

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**THE REGIONAL MUNICIPALITY OF WATERLOO**

Applicants

- and -

**PERSONS UNKNOWN AND TO BE ASCERTAINED**

Respondents

**NOTICE OF CONSTITUTIONAL QUESTION**

The Respondents 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 intend to question the constitutional validity of: the Trespass Notice issued by the Regional Municipality of Waterloo pursuant to 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 Regional Municipality of Waterloo (the “Code of Use By-Law) as well as the constitutional validity of the Code of Use By-Law itself.

And seek remedies pursuant to s. 24(1) and 52(1) of the *Constitution Act*, 1982, Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 1.1.

The question is to be argued (*choose one of the following*)

- In person
- By telephone conference
- By video conference

at the following location

Superior Court of Justice  
Waterloo Region Courthouse  
85 Frederick Street  
Kitchener, Ontario N2H 0A7

On the 7<sup>th</sup> and 8<sup>th</sup> of November, 2022 at 10:00 a.m.

The following are the material facts giving rise to the constitutional question:

1. The Respondents are individuals (the “Encampment Residents”) who have erected tents or shelters on the property municipally known as 100 Victoria Street, Kitchener, Ontario (the “Encampment”). The Encampment Residents were living at the Encampment at various times beginning in December 2021 through to the present, along with other homeless individuals living at the Encampment.
2. The Encampment has had varying numbers of tents and residents during its existence, ranging from a few tents and individuals up to approximately seventy tents.
3. The individuals living at the Encampment are unhoused and unable to find housing due to limited financial means and complex personal circumstances. The Encampment Residents are in receipt of either Ontario Works or Ontario Disability Support Program Benefits, and as a result are living in extreme poverty. They are unable to rent market housing, and are left to seek housing in subsidized, supportive, and low barrier options which are extremely limited in the Region of Waterloo.
4. The Encampment Residents demographically consist of the following:
  - a. Couples;
  - b. Members of racialized communities;
  - c. Individual men and women;
  - d. Persons with a disability including physical and mental disabilities;
  - e. Persons suffering from substance use disorders;
  - f. Persons in the 2SLGBTQ+ community;
  - g. Indigenous people; and
  - h. Domestic abuse survivors.
5. Among the Region’s homeless population, Indigenous persons are overrepresented. In a survey conducted by the Region of people residing in encampments, 19% of the survey respondents identified as Indigenous.

6. The Encampment property is owned by The Regional Municipality of Waterloo (the “Region”) and at all materials times was an unused, vacant lot of land. The future plans for the Encampment property are purported to be for overflow parking for a nearby Via and Go Train station at an undetermined date and later for a lay down site for construction materials during the construction of a Region-owned transportation hub.
7. The Encampment property is located across the street from St. John’s Kitchen, a soup kitchen run by a not-for-profit organization serving people living in poverty.
8. The Encampment property is located a block away from the Consumption and Treatment Services Site (the “CTSS”), which is operated in partnership by the Region of Waterloo Public Health and Emergency Services and Sanguen Health Centre. The CTSS provides supervised consumption/overdose prevention services, harm reduction supplies, naloxone kit distribution, wound care, sharps disposal and access to mental health supports, addiction services, primary care and social services.
9. There are regular visits to the Encampment by local agencies providing health and social supports to the Encampment Residents, as well as regular donations of food and items made by members of the community.
10. On June 6, 2022, the Region posted signs around the property pursuant to By-Law Number 13-050 of The Regional Municipality of Waterloo (the “Code of Use By-Law”) and the *Trespass to Property Act*, R.S.O. 1990, c. T21 (the “Trespass Notice”) requiring the Encampment Residents to remove their belongings, tents or any structures on the Encampment property and to vacate the property on or before June 30, 2022 and not return to the Encampment thereafter. The Respondents concede that the Encampment Residents did not vacate the property following the Trespass Notice, as they have nowhere to go.
11. The Region made an Application to the Superior Court of Justice on or about July 4, 2022 pursuant to sections 11 and 440 of the *Municipal Act, 2001*, S.O. 2001, c. 25, as amended as well as the

*Trespass to Property Act*, R.S.O. 1990, c. T.21, as amended seeking a number of Declarations and

Orders from the Court including but not limited to:

- a. Declarations that the Respondents are in breach of the Code of Use By-Law;
  - b. Interim and Final Orders restraining individuals from breaching the Code of Use By-Law by remaining or re-entering on the Encampment property;
  - c. Orders for the Waterloo Region Police Service (the “WRPS”) to have authorization to arrest and remove the residents of the Encampment still living on the site; and
  - d. Orders for the WRPS to remove any belongings at the Encampment property.
12. The Region is aware that the Encampment Residents do not have anywhere to go if they are evicted and will remain unhoused, and will disperse to other encampments or erect their tents in other locations, including more remote locations so as to avoid detection from by-law officers and the public. The Encampment Residents are unable to comply with the Trespass Notice without continuing to violate the Code of Use By-Law on other Regional owned land, or similar such By-Laws for the City of Kitchener, Cambridge or Waterloo.
13. The Region does not have the space available in its Emergency Shelter System to meet the current needs of all the Region’s homeless population. As of September 21, 2021, 1,085 people were actively experiencing homelessness in Waterloo Region. The Region’s Emergency Shelter Capacity in 2021/2022 listed 451 spaces, with only 64 spaces dedicated to a women’s only shelter.
14. Despite this, the Region has offered some of the Encampment Residents space in the Region’s Emergency Shelter System, however the Encampment Residents have refused the offers of temporary shelter for a number of reasons, including:
- a. Lack of shelter space to meet the demand at any given time, leading to uncertainty on a night-by-night basis as to whether a space will be obtained for that night or whether the individual will be left without shelter;

- b. Lack of shelter space for specific populations including women, couples, Indigenous people, people with disabilities and members of the 2SLGBTQ+ population;
- c. Structural barriers in the design of the emergency shelter system. The design of the Emergency Shelter System discriminates against individuals on the basis of disability, against individuals with complex mental health issues and/or trauma, and against people experiencing substance use disorders and mental health disorders. The Emergency Shelter System does not accommodate Indigenous cultural practices or recognize the unique needs of Indigenous individuals. The Emergency Shelter System does not offer a space that is safe and specific for members of the 2SLGBTQ+ community.
- d. Shelters generally do not permit people to keep personal items or pets in the shelter space.
- e. Shelters generally do not permit people to remain there during the day, requiring people to find a suitable, safe space during the daytime hours and requiring them to carry their belongings with them, creating challenges particularly for those with physical disabilities.
- f. There are very limited spaces available for couples and women only. Women are subject to sexual violence and physical harm in the Emergency Shelter System.
- g. There is very little or no privacy in congregate shelter space. Theft and violence is common in shelters.
- h. The Emergency Shelter System discourages people from creating a homelike environment as long stays are discouraged, although long term stays have become the reality in many shelters.
- i. Most of the shelters have abstinence only policies, discriminating against people suffering from substance-use disorders and perpetuating stigma around substance use. Some people with substance-use disorders do not use shelters for this reason. On the other hand, despite abstinence only policies, there is inconsistency in how policies are enforced and some people working towards sobriety chose to avoid shelters because of the drug use there.

- j. Encampment Residents may have service restrictions or bans which prevent them from using the Emergency Shelter System. These service restrictions typically arise as a result of the mental illness, trauma, and/or substance use disorder that Encampment Residents suffer from.
15. Living in the Encampment has provided stability for the Encampment Residents relative to living rough on the streets. The Encampment Residents experience benefits such as a sense of community and the safety of looking out for one another. The Encampment Residents have somewhere to stay 24 hours, 7 days a week where they are able to have their belongings with them rather than having to carry everything they own while moving from place to place.
16. Encampment Residents are able to live continuously in a single location which enhances their ability to access services such as medical care and social services, as the providers are better able to find them and provide services to them compared to if they are living in more remote, dispersed, and unknown locations.
17. If evicted, the Encampment Residents will remain unhoused and will either disperse to other locations in the Region to camp or will be forced to sleep rough on the streets. In either case the Encampment Residents will be less secure and farther away from services and supports. They will face increased risk of deterioration of their physical and mental well-being, and be prevented from obtaining the basic necessities of life including survival shelter, rest, sleep and freedom from exposure to the elements.
18. If evicted, Encampment Residents will face greater risks of physical harm as they will lose the protection of being part of a community and will be vulnerable to increased risks of theft, harassment, physical violence and sexual assault. If moving to more remote locations to avoid by-law detection, Encampment Residents risk not having the benefit of community during a potential overdose or other medical emergency.

The following is the legal basis for the constitutional question:

**Sections 7 and 15(1) of the Charter:**

1. The *Canadian Charter of Rights and Freedoms* (the “*Charter*”) applies to municipalities and their actions (*Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844).
2. The Trespass Notice violates sections 7 and 15(1) of the *Charter* in a manner that cannot be justified under section 1 of the *Charter*, and/or the Code of Use By-Law, insofar as it affects the rights of the Encampment Residents, violates section 7 and 15(1) of the *Charter* and cannot be justified under section 1 of the *Charter*.
3. The Trespass Notice violates section 7 by seeking to cause the eviction of the Encampment Residents, which eviction would deprive them of their right to life, liberty and/or security of the person in a manner that is not in accordance with the principles of fundamental justice.
4. The Code of Use By-Law prohibits activities such as erecting tents/temporary shelters as well as loitering, obstructing, preventing or hindering the rights of others including the Region on Regional property. The effect of the Code of Use By-Law and its enforcement against the Encampment Residents is to criminalize being homeless and force the Encampment Residents to move to other locations to tent, which would also be a violation, or to sleep rough on the street without a tent. This action, and the continual displacement of the Region’s homeless would deprive the Encampment Residents of their section 7 rights.
5. Forcing Encampment Residents to move away from services and access to healthcare would endanger their wellbeing and violates their right to life and security of the person. The Code of Use By-Law also interferes with the fundamentally important personal decision to shelter one’s self, creating a deprivation of the section 7 liberty interests.
6. The eviction will increase the trauma and potential for physical and mental harm experienced by the Encampment Residents, who are already vulnerable and suffer from ongoing trauma and harm to their health as a result of being unhoused. The act of evicting the Encampment Residents by the

Region pursuant to the Code of Use By-law would cause an increased risk of conflict with the law if the eviction proceeds and the potential to be incarcerated as a result of being evicted from the Encampment.

7. The Code of Use By-Law is overbroad and disproportionate to its effects in the context of the forced eviction of the Encampment Residents, as it does not distinguish between someone who is camping on Regional land as a choice and someone who is homeless and has no other option. The impact of the restriction on the Encampment Residents' life, liberty and security interests is grossly disproportionate – in nature and gravity - to the objective of the By-Law.
8. These violations of section 7 cannot be justified under section 1 of the *Charter*.
9. The prohibitions on activities such as erecting tents/temporary shelters as well as loitering on Regional property in the Code of Use By-Law violate s. 15(1) of the *Charter* because these prohibitions have a discriminatory impact on the homeless population and the Encampment Residents on the basis of race, indigeneity, sex, disability and marital status, either separately or in combination (i.e. intersectional discrimination).
10. People with disabilities and mental health needs, 2SLGBTQ+ populations, women, racialized groups, and Indigenous people are disproportionately under-housed, unhoused, more likely to experience harm while unhoused and experience barriers to access affordable, permanent, stable, and supportive housing. The proposed evictions of the Encampments Residents by the Region pursuant to the Code of Use By-Law breaches s. 15(1) of the *Charter* by the disproportionate and discriminatory impact of the eviction action on specific sub-populations within the homeless population.
11. These violation of section 15(1) cannot be justified under section 1 of the *Charter*.
12. The interpretation of sections 7 and 15(1) of the *Charter* must comply with Canada's international legal obligations including under the *International Covenant of Economic, Social and Cultural Rights*.



13. Any further and other grounds that counsel may advise, and this Honourable Court may permit.

**Remedies Sought:**

1. The Respondents seek the following remedies pursuant to sections 24 and 52 of the *Charter*:
  - a. A declaration that pursuant to s. 24(1) of the *Charter* that the rights of the Encampment Residents, and other individuals living in the Encampment, to life, liberty and the security of the person, guaranteed by section 7 of the *Charter* will be infringed if the declarations and orders sought by the Regional Municipality of Waterloo in the Application, were to be granted;
  - b. In addition and in the alternative, a declaration pursuant to s. 24(1) that enforcement actions pursuant to the Code of Use By-Law against the Encampment Residents, and other individuals living in the Encampment violate section 7 rights guaranteed under the *Charter* and cannot be justified under s. 1;
  - c. In addition and in the alternative, a declaration pursuant to s. 24(1) that the provisions of the Code of Use By-Law prohibiting activities such as erecting tents/temporary shelters as well as loitering, obstructing, preventing or hindering the rights of others including the Region on Regional property insofar as those provisions apply to the Encampment Residents, and other homeless individuals living in the Encampment violate section 7 rights guaranteed under the *Charter* and cannot be justified under s. 1;
  - d. In addition and in the alternative, a declaration pursuant to s.24(1) of the *Charter* that the Code of Use By-law and any proposed eviction enforcement actions against the Encampment residents and other homeless individuals living in the Encampment pursuant to the Code of Use By-Law, constitutes discrimination under s. 15(1) on the basis of race, indigeneity, sex, disability and marital status, either separately or in combination (i.e. intersectional discrimination);

- e. In addition, a declaration that pursuant to s. 52 of the *Constitution Act, 1982*, that the Code of Use By-laws are either inapplicable or of no force and effect to the extent that they are applied to the Encampment Residents, and other individuals living in the Encampment as the provisions violate sections 7 and 15(1) of the *Charter*.
- f. In addition to the above-noted remedies being sought, such further and other relief as the Respondents may advise, and this Honourable Court may permit.

**September 15, 2022**

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RCP-E 4F (February 1, 2021)

**THE REGIONAL MUNICIPALITY OF  
WATERLOO**  
Applicants

**PERSONS UNKNOWN AND TO BE  
ASCERTAINED**  
Respondents

Court File No.: CV-22-00000717-0000

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at KITCHENER

**NOTICE OF CONSTITUTIONAL**

**QUESTION SEPTEMBER 15, 2022**

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