

# #OJENROEJSP22

## OJEN's Spring 2022 Twitter Moot

### Encampment Evictions

#### Should a city be able to evict people living in tent encampments?

During the COVID-19 pandemic, Canadians were told to “stay at home” to reduce the spread of the virus. This was a difficult, if not impossible, demand of unhoused people. In response, several individuals began to sleep in tents. Some people feared they would contract COVID-19 in shelters where social distancing was not possible<sup>1</sup> whereas others found a strong sense of community and support in encampments.<sup>2</sup> Over time, tent encampments began to increase in city parks.

In the early weeks, many cities did not take any steps to evict encampment residents. As time passed, cities started to become concerned with safety. A lack of running water and public restrooms caused sanitary issues. Park users and neighbours began making complaints about garbage, violence, drug use, and criminal activity. Fires also broke out, tragically leading to some residents' deaths.

Cities began to enforce bylaws that prohibited camping and sheltering overnight in parks. Advocates and residents, however, urged that evictions severed residents from community supports and undermined their autonomy. Groups of encampment residents brought constitutional challenges to try and stop the evictions.<sup>3</sup> Despite resistance from residents and their supporters, police officers and security guards ultimately evicted several residents and cleared many encampments.

Given the COVID-19 public health crisis and the housing crisis, should a city be able to evict people living in tent encampments?

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<sup>1</sup> *Black et al. v. City of Toronto*, 2020 ONSC 6398 at para 4. [Black]

<sup>2</sup> *Ibid* at para 101.

<sup>3</sup> See: CBC. “People Experiencing homelessness fight city in court to stay in their tents.” 30 September 2020: <https://www.cbc.ca/news/canada/toronto/covid-ont-toronto-encampments-1.5745043>.

## Should a city be able to evict people living in tent encampments?

OJEN invites Twitter Moot participants to prepare discussion points dealing with the **moral**, **social** and **legal** implications of encampment evictions from a variety of perspectives.

Here are some additional questions to consider:

- What rights do residents of encampments have?
- Which of the rights guaranteed by the *Canadian Charter of Rights and Freedoms* (*Charter*) are triggered by this issue?
- Could you also consider international human rights treaties and/or the *Ontario Human Rights Code*?
- What legal and moral obligations do cities have towards unhoused people?
- Are Canadian cities doing enough to help unhoused people find shelter, interim housing, and permanent housing?
- Are Canadian cities effectively balancing the rights of public park users and neighbours with encampment residents?

## Relevant law

### City Bylaws

Bylaws are created under the authority of a provincial act to address local issues and concerns.<sup>4</sup> Common bylaws include vehicle parking, building and construction, noise limits, zoning and management of public recreation areas.

Encampment residents have challenged the enforcement of city bylaws in the courts. In these cases, courts have tried to balance the competing interests of the many people who use public parks.<sup>5</sup>

Applicable bylaws<sup>6</sup>:

§ 101. Access.

A. Unless authorized by a parks access agreement, no person shall access or occupy a park for non-recreational uses, or to access an adjacent property.

B. Unless authorized by permit, no person shall use, enter or gather in a park between the hours of 12:01 a.m. and 5:30 a.m.

<sup>4</sup> City of Oakville. "Municipal By-laws." <https://www.oakville.ca/townhall/bylaws.html> 2022.

<sup>5</sup> Canadian Bar Association (CBA). "Encampment in Municipal Parks." <https://www.cba.org/Publications-Resources/Practice-Tools/Tackling-Homelessness/Encampment-in-Municipal-Parks>

<sup>6</sup> For the purpose of the Twitter Moot, we will use the above bylaws adapted from the City of Toronto municipal bylaws: 608-9, 608-13 and 608-14, and assume the city is the fictional City of Mariposa, Misisauga County, Ontario.

§ 102. Camping and lodging.

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

§ 103. Tents and structures.

Unless authorized by permit, no person shall place, install, attach or erect a temporary or permanent tent, structure or shelter at, in or to a park.

## Section 7 of the *Charter*

### Do encampment evictions violate residents' rights under section 7 of the *Charter*?

Section 7 of the *Charter* outlines that everyone "has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." For the courts to find a violation of section 7, a person must show that a law violates their right to either life, liberty, or security of the person in a way that violates at least ONE of the principles of fundamental justice (or "PFJs").

The section 7 *Charter* rights of unhoused people facing encampment evictions have been recognized by courts in Ontario and British Columbia.<sup>7</sup> Courts have also found that the section 7 *Charter* "liberty" interest is engaged when a local government interferes with an individual's right to shelter themselves in a public space "where there is no practical shelter alternative". The **availability of shelter space** is central in these cases.<sup>8</sup>

Principles of fundamental justice (PFJs) are important values that protect the basic fairness of our justice system. According to the Supreme Court, a law violates the principles of fundamental justice if it is arbitrary, grossly disproportionate, or overbroad. A law is **arbitrary** if its infringement of life, liberty, or security of the person "bears no connection" to the law's purpose.<sup>9</sup> Likewise, a law is **grossly disproportionate** if the punishment imposed by the law greatly outweighs the law's purpose or benefit.<sup>10</sup> Finally, a law is **overbroad** when it captures behaviour that "bears no relation to its purpose in order to make enforcement more practical."<sup>11</sup>

## Section 15 of the *Charter*

### Do encampment evictions violate residents' rights under section 15 of the *Charter*?

Section 15(1) of the *Canadian Charter of Rights and Freedoms* says that every individual has a right to equal treatment before the law. This section prohibits certain forms of discrimination from being perpetrated by the government of Canada. Therefore, if a government action

<sup>7</sup> See: *Victoria (City v. Adams)*, 2009 BCCA 563, 313 D.L.R. (4th) 29 and *Black*, supra note 1.

<sup>8</sup> *CBA*, supra note 5.

<sup>9</sup> *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 101.

<sup>10</sup> *Ibid* at para 120.

<sup>11</sup> *Ibid* at para 113.

results in discrimination towards an individual or a group of people, this government action could be the subject of a section 15 challenge.

## Section 1 of the *Charter*

### If encampment evictions violate the *Charter*, could they be “saved” under section 1?

Section 1 explains that *Charter* rights are subject to “reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” Even if a law violates one of the rights listed in the *Charter*, this violation may still be found constitutional (or “saved”) if it is a reasonable limit on rights. The courts use this section to resolve disputes between the rights of individuals and the rights enjoyed by others or broader collective interests. When assessing whether a limit on *Charter* rights is valid under section 1, the courts use the *Oakes* test.

The *Oakes* test<sup>12</sup> has two steps. The **first step** of the test asks whether there is a “pressing and substantial” objective for the law or government action. The **second step** asks whether the means chosen to achieve the objective are proportional to the burden on the rights of the claimant. This second step contains within it three sub-questions:

- (a) Is the law's objective rationally connected to the limit on the *Charter* right?
- (b) Does the limit minimally impair the *Charter* right?
- (c) Is there an overall balance or proportionality between the benefits of the limit and its deleterious effects?

If the law fails to meet any one of these requirements, it is unconstitutional and is not “saved” under section 1.

Section 1 of the *Charter* has a special relationship with section 7. The design of section 7 captures and neutralizes “inherently bad laws” that run “afoul of our basic values.”<sup>13</sup> Because of this, the Supreme Court of Canada has cautioned that infringements of section 7 “are not easily saved by section 1.”<sup>14</sup> To date, the Supreme Court of Canada has not upheld a law that violates section 7 using the *Oakes* test. However, the Supreme Court of Canada has never said that section 1 cannot save a law that violates section 7. In fact, the Supreme Court has singled out events such as “natural disasters, the outbreak of war, *epidemics*, and the like” as instances where such a violation may be acceptable.<sup>15</sup> Importantly, while the Supreme Court of Canada has never used section 1 to save a law that violates section 7, lower appellate courts, like the Ontario Court of Appeal, have used section 1 to save laws that violate section 7.<sup>16</sup>

<sup>12</sup> *R v Oakes*, [1986] 1 SCR 103 at para 69-70.

<sup>13</sup> *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 96.

<sup>14</sup> *New Brunswick (Minister of Health and Community Services) v G (J)*, [1999] 3 SCR 46 at para 99.

<sup>15</sup> *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at para 85.

<sup>16</sup> See: *R v Michaud*, 2015 ONCA 585.

## Additional Reading

OJEN resources:

[In Brief: Canadian Charter of Rights and Freedoms](#)

[In Brief: Canadian Constitution](#)

[In Brief: Section 1 of the Charter & the Oakes Test](#)

Canadian cases:

[Canada \(Attorney General\) v. Bedford, 2013 SCC 72](#), for the section 7 analysis

[Alberta v. Hutterian Brethren of Wilson Colony, 2009 SCC 37](#), for the section 1 analysis

[Black et al. v. City of Toronto, 2020 ONSC 6398](#)

[Victoria v. Adams \(2009\), 280 B.C.A.C. 237 \(CA\)](#)

[Abbotsford \(City\) v. Shantz, 2015 BCSC 1909, 392 D.L.R. \(4th\) 106](#)

[Sanctuary et al. v. Toronto \(City\) et al., 2020 ONSC 6207](#)

News articles, websites posts, and other sources:

[A National Protocol for Homeless Encampments in Canada](#)

[The Saturday Debate: Should tent encampments be left alone?](#)

[People experiencing homelessness fight city in court to stay in tents](#)

[Policing and evicting people living in encampments will not solve homelessness in Canada](#)

[Public Statement Against Encampment Evictions from 50+ Legal Academics](#)