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Taking Encampment *Charter* Claims Seriously: A Comment on *Heegsma v Hamilton* (2026 ONCA)

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Case Commented On: *Heegsma v Hamilton*, 2026 ONCA 726 (CanLII) rev'g 2024 ONSC 7154 (CanLII)

In *Heegsma v Hamilton* (CA), the Ontario Court of Appeal recently considered the issue of what limits the *Canadian Charter of Rights and Freedoms* places on municipalities' bylaws and enforcement actions with respect to unhoused people and their shelters. The Court of Appeal found that the magnitude of legal errors made by the trial judge required that the matter be remitted for a new hearing. Its decision addresses several important issues related to *Charter*-related encampment litigation and emphasizes that *Charter* claims by encampment residents must be treated by courts seriously and with care. The Court of Appeal decision cautions judges against summarily dismissing the evidence of unhoused affiants even when they have mental health issues, are in active addiction or have a history of using controlled substances. The Court of Appeal also emphasizes the importance of cogent reasons and a sufficient "depth of analysis" given the gravity and public importance of issues relating to encampments (CA at para 40). The trial court decision (SC) had addressed several important issues: whether section 7 of the *Charter* establishes a right to shelter during the daytime, whether encampment evictions violate section 15 of the *Charter,* and whether unhoused individuals should be granted *Charter* damages for their removal from encampments. The Court of Appeal decision does not include substantive decisions on these points but does provide guidance on the types of questions that must be addressed in resolving them. This case comment synthesizes these key takeaways from the *Heegsma* case.

Procedural Overview

The application before the court was brought by 14 unhoused individuals against the City of Hamilton. They initially sought an injunction to prevent the City from removing encampments. After that application was denied, in *Poff v City of Hamilton*, 2021 ONSC 7224 (CanLII) at para 256, they amended their application to seek a declaration that the City had breached their *Charter* rights under section 7 (life, liberty and security of person) and section 15 (non-discrimination), and an order for damages under section 24(1) of the *Charter*.

The lower court found against the applicants, i.e., that there was no *Charter* breach and that they were not entitled to *Charter* damages. The Court of Appeal overturned the lower court decision, finding that the application judge had made a series of errors. These errors included:

- Striking documents that the applicants had sought to introduce without considering whether they were admissible for the truth of their contents under the public documents exception (CA at para 61).
- Dismissing the evidence of unhoused affiants based on stereotypical reasoning about the credibility of people who have mental health issues, are in active addiction or have a history of using controlled substance (CA at para 72).
- Failing to apply the appropriate legal frameworks when analyzing whether the City had breached the applicants' section 7 or 15 *Charter* rights (CA at paras 75, 91).
- Collapsing the analysis required under section 1 of the *Charter* into its section 7 analysis (CA at para 80).
- Applying the test articulated by the Supreme Court of Canada in *Power v Canada*, 2024 SCC 26 (CanLII) for when *Charter* damages are appropriate for unconstitutional legislation, without considering if the same test should apply to unconstitutional municipal bylaws and/or a municipality's conduct when enforcing such bylaws (CA at para 94).

The Court of Appeal declined to decide the substance of the applicants' claims and instead remitted the case back to the lower court, to be heard by a new application judge (CA at para 106).

Taking Encampment-Related *Charter* Claims Seriously: Credibility of Unhoused Affiants, Documentary Evidence, and Adequate Reasons

The unhoused applicants had alleged that City officials had forcibly removed them from their shelters in a public park during both the daytime and overnight (CA at para 23), and that both types of removals violated their section 7 *Charter* rights to life, liberty and security of the person. As discussed below, it would be easier for them to establish a violation of their section 7 *Charter* rights if they could prove that the City had prevented them from sheltering in encampments overnight.

The lower court found that the applicants had *not* been removed from their shelters during the overnight period, despite their sworn evidence to the contrary. The applications judge indicated that he "did not believe" the evidence of the unhoused individuals (SC para 38). The reason he gave for his incredulity is that all but one of the applicants "have mental issues or drug problems which can affect perception and memory" (SC at para 24).

The Court of Appeal held that the lower court had "improperly relied on stereotypes" that suggested people with mental health issues, in active addiction or with a history of using controlled substances are not trustworthy witnesses (CA at para 4). Instead of collectively dismissing their evidence, the lower court should have carried out "an individualized assessment of [each applicant's] credibility and reliability" because the impacts of mental health and addiction on memory differ amongst individuals (CA at para 70). Instead, the application judge's "blanket assumptions" about the applicants "perpetuate[d] myths and stereotypes about some of the most vulnerable people in our society" (CA at para 72). Because of these errors, the lower court's factual finding that there were no nighttime evictions "cannot stand" (CA at para 73). The finding that the

applicants had not been removed overnight was central to the application judge's decision on the section 7 *Charter* claim and thus the entire claim needed to be remitted for reconsideration by a new judge.

The Court of Appeal's reasons highlight that judges dealing with encampment-related *Charter* claims need to treat evidence of vulnerable unhoused individuals seriously and without resort to myths and stereotypes. They must carefully assess evidence on an individual, rather than a group basis. As noted in the "Procedural Overview" above, the Court of Appeal also addressed the lower court judge's approach to dealing with significant documentary evidence filed by the applicants, finding that the judge erred in his cursory dismissal of this evidence without properly considering relevant evidentiary principles.

The Court of Appeal found that the application judge also failed to provide adequate reasons and conduct the required legal analyses. We discuss the relevant legal frameworks below, but emphasize here that the Court of Appeal held that the lower court's reasons were "conclusory and lacked the depth of analysis that is required when dealing with issues of this significance. The issue of homeless encampments is of great public importance" (CA at para 40). The Court of Appeal emphasized that reasons for a judgment must set out a "logical path" to the outcome and must "explain not only what the decision is, but why" (CA at para 41). The failures outlined in this section led the Court of Appeal to remit the matter back for a new hearing. However, the Court of Appeal did address several key substantive issues, and we turn to these now.

Section 7 of the *Charter and* the Right to Shelter During the Daytime

Canadian courts, starting with the British Columbia Court of Appeal in the case of *Victoria v Adams,* 2009 BCCA 563 (CanLII), have held that municipalities breach the *Charter* rights of unhoused individuals if they prevent them from erecting overnight, temporary shelters on public land if there are no accessible, alternative housing options for them (e.g., emergency shelter spots). A good summary of these court decisions is available in this report, starting at page 34. Some courts – such as the Ontario Superior Court in *The Regional Municipality of Waterloo v Named Respondents and Persons Unknown*, 2026 ONSC 2971 (CanLII) – have gone further and allowed encampments to remain on a continuing basis during the daytime (see our blog post on this decision here). In litigation over encampments in Prince George, the British Columbia Supreme Court explicitly recognized that unhoused individuals require somewhere to stay during the daytime, especially during Northern British Columbia's harsh winters, see *Prince George (City) v Stewart,* 2021 BCSC 2089 (CanLII) at para 115. The applicants in *Heegsma* similarly argued that removal of an unhoused person's daytime shelter violated that person's section 7 *Charter* rights.

The lower court refused to find that section 7 protected against daytime removals, finding that it was not encampment removals that put people's life, liberty or security of person at risk, but rather homelessness itself (SC at para 76). The lower court also accepted the evidence of the City's expert that encampments are more dangerous for unhoused folks than emergency shelters. The applicants' expert witnesses testified that encampments may offer a sense of safety and community, are often safer than living unsheltered on the streets, and that coerced evictions from encampments are harmful. But the lower court preferred the evidence from the City's expert because it "has the ring of truth; that is, it makes sense" (SC at para 63).

The Court of Appeal held that the lower court erred in its section 7 analysis because it did not apply the recognized legal framework; namely, have the applicants shown that their daytime removals amounted to a deprivation of life, liberty or security of the person, and were those removals carried out in violation of the principles of fundamental justice? (CA at para 76). The Court of Appeal also criticized the lower court's reasons to the extent that they identified homelessness as the root cause of any risks to life, liberty or security of the person. The applicants may succeed on their *Charter* claim if they can show that the City's bylaws or conduct contribute to the risks they experience, even if the dominant cause of those risks is their homelessness (CA at para 79).

The Court of Appeal declined to indicate how section 7 of the *Charter* should be interpreted in the context of encampment removals because the lower court had not made adequate findings of fact, and it did not want to decide this question in the abstract. However, it noted that it may be called on to provide such direction in the future, including "on the issue of whether *Adams* should be followed [in Ontario]" (CA at para 85).

Section 15 of the *Charter* and Encampment Evictions

The applicants had asserted that their section 15 equality rights were violated by the City's actions with respect to encampment removals, and brought evidence that women, Indigenous people, and persons with disabilities are disproportionately impacted by the impugned municipal bylaws and enforcement actions. The Court of Appeal noted that the application judge's entire section 15 analysis was relegated to only three very short paragraphs. The application judge "made no effort to apply the legal framework for assessing an alleged s. 15 *Charter* infringement to the evidence in this case. Rather, he made conclusory statements that were contrary to the legal framework and that failed to engage with the evidence" (CA at para 89). The Court of Appeal pointed out that there was evidence before the application judge that suggested that the impugned bylaw "may have a differential impact on women" but that the judge did not conduct the proper analysis or consider this evidence (CA at para 91). The Court of Appeal noted that the Supreme Court of Canada recently clarified in *Quebec (Attorney General) v Kanyinda,* 2026 SCC 7 (CanLII) that even where a measure does not explicitly distinguish based on a protected ground, claimants can still establish that the measure creates a distinction "in effect" because of disproportionate impacts on a protected group (CA at para 90).

***Charter* Damages for Encampment Evictions**

The applicants had initially sought to prevent the City from removing encampments from public parks. After their initial injunction application was denied, the applicants amended their pleadings to seek damages for alleged *Charter* violations under section 24(1) of the *Charter*. The applicants relied on *Ward v Vancouver*, 2010 SCC 27 (CanLII), wherein the Supreme Court of Canada held that monetary damages may be an appropriate remedy for people whose *Charter* rights have been violated and set out a framework for deciding when damages would be awarded.

The lower court held that *Charter* damages were not appropriate in this case. It relied on the 2024 Supreme Court of Canada decision in *Power v Canada* for the principle that *Charter* damages would only be awarded if the municipality had acted "wrongly, in bad faith or in abuse of power"

(SC at para 65). The lower court held that the municipality had not crossed this threshold because its conduct was compliant with the decision in *Adams*, in that it had not removed people from shelters during the overnight period (SC at para 66).

The Court of Appeal held that it was an error for the lower court to rely on the *Power* decision without greater analysis of whether it applied to the applicants' claim. The *Power* decision had addressed when a court could award *Charter* damages against a government for passing legislation that is later determined to be unconstitutional. The Court of Appeal noted that the lower court should have first determined if the test from *Power* should apply to a municipal government that passes a bylaw that it later determined to be unconstitutional or to a municipal government that enforces the bylaw in a way that violates an individual's *Charter* rights (CA at para 95). The Court of Appeal noted that the applicants' claims might be understood as a challenge to the bylaw itself, the City's enforcement process under the bylaw, or specific instances of applicant's being evicted and that greater clarity on this point would be helpful at the re-hearing (CA at paras 103-104).

Conclusion

While advocates may be disappointed that the Court of Appeal declined to clearly endorse or expand the *Adams* analytical framework or to weigh in substantively on the issues, its decision in *Heegsma* is important in that it clearly signals that issues relating to encampments are of public importance and that the evidence and rights claims of encampment residents must be treated with utmost seriousness by courts. Courts must reject impermissible myths and stereotypes about unhoused people, must consider documentary evidence seriously, and must carefully assess the evidence of expert witnesses. Courts must ensure that their reasons adequately reflect the importance of issues before them and that they properly apply the tests for section 7 and 15 *Charter* claims. The Ontario Court of Appeal may have a chance to revisit many of these important issues and provide guidance to municipalities and vulnerable encampment residents sooner rather than later: the City of Waterloo has appealed an important lower court ruling in a case involving an encampment in that city.

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