

CITATION: Heegsma v. Hamilton (City), 2024 ONSC 7154
COURT FILE NO.: CV-21-77817
DATE: 2024-12-23

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
Kristen Heegsma, Darrin Marchand, Gord)	
Smyth, Mario Muscato, Shawn Arnold,)	<i>Sujit Choudry, Sharon Crowe, Wade</i>
Cassandra Jordan, Julia Lauzon, Ammy)	<i>Poziomka, Michelle Sutherland and Curtis</i>
Lewis, Ashley MacDonald, Corey)	<i>Sell for the Applicants</i>
Monahan, Misty Marshall, Sherri Ogden,)	
Jammy Pierre and Linsley Greaves)	
)	
Applicants)	
)	
– and –		
		<i>Bevin Shores and Jordan Diacur for the</i>
City of Hamilton		<i>Respondent</i>
Respondent		

**HEARD: December 16 - 18, 2024 at
Hamilton**

MR JUSTICE J.A. RAMSAY

- [1] The applicants are 14 homeless individuals who apply for a declaration that the City of Hamilton’s enforcement of its Parks by-law during the period from August 2021 to August 2023 breached their right under the Charter to life, liberty and security of the person (s.7) and to equal benefit of the law (s.15). They seek damages from the City.

- [2] The applicants say that they were evicted from encampments during the period from August 2021 to August 2023 in breach of the Charter, and that they suffered harm as a result.

- [3] The record consists of some 10,000 pages. These reasons do not reflect the massive amount of work that was done by both sets of lawyers. Their work has allowed me to deal with the issues in what I hope is a complete but concise manner.

- [4] I was reminded by counsel for the applicants that while the legislature represents the will of the people, the court holds the moral compass that is often the only protection for the most vulnerable. I observe that the most vulnerable includes not only the homeless but also the

elderly person and the child who want to use a sidewalk or a city park without tiptoeing through used needles and human faeces.

The by-laws and their enforcement

[5] By-Law 01-219 provides:

3. No person shall enter into or be in any park between the hours of eleven in the afternoon (11:00 p.m.) and six o'clock in the forenoon (6:00 a.m.), except where after hours use of a park has been approved by the City.

12. Unless authorized by the Director or by permit, no person shall encroach upon or take possession of any park, by any means whatsoever, including the construction, installation or maintenance of any fence or structure, the dumping or storage of any materials, or planting, cultivating, grooming or landscaping, thereon.

17. Unless authorized by permit, no person shall dwell, camp or lodge in any park.

18. Unless authorized by permit, no person shall place, install or erect any temporary or permanent tent or structure in any park.

[6] By-Law 97-162 provides:

16. (12) 12.1 For the purposes of this subsection:

(a) "cease" means to stop or bring to an end.

(b) "congregate" means to gather into a group of more than one person.

(c) "obstruct" means to interfere with or make difficult of passage.

(d) "officer" means a sworn member of the Hamilton-Wentworth Regional Police Service or municipal by-law enforcement officer appointed by the City of Hamilton.

12.2 No person shall congregate and sit or stand so as to obstruct the free passage of either pedestrian or vehicular traffic on any streets or sidewalks regulated by this By-law.

12.3 Any person who obstructs pedestrian or vehicular traffic on a sidewalk or street shall, when directed to do so by an officer, cease such obstruction.

...

12.5 Sworn members of the Hamilton-Wentworth Regional Police Service and municipal by-law enforcement officers of the City of Hamilton are authorized to enforce the provisions of this by-law.

[7] Hamilton is a single tier municipality. It is not disputed that it had the authority under the *Municipal Act, 2001*, S.O. 2001 c. 25, to enact the by-laws in question. The by-laws were enforced in accordance with protocols in operation during three time periods.

[8] From October 2020 to August 2021 (“the old protocol”) encampments were permitted in public parks as long as they were not on sidewalks or playgrounds. Upon receipt of a complaint the Outreach Team would speak with encampment residents and assess their needs, using a decision assistance tool which is, I take it, a form of questionnaire. The residents were given an “acuity score.” If they had a low score they would be given 14 days to leave, and they would be offered housing supports. If they had a high score they would not be given a deadline.

[9] From August 2021 to August 2023 (“the encampment process”) the policy was again complaint driven. The Outreach Team would visit, offer supports and seek voluntary compliance. If there was no compliance a trespass notice would be served. The process called for police to execute the notice, but it is not clear that in fact they did. No one was asked to leave at night. City staff would clean up the park if the occupants had left. I find that they did not clean up a park when a resident was present. They did not dispose of property that had not been abandoned. I reject the evidence to the contrary.

[10] Since 2023 (“the new protocol”) the policy has been that temporary shelters may be erected indefinitely in parks as long as they are not within a certain distance of sensitive areas, such as schools. There is an enforcement process involving multiple steps.

[11] The position of the applicants is that the enforcement of the by-law during the encampment process period breached their rights because of two circumstances:

- a. They were kept from staying overnight when their were insufficient accessible shelter beds to accommodate them; and
- b. They were kept from staying during the daytime, that is, they were forced to pack up and move, potentially every morning.

[12] Again, I find that they were not prevented from staying overnight.

[13] If they had been, the City might have been in breach of s.7 of the Charter according to British Columbia jurisprudence (*Victoria (City) v. Adams*, 2009 BCCA 563) which has been adopted by this court in *Waterloo (Regional Municipality) v. Persons Unknown*, 2023 ONSC 670 and *Kingston (City) v. Doe*, 2023 ONSC 6662. I say “might have been” because *Adams* dealt with the case where the by-law allowed the public to stay in parks overnight as long as they did not erect a shelter. The Hamilton by-law prohibits being in a park overnight.

[14] To apply the protection of s.7 of the Charter to eviction during the daytime, I am asked to advance the jurisprudence to the next step. These reasons explain why I decline to do. It is implicit in my reasons that I disagree with the *Adams* and *Waterloo* cases, but it is not necessary to my decision to decline to follow them.

Admissibility of evidence – experts

[15] The applicants object to the evidence of Dr Sharon Koivu. Dr Koivu is a medical doctor who holds a certificate of added competency in addiction medicine. She has experience treating homeless patients. She has visited an encampment. The main focus of her research is addiction. She advocates against safe use sites. She is not an advocate with respect to encampments. She

has spoken to countless homeless persons who were her patients, and she has made observations of them over time. I do not agree with the position of the applicants that as an addiction specialist she is not competent to give expert testimony on homelessness. There is a significant connection between addiction and homelessness. Her evidence is relevant, and she has expertise outside the knowledge of a trier of fact on the question of whether there are health advantages of an encampment over a shelter. Her evidence is admissible.

[16] The respondent objects to the evidence of Leilani Farha and Professor Ameil Joseph.

[17] From 2014 to 2020 Leilani Farha was the United Nations special rapporteur on the right to housing. At present she is global director of The Shift, an international movement to secure the right to housing. It was launched with the United Nations High Commissioner for Human Rights and United Cities and Local Government. She is a lawyer. Her area of expertise is international law. A court can admit expert evidence on international law if it would be helpful. Such experts can help the court with complex technical questions.

[18] Ms Farha's testimony is essentially that eviction from encampments contravenes commentaries on the International Covenant on Economic, Social and Cultural Rights which are not binding on the states parties. She authored one of these commentaries herself with Dr Kaitlyn Schwan. Ms Farha says that conditions in encampments are deplorable.

[19] The applicants offer her evidence on section 1 of the Charter. As I do not arrive at the application of section 1, I do not need to consider her evidence to any great extent.

[20] Professor Ameil Joseph is an associate professor in the School of Social Work of McMaster University in Hamilton. Essentially he deposes that various identity groups are disproportionately homeless. And because discriminatory ideas historically became embedded in our nation's policies, these realities frame how racialized people, disabled people, Indigenous people, and people with mental health issues become more at risk of being homeless as well as how systems view them through a gaze that deems them as threat risk, burden, or in terms of inferiority and undeservingness. His evidence helps me understand some origins of homelessness but not its solution. More particularly it does not help me on the effect of enforcement of the by-laws.

[21] The remaining experts are doctors and researchers. They meet the requirements of *R. v. Mohan*, 1994 SCC 80. They are advocates for the homeless, and often advocates for encampments, but it is to be expected that experts on matters of policy will advocate for one policy or another. It does not prevent them from testifying as experts. It could go to weight.

Admissibility of public documents

[22] There are also public documents in the record. They are admissible under the traditional exception to the hearsay rule. They contain information about shelters and the needs of persons in encampments, among other things.

The applicants

- [23] Gordon Smyth is a physically disabled person. He also has anger issues and problems being around people. He was renovicted from his rent-subsidized apartment in June 2021. He refused a shelter bed because, among other things, he could not keep his dog. It was not a service animal. On November 27, 2021 he was placed in a rent-subsidized apartment. He was moved from one site to another. He would have preferred to stay in one place.
- [24] The remaining applicants all used or use drugs. Many of the affidavits of the applicants contained boilerplate. Parts were obviously drafted by lawyers. The applicants, apart from Mr Smyth, have mental issues or drug problems which can affect perception and memory. Some of their recollections of being evicted were hazy or were the product of what they were told. I prefer the evidence of the City staff as to what happened in enforcement of the by-law.
- [25] Shaun Arnold, Julia Lauzon, Ammy Lewis, Ashley MacDonald, Cory Monahan and Jammy Pierre were housed. All but Cory Monahan remain housed.
- [26] Persons who use substances are a difficult demographic to help. They often do not prioritize shelter. Their addiction takes priority over compliance with shelter rules, collecting their chattels from storage, maintaining relationships with family, following up on meetings with potential supports and attending medical appointments. And, of course, money they spend on drugs is money that cannot be used for rent and food.
- [27] The applicants are a diverse group, with their own individual needs, desires and outcomes. Some of them tried and failed to get into a shelter. Some prefer an encampment to a shelter. Some have been kicked out of shelters. Some have been victimized in shelters. Some have been victimized in encampments. Seven have been housed and four have refused housing.
- [28] Corey Monahan and Shaun Arnold do not like shelters because there are hard drugs there. Shaun Arnold uses methadone to stay off drugs. He says that drug dealers target encampments as well. Mr Arnold has a high acuity score, so the police have on occasion used discretion to allow him to stay in an encampment. He lost his tent to thieves who stole it from the encampment while he was away.
- [29] Linsley Greaves reports that shelter residents target him for drugs. He has been a victim of racial profiling by the residents. They assume that he is a dealer because he is black. He stayed in Woods Park in a tent. He even ran a bicycle repair business from his tent. He was evicted under the encampment process. He was offered a room at the Four Points but declined because there was no room for his belongings. An outreach worker got him a new tent. He has been offered other placements, including a residential care facility but he turned them down. In encampments he has run into some of the people who subjected him to racism.
- [30] Darrin Marchand suffers from paranoid schizophrenia. He witnessed a serious assault in a shelter which causes him to avoid shelters. He has been victimized in encampments. Locals have urinated on his shelter and stolen from him.
- [31] Mario Muscato uses methadone to stay off fentanyl. He feels safer in encampments, but sometimes locals throw things at the tents.

- [32] Misty Marshall has tried to get into shelters unsuccessfully because there was no room. She did manage to get into overnight drop-ins a couple of times. At one shelter for women, where the women line up outside for a place, men drive around soliciting them for sex.
- [33] Cassandra Jordan was evicted from the Ferguson Street encampment. A hotel room was offered to her. She has experienced arson at an encampment.
- [34] Kristen Heegsma has been repeatedly kicked out of shelters. Ashley MacDonald has been unsuccessful in finding place at a shelter. She moved out of an encampment because she did not feel safe. She also couch surfed but found it dangerous. Men often expect sex in return for a place to stay. She has lost six cell phones to theft.
- [35] Ammy Lewis could not get into her shelter with her dog. She stayed with her mother when she got out of the penitentiary, but her mother kicked her out. Her tent was repeatedly attacked by people who threw stuff, set fires and stole her belongings whenever she left.
- [36] Sherri Ogden was able to stay at the Four Points but got kicked out because of a domestic violence incident.
- [37] Ashley MacDonald has housing, but she takes comfort from staying in a tent on occasion. She safe uses, that is, uses in a safe injection site.

The shelter system and the enforcement of the by-law

- [38] Under any of the three policies people were never evicted as night approached, as the applicants largely confirm in their depositions. Where they state the contrary, I do not believe them. When they were evicted, they could take their chattels with them, or the City offered to store them, although not permanently. Mario Muscato and Linsley Greaves confirm this.
- [39] The City has spent millions of dollars on various programmes to help the homeless and on security to protect the homeless. The City's shelter system is sometimes, but not always full to capacity. But there are overflow facilities available. The shelters do not allow animals, except service animals, because of concerns about allergies and aggressive dogs. The City's budget for homelessness was \$61.5 million for fiscal 2022. It has risen since. The City has installed washroom and shower facilities in some parks.
- [40] Indigenous persons are over-represented among the homeless. Women are not over-represented, but there are fewer shelter spaces for them, sometimes in smaller proportion than their share of the population. There are as well a significant number of Indigenous women who are homeless.
- [41] In September and October 2021 the occupancy rates of the City's shelters were as follows:

Women's shelters	108%
Family shelters	99%

Youth shelters	61%
Men's shelters	97%
<u>Overflow facilities</u>	
Hotel (women)	89%
Hotel (family)	Available ad hoc
Hotel (couples and women)	95%
Men's	38%

[42] In addition to the City shelters there are domestic violence shelters, the YMCA, the YWCA and the Hamilton Regional Indian Centre, but I do not have statistics as to capacity and demand.

[43] It is impossible to be certain, and the numbers change from time to time, but it seems from the City's records that there may be up to 2,000 homeless persons in Hamilton on a given night. The total number of City-run shelter beds could have been 950-odd. The City has identified 506 persons as having stayed in encampments from 2020 to 2021, perhaps 200 at a time. Between May and August 2023 there were from 117 to 165 persons in encampments at a time. As of June 2024 there were 271 people staying in encampments. Records between 2021 and May 2023 were lost to a cyber attack. I infer that there are homeless persons who stay elsewhere than shelters and encampments. They could be sleeping rough, staying in shelters outside the City system, couch surfing or staying short-term with family.

The experts

[44] Dr Stephen Gaetz is a professor of education. He deposed that there is no single cause of homelessness. Pathways into and out of homelessness are neither linear nor uniform. In a 2018 survey the Government of Canada found that on any given night 25,000 to 35,000 people might be homeless. They were a diverse group. Males made up 62%.

[45] Dr Gaetz he offers reasons why homeless persons may prefer encampments to shelters:

- a. Fear of other residents;
- b. Risk of assault;
- c. Not being able to stay with friends;
- d. Negative previous experience with public institutions;
- e. Lack of facilities to store personal belongings;

- f. Couples cannot stay together;
- g. Noise;
- h. Inability because of mental health to handle communal living; and
- i. Communicable disease.

[46] These reasons are all rational factors in the decision not to stay in a shelter, but I note that shelters at least have rules in place that attempt to deal with assault, drugs and theft while encampments do not.

[47] Dr Gaetz deposes that homeless persons have a higher rate of health problems, in spite of a higher rate of use of the health system. Homeless encampments often have a social structure. They offer a sense of community.

[48] Dr Kate Hayman is an emergency physician who treats the homeless. She gives essentially the same reasons as Dr Gates why encampments are preferred by some to shelters. She adds that the rules and structure of shelters can remind occupants of prison. They have to call hourly to reserve a space and they may be told to go to a shelter that is not close to their medical and other supports. She does not know anything about shelters in Hamilton or encampment evictions in Hamilton.

[49] Dr Stephen Hwang is a specialist in internal medicine with training in public health and epidemiology. His primary area of research is homelessness. Homelessness is associated with serious health risks. Sleeping in the open, as opposed to sleeping under shelter, even a makeshift shelter, is much worse. Persons who sleep on the streets or in shelters are at risk of communicable diseases and assault. Persons who sleep outdoors are at risk of sleep deprivation and trench foot. They are unable to access health care and cannot live healthy lifestyles.

[50] Dr Aaron Orkin is a physician and an epidemiologist. He has a Ph.D. as well as an MD. People experiencing homelessness in Canada have restricted but real choices as to housing. They change choices over time. The choices are rational.

[51] He deposes:

23. Various disease processes and threats to safety may be associated with homeless encampments. These include for example unsafe use of generators, fires and other heating devices, sanitation, conflicts and assaults, and harms associated with substance use such as overdose. These safety threats have been reported in the popular press in Canada, including instances in Hamilton, Ontario. I am not aware of any epidemiological or public health research on the health and health risks of living in a homeless encampment in Canada or internationally.

24. Therefore, there is no basis in the public health or epidemiological literature to conclude that living in an encampment is more or less healthy than living in a shelter. There is to my knowledge no available research to support the conclusion that individuals who choose to live in an encampment are making a choice that is

objectively or universally less (or more) healthy than those who choose to live in a homeless shelter.

25. The corollary is that there is no available research to support the position that relocating individuals (or communities of individuals) from an encampment to a shelter will serve to protect or improve their health in any objective or absolute way. Stated differently, there is no scientific or health research to support the position that municipalities or other actors can involuntarily relocate people from encampments to shelters in order to protect their health.

[52] The coercion involved in evictions is harmful and choice is helpful.

[53] Dr Kaitlin Schwan has a Ph.D. in social work. She co-authored the National Encampments Protocol with Leilani Farha. She was the senior researcher at the Shift. She is now National Director of the Women's National Housing and Homelessness Network. She studies homelessness among women, girls and gender-diverse people. She concludes that there are too few shelters for this population and that encampments are safer, but not safe. Women face additional challenges from homelessness. They are vulnerable to sexual predation and domestic violence.

[54] Dr Andrea Sereda is a doctor at the Health Clinic in London. She has experience dealing with unhoused persons and persons who inject drugs. She combines office-based care with mobile outreach and street medicine. I do not rely on her evidence. She omitted from her affidavit, but admitted in cross-examination, that she was part of a pressure group created to dissuade the City of London from evicting encampments. She is more than an expert who has views on policy. She is a partisan advocate for one side.

[55] Dr Sharon Koivu was the City's expert. She is a family doctor with experience treating the homeless in London. She is also an addiction physician. She has experience in public health and as an Assistant Professor she teaches, among other things, Indigenous Cultural Safety. She has belonged to such committees as Street Level Women at Risk Committee, the London Homeless Coalition, the Sexual Assault Centre, the Canadian Mental Health Association, Violence Against Women Services, Physicians for Social Responsibility and the Canadian Society of Addiction Medicine.

[56] Dr Koivu deposed that there are serious health risks associated with encampments. They are:

- a. Exposure to cold, which can lead to hypothermia or frostbite;
- b. Burns and carbon monoxide poisoning from fires that are set for heating and cooking;
- c. Trench foot;
- d. Wind, lightning and falling branches;

- e. Exposure to heat, which can lead to dehydration, which can in turn lead to rhabdomyolysis, a condition associated with muscle cell death and kidney damage;
- f. Rodents and diseases carried by rodents;
- g. Dog bites;
- h. Bacterial, viral and fungal infections caused by exposure to faeces, bodily fluids and needles;
- i. Infectious complications, such as sepsis;
- j. Arson;
- k. Influenza, scabies and lice;
- l. Overdose;
- m. Sexual violence and sex trafficking;
- n. Robbery, assault and theft.

[57] Drugs are often diverted from safe use programmes. That is, recipients of opiates are forced to part with them so that dealers can sell them.

[58] Patients reported to her that drug use increased in encampments. They also reported that stopping drug use is impossible in an encampment. They often progress to fentanyl. Methamphetamine is used to stay awake to guard property.

[59] Community based follow up, such as home care nursing and physiotherapy, require an address. An encampment is not an address. A shelter is an address.

[60] She concludes that encampments are a significant public health risk to the people living in them as well as the surrounding communities. She agrees with Dr Joseph that marginalized people require equity and equality, but she thinks that encampments further marginalize and alienate people; they are a form of colonialization. The sense of security that some occupants have is a false sense of security.

[61] She is concerned that there is a developing, false narrative that encampments are a safe alternative form of housing. That narrative appears in the affidavits of some of the applicants' witnesses. From talking to her patients it appears that it has been a factor in the decision to leave safer environments.

Findings of fact

[62] There is consensus among the medical experts that homelessness itself is associated with health problems. It is obvious that staying outdoors without shelter is harmful, compared to staying under a tent or tarp, in all seasons. Also, being asked to move from an encampment is a cause of stress.

[63] As to the difference between a shelter and an encampment, I prefer the evidence of Dr Koivu to the evidence of the experts called by the applicants to the extent that they disagree. They are based in her 40 years of real life experience. Dr Koivu's opinion has the ring of truth; that is, it makes sense. It is supported by much of the applicants' own evidence. Dr Orkin agrees that nothing in the literature suggests that encampments are better than shelters from a health point of view.

[64] Dr Koivu's concern about the false narrative encouraging people to leave safer alternatives is supported by the evidence of David Buckle, a member of the Outreach Team, who has observed organized groups encouraging encampment residents to resist options other than encampments.

Damages

[65] A municipality is not liable to pay damages simply for enacting a by-law that is unconstitutional: *Canada (AG) v. Power*, 2024 SCC 26. Before damages will be awarded it must be shown that the municipality acted wrongly, in bad faith or in abuse of power. This high threshold was set for Charter breach damages by legislatures. Contrary to the submission of the applicants, I think that the same standard should apply to municipal legislatures. Municipalities legislate with power delegated by the province..

[66] I do not think that the City acted wrongly, in bad faith or in abuse of power in enforcing the by-law. It has not shown a disregard for the applicants' Charter right. The City has not prohibited anyone from erecting temporary, overnight shelter. It has acted in compliance with then-existing Charter jurisprudence including *Victoria (City) v. Adams*, 2009 BCCA 563. That is, in the period of the encampment process, it evicted people in the daytime, but not at night. That is enough to dispose of the application for damages in favour of the respondents.

Section 7 of the Charter

[67] In *Adams*, the court held that when people are not prohibited from sleeping in a public park, a by-law that prohibits the erection of an overnight shelter in the form of tents, tarps and cardboard boxes is overbroad and therefore in contravention of section 7 of the Charter. The issue of a right to set up a semi-permanent camp, as opposed to a temporary shelter taken down each morning, was not before the court in *Adams*: paragraph 99.

[68] In the *Waterloo* case, Valente J. considered *Adams* and the British Columbia cases that followed it in connection with an encampment on a gravel parking lot. He found that there were insufficient shelter spaces in Waterloo and that it followed that the by-law, which prohibited erecting shelter, infringed the right to life and security of the person given by section 7 of the Charter and this "notwithstanding the tremendous and praiseworthy efforts the Region has made and is continuing to make to address the plague of homelessness." He concluded that the law had developed to the point that the Region could not prevent an overnight temporary structure unless

- a. there was enough shelter space; and

- b. the shelter space was truly accessible in that it met the needs of the homeless population.

[69] I have found that the City did not prevent anyone from staying overnight. I am asked to extend the right to stay in encampments to public parks in the daytime, that is, not to have to tear down and move every day. This extension is said to be conditional on the lack of accessible shelter space that was stipulated as a condition in the Waterloo case.

[70] I find it impossible to extend this conditional “right”. First, I do not see the connection between the right and the conditions.

[71] Some barriers to accessibility in shelters suggested to me in the evidence are:

- a. They do not allow animals;
- b. They do allow animals;
- c. They do not allow couples;
- d. They only allow couples;
- e. They do not permit substance use;
- f. They are not effective in preventing substance use;
- g. They do not accommodate persons whose mental health issues make it difficult to get along with people.
- h. They do accommodate such persons.

[72] A combination of different shelters would be needed to eliminate these “barriers.” They would have to have private showers and storage space for belongings. This condition is impossible.

[73] The condition set by the *Waterloo* case is also arbitrary: Some people will not stay in a shelter whether it is available or not. Also, there are many homeless persons who do not use either shelters or encampments, and there is no reason to think that they are all sleeping rough.

[74] The applicants insist that it is only City-run shelters that are relevant to the equation. That is even more arbitrary.

[75] Moreover, shelters also require occupants to move every day, one of the main reasons for preferring indefinite encampments. There is no logical connection between availability of shelter space and harm caused by eviction from encampments. The presence of adequate shelter space is a red herring.

[76] Second, the life, liberty and security of the applicants are not put at risk by enforcement of the by-law. They are put at risk by homelessness. Encampments contribute to this risk. They are lawless, dangerous and unsanitary.

[77] In all this we must not lose sight of the countervailing interest of preserving public parks. It was an important enough public interest that in the Toronto encampment injunction case *Schabas J.* found that it decided the balance of convenience in favour of the city notwithstanding the risk of irreparable harm: *Black v. Toronto (City)*, 2020 ONSC 6398.

[78] Finally, extending the freedom from enforcement to daytime or indefinite encampment would amount to expropriating property, or at least severely limiting property rights. City officials have noticed that since the implementation of the new protocol some occupants have become more territorial, or possessive of “their” camps. Extension of freedom from enforcement would have the effect of depriving the City of the use and enjoyment of its property.

[79] For these reasons, I do not extend the prohibition on enforcement to daytime or indefinite camping.

Section 15 of the Charter

[80] I do not think that the by-law violates the equality rights of Indigenous persons, women and persons with a disability. The law does not treat them differentially by intent or impact. They are disadvantaged by homelessness, not by enforcement of the by-law.

[81] The fact that a group is over-represented does not by itself prove illegitimate discrimination.

[82] The only characteristic that the applicants all share is homelessness. It is agreed that homelessness is not an enumerated or analogous ground.

Conclusion

[83] The problem of homelessness is of diverse origin. Its resolution will come from diverse input. In *City of Grant’s Pass v. Johnson*, 603 US __, 144 S. Ct. 2202 (2024), the Supreme Court of the United States was dealing with the Eighth Amendment (cruel and unusual punishment) in connection with encampments in public parks. Nevertheless the words of Gorsuch J. are apt and can be adapted to the Canadian context:

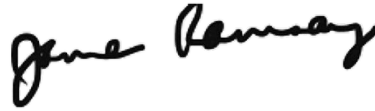
Homelessness is complex. Its causes are many. So may be the public policy responses required to address it. At bottom, the question this case presents is whether the Eighth Amendment grants federal judges primary responsibility for assessing those causes and deriving those responses. It does not. Almost 200 years ago, a visitor to this country remarked upon the “extreme skill with which the inhabitants of the United States succeed in proposing a common object to the exertions of a great many men, and in getting them voluntarily to pursue it.” A. de Tocqueville, *Democracy in America* 129 (H. Reeve transl. 1961). If the multitude of amicus briefs before us proves one thing, it is that the American people are still at it. Through their voluntary associations and charities, their elected representatives and appointed officials, their police officers and mental health professionals, they display that same energy and skill today in their efforts

to address the complexities of the homelessness challenge facing the most vulnerable among us.

[84] The public is generally sympathetic to the homeless, but it tires of seeing its public spaces appropriated by lawless, unsanitary encampments. There has to be a balance, and the democratic process is best equipped to achieve that balance.

[85] Encampments are a symptom, not a solution. The City is trying to find a solution to homelessness in consultation with numerous others. It has attempted to address the problem with the old protocol, the encampment process and the new protocol. It has limited resources and a duty to its housed constituency. I think I am well advised to leave them to it without interference. Micro-management by judges will not be productive.

[86] The application is dismissed. If anyone seeks costs, submissions not exceeding 3 pages, to which a bill of costs and any offer to settle may be appended, may be uploaded to Case Centre within 10 days for the respondent and 15 days for the applicant.



J.A. Ramsay J.

Released: 2024-12-23

CITATION: Heegsma v. Hamilton (City), 2024 ONSC 7154
COURT FILE NO.: CV-21-77817

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Kristen Heegsma, Darrin Marchand, Gord Smyth, Mario
Muscato, Shawn Arnold, Cassandra Jordan, Julia
Lauzon, Ammy Lewis, Ashley MacDonald, Corey
Monahan, Misty Marshall, Sherri Ogden, Jahmal Pierre
and Linsley Greaves

Applicants

– and –

City of Hamilton

Respondent

REASONS FOR JUDGMENT

J.A. Ramsay J.

Released: 2024-12-23