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Edmonton's Encampment Litigation: A View from the Inside

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Matter Commented On: Edmonton's Encampment Litigation

In the autumn of 2023, the Coalition for Justice and Human Rights sued the City of Edmonton to limit when and how it forcibly evicts unhoused people from encampments. The Coalition argued that the City's approach to displacing encampments violated the human rights of encampment residents, as protected by Canada's *Charter of Rights and Freedoms*. A court dismissed the Coalition's claim on a preliminary ground, deciding that the lawsuit should be brought by someone else, and thus the Court did not decide whether the City's displacement policies infringed the *Charter*. The case illustrates the difficulties of vindicating the rights of marginalized persons through the courts, raising the troubling prospect that our unhoused neighbours may *in theory* have the same fundamental rights as the rest of Canadians, but *in practice* are unable to exercise them.

I was part of the legal team that worked alongside the Coalition to advance the litigation against the City. I have now written an academic article detailing what happened in the lawsuit and the arguments we intended to make about how the City's practices violated the *Charter*. As I explain in the article, I am specifically not commenting on the court's standing decision. Instead, the three aims of the academic article are to offer guidance to others engaged in encampment litigation, to broaden the conversation about how the *Charter* is implicated in homeless encampments and the governments' responses to them, and to give voice to the unhoused individuals, who provided evidence in support of the Coalition's lawsuit. This blog summarizes key points from the article.

The *Charter* and Encampments

The Coalition argued that the City's displacement practices violated the *Charter*. The *Charter* is a foundational document in Canada's constitution. Written laws and government conduct must comply with it. If they do not, courts have a range of powers that they can draw on to remedy the situation.

Courts have held that the *Charter* provides a limited right to shelter to unhoused individuals. Section 7 of the *Charter* protects every person's right to life, liberty and security of person. In 2009, the British Columbia Court of Appeal released a groundbreaking decision in *Victoria (City) v Adams*, 2009 BCCA 563 (CanLII) (*Adams*) finding that unhoused people must be allowed to erect temporary overnight shelters in public spaces if there is inadequate indoor shelter space for them.

In the 15 years since *Adams* was decided, many municipalities, especially in British Columbia and Ontario, have seen litigation over unhoused encampments. Some of these decisions have

interpreted the right to shelter more robustly than initially articulated in the *Adams* decision. For example, in a recent case out of Waterloo (*The Regional Municipality of Waterloo v Persons Unknown and to be Ascertained*, 2023 ONSC 670 (CanLII)), the court held that the right to shelter can include a right to remain in one's temporary shelter during the day (at para 105).

The increase in litigation over the rights of unhoused people has occurred alongside a significant spike in the homeless population across Canada. For example, in Edmonton, the unhoused population doubled in a three-year period from 1,651 in 2020 to 3,137 in 2023. The visibility of encampments has increased across Canada, but Edmonton displaces encampments more frequently than other major Canadian cities.

How the Edmonton Encampment Case Came to Be

Chris Wiebe knew that something needed to be done about the situation facing unhoused people in Edmonton. He is a lawyer in town and had worked in the housing and homelessness sector prior to attending law school. His friends, who were still working in the sector, were telling him about the harms they were seeing as a result of the City's displacements. So, Chris started collecting evidence. He visited people living in encampments along with Judith Gale, a member of the Coalition for Justice and Human Rights, who has been involved in mutual aid outreach to unhoused Edmontonians. Judith's involvement was important, because she already had established relationships with many of the encampment residents. The residents were more willing to open up to Chris about their experiences because they trusted Judith.

A team coalesced around Chris. He connected with Avnish Nanda, an Edmonton lawyer who has sued the Alberta Government over constitutional issues. Devyn Ens is a paralegal who works with Avnish, she became a key player in the legal team. I had taught Chris at law school and have long admired his work on behalf of unhoused Edmontonians. When he asked me to be involved, I readily agreed. DJ Janjua, another lawyer, helped with legal research and strategy. Shayla Breen provided communications support.

We needed a plaintiff; someone to bring the lawsuit. Often, in litigation, the person who sues is directly implicated in the dispute. Encampment residents could have sued the City because they are directly impacted by displacements. However, unhoused Edmontonians face significant obstacles to bringing a *Charter* challenge. The struggle of surviving day-to-day consumes much of the energy of unhoused people, leaving little time or energy for constitutional litigation. More prosaically, they are regularly being moved around which makes it difficult for them to stay in touch with a lawyer. And lawyers need to be able to get instructions from their clients on an ongoing, and sometimes urgent, basis.

Canadian courts recognize that important legal issues may be insulated from court review because those who are directly affected face significant obstacles to pursuing litigation. This is a problem because it means that government may be able to infringe the human rights of Canadians with impunity. To fix this problem, the courts have developed the concept of "public interest standing" which allows someone to start a lawsuit on behalf of a directly impacted party. For example, in 2022 the Supreme Court of Canada granted a non-profit organization standing to challenge

mandatory treatment legislation in British Columbia on behalf of patients with mental health issues, to whom the legislation applied.

Many organizations did not want to sue the City over its encampment policies. People in the sector would privately express their concerns to Chris, but worried about the repercussions of being publicly named as the plaintiff in a lawsuit. Many worked for organizations that rely on the City or the Province for funding and worried that bringing a lawsuit would sour those relationships.

The Coalition for Justice and Human Rights was prepared to sue the City as a public interest litigant on behalf of unhoused Edmontonians. The Coalition is a non-profit organization made up of people working at other organizations, who wanted greater scope to address social issues than they had in their home organizations. They wanted to collaborate on issues that transcended the mandates of their own organizations. And they wanted to be able to challenge governments. The Coalition specifically does not seek funding from government. The Coalition's President, Sam Mason, explained that if the Coalition is "holding different levels of government accountable, receiving money from them makes that very difficult." (*Coalition for Justice and Human Rights*, Action Number 2303 15571 (Transcript of Questioning of Sam Mason, 11 October 2023) at 34, lines 1-5)

The Coalition's *Charter* Claims

In Alberta, most lawsuits are started by drafting a Statement of Claim and filing it at the courthouse. In a *Charter* challenge, the Statement of Claim needs to set out why the plaintiff thinks the government's conduct violates the *Charter* and indicate what remedy the plaintiff wants from the court.

Most Canadian encampment litigation has focused on section 7 of the *Charter*, which protects the right to life, liberty and security of the person. Following *Adams*, our Statement of Claim argued that the City was violating the section 7 rights of unhoused Edmontonians by displacing them from encampments when there were not adequate alternate shelter spaces available to them. The evidence the Coalition led indicated that displacements in these conditions lead to death, hypothermia, frostbite, and frostbite-related amputations.

But the stories that Chris heard when he was visiting encampments painted a more complex picture of the benefits that residents derived from living together in encampments and the harms they suffered when they were forcibly evicted. We advanced additional arguments under other sections of the *Charter* to reflect what Chris was hearing from those who were most directly impacted.

Chris heard from people living in encampments that they felt safer when they were able to live with other people, including their friends and family. They were able to establish networks of care. They could intervene to protect each other from violence, from cold weather injuries, from drug poisonings. These networks of care were especially important for women and gender non-conforming people, who face high rates of sexual violence when living unhoused. Forcible evictions undermined these networks of care – people often lost contact with each other following a displacement. We argued that the City's displacement policy breached people's freedom of assembly and association, as protected in section 2 of the *Charter*.

A frequent concern raised by encampments residents related to how they often lost property during displacements. Police might seize property because they assumed it was stolen. City workers would take property because they deemed it to be unsafe. Often the residents weren't given enough time to pack up their property, or they just were not physically able to take it with them. The city workers would then dispose of the resident's belongings. We argued that the City's displacements practices amounted to an unlawful seizure, which is prohibited by section 8 of the *Charter*.

Encampment residents described how displacements are dehumanizing, especially since for many of them there is nowhere in the City where they can legally exist: waiting lists for housing are long, shelter spaces are unavailable or inaccessible, transit centres are closed to them, and if they camp on public land they face frequent, forcible evictions. We argued that the City's displacement practices constituted cruel and unusual treatment, which is prohibited by section 12 of the *Charter*.

Our last *Charter* argument engaged section 15, which prohibits state actors from discriminating against people on the basis of characteristics such as their gender, religion, race, or disability. We argued that the City's displacement policies disproportionately impacted women, gender minorities, LGTBQ2+ people, non-Christians, people with disabilities, and Indigenous peoples. I want to focus on this last argument because it has particular salience in the Edmonton context.

Indigenous peoples are overrepresented in the unhoused population across Canada, yet the *degree* of overrepresentation of Indigenous peoples in Edmonton's unhoused population is remarkable and troubling. Indigenous peoples make up about 6% of the population of Edmonton, 55% of the unhoused population, and 65% of those unhoused people who are staying outside.

The reasons for Indigenous overrepresentation in the unhoused population are complex. They include the impoverishment of Indigenous communities through Canada' failure to fulfill its treaty promises, the intergenerational impacts of residential schools and racist child welfare policies, and insufficient investment in housing for Indigenous peoples, both on and off reserve.

Unhoused Indigenous peoples face particular barriers to accessing emergency shelters and thus are more likely to stay outside. Their experiences in residential school and other colonial institutions can mean that they feel especially unsafe in congregate care settings, such as emergency shelters, where everyone is sleeping in a shared area. They may also distrust Christian religious institutions, and many of the shelters in Edmonton have some connection to organized Christian religions.

Indigenous peoples also experience unique harms when forcibly evicted. The Indigenous encampment residents that Chris spoke with repeatedly told him that the displacements were especially wounding because they were *once again* being removed from their traditional territories.

The Coalition believed that the City violated section 15 of the *Charter* when it forcibly removed the disproportionately Indigenous population of encampments in ways that aggravated historical and continuing injustices and perpetuated their marginalization.

Throughout our Statement of Claim, we attempted to translate the stories we heard from encampment residents into legal claims. I've outlined the main *Charter* claims here; we advanced

claims based on other legal grounds including tort law and the *Alberta Personal Property Bill of Rights*, RSA 2000, c A-31. We asked the Court to declare that the City's practices violated the *Charter* and to place limits on when and how displacements could occur.

The day after we filed the Statement of Claim, we filed additional paperwork seeking a court order called an injunction, which would place limits on when and how the City carried out displacements. The Court would decide on the injunction before a trial on the *Charter* claims. Getting ready for trial can take years, and in the interim, we wanted temporary measures in place to protect unhoused Edmontonians from the worst harms of displacement.

The City and the Police Respond

The City responded to our Statement of Claim by raising six preliminary issues. It argued that the Coalition was not an appropriate plaintiff, that our experts were biased, that some of our claims lacked merit, and that some of the remedies we sought were not available to the Coalition.

The Police had not been sued, however, they wanted to be involved in the litigation because they were worried that the Coalition's evidence might negatively impact the Police's reputation. They were granted intervener status, which means they could be involved in the lawsuit, but in a limited way. For example, the Police were limited in the amount of evidence they could put before the Court.

Compiling Evidence on Eviction Practices

The autumn of 2023 was busy. We needed to build the record of evidence supporting our application for an injunction. Courts commonly decide applications, like injunctions, based on written affidavits instead of having people testify in court. An affidavit sets out the evidence that a person, called the affiant, would give if they were called to provide oral testimony in court. The person must swear or affirm that the contents of the affidavit are true, and then the affidavit is filed with the court. The other parties to the litigation can test the evidence in an affidavit by questioning the affiant. The questioning is recorded, a written transcript is prepared, and this is filed with the court as well.

The Coalition, the City, and the Police filed over 3700 pages of affidavit evidence. Ten encampment residents provided affidavits detailing the harms they experienced after being displaced. We arranged for affidavits from people with relevant expertise: medical doctors who worked with unhoused people, an urban geographer who has studied homelessness in Edmonton, a political scientist with expertise on Indigenous housing policy, and a social worker who studies the experiences of unhoused women and gender diverse people. The president of the Coalition swore an Affidavit setting out the organization's history and why it was an appropriate plaintiff. Devyn, the paralegal, swore an affidavit attaching records collected from the City and the Police using the freedom of information process (see *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25). The City provided affidavits from people involved in its housing and homelessness work, as well as park rangers, a public health expert, and a safety professional. Both the City and the Coalition provided affidavits from businesses and residents who live in

neighbourhoods where encampments are often located. The police provided evidence from an officer involved in displacements. (Select affidavits are available HERE).

The parties spent over 40 hours in questionings, producing over 1100 pages of transcript evidence. Questioning is commonly conducted at a lawyer's office. The party being questioned sits next to their lawyer and across the table from the lawyer doing the questioning. A court reporter is in the room, preparing the transcript. During the COVID-19 pandemic, it became more commonplace to conduct questionings online, using remote technology. Both of these methods were used in the Coalition's lawsuit. Additionally, we made alternative arrangements for the unhoused affiants. Two were questioned at a downtown social service agency. Three were questioned remotely from their encampments, with Chris running the questioning off his laptop and personal hotspot.

The displacements continued during the litigation. On two separate days, Chris showed up for questionings with unhoused affiants at their encampments, only to discover that the encampments were in the process of being forcibly evicted. Ultimately, we were unable to locate some of the unhoused people for questioning. The City argued that their evidence should not relied upon, because we had not produced them for questioning.

The injunction application and the City's preliminary objections were scheduled to be dealt with on January 10 and 11, 2024. The Coalition had wanted an earlier hearing date, so that the injunction would be in place before the coldest part of the winter. The City argued that it needed more time to test the Coalition's evidence and produce its own.

The December Emergency Injunction

On Thursday, December, 14, 2023, our team was alerted that plans were underway to displace eight encampments in the week before Christmas. People working in the housing sector reached out to express their concerns about the scale and speed at which the planned displacements were to take place. That evening, Avnish, Devyn, and Sam, the president of the Coalition, consulted with people in the targeted encampments. The next morning, we went to court and asked for an order preventing any displacements until the January hearing of our injunction application. The Court imposed a temporary injunction, until the following Monday, so that the City and Police could produce evidence justifying why the encampments needed to be cleared on an urgent basis.

Over the weekend a police officer swore an affidavit and Avnish questioned him on it. Additionally, we collected affidavits from three social housing agencies in Edmonton detailing why they were concerned about the scale and speed of the proposed displacements.

When court reconvened on Monday, the presiding Justice directed the parties to attempt to negotiate a resolution. After several hours of back-and-forth, everyone agreed to a temporary court order that limited the circumstances in which displacements could occur. The City had to confirm if adequate shelter space was available before carrying out a displacement, they had to take account of the dangers posed by cold weather before displacing an encampment, and they had to give prior notice of displacements to the residents of the encampment and the social agencies which support them. The City of Edmonton subsequently updated its displacement policy, sometime before January 3, 2024, to incorporate some of these conditions.

The City went ahead with displacing all 8 encampments between December 29, 2023 and January 10, 2024. The last displacement, of an Indigenous-led encampment at Rowland Road, made national headlines as the result of the physical violence used and multiple arrests made during the closure, including the arrest of journalist Brandi Morin. The charges against Morin were subsequently dropped.

We thought that some of these displacements violated the conditions in the court order, in particular as relates to the need for adequate alternate shelter. We applied to the court to hold the City and Police in contempt. A party is in contempt when they fail to comply with a court order without an adequate excuse. The court determined that it did not have enough evidence to decide the matter and instructed the parties to return to court later, if they were unable to resolve the dispute.

The Court Determines that the Coalition Lacks Standing and Should Pay Costs

The parties were back in court on January 10 and 11, to argue the preliminary issues raised by the City and the injunction. However, the Justice indicated that he thought we would need two days just to cover the preliminary issues. We were asked to set aside the Tuesday the following week to argue the injunction, if necessary.

The City had raised standing as a preliminary issue. Recall that the Coalition had sought to bring the *Charter* challenge on behalf of unhoused Edmontonians. The Court had to decide if they were an appropriate plaintiff to bring the lawsuit as a public interest litigant. The Coalition had previously advocated on behalf of unhoused people, including writing to a local emergency shelter, detailing concerns with its operations, and being part of a group that objected when the City closed its temporary isolation space for unhoused people with COVID-19. Additionally, the organization's directors and members have significant experience working with unhoused people in their day jobs. Before the court, we also indicated that other organizations were reluctant to bring a *Charter* challenge for fear of souring relationships with government and jeopardizing their funding.

When a Court decides on whether a litigant should be granted public interest standing the Court will consider if the litigant has the necessary resources to advance the lawsuit. *Charter* challenges, like the one the Coalition brought, are resource intensive. Consider the hundreds of hours that went into interviewing impacted people, researching law, drafting the statement of claim, preparing affidavits, questioning the other side's affiants, preparing for court, and arguing matters in court. Some *Charter* challenges qualify for funding from the federal government's Court Challenges Program, but only if the lawsuit raises questions about the federal government's legislation or conduct. The encampment lawsuit was focused on municipal bylaws and provincial legislation and so did not qualify for the Program. In some provinces, a *Charter* challenge might qualify for funding under the provincial legal aid program, but Alberta's legal aid model does not cover this kind of litigation. The Coalition was only able to bring its *Charter* challenge because Chris and Avnish were willing to donate a huge amount of their time to advancing the claim. In our submissions on public interest standing, we emphasized how important having *pro bono* counsel is to bringing a claim like the encampment litigation.

The Court ultimately found that the Coalition was not an appropriate party to bring the *Charter* challenge. It held that the Coalition did not have a sufficient track record of advocacy on behalf of unhoused people. It held that an organization more directly involved in the provision of services to unhoused people would be a better plaintiff. (*Coalition for Justice and Human Rights Ltd v Edmonton (City)*, 2024 ABKB 26 (CanLII))

The Court never decided the Coalition's claims regarding whether the City's displacement practices violate the *Charter*. Because the court held that the Coalition did not have standing, the lawsuit ended without any decision on its merits.

A litigant who loses a lawsuit is commonly required to pay compensation to the winning party to cover some of the costs that the winning party incurred in going to court. However, the rules shift where a litigant has advanced a public interest lawsuit and lost. Courts recognize that such litigants have contributed to the public good by advancing the lawsuit, and thus should not have costs awarded against them. In rare cases, courts might even require a successful defendant to pay some of the losing plaintiff's costs. However, in the encampment lawsuit the City sought costs of $25,000 against the Coalition. The court agreed that the Coalition should pay some costs, but reduced the amount to $11,500. (*Coalition for Justice and Human Rights Ltd v Edmonton (City)*, 2024 ABKB 148 (CanLII))

The Aftermath of Losing and the Federal Housing Advocate's Calls to Action

The day after the lawsuit ended, the Province and the Police announced a new approach to unhoused encampments in Edmonton. They opened a navigation centre to help connect unhoused people to supports. They also accelerated the rate at which encampments were displaced: from an average of 215 tents per month between January and April 2023 to 333 tents per month over the same time period in 2024. The number of unhoused Edmontonians has continued to grow, to 4011 by July 2024. Frostbite injuries and amputations amongst the unhoused population climbed alongside the increased displacements. During the litigation, we repeatedly underlined that people's lives and limbs were at stake when they are forced from their shelters during cold temperatures. None of us take any joy in being right.

If you want to experience human kindness, I recommend losing a high-publicity lawsuit. In the days and weeks after we lost, we all had friends, colleagues, and strangers reach out with words of support and encouragement. Some have said that the litigation was important, for how it raised awareness around encampments. Others said that even delaying the displacements for a few weeks in December 2023 probably saved lives. There may be truth in both of these statements, but, for me, it is hard to contemplate the silver linings knowing the incredible amount of human suffering that we continue to tolerate in a community as wealthy as ours.

And we can do better. About a month after we lost the lawsuit, the Federal Housing Advocate released its final report on homeless encampments with six Calls to Action, aimed at federal, provincial and municipal governments. The Calls to Action highlight the need for more housing options, including culturally appropriate housing for Indigenous Peoples. But until realistic housing options are available, people need to live somewhere and the Advocate has called for an

end to forced evictions of encampments. Instead, governments should ensure that people living in encampments have access to the necessities of life, including water, sanitation, heating, and cooling. Encampment residents should have a voice in the decisions that affect them: governments should consult them and they should have access to meaningful remedies when their rights are threatened. The Advocate has charted a route forward; it is now up to our governments to act on it, and for the rest of us to let them know that our unhoused neighbours deserve better.

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