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PRIVILEGED & CONFIDENTIAL

May 6, 2024

File No. 318700

Mayor Mike Bradley and Members of Council
The Corporation of the City of Sarnia
225 Christina Street North
Sarnia, Ontario
N7T 7N2

Your Worship and Members of Council:

Re: Rainbow Park Encampment Enforcement
Legal Implications for Evictions

We have been asked to provide a legal opinion to The Corporation of the City of Sarnia (the "**City**") with respect to potential enforcement actions against an encampment within Rainbow Park, a municipally-owned park.

Executive Summary

In the present circumstances, the City does not have the legal authority to evict encampment residents from Rainbow Park. Based on the judicial guidance, such enforcement actions would violate the rights of encampment residents under the *Canadian Charter of Rights and Freedoms*.[1] The constitutional "right to shelter" under section 7 of the *Charter* is engaged where there is a lack of available and truly accessible indoor shelter space, which appears to be the situation that the City is currently faced with. The onus would be on the municipality seeking to evict encampment residents to demonstrate that there is sufficient, accessible shelter space.

At this time, it is strongly recommended that the City stand down on forcibly removing encampment residents from Rainbow Park. Instead, the City should focus its efforts on outreach and support with appropriate social services agencies, and taking measures to address any perceived risks to public safety. If the City were to proceed unilaterally with encampment enforcement and eviction, it would face significant litigation risk.

Background

In recent years, municipalities across the country have been facing significant challenges relating to homeless encampments on municipal lands, including in public parks. The City is no exception. On account of an increase in the local homeless population, encampments have, from time to time, developed on City-owned properties.

[1] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11; [the "***Charter***"].

Rainbow Park is a large public park owned and operated by the City. An encampment has developed in Rainbow Park, which has grown considerably in recent months. City staff understand that there are an estimated 25 tents within the encampment, which fluctuates daily, but the precise number of individuals residing in the encampment is unknown.[2]

In the two-tier system of municipal government, the City's corresponding upper-tier municipality, the County of Lambton (the "**County**"), has been designated as a "service manager" under the *Housing Services Act, 2011*.[3] As such, responsibility for housing and homelessness services is assigned to the County.

In its role as service manager, the County operates, directly and through third party service providers, 3 of the 4 shelters that are located within the County. We understand that the private shelter has a policy against drug use, thus presenting barriers to entry. Of the shelters operated under the supervision of the County, one is designated for youth experiencing homelessness only; one shelter, consisting of 28 beds, that operates as a temporary overflow shelter is scheduled to be closed on May 2, 2024; and the remaining shelter intended for the general homeless population consists of 35 beds.

The number of homeless persons within the City far exceed the number of available shelter spaces within the County's shelter system.[4] Moreover, City staff have been advised that spaces within the shelter system may not be accessible as they are not low barrier to entry.

The public has expressed concerns with the encampment at Rainbow Park, particularly waste and debris in Rainbow Park, instances of drug use and drug paraphernalia, and crime. On account of this, members of the public have called on the City to evict the encampment residents from Rainbow Park.

At its meeting on April 8, 2024, Council voted to give direction to City staff to undertake interim measures to address health and safety issues at Rainbow Park, pending receipt of legal advice and input from social service agencies at the meeting of Council on May 6, 2024, at which time Council will consider whether to proceed with enforcement measures against the encampment in Rainbow Park.

Issues

We have been asked to opine on the following questions:

1. Does the City have the legal authority to evict encampment residents from Rainbow Park?

2. What risks would the City face if it decided to proceed with encampment evictions?

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[2] Public reporting suggests around 20 individuals may reside in the Rainbow Park encampment. However, as is the case with many encampments, this number can fluctuate significantly.

[3] *Housing Services Act, 2011*, S.O. 2011, c. 6, Sched. 1 and O. Reg. 367/11 "General", s. 6 and Schedule 2 – Service Managers and Service Areas

[4] Based on data reported by the County, in March 2024, there were 345 individuals experiencing homelessness on the "by names list," 198 of which are experiencing chronic homelessness.

Analysis

1. Municipal Enforcement Against Encampments

Municipalities faced with unpermitted occupation of municipal parks will typically rely on two legal instruments to take enforcement measures: a municipal parks by-law which prohibits camping in parks, and the *Trespass to Property Act,*[5] pursuant to which an owner of land can legally require a person to leave their property. These mechanisms have been used by municipalities to take enforcement action against encampments, albeit mostly unsuccessfully.

The City's Parks By-law No. 1999-206, as amended (the "**Parks By-law**") provides that no person shall camp in any "Public Park," except Camp Saredaca where the City's permission has been obtained. "Camp" is not defined in the Parks By-law, but would conceivably refer to the erection of temporary accommodations, such as tents, and sleeping overnight. The Parks By-law also contains other regulations dealing with the use of and activities within a City park.

In ordinary circumstances, the Parks By-law's prohibition on camping could be applied to a person setting up a tent and camping on City property recreationally. However, the City's by-laws could not be enforced if doing so would be unconstitutional. As discussed further below, special *Charter* considerations apply when dealing with the issue of encampments occupied by homeless persons.

2. The "Right to Shelter" under the *Charter*

Recent case law establishes the general proposition that a municipality cannot take enforcement actions against encampments by homeless individuals under a municipal parks by-law or the *Trespass to Property Act* where there is insufficient alternative shelter space that is truly accessible to the needs of encampment residents. The onus would be on the given municipality to demonstrate that there is alternative shelter space that is truly accessible to the needs of encampment residents.

Section 7 of the *Charter* protects the right to life, liberty, and the security of the person:

> **Life, liberty and security of person**
>
> **7** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The case law interpreting section 7 of the *Charter* has extended constitutional protections to homeless individuals erecting shelters and sleeping overnight in municipal parks.

(a) British Columbia Case Law

The nascent "right to shelter" can be traced back to *Victoria (City) v. Adams*,[6] which began as a civil injunction proceeding commenced by the City of Victoria in British Columbia to enforce its by-law respecting parks and public spaces against a so-called "tent city" established in a

[5] *Trespass to Property Act*, R.S.O. 1990, c. T.21.

[6] *Victoria (City) v. Adams,* 2008 BCSC 1363.

municipal park. Madam Justice Ross found that the by-law prohibiting homeless individuals from erecting temporary shelters violated their right to life, liberty and security, and refused to issue the injunction sought. Instead, Justice Ross issued a declaration pursuant to the *Charter* that the by-law was of no force and effect, as applied to homeless persons.

On appeal to the British Columbia Court of Appeal, Justice Ross' order was refined as follows:

> Sections 14(1)(d) and 16(1) of the Parks Regulation Bylaw No. 07-059 are 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.[7] [**emphasis added**]

Subsequent judgments have treated the "right to shelter" articulated in *Adams* as being circumscribed by two factors: (1) the right is engaged where the number of homeless persons within a given jurisdiction is greater than the available indoor shelter spaces; and (2) the right to erect temporary shelters is limited to overnight hours.[8] Since *Adams* was decided, there have been several cases in British Columbia where municipal by-laws were challenged, with success, where they prohibited the ability of homeless persons to erect temporary shelters in municipal parks.[9]

The essence of the British Columbia cases gives rise to a constitutionally protected "right to shelter" when the number of homeless persons exceed the number of available and accessible indoor shelter spaces within a given jurisdiction.

(b) Ontario Cases

The principles discussed in the British Columbia cases have been adopted and applied in several recent decisions in Ontario. These cases have taken multiple forms, including injunctions to restrain municipalities from proceeding to evict encampments during the COVID-19 Pandemic, and municipally-initiated applications pursuant to section 440 of the *Municipal Act, 2001*[10] for a court order in aid of enforcing a municipal parks by-laws.

In both types of proceedings, the courts have adopted and applied the approach espoused in *Adams*, namely, assessing whether the number of homeless persons within the jurisdiction exceeds the number of available and "truly accessible" shelter spaces. This is the threshold consideration for whether enforcement will be permitted, not the qualities or amenities within the given park.

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[7] *Victoria (City) v. Adams,* 2009 BCCA 563, at para. 166.

[8] See e.g., *Bamberger v. Vancouver (Board of Parks and Recreation)*, 2022 BCSC 49, at para. 13; ["***Bamberger***"].

[9] See generally *Vancouver Board of Parks and Recreation v. Williams*, 2014 BCSC 1926; *Abbotsford (City) v. Shantz*, 2015 BCSC 1909; *British Columbia v. Adamson*, 2016 BCSC 584; *British Columbia v. Adamson*, 2016 BCSC 1245; *Nanaimo (City) v. Courtoreille*, 2018 BCSC 1629; *Vancouver Fraser Port Authority v. Brett*, 2020 BCSC 876; and *Prince George (City) v. Stewart*, 2021 BCSC 2089.

[10] *Municipal Act, 2001*, S.O. 2001, c. 25.

i. Regional Municipality of Waterloo

In *The Regional Municipality of Waterloo v. Persons Unknown and to be Ascertained*,[11] a large encampment was established on a regionally-owned parcel of land. Following lengthy outreach efforts, the Region brought an application pursuant to section 440 of the *Municipal Act, 2001* seeking to enforce its by-law governing the use of regionally-owned lands. Justice Valente of the Superior Court of Justice refused to issue the order sought by the Region, and instead declared that the Region's by-law was unconstitutional to the extent that it applied to prevent the encampment residents from erecting temporary shelters when the number of homeless persons exceeded the number of available accessible shelter beds in the Region.[12]

The background to the *Waterloo* decision is similar to the experience of many municipalities in Ontario grappling with the issue of homelessness and encampments. In *Waterloo*, an encampment of approximately 57 residents sprung up on a vacant parking lot which was awaiting redevelopment by the Region. Initially, the Region halted enforcement efforts in favour of outreach and support. The Region adopted an encampment policy, incidental to its by-law, which emphasized a social services approach. Pursuant to this policy, Regional staff worked with community groups and stakeholders to offer outreach and support services to encampment residents, visiting the encampment several times during the week to connect residents with support services.

On account of the growing size of the encampment, the Region developed a risk assessment tool to ascertain when an encampment would pose a risk to public health and safety. Upon consideration of that risk assessment tool, the Region made the determination that the encampment posed risks to health and safety of both the public and encampment residents alike. The Region subsequently posted eviction notices and notices pursuant to the *Trespass to Property Act* requiring encampment residents to disband the encampment and relocate. When those notices were not voluntarily complied with, the Region applied to the Superior Court of Justice pursuant to section 440 of the *Municipal Act, 2001* seeking an order to assist in its enforcement efforts.

A critical backdrop to the Region's enforcement efforts was a lack of sufficient shelter space in the Region-run system. Despite efforts to expand resources for the homeless, the evidence before Justice Valente demonstrated that the capacity of the Region's emergency shelter system was insufficient, falling short by approximately 50% of what was required to accommodate the Region's homeless population.[13]

In addition to this, Justice Valente further noted that the determination of shelter availability was more than just a numerical exercise, and required a consideration of whether the available shelter beds were "truly accessible" in that they did not pose barriers to entry for homeless individuals, based on their unique needs and circumstances:

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[11] *The Regional Municipality of Waterloo v. Persons Unknown and to be Ascertained*, 2023 ONSC 670; ["***Waterloo***"].

[12] *Ibid.*, at para. 158.

[13] *Ibid.*, at para. 92.

> To be of any real value to the homeless population, the space must meet their diverse needs, or in other words, the spaces must be truly accessible. If the available spaces are impractical for homeless individuals, either because the shelters do not accommodate couples, are unable to provide required services, impose rules that cannot be followed due to addictions, or cannot accommodate mental or physical disability, they are not low barrier and accessible to the individuals they are meant to serve. Although not binding on me, I adopt and follow the decisions of the British Columbia Supreme Court in *Shantz*, *Prince George (City) v. Stewart*, 2021 BCSC 2089, 57 B.C.L.R. (6th) 118 [*Stewart*], and *Bamberger,* all of which hold that in order for the shelter spaces to be truly available, they must in fact be low barrier or accessible to accommodate the homeless population.[14]

Although the Region submitted that it was only required to demonstrate that it had sufficient capacity to accommodate the residents of the specific encampment sought to be cleared, Justice Valente rejected this proposition, owing to the fluctuating and variable capacity with the Region's shelter system on any given day.[15]

Following his determination that the "right to shelter" was engaged on the facts before him, Justice Valente went on to consider whether the section 7 rights of encampment residents would be violated by the Region's by-law. The purpose and content of those rights, and how those rights were violated by the Region's by-law, was described by Justice Valente as follows:

- **Right to Life:** only engaged in a narrow set of circumstances, the right to life prohibits state action that imposes death or an increased risk of death, either directly or indirectly.[16] The ability to provide oneself adequate shelter is a necessity of life that falls within the right to life.

  The evidence established that exposure to the elements without adequate shelter can result in serious harm and death, particularly during the late fall and winter months. The Region's by-law, which prohibited the erection of essential shelter, increased the risk of serious harm and death, and therefore violated the *Charter* protected right to life.[17]

- **Right to Liberty:** tied to inherent respect for human dignity, the right to liberty protects fundamental personal decisions without interference by the state.[18]

  The ability to create shelter to protect oneself from the elements is critical to an individual's dignity and independence. Justice Valente found that the Region's attempt to prevent homeless persons from sheltering interfered with their choice to protect themselves from the elements, thereby depriving their liberty.[19]

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[14] *Waterloo*, *supra* note 11 at para. 93.

[15] *Ibid.,* at para. 94.

[16] *Ibid.*, at para. 95; citing *Carter v. Canada (Attorney General)*, 2015 SCC 5, at para. 62.

[17] *Ibid.,* paras. 96, 97.

[18] *Ibid.*, at para. 98; citing *R. v. Morgentaler*, [1988] 1 S.C.R. 30, pp. 164-166 (S.C.C.).

[19] *Ibid.*, at para. 101.

- **Right to Security of the Person:** this right protects serious impairments of both physical and psychological integrity, including state action which has the likely effect of impairing a person's health.[20]

  Justice Valente found, based on the evidence, that enforcing the Region's by-law would expose encampment residents to significant physical and psychological health problems.[21]

Based on the construction of section 7 of the *Charter*, having found the Region's by-law violated the rights to life, liberty and security of the person, Justice Valente went on to consider whether such violations were not in accordance with the "principle of fundamental justice." Two principles led in this analysis: overbreadth, and gross disproportionality.

First, a law that is "overbroad" is one that takes away rights in a way that generally supports the object of the law, but goes too far by denying the rights of some individuals in a way that bears no relation to the object.[22] If the state uses means which are broader than necessary to accomplish the objectives of the law, the principles of fundamental justice will be violated because individual rights have been violated for no reason.[23]

The purpose of the Region's by-law was to govern the conduct of persons who use Region-owned property, and prevent physical damage, disruption to Regional operations, and disruption to the use and enjoyment by other users. However, by prohibiting any form of shelter required by encampment residents due to the lack of available and accessible shelter space, Justice Valente held that the Region's by-law was overbroad. The Region was not required to quasi-criminalize the erection of temporary shelters in order to achieve the goals of the by-law.

Second, a law that is "grossly disproportionate" is one that imposes restrictions on life, liberty and security of the person in a manner that is grossly disproportionate to any legitimate government interest. The focus of the analysis is not the impact of the law on society or the public generally and its effectiveness, but rather, the impact on individual rights. The question required by this analysis is whether "the impact is completely out of sync with the object of the law."[24]

Justice Valente found that the principle of gross disproportionality was violated on the facts before him. While the Region's by-law had the objective of regulating parks use, the impact to individual encampment residents was incredibly severe. Further, the evidence also demonstrated that there were many benefits to living in the encampment, including offering a safe place to rest, access to social services and healthcare, and a sense of community. Given the accepted purpose of the Region's by-law, the proposed eviction of encampment residents would be completely "out of sync" with the Region's need to regulate the use of its property.[25]

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[20] *Waterloo*, *supra* note 11, paras. 102, 103.

[21] *Ibid.*, at para. 104.

[22] *Ibid.*, at para. 109; citing *Abbotsford (City) v. Shantz*, 2015 BCSC 1909, at para. 200.

[23] *R. v. Heywood*, [1994] 3 S.C.R. 761, at pp. 792, 793 (S.C.C.).

[24] *Carter v. Canada (Attorney General)*, 2015 SCC 5, at para. 89.

[25] *Waterloo*, *supra* note 11, paras. 117, 118.

On the basis of the *Charter* violation discussed above, which could not be saved under the "reasonable limits" clause of section 1 of the *Charter*,[26] Justice Valente refused to grant the order requested by the Region. Instead, Justice Valente issued the *Charter* remedy of a declaration that the Region's by-law was "inoperative insofar, and only insofar, as it applies to prevent the residents of the Encampment from living on and erecting temporary shelters without a permit on the Property when the number of homeless persons exceeds the number of available accessible shelter beds in the Region."[27]

ii. City of Kingston

More recently, in *The Corporation of the City of Kingston v. Doe*,[28] Justice Carter of the Superior Court of Justice similarly declined to issue an order pursuant to section 440 of the *Municipal Act, 2001* sought by the City of Kingston to aid in its enforcement against an encampment in a large municipal park. In a similar fashion to the *Waterloo* decision, Justice Carter found that the prohibitions on camping in the City's parks by-law, when applied to the homeless population, constituted a violation of section 7 of the *Charter*.

Justice Carter's treatment of the previous case law on the "right to shelter" is noteworthy in that instead of interpreting those cases as establishing a novel constitutional right, the outcome and remedies issued in each case were largely driven by the facts and evidence before the courts. Justice Carter accordingly approached the issues before the court on the basis of the evidentiary record, and whether a violation of section 7 could be made out on the facts.

In addition, Justice Carter's consideration of the *Waterloo* case seemingly eschewed the threshold question of whether the "right to shelter" is engaged, based on the number of homeless individuals and the availability of shelter space; instead, any encampment eviction that could expose homeless individuals to risk of harms engages section 7 of the *Charter*. In particular, Justice Carter held that the *Waterloo* decision did not specifically adopt the "essence" of the British Columbia decision as a principle of law. Rather, it was held that the *Waterloo* decision was decided solely on whether the by-law at issue violated the rights of encampment residents under section 7 of the *Charter*, not whether the "right to shelter" had been engaged based on an assessment of available shelter alternatives.[29]

Notably, the evidentiary record before Justice Carter was relatively less robust than in previous encampment cases. For example, despite earlier jurisprudence suggesting the threshold question dealt with availability of shelter space, the City did not adduce evidence on the state of its shelter system. The City provided some evidence on the hours of operation of various shelters, but did not present quantitative evidence of how many people could attend each shelter, nor any qualitative evidence on the nature of accessibility of those spaces.

As such, Justice Carter was ostensibly left with the assessment of the case based on whether or not the City's proposed eviction of encampment residents would violate their rights under section

[26] *Waterloo*, *supra* note 11, paras. 128-130.

[27] *Ibid.*, at para. 158.

[28] *The Corporation of the City of Kingston v. Doe*, 2023 ONSC 6662; ["***Kingston***"].

[29] *Ibid*., at para. 93.

7 of the *Charter*. The evidence before the court, coupled with the City's concession, was still sufficient to establish that the City's desired enforcement outcome would expose encampment residents to the same risks of harm discussed in the *Waterloo* decision, and in a manner that was overbroad and grossly disproportionate, and could not be reasonably justified.

In summary, the *Waterloo* and *Kingston* decisions demonstrate that a municipality cannot take enforcement action against encampment residents where it cannot demonstrate that there is sufficient available and "truly accessible" shelter space. Failing this demonstration, enforcement would violate the *Charter* rights of encampment residents.

iii. City of Toronto

Other reported decisions dealing with municipal enforcement against encampments reinforce the principle that a municipality will be constitutionally prohibited from evicting or forcibly relocating encampment residents unless it can demonstrate that there are suitable alternative accommodations available. The qualities of or amenities within a particular park or public space do not factor into this determination.

The Superior Court of Justice's decision in *Church of Saint Stephen et al v. Toronto (City)*[30] is a contrary example of where encampment enforcement was permitted to proceed. However, based on the facts in that case, it was clear that suitable alternative accommodations were made available to encampment residents such that eviction did not expose them to the harms discussed in earlier "right to shelter" cases, but rather, would improve their condition.

The encampment dealt with in *Church of Saint Stephen et al v. Toronto (City)* was located in front of a church, on lands that were owned by the City. The church and its reverend provided meals to encampment residents and the homeless population generally, as well as help to access social services.

The encampment was located at the end of a busy residential street, in close proximity to a school and day care centre. Portions of the encampment were set up within the municipal right of way, spilling out onto sidewalks. At any given time, the encampment consisted of between two and fourteen residents, living in makeshift accommodations and tents. Notably, there had been three fires at the encampment in the 10 months preceding the decision, which were responded to by the City's fire service.

Based on the escalating fire risk, cramped conditions, and hoarding of materials, the City designated the encampment as a high priority for enforcement. Importantly, through its outreach efforts, the City offered each individual encampment resident accommodation in hotel shelters for an indeterminate period of time.[31] These hotel shelters also provided food, laundry, daily housekeeping, access to medical care and mental health supports, as well as harm reduction supplies.

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[30] *Church of Saint Stephen et al v. Toronto (City)*, 2023 ONSC 6566; ["***Toronto***"].

[31] During the COVID-19 Pandemic, when hotel occupancy was low, the City of Toronto contracted with many hotel and motel operators to rent rooms that could be made available to the homeless population. This practice has continued as a means to supplement the City's stock of shelter beds.

The matter came before the Superior Court in the form of an application brought by the church and a resident of the encampment for an interlocutory injunction to prohibit the City from clearing the encampment, pending the hearing of an application to strike down portions of the City's by-laws dealing with encampments on constitutional grounds. As such, Justice Koehnen was required to apply the tripartite test established in *RJR-MacDonald Inc. v. Canada (Attorney General)*: 1) there is a serious issue to be tried, 2) there will be irreparable harm if the relief is not granted, and 3) the balance of convenience favours granting the injunction.[32]

The City conceded that the application to challenge the constitutionality of the City's by-law raised a serious question. As such, the bulk of Justice Koehnen's analysis focused on irreparable harm and the balance of convenience.

As to irreparable harm, the applicants adduced medical evidence of the harms that would result from clearing the encampment, including increased risk of physical ailments and psychological harm. However, Justice Koehnen noted that the evidence related less to the harms of clearing an encampment than to the issue arising from lack of shelter once the encampment was cleared.[33] This was a critical distinction because the City had offered hotel accommodations in single rooms to all residents of the encampment.[34] Moreover, the City's Streets to Homes department had visited the encampment 260 times in the preceding year, and had worked with encampment residents to refer them to indoor shelters. This effectively mitigated the harms encampment residents would face if the encampment was cleared.

While portions of this evidence were disputed by the applicants, Justice Koehnen noted that the City could offer more in the way of resources to encampment residents that would lead to longer term transition to permanent housing than the church would be able to.[35]

Justice Koehnen expressly held that "current residents [of the encampment] would have difficulty demonstrating irreparable harm given that they have all been offered accommodation in hotel shelters," which would expose them to significantly less harm than if they did not relocate from the encampment.[36] Justice Koehnen noted that while there may be some irreparable harm, it was technical and carried little weight in the overall analysis.

Lastly, the balance of convenience was the dominant factor in Justice Koehnen's analysis. Several factors turned this analysis in favour of the City being able to proceed with enforcement:

- The encampment was on a public right of way, which the City's by-law sought to prevent obstructions of. The continued occupation and crowded conditions gave rise to public safety concerns.

[32] See *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at pp. 347-348 (S.C.C.).

[33] *Toronto, supra* note 30, at para. 16.

[34] This was unlike the *Waterloo* and *Kingston* decisions, where the evidence established that encampment residents did not have suitable alternative accommodations.

[35] *Toronto, supra* note 30, at para. 28.

[36] *Ibid.*, at para. 30.

- The encampment posed an elevated risk to fire safety, which was supported by evidence of past incidents. With the impending winter, it was reasonable to conclude that open fires would be more prevalent, exacerbating the issue. Ultimately, the animating public purpose of fire safety is to prevent fires, not just respond to them.

- Danger to public safety was a necessary component of the analysis, and weighed in favour of allowing the encampment to be cleared.

- Moving encampment residents to hotel accommodations would also remove them from immediate risks of homelessness that the Applicants proffered evidence of.

In summary, Justice Koehnen concluded that there was a relatively minor inconvenience and a potential real benefit to residents in being moved to a hotel accommodation, versus the dangers faced when living homeless during the winter, and the dangers they and the public faced from risk of fires. As such, Justice Koehnen declined to issue an injunction, allowing the City to clear the encampment.

iv. Summary

In summary, the preponderance of the case law establishes that a municipality cannot take action to clear an encampment where it is unable to demonstrate that there is sufficient alternative shelter space, both as to quantity and quality. Doing so would violate the section 7 *Charter* rights of encampment residents. While the recent case law suggests this approach is driven by the facts of each case as opposed to a uniformly applicable legal principle, the cases provided guidance as to how such a challenge would play out.

What is not relevant to the determination as to whether a municipality will be permitted to clear an encampment is the type of land on which the encampment is located, such as a public park versus vacant land, and the amenities or equipment located within a park. Justice Koehnen succinctly summarized the crux of the issue in *Church of Saint Stephen et al v. Toronto (City)* as follows:

> Two lines of cases have emerged that address encampments such as this one. The cases that enjoin municipalities from clearing encampments and the cases that allow municipalities to clear them seem to turn on the municipality's effort to find shelter spaces for the specific residents of the encampments in question. Where those residents are offered shelter spaces, interlocutory injunctions have been denied. Where municipalities do not offer spaces to residents, injunctions have been granted.[37] **[emphasis added]**

Based on the foregoing, we strongly recommend that the City not proceed in any way to take enforcement action to clear the encampment in Rainbow Park. There is no clear indication from the County that there is sufficient emergency or transitional shelter space in its system to house the County's homeless population. Moreover, even if there are anecdotal reports of shelter availability, this is only one component of the analysis. Shelter spaces must be "truly accessible" in that they are low barrier to access, based on the unique needs of homeless individuals. It is far from evident that the County's shelter spaces are of this nature.

[37] *Toronto, supra* note 30, at para. 50.

On account of this lack of alternative accommodations, the City's forcible eviction of the encampment will almost certainly be found to violate the section 7 *Charter* rights of the encampment residents.

We appreciate that the City does not directly control the availability of shelter spaces, whether in terms of quantity or quality. That matter falls to the responsibility of the County under the *Housing Services Act, 2011*. At present, the state of the case law is not sympathetic to the dynamics of multi-tier local governance. However, that is not a justification for the City to derogate from the established jurisprudence on the "right to shelter." The *Charter* is the "supreme law of Canada,"[38] and must be complied with, as it has been articulated by the courts.

3. Risks of Unilaterally Enforcing Against Encampments

If the City were to proceed with encampment enforcement in the present circumstances, this would expose the City to significant litigation risk. Principally, there is a high likelihood that the City's actions would be found to be unconstitutional in a legal challenge by encampment residents or community groups.

First, a party could move *ex parte* (i.e., on an urgent basis and without notice to the City) for an interim injunction to halt any pending enforcement actions. For example, we are aware that the Superior Court of Justice issued a temporary *ex parte* injunction against the City of Hamilton in July 2020[39] restraining the City from clearing an encampment in advance of an application for an interlocutory injunction. Although initially issued for a period of 10 days, the temporary injunction was extended for several months pending the hearing of the full application.[40]

If faced with an *ex parte* injunction, the City would be required to immediately comply with the terms of the court order, pending a full hearing of an application for an interlocutory injunction.

Second, a party could also move for a permanent injunction to prevent the City from enforcing against encampments altogether. This type of proceeding has been demonstrated in several high profile cases, including *Poff v. City of Hamilton* and *Black v. City of Toronto*.[41] In the face of such an injunction, as observed by Justice Koehnen in *Church of Saint Stephen et al v. Toronto (City)*, the case would turn on the question of alternative shelter spaces for the specific residents of the encampments in question.[42]

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[38] *The Charter*, s. 52(1).

[39] *Bailey, et al. v. City of Hamilton* (July 30, 2020) Hamilton Court File No. CV-20-73435 (Ont. S.C.J.) (unreported).

[40] See *Poff v. City of Hamilton*, 2021 ONSC 7224, where the Superior Court of Justice eventually declined to issue an interlocutory injunction to prohibit the City of Hamilton from clearing an encampment on the basis that there was sufficient and safe shelter space in the City.

[41] *Black v. City of Toronto*, 2020 ONSC 6398. Similar to the Court's findings in *Poff v. City of Hamilton*, *supra* note 40, Justice Schabas found that the City of Toronto was providing sufficient and safe accommodations within its shelter system, including implementing measures to address the ongoing COVID-19 Pandemic.

[42] *Toronto, supra* note 30, at para. 50.

Thirdly, encampment residents could, at any time, bring an application for a declaration that their "right to shelter" is engaged and would be violated by the City's proposed enforcement actions, or if enforcement did proceed, that such enforcement was conducted in an unconstitutional manner. At present, we believe that such an application would stand a good chance of success.

In any of these scenarios, the City would be put to the immediate cost of responding to legal proceedings, which we anticipate would be hard fought. Such a proceeding would involve complex evidence from several parties, potentially even the County in its capacity as service manager, which the City would have to respond to. If the City were unsuccessful, it may also be ordered to pay legal costs. We would also note that based on the different approaches taken in the *Waterloo* and *Kingston* decisions, any litigation would be ripe for appeal, which would further draw out the proceedings and add to the City's legal expenses.

If the court were to find that *Charter* rights have been infringed by the City's enforcement actions – which we expect will be the case in the present circumstances – the court would also be authorized to issue any remedy it considers just and appropriate in the circumstances pursuant to its powers under subsection 24(1) of the *Charter*. This is not limited to declaratory relief. A *Charter* remedy could include monetary damages to compensate for personal loss, or an order that the City be compelled to do some thing, or refrain from doing some thing.

In addition to legal costs and potential damages, there is significant reputational risk as there would be severe public scrutiny and negative press across the county (and perhaps beyond) associated with a finding that the City has violated the *Charter* rights of marginalized individuals, including homeless persons.

From our review of the applicable case law, the potential for civil liability arising from risks of encampments is not a factor weighed by the courts in considering whether an eviction of encampment residents is unconstitutional. A municipality can and should take steps to mitigate risks to public heath and safety by, among other things, taking reasonable precautions against such hazards. However, such risks do not factor into a court's conclusions on shelter availability and accessibility as the primary *Charter* considerations addressed above.

Nor is the nature or characteristics of Rainbow Park serve to justify the City in proceeding with enforcement. We appreciate that in *Waterloo*, the parcel of land on which the encampment developed was a vacant parking lot. This was not the case in *Kingston*, however, where the encampment at issue was located within a public park with many public facilities. Notwithstanding this, the case law is clear that the amenities in a park do not factor into the court's analysis of whether the section 7 "right to shelter" will be engaged on the facts of a particular case. This is based solely on the availability and accessibility of shelter space.

Lastly, on a purely practical and observational basis, it is far from clear that evicting the residents of an encampment from one location is an enduring solution to the situation. The experience from municipalities across the county demonstrates that even if an encampment is cleared in a constitutionally-compliant manner, this does not mean a similar encampment will not develop in another public park.

For example, in *Bamberger v. Vancouver (Board of Parks and Recreation)*, which was a legal challenge to a municipal order closing a park to encampments, the British Columbia Supreme Court noted that the encampment dealt with in that case emerged shortly after another

encampment at different park in Vancouver's Downtown Eastside was closed, which was preceded by the closure of an encampment on adjacent lands owned by the Vancouver Fraser Port Authority pursuant to a court order.[43]

The foregoing experience is not uncommon. Encampment residents facing eviction from a particular park – who legitimately have nowhere else to go – will often establish a new encampment in another location. Proceeding with clearing encampments, as an opening salvo and without any support from social service agencies to transition residents to suitable, stable housing, may result in perpetual cycle of enforcement.

We suggest that the appropriate approach in the present circumstances is one of political advocacy at the County level, while taking steps to ensure the City, together with the County, continues to provide outreach and support in an attempt to transition encampment residents to stable forms of housing and address any hazards to health and safety. As Justice Koehnen commented in *Church of Saint Stephen et al v. Toronto (City)* on the topic of availability of shelter space, questions of general policy about how to address homelessness are best left for policy debates within legislating bodies and elections, not the courts.[44]

Based on the foregoing, at this time, it is strongly recommended that the City refrain from taking any unilateral enforcement measures to forcefully evict or relocate the residents of the encampment in Rainbow Park. In our opinion, such enforcement action would almost certainly be found to constitute a violation of the *Charter*, based on the existing case law articulating the "right to shelter."

Conclusions

For all the reasons set out above, we strongly recommend against the eviction of encampment residents from City parks, including Rainbow Park. Evictions would expose the City to a significant risk of litigation, given the judicial guidance in recent court decisions in Ontario.

The fundamental issue in each decision is whether there is appropriate and sufficient shelter capacity available for encampment residents to go. There must be sufficient quantitative capacity in the shelter system for all persons experiencing homelessness, but those shelter spaces must also be "truly accessible" to the unique needs and circumstances of encampment residents. The type of municipal lands and the potential risk to municipalities do not serve as a factor to justify encampment enforcement in the face of a lack of shelter spaces.

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[43] *Bamberger*, *supra* note 8, at para. 22

[44] *Toronto, supra* note 30, at para. 60. This sentiment was echoed by Justice Carter in *Kingston*, *supra* note 28, where he commented at para. 132 on the topic of a declaratory relief on the subject of availability of shelter space:

> In addition, such a declaration would essentially place the focus on creating more shelter beds. It is far from clear based on the evidence before me that this is the only, or even most appropriate, solution to the problem. ... The point being is that the City should be entitled to choose amongst various options in crafting a response to this court's finding of unconstitutionality.

We expect the City would face a *Charter* challenge to any encampment eviction action. Owing to the lack of suitable shelter space, we expect a court would rule against the City. This is the case whether the City proactively sought injunctive relief from the courts, or if the City proceeded with encampment evictions and is challenged by residents and groups supporting those residents.

Yours truly,

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