

Real Estate

Court decision refusing eviction of encampment residents raises bar for municipalities, part two

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(July 14, 2023, 10:43 AM EDT) -- The Jan. 27 decision, *Waterloo (Regional Municipality) v. Persons Unknown and to be Ascertained* 2023 ONSC 670, which addresses the enforceability of 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, was summarized in part one of this article. This part will examine previous Canadian cases regarding encampments and the implications of the Waterloo case on municipalities going forward.

Precedents

This case is not the first to tackle the complex issue of encampments. Previous decisions in Ontario and British Columbia have generally addressed the issue by looking at the number of shelter spaces available for homeless individuals. Where a municipality was able to show that there are sufficient shelter spaces available, the courts have sided with municipalities in permitting encampment evictions. Where there are insufficient shelter spaces, the courts have generally sided with the encampment residents and declared that such laws violate the Charter.



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The court here also adopted the reasoning from three British Columbia cases, *Abbotsford (City) v. Shantz* 2015 BCSC 1909, *Prince George (City) v. Stewart* 2021 BCSC 2089 and *Bamberger v. Vancouver (Board of Parks and Recreation)* 2022 BCSC 49, where it was decided that for the number of spaces to be considered available, they must be "low barrier" or "truly accessible" to the homeless population. The court reasoned that:

... it is simply not a matter of counting the number of spaces. 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 additions, or cannot accommodate mental or physical disability, they are not low barrier and accessible to the individuals they are meant to serve (*Waterloo*, supra note 2, at para. 93).



The practical implications of this reasoning are extensive. Going forward, before a municipality tries to evict residents from encampments, they need to truly understand the needs of the homeless population, and more specifically, the needs of individuals within the homeless population.

The court also stated that for a municipality to show that it has sufficient

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capacity in the system to accommodate the encampment residents, the municipality cannot merely look at the numbers of individuals in the particular encampments, but must take a system-level view. In this case, the Region was estimated to have approximately 1,100 homeless individuals within its boundaries, with a bed capacity of approximately 400. Even though the Region claimed that it had between 45 to 85 unoccupied beds at the time in question, thus meeting the needs of the 50 residents in the encampment, the court found that the Region needed to look at the overall number of shelter spaces in the system. In this case, the Region's overall shelter spaces fell short by some 50 per cent of what was required.

Lessons to be learned for municipalities

This case has a number of implications for municipalities wishing to implement a bylaw similar to that of the Region:

- **Risk assessment:** Municipalities must thoroughly assess the real risk posed by encampments. The Region attempted to quantify the risk of encampments through an evaluation that was admitted to be not "well researched," where the methodology was not objective in assessing the risk posed by the encampment. Furthermore, the risk assessment was one-sided in that it did not assess the risk to encampment residents if they were evicted. The lesson to be learned is that municipalities need to create an objective risk assessment methodology that takes a holistic perspective.
- **Understand the individual needs:** This case also underscores the importance of understanding the real needs of homeless individuals rather than making decisions on a population basis. The court has articulated that moving encampment residents requires that a municipality have sufficient accessible shelter spaces available. For these spaces to be "accessible," they must meet the practical needs of those requiring shelter. Therefore, municipalities need to understand what these practical needs are in their communities and meet these needs before evicting encampment residents.
- **Proportionality:** Any negative impacts of a bylaw must be proportional to the goals that are to be achieved. In the Waterloo case, the court found that there was a lack of proportionality as there was a disconnect between the Region's goals and the legislation, especially as the goals were not based on a sound risk analysis. As the court pointed out "... absent suitable housing, does not closing the Encampment simply move all of these risks elsewhere?" Therefore, the municipality should be able to articulate what it is trying to achieve and then narrowly target actions to meet said outcomes.
- **Implementation:** Although the Region's implementation strategy may not have impacted the legal analysis of the case, the Region's use of their road maintenance crew with heavy equipment was criticized by the Region's own staff, where they stated that "the manner in which these actions were carried out did not reflect the dignity of those living in the encampment." Thus, it is important to make sure that any evictions are done in a respectful manner that addresses the human rights and dignity of the residents. We encourage readers to review the City of Toronto Ombudsman's recent report: *Investigating into the City's Clearing of Encampments in Summer 2021* for reflections on some good and some not so good practices employed by the City of Toronto with respect to evicting residents from encampments. The report also has recommendations from the ombudsman on some of the steps to take when clearing encampments, if that is the decision made by the municipality.

To read about our outstanding questions and our thoughts on the significance of this case, see part three of this article.

This is the second instalment of a three-part series. Part one: Court decision refusing eviction of encampment residents raises bar for municipalities.

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