

**CITATION:** The Regional Municipality of Waterloo v. Persons Unknown and to be  
Ascertained, 2023 ONSC 670  
**COURT FILE NO.:** CV-22-717  
**DATE:** 2023-01-27

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**BETWEEN:** )  
)  
The Regional Municipality of Waterloo ) James J. Bennett and Erin Kadwell, for the  
Applicant ) Applicant  
)  
– and – )  
)  
Persons Unknown and to be Ascertained )  
Respondent(s) )  
)  
Named Respondents – Jennifer Draper, ) Shannon K. Down and Ashley Schuitema,  
Sandra Hayward, Caleb Watson, Drew ) for the Named Respondents (Applicants in  
Zekai, Michael Wosik, Albert Tugwood, ) the Constitutional Application)  
Mark Duke, John Slade, Andrew Entwistle, )  
Sean King, Andrew Mandic, Kathryn )  
Bulgin, Lee-Anne Mason, Liam Flanagan, )  
Jordan Aylott, and Sean Simpell )  
Respondents )  
*Amicus Curiae* ) Mercedes Perez, as *Amicus Curiae*  
)  
Waterloo Regional Police Service and the ) Gary Melanson, counsel for WRPS  
Chief of Police )  
Intervenor )  
)  
) **HEARD:** November 7, 8, and 16, 2022;  
) Final Submissions received December 2,  
2022

**THE HONOURABLE JUSTICE M.J. VALENTE**

**REASONS FOR JUDGMENT**

**Introduction**

[1] The issue in this application of The Regional Municipality of Waterloo (the ‘Region’) concerns the prohibition against erecting any type of structure, including a tent, on the Region-owned property, municipally known as 100 Victoria Street North, in the city of Kitchener (the

‘Property’). More generally, however, the Region’s application touches on the unfortunate, complex and nationwide social issue of homelessness.

### **The Parties and their Respective Positions**

[2] In its application, the Region takes the position that the homeless persons who have erected shelters and are living on the Property are in breach of By-Law number 13-050, *A By-Law Respecting the Conduct of Persons Entering Upon Buildings, Grounds and Public Transportation Vehicles Owned or Occupied by the Region* (the ‘By-Law’). The Region seeks, in addition to other relief, a declaration that the homeless living on the Property are in breach of the By-Law together with interim and final orders restraining and enjoining them from breaching the By-Law by remaining and/or re-entering onto the Property pursuant to section 440 of the *Municipal Act, 2001*, S.O. 2001, c.25, as amended (the ‘*Municipal Act*’).

[3] A number of the individuals living at the Property’s encampment have filed notices of appearance. These individuals are Jennifer Draper, Sandra Hayward, Caleb Watson, Drew Zekai, Michael Wosik, Albert Tugwood, Mark Duke, John Slade, Andrew Entwistle, Sean King, Andrew Mandic, Kathryn Bulgin, Lee-Anne Mason, Liam Flanagan, Jordan Aylott and Sean Simpell (collectively, the ‘Named Respondents’). The Named Respondents delivered a notice of constitutional question seeking remedies pursuant to sections 24(1) and 52(1) of the *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*’). The Named Respondents allege that the By-law and the trespass notice issued under it breach their section 7 (right to life, liberty and security of person) and section 15(1) (equality) *Charter* rights in a manner that is not demonstrably justified in a free and democratic society.

[4] Prior to the matter coming before me for argument, I ordered the appointment of *amicus curiae* “for the purpose of advocating on behalf of individuals living in the encampment... whose capacity to engage or instruct counsel is in question, who have not retained counsel, and who have no other identified way to participate in these proceedings.”

[5] I also granted intervenor status to the Waterloo Region Police Service and the Chief of Police (collectively, the ‘WRPS’) which take no position on the application itself but have

provided the Court with helpful submissions should I decide to accede to the Region's request that WRPS be authorized to arrest and remove the homeless persons living in the Property's encampment and remove both their shelters and belongings, as necessary.

[6] The Region's position is that it does not require the Court's assistance in the determination of its legal rights. It maintains that it may assert its legal rights to evict any trespasser on Region-owned property who are in breach of the By-Law. Rather, the Region brings this application to seek the direction of the Court in how it might enforce its legal rights. Once it has the Court's direction, including a ruling that the *Charter* rights of the Named Respondents have not been violated, the Region proposes to use this Court's order as a precedent for its treatment of other homeless encampments across the Region.

### **The By-Law**

[7] It is undisputed that the *Municipal Act* gives the Region the express authority to pass by-laws respecting its public assets and the protection of persons and property (see *Municipal Act*, ss. 8, 9, and 11(2)). It is also acknowledged that the *Trespass to Property Act*, R.S.O. 1990, c.T21, as amended, ss. 3 to 8 (the '*TPA*') allows an occupier of premises to prohibit or regulate entry onto premises and that the Courts have recognized municipalities as occupiers.

[8] Pursuant to the *Municipal Act*, the Region enacted the By-Law in December 2013. The By-Law prohibits certain activities on lands owned or occupied by the Region. The prohibited activities include erecting, without authorization, any form of structure on the lands as well as bringing any dangerous, illegal or flammable goods on the lands that are likely to cause injury or damage to the lands.

[9] The purpose of the By-Law is to (i) prevent physical damage to the lands owned or occupied by the Region (the 'Designated Premises') (ii) prevent the disruption of the Region's operations on the Designated Premises; and (iii) regulate the use and enjoyment of the Designated Premises by other persons.

[10] The Region's remedies pursuant to the By-Law are to lay a charge and/or exercise its available remedies under the *TPA*. These include issuing a written notice or posting a sign

prohibiting the impugned conduct and/or requiring the person engaged in the prohibited activity to leave the property in question.

[11] Prior to December 2021, the By-Law was used by the Region to address and regulate homeless encampment complaints. In late November 2021, the Region's by-law enforcement staff attended at a homeless encampment at 34 Stirling Street East, in the city of Kitchener (the 'Stirling Encampment') to enforce the provisions of the By-Law prohibiting unauthorized occupation of Region-owned public lands. To assist with the eviction of the encampment residents, and because of certain health and safety concerns for the Region staff and members of the public stemming from the presence of unsanitary conditions, broken glass, large items and drug paraphernalia, the Region's enforcement staff enlisted the help of a road maintenance crew with heavy equipment to clear the Stirling Encampment.

[12] While the Region's Planning, Development, and Legislative Services and Legal Services Report to Regional Council of December 15, 2021 (the 'December 2021 Report'), maintains that the steps undertaken to evict the Stirling Encampment occupants "were consistent with the requirements of the [B]y-law," the same Report concedes that "the manner in which these actions were carried out did not reflect the dignity of those living at the encampment."

[13] As a result, the Region conducted a review of its then existing encampment eviction process and proposed a draft policy to Regional Council to supplement the By-Law as it specifically applies to homeless encampments. The draft policy was approved by Regional Council on December 15, 2021 (the 'Encampment Policy'). The details of the Encampment Policy are discussed below.

### **100 Victoria Street North, Kitchener**

[14] The Region acquired the Property in November 2012. The Property is located on the corner of Victoria and Weber Streets in the city of Kitchener and is approximately one-half acre in size. It is a gravel parking lot. The VIA Rail/GO Transit and bus stations are to the east of the Property, a commercial plaza lies directly to the west, and a Metrolinx owned rail corridor is to the north. To the south of the Property are a variety of businesses and a church, including St. John's Kitchen, which provides meals during weekdays to persons in need.

[15] In May 2018, the Region and the province of Ontario entered into a Transfer Payment Agreement for the partial funding of the King Victoria Transit Hub (the ‘Hub’). The Hub is a new train/bus station for the Region in close proximity to the Property. The Hub will require construction on Region lands. While there are no plans for any construction on the Property, the Region intends to use the Property in the short-term for additional motor vehicle parking for the VIA Rail and GO Transit stations across the street due to an anticipated increased use of the stations with the decline of the pandemic and as a lay-down area for the construction of the Hub. No evidence was, however, proffered by the Region respecting the immediate need for increased parking spaces to accommodate anticipated demand and although the evidence of Ellen McGaghey, the Region’s Director of Facilities and Fleet Management, is that the construction of the Hub is projected for spring 2023, Ms. McGaghey admitted in cross-examination that there is no firm construction start date.

[16] In the long-term, the Region intends to use the Property for approximately one hundred dedicated transit customer parking spaces for the new Hub train/bus station. As a term of the Transfer Payment Agreement, the one hundred dedicated parking spaces are required of the Region upon the completion of the first stage of the Hub. It is projected that the contractually required parking will be required some time in late 2024, but there is no firm completion date.

### **Homelessness in the Region**

[17] In 2014, the Region was the first Canadian community to count the number of people found to be experiencing homelessness. In 2018, the federal and provincial governments mandated bi-annual “Point in Time Counts” of the number of people experiencing homelessness. Based on the Region’s Point in Time Count that was completed in September 2021, there were approximately 1,085 people experiencing homelessness in the Region. According to Kelly-Anne Salerno, Assistant Director of Housing Operations and Administration for the Region, the approximate 1,100 count is the most reliable information available on the extent of homelessness in the Region. According to the September 2021 Point in Time Count report, the number of people experiencing homelessness in the Region tripled from 2018 to 2021.

[18] In addition to the number of homeless in the Region, the Point in Time Count report also contains data about the demographics of the homeless in the Region. Specifically, of the 1085 experiencing homelessness, 412 were living rough (living on the street, sleeping in parks or squatting in temporary shelter), 385 were experiencing hidden homelessness (provisionally accommodated; couch surfing), 191 were accessing emergency shelters and 63 were institutionalized. Of the individuals who completed a survey during the Point in Time Count, 75% had been experiencing homelessness for more than six months in the last year, 30% of those counted were women, 67% were men, 10% were transgender, Two-Spirit or non-binary. Additionally, of the individuals counted, 17% identified as Indigenous or First Nations and 15% identified as part of a racialized community.

### **The Encampment**

[19] In or around December 2021, a small number of people began erecting tents on the Property without the Region's permission. Over the following six months, approximately 70 temporary shelters were erected to house some 50 people on the Property (the 'Encampment'). As of the hearing of the application, no current evidence was provided with respect to the number of tents and number of homeless persons living on the Property. The most reliable evidence is that, on July 27, 2022, the Region surveyed 53 residents living in the Encampment.

[20] In March 2022 the Region hired Barber Collins Security to monitor the Encampment, to respond to any disruptions and to respond to any complaints from the public, and specifically, from the businesses located in the plaza to the south of the Property. In May 2022, the Region authorized the Barber Collins security staff to be posted at the entrance of the St. John's Kitchen to permit overnight access to the washrooms located at this facility.

[21] As of July 2022, the Region's monthly costs associated with its response to the Encampment was approximately \$80,000. This cost not only included security services, but also garbage pick-up and janitorial services to clean the St. John's Kitchen washrooms.

## **The Encampment Residents**

[22] The composition of the residents of the Encampment is reflective of the demographics of the Region's homeless population. They are individual men and women, couples, members of the 2SLGBTQ+ community, Indigenous people, members of racialized communities, as well as persons suffering from disabilities and substance abuse and domestic abuse survivors.

[23] Certain of the Named Respondents deposed to their personal histories and experiences as follows:

a) Kathryn Bulgin

Kathryn Bulgin testified that she is a 32-year-old victim of both physical and sexual assault and currently suffers from drug addiction. She has been homeless for approximately 6 years. Prior to June 2022 when she began living in the Encampment, she slept in hotel rooms, shelters, behind dumpsters and couch surfed. She found lining up for a shelter bed very stressful because there was no certainty if a bed would be available and because she did not have a watch or phone and could not always return at a designated time to claim a bed. If evicted from the Encampment, Ms. Bulgin will simply move to another campsite.

b) Jennifer Draper

Jennifer Draper testified that she is an Indigenous woman who is disconnected from her community. She suffers from depression, anxiety and a panic disorder. She is a user of crack cocaine and methamphetamines. Until she arrived at the Encampment, Ms. Draper had rented a home for herself and her 3 children, but when she lost her job, the family was evicted from the home and the children were apprehended by the local family and children services. She subsequently stayed at various shelters, including Mary's Place, and outdoors with her partner, and co-Named Respondent, Albert Tugwood. At Mary's Place, Ms. Draper was assaulted and robbed many times. If she left the shelter in the evening to spend time with Mr. Tugwood, shelter staff threatened to give her bed away. Should Ms. Draper be evicted from the Encampment, she and Mr. Tugwood plan to sleep on the streets or in the bush.

c) Sean Simpall

Sean Simpall deposed that he suffers from drug addiction. He has been homeless since he was released from jail in June 2020. Prior to coming to the Encampment in March 2021, he bounced between a trailer, a Cambridge encampment, and a few shelters. As a drug user, Mr. Simpall found it difficult to be around other people in the shelter who were very judgmental. Unlike the shelters, where he was the subject of ridicule, at the Encampment: “we respect each other, we consider each other family and we don’t touch each other’s stuff. I have privacy here and no one steals from me.” If Mr. Simpall is forced to leave the Encampment, he fears that he will lose everything: “It is my greatest fear. This encampment may seem like garbage to some people, but to the people living there, it’s everything.”

d) Andrew Zekai

Andrew Zekai is Indigenous and suffers from drug addictions. He has been in and out of jail for the past 7 ½ years and homeless for most of the time when not incarcerated. Prior to living in the Encampment, he stayed in shelters but found them to be triggering for his drug use and ripe for theft of his personal belongings. He prefers the Encampment over the available housing options because he has easy access to St. John’s Kitchen for food and his sanitary needs as well as access to safe injection supplies from the nearby Consumption and Treatment Site. If evicted, Mr. Zekai testified that he believes he has nowhere to go and he will lose “most of his belongings and his stability.”

**The Encampment Policy**

[24] The December 2021 Report recommending Regional Council’s acceptance of the Encampment Policy states that the By-Law “has broad application to a wide range of prohibited activities” and “[a]s a result, specific direction as to the timing and manner of enforcement is not set out in the bylaw.” The Encampment Policy, as adopted by Regional Council on December 15, 2021, is intended to provide that direction for enforcement.

[25] The Encampment Policy seeks to guide Regional staff in providing outreach services to homeless persons living on the Region’s lands and to balance the need to provide “appropriate supports to vulnerable individuals and the civic responsibility of maintaining the use of these lands for the public and/or operational requirements of the municipality.”



[26] The Encampment Policy specifies 4 guiding principles that are to be followed prior to undertaking any encampment eviction. These guiding principles, as quoted from the Encampment Policy, are as follows:

1. The Region's priority is to assist individuals to access safer, sustainable, and healthier alternatives, not enforcement. Enforcement will only occur after all reasonable support efforts have been attempted without success and with reasonable advance notice of the requirement to vacate a public space. In exceptional circumstances, however, more immediate intervention may be required to address public safety concerns.
2. Regional staff, supported by community social service agencies, will work with individuals living outside to respond to their individual needs on a case-by-case basis by providing access to services, supports and shelter. The Region will use a co-ordinated approach between Regional departments in responding to the needs and issues related to individuals living rough or experiencing homelessness.
3. The Region will engage in ongoing proactive communication with individuals experiencing homelessness, service providers, regional councillors, community agencies and other groups.
4. The Region acknowledges that individuals living rough cannot be forced to accept services and supports. However, the refusal of an individual to accept services and supports is not sufficient reason to prevent the enforcement of Regional by-laws.

[27] In practical terms, the Encampment Policy provides for a two-step approach prior to enforcement of the By-Law.

[28] The first step calls for the Region's Community Services department to reach out to persons experiencing homelessness to encourage and assist them in accessing safer and healthier alternatives, including housing, support services, shelter and more permanent housing options.

The anticipation of the Region is that, over time, individuals who are being so assisted will choose these better alternatives and will voluntarily leave the Region's encampments.

[29] Step two requires that enforcement occur only after all reasonable outreach and support efforts have been provided without success and after reasonable notice of the need to vacate has been given. Once the prescribed protocols have been followed and a decision to evict is made, enforcement shall be completed in a way that respects both the safety of all concerned and the dignity of the individuals experiencing homelessness.

[30] The Minutes of the December 15, 2021, meeting of Regional Council approving the Encampment Policy, record the solicitor for the Region, Jeff Schelling, having advised Council prior to their vote that the "new policy provides a greater emphasis on outreach and communication, with enforcement as a last option."

[31] Because Regional Council passed a by-law to confirm its action of December 15, 2021, the Named Respondents would have me find that the Encampment Policy has the authority of a by-law. While I do not agree that Regional Council's confirmation by-law has the effect proposed by the Named Respondents, I find that the Encampment Policy supplements the By-Law by providing specific principles and processes to be followed when addressing homeless encampment issues.

### **Steps Initiated by the Region Pursuant to the Encampment Policy**

[32] It is the Region's evidence that a number of steps were taken by it pursuant to the Encampment Policy prior to its decision to disband the Encampment, the posting of its notice on June 6, 2022, requiring the residents as trespassers to vacate the Property by 9:00 a.m. on June 30, 2022 (the 'Trespass Notice'), and the commencement of this application on July 5, 2022.

[33] Based on the record, I find that the Region offered the following services and supports to the Encampment residents prior to its enforcement of the By-Law on June 6, 2022, with the posting of the Trespass Notice. These initiatives, as outlined by Ms. Salerno in cross-examination on her affidavit, are as follows:

- i. Starting in April 2022, Region staff met with the staff of Saugeen Health Centre and The Working Centre to ensure that person-centred supports and services were offered to the Encampment residents.
- ii. On May 25, 2022, two Region Ontario Works caseworkers began visiting the Encampment 3 times a week to provide support and services. For the six-week period from May 25, 2022, to June 30, 2022, the caseworkers spoke to a total of 38 individuals; of these 38 residents 22 were spoken to on one occasion.
- iii. Four service fairs were held on May 18, 19, and June 8 and 9, 2022, at the downtown YWCA to offer people the opportunity to connect with such community services as Lutherwood Housing Services, Saugeen Health Centre, and The Working Centre. A total of 40 people attended the service fairs, but it is unclear from Ms. Salerno's evidence how many of the attendees were residents of the Encampment.

[34] In addition to the support services listed above, at its June 22, 2022, meeting, Regional Council passed a motion “[t]hat staff develop a plan to establish interim housing solutions for the regional residents experiencing homelessness including those currently residing in encampment.”

[35] In response to the June 22, 2022, motion, Regional staff moved quickly to provide a number of recommendations to Regional Council at its August 18, 2022, meeting, including:

- a) the development of a Homelessness Master Plan detailing the strategies and resources necessary to end homelessness in the Region; and
- b) the implementation of interim housing solutions to support those experiencing homelessness in the following order:
  1. expansion of the Transition Housing Program, including the Indigenous-focused and led site;
  2. expansion of the Home-Based Support Program;
  3. expansion of the Emergency Shelter Program; and

4. establishment of a managed hybrid/outdoor shelter model.

[36] All of these recommendations were approved by Regional Council at its mid-August 2022 meeting.

### **The Risk Assessment**

[37] In May 2022, the Region developed a risk assessment tool (the 'Risk Assessment') to address the growing size and risks of the Encampment. It is unclear from the evidence whether the Risk Assessment was undertaken in contemplation of the Encampment Policy's principles and procedures or independent of it. The Risk Assessment addressed 15 categories of risk (for example, surrounding areas, known risks to safety, number of structures, types of items on-site, number of adults on-site) and assessed each of the 15 categories with a low/medium/high risk rating. The Risk Assessment also included empirical information on the number of inhabitants and reported incidents to allow the Region to determine any upward or downward trends.

[38] On May 12, 2022, and May 26, 2022, the Region completed two risk assessments. The Region concluded there was high risk in relation to the number of tents and individuals on-site but medium to low risk in all thirteen of the remaining categories. The Risk Assessment defined above 8 tents and individuals as a medium risk and above 20 as indicative of a high risk. On May 12, 2022, there were approximately 40 tents and 32 Encampment residents and on May 17, 2022, the Region counted some 63 tents and 50 individuals living in the Encampment.

[39] The Region also concluded that there was a significant increase in the number of Encampment incidents and a corresponding increase in the involvement of WRPS between March 25, 2022 and May 16, 2022. The Region points to a 18.77 % increase in the daily average number of incidents and a 116.33% increase in the daily average number of WRPS involvement between the week of March 25, 2022, and the week of May 16, 2022.

[40] Overall, it was the Region's determination that the conditions at the Encampment posed a risk to the health and safety of the Encampment residents as well as to that of others. As a result, the Region determined that the Encampment had to be disbanded.

[41] There may have been undisclosed reasons why the Region moved to evacuate the Encampment with the posting of the Trespass Notice, but I find that the results of the Risk Assessment are insufficient reason to justify the clearing of the Encampment.

[42] Apart from the fact that 13 of the 15 categories were rated as medium to low risk, Erin Rowles, the Region's Director of its Strategic and Quality Initiative Division, admitted on cross-examination that the Risk Assessment was not well researched. It was based on a risk assessment tool prepared for the City of Sudbury. That assessment tool chose 8 tents as indicative of high risk. The Region chose 20 tents as an indicator of high risk because it thought "20 made good sense." The twenty-tent mark was also based on feedback from community partners: 20 tents was "their best guidance and guess as well" according to Ms. Powles. I find that there was little or no analysis to justify the decision to assign 20 tents as a numerical indicator of high risk.

[43] The Risk Assessment also fails to include any qualitative analysis of the events reported as "incidents" and events requiring the response of WRPS. The total number of incidents recorded is 136 but a closer look at these "incidents" reveals such innocuous and unexplained events as 8 counts of "unauthorized guest belongings" (where else but on the Property would the residents store their possessions?), 8 counts each of "suspicious persons" (without any definition of such persons) and "loitering" (which one might expect from the Encampment residents), 11 "parking complaints" (how this may be a risk for the Encampment is less than clear), and 5 counts of "unauthorized vehicle" (given that no one had authorization to be at the Encampment, it is unclear how this factor contributes to the relative risk).

[44] Furthermore, while the Region is accurate in reporting an 18.77% increase in the relative number of daily average of incidents and a 116.33% increase in the relative number of daily average of incidents with WRPS involvement for the period of March 25 to May 16, 2022, as compared to the period of May 3 to May 16, 2022, the Region's statistics are far less compelling when presented by way of the actual number of increases. The actual increase in the daily average of incidents is 0.18 incidents per day and the actual increase in the daily average number of WRPS involvement is 0.126 incidents per day. To my mind, the actual numerical daily increase provides a more realistic perspective on how many incidents were occurring and how much their frequency actually increased.

[45] Ms. Rowles, as the Region's Director of Strategic and Quality Initiatives, also admitted in cross-examination that, in developing the risk assessment tool and its collection of the information included in it, the Region did not consult with any of the Encampment's residents. Instead, the Region relied on the verbal reports of the local fire and police departments as well as those from community partners providing outreach services.

[46] Finally, the Risk Assessment omits any consideration of the potential risks associated with the eviction of the Encampment residents. Because there is no comparative risk assessment, in my opinion, the Risk Assessment as a tool is not tethered; or in other words, it has no way to measure the relative risk of choosing between eviction, allowing the Encampment residents to stay, or pursuing other options.

### **Adverse Impacts of the Encampment**

[47] Shannon Walls, Corporate Security Supervisor for Barber Collins Security, in cross-examination on her affidavit, describes encampments and shelters as equally "dangerous and volatile" subject to the caveat that encampments are more unpredictable. Apart from the specific risks that I have identified above, the Region points to a number of other risks that contribute to the Encampment's dangerous and chaotic living environment. These additional risks include the following:

- a) rat droppings and rodent burrows;
- b) human feces and urine on the Property;
- c) the consumption of alcohol and drugs;
- d) the presence of barbeques and propane tanks in and around the tents creating a potential fire hazard;
- e) physical altercations; and
- f) repeated trespasses onto the neighbouring commercial plaza and complaints from local business owners.

[48] Albeit that the Region has assessed these issues in the medium to low-risk category, I accept the Region's position that each of these matters, with the exception of the trespassing onto neighbouring lands, have an adverse impact on the Encampment's living environment. Having reached that conclusion, however, I am also of the opinion that, absent suitable housing, does not closing the Encampment simply moves all of these risks elsewhere. Furthermore, does not the Region have some responsibility to take further steps to mitigate these risks? Is that not within the letter, or at least the spirit, of the Encampment Policy?

[49] For example, while the Region contracted with Abell Pest Control to control the rat population, bait and traps were placed only on the eastern boundary of the Encampment with the adjacent property. No bait or traps were placed within the Encampment or along the other three sides of the Encampment's perimeter. Likewise, the problem with human waste could have easily been addressed had the Region facilitated earlier access to the washrooms located at St. John's Kitchen and/or installed the two portable toilets on the Encampment sooner than it had. Furthermore, it is disappointing that the Region's policies prevented its representatives at the Encampment from approaching the residents with a view of educating them on health and safety issues which, according to the testimony of Chris Komorowski, Manager of the Region's Health Protection and Investigation Division, likely contributed to the Encampment residents receiving no education on these issues.

[50] As far as the adjacent property owners are concerned, those who testified admitted that they had not personally witnessed much behaviour that troubled them. They were more concerned with the potential dangers of the Encampment and the fear of the unknown.

### **Risk of being Homeless**

[51] Unlike the Risk Assessment, which does not consider the potential risks of eviction, the expert evidence of the Named Respondents addresses these risks in specific detail.

[52] While the Region did not attempt to disqualify the Named Respondents' expert testimony, it submits that this expert evidence is of little relevance because none of the Named Respondents' experts, save for one, visited the Encampment or spoke to any of its residents. Rather, the expert testimony is based on noncontroversial opinions respecting the issues that

contribute to homelessness in Canadian society. For this reason, however, and because the opinions of Dr. Andrea Sereda, in particular, were not effectively challenged on cross-examination respecting the negative consequences of homelessness and the benefits of encampments, I find the Named Respondents' expert testimony helpful in considering the issues before me.

[53] Dr Andrea Sereda is a physician practicing at the London Intercommunity Health Centre in London, Ontario. The Health Centre serves patients who experience barriers to healthcare in the traditional healthcare system. Dr. Sereda's practice focuses on people experiencing homelessness, people who inject drugs, and women working in the sex trade. Most of Dr. Sereda's patients are unhoused, living in encampments, staying in shelters, couch surfing, or any combination thereof. Dr. Sereda has provided health care to the homeless for 12 years.

[54] In Dr. Sereda's opinion, there are many health risks associated with homelessness. Dr. Sereda explains these risks as follows:

- a) The forced transience faced by unhoused people, which includes eviction from encampments, interrupts the ability of healthcare teams to complete diagnostic and treatment plans.
- b) Other healthcare problems created by encampment evictions include:
  - i. the inability to locate patients once they have been forced to leave can lead to their discharge from programs which require regular attendance;
  - ii. acute conditions such as frostbite, exposure, and heatstroke due to the loss of tents, clothing, and medications;
  - iii. the exacerbation of such mental health conditions as depression, anxiety, PTSD, and panic disorders; and
  - iv. increased substance use and fatal overdoses.
- c) For individuals experiencing homelessness, most of each day is spent on survival living, including accessing food, shelter, and hygiene. Because



most of the day is consumed with securing these basics, acute and chronic health conditions are often not prioritized by patients experiencing homelessness.

- d) Physically locating a patient who is homeless can be very difficult which often results in a delayed diagnosis and treatment of both acute and chronic conditions.
- e) “People who have nowhere to sleep commonly have profound sleep deprivation, which can impact physical and mental health but also contribute to a greater risk of death through mechanisms like overdose.”
- f) Because of the persistent onslaught of environmental factors such as heat, cold, rain and snow, individuals living unhoused are subject to injuries and acute illnesses. In these circumstances, it is difficult for healthcare providers to help the homeless move beyond the treatment of the acute illness at the cost of not addressing chronic conditions. The focus on acute care rather than preventative care for chronic conditions “increases morbidity and mortality from those chronic conditions.”

[55] In contrast, Dr. Sereda describes the advantages of living in an encampment as compared to living in a public space in this way:

- a) Encampments decrease forced transiency which increases the odds that the unhoused can maintain a connection to such outreach services as healthcare, street outreach for basic needs (food, clothing), delivery of medications and harm reduction supplies.
- b) Encampments decrease isolation and risk of fatality. By being forced to move into the margins, people place themselves at greater risk of harm because they are alone and disconnected from routine services. This places them at greater risk of violence, overdose, and loss of connection to medical services.

- c) Encampments give people sense of community. The benefits of this include increased mental health stabilization, increased chances of being helped during an overdose, and emotional support.
- d) Encampments minimize sleep deprivation. Many unhoused people with nowhere to sleep need to stay up all night due to fear of violence and theft if they sleep alone in the open.
- e) Encampments provide physical and mental rest. It is both physically and mentally exhausting to have to constantly move and search for new places to shelter. Being able to remain in one place gives people a chance to rest and focus on recovery.

[56] Dr. Sereda also opines with respect to the advantages of living in an encampment over a shelter. She explains those advantages as follows:

- a) In encampments, couples or “survival partners” can remain together. Almost always, there is insufficient shelter options for couples.
- b) Shelter stays are inherently unpredictable and precarious. Many people can find themselves abruptly evicted in any weather condition.
- c) Shelter spaces are often abstinence-based with policies that refuse to adopt a harm reduction approach to provide increased safety and support for people who are experiencing homelessness and using substances.
- d) Encampments provide relief from the physical burden of leaving and entering shelters every day. Additionally, when people must leave the shelter each day, they are left with nowhere to rest or decompress until they return at night.
- e) Shelters can be re-traumatizing for people with a history of trauma or abuse. People with this history may be triggered by a congregate setting of strangers.

### **The Region's Efforts to Expand Resources for its Homeless**

[57] Dr. Sereda is of the opinion that the new initiatives of the Region to address the homelessness problem are both good and helpful. I share Dr. Sereda's opinion.

[58] The Region has increased the number of beds in its Emergency Shelter Program with new spaces planned for the near future. It has expanded its Home-Based Support Program with additional funding of \$1.3 million to assist 50 more people experiencing chronic homelessness find and keep a home in the private rental market. Thirdly, the Region doubled its funding to its Street Outreach Services Program to assist people experiencing homelessness connect to services and it has extended the interim housing program at an annual cost of \$2.8 million to fund the lease of space at 139 University Avenue in Waterloo. The Region has also accelerated the development of affordable housing tenfold with 837 new affordable homes in development and a total of 153 homes already occupied this year.

[59] The Region is funding the operating costs of the House of Friendship's new shelter in Waterloo. Once operational later this year, this program will have capacity for up to 100 people. The Region is also funding The Working Centre emergency shelter that opened in October 2022. Additionally, the Region is funding a 60-bed emergency shelter in downtown Kitchener.

[60] Finally, the Region is seeking service providers to implement the various interim housing programs approved by Regional Council at its August 18, 2022 meeting. The Region is looking to find service providers and locations for the proposed interim housing programs. In particular, the Region's intention is to have one or more hybrid outdoor managed shelter properties, managed by a third party, up and running for the Region's homeless sometime in winter 2023.

[61] All of the Region's efforts are both proactive and laudable.

### **The Region's Current Emergency Shelter Capacity**

[62] The Region currently operates an emergency shelter program (the 'Emergency Shelter Program') which includes six third-party service providers. Individuals experiencing homelessness can access the Emergency Shelter Program through a Region-funded call centre

that operates 24 hours a day. The Emergency Shelter Program not only includes congregate living settings but also access to motel rooms throughout the Region.

[63] It is the Region's position that, since January 2022, there has been a week over week surplus capacity in its shelter system. An emergency shelter occupancy report compiled by the Region for the period of July 1, 2022, to November 3, 2022, shows an increase in total bed capacity from 371 as at July 1, 2022, to 416 as at November 3, 2022, as well as an increase in average weekly capacity of daily unoccupied beds ranging from a low of 45 beds to a high of 85 beds as recently as November 3, 2022. While these numbers include 20 motel beds located at the Cambridge Shelter Overflow, they do not include the motel rooms available through the YWCA Kitchener which accommodate 23 families and The Working Centre motel spaces to support approximately 58 individuals. In short, the Region argues that there is more than sufficient capacity to accommodate the approximately 50 Encampment residents were the Encampment to be cleared.

[64] The Region has offered emergency shelter accommodation to 7 of the 16 Named Respondents, all of whom have refused the Region's offer. Nonetheless the Region is committed to reserving spots for the Encampment residents at its emergency shelter locations.

[65] Apart from Ms. Salerno's admission on cross-examination that the Region does not have sufficient emergency shelter capacity to accommodate its best estimate of the approximate 1,100 homeless individuals living within its boundaries, the Named Respondents assert that the Region's available bed capacity as of November 3, 2022, is, in reality, only 30 beds. The Named Respondents base their position on a number of observations including the following:

- a) The Region asserts that The Working Centre University Avenue facility has a total bed capacity of 80 with 13 beds available in early November 2022. However, Ms. Salerno admitted on cross-examination that, of these 13 beds, an unknown number are in fact not accessible because of necessary repairs to be undertaken in the units. Ms. Salerno also agreed on cross-examination that, because the facility provides interim housing,

that there is not a lot of turnovers, and therefore, it is unlikely that someone could secure a bed through the call centre.

- b) Like The Working Centre, House of Friendship is also an interim housing facility. Therefore, although it may have a 26-bed capacity, its inclusion in the Region's emergency shelter system makes little sense when the bed turnover is minimal.
- c) The Kinsmen COVID-19 Isolation Facility is a congregate living space for those isolating due to COVID-19 symptoms. Although this facility has a total bed capacity of 24 beds, they are not available to the Encampment Residents unless they are suffering from COVID-19. On her cross-examination, Ms. Salerno agreed that these beds should not be included in the Region's emergency shelter capacity numbers.
- d) Ms. Salerno also conceded on cross-examination that there are issues with the accuracy of the Cambridge Shelter's ('Bridges') recorded daily capacity. The stipulated availability may not be accurate because Bridges is more of a permanent shelter where a bed is saved nightly for a person staying there. If that person is not present at curfew, the bed is held. Should the individual not return, the bed is counted as an 'empty space' although it cannot be accessed by anyone else on that particular night.
- e) The YWCA Shelter with an available capacity for 5 beds as at November 3, 2022 accepts only women and gender diverse individuals so like the Kinsmen Facility, these beds are available to only a select number of the Encampment residents.
- f) Ms. Salerno admitted on cross-examination that The Working Centre Shelter ('Schwaben Club') was, week after week, at or above capacity between July and September 2022. Throughout October this location had a 'phased approach' to reaching its current total capacity of 70 beds and the shelter currently has a waitlist every night of 10 or more people.

- g) Finally, the two oneROOF Shelters and the Safe Haven Shelter are exclusively youth facilities. The oneROOF Shelters serve individuals aged 16 to 25 while the Safe Haven Shelter exclusively serves individuals 12 to 18 years of age. It is therefore the position of the Named Respondents that these facilities, with the very limited cumulative availability of only 5 spaces as of November 3, 2022, are of little to no consequence to the Encampment residents.
- h) Respecting the motel rooms available through the YWCA, the Named Respondents argue that because these are for families that include children, none of the Encampment residents would have access to the rooms. In cross-examination, Ms. Salerno admitted that, although The Working Centre has access to some 45 motel rooms, the rooms are predominantly for those with acute or severe medical needs. Otherwise, the rooms are available at the motel operator's discretion and throughout 2022 these rooms were at capacity.

[66] While I cannot be certain that the Region's current average daily emergency shelter bed capacity is indeed 30, as the Named Respondents urge me to find, it is less than the 85 beds submitted by the Region, and in all the circumstances likely less than the 53 individuals living at the Encampment at last count.

**Are the Shelter Beds Accessible?**

[67] It is the Named Respondents' position, however, that an analysis of the available beds in the Region's shelter system does not end there. They submit in order for a bed to be considered available, it must be truly accessible to the Region's homeless given their specific circumstances. In light of the current research and the evidence of certain of the Encampment residents, the Named Respondents assert that few of the available beds are truly accessible.

[68] Dr. Kaitlin Schwan is the national director of the Women's National Housing and Homelessness Network and a senior researcher at the Canadian Observatory on Homelessness. She is also an assistant professor at the University of Toronto Faculty of Social Work and a

former senior researcher for the UN Special Rapporteur on the Right to Affordable Housing. In her evidence, Dr. Schwan refers to and endorses the project Willow Report (the ‘Willow Report’). It is a study of gender-based violence among women experiencing homelessness in the Region, published in June 2022. The study surveyed 48 and interviewed 13 women and gender-diverse individuals in the Region in 2020. The pertinent findings of the Willow Report include:

- a) 73% of the respondents stated they felt unsafe in co-ed shelters, and as a result, they avoided them;
- b) for some participants, the women’s emergency shelter system also felt unsafe; and
- c) 64% of the respondents said they avoided spaces they perceived to be male dominated because of safety concerns.

[69] The Pan-Canadian Women’s Housing and Homelessness Survey is the largest national gender-specific survey on housing needs and homelessness in Canada to date. It was completed by 500 women and gender-diverse people, authored by Dr. Schwan and published in September 2021 (the ‘Survey’). The Survey found that those participants that used substances reported being banned from shelters at a rate 3 times higher than those who did not.

[70] Based on Dr. Sereda’s findings, 95% of encampment residents are substance dependent. This estimation is supported by the evidence of 10 of the 11 Named Respondents who have testified that they have current or past substance use issues. It is also Dr. Sereda’s evidence that shelters have inconsistent practices around substance use. The inconsistency in shelter practice regarding substance use creates uncertainty for the homeless population. In a 2020 survey conducted by the Waterloo Region Crime Prevention Council, titled “Focus on Safe Supply”, 91% of the participants who regularly consume drugs and lack stable housing stated permitting substance use on-site in shelters is essential.

[71] The Named Respondents also submit that the existing emergency shelter system is unable to accommodate the needs of the Region’s homeless and is truly not low barrier because they live with survival partners, suffer from mental health or physical disabilities, are subject to

service restrictions at the shelters, or a combination of all of the above. These reasons align with the experience of the Named Residents. In particular,

- a) Jennifer Draper and Albert Tugwood attested to insufficient options for couples;
- b) Andrew Mandic, Sean Simpell, and Michael Wosik explained the physical burden and toll of having to leave and re-enter the shelter system every day with one's belongings;
- c) Jordan Aylott, Kathryn Bulgin, and Liam Flanagan attested to the weight of uncertainty of the availability of shelter space on any given night;
- d) Mark Duke, Liam Flanagan, and Andrew Zekai gave evidence respecting their conflicts with staff and other homeless individuals for a variety of reasons, including the shelter's inability to provide required services; and
- e) Sean Simpell, Albert Tugwood, and Andrew Zekai each attested to issues with substance use – either wanting to use substances in the face of abstinence rules and stigma or wanting to abstain from drug use but being surrounded by users.

[72] Having considered all of these accessibility factors, I find that, separately and cumulatively, they have the net effect of reducing the number of beds that would otherwise be available in the Region.

### **Does the *Charter* Apply?**

[73] The goal of *Charter* interpretation is to secure for all people “the full benefit of the *Charter*'s protection.” The *Charter* is remedial in purpose and *Charter* rights must be interpreted purposively, generously, contextually and in a large and liberal manner: see *Quebec (Attorney General) v. 9147-0732 Quebec Inc.*, 2020 SCC 32, at para. 7.

[74] Section 32(1) of the *Charter* provides as follows:



32(1) This *Charter* applies

- a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
- b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

[75] The Supreme Court of Canada's decision in *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, at paras. 50-51 [*Godbout*], clearly establishes that the *Charter* applies to municipalities and municipal by-laws.

[76] The Region argues, however, that the *Charter* does not apply in this instance because this case is about the allocation of resources. I disagree. I agree with the Named Respondents' submission that the matter before me calls into question the constitutionality of a prohibition contained in a by-law, the determination of which falls within the role and responsibility of the Courts: see *Victoria (City) v. Adams*, 2008, BCSC, 1363, 88 B.C.L.R (4<sup>th</sup>) 116, at para 123 [*Adams BCSC*].

[77] The Region also submits that the *Charter* has no application to this case because the Named Respondents are looking to protect property rights, none of which are *Charter* protected. Again, I disagree. The Named Respondents are not claiming a right to the Property. To my mind, a preference to stay at the Encampment because it allows the residents easy access to a variety of services they regularly use (like St. John's Kitchen) and/or because they prefer the Encampment over the Region's shelters for a variety of accessibility reasons does not equate to a claim to a right to the Property. Further, as Justice Ross stated in *Adams BCSC*, at para 131:

Public properties are held for the benefit of the public, which includes the homeless. The government cannot prohibit certain activities on public property based on its ownership of the property if doing so involves a deprivation of the fundamental human right not to be deprived of the ability to protect one's own bodily integrity: see *Committee for the Commonwealth*

*of Canada v Canada*, [1991] 1 S.C.R. 139; Jeremy Waldron, “Homelessness and Community” (2000) 50 U.T.L.J. 371.

### **Section 7 of the *Charter***

[78] Section 7 of the *Charter* provides:

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.

[79] The onus is on the rights claimant under section 7 of the *Charter* to establish on a balance of probabilities that the impugned legislation deprives him or her of either life, liberty, of security of the person, and that the deprivation is not in accordance with the principles of fundamental justice. Should the claimant be successful in this respect, then the burden shifts to the respondent, under section 1 of the *Charter*, to justify the deprivation as a “reasonable” limit that is “demonstrably justified in a free and democratic society: see *R. v. Michaud*, 2015 ONCA 585, 127 O.R. (3d) 81, at para. 60. The same principles apply in regard to section 15(1) of the *Charter*: see *Abbotsford (City) v. Shantz*, 2015 BCSC 1909, at para.226 [*Shantz*].

[80] I add one qualification to the above section 7 analysis described by the Ontario Court of Appeal in *R. v. Michaud*, based on the statement of Chief Justice McLachlin in *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350, who explained, at para.12, that the first of the two steps to be established by the moving party are meant to examine whether “there has been or could be a deprivation of the right to life, liberty or security of the person.”

### **Section 7 and the History of the “Right to Shelter” Cases**

[81] As homelessness continues to be a growing and problematic issue across Canada, the section 7 jurisprudence has continued to develop. In *Bamberger v. Vancouver (Board of Parks and Recreation)*, 2022 BCSC 49 [*Bamberger*], Justice Kirchner summarized the development of the British Columbia caselaw regarding the ‘right to shelter’ at paragraphs 11-20:

[11] In *Adams BCSC*, Madam Justice Ross found a Victoria bylaw prohibiting homeless persons from erecting temporary shelters in Victoria parks infringed their right to life, liberty, and security of the person, as guaranteed by s. 7 of the *Charter*. She found the number of homeless persons in Victoria far outnumbered the available shelter beds such that many of Victoria's homeless were forced to sleep outside. Despite this, the city's bylaw prohibited anyone from erecting temporary shelters, including tents, tarps, or even cardboard boxes, in public parks, leaving them exposed to serious and life-threatening conditions and depriving them of their dignity, independence, and ability to protect themselves.

[12] After a refinement of Ross J.'s order by the Court of Appeal, it was declared that the offending sections of Victoria's *Park Regulation Bylaw* were "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": *Adams BCCA* at para. 166.

[13] The constitutional right as articulated in *Adams* was thus circumscribed in two respects: (1) the right is exercisable when the number of homeless outnumbered the available indoor sheltering spaces, and (2) the right to erect a temporary shelter is confined to overnight hours.

[14] Since *Adams*, many municipal bylaws and government actions that seek to limit or restrict the ability of persons experiencing homelessness to erect and maintain shelters have come under challenge in this court, including in: *Vancouver Board of Parks and Recreation v. Williams*, 2014 BCSC 1926 [*Williams*]; *Abbotsford (City) v. Shantz*, 2015 BCSC 1909 [*Shantz*]; *British Columbia v. Adamson*, 2016 BCSC 584 [*Adamson No. 1*]; *British Columbia v. Adamson*, 2016 BCSC 1245 [*Adamson No. 2*]; *Nanaimo (City) v. Courtoreille*, 2018 BCSC 1629 [*Courtoreille*]; *Vancouver Fraser Port Authority v. Brett*, 2020 BCSC 876 [*Brett*]; and, most recently, *Prince George (City) v. Stewart*, 2021 BCSC 2089 [*Stewart*].

[15] The basic constitutional right as framed in *Adams* has remained largely unchanged. However, it is now recognized that it is not just the number of available indoor sheltering spaces that frames the right but also whether those spaces are truly accessible to those sheltering in parks. In *Shantz*, for example, Hinkson C.J.S.C. stated:

[82] Given the personal circumstances of the City's homeless, the shelter spaces that are presently available to others in the City are impractical for many of the City's homeless. They simply

cannot abide by the rules required in many of the facilities that I have discussed above, and lack the means to pay the required rents at others.

[16] More recently, in *Stewart*, Hinkson C.J.S.C. stated:

[74] It is apparent that very few of the emergency shelter beds are low barrier, and it appears that many of the homeless persons in the City are ineligible to stay in at least some of the shelters. While the City contends that the availability of 81 shelter beds in the City is sufficient to house the encampment occupants, I am not satisfied that these shelter spaces are in fact accessible to all of the occupants of the encampments.

[17] The question of sheltering in public parks during daytime hours has also arisen in the cases since *Adams*, but the jurisprudence, thus far, has not extended the s. 7 *Charter* right to include it, at least not expressly. In *Shantz* at para. 276, Hinkson C.J.S.C. found “there is a legitimate need for people to shelter and rest during the day and no indoor shelter in which to do so” but held that a “minimally impairing response to balancing that need with the interests of other users” of the parks would be to allow overnight sheltering between 7:00 p.m. and 9:00 a.m.

[18] However, in *Adamson No. 1* and *Stewart*, Hinkson C.J.S.C. declined to grant injunctions to close specific homeless encampments and made no specific qualification that those sheltering in the parks could only do so during overnight hours. In *Adamson No. 1*, Hinkson C.J.S.C. did not squarely address the issue of daytime sheltering but nor did he tailor a remedy to require the encampment to be removed at sunrise.

[19] In *Stewart*, he addressed the issue more directly, noting at para. 73 that the closure of shelter spaces due to COVID-19 resulted in scores of people having nowhere to shelter “in either the daytime or the nighttime.” He observed that these persons did not remove their tents or vacate the encampment each morning. In declining to grant the injunction, at least in respect of one, he did not consider or grant a more limited injunction that would restrict sheltering to overnight hours. He took judicial notice of the fact that “Prince George can be very cold in the fall and winter, and that people with nowhere warm to stay must find ways of keeping warm to stay alive”: *Stewart* at para. 64.

[20] Thus, while neither *Adamson No. 1* nor *Stewart* purport to expand the scope of the constitutional right to daytime sheltering, it was not specifically enjoined in either case.

[82] The essence of the British Columbia decisions is the establishment of a constitutional right to shelter oneself when the number of homeless persons exceed the number of available and accessible indoor shelter spaces within a given jurisdiction.

[83] While the Region acknowledges the British Columbia jurisprudence, it submits that these decisions have been distinguished by Ontario decisions on the basis of an *obiter* comment of the British Columbia Court of Appeal in *Victoria (City) v. Adams*, 2009 BCCA 563, 100 B.C.L.R. (4<sup>th</sup>) 28, [*Adams BCCA*] and the Region urges me to follow these Ontario rulings.

[84] The British Court of Appeal stated, at para. 109:

We agree with the trial judge that prohibiting the homeless from taking simple measures to protect themselves through the creation or utilization of rudimentary forms of overhead protection, in circumstances where there is no practicable shelter alternative, is a significant interference with their dignity and independence. The choice to shelter oneself in this context is properly included in the right to liberty under s. 7.

[85] However, the Court then goes on to comment in *obiter* as follows at para. 162:

If there were adequate shelter beds or appropriate designated areas outside of parks to accommodate the homeless, the Bylaw provisions that we are concerned with might well be valid.

[86] In the recent Ontario decisions of *Black v. Toronto (City)*, 2020 ONSC 6398, 152 O.R. (3d) 529 [*Black*] and *Poff v. City of Hamilton*, 2021 ONSC 7224 [*Poff*] homeless individuals sought an injunction to prevent the municipality from evicting them from city parks. In both instances, the Ontario Courts considered the British Columbia decisions and distinguished them on the basis of a factual finding that there were adequate shelter spaces to accommodate all of the cities' homeless.

[87] In *Black*, Justice Schabas found, at para. 149, that the city of Toronto had addressed the applicants' fears of COVID-19 in the shelter system "such that there are adequate safe alternatives to sleeping in encampments."

[88] Likewise, in *Poff*, Justice Goodman, at para. 235, differentiated the facts in *Adams* and *Shantz* from those before him on the basis that in the British Columbia cases the Court found "there was insufficient shelter space in the city to house all the city's homeless people." This, according to Justice Goodman, at para. 236, "is not the situation in Hamilton."

[89] Given these factual findings, and in following the suggested path of the British Columbia Court of Appeal in *Adams*, the Ontario Courts ruled that there was no breach of section 7.

[90] In the alternative, to urge my following the *Black* and *Poff* decisions, the Region submits that provided I find that there is adequate capacity in the shelter system to accommodate the residents of the Encampment, I should nonetheless find that the By-Law does not violate the section 7 rights of the Encampment residents.

[91] Apart from the position that there are not sufficient available spaces in the Region to shelter its homeless population, the Named Respondents and *Amicus Curiae* submit that it is not simply the number of available shelter spaces that frames the section 7 rights but also whether those spaces are truly accessible to the homeless. They also argue that the Ontario decisions mentioned above are distinguishable from the case before me on the basis that the two encampments, each in the cities of Toronto and Hamilton, were located in municipal parks and not in a vacant lot. Whereas the Ontario Courts found that there was significant public interest in ensuring that everyone had access to the parks, there is no such public interest in the Property.

[92] Based on the record before me, I find that despite the Region's past and current impressive efforts to accommodate its homeless population, there are not sufficient shelter spaces. I find that the number of homeless persons in the Region far outnumber the available shelter beds such that many of the Region's homeless have no alternative but to sleep outside. The most reliable evidence is that the Region has a homeless population of approximately 1,100 individuals. Excluding the motel spaces (because their availability is at the discretion of the motel operators and in many cases the rooms are available only to those with acute or severe

medical needs or families), the most current information is that the Region has a maximum capacity of 416 shelter spaces. Even with the inclusion of the rooms at the YWCA and Working Centre (the Cambridge Shelter Overflow beds having already been included in the 416 available shelter spaces) the Region has a current capacity to shelter approximately 553 individuals (calculated on the assumption that each of the 23 families to be housed through the YWCA motel booking have 4 members). The available shelter spaces, unfortunately, fall short by some 50% of what is required. This result, in my opinion, does not equate to “adequate safe alternatives to sleeping in encampments” in the words of Justice Schabas.

[93] Furthermore, I accept 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 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. (6<sup>th</sup>) 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.

[94] Finally, I reject the Region’s submission that, at the end of the day, in order to grant the relief it seeks, I need only be satisfied that there is sufficient capacity in the system to accommodate the Encampment residents. I reject this proposition because of the fluctuating and variable capacity of the system based on the Region’s own numbers. Furthermore, were I to be guided by this principle, and satisfied that there is a sufficient bed capacity for the Encampment residents on any given day, how does this approach respond to the many other vulnerable homeless individuals in the Region? It does not. The approach is particularly problematic in my view because the Region intends to be guided by this decision in its treatment of other encampments. Were I to accede to the Region’s submission, it seems to me I would be helping to create an immediate disadvantage for those who are homeless and living outside encampments. I

am not prepared to do that. Finally, even if I were to accept the Region's suggested approach, I am not satisfied that the Region has adequate capacity to shelter the approximately 50 Encampment residents given that its shelters are not low barrier or truly accessible.

**Does the By-Law Deprive the Encampment Residents of One of the Protected Section 7 Rights?**

*(a) Life*

[95] The Supreme Court of Canada established in *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331 [*Carter*], that the right to life is engaged in a narrow set of circumstances. It observed, at para. 62, that:

This Court has most recently invoked the right to life in *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791, where evidence showed that the lack of timely health care could result in death (paras. 38 and 50, per Deschamps J.; para. 123, per McLachlin C.J. and Major J.; and paras. 191 and 200, per Binnie and LeBel JJ.), and in *PHS*, where the clients of Insite were deprived of potentially lifesaving medical care (para. 91). In each case, the right was only engaged by the threat of death. In short, the case law suggests that the right to life is engaged where the law or state action imposes death or an increased risk of death on a person, either directly or indirectly.

[96] Just as the British Columbia cases have found, and as Justice Schabas acknowledged in *Black*, so too do I conclude that the ability to provide adequate shelter for oneself is a necessity of life that falls within the right to life protected by section 7 of the *Charter*. Like Justice Ross in *Adams BCSC*, I have reached this conclusion because the very clear and uncontroverted evidence before me is that exposure to the elements without adequate shelter can result in serious harm, inducing death. The risk of harm is substantially increased during the late fall and winter months in the Region. Just as Chief Justice Hinkson was prepared to take judicial notice in *Stewart* that Prince George can be very cold in the fall and winter (at para. 64), so too am I prepared to take judicial notice of this reality facing the Region's homeless.



[97] Because the By-Law prohibits the erection of shelter protection that is necessary to protect homeless individuals from risk of serious harm, and there is currently inadequate shelter beds in the Region, I conclude that it violates the *Charter* protected right to life.

(b) *Liberty*

[98] The concept of liberty as protected by section 7 of the *Charter* was defined by Justice Wilson in *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at pages 164-166, in this way:

The *Charter* and the right to individual liberty guaranteed under it are inextricably tied to the concept of human dignity. Professor Neil MacCormick, Regius Professor of Public Law and the Law of Nature and Nations, University of Edinburgh, in his work entitled *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (1982), speaks of liberty as "a condition of human self-respect and of that contentment which resides in the ability to pursue one's own conception of a full and rewarding life" (p. 39). He says at p. 41:

To be able to decide what to do and how to do it, to carry out one's own decisions and accept their consequences, seems to me essential to one's self-respect as a human being, and essential to the possibility of that contentment. Such self-respect and contentment are in my judgment fundamental goods for human beings, the worth of life itself being on condition of having or striving for them. If a person were deliberately denied the opportunity of self-respect and that contentment, he would suffer deprivation of his essential humanity.

...

The idea of human dignity finds expression in almost every right and freedom guaranteed in the *Charter*. Individuals are afforded the right to choose their own religion and their own philosophy of life, the right to choose with whom they will associate and how they will express themselves, the right to choose where they will live and what occupation they will pursue. These are all examples of the basic theory underlying the *Charter*, namely that the state will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life.

Thus, an aspect of the respect for human dignity on which the *Charter* is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty. Liberty, as was noted in *Singh*, is a phrase capable of a broad range of meaning. In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance.

[99] In finding that a prohibition against the possession of marijuana for the treatment of epilepsy violated section 7 of the *Charter*, Justice Rosenberg for the Ontario Court of Appeal in *R. v. Parker*, (2000) 49 O.R. (3d) 481, discusses the liberty interest, at paras. 92, 102-103, in this way:

[92] Accordingly, I believe that I am justified in considering Parker's liberty interest in at least two ways. First, the threat of criminal prosecution and possible imprisonment itself amounts to a risk of deprivation of liberty and therefore must accord with the principles of fundamental justice. Second, as this case arises in the criminal law context (in that the state seeks to limit a person's choice of treatment through threat of criminal prosecution), liberty includes the right to make decisions of fundamental personal importance. Deprivation of this right must also accord with the principles of fundamental justice. I have little difficulty in concluding that the choice of medication to alleviate the effects of an illness with life-threatening consequences is such a decision. Below, I will discuss the principles of fundamental justice that would justify state interference with that choice.

...

[102] In my view, Parker has also established that the marijuana prohibition infringed the second aspect of liberty that I have identified -- the right to make decisions that are of fundamental personal importance. As I have stated, the choice of medication to alleviate the effects of an illness with life-threatening consequences is a decision of fundamental personal importance. In my view, it ranks with the right to choose whether to take mind-altering psychotropic drugs for treatment of mental illness, a right that Robins J.A. ranked as "fundamental and deserving of the highest order of protection" in *Fleming v. Reid* (1991), 1991 CanLII 2728 (ON CA), 4 O.R. (3d) 74 at p. 88, 82 D.L.R. (4th) 298 (C.A.).

[103] To intrude into that decision-making process through the threat of criminal prosecution is a serious deprivation of liberty.

[100] Finally, in *R. v. Heywood*, [1994] 3 S.C.R. 761 [*Heywood*], the Supreme Court of Canada held that a person's section 7 liberty interest is engaged when there are statutory duties not to loiter in or near areas such as school grounds, public parks, and bathing areas.

[101] I have found as a fact that there are not enough accessible shelter beds for the Region's homeless population. If evicted from the Encampment, the residents will likely be forced to live in the rough or set up camp somewhere else because there is an insufficient supply of low-barrier accessible beds in the Region. In these circumstances, creating shelter to protect oneself is, in my opinion, a matter critical to any individual's dignity and independence. The Region's attempt to prevent the homeless population from sheltering itself interferes with that population's choice to protect itself from the elements and is a deprivation of liberty within the scope of section 7.

(c) Security of the Person

[102] Security of the person includes the protection of both physical and psychological integrity. In *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, 1 S.C.R. 791, at paras. 123-124, Chief Justice McLachlin and Justice Major stated as follows:

123 Not every difficulty rises to the level of adverse impact on security of the person under s. 7. The impact, whether psychological or physical, must be serious. However, because patients may be denied timely health care for a condition that is clinically significant to their current and future health, s. 7 protection of security of the person is engaged. Access to a waiting list is not access to health care. As we noted above, there is unchallenged evidence that in some serious cases, patients die as a result of waiting lists for public health care. Where lack of timely health care can result in death, s. 7 protection of life itself is engaged. The evidence here demonstrates that the prohibition on health insurance results in physical and psychological suffering that meets this threshold requirement of seriousness.

124 We conclude, based on the evidence, that prohibiting health insurance that would permit ordinary Canadians to access health care, in circumstances where the government is failing to deliver health care in a reasonable manner, thereby increasing the risk of complications and death, interferes with life and security of the person as protected by s. 7 of the *Charter*.

[103] In *R. v. Parker*, the Court noted at paras. 94 and 97:

[94] In *R. v. Monney*, 1999 CanLII 678 (SCC), [1999] 1 S.C.R. 652 at p. 685, 133 C.C.C. (3d) 129 at p. 156, Iacobucci J. held, relying upon *Singh v. Canada (Minister of Employment and Immigration)*, 1985 CanLII 65 (SCC), [1985] 1 S.C.R. 177, 17 D.L.R. (4th) 422, that "state action which has the likely effect of impairing a person's health engages the fundamental right under s. 7 to security of the person".

...

[97] ... I conclude that deprivation by means of a criminal sanction ... of access to medication reasonably required for the treatment of a medical condition that threatens life or health constitutes a deprivation of security of the person. Such a deprivation fits easily within any of the above statements.

[104] In the case before me, the Region does not have adequate accessible shelter spaces for its homeless population of some 1100 individuals. The Region has made it clear that any order in its favour on this application will be used as a precedent to evict other encampments in the Region. As I have previously stated, an order in the Region's favour would therefore force the Encampment residents to choose between living outside in the rough or risk setting up an encampment elsewhere only to be evicted once again. At the end of the day, the By-Law's prohibition to the erection of temporary shelter exposes the homeless of the Region to risk of significant health problems, both physical and psychological in nature. The evidence before me is clear in that respect. Just as in *R v. Parker*, the state's action has deprived the homeless of access to shelter required for adequate protection. I therefore find that the Region's By-Law amounts to a deprivation of the security of the person.

[105] Whereas I find that in the circumstances of the Encampment residents, the constitutional right to shelter is invoked where the number of homeless individuals exceed the number of available and truly accessible indoor sheltering spaces, I also find that the Encampment residents' right to shelter is not limited to the overnight hours. I have reached this conclusion for two reasons. Like Chief Justice Hinkson found in *Shantz*, at para. 276, I find on the evidence that "there is a legitimate need for people to rest and shelter during the day" but, unlike the British Columbia's Supreme Court's Chief Justice, I find that there is no need in the case of the Encampment to balance their needs with the rights of the Region's other residents. Unlike in

*Adams* and *Shantz*, the Property is not a park or other space designed with the purpose of being enjoyed by the public at large. Instead, the Property is a vacant lot to be used by the Region as a temporary parking lot and lay down construction area at some undefined future date. Therefore, based on these facts, there is no need to consider how the impact of the Encampment residents sheltering overnight may impair the interests and rights of other residents of the Region.

[106] Finally, I have considered the Region's submission that personal "choice" negates any claim to a breach of the section 7 protected rights. While some of the Encampment residents have chosen to live in the Encampment because they feel relatively safe and have a sense of community there rather than attempting to access a shelter that may not meet their needs, personal "choice", in my opinion, does not negate a claim that one's section 7 *Charter* rights have been breached. In my view, the overriding context in the matter before me is not one of freedom in the exercise of autonomous choice. As the Named Respondents submit, it is a context characterized by poverty, drug addiction, disability, and insufficient shelter alternatives.

[107] The question is not whether the Encampment residents' circumstances are self-made, but rather, whether enforcement of the By-Law will make the residents' already dire predicament worse.

***Is the Deprivation in Accordance with the Principles of Fundamental Justice?***

[108] Having found the By-Law constitutes a deprivation of the Unnamed Respondents' rights protected by section 7 of the *Charter*, the next issue is to determine whether this infringement is in accordance with the principles of fundamental justice.

***(a) Overbreadth***

[109] The Supreme Court of Canada makes clear in *Godbout* that the principles of fundamental justice require that any restriction on life, liberty, and security of the person must not be more broadly framed than necessary to achieve the legislative purpose. In *Shantz*, Chief Justice Hinkson articulated the principle at para. 200:

The overbreadth inquiry asks whether a law that takes away rights in a way that generally supports the object of the law, goes too far by denying the rights of some individuals in a way that bears no relation to the object.

[110] In *Heywood*, Justice Cory, for the majority, described the principle of overbreadth, at pp. 792-793, in this way:

Overbreadth analysis looks at the means chosen by the state in relation to its purpose. A court must consider whether those means are necessary to achieve the state objective. If the state, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.

[111] In essence, whether a law is overbroad within the meaning of section 7 turns on the relationship between the law's purpose and its effect: see *R. v. Moriarity*, 2015 SCC 55, [2015] 3 S.C.R.485, at para. 24; *R. v. Safarzadeh-Markhali*, 2016 SCC 14, [2016] 1 S.C.R. 180, at para. 24. In *Adams BCSC*, Justice Ross applied the test for overbreadth from *Heywood* with approval of the British Columbia Court of Appeal.

[112] The Named Respondents and *Amicus Curiae* submit that the By-Law is overbroad to the extent that it denies the Region's homeless the right to shelter on lands owned or operated by the Region. The preamble to the By-Law, in their submission, makes its purpose clear: to regulate the conduct of persons on buildings, grounds, and public transportation vehicles (collectively, the "designated premises") owned or operated by the Region to prevent physical damage to the Designated Premises, prevent disruption of the Region's operations, and to prevent the disruption of the use and enjoyment of the Designated Premises by other people. I accept that this statement accurately describes the By-Law's purpose.

[113] The Named Respondents and *Amicus Curiae* argue that a much narrower prohibition would have been just as effective in achieving the By-Law's purpose. They argue the Region recognized this reality with the adoption of the Encampment Policy that is intended to guide

Regional staff with respect to the enforcement of the By-Law as it effects the homeless. They argue that because the By-Law prohibits any form of shelter regardless of the circumstances, it goes too far by sweeping conduct into its ambit that bears no relation to its objective.

[114] I agree with the position of the responding parties. If the Region's purpose is to prevent physical damage to the physical premises, prevent disruption to regional operations, and prevent the disruption of the use and enjoyment of the Designated Premises by others, the Region could have accomplished this goal without punishing everyone who erects a shelter when there is no accessible shelter alternative. The homeless population of the Region needs to be able to create some shelter. If there were sufficient, truly accessible shelter beds in the Region, and the homeless chose not to use them, the situation would be quite different, but that is not the case here. I have also concluded that the rights of the homeless population have been limited for no valid reason by means which are broader than are necessary to accomplish the stated objective because, based on the record before me, I am not convinced that the Encampment has caused damage of any significance to the Property's physical premises, disrupted the Region's operations, or disrupted its use by "other persons" including the Region which has no immediate need for the Property.

*(b) Gross Disproportionality*

[115] Gross disproportionality is another principle of fundamental justice. This principle is infringed when the impact of the restriction on the individual's life, liberty, or security of person is grossly disproportionate to any legitimate government interest: see *Shantz*, at para. 204. The focus is not on the impact of the law on society or the public or its effectiveness, which are matters for the section 1 analysis, but on its impact on the rights of the claimants: see *Carter*, at para. 89. The inquiry into gross disproportionality compares the law's objective with its negative effect on the rights of the claimant and "asks if this impact is completely out of sync with the object of the law": *Carter*, at para. 89.

[116] Gross disproportionality is not concerned with the number of people who experience grossly disproportionate effects but rather a grossly disproportionate effect on just one person is

sufficient to violate the norm: see *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 122 [*Bedford*].

[117] The responding parties argue that enforcement of the By-law to evict the Encampment residents would have multiple and severe negative consequences on them. Those negative consequences include lack of stability, difficulty accessing services, increased health problems, and risk of death. In addition to these harmful effects, *Amicus Curiae* submits, and I accept, the consequences are more severe for those Encampment residents who suffer from mental illness or substance abuse to the extent that they lack capacity to understand the legal consequences of the By-law's enforcement.

[118] On the other hand, the evidence points to the conclusion that there are many benefits to encampment living. Both the Named Respondents and Dr. Sereda have attested to these benefits which include a safe place to rest, access to social services and healthcare, a sense of community (which correlates with mental health stabilization and emotional support), and privacy.

[119] Given that the accepted purpose of the By-Law is to prevent physical damage to the Designated Premises and disruption to the Region's operations as well as the use and enjoyment of the Designated Premises by others, I find that the proposed eviction of the Encampment residents is grossly disproportionate to the By-Law's goal. In short, the impact of the enforcement of the By-Law is "completely out of sync with the object of the law."

### **Section 15(1) of the *Charter***

[120] Section 15(1) of the *Charter* states:

15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[121] To prove a *prima facie* violation of section 15(1), the onus is on the claimant to establish that:



- a) the impugned law, on its face or in its impact creates a distinction based on enumerated or analogous grounds; and
- b) the impugned law imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating the disadvantage of the group: see *Fraser v. Canada (Attorney General)*, 2020 SCC 28, 450 D.L.R. (4<sup>th</sup>) 1, at paras. 72-75 [*Fraser*]).

[122] It is unnecessary for the moving party to prove that the discrimination affects all members of a protected group in the same manner. Policies or laws that do not affect all members of a protected group may still be discriminatory: *Fraser*, at paras. 72-75. What must be determined is whether the distinction raised by the moving party relates to personal characteristics of the individual or group which has the effect of imposing burdens, obligations, or disadvantages of such an individual or group that is not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society: *Fraser* at para. 70.

[123] The Named Respondents argue that while the By-law may be facially neutral, in practice, it places homeless women and gender-diverse people, many of whom have intersecting grounds of race and disability, at a heightened risk of gender-based violence, harassment, and abuse when they are displaced. The Named Respondents submit that the effect of the By-Law is to displace women and gender-diverse people from the Encampment and hinder their ability to be safe. The Named Respondents argue that women and gender diverse people who are experiencing homelessness have been historically disadvantaged and the impugned provisions serve to exacerbate and perpetuate that disadvantage.

[124] For its part, *Amicus Curiae* submits that the By-Law creates disproportionately negative impacts on Encampment Residents who suffer from mental illness and addictions. The greater disproportionate effects include psychological stress, exacerbation of existing mental illness, and the risks of starvation and fatal overdose. Furthermore, homeless persons with mental illness will be less able to find and maintain alternative safe shelter arrangements. *Amicus Curiae* submits that the By-Law has the effect of perpetuating this disadvantage.

[125] Although I agree with Justice Abella's statement in *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61, at para. 354, that heterogeneity within the claimant group does not defeat a claim of discrimination, I agree with the Region's position that "homelessness" is not an analogous ground pursuant to section 15(1). The Region relies in part on the decision of Justice Lederer in *Tanudjaja v. Attorney General (Canada)*, 2013 ONSC 5410, 116 O.R. (3d) 574. His Honour rejected the argument that "homelessness" is an analogous ground on the following basis at paras. 129-130, 134 and 136 of that decision:

[129] The reliance of the applicants on *Falkiner* misses a fundamental point. In *Falkiner*, the analogous ground was the receipt of social assistance. This is not, strictly speaking, immutable. The identity of the people who are eligible to collect these benefits will change as the vagaries of life impact on the individuals involved, for good or ill. The fact remains that, at any moment in time, it is possible to identify those who are collecting social assistance. In the circumstances of this Application, it is not possible to identify who is "homeless". As I have already observed, homelessness is not, for the purposes of this Application, restricted to those without homes. Three of the four individual applicants have homes. It may be that what is being referred to as "the homeless" includes those without "affordable, adequate and accessible" housing. What is adequate housing? Presumably, this depends on the circumstances of the individuals involved. What is adequate for a single mother with two children (the applicant Jennifer Tanudjaja) is different from what would be adequate for a family of six. The difference would be more pronounced if two of the four children in the family of six were disabled and even more pronounced if one of the children required a wheelchair (the applicant Ansar Mahmood). The need of the wheelchair introduces a need for accessibility. It does not seem out of line to suggest that a determination of what is adequate housing may be a matter to be decided on an individual basis.

[130] Being without adequate housing is not a personal characteristic ("race, national or ethnic origin, colour, religion, sex, age or mental or physical disability") or a fact that can be determined on objective criteria ("social assistance recipient", "marital status", "Aboriginality-residence (off-reserve band members)", "employment status", and "citizenship"). There will be a subjective component that arises from the circumstances of the individual and what they and others believe is "adequate" or "accessible". The lack of adequate or accessible housing is not a shared quality, characteristic or trait.

...

[134] Homelessness is not a term that, in the context of this case, can be understood. Without an understanding of the common characteristics which defines the group, it cannot be established as an analogous ground under s. 15(1) of the *Charter*. Poverty or [page 631] economic status, which is seemingly the only common characteristic, is not an analogous ground.

...

[136] Homelessness is not an analogous ground under s. 15(1) of the *Charter*. The application does not propose to protect "discreet and insular minorities". It is an attempt to take "disparate and heterogeneous groups" and treat them as an analogous ground under s. 15(1) of the *Charter*. Such groups do not obtain this protection.

[126] Just as Chief Justice Hinkson in *Shantz* accepted Justice Lederer's conclusion that homelessness is not an analogous ground, so too do I. In reaching this finding, I am particularly persuaded by the reasoning that homelessness is not a personal characteristic, nor is it a fact that can be determined objectively. To my mind, there is inevitably a subjective element in determining what may or may not be accessible housing given an individual's particular circumstances. The evidence and submissions of the responding parties speak to this subjective element. Other than poverty, which is not an analogous ground, in my opinion there are no common characteristics that define those individuals experiencing homelessness in the Region. For that reason, and based on the facts of this case, I conclude that the homeless of the Region are not entitled to the protection of subsection 15(1).

[127] While I acknowledge without hesitation that women, gender-diverse individuals, and those who suffer from mental illness and addictions have been the subject of historic mistreatment, to my mind it does not follow that these groups of individuals, as compared to other groups, have been discriminated against in some way as a result of the By-Law.

### **Section 1 Analysis**

[128] Having found that the responding parties have demonstrated on a balance of probabilities that the By-Law breaches the rights established by section 7 of the *Charter*, the focus now turns to whether the breach can be justified under section 1. The government bears the burden of

proving that a law that breaches section 7 is reasonable and demonstrably justified in a free and democratic society. The section 1 analysis requires (a) a pressing and substantial objective; (b) a rational connection between the impugned law and the government objective; (c) whether the law minimally impairs section 7 rights in pursuing the government objective; and (d) the Court is required to weigh the negative impact of the law on section 7 rights against the beneficial impact of the law in achieving the goal for the greater public good. Impacts are judged both qualitatively and quantitatively: see *Bedford* at para. 126.

[129] It is difficult to justify a section 7 violation. The rights protected are fundamental and not easily overridden by competing social interests. A section 7 breach will rarely be justifiable under section 1 except “in cases arising out of exceptional conditions, such as disasters, the outbreak of war, epidemics and the like.”: see *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46, at para. 99, citing *Reference re Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486 at p.518. A section 7 breach is difficult to justify where the impugned law runs afoul of the principles of fundamental justice.

[130] None of the exceptional circumstance contemplated by the Supreme Court of Canada apply in the matter before me. The By-Law and its supplemental Encampment Policy are not intended to, nor do they, attempt to resolve the complex and intersecting economic, social, and medical issues facing the encampment residents. In light of the reality that there are insufficient shelter beds in the Region, evicting the Encampment residents from vacant public land cannot justify the section 7 breaches.

### **Section 440 of the *Municipal Act***

[131] If I am incorrect in my conclusion that the prohibition in the By-Law against the erection of tents and other temporary structures on the Property constitutes a deprivation of the rights to life, liberty, and security of the Encampment residents protected pursuant to section 7, I next turn my mind to whether the Region is entitled to the requested injunctive relief pursuant to section 440 of the *Municipal Act*.

[132] The legal test for a statutory injunction under section 440 of the *Municipal Act* is narrower than the legal test for an equitable injunction at common law as established in *RJR-*

*MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199. The Region need not ordinarily establish inadequacy of damages or irreparable harm and the balance of convenience favours the granting of the injunctive relief because the Region is presumed to be acting in the best interests of the public and a breach of the law is considered to be irreparable harm to the public interest: see *The Corporation of the City of Windsor v. Persons Unknown*, 2022 ONSC 1168 at paras. 51-56 [*City of Windsor*].

[133] For these reasons, the legal test for a statutory injunction, including an order under section 440 of the *Municipal Act*, requires only that the public authority establish a strong *prima facie* case, on a balance of probabilities, that there is a breach of the applicable statute: *City of Windsor*, at paras. 51-56. Where the applicant has successfully demonstrated that a statute has been breached, a restraining order does not, however, automatically follow; the Court retains discretion in ordering an injunction. Nonetheless, the exercise of the Court's discretion is limited to "exceptional circumstances." The onus lies with the respondent to establish exceptional circumstance: *City of Windsor*, at paras. 51-56.

[134] While there is no definition of what may constitute exceptional circumstances, the jurisprudence does provide some guidance. Justice Harley in *Gobalian v. Poxon*, 2020 ONSC 6750, suggests that an exceptional circumstance would arise where a municipality expressly approved a by-law contravention and then moved to restrain the conduct it authorized. Chief Justice Morawetz in *City of Windsor* summarizes other instances where Courts have exercised their discretion to decline to issue an injunction, at para. 56, including where:

- a) the offending party has ceased the activity and/or has provided clear and unequivocal evidence that the unlawful conduct will cease;
- b) the injunction is moot and would serve no purpose;
- c) there is a right that pre-existed the enactment that was breached;
- d) there is uncertainty regarding whether the offending party is flouting the law; and
- e) the conduct at issue is not the type of conduct that the enactment was intended to prevent.

[135] In my opinion, it is clear that the Encampment residents are in violation of the By-Law. The Region submits that there are no exceptional circumstances which permit me to exercise my residual jurisdiction to refuse the requested injunction. The Named Respondents, however, take the position that the Region's failure to follow the Encampment Policy constitutes an exceptional circumstance.

[136] I have already found that the Encampment Policy does not have the authority of a By-Law but that it does supplement the By-Law. Specifically, the Encampment Policy stipulates instructive principles and processes that are required to be followed by Regional staff prior to the enforcement of the By-Law.

[137] Some of the mandatory guiding principles include:

- a) prioritizing assisting the homeless to access safer, sustainable, and healthier alternatives rather than enforcement of the By-Law;
- b) working with homeless individuals to respond to their individual needs on a case-by-case basis by providing access to services, supports and shelter; and
- c) engaging in ongoing proactive communication with individuals experiencing homelessness along with service providers and other groups.

[138] According to the Encampment Policy, in practical terms these principles require Regional staff to reach out to the homeless to assist and encourage them to find safer and healthier shelter and to enforce the By-Law only after all reasonable outreach and support efforts have been made without success.

[139] The Region's Director of Housing Services, along with the Region's Director of Facilities and Fleet Management, and Director of Strategic and Quality Initiatives divisions, all acknowledged on cross-examination that it was their understanding that the Encampment Policy was to be followed whenever the Region was addressing the issue of its homeless encampments.

[140] The Named Respondents submit that, apart from relying on the poorly researched Risk Assessment that triggered the enforcement of the By-Law on June 6, 2022, with the posting of the Trespass Notice, the Region has failed to live up to the Encampment Policy in a number of ways, including:

- a) the Region's Ontario Works caseworkers began to visit the Encampment residents only on May 25, 2022, 9 days prior to the posting of the Trespass Notice;
- b) on the Region's own admission in the 6 weeks between May 25, 2022, and the eviction date of June 30, 2022, its caseworkers met with only 38 of the then 70 residents living at the Encampment and of the 38 residents, 22 were spoken to on only one occasion; and
- c) most of the support offered by the Region's outreach workers were for shelter spaces despite many of the Encampment residents feeling unsafe in shelters and/or the shelters having restrictions in place preventing them from accessing these shelters.

[141] The Named Respondents submit that if the Region was truly committed to fulfilling its obligations pursuant to the Encampment Policy, it would have provided the Encampment residents with the option of relocating to the encampment otherwise known as the hybrid shelter/outdoor model sanctioned by Regional Council in August 2022.

[142] I do not accept that prior to June 2, 2022, or for that matter June 30, 2022, the Region should have offered the sanctioned encampment option to the residents given that there was not approval for the hybrid shelter/outdoor model until mid-August. I am, however, troubled by the lack of effort the Region made to connect with Encampment residents and the options provided to them prior to both the date of the Trespass Notice and the Eviction Date. Indeed, each of Kathryn Bulgin, Drew Zekai, Albert Tugwood and Lee-Anne Mason stated that they were not contacted by the Region's outreach workers prior to June 30, 2022. Some of these same individuals together with Jennifer Draper and Andrew Mandic also attested that the services offered did not meet their personal needs. It is also disconcerting that none of the 4 well-

intentioned Region sponsored service fairs were held on the Encampment site and there is no evidence of how many, if any, Encampment residents attended the fairs.

[143] In my opinion, and notwithstanding the tremendous and praiseworthy efforts the Region has made and is continuing to make to address the plague of homelessness, it has fallen short of the principles and policies stipulated in the Encampment Policy. In this instance, prior to the enforcement of the By-Law, the Region did not use all reasonable outreach and support efforts to connect with the Encampment residents and “address their individual needs on a case-by-case basis by providing access to services, supports and shelter” as the Encampment Policy requires. As a consequence of the Region’s failure to meet its own self-imposed terms prior to any enforcement of the By-Law, I find that the Region’s actions in attempting to enforce the By-Law constitutes an ‘exceptional circumstance.’ On that basis, I am prepared to exercise my limited discretion and decline to grant the injunctive relief requested by the Region in the event that I have wrongly concluded that the By-Law deprives the Encampment residents of their section 7 protected rights of life, liberty, and security.

### **Remedy**

[144] The Named Respondents and *Amicus Curiae* each seek declaratory relief pursuant to section 52(1) of the *Constitution Act, 1982* that the By-Law is inoperable with respect to the residents of the Encampment because it violates sections 7 and 15(1) of the *Charter*. I have found that the By-Law indeed violates section 7 but not section 15(1) of the *Charter*.

[145] There are two types of remedies for a violation of the *Charter*: section 24(1) of the *Charter* and section 52(1) of the *Constitution Act, 1982*, Part VII, of which the *Charter* is Part I.

[146] Section 24(1) of the *Charter* states:

Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy, as the court considers appropriate and just in the circumstances.

[147] Section 52(1) of the *Constitution Act, 1982* provides;



The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

[148] Section 24(1) of the *Charter* provides remedies for acts of government that violate the *Charter* while section 52(1) of the *Constitution Act, 1982*, provides remedies for unconstitutional laws. The Supreme Court of Canada in *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, considered the issue of whether a remedy lies under section 24(1) of the *Charter* or section 52(1) of the *Constitution Act, 1982*. Whereas section 52(1) of the *Constitution Act, 1982*, applies to unconstitutional legislation, section 24(1) of the *Charter* functions primarily as a remedy for unconstitutional government acts under the authority of legal regimes that are otherwise accepted as constitutional. As Chief Justice Hinkson points out in *Shantz*, it is, however, possible for litigants to seek both a section 24(1) and a section 52(1) remedy for an unconstitutional law and acts of government under that law.

[149] The unique factors of this case make the issue of an appropriate remedy somewhat difficult. The Named Respondents and *Amicus Curiae* concede that the By-Law is not generally unconstitutional. The By-Law does nonetheless violate the section 7 *Charter* rights of the Encampment residents because of complex economic, personal, and social circumstances, including the shortage of accessible shelter spaces in the Region for homeless persons. The homeless of the Region have no place to live, rest and sleep without severe risk to their health caused, in part, by the By-Law's prohibition to erecting any form of shelter on the Region's lands. In the circumstances, I agree with the submission of *Amicus Curiae* that the section 52(1) remedies of striking down or severance would not provide a tailored constitutional remedy.

[150] Furthermore, I also accept *Amicus Curiae's* position that because the By-Law includes such prohibited uses as smoking, loitering, and consuming alcohol, a declaration limited to the By-Law's prohibition to the erection of temporary shelters would not adequately shield Encampment residents from future eviction notices.

[151] On the other hand, I find that in the circumstances of this case, individual remedies crafted pursuant to section 24(1) of the *Charter* are equally unsatisfactory. *Amicus Curiae*

submits, and I accept, constitutional exemptions decided on a case-by-case basis leave the law uncertain and unpredictable and are generally an unreasonable solution for vulnerable individuals, like those experiencing homelessness, who can face unsurmountable barriers in litigating *Charter* issues.

[152] For these reasons, I find that a remedy under section 24(1) of the *Charter*, in the form of constitutional exemptions or otherwise, is not adequate or appropriate to protect the section 7 *Charter* rights of the Encampment residents. I am mindful, however, that in fashioning a remedy pursuant to section 52(1) of the *Constitution Act, 1982*, close attention must be paid to ensure that any declaration that laws are of no force or effect be limited only to the extent of their inconsistency with the *Charter*. Accordingly, I declare, pursuant to section 52(1) of the *Constitution Act, 1982*, that the By-Law violates section 7 of the *Charter* in that it deprives the homeless residents of the Encampment of life, liberty, and security of the person in a manner not in accordance with the principles of fundamental justice and is not otherwise saved by section 1 of the *Charter*. I also declare that the By-Law is inoperative insofar as it applies to prevent the Encampment residents from living and erecting temporary shelters on the Property when the number of homeless individuals in the Region exceed the number of accessible shelter beds.

[153] Because I am most impressed, however, with the Region's past and ongoing efforts to meet the needs of its homeless population, I am also prepared to order that the Region may apply to terminate my declaration at such a time when it is in a position to satisfy this Court that the By-Law no longer violates the section 7 rights of the Encampment residents.

### **Disposition**

[154] For all of the above reasons:

[155] I decline to declare that the homeless individuals living in the Encampment on the Property are in breach of the By-Law.

[156] I dismiss the Region's requested injunctive relief pursuant to section 440 of the *Municipal Act*.

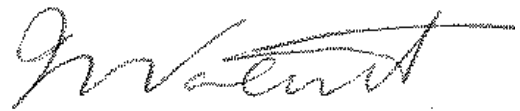
[157] I declare pursuant to section 52(1) of the *Constitution Act, 1982*, that the By-Law violates section 7 of the *Charter* in that it deprives the homeless residents of the Encampment of life, liberty and security of the person in a manner not in accordance with the principles of fundamental justice and is not saved by section 1 of the *Charter*.

[158] I declare that the By-Law is 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.

[159] Finally, I order that the Region may apply to terminate my declaration upon it being in a position to satisfy this Court that the By-Law no longer violates the section 7 rights of the Encampment residents.

#### **Costs**

[160] I encourage the parties to agree on the issue of costs. If they are unable to do so, the party seeking costs shall deliver costs submissions within 15 days of the release of this decision and the responding party shall deliver responding costs submissions within 10 days of receipt of the submissions of the party seeking costs. Reply submissions, if any, are to be delivered within 5 days of receipt of the submissions on behalf of responding party. The initial and responding submissions are not to exceed ten (10) pages doubled spaced excluding costs outlines, offers to settle and authorities. Any reply submissions are not to exceed four (4) pages. All submissions are to be sent to my attention via my Judicial Secretary by email to Kelly.Flanders@ontario.ca with a copy to the Kitchener.SCJJA@ontario.ca email address.



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M.J. Valente J.

**CITATION:** The Regional Municipality of Waterloo v. Persons Unknown and to be  
Ascertained, 2023 ONSC 670

**COURT FILE NO.:** CV-22-717

**DATE:** 2023-01-27

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

The Regional Municipality of Waterloo

– and –

Persons Unknown and to be Ascertained

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**REASONS FOR JUDGMENT**

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M.J. Valente J.

**Released:** January 27, 2023