

Real Estate

Court decision refusing eviction of encampment residents raises bar for municipalities

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(July 13, 2023, 10:41 AM EDT) -- A decision from early in 2023, *Waterloo (Regional Municipality) v. Persons Unknown and to be Ascertained 2023* ONSC 670, has been hotly debated by those providing homelessness services and those working at municipalities. As the court states, the case “touches on the unfortunate, complex and nationwide social issue of homelessness” and the systemic impact of this problem is felt throughout the court’s decision.

Justice Michael Valente does not shy away from the complexity in front of him and brings the human impact of homelessness into focus by recounting personal histories and experiences of certain residents of the encampment. The court appears to genuinely see the people seeking redress, and the stories are illuminating and heartbreaking at the same time.

The case deals with a Region of Waterloo bylaw that prohibited the erection of camps on municipality owned properties, including on a one-half acre vacant gravel parking lot in Kitchener where approximately 50 residents had erected tents without the Region’s permission. The Region attempted to enforce the bylaw in June 2022 by evicting the residents from the encampment. The Region subsequently brought this application to seek the direction of the court in how it might best enforce its legal rights under the bylaw in order to prohibit encampment residents from entering the property.

Notably, the court held that the bylaw violates s. 7 of the Charter in that it deprives the homeless residents of their right to life, liberty and security of the person in a manner not in accordance with the principles of fundamental justice, and that the bylaw was not saved by s. 1 of the *Canadian Charter of Rights and Freedoms*. Accordingly, the court found that the bylaw is inoperative insofar as it applies to prevent the residents of the encampment from living on and erecting temporary shelters on the property when the number of homeless persons exceeds the number of available accessible shelter beds in the region. The court also considered whether the bylaw violated the equality rights of the encampment residents under s. 15(1) of the Charter but no violation was found.

The Region decided not to appeal the court’s decision, making the judgment binding on other courts in Ontario. However, the court left open the possibility that the Region could apply to rescind the court’s declaration “when it is in a position to satisfy this court that the By-law no longer violates the s. 7 rights of the Encampment residents.” Housing advocates are optimistic that this case will be followed in future Ontario judicial decisions relating to encampment evictions, including a case which challenges municipal bylaws in the City of Hamilton.

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Does Charter apply?

The court accepted the argument that the case relates to the constitutionality of a prohibition contained in the bylaw. While the Region made the argument that there is established case law that provides that courts are not to interfere with the legislative allocation of resources, the judge succinctly dismissed the argument with two words: "I disagree."

As a result, even though the case is about the enforcement of a bylaw and not about immediate allocation of resources, if a municipality wishes to enact legislation to evict homeless residents from encampments, this decision will force municipalities to allocate more resources to assist the homeless individuals. While this may seem like a positive outcome, it is unlikely that most municipalities will have the resources to fund the required number of accessible shelter beds.

Charter analysis

The bylaw was found to violate the right to life, liberty and security of the person protected under s. 7 of the Charter:

- **Life:** The court agreed with previous British Columbia cases in that adequate shelter is a necessity of life and exposure to the elements without adequate shelter risks serious harm, including death, thus impacting the right to life under the Charter.
- **Liberty:** The court found that the Region, by preventing the homeless individuals from protecting themselves from the elements, where the Region had not provided sufficient shelter spots and then restricted the individuals from living in the encampment, violated the individual's dignity and independence. As such, the individuals' liberty rights were violated.
- **Security of the person:** The court found that enforcement of the bylaw would expose residents to significant physical and health risks, thus depriving individuals of their security of the person rights under the Charter.

The court also found that the encampment residents' Charter right to shelter is not limited to just overnight hours. This right also exists during the day as there is a legitimate need for individuals to rest and shelter during the day as well. The court articulated that the property in question in this case is "not a park or other space designed with the purpose of being enjoyed by the public at large." Therefore, the court did not deem it necessary to look at the impact of the encampment on other residents of the region as those other residents' rights were not impaired by the recampment being on private property.

After deciding that the bylaw violated the encampment residents' right to life, liberty and security of the person, the court continued with the s. 7 Charter analysis and found that the infringement was not in accordance with the principles of fundamental justice. The bylaw was deemed to be too broad as the court was not convinced that the encampment had caused any significant damage to the Region, its property or inhabitants. Furthermore, the court found the bylaw's negative impact on the encampment residents was grossly disproportionate to its stated objectives — preventing damage to the property, disrupting the Region's operations and enjoyment of the property by others.

The infringement was not found to be justified under s. 1 of the Charter.

The court also assessed the case through the lens of the equality rights protected under s. 15(1) of the Charter and found that the Charter rights of the homeless individuals were not violated because homelessness is not an analogous ground protected by s. 15(1) of the Charter.

To read about previous decisions regarding encampments and lessons to be learned for municipalities by the Waterloo case, see part two of this article.

This is the first instalment of a three-part series.

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