



ENCAMPMENTS AND LEGAL OBLIGATIONS: EVOLVING RIGHTS AND RELATIONSHIPS

REPORT FOR ADVOCATES AND LEGAL PRACTITIONERS

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INTRODUCTION

Encampments are a vivid illustration of the failure of governments in Canada to meet their human rights obligations to ensure everyone has access to adequate housing. The 2020-2022 point-in-time count showed a 20% increase in homelessness overall and an 88% increase in unsheltered homelessness from 2018.¹ The right to housing is inherently linked with the fulfillment of other human rights and with basic human dignity.² Thus, where the right to housing is violated, other human rights are often violated.³ Advocacy for the human rights of encampment residents then necessarily implicates a wider set of human rights. Legal advocacy is therefore a necessary part of a broader movement to realize human rights for all people. Canadian jurisprudence has centered on the right to life, liberty and security of the person protected by section 7 of the *Charter of Rights and Freedoms*, interpreted as freedom from government actions such as encampment removals. However, the rights involved draw from other sources of laws, including Indigenous and international legal frameworks.⁴ In this report we focus on the existing case law and legal strategies. Our objective is to identify arguments used to date, as well as opportunities for future legal advocacy on the issue of encampments.

Given the context of colonial dispossession and the vast overrepresentation of Indigenous Peoples in the unhoused population we highlight the relationship between the right to housing and Indigenous rights, both from a colonial Canadian legal perspective and from an Indigenous legal perspective. While we point to opportunities to engage with legal tools within the Canadian colonial legal system where they may be strategic and useful, we acknowledge the limitations of these tools. Therefore, we also highlight opportunities to connect advocacy about encampments with Indigenous legal orders and jurisdiction, including work being done by groups engaged in or considering litigation or advocacy on encampments. While there is limited research on the role of Indigenous law in encampments at present, in our view, this is an urgent area of advocacy to find long-term, sustainable, and human rights-compliant solutions to homelessness.

This report starts from the recognition that encampment residents are rights-bearers and must be centered in discussions on how to move forward. While it does not include testimony from those with lived experience it is informed by the long history of advocacy inside and outside of courtrooms by people unhoused people themselves and in partnership. This is critical in the context of encampments: when unhoused people claim public or private space to meet their basic needs it is essential that we acknowledge and respect their dignity and agency. Encampment residents are experts in their own lives. As we explain, meaningful engagement is the foundation of any human rights-based response. This includes respecting the structures of decision making that emerge in encampments, the trusted

¹ Infrastructure Canada, *Everyone Counts 2020-2022* (Ottawa, 2023), online: <https://www.infrastructure.gc.ca/alt-format/pdf/homelessness-sans-abri/reports-rapports/pit-counts-dp-2020-2022-results-resultats-en.pdf> [Everyone Counts 2020-2022].

² Leila Farha & Kaitlin Schwan, “A National Protocol for Homeless Encampments in Canada” (2020), online: <https://make-the-shift.org/wp-content/uploads/2020/08/A-National-Protocol-for-Homeless-Encampments-in-Canada.pdf>.

³ Leilani Farha, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to Adequate Standard of Living, and on the Right to Non-Discrimination in this Context*, UNGAOR, 28th Sess, UN Doc A/HRC/28/62 (2014) [SR Report 2014]; Farha & Schwan, *ibid*.

⁴ United Nations Human Rights Committee, General Comment No. 36 on Article 6 (Right to Life), UN Doc. CCPR/C/GC/35 (2018) at para 26.

advocacy relationships developed with those around them, and principles of fairness that guarantee particular rights.

This report has been drafted to help inform legal practitioners and advocates about the state of jurisprudence in Canada relevant to homeless encampments. It highlights some of the limitations of jurisprudence to date and points to opportunities for future legal advocacy, highlighting the need to integrate Indigenous legal traditions.

Part One provides a background on the meaning of a human rights approach and the regulation of encampments in Canada.

First, we detail the connections between the right to housing and encampments in the Canadian context. We define what we mean by adequate housing, where the progressive realization of the right to housing comes from under Canadian and Indigenous legal frameworks, and provide a three-part framework for considering the right to adequate housing.

Second, we outline the current system of regulation of encampments in Canada. We explore the regulation of encampments based on international and domestic laws, highlighting that jurisdictionally fractured set of rules each seek to govern encampment residents, exacerbating their vulnerability. In this section, we distinguish between constitutional protections, legislation and bylaws that protect encampment residents, and those that seek to displace them.

Part Two sets out advocacy and litigation strategies in relation to encampments.

Third, we outline advocacy efforts in relation to encampments. In this section we explain the many ways in which advocates are seeking change in local policy-making, law reform, and enforcement. These efforts may - but do not always - rely on court decisions, and legal challenges are but one tactic used to advance the interests of encampment residents.

Next, we set out the case law concerning encampments, explaining the different approaches that have been taken since the seminal case, *Adams v Victoria*, was decided in 2009 setting out the current framework used by the courts. We explain court decisions in relation to injunction applications mainly brought by municipalities, *Charter* arguments, judicial review applications, shelter standards, public-private property distinctions, and challenging enforcement. These cases were all decided between *Adams* and 2022.

We conclude by summarizing the legal framework related to encampments, with the gaps and opportunities for realizing a right to housing for those experiencing the most profound violation of that right, homelessness.

Essential Context: Indigenous Peoples and Homelessness in Canada

“Aboriginal housing and community services are in a bad state, by all measures falling below the standards that prevail elsewhere in Canada and threatening the health and well-being of Aboriginal people.”⁵

It has been almost thirty years since the 1996 Report of the Royal Commission on Aboriginal Peoples made these observations and noted it was both “possible and desirable to achieve adequate housing for Aboriginal people in ten years.”⁶ Yet, homelessness and housing insecurity continue to disproportionately affect Indigenous Peoples in Canada.⁷ A human rights approach to encampments in Canada must account for this context and centre Indigenous self-determination. For the purposes of this report, this requires meaningful engagement with Indigenous laws and jurisdiction. As we discuss below, the right to meaningfully participate in policy development and decision making is a core element of the right to housing and is also critical to self-determination for Indigenous Peoples.⁸ Further, encampments are located on Indigenous territories and, as outlined below, residents are disproportionately Indigenous. Thus, governments must recognize the role of Indigenous Nations and organizations in responding to encampments and ensure responses reflect the Indigenous decision-making processes and protocols appropriate to relevant territory, treaty, and jurisdiction.⁹

The profound housing discrimination faced by Indigenous Peoples is well documented.¹⁰ Indigenous households in Canada are 1.5 times more likely to be in core housing need than non-Indigenous households, with the difference growing to 1.7 and 1.8 in Manitoba and Saskatchewan.¹¹ They were

⁵ Canada, Royal Commission on Aboriginal Peoples, Report of the Royal Commission on Aboriginal Peoples *Gathering Strength*, vol. 3 (Ottawa: Supply and Services Canada, 1996) at 365 [RCAP].

⁶ *Ibid* at 377.

⁷ Caryl Patrick, *Aboriginal Homelessness in Canada: A Literature Review* (Toronto: Canadian Homelessness Research Network Press, 2014) at 15; Canada, Minister of Indian and Northern Affairs, *Government Response to the Seventh Report of the Standing Committee on Aboriginal Affairs and Northern Development; Aboriginal Housing*, Parliament of Canada (17 October 2007); Canada, Truth and Reconciliation Commission, *Canada’s Residential Schools: The Legacy*, vol 5 (Kingston & Montreal: McGill-Queen’s University Press, 2015) at 163 [TRC]; SR Report 2014, *supra* note 3; Canada, The National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, Vol. 1a (Ottawa: 2019) [MMIWG Report]; ; House of Commons, Standing Committee on Human Resources and Social Development and the Status of Persons with Disabilities, “Indigenous Housing: The Direction Home” (2021) online (pdf): <www.ourcommons.ca/Content/Committee/432/HUMA/Reports/RP11348049/humarp05/humarp05-e.pdf> at 60 [*Indigenous Housing: The Direction Home*]; see the most recent housing statistics and homelessness point-in-time data, also discussed below: <https://www12.statcan.gc.ca/census-recensement/2021/as-sa/98-200-X/2021007/98-200-X2021007-eng.cfm>; Everyone Counts 2020-2022, *supra* note 1 at 20-21.

⁸ United Nations Declaration on the Rights of Indigenous Peoples, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2007) [UNDRIP] at art 3.

⁹ Right to Housing in Toronto, “Encampments Rights Review: Report on encampments in Toronto during COVID-19” (2020), online (pdf): <<https://right2housingto.ca/wp-content/uploads/2020/09/R2HTO-Encampments-Rights-Review-final.pdf>>.

¹⁰ See e.g. *Desjarlais v. Kanganilage and another*, 2012 BCHRT 243; *Smith v. Mohan*, 2018 BCHRT 207; *Copenace v. West*, 1979 ON HRT 3893; and *Bishop v. Markowski*, 1993 SK HRT 9117.

¹¹ Parliamentary Budget Officer (PBO), *Urban, Rural, and Northern Indigenous Housing*, Report (Ottawa, 2021),

more likely to live in crowded conditions and in housing in need of repair than non-Indigenous households.¹² Just over half of Inuit people living in Inuit Nunangat live in crowded housing.¹³ While 5% of the population identifies as Indigenous, 31% of the respondents to the last point-in-time homelessness count identified as Indigenous. This increased to 41% amongst those in unsheltered locations, such as encampments, up from 37% in 2018.¹⁴

Research shows Indigenous Peoples are less likely to use shelters than other unhoused people as they can “replicate colonial oppression” and thus be inaccessible to Indigenous Peoples.¹⁵ Hidden homelessness, such as staying with friends or family, is also more prevalent for Indigenous Peoples, particularly Indigenous women.¹⁶ Indigenous overrepresentation is particularly striking when broken down by gender.¹⁷ *The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* clearly documents the link between inadequate and unsafe housing in Indigenous communities, homelessness, and violence.¹⁸ Unhoused women in Canada have overwhelmingly experienced violence in their lives.¹⁹ Indigenous women may avoid shelters for fear of violence and the lack of culturally appropriate services. Some may simply not have accessible options in rural or remote areas.²⁰ Gender-diverse Indigenous Peoples often experience discrimination when accessing a gender-

online: <<https://distribution-a617274656661637473.pbo-dpb.ca/5b2407108abe40544f4c66d4a7fe08c47aeece914911c2f7e3bbcad23a2070fc>>.

¹² Statistics Canada, *Housing conditions among First Nations people, Métis and Inuit in Canada from the 2021 Census* (Ottawa, 2022), online: <<https://www12.statcan.gc.ca/census-recensement/2021/as-sa/98-200-X/2021007/98-200-X2021007-eng.cfm>>.

¹³ *Ibid.*

¹⁴ Everyone Counts 2022-2022, *supra* note 1 at 20-21.

¹⁵ UNGA, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context*, 74th Sess, UN Doc A/74/183 (2019) [SR Report 2019] at 10.

¹⁶ Julia Christensen, “Our home, our way of life’: Spiritual homelessness and the socio-cultural dimensions of Indigenous homelessness in the Northwest Territories (NWT), Canada” (2013) 14:7 *Social Cultural Geography* 804. Homes for Women, “Housing First, Women Second: Gendering Housing First” (2013), online: *Homeless Hub* <<https://www.homelesshub.ca/resource/housing-first-women-second-gendering-housing-first>>.

¹⁷ Carol Muree Martin & Harsha Walia, “Red Women Rising: Indigenous Women Survivors in Vancouver’s Downtown Eastside” (2019), online: <<https://yellowheadinstitute.org/wp-content/uploads/2019/04/mmiw-report-final-march-10-web.pdf>> [Red Women Rising]; Jenna Drabble & Sadie McInnes, “Finding her home: A gender-based analysis of the homelessness crisis in Winnipeg” (2017), online: *Manitoba Research Alliance* <https://policyalternatives.ca/sites/default/files/uploads/publications/Manitoba%20Office/2017/03/Finding_Her_Home_%20low-res.pdf>.

¹⁸ MMIWG Report, *supra* note 7 at 537-545.

¹⁹ Sadie McInnes, “Fast Facts: 4 things to know about women and homelessness in Canada” (2016), online: *Canadian Centre for Policy Alternatives* <<https://policyalternatives.ca/publications/commentary/fast-facts-4-things-know-about-women-and-homelessness-canada>>.

²⁰ Farha & Schwan, *supra* note 2; MMIWG Report, *supra* note 7.

segregated shelter system.²¹ Indeed, policy responses to homelessness and encampments rarely account for the specific experiences of Indigenous women and gender-diverse people.²²

Individual experiences of housing discrimination reflect broader systemic failings with respect to housing in Indigenous communities.²³ Historical and ongoing processes of colonization and racism are at the root of this profound violation of Indigenous Peoples' human rights. Understanding Indigenous homelessness as rooted in disconnection from lands, culture and community reveals a distinctively Indigenous experience of homelessness.²⁴ Thus addressing Indigenous homelessness requires engagement with the ongoing dispossession of land and displacement from territory, broken Treaty promises, residential schools and removal of children into foster care, intergenerational disconnection from language and culture, chronic underfunding of housing and social services, the over-incarceration, gendered violence, and systemic discrimination in employment and housing.²⁵ Métis-Cree scholar Jesse Thistle describes this kind of "spiritual homelessness" as "being without All My Relations."²⁶ Therefore, for unhoused Indigenous Peoples, addressing homelessness "requires a holistic approach that reconstructs the links between the individual, family, community and Nation."²⁷ In the context of legal advocacy this requires advocates to foreground Indigenous self-determination and to engage with Indigenous law. We discuss this in more detail below.

²¹ Red Women Rising, *supra* note 17 at 20; McCreary Centre Society, "Raven's Children IV: Aboriginal Youth Health in B.C." (2016), online <https://www.mcs.bc.ca/pdf/ravens_children_iv.pdf>; Alex Abramovich "1 in 3 transgender youth will be rejected by a shelter on account of their gender identity/expression" (2014), online: *Homeless Hub* <<https://www.rondpointdelitinerance.ca/blog/1-3-transgender-youth-will-be-rejected-shelter-account-their-gender-identityexpression#:~:text=The%20simple%20answer%20is%20because,erasing%20trans%20people%20from%20existence>>; Janice Ristock and Art Zoccole, "Aboriginal Two-Spirit and LGBTQ Migration, Mobility and Health Research Project: Vancouver Final Report" (2011), online: <<https://www.2spirits.com/PDFFolder/2011%20Vancouver%20full%20report%20final.pdf>>.

²² Red Women Rising, *ibid* at 100.

²³ Shelagh McCartney, Jeffrey Herskovits & Lara Hintelmann, "Failure by Design: The On-Reserve First Nations' Housing Crisis and Its Roots in Canadian Evaluation Frameworks" (2018) 38:2 *The Canadian Journal of Native Studies* 101 [Failure by Design] at 113; Shelagh McCartney, Jeffrey Herskovits & Lara Hintelmann, "Developing occupant-based understandings of crowding: a study of residential self-assessment in Eabametoong First Nation" (2021) 36:2 *Journal of Housing and the Built Environment* 645 at 646; Red Women Rising, *ibid* at 88.

²⁴ Evelyn J. Peters & Julia Christensen, eds, *Indigenous Homelessness: Perspectives from Canada, Australia, and New Zealand* (Winnipeg: University of Manitoba Press, 2016).

²⁵ Jesse Thistle, "Definition of Indigenous Homelessness in Canada" (2017), online: *Canadian Observatory on Homelessness Press* <www.homelesshub.ca/IndigenousHomelessness> [Thistle] at 8; Red Women Rising *supra* note 17.

²⁶ Thistle, *ibid*.

²⁷ Peter Menzies, "Developing an Aboriginal Healing Model for Intergenerational Trauma", (2008) 46:2 *Intl J of Hlth Promotion & Edu* 41 at 47.

PART 1: THE MEANING OF A HUMAN RIGHTS-BASED APPROACH AND THE REGULATION OF ENCAMPMENTS

I. Adequate housing, the right to housing, and encampments

What is “adequate housing”?

Many contemporary legal and political conceptions of the right to adequate housing are derived from international human rights law. In particular, the *International Covenant on Economic, Social and Cultural Rights* [the “ICESCR”], which is a human rights treaty that Canada has signed and ratified.²⁸

The ICESCR declares that all state parties “recognize the right of everyone to an adequate standard of living,” including housing and the continuous amelioration of living conditions.²⁹ The right to housing is more than mere shelter. Beyond “having a roof over one’s head,” the ICESCR protects “the right to live somewhere in security, peace and dignity.”³⁰

The right to housing is interpreted broadly to be “the right to live somewhere in security, peace and dignity.”³¹ It is understood to include the essential features of: security of tenure, affordability, habitability, accessibility, cultural appropriateness, and a suitable location with access to services.

What does the progressive realization of the Right to Adequate Housing mean?

While the right to adequate housing does not require that a member state provide housing to all citizens, it does require that adequate housing options are available to “prevent homelessness” and requires States to prohibit forced evictions and address housing discrimination, obliging States to “focus on the most vulnerable and marginalized groups.”³² People have the right “to expect their Governments to be concerned about their shelter needs, and to accept a fundamental obligation to protect and improve houses and neighbourhoods, rather than damage or destroy them.”³³ Therefore, the scope of the right to housing in international law has particular implications for government responses to encampments.

In signing the ICESCR, governments undertook to take steps to progressively achieve the rights recognized in the Covenant. This ‘progressive realization’ does not simply require making progress on housing issues generally. It must be understood in relation to the rights enshrined in the ICESCR. The ICESCR commits state parties to “take steps...to the maximum of its available resources, with a view to

²⁸ International Covenant on Economic, Social and Cultural Rights, GA Res 2200A (XXI), OHCHR (3 January 1976) [ICESCR] at art 11(1).

²⁹ *Ibid.*

³⁰ United Nations Committee on Economic, Social, and Cultural Rights, General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), UNHCR, 6th Sess, UN Doc E/1992/23 (1991) [General Comment No. 4]; Office of the United Nations High Commissioner for Human Rights, “Fact Sheet No. 21, The Human Right to Adequate Housing” (2014), online: *United Nations* <https://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf> [Right to Adequate Housing].

³¹ General Comment No. 4, *ibid.*

³² Right to Adequate Housing, *supra* note 30 at 6.

³³ *Ibid* at 3.

achieving progressively the full realization of the rights recognized in the present covenant by all appropriate means, including the adoption of legislative measures.”³⁴

The Committee on Economic, Social and Cultural Rights [the Committee] has made it clear that while aspects of realizing the right to housing will inevitably take some time and resources, necessitating plans and strategies like the *National Housing Strategy* we discuss below, other obligations are immediate.³⁵

Framework for the progressive realization of housing

In meeting requirements regarding the progressive realization of the right to housing, we advance the following framework:

1. Are governments **adopting measures** to reduce and prevent homelessness and to protect the human rights of unhoused people, including encampment residents? This includes addressing systemic discrimination in housing and the impacts of colonialism.
2. Are governments applying the **maximum of available resources** to reducing and prevent homelessness? This includes ensuring investments are addressing the disproportionate impact of housing injustice and homelessness on vulnerable populations and priority groups.
3. Are they **applying all appropriate means**, including but not limited to legislative measures? This includes ensuring **immediate obligations** being met, even where longer term policy mechanisms are in place, and even where other levels of government are involved. It also includes meaningful engagement with rights-holders at all stages of housing programs and implementing the recommendations brought forward by bodies under the NHSA.

Forced evictions

An important example of an immediate obligation is legal protection against forced evictions. Forced evictions are “the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection ... in conformity with the provisions of the International Covenants on Human Rights.”³⁶ Forced evictions are never justified and are a gross violation of human rights, and are prohibited by Article 17 of the *International Covenant on Civil and Political Rights (ICCPR)*,³⁷ which declares that “no one shall be subjected to arbitrary or unlawful interference with his privacy, family, [or] home.”³⁸ This includes instances where state harassment, intimidation, or threats cause encampment residents to relocate against their will. Evictions falling outside the legal definition of “forced” may only be justified in rare circumstances and nonetheless require that relocation only be carried out with minimal force and after exploring all viable alternatives with residents in accordance

³⁴ ICESCR *supra* note 28.

³⁵ General Comment No. 4, *supra* note 30.

³⁶ United Nations Committee on Economic, Social, and Cultural Rights, General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions, UNCESCOR, 16th Sess, UN Doc E/1998/22 (1997) [General Comment No. 7].

³⁷ International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976) [ICCPR].

³⁸ *Ibid* at art 17.

with law.³⁹ Additionally, they must be consistent with the right to housing, and only occur after securing access to safe and adequate indoor shelter space appropriate to a resident's needs rather than leaving individuals unhoused.⁴⁰ These basic protections are not subject to progressive realization. They are immediate and not dependent on the resources of the state.

Indeed, protection from forced or arbitrary evictions is so central to the right to housing it has been a key focus of the UN Committee on Economic Social and Cultural Rights.⁴¹ The Committee specifically stated that forced evictions are “*prima facie* incompatible with the requirements of the Covenant.” Not only are states required to refrain from forced evictions themselves, they must also ensure the prohibition is respected by its agents or third parties, public and private. Such protection is not limited by a state's available resources.⁴² This includes enacting legislation against forced eviction as “an essential basis on which to build a system of effective protection.”⁴³ An appropriate legislative framework would include requirements for consultation, notice, provision of detailed and adequate information on planned evictions and the justification, legal remedies, and legal aid to seek redress.⁴⁴ Further, it includes the obligation for states to take all appropriate measures, to the maximum of its available resources, to ensure adequate alternative housing and that no individuals are rendered homeless or vulnerable to having other human rights violated as a result of an eviction.⁴⁵ While the existence of encampments is itself a violation of the right to housing, the protection of security of tenure extends to informal settlements and is a core element of the right to housing.⁴⁶ The Advocate's report highlights the prohibition on forced evictions of encampment residents as an urgent area of action for all levels of government.⁴⁷

II. The regulation of encampments in Canada

Different jurisdictions and levels of government largely operate in isolation with respect to encampments. This bifurcated approach to regulating encampments means that multiple laws and other rules intersect, causing considerable confusion in terms of the rights that encampment residents have and the obligations that various governments must respect. The Federal Housing Advocate's 2024 Report has rightly called on the federal government to lead the development of a human rights-based National Encampment Response Plan to coordinate an all-of-government response. This would require all governments to expressly adopt a human rights-based approach and to take all appropriate

³⁹ General Comment No. 7, *supra* note 36 at paras 13-15.

⁴⁰ See *ibid* at para 16.

⁴¹ See General Comment No. 4, *supra* note 30; General Comment No. 7, *supra* note 36. For a helpful summary of the role of the General Comments see Jesse Hohmann, *The Right to Housing: Law, Concepts, Possibilities* (London: Hart Publishing, 2013).

⁴² General Comment No. 7, *ibid* at para 10.

⁴³ *Ibid*.

⁴⁴ *Ibid*.

⁴⁵ *Ibid* at para 17.

⁴⁶ See SR Report 2019, *supra* note 15 at 6 & 23; General Comment No. 4, *supra* note 30.

⁴⁷ The Office of the Federal Housing Advocate, *Upholding dignity and human rights: the Federal Advocate's review of homeless encampments – Final report* (Ottawa: The Office of the Federal Housing Advocate, 2024) [Advocate's Final Report].

measures, to the maximum of available resources, and apply all appropriate means towards the progressive realization of the right to adequate housing.

Indigenous legal orders are a key foundation for this work. The existing legal frameworks are operating in isolation at present with no effective coordination, with particular consequences for Indigenous Peoples who comprise a disproportionate percentage of those who are unhoused. As the Assembly of First Nations has made clear, Indigenous Nations and organizations must be at the forefront of efforts to address encampments. This requires governments working with the other international and domestic legal frameworks we outline below to deeply engage with Indigenous law and governance systems in order to develop approaches that are truly human rights-based.

1. Indigenous Laws

The commitments made under the NHA have thus far failed to take up Indigenous jurisdiction and/or to look to Indigenous legal traditions in order to think through what our own responsibilities and commitments as humans must be to our fellow humans. What perspectives and values can Indigenous law bring forward for how we think about housing as a human right? Or more importantly, what are our obligations to ensure others are sheltered? What would it look like to take Indigenous law and jurisdiction over their aboriginal territories seriously in our efforts to answer these questions?

Self-determination must be central to addressing Indigenous homelessness and housing precarity.⁴⁸ As discussed in more detail below, Article 23 of the *United Nations Declaration on the Rights of Indigenous Peoples* protects the right to “be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.”⁴⁹ This requires meaningful engagement with Indigenous legal orders and the principles and processes appropriate to a particular territory and system of Indigenous governance.⁵⁰

Deep engagement with Indigenous legal orders is necessary to ensuring that conceptions and components of adequacy are “defined and assessed by” [I]ndigenous [P]eoples themselves.⁵¹ Further, understandings of homelessness must be grounded in Indigenous worldviews and experiences of colonialism. Thistle conceptualizes Indigenous homelessness as including a disconnection from one’s Indigeneity, be it cultural, spiritual, emotional, and/or physical.⁵² In consultation with Indigenous scholars, front-line workers, community members, those with lived experience of homelessness, and

⁴⁸ Canadian Observatory on Homelessness, “Closing the Circle: Discussing Indigenous Homelessness in Canada” (October 2019), online: *Homeless Hub* <<https://www.homelesshub.ca/resource/closing-circle-discussing-indigenous-homelessness-canada>>; SR Report 2014, *supra* note 3.

⁴⁹ UNDRIP, *supra* note 3 at arts 3 & 23. See also United Nations Declaration on the Rights of Indigenous Peoples Act (S.C. 2021, c. 14) [UNDRIP Act] at section 5, which states “The Government of Canada must, in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure that the laws of Canada are consistent with the Declaration.”

⁵⁰ For an introduction to engaging with Indigenous legal orders, see Val Napoleon and Hadley Friedland, *Indigenous Legal Traditions from Roots to Renaissance* (Fernwood Publishing, 2018); John Borrows, “Indigenous Legal Traditions in Canada,” (January 2005) 19 *Wash UJL & Policy*; John Borrows, *Recovering Canada: The Resurgence of Indigenous Law*, (Toronto: University of Toronto Press, 2002) [*Recovering Canada*]; et cetera. . .

⁵¹ SR Report 2014, *supra* note 3 at 18.

⁵² Thistle, *supra* note 25.

those who work in the area of Indigenous homelessness, he identified twelve dimensions of Indigenous homelessness: historic displacement, contemporary geographic separation, spiritual disconnection, mental disruption and imbalance, cultural disintegration and loss, overcrowding, relocation and mobility, going home, nowhere to go, escaping or evading harm, emergency crisis, and climatic refugee. The more these dimensions are layered on each other for an individual or community the more severe the experience of homelessness.⁵³ The following case study engages with an Anishinaabe story as one example of how Indigenous legal frameworks address the context of homelessness and understand the shared responsibilities and obligations that arise when community members experience harm and vulnerability.

Housing Rights and Responsibilities in Indigenous Legal Orders: A Case Study

Among the Anishinaabeg there is a story told about why some trees keep their leaves. In this story there is a bineshiinh, a little bird, who, in the last of the summer storms, was blown from the branch of a tree and broke his wing. The little bird was unable to fly yet he knows his friends and family were preparing to fly south for the winter. The bineshiinh tried to help himself as much as he could, hoping around for food and drinks of water. He sang his best songs to cheer up his friends and family but soon they had to leave and could not wait any longer for the little bird's wing to heal. That bineshiinh tried to remain positive, hoping about and taking care of himself throughout the fall season. But soon fall became winter. As the wind blew, that little bird became very cold and suffered. He turned to the trees for help. He asked the birch tree if he could shelter among his branches. But the birch tree responded with a voice of disdain, exclaiming that he had his own winter birds to take care of and wasn't interested in taking on any additional birds. The little bird was surprised the birch was so unfriendly but also considered that maybe another bird was just too much for the birch tree's branches to support. So that bineshiinh tried to stay positive and continued on. Next that little bird asked the mighty oak tree. Bineshiinh knew the mighty oak was strong and hoped this tree could support another little bird. But that oak also denied the little bird, saying she already had to feed the squirrels and chipmunks. She warned that the little bird wouldn't just want shelter but also food, when the winter months grew long. So the little bird went to the butternut tree. Well that butternut tree also said no to the little bird, exclaiming that it was bad enough that the Anishinaabeg and the bears were always pawing through their branches, stealing their nuts. They surely shouldn't also have to take care of this little bird. Trying to persevere, the bineshiinh next asked the willow. However, that willow tree just responded that she doesn't talk to strangers and told the little bird to just hop south if they can't fly.

Distraught, that little bineshiinh hung his head and hid under his good wing. He thought that it might be better to just let that cold winter wind take what life he had left. But then he thought of his family. He thought he should at least try and so decided to hop south.... Hoping along that little bird heard a friendly voice...it was the spruce. He called out "Little Brother, Little Brother, Come over here. You may live in my branches all winter. I have lots of room." The little bird gratefully hopped into the shelter of the spruce. The White Pine, next, offered assistance, saying he would shelter both the spruce and that little bird. The cedar followed, offering her cones for food.

As the north wind blew through, he asked the Creator if he could have all the leaves of the trees as he passed. The Creator said no, offering the leaves of the birch, oak, butternut tree and the willow but, having seen how the trees responded to the injured bineshiinh, said the North Wind must leave the

⁵³ *Ibid.*

leaves of the spruce, white pine and cedar. This is why some trees keep their leaves in the winter and others don't.⁵⁴

Stories have many functions for the Anishinaabeg, much like they do for many Indigenous nations. They detail the relationships we have to Creation, to one another, and to our self. The power of stories is found in their ability to outline the connections people have to their place, their people, and their history. As N. Bruce Duthu reminds us, "Stories carry us through time and reveal our relationships to our historical selves, to others around us, and to the natural and supernatural world. The meanings attached to these stories, like the relationships they explore, are dynamic, increasingly complex, and often surprising."⁵⁵ Stories are how we make sense of the world. They function as road maps, guiding us towards exploration, discovery, and meaning. There are a multitude of stories among the Anishinaabeg, contained in various forms, that all work toward to same end: to provide meaning to the world we live in and guide us on how to relate to one another and the world around us. It is through lived experiences, through interaction with all of creation that we come to produce the stories that serve to aid us in making sense of the world.

Stories, in teaching us how to relate to one another, are a source of law. Anishinaabe legal scholar John Borrows, in his groundbreaking study of Anishinaabe law, finds "stories express the law in Aboriginal communities since they represent the accumulated wisdom and experience of First Nations conflict resolution." He notes, "some of these narratives predate the common law, have enjoyed their effectiveness for millennia, and have yet to be overruled or abrogated."⁵⁶ Law, of course, is an important organizing force within virtually all societies. "However," Borrows reminds us, "there are many definitions and disagreements about what constitutes law... Its effect can simultaneously produce peace and chaos, depending in whose name it is administrated and from whose perspective it is processed."⁵⁷ And yet law plays an important role in each person's life as it seeks to guide how we should relate to and interact with one another. Stories are emphatically a source of law as they lay out critical principles for how the Anishinaabe order our world.

This story of why some trees keep their leaves and others don't has much to say about Anishinaabe legal orders regarding the right to housing. Indeed, it raises many questions for consideration and ultimately shifts our thinking away from questions of whether the little bird has a right to shelter, instead placing its focus on *who has a responsibility to shelter this little bird*. Indeed, if we turn to this story to bring forward potential answers regarding who has a responsibility to shelter the bird, we can draw out many insights. The story opens by informing us that the wind has blown the bineshiinh from the branch, raising questions of whether the wind or branch have a responsibility to remedy the harm that was brought to the little bird. If bineshiinh had not broken his wing, he would not have been in need of winter shelter, as he would have flown off with his relatives. This harm that resulted in his broken wing caused bineshiinh to become severed from the kin relations that ensured his safety and protections. Is it the little bird's responsibility alone to care for himself? What can mobilize our responsibility to care for others?

⁵⁴ This story is narrated by Mary Siisip Geniusz, *Plants Have So Much to Give Us, All We Have to do is Ask: Anishinaabe Botanical Teachings*, ed. Wendy Makoons Genuisz (Minneapolis: University of Minnesota Press, 2015) at 77-80.

⁵⁵ N. Bruce Duthu, "Incorporative Discourse in Federal Indian Law: Negotiating Tribal Sovereignty through the Lens of Native American Literature," *Harvard Human Rights Journal* 13 (Spring 2000) at 141-142.

⁵⁶ *Recovering Canada*, *supra* note 50 at 13.

⁵⁷ John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 7.

We also learn how some of the trees are concerned with the burdens they already carry, their responsibilities to others. When might an offer of care limit our abilities to provide for those whom we already have obligations to? Are there limits on our obligations to offer care? What forms of responsibility does an offer of care produce for those receiving care? The trees remind us that we are all always encumbered by responsibilities and obligations to others. The birch spoke of obligations they had to other winter birds. Indeed, the bineshiinh was understanding that perhaps the birch's branches could not bear the weight of another little bird. While important to understand one's own limits, exclusive attention to these limitations provided no solutions for the little bird's needs to be met. Indeed, the oak and butternut tree also focused exclusively on their own limitations. While important to recognize that one support – shelter – could imbue additional obligations – the responsibility to feed – these trees failed to center the supports they could offer but instead focusing exclusively on the ones they would be unable to meet. The spruce, white pine and cedar worked collectively to support one another in meeting the needs of the little bird. They shared the responsibilities so that the burden wouldn't befall just one of the trees alone.

The willow was unwilling to speak to anyone that was a stranger. This approach, while a protective stance that mitigated the chance of harm or burden for the willow, also ensured the willow would be unable to make new kin out of strangers. In the process, this closed off approach also functioned to limit the kin with whom the willow would be able to turn to in times of need, decreasing their own circle of supports. The Creator, seeing the generosity and acts of care carried out by the spruce, white pine and cedar, rewarded these trees by ensuring they would keep their leaves in the winter, denying the north wind the ability to take them and ensuring the trees ability to carry out these acts of care into the future. The story, in many ways, serves to impart the importance of an "ontology of care". This ontology is formed through Indigenous legal orders that flow from relationships with the land, other than humans and humans. These relationships are rooted in love and respect and account for our interdependence through reciprocal modes of relating.⁵⁸

These ontologies of care illustrated in the story *Why Some Trees Keep their Leaves* are animated by Indigenous legal orders in the everyday. One space where we see Indigenous law flourishing is in urban Indigenous territories, with individuals coming together to carry out acts of care for their relatives struggling with homelessness. In Winnipeg, the Mama Bear Clan movement patrols the streets, providing food and other supports for people who are unhoused. The Mama Bear Clan grew out of the Woman's Warrior Circle from the North Point Douglas Women's Centre. The Mama Bear Clan is a predominantly Indigenous women-led and man supported group of volunteers that are committed to providing supports for those in need. Recognizing the community of unhoused as both members of their larger community and as relatives in need of care, many of the volunteers see their own lives as intersecting with those in need.⁵⁹ These ontologies of care are also being carried out by Indigenous peoples in Ottawa. Operating out of the Odawa Native Friendship Centre, the Bannock Bus program delivers food, clothes and other supports to those struggling with homelessness or in need. Jeff Budge, a delivery driver interviewed by APTN, spoke of the joy that helping others brings to him. He also

⁵⁸ Shiri Pasternak, *Grounded Authority: The Algonquins of Barriere Lake Against the State* (Minneapolis: University of Minnesota Press, 2017). Also see Settler Colonial and Indigenous Geographies, Response by Shiri Pasternak, *Society and Space* (2019), online: <<https://www.societyandspace.org/articles/response-by-shiri-pasternak>>.

⁵⁹ Martha Troian, "Mama Bear Clan: Meet the women-led group patrolling Winnipeg streetsm" *CBC News* (30 November 2016), online: *CBC* <<https://www.cbc.ca/news/indigenous/mama-bear-clan-winnipeg-1.3872964>>.

mentioned how happy those receiving supports are to see the Bannock bus and be able to connect with folks offering care and support.⁶⁰

These acts of care both serve to recognize a responsibility to care for those within their jurisdiction and to provide supports for those in need. Though animated through volunteer labor and urban service providers, these acts of care are embodiments of Indigenous law and jurisdiction. Much like the spruce, white pine and cedar, volunteer and service providers are carrying out Indigenous legal orders in urban centers, legal orders that centre ontologies of care for others, that recognize we are all related and that focus on our responsibilities to one another. Instead of focusing in on the limitations of care they can provide, these volunteers and service providers work together to bring forward the supports they have to offer. While not a remedy for homelessness, these acts of care centre the humanity of individuals and recognize we all deserve care and support. Recognizing Indigenous law and jurisdiction can bring forward the various acts of care that should be carried out when there is a lack of housing as well as expand whom should be brought into policy making decisions in relation to encampments and services.

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

One emerging legal tool to advance Indigenous self-determination and the role of Indigenous legal orders is the UNDRIP. The UNDRIP sets minimum standards to support the survival, dignity, and wellbeing of Indigenous Peoples grounded in binding international law in treaties, conventions and customary international law.⁶¹ While it does not regulate encampments directly, the Supreme Court of Canada has recognized that UNDRIP “has been incorporated into the country’s positive law”. Therefore, it is now therefore a crucial source of legal guidance about the relationship between the Crown and Indigenous Peoples in Canada.⁶² As a Declaration rather than a Treaty, the UNDRIP may not itself formally create binding legal obligations, and domestic implementation legislation thus far obligate governments to create processes to determine how it will be implemented rather than directly implementing it. However, many of the articles are grounded in obligations set out in binding international instruments and customary international law. These attract the presumption of conformity in Canadian law, which means that courts will presume Canadian laws uphold our international commitments unless the law clearly indicates otherwise.⁶³ Further, the declaration reflects relevant and persuasive sources to inform the interpretation of domestic law and the review of government decision making, particularly the *Charter*.⁶⁴ Advocacy about encampments must therefore reflect the interdependence and indivisibility of the right to adequate housing and the rights and obligations set out in the UNDRIP. Given the disproportionate representation of Indigenous Peoples in encampments, all

⁶⁰ Jamie Pashagumskum, “Bannock bus delivering meals to people of Ottawa,” *APTN National News* (8 December 2020), online: <<https://www.aptnnews.ca/national-news/bannock-bus-delivering-meals-to-people-of-ottawa/>>.

Also see Kanatase Horn, “Indigenous Law is Already Here: Law, Kinship, and Mobile Obligations at the Owada Native Friendship Centre,” Dissertation Thesis, Law and Legal Studies (Carleton University, 2024).

⁶¹ UNDRIP, *supra* note 8.

⁶² *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 at para 4.

⁶³ *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58 at paras 47-48.

⁶⁴ *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at 861; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313 at 394; *Quebec (Attorney General) v 9147-0732 Québec inc*, 2020 SCC 32 at para 32 [Quebec].

government responses and legal or policy frameworks should be guided by and must account for the UNDRIP.

As we noted above, the rights enshrined in the UNDRIP are grounded in and flow from the foundational recognition of Indigenous self-determination.⁶⁵ Article 3 recognizes the right of self-determination and the freedom to determine political status and pursue economic, social, and cultural development. The structure of the UNDRIP makes it clear that this is a “precondition” for the realization of other rights, particularly economic and social rights relevant to the right to housing.⁶⁶ As the UN Special Rapporteur on the right to adequate housing has recognized, “[t]he right to housing of [I]ndigenous [P]eoples – properly understood – is an important but often neglected aspect of the right to self-determination and of the pursuit of economic, social and cultural development.”⁶⁷ Several articles are broadly relevant to housing, and to government responses to encampments specifically. Article 1 guarantees Indigenous Peoples’ right to full enjoyment of all human rights and fundamental freedoms recognized in international law, which includes the right to adequate housing. Housing is specifically mentioned in two articles. Article 21 states that Indigenous Peoples have the right to the improvement of economic and social conditions, including housing and sanitation. Article 23 recognizes that self-determination requires that Indigenous Peoples have the ability to develop and administer health, housing, and other economic and social programs affecting them through their own institutions and in accordance with their needs. We note the declaration does not differentiate between urban and rural and remote Indigenous populations in recognizing the right to self-determination. Realization of the right to housing is also inextricably linked to the protection of Indigenous rights to lands and resources.⁶⁸ Article 26 protects the right to traditional territories, including the right to own, use, develop and control lands, territories and resources, and requires states to recognize and protect them. Article 10 establishes that Indigenous Peoples “shall not be forcibly removed from their lands or territories.”

In her report on Indigenous Peoples and the right to adequate housing, the then Special Rapporteur, Leilani Farha recognized the indivisibility of the rights articulated by the UNDRIP and the right as it is set out in the ICESCR.⁶⁹ This relationship, and specific federal obligations to Indigenous Peoples in the context of encampments, have been strengthened by the enactment of both the *NHSA* and the *United Nations Declaration on the Rights of Indigenous Peoples Act*. The *United Nations Declaration on the Rights of Indigenous Peoples Act* imposes obligations to bring federal law into compliance with international human rights law as per the *UNDRIP*.⁷⁰ Thus, the *NHSA* must comply with the UNDRIP, including ensuring housing plans and policies further and uphold self-determination. Beyond the federal *UNDRIP* statute, other Canadian governments at the provincial and municipal levels have endorsed or adopted the *UNDRIP*.⁷¹ International human rights obligations extend to all levels and branches of

⁶⁵ Camilo Pérez-Bustillo & Jessie M. Hohmann, “Indigenous Rights to Development, Socio-Economic Rights, and Rights for Groups with Vulnerabilities: Articles 20 – 22, 24 and 44,” *Oxford Commentaries on International Law: A Commentary on the United Nations Declaration on the Rights of Indigenous Peoples* (OUP, 2017) 484.

⁶⁶ *Ibid.*

⁶⁷ SR Report 2014, *supra* note 3.

⁶⁸ *Ibid.*; Farha & Schwan, *supra* note 2; Anthony Thalia & Jessie Hohmann, “Indigenous Housing Rights and Colonial Sovereignty: Self-Determination and Housing Rights beyond a White Possessive Frame,” *Social & Legal Studies* (2014) 14.

⁶⁹ SR Report 2014, *ibid.*

⁷⁰ *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021 c 14 [*UNDRIP Implementation Act*].

⁷¹ See e.g. *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44 [*DRIPA*]; *UNDRIP Act*, *ibid.*; City of Toronto, “Commitments to Indigenous Peoples” online: <<https://www.toronto.ca/city-government/accessibility->

government, including municipalities, and inform the interpretation of domestic law, including constitutional protections for Aboriginal peoples under Section 35(1).⁷²

However, Canada has not formally recognized the right to housing for Indigenous Peoples as situated in the context of s. 35 constitutional rights and treaty relationships. Rather than adopting a rights-based approach, Canada has continued to download responsibility without the necessary support and recognition for Indigenous self-determination.⁷³ Thus, one crucial area of ongoing advocacy is ensuring that policy related to Indigenous housing, including encampments, is grounded in a renewed Nation-to-Nation relationship consistent with a rights-based approach and informed by the interrelated commitments to self-determination and the right to housing in the *NHSA* and the *UN Declaration Act*. Federal leadership in this regard would be a strong indication to other levels of government that encampment responses must also be rights-based and start from a Nation-to-Nation relationship.

The Duty to Consult and Accommodate

While our emphasis in the report is on the role of Indigenous law and the obligation to respect Indigenous jurisdiction, we note that all governments have a constitutional duty to consult and accommodate Indigenous Peoples, as the Supreme Court set out in *Haida Nation*.⁷⁴ To date, this duty has not been applied in the context of encampments, in part because the doctrine has been developed largely in the context of land-based claims and natural resource extraction rather than urban Indigenous social and economic cases. As Julia Hughes and Roy Stewart have noted, courts have “taken a predominantly property-based approach that is in tension with the sovereign and self-governance dimensions of Aboriginal rights.”⁷⁵ Urban Indigenous communities do not necessarily map on to the type of rights holder and territorial relations recognized by the duty to consult case law. The application of the duty to consult and accommodate in encampment cases is also challenged by the communal nature of section 35 rights, which limits individuals from bringing a claim.⁷⁶ Thus, we recognize the limitations of the duty as it is currently set out in Canadian colonial law. In our view the duty to consult and accommodate is most appropriately applied as a way to recognize and enhance Indigenous jurisdiction in the context of encampments. In this way it could serve as a potential, albeit limited, tool to advance the recognition of Indigenous legal orders as essential to encampment responses. We discuss Indigenous jurisdiction in more detail below in the context of the Megan or Beacon Hill Park case study.

From this perspective the duty to consult and accommodate can inform the context of encampments at two levels: first, respect for the self-determination of urban Indigenous communities and the systems of governance they develop; and second, obligations to the holders of s 35 rights to the relevant territory as decision makers, including the increasing involvement of Indigenous Nations in the development, provision, and governance of housing and programs for unhoused individuals.⁷⁷ Restricting the duty to

human-rights/indigenous-affairs-office/commitments-to-indigenous-peoples/.

⁷² SR Report 2014 *supra* note 3.

⁷³ Crown-Indigenous Relations and Northern Affairs Canada, *Evaluation of On-Reserve Housing*, (Ottawa: 2017), online: <<https://rcaanc-cirnac.gc.ca/eng/1506018589105/1555328867826>>.

⁷⁴ *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida*].

⁷⁵ Julia Hughes and Roy Stewart, “Urban Aboriginal people and the honour of the crown—a discussion paper.” 66 UNBLJ (2015) 263 at 268.

⁷⁶ *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26.

⁷⁷ Hughes & Stewart, *supra* note 75 at 296. See e.g. Mississaugas of the New Credit First Nation, “Trailblazers: The Mississaugas of the New Credit First Nation Strategic Plan” (September 2017) at 39 & 48.

consult to a property-based framework in the context of encampments would compound the exclusionary property rights approaches municipalities have taken thus far. Further, while representational issues are genuinely complex, as Hughes and Stewart point out, there is a significant risk that urban Indigenous Peoples are being left out of processes and decisions that directly impact their rights and therefore, that processes are failing to meet constitutional requirements.⁷⁸ This is particularly important in the context of encampments where residents experience marginalization on multiple intersecting bases.

The *UNDRIP* requires governments to obtain the free, prior and informed consent of Indigenous Peoples in all decisions that affect their socio-economic development.⁷⁹ Canadian courts have also recognized the right to self-determination applies to urban Indigenous Peoples and communities with respect to social programs and decisions that affect them.⁸⁰ Therefore, while there is limited case law on the meaning of the duty to consult and accommodate in this context, it is clear that relevant government actors have legal duties to consult and engage with Indigenous governments, as well as with regional and urban Indigenous organizations providing programs and services, about policies and priorities related to housing and homelessness policy. Where programs and services aimed at Indigenous Peoples are designed in ways that exclude input and participation from urban Indigenous communities this can impact their human dignity and violate section 15 of the *Charter* which protects equality rights.⁸¹ Further, forced evictions of Indigenous Peoples from encampments *prima facie* do not comply with requirements for meaningful good faith consultation about and involvement in social programs, nor are they consistent with the recognition of Indigenous self-determination. Given that more than half of all Indigenous Peoples live in urban areas, constitutionally compliant policy-making requires robust frameworks for urban Indigenous consultation across the spectrum of housing precarity.⁸² As Hughes and Stewart note, a lack of consultation about changes to funding or policy in areas like housing, cultural services, and employment supports can have “devastating impacts when programs and services are altered or eliminated.”⁸³

2. Public International Law

International covenants such as the *ICESCR* have been cited in case law concerning encampments, including *Victoria v Adams* discussed above.⁸⁴ The British Columbia Court of Appeal (BCCA) expressly affirmed the use of international human rights instruments as an interpretive aid to inform the scope and content of s. 7 of the *Charter*. Thus, municipal decisions regarding encampments and the realization of the right to housing must be grounded in international human rights obligations.

At trial in *Adams* Justice Ross referred to several international human rights instruments including the

⁷⁸ Hughes & Stewart, *ibid* at 294.

⁷⁹ *UNDRIP*, *supra* note 8 at arts 10, 11(2), 19, 28(1), 29(2), and 32(2).

⁸⁰ *Canada (AG) v Misquadis*, 2003 FCA 370; *Ardoch Algonquin First Nation v Canada (AG)*, 2003 FCA 473 at para 36 [*Ardoch Algonquin*].

⁸¹ *Ardoch Algonquin*, *ibid* at para 141.

⁸² See Statistics Canada, “Canada’s Indigenous Population” (2023), online:

<<https://www.statcan.gc.ca/o1/en/plus/3920-canadas-indigenous-population>>; Statistics Canada, “How the Census counts Indigenous people living in urban areas (2022), online: <<https://www150.statcan.gc.ca/n1/pub/11-627-m/11-627-m2022059-eng.htm>>.

⁸³ Hughes & Stewart, *supra* note 75.

⁸⁴ *Victoria (City) v Adams*, 2009 BCCA 563 [*Adams BCCA*] at para 33.

ICESCR. She concluded that while “the various international instruments do not form part of the domestic law of Canada, they should inform the interpretation of the *Charter* and in this case, the scope and content of s. 7.”⁸⁵ In rejecting the BC Attorney General’s argument that international legal instruments provided no assistance, Ross J. emphasized that the Supreme Court of Canada (SCC) had long recognized the interpretive value of international human rights law in interpreting the *Charter*.⁸⁶ Indeed she noted Canada’s own responses to the United Nations Committee reviews of Canada’s human rights record in which they acknowledged they were bound by the Supreme Court’s findings that the *ICESCR* could inform s. 7 interpretation, including that people are not deprived of the basic necessities of life.⁸⁷ In examining the scope of Article 11.1 of the *ICESCR* Ross J. specifically pointed to the importance of security of tenure and protection against forced eviction.⁸⁸ The trial judge also cited *Suresh v Canada (Minister of Citizenship and Immigration)*⁸⁹ in which the SCC held that the principles of fundamental justice are informed by both the Canadian experience and international human rights instruments, including declarations, covenants, conventions, decisions from international tribunals, and customary norms.⁹⁰

Despite there being no issue raised on appeal about reference to international instruments in the trial decision, the BCCA expressly accepted the British Columbia Superior Court (BCSC)’s analysis on the application of international human rights law. The Court noted that the SCC had long settled the question.⁹¹ Using international human rights instruments as interpretive aids, they stated, “is well established in Canadian jurisprudence”, particularly with respect to s 7.⁹²

3. Domestic Laws

In relation to housing and homelessness, federal, provincial and municipal governments each point their fingers at one another as primarily responsible due to the overlapping jurisdictional issues inherent in housing. Unfortunately, Canada’s Constitution doesn’t provide an explicit answer: Section 91 provides that the federal government has authority over matters of a “national” or “international” nature, while Section 92 states that provinces are to focus on issues closer to home, such as property and civil rights, and municipalities. Housing isn’t explicitly included in either list. The result of this constitutional silence is a deeply fragmented policy framework and a lack of interjurisdictional cooperation when it comes to the governance of encampments.

This section introduces the constitutional provisions, unwritten constitutional principles, legislation and bylaws that each play a role in encampments.

a. Federal legislation: National Housing Strategy Act

⁸⁵ [Victoria \(City\) v. Adams, 2008 BCSC 1363](#) [Adams BCSC] at para 100.

⁸⁶ *Ibid* at para 95, citing *Baker*, *supra* note 64 at para 70.

⁸⁷ See *Adams BCSC*, *supra* note 85 at para 99. See also [Irwin Toy Ltd. v. Quebec \(Attorney General\), \[1989\] 1 SCR 927](#) at 1003.

⁸⁸ *Adams BCSC*, *ibid* at para 89, citing General Comment No. 4, *supra* note 30 at 114.

⁸⁹ [Suresh v. Canada \(Minister of Citizenship and Immigration\), 2002 SCC 1](#).

⁹⁰ *Adams BCSC*, *supra* note 85 at paras 161-162.

⁹¹ *Adams BCCA*, *supra* note 84 at paras 33-35.

⁹² See *ibid* at para 35.

The most important legislative framework at the federal level is the 2019 *National Housing Strategy Act* [NHTSA], which enshrined the right to adequate housing and government obligations for progressive realization of the right in domestic law.⁹³

The NHTSA is the result of long-term advocacy by people with lived experience of housing precarity and homelessness and housing advocates about the need for Canadian governments to recognize and realize the right to housing as set out in international law. In 2017, the federal government published a preliminary National Housing Strategy document, which outlined a commitment to a human rights-based approach.⁹⁴ Civil society organizations provided significant feedback on the document, particularly about the need to clearly and expressly articulate recognition of housing as a human right and to provide for effective monitoring and remedies.

The NHTSA Incorporates the Right to Housing in International Law into Domestic Law

In the 2019 Act, the federal government expressly enshrined the right to adequate housing in federal law.⁹⁵ The Act expressly recognizes that the right to adequate housing is a fundamental human right affirmed in international law and commits to the progressive realization of the right to adequate housing as set out in the *International Covenant on Economic, Social and Cultural Rights*.⁹⁶ It recognizes the right to adequate housing as inherently linked to human dignity and well-being. Section 4 of the Act states:

It is declared to be the housing policy of the Government of Canada to:

- a) recognize that the right to adequate housing is a fundamental human right affirmed in international law;
- b) recognize that housing is essential to the inherent dignity and well-being of the person and to building sustainable and inclusive communities;
- c) support improved housing outcomes for the people of Canada; and
- d) further the progressive realization of the right to adequate housing as recognized in the International Covenant on Economic, Social and Cultural Rights.

The structure of the operational sections of the Act that follow from this s 4 policy declaration are all rooted in this recognition of the right to housing and its relationship to other human rights. They should

⁹³ *National Housing Strategy Act*, SC 2019, c 29, s 313 [NHTSA]; see Bill C-97 (First Reading) April 8, 2019, online: <<https://parl.ca/DocumentViewer/en/42-1/bill/C-97/first-reading>>. See also discussion of the process by Bruce Porter, "Implementing the Right to Adequate Housing Under the *National Housing Strategy Act*: The International Human Rights Framework," (Federal Housing Advocate, 2021), online: <<https://www.socialrights.ca/2021/Porter%20-%20NHTSA%20&%20IHL.pdf>> at 12-13 [Porter].

⁹⁴ See Canada, Employment and Social Development Canada, *Canada's National Housing Strategy – A place to call home* (Gatineau: Employment and Social Development Canada, 2018), online: <<https://eppdscrmssa01.blob.core.windows.net/cmhcprodcontainer/sf/project/placetocallhome/pdfs/canada-national-housing-strategy.pdf>>.

⁹⁵ *Supra* note 93.

⁹⁶ NHTSA, *supra* note 93 Preamble; ICESCR *supra* note 28.

be interpreted consistently with Canada's obligation to progressively realize the right to adequate housing.

What does the NHTA require the federal government to do?

The *NHTA* obligates any federal government to develop and maintain a National Housing Strategy [NHS] that accounts for human rights obligations:

5 (1) The Minister **must develop and maintain** a national housing strategy to further the housing policy, **taking into account** key principles of a human rights-based approach to housing.⁹⁷

The *NHTA* prescribes minimum content for the NHS including a long-term vision for housing, national goals and related priorities, initiatives, timelines and desired outcomes, and participatory processes for ongoing inclusion and engagement, including of vulnerable groups and persons with lived experiences of housing need. The Act requires an explicit focus on improving housing outcomes for persons in the greatest need.⁹⁸

Participation in review of the NHS and taking action to uphold the commitments therein are important advocacy opportunities. This includes the potential for litigation where the NHS falls short or where it is not being fulfilled. The existing NHS has been critiqued on a number of fronts, including the lack of alignment with the *NHTA*.⁹⁹ A number of critiques are particularly relevant to the context of encampments:

- 1) The failure to eliminate homelessness, including adopting and funding timelines and plans to do so and to appropriate measure progress;¹⁰⁰
- 2) The emphasis on a limited definition of "chronic homelessness", which fails to account for the ways in which homelessness is experienced, particularly by women, girls and gender-diverse people, as well as Indigenous Peoples, immigrants and refugees;¹⁰¹
- 3) Reliance on market housing and inappropriate measures of affordability, as well as inadequate support for non-market (including non-profit and social) housing means NHS programs are

⁹⁷ *NHTA*, *ibid* at s 5(1).

⁹⁸ See *ibid* at s 5.

⁹⁹ Canada Human Rights Commission, "Canada needs a National Right to Housing Strategy" (2022), online: <<https://www.housingchrc.ca/en/canada-needs-a-national-right-to-housing-strategy#:~:text=Housing%20is%20a%20fundamental%20human,Strategy%20to%20advance%20this%20right>>.

¹⁰⁰ Office of the Auditor General of Canada, *Chronic Homelessness*, Report (Ottawa, 2022), online: <https://www.oag-bvg.gc.ca/internet/docs/parl_oag_202211_05_e.pdf>.

¹⁰¹ Kaitlin Schwan & Nadia Ali, "A Rights-Based, GBA+ Analysis of the National Housing Strategy" (Toronto: Women's National Housing and Homelessness Network, 2021), online: <<https://womenshomelessness.ca/wp-content/uploads/EN-Rights-Based-GBA-Analysis-of-NHS-28-Sept-2021.pdf>>; Michèle Biss & Sahar Raza, "Implementing the Right to Housing in Canada: Expanding the National Housing Strategy" (2021), online: *The National Right to Housing Network* <<https://housingrights.ca/wp-content/uploads/NRHN-OFHA-Expanding-the-NHS-2021.pdf>>.

excluding those most in need of housing, including unhoused people and could exacerbate the financialization of housing;¹⁰²

- 4) The NHS does not require governments to adopt measures to stop forced evictions;¹⁰³
- 5) NHS programs do not adequately address structural inequalities in access to housing;¹⁰⁴
- 6) The NHS lacked an Urban, Rural and Northern Indigenous housing strategy and does not recognize Indigenous self-determination as required by the UNDRIP;¹⁰⁵
- 7) The NHS does not create the conditions for interdepartmental or intergovernmental cooperation and has not resulted in a whole-of-government response within the federal government;¹⁰⁶
- 8) The NHS fails to hold other levels of government accountable for human rights obligations related to the right to adequate housing;¹⁰⁷
- 9) The NHS provides for limited opportunities for meaningful engagement;
- 10) The NHS does not hold the private sector accountable for the provision of affordable housing or protection of the right to adequate housing;
- 11) There is no explicit justiciable right to housing in Canada under the statute.¹⁰⁸
- 12) There is confusion regarding targets and inadequate systems in place to monitor progress.¹⁰⁹

Thus, the NHS provides for some but not all of Canada's obligations. In particular, it does not address some of the immediate obligations that relate to encampments and does not ensure that all appropriate measures are being taken to the maximum of available resources.

As the signatory to the international instruments Canada has committed to the federal government has ultimate responsibility to see that their obligations are fulfilled, regardless of internal divisions of responsibility.¹¹⁰ After ratification states can choose to delegate the implementation of the treaty terms

¹⁰² Biss & Raza, *ibid*.

¹⁰³ *Ibid*.

¹⁰⁴ Schwan & Ali, *supra* note 101 at 10-11.

¹⁰⁵ Biss & Raza, *supra* note 101; Sylvia Maracle, Justin Marchand, Margaret Pfoh, Marc Maracle, Tanya Sirois, Marcel Lawson Swain, Patrick Stewart, Pamela Glode Desrochers, Damon Johnston, & Leilani Farha, "Statement on National Urban Indigenous Housing Strategy" (11 December 2019), online: <<https://ofifc.org/wp-content/uploads/2020/03/Statement-on-National-Urban-Indigenous-Housing-Strategy-11-12-19-1.pdf>>; Daniel J. Brant & Catherine Irwin-Gibson, "Urban, Rural, & Northern Indigenous Housing: The Next Step" (2019), online: *Canadian Housing and Renewal Association* <https://chra-achru.ca/wp-content/uploads/2019/09/20190802-urn_indigenous_housing_final_report.aug26.2019.pdf>.

¹⁰⁶ Office of the Parliamentary Budget Officer (PBO), *Federal Program Spending on Housing Affordability*, Report (Ottawa, 2019), online: <https://publications.gc.ca/collections/collection_2019/dpb-pbo/YN5-191-2019-eng.pdf>.

¹⁰⁷ Biss & Raza, *supra* note 101.

¹⁰⁸ See *ibid*; *supra* note 106. But note that Section 7 of the *Charter of Rights and Freedoms* has been used as the basis for justiciable rights to housing in Canada, and this area of law continues to develop. See also Bruce Porter on the good faith obligation on states to perform their treaty obligations under customary international law, "Implementing the Right to Adequate Housing Under the National Housing Strategy Act: The International Human Rights Framework (Office of the Federal Housing Advocate, 2021), online: <<https://www.socialrights.ca/2021/Porter%20-%20NHSA%20&%20IHL.pdf>>.

¹⁰⁹ Michèle Biss, Bruce Porter, Sahar Raza, & David Desbaillets, "Progressive Realization of the Right to Adequate Housing: a Literature Review" (2022), online (pdf): <housingrights.ca/wp-content/uploads/NHC-Progressive-Realization-Paper_EN.pdf>.

¹¹⁰ See *ibid* at 202.

to other levels of government, who are bound by those obligations.¹¹¹ Nonetheless, “for the purposes of international responsibility the conduct of [the State’s] institutions... [are] attributable to the State, even if those institutions are regarded, in domestic law, as autonomous and/or independent of the central executive government.”¹¹² The division of responsibilities across governments must be consistent with the State’s compliance with international human rights obligations.¹¹³

This means that the federal government has a leadership role to ensure human rights issues are addressed regardless of domestic legal jurisdiction. In the context of encampments, the federal government can do so in three broad ways.

First, by aligning its own laws, policies and practices with human rights law it can serve as a model for other governments. Immediate federal action includes prohibiting forced evictions of encampments on all federal lands, including lands operated by agencies and other federal entities. Further, urgent action to allocate specific funding to address encampments in communities across Canada to the maximum of all available resources, focused on funding for deeply affordable and low-barrier non-market housing, is necessary to align NHS programs with section 5 of the Act and Canada’s international obligations to focus on those with the greatest needs.

Second, it can bring other governments, agencies and departments together to coordinate urgent and effective responses to homelessness in a timely manner. In her 2024 calls to action, the Federal Housing Advocate called for a National Encampments Response Plan in order to bring together the multiple governments involved in the response to homelessness.¹¹⁴

Third, the federal government can use its role as a funder to require provinces, territories, and municipalities to align their own laws, policies and programs with human rights obligations. Under this approach, all funding agreements would ensure that federal funding is contingent on human rights compliance.

Access to justice mechanisms for encampment residents and advocates under the NHSA

Meaningful engagement with people with lived experience of housing injustice is a core element of the right to adequate housing. As will be discussed below, this concept has been developed in international legal forums and in other jurisdictions such as South Africa and should be central to the implementation of the NHSA, but also to the realization of the right to adequate housing more broadly by all levels of government. Thus, the NHSA mechanisms will play a key role in this, but parallel mechanisms will be

¹¹¹ UN Human Rights Council Advisory Committee, Role of Local Government in the Promotion and Protection of Human Rights, UNGAOR, 13th Sess, A/HRC/30/49 (2015) at para 21.

¹¹² *Ibid* at para 17.

¹¹³ See SR Report 2014 at *supra* note 3.

¹¹⁴ *Supra* note 47.

required at all levels of decision making. Federal leadership in developing and supporting opportunities for meaningful engagement will be essential to ensure they are human rights-based.¹¹⁵

The NHTA takes a systemic approach to housing issues rather than focusing on the adjudication of individual claims. It creates opportunities for individuals and groups to draw attention to housing issues and to participate in the development of solutions and to identify key areas for law reform. By taking a systemic approach the Act provides opportunities to raise and engage systemic elements of housing justice that courts and tribunals have been unwilling or unable to address. Indeed, given that systemic discrimination limits access to justice in existing forums, the Act emphasizes a different form of accountability.¹¹⁶

The NHTA established the Federal Housing Advocate whose wide mandate includes monitoring the progressive realization of the right to housing and the goals and timelines of the NHT, conducting research on systemic housing issues and conditions affecting the housing system, engaging with and receiving submissions from members of Indigenous Peoples and disadvantaged groups, and persons with lived experience of housing need and homelessness and providing advice to the Minister.¹¹⁷ The Advocate reports findings and recommendations on housing policy within federal jurisdiction to the Minister.¹¹⁸ The Minister is required to respond to reports from the Advocate.¹¹⁹ Notably the Advocate can receive submissions and conduct reviews of the systemic issues raised by submitters.¹²⁰

The NHTA creates a National Housing Council that provides advice to the Minister, particularly on the effectiveness of the National Housing Strategy.¹²¹ Members are appointed by the Minister, who must consider the importance of representation of members of vulnerable groups, persons with lived experience of housing need and homelessness, the diversity of Canadian society, and human rights expertise.¹²² The Advocate sits on the Housing Council as an ex officio member.

A Review Panel may be constituted by the Council on the request of the Advocate to review systemic issues within the jurisdiction of Parliament. A Review Panel must be constituted by the Council on the request of the Advocate to review systemic issues within the jurisdiction of Parliament that have been identified by the Advocate or identified in a submission received by the Advocate.¹²³ The Panel must hold a hearing into the issue identified and the Act requires the process to include opportunities for affected individuals and groups to participate, as well as groups with human rights and housing

¹¹⁵ *Ibid* at 19; Farha & Schwan, *supra* note 2; Canadian Lived Experience Leadership Network, “Our 7 Principles” online: <<https://cleln.ca/who-we-are/our-7-principles/>>.

¹¹⁶ Porter, *supra* note 93.

¹¹⁷ NHTA, *supra* note 93 at s 13.

¹¹⁸ *Ibid* at ss 13(g)(h).

¹¹⁹ *Ibid* at s 17.

¹²⁰ *Ibid* at s 13.1(1). Indeed, the Advocate undertook a systemic review of encampments in 2023 and released a robust set of recommendations for all levels of government in her 2024 report. See the final report, <https://www.housingchrc.ca/en/publications/upholding-dignity-and-human-rights-federal-housing-advocates-review-homeless>.

¹²¹ *Ibid* at s 6.

¹²² *Ibid* at s 8.

¹²³ *Ibid* at ss 13.1(1)(2).

expertise. The Panel is required to prepare a report and can make recommendations to the Minister.¹²⁴ The Minister is required to respond and bring the response before Parliament.¹²⁵

Whether these mechanisms effectively contribute to the progressive realization of the right to adequate housing depends on whether they are sufficiently funded and staffed. There must be political will to treat the right to housing as a human right and therefore prioritize funding, oversight, and implementation. To be effective, access to justice opportunities require substantial funding to support advocacy, including the resources to build strong systemic and intersectional analysis of housing issues.¹²⁶ This is particularly challenging in the context of encampments and homelessness where data is often challenging to access or non-existent.¹²⁷ Thus, to make a difference for encampment residents this requires not only funding, but also respect for the expertise and the structures of leadership and decision making that emerge in encampments. Support for outreach and education to ensure encampment residents and the advocates they trust know about and understand the NHTA mechanisms will also be crucial. At present neither the Act nor the NHTA put these in place, other than through the work of the Federal Housing Advocate. Notably, research from 2021 noted that opportunities for engagement directly with the federal government have been limited since the inception of the NHTA.¹²⁸

The NHTA has not yet been found to include a justiciable right to housing

The alternative claiming mechanisms established under the Act are important alternatives to expensive and often-delayed litigation-based rights claiming. However, it is critical to note the NHTA has not yet been found to create a justiciable right, including affording individuals or groups legal remedies akin to *Charter* rights for violations of the right to housing. Thus, the emphasis on mechanisms designed to address systemic issues means it will nonetheless continue to operate alongside *Charter*-based litigation until the right to housing is recognized under the *Charter* and other human rights regimes that create justiciable rights.

We note this is a significant shortfall of the NHTA framework from an international human rights law perspective.¹²⁹ Given the failure of Canadian courts to recognize the right to housing as protected under the *Charter*, the NHTA would have been an ideal opportunity to address this gap.

Charter-based litigation is expensive and lengthy and requires financial support. This work to advance the right to housing in the courts in the context of encampments remains important, particularly where immediate human rights violations are occurring, and it is complementary to the systemic opportunities under the NHTA. Thus, litigation support funding must be available to encampment residents and advocates.

Further, as in other areas of law, the NHTA should guide federal government litigation strategy. Guidance for counsel would include avoiding procedural tactics that diminish access to justice for those

¹²⁴ *Ibid* at s16.3.

¹²⁵ *Ibid* at s 17.2(1).

¹²⁶ Biss & Raza, *supra* note 101 at 71.

¹²⁷ *Ibid*.

¹²⁸ *Ibid*.

¹²⁹ *Ibid*; Leilani Farha, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to Adequate Standard of Living, and on the Right to Non-Discrimination in this Context*, UNGAOR, 37th Sess, UN Doc A/HRC/37/53 (2018) [SR Report 2018].

facing housing need and to avoid arguments that deny positive obligations pursuant to the right to housing.

The potential of the NHSA as a basis for legal action

In 2010, four inadequately housed people and the Centre for Equality Rights in Accommodation brought an action against the Attorneys General of Ontario and Canada as respondents and sought to challenge the “changes to legislation, policies, programs and services, which have resulted in homelessness and inadequate housing.”¹³⁰ The plaintiffs sought a declaration that the federal and provincial governments have obligations to implement effective strategies to reduce and eventually eliminate homelessness and inadequate housing, and that the failure to implement such strategies violated the Applicants’ rights to life, liberty and security of the person contrary to s. 7 of the *Canadian Charter of Rights and Freedoms* (*Charter*), and their right to equality contrary to s.15 of the *Charter*.¹³¹

The claim in *Tanudjaja* never received a full hearing on the merits. Instead, the governments of Canada and Ontario brought a motion to stop the claim before it was heard. The motion to strike was granted and upheld by the Court of Appeal.¹³² As noted by Justice Feldman in her strong dissent, the thousands of pages of evidence produced by the applicants in *Tanudjaja v Attorney General (Canada)* to support their argument that the *Charter* grounds were never considered by the motions judge or the Court of Appeal.¹³³ The Supreme Court of Canada (SCC) denied leave to appeal.¹³⁴ However, we note that the Court of Appeal upheld the decision only on the basis that it was not justiciable, in other words that it was outside the courts authority to determine the issues raised. They did not uphold the findings by the motions judge as to the limits of positive obligations that may be imposed on governments by the *Charter* under s 7 or 15, and whether homelessness could be an analogous ground under s 15.¹³⁵

Thus to the extent that encampment jurisprudence in Canada has relied on the *Tanudjaja* case as a precedent for future courts to reject positive obligations under s 7 or “homelessness” as analogous ground under s 15 in the context of encampments, it is simply not good authority.¹³⁶ Section 15 focuses on equality rights, so a different decision would have protected people who faced discrimination by governments on the basis of poverty. As a result of *Tanudjaja* and its treatment in later decisions, very few Canadian courts have fully examined the right to housing under the *Charter* to date, and certainly not since the NHSA was enacted.¹³⁷

Further, the enactment of the NHSA calls into question any definitive treatment of *Tanudjaja*. In our view, the NHSA should inform a renewed engagement with international human rights law in the context of encampment litigation. Since the *Tanudjaja* litigation took place prior to the enactment of the NHSA, and therefore to the recognition of the right to housing in domestic law, the status of the right to

¹³⁰ [Tanudjaja v. Attorney General \(Canada\) \(Application\), 2013 ONSC 5410](#) at para 2.

¹³¹ *Ibid.*

¹³² Tracy Hefferman, Fay Faraday & Peter Rosenthal, “Fighting for the Right to Housing in Canada” (2015) 24 J.L. & Soc. Pol’y 10.

¹³³ [Tanudjaja v. Canada \(Attorney General\), 2014 ONCA 852](#) [*Tanudjaja* ONCA].

¹³⁴ [Jennifer Tanudjaja, et al. v. Attorney General of Canada, et al., 2015 CanLII 36780 \(SCC\)](#).

¹³⁵ *Tanudjaja* ONCA, *supra* note 133 at 37. See also Feldman J.’s comments in dissent at 62.

¹³⁶ For example, *Abbotsford (City v Shantz)*, 2015 BCSC 1909 at 148, 177, 231; See [Gosselin v. Québec \(Attorney General\), 2002 SCC 84 for a discussion of positive obligations under s 7](#).

¹³⁷ *Adams* BCSC, *supra* note 84; *Gosselin*, *supra* note 136.

housing in Canadian law once again in question. While the NHA does not import the right to housing into the *Charter*, the purpose statement is a strong endorsement of the right to adequate housing and its interrelationship with broader human rights frameworks.

We note two possibilities in mobilizing the NHA in particular. The federal government has entered into bilateral arrangements with provinces and territories to require that their Action Plans meet a number of requirements. In particular, the agreements state that provincial and territorial governments “will include support for those in greatest need, will be consistent with the principles of participation and inclusion; equality and non-discrimination; and accountability, and will speak to the federal human rights-based approach to housing. In so doing, the Action Plan will complement the NHA goal of helping advance the progressive realization of Canada’s obligations in relation to housing under the International Covenant on Economic, Social and Cultural Rights (ICESCR).”

Two cases suggest possible actions if the federal government does not enforce its agreements with provinces and territories. In *Finlay v Canada (Minister of Finance)*, the Supreme Court found that a social assistance recipient affected by provincial non-compliance with the then requirement under the Canada Assistance Plan Act that social assistance rates cover basic requirements should be granted public interest standing to challenge provincial non-compliance and to potentially require the feds to withhold funding until the province complies.¹³⁸ In a more recent case, *Canada (Commissioner of Official Languages) v Canada (Employment and Social Development)*, the Federal Court of Appeal found a funding agreement that did not comply with the federal obligations under the *Official Languages Act* had to be terminated or renegotiated to comply with the statutory obligations to “enhance the vitality of the linguistic minority and not to hinder it.”¹³⁹ The FCA made reference to the vulnerability of the linguistic minority community and their constitutional protections under Section 23 of the *Charter*.

b. Provincial / Territorial Legislation

As noted earlier, Canada is a signatory to certain international human rights obligations. As such, all governments – federal, provincial and municipal – are bound by human rights obligations. Provincial governments are seen to play a primary role in housing given their role in funding, constructing and operating social housing, and regulating landlord-tenant relationships.¹⁴⁰ Provincial governments are also responsible for health and social services. Provinces may also have human rights codes that set out protections for discrimination, however they have not been successfully used as a basis for legal challenges in relation to encampments.¹⁴¹

Provinces also designate the powers of municipalities. Under the Constitution, provinces are deemed

¹³⁸ *Finlay v. Canada (Minister of Finance)*, [1986] 2 SCR 607.

¹³⁹ *Canada (Commissioner of Official Languages) v. Canada (Employment and Social Development)*, 2022 FCA 14.

¹⁴⁰ See e.g. *1193652 B.C. Ltd. v. New Westminster (City)*, 2021 BCCA 176 at paras 11-13: “In British Columbia, the Residential Tenancy Act governs residential tenancy relationships. Its purpose, broadly speaking, is to regulate residential tenancies and, in doing so, to balance the rights of landlords and tenants... The schemes established by the Residential Tenancy Act prescribes standard terms and requirements for every tenancy agreement: ss.12-14. It also prescribes rights, obligations and prohibitions that apply to all landlords and tenants.”

¹⁴¹ See e.g. Canadian Centre for Diversity and Inclusion, “Overview of Human Rights Codes by Province and Territory in Canada” (2018), online: <<https://ccdi.ca/media/1414/20171102-publications-overview-of-hr-codes-by-province-final-en.pdf>>. But see *Vancouver Area Network of Drug Users v. Downtown Vancouver Business Improvement Association*, 2018 BCCA 132.

responsible for “Municipal Institutions in the Province.” Under this provision, provinces have “exclusive authority” to decide on the design of municipalities, including their sizes, how they are governed, and the responsibilities they have for social programs and services. The Supreme Court of Canada has affirmed that provinces are able to set rules for municipalities with few limits.¹⁴² As the next section details, even though municipalities are at the front lines in addressing homelessness, they rarely have the legal and financial powers that are needed to build the housing needed to solve the problem. Municipalities may try to negotiate with provinces to provide more funding for income or housing, but they can’t force provinces to act.

c. Municipal By-Laws

While municipal governments are often understood as having limited legislative powers, in the context of encampments they are the governments with the most direct day-to-day impact on unhoused people’s lives. Due to a combination of the historic downloading of housing responsibilities to local governments in Canada and municipal ownership and management of large portions of public space within communities, municipal by-laws have emerged as a primary legal response to encampments. At the outset it is important to note that municipal by-laws are often framed neutrally to govern space rather than expressly addressing the impact on people or human rights. However, as researchers have documented, in practice by-laws operate to control, criminalize, and dehumanize poor and unhoused people in a variety of ways.¹⁴³

What are by-laws and why are they important for encampments?

By-laws are the legislative tool municipalities use to regulate spaces within their geographic boundaries and the kinds of activities allowed or prohibited in particular places. Most (though not all) encampments occur in public spaces, which are heavily regulated by local by-laws. Such by-laws are sometimes enforced in ways that violate unhoused people’s human rights. This is particularly the case when by-laws are enforced in conjunction with provincial trespass laws to evict encampment residents and remove their homes and belongings. Bylaws are often enforced informally by bylaw officers with little accountability, and they can be enforced by a range of other actors including police, but also private security, and even civilians.¹⁴⁴ Thus, as discussed below, most of the litigation surrounding encampments has focused on municipal by-laws. In Section V we outline key findings and concepts in the encampment jurisprudence.

What kinds of by-laws are relevant to encampments?

Professor Joe Hermer has examined municipal bylaws that are used to target unhoused people across Canada. He found 511 bylaws nationally that include at least one ‘neo-vagrancy’ offence, including panhandling, loitering, obstructing, salvaging, resting/sleeping, sheltering, and disorder. By their nature these offences are designed to target the very presence of people and possessions in public space. Thus,

¹⁴² [Toronto \(City\) v. Ontario \(Attorney General\), 2021 SCC 34.](#)

¹⁴³ Alexandra Flynn, Joe Hermer, Caroline Leblanc, Sue-Ann MacDonald, Kaitlin Schwan, Estair Van Wagner, *Overview of Encampments Across Canada: A Right to Housing Approach* (Ottawa, 2022), online: [The Office of the Federal Housing Advocate](https://www.homelesshub.ca/sites/default/files/attachments/Overview%20of%20Encampments%20Across%20Canada_EN_1.pdf) <https://www.homelesshub.ca/sites/default/files/attachments/Overview%20of%20Encampments%20Across%20Canada_EN_1.pdf> [OFHA Group Report].

¹⁴⁴ *Ibid* at 16.

their impact on unhoused people who have nowhere else to go, and nowhere else to store and use their belongings, is profound and disproportionate.¹⁴⁵ Being unable to rest, sleep, hang out, or meet basic needs in a public space will have a very different effect on a housed person and an unhoused person. By-laws may also be used to target encampments on private property by fining owners who permit them on their property.¹⁴⁶

These various types of by-laws are applied to encampments and encampment residents and their belongings. However, parks by-laws that target sleeping or sheltering in public spaces have a particularly long history of being applied to encampments in Canadian cities.¹⁴⁷ While not all encampments are located in parks, these are some of the most commonly cited by-laws when cities are taking action to evict encampments and serve encampment residents with by-law infraction and trespass notices. Below we explain how by-laws regulating encampments work.

Examples of by-laws used to regulate encampments

The Toronto Municipal Code Chapter 608-13, prohibits camping in parks, stating, “no person shall dwell, camp or lodge in a park,” without a permit. Chapter 608-14 prohibits someone from putting up a tent or building structure in the park. It states, “no person shall place, install, attach, or erect a temporary or permanent tent, structure or shelter at, in...a park,” without a permit.¹⁴⁸

In Toronto, Chapter 608-53 authorizes by-law officers to act if someone is not complying with parks by-laws. Usually, by-law officers will issue a ticket for violations of municipal by-laws. However, if the city decides to escalate, they may involve the police through the issuance of a trespass notice, which allows the police to take actions to clear an encampment. Police may be authorized to remove an “encroachment” and install fencing if orders to leave the park are not complied with.

For example, in Toronto Chapter 608-53(B)(2) authorizes a by-law officer to “[r]emove from the park to a pound or storage facility any animal or thing owned by or in control of the person who the officer believes is or was involved in the contravention.”

A Report on the encampment clearances in the summer of 2021 released by the Toronto Ombudsman in 2023 found that the City’s encampment clearances were led by the Office of Emergency Management,

¹⁴⁵ See e.g. Joe Hermer, “The Mapping of Vagrancy Type Offences in Municipal By-Laws,” Homeless Hub (22 July 2020), online: <<https://www.homelesshub.ca/blog/mapping-vagrancy-type-offences-municipal-laws>>; Nicholas Blomley, Alexandra Flynn, Marie-Ève Sylvestre, and Nicholas Olson, “Law, Urban Space, and Precarious Property: The Governance of Poor People’s Possessions” 50 *Fordham Urb. L.J.* 223.

¹⁴⁶ See e.g. Maggie Helwig, “Our Toronto churchyard was a safe haven. Then the City cleared it.” (12 February 2024), online: *Maclean’s* <<https://macleans.ca/society/kensington-market-encampment-toronto>>.

¹⁴⁷ For a sense of the types of by-laws used to police homelessness, see “Neo-Vagrancy By-Laws Across Canada” (12 July 2020), online: *Policing Homelessness* <policinghomelessness.ca/mapOne.html>. This resource includes anti-camping by-laws, but also by-laws aimed at loitering, panhandling, obstructing, resting, salvaging, and disorder, what Joe Hermer calls “neo-vagrancy laws”. For examples where parks by-laws are engaged see e.g. *Adams BCCA*, *supra* note 84; *Bamberger v Vancouver (Board of Parks and Recreation)*, 2022 BCSC 49 [Bamberger]; *Poff v Hamilton*, 2021 ONSC 7224 [Poff]; *Vancouver Fraser Port Authority v. Brett*, 2020 BCSC 876 [Brett]; *Black et al v City of Toronto*, 2020 ONSC 6398 [Black].

¹⁴⁸ City of Toronto, by-law No 854-2004, *To adopt a new City of Toronto Municipal Code Chapter 608, Parks, and to repeal various by-laws of the former municipalities relating to parks* (29 June 2022).

which had no experience dealing with encampments and shelter and housing and “was only tasked with coordinating the clearing of encampments” while other staff dealt with shelter and housing needs separately.¹⁴⁹ As a result the operation of the evictions was focused on logistics rather than the people involved. Indeed, direction from the City Manager was that encampments must be cleared “at war-time speed.”¹⁵⁰ The Ombudsman reported that staff told their office that the City had to be “constantly” reminded that dealing with encampments was “about people and not just about structures and ‘footprints.’”¹⁵¹ Perhaps most glaringly, the Report found there was no reference to mental health supports in the operational plans for the 2021 clearances, and no supports were provided on-site.¹⁵²

How do anti-camping by-laws work?

Anti-camping by-laws make setting up and living in an encampment illegal on the premise that residents have not obtained permission from the owner (the municipality) to use and occupy the land in this way. Without permission, some municipalities argue, encampment residents’ presence is unlawful. Cities have relied on this language to frame clearances as a restoration of order and lawful use of the land rather than as eviction of people from their homes and communities.¹⁵³ Some municipalities have taken the position that unhoused people do not have rights to be on public space without permission, even if they do not have adequate housing.¹⁵⁴ Encampment residents are characterized as trespassing or transient rather than as activity exercising human rights in the context of egregious violations of the right to adequate housing. The shelters residents establish in encampments are characterized as “encroachments” regulated as any other object might be despite their status as homes, and sources of protection from the elements and other risks and harms to unhoused people’s health, dignity, and well-being.¹⁵⁵ Police may also be empowered to remove personal belongings, including tents and pets deemed to be part of the by-law violation.¹⁵⁶

For example, in the City of Toronto communications have not referred to people living in encampments as “residents” or to shelters like tents, as “homes.” Instead, they emphasize the illegal, temporary, and

¹⁴⁹ Ombudsman Toronto, *Investigation into the City’s Clearing of Encampments in 2021*, Report (Toronto, 2023), online: <<https://www.toronto.ca/legdocs/mmis/2023/cc/bgrd/backgroundfile-235280.pdf>> [Toronto Ombudsman]. See also Rights to Housing in Toronto, *supra* note 9.

¹⁵⁰ Toronto Ombudsman, *ibid* at 28.

¹⁵¹ *Ibid* at 23.

¹⁵² *Ibid* at 26-27.

¹⁵³ See generally, Muriel Draaisma & Angelina King “City issues warning letter to Toronto carpenter building shelters for unhoused people” (21 November, 2020), online: *CBC News* <<https://www.cbc.ca/news/canada/toronto/city-legal-action-toronto-carpenter-toronto-tiny-shelters-unhoused-people-1.5811589>>; Leyland Cecco “Why Toronto is taking action against a carpenter amid its homelessness crisis” (28 February, 2021), online: *The Guardian* <<https://www.theguardian.com/world/2021/feb/28/toronto-tiny-homelessness-crisis>>.

¹⁵⁴ See e.g. Delaney McCartan, Lauren Graham, Estair Van Wagner, Kaitlin Schwan, & Alexandra Flynn, “Trespassing on the Right to Housing: A human rights analysis of the City of Toronto’s response to encampments during COVID-19” (Osgoode Hall Law School, 2021), online (pdf): *Environmental Justice and Sustainability Clinic* <ejsclinic.info.yorku.ca/files/2021/12/trespassing-on-the-right-to-housing-city-of-toronto-report-20-december-2021.pdf> at 2.

¹⁵⁵ *Ibid*.

¹⁵⁶ We discuss the belongings of unhoused people below in more detail in Section 5. For a detailed examination of issues surrounding belongings, please see: *Belongings Matter, Possessions of Precariously Housed People* (2024), online: <<https://belongingsmatter.ca/report/introduction>>.

informal nature of encampments.”¹⁵⁷ Residents of encampments are characterized as “individuals who were sleeping outside secure permanent housing.”¹⁵⁸ When governments characterize encampment residents as “trespassers”, the consequences of clearing encampments are obscured. While people are displaced from their homes and communities, belongings are destroyed or lost, and human rights are violated, this is portrayed as cleaning up and restoring order to public space for its “proper” uses.¹⁵⁹ The City of Vancouver’s bylaws permit tents and temporary structures overnight, but imposes a significant number of limitations, including the size of the temporary dwelling, its location, and the prohibition on the use of any heating source.¹⁶⁰

This simplistic analysis fails to consider the broader context of housing inequality and how municipal governments’ human rights obligations to *all* residents must shape their responses. Municipalities are landowners and they do have a responsibility to regulate land use on land they own. However, their primary role is as a government. As governments they have human rights obligations. These must guide the development, implementation, and enforcement of by-laws. This includes the obligations set out in international law, such as the right to housing.

Municipal Governments and the Right to Housing

International human rights obligations are grounded in the international laws, treaties, and covenants that Canada has signed and ratified. By signing on to these international standards, the Canadian government has adopted obligations that extend to all Canadian governments.¹⁶¹ Like the federal government, local governments have obligations to respect, protect, and fulfil human rights.¹⁶² International human rights obligations extend to all levels and branches of government within a State, including municipalities, and any institutions, organs, or agents of the State that exercises governmental authority.¹⁶³ While these obligations “[stem] from the human rights obligations of the State”, they are nonetheless important and considered complimentary to the federal government’s primary obligation as the party that signed the international instrument.¹⁶⁴

In the context of encampments and the right to housing, Article 28 of the *ICESCR* and the Article 50 of the *International Covenant on Civil and Political Rights* [the “ICCPR”], expressly contemplate the issue of divided responsibilities and powers in federal systems: “the provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.”¹⁶⁵ Thus, municipal

¹⁵⁷ See e.g. City of Toronto, “Asked Questions - Wooden Structures in Encampments” (25 February 2021), online: <https://www.toronto.ca/news/faq-wooden-structures-in-encampments/>.

¹⁵⁸ *Ibid.*

¹⁵⁹ See generally Nicholas Blomley, Alexandra Flynn, & Marie-Eve Sylvestre, “Governing the Belongings of the Precariously Housed: A Critical Legal Geography” (2020) 16 Annual Review of Law and Social Science, 165; Farha & Schwan, *supra* note 2 at 32-25.

¹⁶⁰ See “Park Bylaws (Consolidated)” (21 June 2021), online (pdf): *Vancouver Board of Parks and Recreation* <parkboardmeetings.vancouver.ca/files/BYLAW-ParksBylawsConsolidated-20210621.pdf> (discussing the regulations on temporary shelter’s at s 11B) at 8. Note that prior to the decision in *Victoria v Adams* (discussed below) Vancouver’s by-law prohibited camping at all; the current by-law is in response to the court’s decision.

¹⁶¹ See *Quebec*, *supra* note 64.

¹⁶² See *supra* note 111.

¹⁶³ SR Report 2014, *supra* note 3.

¹⁶⁴ *Ibid* at para 21.

¹⁶⁵ ICESR, *supra* note 28 at art 50.

governments “are obliged to comply, within their local competences, with their duties stemming from the international human rights obligations of the State.”¹⁶⁶ Put simply, all levels of government share complementary duties to protect, respect, and fulfil human rights protected under international law.¹⁶⁷

This idea of complementarity is to acknowledge that different governments play different roles. While central governments create policies and strategies about how to fulfill human rights obligations, often it is local governments that implement these on the ground.¹⁶⁸ Indeed, it is sometimes suggested the proximity of local government to the day-to-day experience of exercising human rights, or experiencing human rights violations, means they are in a unique position to fulfil international human rights obligations.¹⁶⁹

We note that it is clear in international law that central governments cannot defend human rights violations by invoking the division of powers and responsibilities within domestic governance systems. General Comment No.16 of the UN Committee on Economic, Social and Cultural Rights states, “Violations of the Covenant can occur through direct action of, failure to act or omission by State parties, or through their institutions or agencies at the national and local levels.”¹⁷⁰ Article 27 of the Vienna Convention on the Law of Treaties states, “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”¹⁷¹ This is the case even if the act perpetrated was “*ultra vires* or contravene[ed] domestic law and instruction.”¹⁷² Therefore, all governments, regardless of level or branch, and all governmental authorities collectively share in the responsibilities of the State.¹⁷³ Therefore, it is important to also ensure the federal government is providing clear and transparent standards for international human rights obligations to other levels of government and working with them to develop mechanisms for accountability and enforcement.

PART 2: ADVOCACY AND LITIGATION STRATEGIES

III. Encampment Advocacy Efforts

Advocacy at the municipal level includes legal challenges to by-laws. We expect this to continue as many, if not most, municipalities have anti-camping and other neo-vagrancy by-laws on the books and

¹⁶⁶ *Ibid.*

¹⁶⁷ *Supra* note 111 at para 17.

¹⁶⁸ See *ibid* at para 21.

¹⁶⁹ K laus Starl, “Human Rights and the City: Obligations, Commitments, and Opportunities” in Barbara Oomen, Martha Davis & Michele Grigolo, eds, *Global Urban Justice: The Rise of Human Rights Cities* (Cambridge: Cambridge University Press, 2016) at 203; Elizabeth McIsaac & Effie Vlachoyannacos, “Taking a Human Rights Based Approach to Housing in Toronto” (6 September 2021), online: *Maytree* <maytree.com/stories/taking-a-human-rights-based-approach-to-housing-in-toronto/>; *supra* note 11 at para 8.

¹⁷⁰ United Nations Committee on Economic, Social, and Cultural Rights, General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant), UNESCOR, 34th Sess, UN Doc E/1998/22 (1997) [General Comment No. 16].

¹⁷¹ *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) at art 27.

¹⁷² *Supra* note 11 at paras 17 & 20; *Report of the International Law Commission*, UNGAOR, 53rd Sess, Supp 10, UN Doc A/56/10 (2001) at art 4.

¹⁷³ See SR Report 2014, *supra* note 3 at para 9.

many continue to enforce them. In the next section we outline key tests, concepts and outline the evolution of the case law in this area.

However, as the work of encampment residents and advocates across the country demonstrates, litigation is just one advocacy pathway in upholding the human rights and dignity of unhoused people. The development of human rights-based policies for encampments that confirm to international human rights obligations at the municipal level is a crucial part of this work. This must include the adoption of meaningful engagement mechanisms that both recognize peer leadership and encampment-based decision-making processes. There will be no one size fits all approach; however, some common criteria have emerged in recent years.

Three specific advocacy efforts link directly to litigation efforts:

Government responses to homelessness have failed Indigenous Peoples

Indigenous Peoples are significantly overrepresented in the unhoused population across Canada and in BC.¹⁷⁴ They access emergency shelter services 10 times more than non-Indigenous individuals.¹⁷⁵ At the same time, Indigenous Peoples are more likely to be staying in unsheltered locations and are less likely to use shelters than other unhoused people, as shelters can “replicate colonial oppression” and thus be inaccessible to Indigenous Peoples.¹⁷⁶ In the last Greater Vancouver homeless count, Indigenous Peoples comprised 33% of those who are homeless, even though they represent just two per cent of the population.¹⁷⁷ Of those who were unsheltered, 41% identified as Indigenous.¹⁷⁸ In addition, 64% of Indigenous respondents affirmed that they had lived or generational experience of residential school.¹⁷⁹ Indigenous overrepresentation is even more striking when broken down by gender.¹⁸⁰ Indeed, the *Final*

¹⁷⁴ In the 2020 national point-in-time count 35% of respondents were Indigenous, whereas only 5% of the population in Canada identify as Indigenous. See Everyone Counts 2020-2022, *supra* note 1. This is consistent with past counts, which ranged between 29-37%. See Infrastructure Canada, *Everyone Counts 2018* (Ottawa, 2019), online: < [https://www.infrastructure.gc.ca/alt-format/pdf/homelessness-sans-abri/reports-rapports/1981-Reaching_Home-PIT-EN_\(3\).pdf](https://www.infrastructure.gc.ca/alt-format/pdf/homelessness-sans-abri/reports-rapports/1981-Reaching_Home-PIT-EN_(3).pdf) > [Everyone Counts 2018]; Employment and Social Development Canada, *Everyone Counts 2016* (Ottawa, last modified 31 August 2020), online https://publications.gc.ca/collections/collection_2017/edsc-esdc/Em12-9-2017-eng.pdf > [Everyone Counts 2016].

¹⁷⁵ Everyone Counts 2018, *ibid*.

¹⁷⁶ Everyone Counts 2018, *ibid*; SR Report 2019, *supra* note 15 at 10.

¹⁷⁷ Homelessness Services Association of BC, *2023 Homeless Count in Greater Vancouver* (October 2023), online: *Reaching Home* <https://hsa-bc.ca/Library/2023_HC/2023_Homeless_Count_for_Greater_Vancouver.pdf> [2023 Homeless Count] at 6.

¹⁷⁸ *Ibid*; See also, BC Non-profit Housing Association, “2020 Indigenous Homeless Count: Results in Metro Vancouver” (2020), online (pdf): <infocusconsulting.ca/wp-content/uploads/Homeless-Count-Infographic-2020-FINAL.pdf>.

¹⁷⁹ 2023 Homeless Count, *ibid* at 10.

¹⁸⁰ Kaitlin Schwan, Alicia Versteegh, Melissa Perri, Rachel Caplan, Khulud Baig, Erin Dej, Jesse Jenkinson, Hannah Brais, Faith Eiboff, & Tina Pahlevan Chaleshtari, “The State of Women’s Housing Need & Homelessness in Canada: Key Findings” (Toronto, 2020), online: *Canadian Observatory on Homelessness* <<https://www.homelesshub.ca/sites/default/files/attachments/W%26G-EN%5BKF%5D5.1.pdf>> [State of Women’s Housing]; Nick Falvo, “The Use of Homeless Shelters by Indigenous Peoples in Canada” (2019), online: *Canadian Observatory on Homelessness* <www.homelesshub.ca/blog/use-homeless-shelters-indigenous-peoples-canada>; Employment and Social Development Canada, *Highlights of the National Shelter Study 2005 to 2016* (last modified

Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls specifically addressed shelter standards in their Calls for Justice, including the need to establish Indigenous-led low-barrier shelters and shelters that are appropriate to cultural needs, and available wherever Indigenous women, girls, and 2SLGBTQQIA people reside.¹⁸¹

Centering self-determination requires examining city and provincial responses to understand whether and how they are recognizing and taking up Indigenous legal responses. These legal responses may bring us closer to animating ontologies of care that seek to ask not what our rights to shelter are but instead our responsibilities to provide care for those in need. By starting from the lessons we gleaned from the little bird and the trees in the Anishinaabe story recounted above we can advocate for approaches that mirror the spruce, white pine and cedar instead of reverting to the behaviors of the Birch, Oak, Butternut, and Willow trees that too often foreclose ontologies of care by focusing on the wrong sets of questions.

Enforcement measures should shift away from trespass and police-based frameworks

Government responses to encampments have not only characterised the rights and interests of encampment residents as peripheral to the underlying ownership of public space; they actively construct them as hostile to the proper role and use of public property. Before and during the pandemic, cities used trespass laws to remove unhoused people and their belongings from public space. Only property owners have recourse to trespass laws as they are rooted in the protection of an owner's ability to control use, access, and decision making about land.¹⁸² They are a tool to defend the *private/privacy* dimension of property rights.¹⁸³ Thus, turning to trespass laws in relation to public spaces necessarily foregrounds cities as property rights holders rather than as governments with human rights obligations to all residents. As owners, municipalities assert that they are empowered to remove encampments because their property rights are exclusive, including the power to say who can and cannot access and use the land, and how and when it can be used.¹⁸⁴ Yet, property rights are more complex and nuanced than they appear in dominant narratives, particularly in the context of public

21 April 2022), online: <www.canada.ca/en/employment-social-development/programs/homelessness/reports-shelter-2016.html>; Brittany Bingham, Akm Moniruzzaman, Michelle Patterson, Jitinder Sareen, Jino Distasio, John O'Neil, and Julian M. Somers, "Gender differences among Indigenous Canadians experiencing homelessness and mental illness," (2019) 7:57 BMC Psychology 1.

¹⁸¹ Canada, *The National Inquiry into Missing and Murdered Indigenous Women and Girls, Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, Vol. 1a (Ottawa: 2019) [MMIWG Report].

¹⁸² See Philip H Osborne, *The Law of Torts*, 4th ed (Toronto: Irwin Law, 2011) at 295-96.

¹⁸³ See *Peter Ballantyne Cree Nation v Canada (AG), 2016 SKCA 124* at para 128, citing *Mann v Saulnier* (1959), 1959 CanLII 360 (NB CA), 19 DLR (2d) 130 (NBSC) at 132. See also Sarah Ferencz, Nicholas Blomley, Alexandra Flynn & Marie-Eve Sylvestre, "Are Tents a 'Home'? Extending Section 8 Privacy Rights for the Precariously Housed" (2022) 67:4 McGill LJ 369.

¹⁸⁴ See Larissa Katz, "Exclusion and Exclusivity in Property Law" (2008) 58:3 UTLJ 275, 2011; JE Penner, "The 'Bundle of Rights' Picture of Property" (1996) 43:3 UCLA L Rev 711. See also Estair Van Wagner and Alexandra Flynn, "Op-ed: Toronto uses doublespeak to remove encampment residents from parks," (28 June 2021), online: *Now Toronto* <<https://nowtoronto.com/news/op-ed-toronto-uses-doublespeak-to-remove-encampment-residents-from-parks/>>.

space held by governments for public purposes.¹⁸⁵ Indeed, the state's resort to the blunt tool of trespass to re-assert powers of exclusion illustrates the challenge encampments pose to dominant property relations.¹⁸⁶

Property rights are never absolute. This is particularly true in the context of government-owned property. In *Commonwealth*, a 1991 decision, the Supreme Court of Canada, expressly rejected Crown arguments that government ownership of property presumptively includes the same broad right to exclude and control that attaches to private property.¹⁸⁷ To six of the seven justices, contextual limitations attach to government property because a government owner holds that property pursuant to its government functions and obligations and is subject to the requirements of the *Charter of Rights and Freedoms*.¹⁸⁸ In the concurring opinion authored by Justice L'Heureux Dubé, the *Charter* applies to government ownership of property to uphold the "crucial function of government and the responsibility it bears to its constituents."¹⁸⁹ Based on this reasoning, governments are not ordinary property owners – they own property for the public and in order to fulfill their governmental obligations. Building on this argument in this paper, these obligations include the protection and fulfillment of human rights, including the right to adequate housing. Thus, encampment residents may be legally understood as 'non-owners' in the frame of traditional Anglo-Canadian property law, and peripheral to decisions that flow from ownership.¹⁹⁰ However, their embodied claims to public space for the fulfillment of basic human rights inherently expose the limitations of property relations premised on the primacy of the right to exclude.¹⁹¹ Encampment residents centre the *public* dimension of these spaces by contesting both the exclusivity in state-ownership of property and the primacy of property-owning neighbours in the governance of public space.

Temporary shelters are not housing

A central challenge by advocates is that temporary shelters are not housing and do not fulfill human rights obligations. However, we recognize that as municipalities, in partnership with other governments, work towards progressive realization of the right to housing, there may continue to be a reliance on

¹⁸⁵ See generally Doreen Massey, *For Space* (London: Sage, 2005); Nicholas Blomley, "Precarious Territory: Property Law, Housing, and the Socio-Spatial Order" (2020) 52:1 *Antipode* 36.

¹⁸⁶ See generally, Estair Van Wagner, "Views from periphery: Examining non-ownership in property law" in Nicole Graham, Margaret Davies, Lee Godden, eds, *Handbook of Law, Property and Society* (London: Routledge, 2022). See also Sarah E Hamill, "Property Says No: Relational (In)Equality, Encampments, and Property Rights" (2023) 36:7 *JL & Soc Pol'y* 119.

¹⁸⁷ [Committee for the Commonwealth of Canada v Canada, \[1991\] 1 SCR 139](#) at 155 [*Commonwealth*]. In *Commonwealth*, six of seven justices reasoned that freedom of expression under Section 2(b) of the Canadian Charter of Rights and Freedoms, s 7, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [Charter] applies on government-owned property, although the justices disagreed on the type of government-owned property to which the Charter would apply. See also Stepan Wood, "When Should Publicly Owned Land Be Considered Private in Homeless Encampment Cases? A Critique of Recent Developments in BC" (2023) *Journal of Law and Social Policy* 36.

¹⁸⁸ *Commonwealth*, *ibid*; See also Charter, *ibid* at s 7.

¹⁸⁹ See *Commonwealth*, *ibid* at 192 (reasons provided by L'Heureux-Dubé J, which was also used to arrive at Lamer CJ's concurring result at 149).¹

¹⁹⁰ See discussion of Indigenous jurisdiction in Part IV, Section 8.

¹⁹¹ See generally Van Wagner, *supra* note 15; Sarah E Hamill, "Caught between Deference and Indifference: The Right to Housing in Canada" (2018) 7 *Can J HR* 67.

temporary shelters. Therefore, challenging shelter standards to meet human rights obligations is another short-term advocacy priority. We emphasize that the availability of temporary shelter spaces should not be used as a justification for evictions. As noted in Part III, temporary shelters are not permanent housing and often have strict rules that are not suitable for the diverse needs of unhoused peoples.¹⁹² Temporary shelters may not allow unhoused people to remain with pets, spouses, or other loved ones. In addition, unhoused peoples have often expressed the lack of physical, mental, and cultural safety experienced in shelters.

We note that in order for municipalities to develop and implement human rights-based responses to encampments they will require significant funding and other supports from other levels of government. Therefore, municipalities themselves, and other advocates, must continue to press provincial, territorial, and federal counterparts to properly resource these efforts.

IV. Encampments and the Courts: Past Decisions

Courts have been important in setting the bar for government by-laws and conduct in relation to encampments and their residents. This section provides an overview of the key cases decided in relation to encampments up to (and including) 2023.

1. Injunctions and Encampments: Establishing the Applicable Framework for Encampments

Contemporary Canadian case law dealing with encampments began in 2003 with two British Columbian cases.¹⁹³ In both cases the Vancouver Board of Parks and Recreation was seeking court orders to evict multiple encampment residents from Thornton Park in *Vancouver Parks Board v Mickelson* and Portside Park in *Vancouver Board of Parks and Recreation v Sterritt*.¹⁹⁴ These cases set the stage for judicial treatment of encampments, which continues to focus on injunctions, municipal bylaws, and the infringement of *Charter* rights.

In *Mickelson* the Board sought a declaration that the defendants had violated section 11 of the city's *Parks Control By-Law* and committed trespass, as well as a permanent injunction against the encampment residents from "constructing, placing or maintaining structures in the park" and an interlocutory mandatory injunction requiring them to remove their structures.¹⁹⁵ A Section 7 *Charter* argument was raised in the case. While it was largely dismissed, at least in part because the defendants did not file a statement of defence, the *Charter* implications did lead the court to apply a more onerous

¹⁹² Alexandra Flynn, "Social Control and Homeless Encampments: Shifting the Role of Shelters Through Judicial Review" (2024) *Social & Legal Studies*, 0(0). <https://doi.org/10.1177/09646639241226477>.

¹⁹³ There are earlier Canadian cases dealing with protest occupations which reference homelessness, and a 1939 case involving federal relief camps established during the Great Depression which were intended to in part address homelessness. There is also [*Vancouver \(City\) v Maurice*, 2002 BCSC 1421](#), though this was described at the time as a squat/protest rather than an encampment and the reasoning is thinner and less influential than the cases of the following year. Therefore, we see the examined cases as the start of the current line of jurisprudence.

¹⁹⁴ [*Vancouver Parks Board v Mickelson*, 2003 BCSC 1271](#) [Mickelson]; [*Vancouver Board of Parks and Recreation v Sterritt*, 2003 BCSC 1421](#) [Sterritt]. It is unclear why it is listed as the Parks Board in one style of cause and the Board of Parks and Recreation in the other; the headnote for both cases lists it as the Vancouver Board of Parks and Recreation.

¹⁹⁵ Mickelson, *ibid* at para 1.

injunction test framework to the Board's request.¹⁹⁶

The *RJR-MacDonald* test requires a three-part analysis: 1) whether there is a serious issue to be tried; 2) whether the party seeking the injunction would suffer irreparable harm if it was not granted; and 3) which party the balance of convenience favours, in light of the public interest at stake. If the court had applied the framework in *Maple Ridge (District) v Thornhill Aggregates Ltd*, the municipality would only have had to establish a clear violation of the by-law and outside of exceptional circumstances an injunction would have been granted.¹⁹⁷ The framework in *Thornhill* applies a presumption of legislative or constitutional validity.¹⁹⁸ As decided in *Mickelson*, this is incompatible with the *Charter* as an evolving human rights framework.¹⁹⁹

The judge found for the Board. Notably, it was held that the Board would "suffer irreparable harm as [they] cannot be properly compensated in damages for the violation of the by-law."²⁰⁰ The decision to use the *RJR-MacDonald* test in the encampment context would prove influential on future decisions and it remains the test in the majority of encampment decisions.²⁰¹ While it does impose a more onerous test where a municipal government seeks an injunction, the *RJR-MacDonald* framework does not provide for consideration of *Charter* arguments on the merits.²⁰² The *RJR-MacDonald* framework is now the test even where *Charter* or constitutional issues are not fully raised by the parties or not clearly framed.²⁰³

In *Sterritt* the Board sought an interlocutory mandatory injunction requiring the defendants to remove their structures and belongings from Portside Park.²⁰⁴ Meiklem J cited *Mickelson* and noted the nearly identical circumstances, adopted the reasoning and issued a nearly identical injunction and prohibition (despite the Board seemingly not having made an identical application).²⁰⁵ Notably *Sterritt* expressly discusses the safety, orderliness, and cleanliness of the encampment as well as a significant portion of the defendants being Indigenous, factors that would emerge as significant in later cases.²⁰⁶

Injunction cases may also displace *Charter* arguments where governments successfully argue that lands have a private character. The 2020 *Brett* decision from Vancouver illustrates this point.²⁰⁷ Uniquely,

¹⁹⁶ *Ibid* at paras 27 & 32.

¹⁹⁷ [Maple Ridge \(District\) v Thornhill Aggregates Ltd \[1998\] BCI No 1485](#) at para 9.

¹⁹⁸ *Mickelson*, *supra* note 194 at para 18.

¹⁹⁹ *Ibid* at para 19, quoting [Manitoba \(A.G.\) v. Metropolitan Stores Ltd., \[1987\] 1 SCR 110](#) at 124 [*Metropolitan Stores*].

²⁰⁰ *Metropolitan Stores*, *ibid* at paras 7 & 25.

²⁰¹ See Stepan Wood, "Reconsidering the Test for Interlocutory Injunctions Affecting Homeless Encampments: A Critical Assessment of BC Case Law" (2022) Osgoode Legal Studies Research Paper No. 4297377. While he only examines BC, the majority of encampment decisions take place in BC and therefore they represent the majority of all cases.

²⁰² [RJR-MacDonald Inc. v. Canada \(Attorney General\), \[1995\] 3 SCR 199](#).

²⁰³ *Nanaimo (City) v Courtoreille*, 2018 BCSC 1629 [*Courtoreille*] at para 110; *Bamberger*, *supra* note 147 at 174. See discussion in Wood, *supra* note 201 at 21.

²⁰⁴ See *Sterritt*, *supra* note 194 at para 1.

²⁰⁵ See *ibid* at paras 6 & 11-12.

²⁰⁶ See *ibid* at paras 2-3 & 6-7.

²⁰⁷ Specifically, the plaintiff Christine Brett was also involved in the encampment case [Saanich \(District\) v Brett, 2018 BCSC 1648](#) and an order made concerning an encampment in *Duncan (City) v Brett* [2017] BCSC WL10398269. The decision in *Brett* (2020) notes that Williams granted an injunction against an encampment in Oppenheimer

because the encampment was on Port Authority lands the case was based on common law trespass or alternatively the *Port Authorities Operations Regulations* under the *Canada Marine Act*, rather than a breach of the provincial *Trespass Act* or municipal bylaw.²⁰⁸ Nevertheless, *RJR-MacDonald* was applied. Irreparable harm was established by the fact that encampment residents had “no apparent means of indemnifying the plaintiff” for any costs resulting from their continued presence, and found the balance of convenience favoured the Port Authority with much of the defendants’ evidence being dismissed as conjecture.²⁰⁹ As note below, one year after *Brett* was decided, encampment residents successfully challenged an eviction order brought against residents in the CRAB Park encampment, adjacent to the lands considered by the court in *Brett*.

2. Victoria (City) v Adams: Applying the *Charter* to Encampments

The landmark decision in *Victoria (City) v Adams* continues to shape the case law as the first cases to substantively engage with the *Charter* implications of encampments. Though *Adams* was somewhat similar to *Mickelson* or *Sterritt* on the facts, it was not an injunction application and the defendants’ s 7 *Charter* arguments were fully argued in a trial and were thus considered fully on the merits and not merely through the *RJR* test. This included acutely framing the issue around the shortfall of shelter beds relative to the number of people experiencing homelessness, such that for many camping outside was demonstrably their only option.²¹⁰ Finally, there was the willingness and ability to persist in challenging the city in court for over four years and fund and participate in a full hearing of the merits. The ability to take cases to trial and have arguments heard on the merits continues to be a significant challenge with *Charter* analysis in many encampment decisions being limited and therefore the constitutionality of by-laws being raised but not resolved by the courts.²¹¹

In October 2005, the City of Victoria brought an injunction application to remove an encampment of roughly 70 residents in Cridge Park. The city sought an interlocutory injunction against the residents loitering and “taking up temporary abode overnight” in the park.²¹² Though the injunction was granted and the encampment disbanded, the residents brought a counterclaim challenging the constitutionality of the bylaws and a trial was required.²¹³ At trial, the British Columbia Supreme Court found in favour of the encampment residents and sections of the municipal *Parks Regulation Bylaw* and the *Streets and Traffic Bylaw* were found to have breached the defendants’ s 7 rights to life, liberty and security of the person.

Justice Ross declared the infringing sections of the bylaws “of no force and effect insofar and only insofar as they apply to prevent homeless people from erecting temporary shelter.”²¹⁴

The city appealed to the provincial Court of Appeal, which upheld the trial decision but modified the

Park, which eventually reformed and persisted until a Ministerial Order was made on April 24, 2020 evacuating the encampment. Oppenheimer Park is a kilometre southwest of 101 West Waterfront Road, where the encampment at issue in *Brett* was formed on May 8, 2020. See *Brett*, *supra* note 146 at paras 10-15 & 28-31.

²⁰⁸ *Brett*, *supra* note 147 at paras 36-41.

²⁰⁹ *Ibid* at paras 68-75 & 102-115.

²¹⁰ See *ibid* at paras 37-66.

²¹¹ Wood, *supra* note 201.

²¹² *Adams* BCSC, *supra* note 85 at paras 7-10.

²¹³ See *ibid* at paras 11-14.

²¹⁴ *Ibid* at para 239.

declaration to narrow its application.²¹⁵ The Court of Appeal's 2009 decision declared the bylaws "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."²¹⁶

This revision of the declaration has significantly limited the circumstances to which it could be applied as the Court of Appeal decision binds all other BC courts in future cases. As we discuss below, the link between shelter availability and the right to erect temporary shelter is one of the most enduring features of the case law both within and outside BC.

3. Distinguishing from *Adams*: *Occupy*, *Shantz*, *Adamson*, and Beyond

Following *Adams*, multiple encampment cases arose involving the Occupy movement, a global protest movement that led to the establishment of encampments in various cities. Two of them cited *Adams*, including the Ontario decision *Batty v City of Toronto*, but ultimately distinguished given the Occupy encampments engaged different *Charter* rights than the encampment in *Adams*.²¹⁷ The outcome for a homeless encampment in *Vancouver Board of Parks and Recreation v Williams* hewed closer to *Mickelson* and *Sterritt*, in part because the judge in *Williams* seemed to accept that Vancouver had sufficient capacity to shelter the encampment residents unlike in *Adams*.²¹⁸ Two lengthy cases would follow, each resulting in multiple decisions: *Abbotsford (City) v Shantz* and *British Columbia v Adamson*. These decisions confirmed the application of the *RJR-MacDonald* injunction test applies where *Charter* issues are raised.

The first *Shantz* decision in 2013 granted an injunction evicting the encampment residents and prohibiting them from lighting fires and trespassing. Notably the judge did discuss the issues with the local shelters and expressed concern over the tactics used in clearing encampments.²¹⁹ The second decision in 2015 resulted from the city seeking a permanent injunction against the defendants as well as damages against Mr. Shantz, an activist associated with the BC/Yukon Drug War Survivors group supporting the camp. This case substantiated the allegations that chicken manure and pepper spray had been used by City employees during evictions²²⁰ and provided an expansive analysis of how the city bylaws against camping affected *Charter* rights under sections 2, 7, and 15.²²¹ The court held that only section 7 was violated and that it was not saved under section 1, as the bylaws were not minimally impairing.²²² In so doing, the court clarified that the *Charter* did not create positive obligations with respect to housing and rejected homelessness as a protect ground under the *Charter*'s s 15 equality rights protection, relying on the *Tanudjaja* decision of the Ontario Court of Appeal.²²³

Adamson uniquely involved the provincial government, given that the encampment at issue was located

²¹⁵ See *Adams* BCCA, *supra* note 84 at paras 160-166.

²¹⁶ *Ibid* at para 166. Underline added to emphasize the Court's adjustments.

²¹⁷ See [Batty v. City of Toronto, 2011 ONSC 6862](#). See also [Vancouver \(City\) v. O'Flynn-Magee, 2011 BCSC 1647](#) at paras 41-42.

²¹⁸ See *Vancouver Board of Parks and Recreation v. Williams*, 2014 BCSC 1926 at paras 55-57.

²¹⁹ See [Abbotsford \(City\) v Shantz, 2013 BCSC 2612](#) [*Shantz*] at paras 20-53.

²²⁰ See *ibid* at paras 100 & 107-115.

²²¹ See *ibid* at paras 146-236.

²²² See *ibid* at paras 237-247.

²²³ See *ibid* at paras 148, 177, & 231-234.

on the green space of a provincial courthouse in Victoria. The encampment was formed in November 2015, with the province seeking an injunction in March 2016 after attempts to disperse residents through the *Trespass Act* and *Fire Services Act* failed to fully clear the encampment. The province argued against the *RJR-MacDonald* test in favour of the *Thornhill* test but the court rejected this deviation from *Williams, Shantz* and *Mickelson*.²²⁴ The injunction was denied, with Hinkson J (who also decided *Shantz* [2015]) challenging the near-presumption that the government would suffer irreparable harm from allowing encampments to persist, as well as comprehensively exploring the benefits of encampments, including improved health, access to services, safety of person and possessions, and sense of community, and finding the balance of convenience favouring the residents.²²⁵ The decision also noted that—as in *Adams*—the number of people experiencing homelessness continued to exceed shelter spaces, meaning that clearing the encampment at the courthouse would simply result in the same issues “migrat[ing] to other areas in the City of Victoria.”²²⁶ A second decision by Hinkson J in July 2016 granted an injunction against the same encampment, finding that the province had sufficiently increased the number of alternative housing spaces available and that conditions in the encampment had worsened in the intervening months, increasing the costs incurred by the province/city and decreasing the benefits gained by the encampment residents.²²⁷

The remaining British Columbia encampment cases between 2017 and 2020 largely maintained the principles set by prior cases, being determined primarily on factual circumstances already explored rather than novel facts or reasoning. Of note are two cases which treated with the impacts of encampment residents being rehoused. A dozen former encampment residents from *Adamson* successfully challenged a restrictive visitor policy imposed at the Johnson Street Community Housing Project before the Residential Tenancy Branch. The operators, contracted by BC Housing, applied for judicial review of the Branch’s decision, which was upheld as reasonable and procedurally fair.²²⁸ In the aftermath of *Nanaimo (City) v Courtoreille* [2018], municipal zoning issues arose around properties purchased to house the encampment residents. The court held that Crown immunity protected the governments and their agents in bypassing the zoning requirements.²²⁹ Finally, we saw another protest encampment case considered in Saskatchewan in 2018 where *Shantz* was cited as an example of how “societal interests” and “the plight of the homeless” could be reconciled, though homelessness and section 7 rights were not issues in the decision. That decisions ordered the encampment be cleared.²³⁰

4. Challenging Shelter Adequacy

Several cases have been brought before courts in Ontario and British Columbia since the start of the pandemic in March 2020: the Ontario cases *Sanctuary et al v Toronto (City) et al*, *Black et al v City of Toronto*, and *Poff v Hamilton (City)*, and the British Columbia cases *Bamberger v Vancouver (Board of Parks and Recreation)*, *Prince George (City) v Stewart*, and *Vancouver Fraser Port Authority v Brett*. Quebec has also seen a major decision on homelessness in the pandemic with *Clinique Juridique Itinérante c. Procureur Général du Québec* [2021]. These cases have made novel advancements even

²²⁴ See [British Columbia v. Adamson, 2016 BCSC 584](#) at paras 23-25.

²²⁵ See *ibid* at paras 54-59 & 125-179.

²²⁶ *Ibid* at paras 64-73 & 184-185.

²²⁷ See [British Columbia v. Adamson, 2016 BCSC 1245](#).

²²⁸ See [PHS Community Services Society v Swait, 2018 BCSC 824](#).

²²⁹ See [Buechler v Island Crisis Care Society, 2019 BCSC 1899](#).

²³⁰ See [Dubois v Saskatchewan, 2018 SKQB 241](#).

where they have not succeeded in protecting encampments.²³¹

Sanctuary involved two decisions in which a coalition of advocacy groups had initially pursued an injunction prohibiting the City from operating shelters which did not adhere to rules surrounding distancing of beds; in May 2020, the motion was adjourned as the two sides composed an Interim Settlement Agreement which required regular reports to the coalition.²³² The Agreement acknowledged encampments, noting that new spaces opened to accommodate encampments residents must also meet distancing standards. In June the City claimed to have reached compliance with the agreement, but the coalition alleged they had breached the terms and sought an order declaring as much.²³³ Prior to the court's decision on the Agreement, it ruled on a refusals motion: City witnesses had refused to provide answers to certain questions concerning records of how physical distancing had been implemented, the shelter system's overall capacity, internal processes and policies, and more.²³⁴ The motion was granted in part, with some of the refusals being found to be proper.²³⁵

The court ultimately found the City had breached the Interim Settlement Agreement and was obligated to continue reporting to the coalition on its progress in implementing physical distancing across their shelters.²³⁶ The City acknowledged certain sites were not fully compliant but argued the demands of the pandemic should be taken into account when assessing if they had exerted their best efforts. The court held that "[t]he pandemic context...cuts both ways" and raised the need for accountability, especially among the already-vulnerable homeless population.²³⁷ Despite concerns arising from the internal communications, the court did not find that the City had acted in bad faith.²³⁸ Although limited, the *Sanctuary* decision was a victory in terms of accountability and revealing the shortcomings of the City's shelters in responding to the pandemic, which is important given the continued efforts to move encampment residents into shelters and housing.

In *Black*, 14 Toronto encampment residents applied for an injunction preventing the City from enforcing by-laws (after the moratorium on clearing encampments was lifted) that prohibit camping and structures in parks. The residents argued enforcement would violate their section 7, 12 and 15 *Charter* rights.²³⁹ The injunction was denied on application of the *RJR-MacDonald* test, with the application failing on the third balance of convenience portion which examines the relative harm to the parties.²⁴⁰ Unlike *Adams*, *Shantz*, or *Adamson* the decision in *Black* did not hinge only on availability of shelter

²³¹ It is worth noting that though it did not culminate in a major decision on the issue, in Hamilton the combined efforts of Keeping Six, HAMSMaRT, the Hamilton Community Legal Clinic and Wade Poziomka successfully received a temporary injunction against an encampment clearing in July/August 2020: "Community updates" (2020), online: *Hamilton Justice* <hamiltonjustice.ca/en/encampment-advocacy/>. The city reached an agreement with these groups to end the injunction in October: Dan Taekema & Samantha Craggs, "Court battle over Hamilton tent encampments expected to drag on for days" (19 October 2021), online: *CBC* <cbc.ca/news/canada/hamilton/encampments-1.6215671>.

²³² See *Sanctuary et al v. Toronto (City) et al.*, 2020 ONSC 4708 at paras 6-7.

²³³ See *ibid* at paras 8-10.

²³⁴ See *ibid* at paras 88-136.

²³⁵ See *ibid* at paras 145-147.

²³⁶ See *ibid* at paras 214-216.

²³⁷ *Ibid* at paras 68-75.

²³⁸ See *ibid* at paras 142-159.

²³⁹ See *Black*, *supra* note 147 at paras 1-2.

²⁴⁰ See *ibid* at paras 76-150.

spaces, but the court did find the evidence before it established there was sufficient space.²⁴¹ This difference stems in part from the novelty of the application. Here the injunction was sought by (rather than against) encampment residents to prohibit enforcement *during the pandemic*. It was not a broader challenge to the validity of the bylaws themselves. Overall, the court's acceptance of there being sufficient shelter space and outreach without further examination, and given advocates claims to the contrary, is perhaps the most unfortunate aspect of the decision, implying that the threshold for establishing sufficient shelter capacity is low. Notably the court also imported reasons from the *Batty* case in the context of s 2 freedom of expression rights, though it did consider the BC decisions in *Adamson* and *Abbotsford*. As noted in *Stewart*, discussed below, encampments established for shelter by homeless individuals "must be distinguished" from encampments motivated by expressive activity and advocacy for economic and political change.²⁴² Analysis of the limits of s 2(b) expressive rights should not be used to withhold protection where "one of the most basic and fundamental human rights guaranteed by our Constitution" is at stake.²⁴³

Despite the application being rejected the reasoning in *Black* is notable in its treatment of equality-based arguments. The BCSC in *Adams* accepted the encampment residents had raised a "serious issue to be tried" regarding s 15 of the *Charter*, in particular given the disproportionate number of Indigenous and gender diverse people amongst encampment populations.²⁴⁴ The test for a serious issue to be tried is a low bar and does not indicate the likelihood of success, particularly given the potential of a *Charter* violation to be saved by s 1 reasonable limits, but it does present an opening to explore s 15 further than earlier cases had. Further, the Court specifically refused to apply the s 15 analysis from *Tanudjaja v Canada* rejecting "homelessness" as analogous ground under s 15 in the context of encampments.²⁴⁵ Future claims could be based directly in other grounds such as Indigeneity, gender, race, or disability, in addition to revisiting the question of whether homelessness is an analogous ground.²⁴⁶

The lack of sufficient and appropriate indoor options was also an important factor in *Prince George (City) v Stewart*. This case involved a municipality seeking two statutory injunctions (and a police enforcement order) against the occupants of an encampment. Though the application was allowed in part and one encampment site was permitted to be cleared, the municipality was unable to establish the other encampment site contravened the Zoning Bylaw due to a lack of viable alternatives.²⁴⁷ The court held the existing shelter beds were not "low barrier" enough to provide for accessibility.²⁴⁸ For example, the shelters imposed eligibility criteria which often excluded those with substance abuse issues or mental health issues from accessing these spaces. Other barriers mentioned by the court included a lack of identification and lack of bank accounts or records.²⁴⁹ Notably, Hinkson CJ briefly considered the role of the pandemic in contributing to the lack of normally accessible shelter spaces.²⁵⁰ The decision is also important because the judge considered both the climate and the context of colonization. Taking notice of the ongoing impacts of colonization such as residential schools, the judge noted the disproportionate

²⁴¹ See *ibid* at paras 86-99.

²⁴² [Prince George \(City\) v Stewart, 2021 BCSC 2089](#) [*Stewart*] at para 83.

²⁴³ *Adams* BCCA, *supra* note 84 at para 75.

²⁴⁴ *Adams* BCSC, *supra* note 85 at paras 60-61.

²⁴⁵ *Ibid* at para 62.

²⁴⁶ See *Tanudjaja*, *supra* note 133 at para 37.

²⁴⁷ See *Stewart*, *supra* note 242 at para 84.

²⁴⁸ *Ibid* at para 81.

²⁴⁹ *Ibid* at paras 67-68 & 73.

²⁵⁰ *Ibid* at para 73.

number of Indigenous individuals in the encampment. Several times in the decision the judge also noted the cold climate and the lack of both suitable housing and daytime facilities. This may imply that *Charter* protections regarding sheltering at nighttime may also be extended to daytime situations where the cold weather is a significant threat. In a second injunction application in *Prince George (City) v Johnny*, involving the same encampment the City argued it had satisfied the preconditions set out in *Stewart*.

In the 2023 Waterloo (Region) decision, the court was asked to provide direction to the regional government on how to enforce its legal rights to evict unhoused persons living in an encampment on municipally-owned land in breach of their by-law.²⁵¹ While the Region brought the application with respect to a specific encampment it proposed to use the court's decision as a precedent for the treatment of other encampments. In addition to finding that the Region's plan contravened the Charter, the Court criticized the risk assessment tool developed by the municipality as lacking a basis in research and, perhaps most significantly, failing to consult any of the encampment's residents or include any comparative consideration of potential risks of eviction for encampment residents in the analysis.²⁵² The judge concluded the risk assessment "has no way to measure the relative risk of choosing between eviction, allowing Encampment residents to stay, or pursuing other options."²⁵³

In *The Corporation of the City of Kingston v. Doe*, a 2023 case concerning an encampment in Kingston, Ontario, the court considered a permanent injunction brought by the municipality against an encampment located in Belle Park, a large municipal green space.²⁵⁴ The court held that the prohibitions on camping as contained in the City's parks by-law constituted a violation of section 7 of the Charter when applied to unhoused encampment residents. The court's consideration focused on whether a violation of section 7 could be made out on the evidentiary record, rather than whether there was a constitutional right to shelter based on the number of homeless individuals and the availability of shelter space. The court held that if the City's order were granted, it would expose encampment residents to harm (including possible death), that it was overbroad and grossly disproportionate, and that therefore it could not be reasonably justified.

5. Procedural Protections

In the 2021 *Bamberger* decision, the residents did not raise a s 7 claim, focusing instead on procedural issues about the lack of consultation with residents before the Orders and questions about the reasonableness of the Parks Board's decision. However, the court was live to the s 7 issues, which informed the conclusion that residents had a right to notice and an opportunity to be heard before being ordered to leave. The court also decided that the Parks Board was unreasonable because it did not have accurate information regarding the availability of alternative housing for those living in CRAB Park. On these bases, the Court set aside the order prohibiting overnight shelter at a Vancouver park and remitted the decision for reconsideration.²⁵⁵ Though the order being challenged was implemented during the third wave of the pandemic, the pandemic itself was not an independent consideration for the Court. Rather, the petition succeeded because the General Manager did not have a reasonable

²⁵¹ [*The Regional Municipality of Waterloo v. Persons Unknown and to be Ascertained*, 2023 ONSC 670.](#)

²⁵² *Ibid* at paras 37-36.

²⁵³ *Ibid* at para 46.

²⁵⁴ [*The Corporation of the City of Kingston v. Doe*, 2023 ONSC 6662.](#)

²⁵⁵ See *Bamberger*, *supra* note 147 at paras 63-64.

factual basis for concluding that there were sufficient and appropriate indoor options for those who sought shelter at the park in question.²⁵⁶

While it was not brought as a *Charter* claim, the judge was expressly informed by s 7 in finding that residents had a right to notice and an opportunity to be heard before being ordered to leave. *Bamberger* highlights the role of administrative law in ensuring substantive and procedural fairness for encampment residents. Nonetheless, the decision does not go as far as the human rights obligations enshrined in international law for notice, meaningful participation in decision making, and the prohibition on forced evictions.²⁵⁷ Indeed, given the context of federal ownership of the lands it could have been directly informed by the concept of meaningful engagement and the robust participation called for under the *NHSA* and international law.²⁵⁸ Thus *Bamberger* was a missed opportunity to clarify the role of human rights obligations in the use of trespass orders; but, it will not be the last opportunity to raise these arguments.²⁵⁹

Following *Bamberger*, in July 2022, a two-block area of East Hastings Street in Vancouver, known as the Hastings Block, became the focus of a legal dispute due to its use as an encampment by people experiencing homelessness. The shelters, consisting of tents and tarps, were deemed a fire hazard by Karen Fry, the Fire Chief of the Vancouver Fire Department. After requesting (but not receiving) assistance from the Provincial Fire Commissioner in securing shelter and treatment for the encampment residents, the Fire Chief issued an order on July 25, 2022 under the City of Vancouver's Fire By-law to remove these structures.²⁶⁰ Two residents of the encampment, Stephanie Vandenberg and Lenora Blue, challenged this Fire Order through a judicial review petition. They argued that the Fire Order was unreasonable, failing to consider their rights under sections 7 and 15 of the *Charter*. They also contended that the lack of notice prior to the issuance of the Fire Order violated procedural fairness rules.

Relying on *Adams, Shantz, Johnston, Stewart, Adamson, and Bamberger*, the Court held in favour of Vandenberg (unfortunately Blue passed away). Importantly, the Court held that Vandenberg had adequately shown that her rights under s.7 are implicated in this situation because the Order impacts her ability to find shelter at night, and there is an inadequate number of accessible shelter spaces for individuals who have been displaced. Further evidence demonstrated that Vandenberg's life, liberty and security interests were engaged in this instance, and the Order was not in accordance to the principles of fundamental justice in that it was overbroad and arbitrary in regard to Ms. Vandenberg based on her evidence that her tent and belongings were not posing a fire hazard. The Court held that procedural fairness requirements, including adequate notice, were not provided, and therefore the duty of fairness

²⁵⁶ See *ibid* at para 150.

²⁵⁷ Farha & Schwan, *supra* note 2.

²⁵⁸ See *Grootboom and Others v Government of the Republic of South Africa and Others* – Constitutional Court Order (CCT38/00), 2000 ZACC 14 and Michèle Biss et al, "Progressive Realization of the Right to Adequate Housing: a Literature Review" (2022), online (pdf): <housingrights.ca/wp-content/uploads/NHC-Progressive-Realization-Paper_EN.pdf> at 7.

²⁵⁹ See also David DesBaillets and Sarah E Hamill, "Coming in from the Cold: Canada's National Housing Strategy, Homelessness, and the Right to Housing in a Transnational Perspective" (2022) 37-2 Canadian Journal of Law and Society 273.

²⁶⁰ [Vandenberg v Vancouver \(City\) Fire and Rescue Services, 2023 BCSC 2104](#).

was not met.

6. Challenging Enforcement

In Quebec, *Clinique Juridique Itinérante* challenged the provincial curfew imposed on January 6, 2021 (décret gouvernemental 2-2021) on the grounds that it infringed on the section 7 *Charter* rights (as well as provincial charter rights) of people experiencing homelessness.²⁶¹ Having been decided after the peak of the second wave, the decision took into account the outbreaks at shelters as a valid reason for people to not utilize them on top of the issues raised about shelters denying admittance based on various factors.²⁶² The court found for the applicants, concluding that all elements of the *RJR-MacDonald* test had been satisfied, with the balance of convenience section noting police enforcement could be unpredictable and the exemption would apply to a small percentage of the overall population.²⁶³ Though not directly related to encampments, the curfew came within a month of Montréal's Notre-Dame Street encampment being cleared by police.²⁶⁴

Poff v Hamilton (City), is another example of an injunction application brought by encampment residents. This case followed on an earlier successful application in August 2020, which had led to a negotiated settlement and a Bylaw Enforcement Protocol agreed to by advocates and City Council. When the City voted to repeal the Protocol one year later encampment residents brought a *Charter* challenge and another application requesting the City be restrained from enforcing anti-camping bylaws until the *Charter* case could be fully heard and decided on the merits. The court refused to grant the injunction, finding the five residents bringing the application were no longer in encampments and could not establish irreparable harm. Notably the court refused to consider the broader homeless population in this analysis. Following *Black*, the court also imported analysis from the protest encampment context in *Batty* without acknowledging the very different *Charter* rights at stake under s 7. Here the court rejects the arguments that shelters had high barriers to entry and emphasized the “choice” to remain in encampments.

In January 2024, the *Clinique juridique itinérante* (CJI) brought an application for an interlocutory injunction to stop the municipality of Saint-Jérôme from evicting encampment residents. The clinic also asked the court to halt the city from imposing punishment for regulatory offenses through enforcement of municipal bylaws. In order to obtain the interim order, the applicants must demonstrate real, apparent and objective immediate urgency. The Court held that given the length of time that the encampment had existed, there was no demonstration of urgency pending the resolution of the case in court. The Court also accepted the City's argument that it was clearing the encampment in order to ensure that no one was left out in the cold.

7. Acknowledging effects on Indigenous Peoples

²⁶¹ See *Clinique Juridique Itinérante v Ville de Saint-Jérôme*, 2024 QCCS 29 at para 9 [*Clinique*].

²⁶² See *ibid* at para 10.

²⁶³ See Isaac Olson, “Forced out of Montreal encampment, disbanded homeless community spreads out into city” (9 December 2020), online: CBC <[cbc.ca/news/canada/montreal/homeless-montreal-shelters-encampment-1.5834917](https://www.cbc.ca/news/canada/montreal/homeless-montreal-shelters-encampment-1.5834917)>.

²⁶⁴ See Sidhartha Banerjee, “Montreal authorities clear out Notre-Dame Street homeless camp over safety concerns” (7 December 2020), online: *Global News* <<https://globalnews.ca/news/7505640/notre-dame-street-homeless-camp-evictions-begin/>>.

Over the years, Courts have acknowledged the disproportionate number of unhoused people who are unhoused. In 2003, the court accepted evidence that one-third of the occupants of the named encampment were Indigenous.²⁶⁵ In the *Sterritt* decision referenced above, the court acknowledged that 21% of the City of Abbotsford's homeless individuals identified as Indigenous.²⁶⁶ In 2020, the court in *Vancouver Fraser Port Authority v. Brett*, the Court noted the 2019 Vancouver Homeless Count, which identified 2223 individuals who were experiencing homelessness, 495 of whom identified as Indigenous.²⁶⁷

In two BC cases, the court went further in their consideration of Indigeneity and homelessness. First, in *BC/Yukon Association of Drug War Survivors v. Abbotsford (City)*, the British Columbia Human Rights Tribunal dealt with various allegations brought by five Indigenous men experiencing homelessness of discrimination by the City of Abbotsford and the Abbotsford Police Department.²⁶⁸ The Applicants were all Drug War Survivors (DWS). The five Applicants alleged that the use of pepper spray on one applicant's tent and property, spreading of chicken manure onto an area where the Applicants were living, and the destruction or disposal of their personal property constituted discrimination based on race, ancestry, disability, and place of origin. The Tribunal described the incident as "a degrading and deplorable experience" for those subjected to it. The Tribunal disagreed with the city's claim that they had established new protocols that prohibited the destruction of property in encampments, and so had remedied that discriminatory act, stating that the protocols were inadequate to remedy any discrimination faced by the Applicants. The Tribunal also pointed to evidence brought by DWS that showed that the officer knew, or ought to have known, of the applicant's protected characteristics.

The city argued that discrimination based on 'place of origin' should be dismissed because "being homeless is not connected to a person's place of origin."²⁶⁹ In response, DWS forwarded a novel argument that 'place of origin' here meant 'placelessness' – those experiencing homelessness are treated as though they do not belong, and so are 'placeless' within their own country, province, and city. The Tribunal allowed DWS' argument to proceed for three reasons: one, that a novel claim cannot be struck simply because it is novel; second, the substance of the complaint would proceed regardless; and third, the argument was being advanced on behalf of a significantly marginalized group and so is a matter of public interest.

Second, in the 2021 *Stewart* case, the City of Prince George sought various declarations and orders to remove two encampments on City property, known as 'George Street' or 'The Splits', and 'Lower Patricia' or 'Moccasin Flats'. Regional Chief Terry Teegee, a member of Takla Nation, deposed in an affidavit that a 2018 count found that 79% of the homeless population in Prince George were Indigenous though Indigenous people accounted for only 10-15% of the City's overall population. In bringing their application for an injunction to remove the encampments, the City of Prince George alleged that the encampments posed several risks to the neighbourhood, including criminal activity, drug use, and fire hazards. The Court dismissed these allegations as hearsay or lacking sufficient evidence. While the risk of fire was acknowledged, the Court pointed out that the risk would remain regardless of the encampment's location – the only way to reduce the risk was to move the occupants

²⁶⁵ *Sterritt*, *supra* note 194.

²⁶⁶ [Abbotsford \(City\) v. Shantz, 2015 BCSC 1909](#) [Shantz #3].

²⁶⁷ *Brett*, *supra*, note 147.

²⁶⁸ [BC/Yukon Association of Drug War Survivors v. City of Abbotsford and another, 2020 BCHRT 86](#).

²⁶⁹ *Ibid* at para 100.

into shelters. However, the Court found that the City of Prince George had failed to consider various barriers (ex., lack of identification, substance use disorders, lack of bank accounts) in providing around eighty-one emergency shelter beds. Covid-19 was also determined to have played a role, as it had closed normally accessible shelter spaces. Ultimately, the Court only granted the City of Prince George an injunction against the George Street encampment alongside authorization to dismantle the encampment within seven days of the judgement.

Crucially, the court took judicial notice of the ongoing impacts of colonization such as residential schools, the judge noted the disproportionate number of Indigenous individuals in the encampment. Several times in the decision the judge also noted the cold climate and the lack of both suitable housing and daytime facilities. This may imply that *Charter* protections regarding sheltering at nighttime may also be extended to daytime situations where the cold weather is a significant threat. In a second injunction application in *Prince George (City) v Johnny*, the same encampment the City argued it had satisfied the preconditions set out in *Stewart*.

8. The Role of Indigenous Jurisdiction

While these efforts to recognize the disproportionate impact of encampment responses on Indigenous people and to acknowledge the specific experience of Indigenous encampment residents are welcome and important, the decisions discussed above do not recognize or advance Indigenous jurisdiction and Indigenous legal orders. What would it look like to seriously consider Indigenous law and jurisdiction in the context of encampments? In *British Columbia v. Friends of Beacon Hill Park*, the British Columbia courts missed an important opportunity to take up this question and reconsider our collective obligations to unhoused people.

Beacon Hill Park is an 183 acre park near downtown Victoria, British Columbia, that is often referred to as the crowning jewel of the Victoria park system.²⁷⁰ This park is also the original territory of the Lekwungan speaking peoples who today comprise the Songhees and Esquimalt First Nations. Meegan, the lekwingan word for Beacon Hill that means “to warm by the sun” was an important area for the cultivated food systems developed along the land and for reef net fishing as well as strategic defensive locations for villages. The site of a historic village, this area has continued meaning for the Lekwungan people.²⁷¹

In 1882, the lands constituting the Park were granted to the City under the authority of the *Public Parks Act, 1876*, without regard to Lekwungan title to the area and without consent or compensation, on terms that it be held by the City in trust:

...TO HAVE and TO HOLD the said piece or parcel of land and all singular the premises hereby granted with their appurtenances unto the said Corporation and their successors to and for the several uses intents and purposes and upon the several trusts and with under and subject to the several powers provisos agreements and declarations

²⁷⁰ Craig Turney, “The Contested History of Beacon Hill Park” (2022), online: *Medium* <<https://craigturney.medium.com/whose-park-is-beacon-hill-d7e9afa2cc83>>; *Beacon Hill Park Trust (Re)*, 2022 BCSC 284 [Beacon Hill].

²⁷¹ Songhees Nation, *Traditional Territory*, online: <<https://www.songheesnation.ca/community/l-k-ng-n-traditional-territory>>.

expressed and declared of and concerning the same that is to say UPON TRUST to the express use intent and purpose that the said hereditaments and premises hereby granted shall be maintained and preserved by the said Corporation and their successors for the use recreation and enjoyment of the public under the provisions of the Public Parks Act 1876 and the said Act to amend the Public Parks Act 1876.²⁷²

The terms of the grant became an issue during the COVID-19 pandemic when the number of people sheltering outdoors in Victoria increased dramatically as shelters and service providers suspended or significantly downsized services. Prior to March 2020, there were approximately 24-35 people sheltering in parks, but this number increased to 465 by April of 2020.²⁷³ The 2023 Victoria Point-in-Time Count Report (PIT Report) found that Indigenous people continue to be overrepresented in the homeless population, largely due to increased risk factors arising from systemic barriers, racial discrimination, and intergenerational trauma resulting from colonial policies such as residential schools, The Sixties Scoop and the Child Welfare system.²⁷⁴ Research prepared for the City found, “[T]he majority of Indigenous people experiencing homelessness in Greater Victoria first experienced homelessness as a youth, have personal experience with the foster care system and have personal or family experiences with residential schools.”²⁷⁵ The dispossession of Indigenous peoples from their lands coupled with housing shortages on reserve have compounded these factors. Making up only 5% of the Victoria population, Indigenous peoples represent 32.9% of the homeless population and 31.7%, of the Indigenous homeless population come from nations on Vancouver Island. Though 87% of the homeless population want permanent housing, high rent, low incomes and lack of available affordable housing were the main factors in homelessness in Victoria.²⁷⁶

Despite this context of overrepresentation, dispossession, and discrimination, Indigenous people have had little voice in shaping policies and laws regarding homelessness, encampments, and sheltering in parks. More concerning, Indigenous nations have had little consultation about the approaches taken to address homelessness and provide care for those in need of shelter. Indigenous law and jurisdiction has been largely absent from these conversations. Thus Indigenous Peoples have been limited in their abilities to respond with ontologies of care. This was evident in the contestation that unfolded regarding encampments in Meegan.

The Province declared a state of emergency on March 18, 2020 and initially they stopped enforcing prohibitions on daytime sheltering put in place post-*Adams*. In September 2020, the City adopted temporary bylaw amendments allowing daytime sheltering by persons experiencing homelessness in public parks, provided they complied with certain specific regulations such as rules about the size, location, and spacing of shelters.²⁷⁷ However, the City repealed the temporary provisions allowing for

²⁷² *Beacon Hill*, *supra* note 270.

²⁷³ *Ibid* at para 38.

²⁷⁴ Community Social Planning Council of Greater Victoria, *2023 Greater Victoria Point-in-Time Homeless Count and Needs Survey* (July 2023), online: *Reaching Home* <<https://www.crd.bc.ca/docs/default-source/housing-pdf/housing-planning-and-programs/2023-point-in-time-count-report.pdf>>.

²⁷⁵ Nicole Chaland, “COVID 19: The beginning of the end of homelessness A report on the barriers and recommendations to ending homelessness in the Capital Region” (2021), online: *Homeless Hub* <[https://www.homelesshub.ca/sites/default/files/attachments/The%20Beginning%20of%20the%20End%20of%20Homelessness\[50\].pdf](https://www.homelesshub.ca/sites/default/files/attachments/The%20Beginning%20of%20the%20End%20of%20Homelessness[50].pdf)>.

²⁷⁶ *Ibid* at 14.

²⁷⁷ *Beacon Hill*, *supra* note 270 at para 39.

daytime sheltering as of May 1, 2021. The City of Victoria brought a petition asking for the opinion, advice or direction of the court on whether use of the Park for temporary overnight sheltering by persons experiencing homelessness is consistent with the trust conditions under which the City holds the Park.²⁷⁸ The Friends of Beacon Hill Park Society, a non-profit organization, joined as a respondent to argue that camping in the park contravened the terms of the trust and assert that the city had erred in permitting individuals to shelter in the park. The goal of the Friends of Beacon Hill Park is "To Promote & Protect the Natural & Cultural History of Beacon Hill Park."²⁷⁹

At first instance, Justice Punnett held, "[T]he Trust does not permit use of the Park for temporary sheltering by persons experiencing homelessness. Such activity by the members of the public is contrary to the purpose of the Trust: preservation of the Park for the use, recreation and enjoyment of the public."²⁸⁰ This ruling raises important questions about who constitutes the public. It also effectively occludes questions of who has authority and jurisdiction to make decisions about the use of this territory. Focusing on what constitutes the use, recreation and enjoyment of the public, the court relied restrictions on establishing permanent structures in the park. While recognizing the various uses that have been taken up in the Park, the court provided little reflection on why previous uses were permitted while sheltering in the park was a contravention to the trust. The court noted:

Since it was transferred to the City in 1882 the Park has been used for a range of purposes. For example, cattle grazing, digging gravel pits and the like continued after the settlement of the Trust. At various times it has been used for shelter. The Victoria Rifle Volunteer Corps camped in the Park from at least 1866 to 1870 and Boy Scouts camped there in 1913. During the 1970s, the Park was used as a campground with limited opposition from the City. Five acres of the Park were used during World War I to house and train soldiers, with at least 20 structures having been built for this purpose by the time it was dismantled in 1917. Beacon Hill Park Nursery was established in 1909 and it supplied plants for City parks and boulevards but also generated revenue through commercial sales from that date until the 1930s. Other uses include a road and expanded parking lots. Currently, the City operates a maintenance yard within the Park.²⁸¹

Relying exclusively on a focus on the management and administration of the park as the trust property, rather than as a place embedded in a longstanding ontology of care, the court occluded discussion of constitutional and human rights of individuals in need of shelter.

The Province appealed the decision, arguing that the question required a more qualified answer that accounted for the constitutional context, namely that the terms do not include temporary sheltering "except to the extent that an individual experiencing homelessness has a need to fulfill a basic necessity of life by erecting a temporary overnight shelter in a public place and has nowhere else to go but the Park."²⁸² The Court of Appeal for British Columbia dismissed the appeal concluding that the the question before them was about the terms of the trust rather than the constitutional rights of people experiencing homelessness and sheltering in the park. That question was left to another day, if asserted by specific individuals rather than in the abstract: "If rights to use the Park for other purposes are asserted, they will have to be adjudicated based on the facts and law at the time. The terms of the trust,

²⁷⁸ *Ibid*; also see [British Columbia v. Friends of Beacon Hill Park, 2023 BCCA 83](#) [Friends of Beacon Hill].

²⁷⁹ Beacon Hill Park, Friends of Beacon Hill Park, online: <<https://fbhp.ca>>.

²⁸⁰ *Beacon Hill*, *supra* note 270.

²⁸¹ *Ibid*.

²⁸² *Friends of Beacon Hill*, *supra* note 270.

however, are that the Park is to be used for the recreation and enjoyment of the public, which use does not include temporary overnight sheltering.”²⁸³

While the Songhees and Esquimalt First Nations sought and were given intervenor status in this case, their interests were limited to a framing that the decision would not affect or interfere in their claims to use of the park.²⁸⁴ Like the potential *Charter* claims by individuals sheltering in the park, potential s 35 rights claims would be “conflicting uses” to be dealt with by the trustees “based on the facts and law at the time.”²⁸⁵ The decision does not contemplate the responsibilities and obligations these Nations may have both to the Meegan and to encampment residents. Nor does it consider how Lekwungan legal approaches could shape the terms of the trust. The structural and procedural limitations of this approach to interpreting the trust ensured law functioned within the limited frameworks we saw present in the story of the little bird and the trees. Both turning to the court for an interpretation of the trust, as well as the use of narrow interpretations of bylaws and permit requirements, provided the City with little space for ontologies of care to come forward in responding to encampments. Indeed, many mutual aid efforts, such as establishing access to shower facilities and a Community Care Tent were barred and dismantled by the City throughout the pandemic.²⁸⁶ While City officials also expressed the need for enacting ontologies of care, they framed these acts narrowly as needing to comply with municipal, provincial and federal law frameworks.²⁸⁷ It is a reasonable and just expectation that local governments will comply with their own laws and other domestic frameworks. However, this approach fails to consider the limited contexts and considerations that give rise to these laws. It also closes off alternative imaginations for what enacting ontologies of care can look like if other sources of law are recognized.

Meaningful reconciliation with Indigenous nations requires reframing conceptions about the right to housing at the heart of encampment responses. Shifting away from narrow interpretations of Canadian law and foregrounding Indigenous jurisdiction and legal orders requires us to focus our attention first and foremost on our responsibilities to care for others, including providing shelter. This requires collective work toward addressing this fundamental obligation. We must all turn our minds to what kinds of nations we want to be, what kinds of humans we want to be, and how we can enact the ontologies of care that reflect the humanity we want to see exercised.

Furthermore, meaningful reconciliation requires a reconsideration of authority and decision-making practices. For example, in the context of Meegan, we must ask how the City of Victoria worked with the Songhees and Esquimalt Nations to determine what kinds of use of the park are permissible, which areas should be protected, and what responsibilities and obligations we have to those in need of shelter? While the Trust dates back to the 19th century and carries forward a set of conditions for how this land can be used, Indigenous legal orders date back to time immemorial and also speak to the permissible uses of this land and the corresponding obligations. These legal orders sit alongside one

²⁸³ *Ibid.*

²⁸⁴ Carla Wilson, “First Nations seek to intervene in Beacon Hill Park appeal” (2022), online: *Times Colonist* <<https://www.timescolonist.com/local-news/first-nations-seek-to-intervene-in-beacon-hill-park-appeal-5880474>>.

²⁸⁵ *Friends of Beacon Hill*, *supra* note 266 at para 55.

²⁸⁶ Emily Fagan, “Volunteers Built Showers for Victoria’s Unhoused. They Were Left High and Dry” (2020), online: *The Tyee* <<https://thetyee.ca/News/2020/11/09/Volunteers-Built-Showers-Victoria-Unhoused/>>.

²⁸⁷ Lisa Helps, “Showers, community care tent, The City’s role and next steps towards housing” (2020), online: *Lisa Helps Cities* <<https://lisahelpscities.ca/showers-community-care-tent-the-citys-role-and-next-steps-towards-housing-mayors-sunday-email-november-8-2020/>>.

another and must be overlaid with our ontologies of care for the land, waters, animals, plants and peoples that co-exist in each particular place. Our understanding of the public must be more expansive and take up the multi-juridical reality of the places we share.

CONCLUSION

This paper has summarized core areas related to the legal aspects of encampments and human rights, including the meaning of adequate housing, what it means to progressively realize the right to housing, the laws that apply to encampment regulation, and the legal arguments that have been advanced to date.

From a legal perspective, the cases show that the framework set out in *Adams* has endured in the fifteen years since the case was decided. Injunctions continue to be the primary – and often successful basis – upon which municipalities seek to impose trespass and other orders against encampment residents sheltering overnight.²⁸⁸ Since the coronavirus pandemic, as the level of homelessness has increased sharply, more cases have been brought to the courts, leading to some important changes in the court’s willingness to recognize the rights of encampment residents. In BC, local officials have been asked to show that shelter spaces are accessible, not simply available. Courts have also taken judicial notice of the relationship between colonialism and homelessness, as well as the procedural rights of encampment residents.

By contrast, courts in Ontario are taking a markedly different approach than those in BC, emphasizing the property rights of municipalities without consideration of the social context of encampments, substance use, the ongoing impacts of colonialism, and systemic discrimination against Black and Indigenous persons in housing and policing. These cases also demonstrate that the unique facts of each court action are important, rather than broader questions of housing availability for vulnerable people. We are also seeing more cases outside of BC and Ontario, including in Quebec and Alberta.

In some ways, this report is backwards-looking: we have largely reported on the state of the law, not what the law is capable of. While we continue to hope that they will not be necessary, many more opportunities exist for novel legal avenues, some of which we have alluded to here, such as arguments related to the unique rights of Indigenous Peoples, the potential of the *NHSA* to serve as a legal basis for claims on federal lands or in relation to federal obligations to unhoused peoples, and the application of other sections of the *Charter*.

²⁸⁸ See esp. Stepan Wood, “Rush to Judgment: A Critical Survey of Court Injunctions Against Homeless Encampments in BC, 2000-2022 (Vancouver: UBC Centre for Law and the Environment, 2023), online: <<https://allard.ubc.ca/sites/default/files/2023-10/Rush%20to%20Judgment%20Report%20Oct%202023.pdf>>.

ANNEX – BRIEF SUMMARIES OF RELEVANT COURT CASES

<u>Vancouver Parks Board v Mickelson, 2003 BCSC 1271</u>
The Parks Board’s declaration that structures cannot be erected in the park does not infringe the freedom of expression under the <i>Charter of Rights and Freedoms</i> . However, the inclusion of an enforcement clause (arrest and prosecution) is not appropriate.
<u>Victoria (City) v. Adams, 2008 BCSC 1363</u>
The City’s bylaws prohibiting the defendants from “obstructing and the free use and enjoyment,” “injuring or destroying”, and “depositing waste or debris upon” Cridge Park violate s. 7 of the Charter by depriving homeless people of life, liberty and security of the person in a manner not in accordance with the principles of fundamental justice and it is not justified under s. 1 of the Charter. The bylaws are therefore of no force and effect if there are inaccessible night-time shelter spaces.
<u>Victoria (City) v Adams, 2009 BCCA 563</u>
The Court of Appeal upheld the trial judge’s order (2008 BCSC 1363). However, the City may apply for a termination of the declaration if it can demonstrate that the conditions that make the <i>Parks Regulation Bylaw</i> unconstitutional have ceased to exist.
<u>Batty v. City of Toronto, 2011 ONSC 6862</u>
The City’s Parks bylaw under the <i>Trespass to Property Act</i> prohibiting shelters or other structures and gathering in the park between 12:01 am and 5:30 am was found to be appropriate considering the city’s demands for the use of its limited parklands. Batty’s challenge that was the bylaw violated section 2 rights (freedom of expression) under the <i>Charter</i> was dismissed.
<u>Abbotsford (City) v Shantz, 2013 BCSC 2612</u>
The City’s application for an injunction requiring the defendants to remove themselves and their encampments from Jubilee Park and to cease and desist lighting fires and placing fuels in the park is granted.
<u>Tanudjaja v. Canada (Attorney General), 2014 ONCA 852</u>
The applicants brought an application challenging provincial and federal government decisions, alleging that these decisions eroded access to affordable housing contrary to section 7 of the <i>Charter</i> . The Court held that the assertion of a general free-standing right to adequate housing was doubtful and agreed with the motion judge’s decision to strike the application.
<u>Abbotsford (City) v. Shantz, 2015 BCSC 1909</u>
The City’s application for a permanent injunction for Jubilee Park is declined and their bylaws prohibiting homeless people from sleeping or being in a park overnight or erecting a temporary shelter without permits are found to violate s. 7. Such bylaws are therefore of no force and effect.
<u>British Columbia v. Adamson, 2016 BCSC 584</u>

The Province's application for an injunction to restrain the defendants from establishing an encampment upon the Courthouse Green Space and erecting structures upon it is denied. The balance of convenience is overwhelmingly in favour of the defendants, who have nowhere to move to.

BC/Yukon Association of Drug War Survivors v. City of Abbotsford and another, 2020 BCHRT 86

The DWS allege discrimination on behalf of five men living in tents/improvised structures in Abbotsford by the Abbotsford Police Department. The BCHRT allows allegations arising from a pepper spraying incident

Vancouver Fraser Port Authority v. Brett, 2020 BCSC 876

The VFPA seeks an injunction ordering that residents encamped on their property vacate the area and cease occupation. An interlocutory order (15 days) is granted, but the VFPA's request for an enforcement clause (arrest and detain) is rejected.

Sanctuary et al v. Toronto (City) et al., 2020 ONSC 4708

The City of Toronto has failed to meet its obligations regarding physical distancing standards in shelter settings under the Interim Settlement Agreement.

Black et al v City of Toronto, 2020 ONSC 6398

Fourteen unhoused individuals sought an interlocutory injunction to prevent the city from enforcing a bylaw that prohibited the erection of tents and other structures in parks. The interlocutory injunction was dismissed as the City demonstrated sufficiently adequate and safe indoor shelters during the COVID-19 pandemic.

Prince George (City) v Stewart, 2021 BCSC 2089

The City's application for an order removing all structures, tents, and personal items from the George Street Encampment is granted—occupants have seven days to vacate. However, the City's request for a police enforcement clause is denied.

Poff v Hamilton, 2021 ONSC 7224

The application by five unhoused individuals for an interlocutory injunction to prevent the City from enforcing a bylaw prohibiting camping and the erection of tents/structures in city parks is denied.

Bamberger v Vancouver (Board of Parks and Recreation), 2022 BCSC 49

The applicants' application for judicial review of the Park Board's Orders prohibiting temporary shelters in CRAB Park is permitted. The Orders are set aside to be remitted back to the Park Board for reconsideration.

Prince George (City) v Johnny, 2022 BCSC 282

The City's application for an interlocutory injunction closing a tent encampment of unhoused people in a green-space known as "Lower Patricia" is dismissed.

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

The Region's application for a declaration that unhoused persons living on the Region-owned property in question are in breach of a bylaw is missed. The Region's application for injunctive relief to remove the individuals is also dismissed. Finally, the bylaw is found to be a violation of section 7 of the *Charter* and is therefore inoperative to the extent of the violation.

British Columbia v. Friends of Beacon Hill Park, 2023 BCCA 83

The trust governing Beacon Hill Park does not permit overnight campers or the use of the park as a temporary shelter for unhoused individuals.

The Corporation of the City of Kingston v. Doe, 2023 ONSC 6662

Section 11 of the City's bylaw prohibiting camping at Belle Park is unconstitutional to the extent that it violates encampment residents' section 7 rights. The City is only entitled to injunctive relief for camping during daytime and an exception allowing unhoused persons to erect shelter overnight is to be read in.

Vandenberg v Vancouver (City) Fire and Rescue Services, 2023 BCSC 2104

The Fire Chief's Order prohibiting tarps, tents, and other structures on a two block stretch of East Hastings Street due to fire hazards is reasonable, but the Fire Chief has not met its duty of procedural fairness when issuing the order. As the residents' section 7 rights are engaged by the Order, there must be notice and an opportunity to be heard for residents under the duty of procedural fairness.