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Homeless encampments and the Charter

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Few issues test the limits of municipal authority as directly as homeless encampments. Municipalities own the parks, road allowances, and vacant lots where encampments typically take root. When a municipality moves to clear an encampment, municipal authority can collide with the Charter of Rights and Freedoms.

A recent decision of the Ontario Superior Court of Justice, *The Regional Municipality of Waterloo v. Named and Persons Unknown,* 2026 ONSC 2971, demonstrates just how difficult that collision can be, and breaks new legal ground that every Ontario municipality should understand.

Second look at 100 Victoria

The encampment at 100 Victoria Street North in Kitchener, Ont., has existed since December 2021. The region requires the site as a staging and "lay-down" area for construction of the Kitchener Central Transit Hub, a major Metrolinx project. This is the second time the region has asked the court to sanction the encampment's closure.

In the first round, *The Regional Municipality of Waterloo v. Persons Unknown and to be Ascertained,* 2023 ONSC 670, Justice Valente declined to enforce the region's general "code of use" bylaw against the residents. He declared it constitutionally inoperative insofar as it prevented people from sheltering on the property when the number of homeless persons in the region exceeded the number of available and accessible shelter beds. The region did not appeal.

In the second round, decided in May 2026, the region tried a different approach. Rather than rely on a bylaw of general application, it passed a site-specific bylaw aimed only at 100 Victoria, later amending it to defer the vacant-possession date, remove the offence provision, and add a transition plan for existing residents.

In an unusual step, the region proactively applied for a declaration that its bylaw complied with the Charter; the residents cross-applied for the opposite.

New form, same substance

The region's first hurdle was the earlier decision. Justice Gibson held that the doctrine of horizontal stare decisis bound him to follow Justice Valente's Section 7 conclusions. The site-specific bylaw was, in his words, "new in form but not in substance."

Because its purpose (obtaining vacant possession of the site to support the transit hub) and its practical effect were substantively identical to the bylaw considered in 2023, relabelling the instrument could not avoid the earlier ruling.

For municipalities, the lesson is important: a fresh bylaw will not escape a prior constitutional determination where its object and impact remain the same. It also highlights the importance of appealing decisions with which you may disagree.

Shelter-capacity threshold

At the heart of the Section 7 analysis is a principle Ontario courts have drawn from a line of cases originating in British Columbia: prohibiting people from sheltering themselves outdoors engages their rights to life, liberty, and security of the person when there are not enough accessible indoor spaces to house them.

Where the number of homeless persons exceeds the number of truly

accessible shelter beds, a blanket prohibition on erecting temporary shelter will generally be found to deprive residents of Section 7 rights in a manner grossly disproportionate to the bylaw's objective.

Two features of that test deserve emphasis. First, the comparison is not a simple bed count. Spaces must be genuinely accessible to the individuals who need them; a shelter that cannot accommodate couples, excludes a given gender, imposes sobriety requirements, or cannot meet a resident's disability-related needs may not count as available. Second, the relevant question is capacity for the whole homeless population, not merely for the residents of the encampment in issue.

On the evidence, the gap had widened dramatically since 2023. Point-in-time counts recorded roughly 1,085 people experiencing homelessness in the region in 2021 and 2,371 by late 2024, while emergency shelter capacity covered only about 15 per cent of that population.

The region conceded it could not house everyone. Critically, it also maintained that it would not permit sheltering anywhere else on its lands if 100 Victoria were cleared, leaving the encampment, in the court's words, the "only remaining safety valve" and a "refuge of last resort." That position is what ultimately doomed the bylaw.

New equality dimension

The most significant development lies in Section 15, the Charter's equality guarantee. In 2023, Justice Valente had rejected the residents' equality argument on the basis that "homelessness" is not an enumerated or analogous ground of discrimination. Justice Gibson reached a different result, for two reasons.

First, he relied on the Supreme Court of Canada's March 2026 decision in *Quebec (Attorney General) v. Kanyinda,* 2026 SCC 7, which confirmed that a law can discriminate against a protected subgroup even where the broader group it affects is not itself defined by a protected ground.

Applying that reasoning, the bylaws disproportionately burdened homeless people who are women or gender-diverse, who have disabilities, and who are Indigenous, all of whom are less able to access indoor shelter that meets their needs. That was enough to establish a Section 15 breach.

Second, and more far-reaching, Justice Gibson held that "the time has come" to recognize homelessness itself as an analogous ground under Section 15. Drawing on the Chief Justice's concurring reasons in Kanyinda, he found that homelessness shares the hallmarks of an analogous ground:

- it can attract stereotype and stigma
- it is "constructively immutable" in that people cannot readily exit it by choice
- those experiencing it form a historically disadvantaged, marginalized, and politically vulnerable group

If this holding stands, it would mark a notable expansion of equality protection and would require municipalities across the province to weigh discrimination, not just Section 7, whenever their bylaws touch on people experiencing homelessness.

No Section 1 justification

The region argued that any breach was a reasonable limit justified under Section 1. The court disagreed.

Breaches of Section 7 are rarely saved under Section 1, and this bylaw failed the proportionality analysis: a bare prohibition on sheltering at the only lawful site was not minimally impairing when alternatives (such as a safe tenting protocol or a designated encampment location) were available. And the anticipated benefits of the transit hub, while genuine, were found on the record to be insufficiently demonstrated to outweigh the severe effects on the region's most vulnerable residents.

Notably, the court declined to quash the bylaw for bad faith under Section 273 of the *Municipal Act, 2001,* finding that the notice and consultation shortcomings in the original bylaw had been remedied in the amended version.

Novel remedy: The "declaration plus"

Rather than end with a simple declaration of invalidity, Justice Gibson retained jurisdiction over the matter, an approach he described, borrowing from academic commentary, as a "declaration plus."

The bylaws were declared of no force and effect and an injunction issued, but the region may return to the court once it has implemented a safe tenting protocol, provided an alternative encampment site reasonably close to 100 Victoria, or both. The court pointed to designated-encampment approaches in London and Thunder Bay as possible models.

This remedial structure itself is a signal to municipalities. The court did not order the region to abandon the transit hub; it left the door open to removing the encampment, provided that the region first addresses where its homeless residents can lawfully go. The practical path forward increasingly runs through managed alternatives rather than outright prohibition.

What this means for municipalities

The decision is under appeal. The region filed its notice of appeal on June 22, 2026, and the province (an intervener in the case) has said it will appeal as well.

The region appeals on the following grounds:

- that the site-specific bylaw differed enough in scope and purpose that horizontal stare decisis should not have bound the court on Section 7
- that *Kanyinda* did not change the Section 15 test or support recognizing homelessness as an analogous ground
- that the judge failed to defer to the region's policy choices and wrongly treated the transit hub's benefits as "speculative"

The premier has separately suggested the province could invoke the Charter's notwithstanding clause to override the decision. Until the higher courts have their say, several practical points stand out for municipalities.

A bylaw that prohibits outdoor sheltering is vulnerable wherever accessible shelter space falls short of the homeless population, and redrafting or narrowing the instrument will not cure the problem if its purpose and effect are unchanged. "Accessibility" must be assessed realistically, accounting for gender, couples, disability, and other barriers. And courts are increasingly looking for municipalities to pair enforcement with genuine alternatives: safe tenting protocols, designated sites, and meaningful engagement with residents.

Encampments raise some of the hardest questions in municipal law, engaging real tensions among public infrastructure, public safety, and the Charter rights of vulnerable residents. The Waterloo decision does not resolve those tensions, but it clarifies the legal terrain on which they must be worked out – and reminds municipalities that how they close an encampment can matter as much as whether they should.

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