

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

Date: December 5, 2023

To: City Council

From: City Solicitor

Wards: All Wards

REASON FOR CONFIDENTIAL INFORMATION

The attachment to this report contains advice or communications that are subject to solicitor-client privilege. This report contains information regarding potential litigation that affects the City of Toronto.

SUMMARY

On January 27, 2023, the Ontario Superior Court of Justice released its decision in the *Regional Municipality of Waterloo v. Persons Unknown and to be Ascertained* (2023 ONSC 670) (the "Decision"). In the Decision, the Court denied the Region of Waterloo's application for a declaration that the homeless individuals living in an encampment on a municipal property were in breach of one of the Region's by-law. The Court declared the by-law violated section 7 of the Charter of Rights and Freedoms in that it deprives homeless residents of the Encampment of life, liberty and security of the person in a manner not in accordance with the principles of fundamental justice and is not saved by section 1 of the Charter.

RECOMMENDATIONS

The City Solicitor recommends that:

1. City Council receive this report for information.

2. City Council direct that the confidential information contained in Confidential Attachment 1 remain confidential in its entirety, as it contains advice which is subject to solicitor-client privilege and is in relation to potential litigation.

FINANCIAL IMPACT

There is no financial impact arising from the information contained in this report.

DECISION HISTORY

At its meeting on March 29, 2023, City Council adopted, with amendments, item CC5.3 - Ombudsman Toronto Report: Investigation into the City's Processes for Clearing Encampments in 2021.

[Agenda Item History - 2023.CC5.3](#)

COMMENTS

In its application, the Regional Municipality of Waterloo (the “Region”) sought a declaration from the Court that persons experiencing homelessness and living at a property owned by the Region (the “Encampment”) were in breach of the Region's By-Law prohibiting certain activities including erecting any form of structure on the lands as well as bringing any dangerous, illegal or flammable goods on the property that could cause injury or damage to the lands.

The Region also sought an order pursuant to s. 440 of the Municipal Act, prohibiting encampment residents from remaining on, or returning to, the property in violation of the By-Law. The Region had determined that the conditions at the Encampment posed a risk to the health and safety of both Encampment residents and others, and that it had to be disbanded.

In response, a number of individuals living in the Encampment argued that the By-Law and accompanying trespass notices issued under it were in breach of their section 7 right to life, liberty and security of the person and their section 15(1) right to equality under the Charter.

The property in question consisted of a one-half acre gravel parking lot in the city of Kitchener. The Region intended to use the property as a future parking lot for an expanded Via Rail and Go Transit station, but the property was not currently in use by the Region. In December 2021, a small number of people started living in the Encampment and over the following six months the Encampment grew to approximately 70 temporary shelters where some 53 people resided. The residents of the Encampment were from a diverse demographic including men, women, couples, members of the 2SLGTPBQ+ community, Indigenous people, members of racialized communities, and people suffering from disabilities and substance abuse.

The Region had an Encampment Policy to guide the Region's staff in providing outreach services to individuals experiencing homelessness. The Policy provided that enforcement would only occur after all reasonable support efforts had been attempted, notice of the requirement to vacate had been given, and provided there was no need for immediate intervention to address public safety concerns.

The Decision:

Relying on recent case-law from British Columbia (affirmed by the British Columbia Court of Appeal and cited with approval in *Black et al. v. City of Toronto* 2020 ONSC 6398), the Court affirmed that there is a constitutional "right to shelter oneself" when the number of persons experiencing homelessness exceeds the number of available indoor shelter spaces within a given jurisdiction.

On the facts of the case in the Waterloo Decision, the Court found that the Region did not have adequate shelter space to accommodate either the 53 individuals living in the Encampment or the homeless persons in the Region, which were found to number around 1,100. The Court found that the available shelter spaces fell short by some 50 percent of what is required.

The Court also relied on other recent case-law from British Columbia that recognized that it "is not just the number of available indoor sheltering spaces that frames the right but also whether those spaces are truly accessible to those sheltering". The Court found that failure to consider the accessibility of the beds has the net effect of reducing the number of beds that would otherwise be available in the Region.

Accordingly, the Court held that that the Region infringed on the right to life, liberty and the security of the person protected by section 7 of the Charter because the Region had failed to provide adequate and truly accessible shelter space to individuals prior to its intended clearing of the encampment. The finding that individuals experiencing homelessness fell under the protections of Section 7 was based on evidence that "exposure to the elements without adequate shelter can result in serious harm, inducing death" and that prohibiting the erection of temporary shelters (under the By-Law) can lead to "risk of significant health problems, both physical and psychological".

The Court found that there was no infringement of Section 15 right to equality of the Charter because the By-Law or its impacts did not create a distinction based on an enumerated or analogous ground. The Court found that homelessness is not a personal characteristic or a fact that can be determined objectively and that individuals experiencing homelessness were not defined by a common characteristic.

Confidential Attachment 1 is subject to solicitor-client privilege as it contains legal advice on the impacts of a recent Ontario Superior Court of Justice decision and information in relation to potential litigation.

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SIGNATURE

Wendy Walberg
City Solicitor

ATTACHMENTS

Confidential Attachment 1 - Confidential Information