further, tenants who are incarcerated risk losing their homes due to eviction. Since Indigenous people are more likely to be incarcerated in Canada, they and their families are more likely to face evictions as the consequence of incarceration: this is one of the “collateral consequences” of incarceration.¹⁵⁵

IV. CONCLUSION: HARM REDUCTION OR DECOLONIZING THE EVICTION LEGAL SYSTEM?

This article thinks through some of the ways that eviction functions “in this time, in this place”¹⁵⁶ to reproduce dominant colonial property relations and continually render some Indigenous tenants without a place to live in their homeland. We have suggested that existing legislation and legal processes ingrain the colonialism of eviction. We have also discussed how the eviction legal system’s approach to eviction entangles with and triggers other colonial systems that disrupt Indigenous homes and dispossess Indigenous families.

We believe that various changes could be made within the existing eviction legal system to reduce evictions and increase security of tenure for Indigenous tenants. These could include:

- Education for eviction law decisionmakers about the dynamics of colonialism and the realities of Indigenous housing disparities;
- Culturally appropriate, trauma-informed, and free legal assistance for tenants facing eviction;
- Reforms to residential tenancies law and procedures that focus on mitigating evictions—for example, the implementation of diversion programs that would respond holistically to tenants,¹⁵⁷ or that specifically direct decision makers to account for systemic factors (including the impacts of colonialism) on tenants facing eviction; and
- More Indigenous hearing officers appointed to tribunals that adjudicate eviction cases.

These suggestions might be broadly categorized as what Eve Tuck and Wayne Yang would term “settler harm reduction” initiatives.¹⁵⁸ Tuck and Yang define settler harm reduction as comprising projects aimed at reducing suffering and the damage of colonialism rather than the work of transforming the colonial structure itself. While settler harm reduction can be important, Tuck and Yang note that “by definition, settler harm reduction . . . is not the same as decolonization and does not inherently offer any pathways that lead to decolonization.”¹⁵⁹

So, what would an eviction legal system that centred Indigenous laws and concepts of home look like? How would Indigenous laws and legal processes address housing security, vulnerable tenants, and conflicts between landlords and tenants? These are questions that are worth exploring

¹⁵⁴ See Monchalin, *supra* note 11 at 144.

¹⁵⁵ For a discussion of other collateral consequences of incarceration, see David S Kirk, “The Collateral Consequences of Incarceration for Housing” in Beth A Huebner & Natasha A Frost, eds, *Handbook on the Consequences of Sentencing and Punishment Decisions* (New York: Routledge, 2018) 53.

¹⁵⁶ Nichols, *supra* note 13 at 452.

¹⁵⁷ See Paradis & Heffernan, *supra* note 3.

¹⁵⁸ Eve Tuck & K Wayne Yang, “Decolonization is Not a Metaphor” (2012) 1:1 *Decolonization: Indigeneity, Education & Society* 1 at 21.

¹⁵⁹ *Ibid* at 121–122.

with the leadership of Indigenous communities and Indigenous legal experts, and they inevitably require a process of both making Indigenous legal orders visible and “rebuilding” and revitalizing Indigenous laws in this area.¹⁶⁰ These approaches may require what Brenna Bhandar calls a “radically different political imaginary of property,”¹⁶¹ including the incorporation of Indigenous ontologies that embrace an “embodied and conceptual relationship to the land, animals, and plants that reflect ways of being quite alien to capitalist, commoditized visions of land.”¹⁶² Focusing on Indigenous conceptions of land and relationship to land is foundational. As Blatman-Thomas and Porter write, “that land persists underneath and beyond the concrete of urban skyscrapers, reminds us that relations of belonging always exceed mere possession.”¹⁶³

It follows that decolonizing the eviction legal system is necessarily tied in with decolonization more broadly. Val Napoleon points out that “we have to decolonize Canada in order to decolonize law.”¹⁶⁴ This is because, as she explains, law is “never separate from the economy, it’s never separate from how we manage our politics and how we organize ourselves.”¹⁶⁵ While much has been said and written about decolonization, including its fundamental connection to land,¹⁶⁶ we believe that it also requires ongoing resurgence of Indigenous laws relating to home and housing, as well as support for “individual and collective home-building through culturally rooted, self-determined support frameworks.”¹⁶⁷ Of course, as Angela Cameron, Sari Graben and Val Napoleon point out, Indigenous laws are underpinned by a “profoundly different theoretical and societal model of property, which ... does not easily co-exist with private property models of today.”¹⁶⁸ Yet, as we discussed above, Indigenous laws relating to land, property, and home-making continue to exist. They have not been supplanted even though they have been overshadowed by colonial systems. This work of revitalizing Indigenous laws is complex and messy, but it is, of course, already ongoing.¹⁶⁹

¹⁶⁰ West Coast LEAF, “Recognizing Multiple Legal Systems: Decolonizing Our Understanding of ‘The’ Law with Val Napoleon” (17 July 2019), online: <www.westcoastleaf.org/2019/07/17/decolonizing-our-understandings-of-the-law> [perma.cc/PV2R-7GHL]; See also Hadley Friedland, “Reflective Frameworks: Methods for Assessing, Understanding, and Applying Indigenous Laws” (2012) 11:1 *Indigenous LJ* 1. Friedland notes that Indigenous laws continue to exist in Canada yet are often “invisible or even incomprehensible” to those outside of communities (*ibid* at 3).

¹⁶¹ *Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership* (Durham: Duke University Press, 2018) at 193.

¹⁶² *Ibid* at 193–94.

¹⁶³ *Supra* note 81 at 43.

¹⁶⁴ West Coast LEAF, *supra* note 151.

¹⁶⁵ *Ibid*.

¹⁶⁶ Tuck & Wayne Yang, *supra* note 158 at 1.

¹⁶⁷ Julia Christensen, “‘Our Home, Our Way of Life’: Spiritual Homelessness and the Sociocultural Dimensions of Indigenous Homelessness in the Northwest Territories (NWT), Canada” (2013) 14:7 *Soc & Cultural Geography* 804 at 823.

¹⁶⁸ “Introduction: The Role of Indigenous Law in the Privatization of Canada” in Angela Cameron *et al*, eds, *Creating Indigenous Property: Power, Rights, and Relationships* (Toronto: University of Toronto, 2020) 3 at 7.

¹⁶⁹ Indigenous property laws are actively being revitalized, theorized, and practiced. See generally Angela Cameron, *et al*, eds, *Creating Indigenous Property: Power, Rights and Relationships* (University of Toronto Press, 2020). Indigenous communities are providing housing in many urban areas across the country. Urban Indigenous self-government is happening right now. See JD Crookshanks, “Urban Housing and Aboriginal Governance” in David Newhouse *et al*, eds, *Well-Being in the Urban Aboriginal Community* (Toronto: Thompson Educational, 2012) 55. See also Tim Fontaine, “Idle No More sees tiny house as solution to huge problem” (7 December 2015), online: *CBC News* <www.cbc.ca/news/indigenous/idle-no-more-tiny-house-1.3351893> [perma.cc/L94R-5ZJ3]. Fontaine describes the work of Idle No More, which aims to build housing and resistance to colonial systems.