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HUMAN RIGHTS CITIES: REALIZING THE RIGHT TO HOUSING AT THE MUNICIPAL SCALE

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I. INTRODUCTION

The growing number of encampments in cities across Canada is a glaring symptom of the deepening national housing crisis.[1] It is also a human rights crisis. Cities overwhelmingly approach encampments as property owners—relying on policing tactics, displacing residents, and perpetuating precarity.[2] Instead, they

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1 By "encampments", we mean areas where individuals or groups live in homelessness in tents or other temporary structures.

2 See Kwame Addo & Ciarán Buggle, *Ombudsman Toronto Investigation Report: Investigation into the City's Clearing of Encampments in 2021* (Toronto: Ombudsman Toronto, 2023) [*Toronto Ombudsman Report*]. See also Alexandra Flynn et al, *Overview of Encampments Across Canada: A Right to Housing Approach* (Ottawa: The Office of the Federal Housing Advocate, 2022) at 18–23 [*OFHA Report*]; Estair Van Wagner, *Case Study: Hamilton: A Human Rights Analysis of Encampments in Canada* (Ottawa: The Office of the Federal Housing Advocate, 2022) [*Hamilton Case Study*]; Caroline Leblanc et al, *Case Study: Montréal, Sherbrooke, and Gatineau: A Human Rights Analysis of Encampments in Canada* (Ottawa: The Office of the Federal Housing Advocate, 2022) [*Montreal/Sherbrooke/Gatineau Case Study*]; Joe Hermer, *Case Study: Prince George: A Human Rights Analysis of Encampments in Canada* (Ottawa: The Office of the Federal Housing Advocate, 2022) [*Prince George Case Study*]; Kaitlin Schwan et al, Case Study: *Toronto: A Human Rights Analysis of Encampments in Canada* (Ottawa: The Office of the Federal Housing Advocate, 2022) [*Toronto Case Study*]; Alexandra Flynn,

must urgently work to reorient their responses to advance and affirm the human rights of unhoused residents. This requires cities to understand their role as human rights actors. In this article, we explain how Canadian cities are both bound by human rights obligations in law and have social and political obligations to protect and advance human rights as governments.[3] These obligations must be at the core of the legal and policy frameworks they adopt in relation to encampments—the most visible reminder of our ongoing failure to realize the right to housing in Canada, which is itself a violation of basic human rights.[4] This failure is continually compounded when cities prioritize property rights over human rights in relation to public space, with bylaws framing encampments as trespass and shelters as obstructions, even when there are no safe and accessible alternatives.[5] As we argue below, it is time for a new approach that centres the dignity and security of encampment residents.

The role of property law in structuring our relations with place, space, and each other is powerfully illustrated by municipal responses to encampments.[6] Encampments arise due

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Case Study: Vancouver: A Human Rights Analysis of Encampments in Canada (Ottawa: The Office of the Federal Housing Advocate, 2022) [*Vancouver Case Study*]. For specific examples of state-sanctioned displacement on Canada's West Coast without the presence of a court order, see *Prince George (City) v Johnny*, 2022 BCSC 282 [*Johnny*]; Bridgette Watson, "Vancouver Police, City Staff Begin Removing Encampment on East Hastings Street", *CBC News* (5 April 2023), online: <cbc.ca/news/canada/british-columbia/vpd-encampment-removal-1.6802439> [*Hastings Street Encampment*].

3 By "human rights obligations", we refer to the international and domestic laws that have enumerated the legal principles by which governments are bound in the design, implementation, and enforcement of law and policy.

4 See Leilani Farha & Kaitlin Schwan, "A National Protocol for Homeless Encampments in Canada" (30 April 2020) at 2, online (pdf): <make-the-shift.org/wp-content/uploads/2020/04/A-National-Protocol-for-Homeless-Encampments-in-Canada.pdf> [*National Encampment Protocol*].

5 See e.g. *Toronto Ombudsman Report*, *supra* note 2.

6 See generally Estair Van Wagner, "Notes from the Periphery: Finding More Than (Non)Ownership in Property Law" in Nicole Graham, Margaret Davies & Lee Godden, eds, *The Routledge Handbook of Property, Law and Society* (London: Routledge, 2022) 217.

to an acute lack of social and affordable housing.[7] In other words, encampments arise when the right to housing is being violated. Municipalities are at the front lines of the housing crisis in Canada, which long predates the pandemic.[8] As COVID-19 closed schools and workplaces in March 2020, some governments recognized the likely effects that loss of income would have in relation to housing stability, introducing eviction moratoriums and income supplements.[9] These efforts did little to alleviate the effects on the most vulnerable, especially as COVID-19 spread in shelters, forcing them to reduce occupancies as a result of outbreaks.[10] In the wake of increases in visible homelessness across Canadian cities, advocates and doctors recommended that municipalities curtail any forced evictions, owing to the lack of secure, safe housing for those living in encampments.[11] Some

7 See *OFHA Report*, *supra* note 2 at 11–12.

8 See generally Tracy Heffernan, Fay Faraday & Peter Rosenthal, "Fighting for the Right to Housing in Canada" (2015) 24:1 J L & Soc Pol'y 10.

9 For an overview on eviction moratoriums related to COVID-19 in Canada, see Canada Mortgage and Housing Corporation, "COVID-19: Eviction Bans and Suspensions to Support Renters" (25 March 2020), online: <cmhc-schl.gc.ca/en/consumers/renting-a-home/covid-19-eviction-bans-and-suspensions-to-support-renters>.

10 See especially Heather Butts & Alexandra M Jones, "Shelter Outbreaks Leave People Experiencing Homelessness Even More Vulnerable during COVID-19", *CTV News* (21 March 2021), online: <ctvnews.ca/canada/shelter-outbreaks-leave-people-experiencing-homelessness-even-more-vulnerable-during-covid-19-1.5356600?cache=%3FclipId%3FclipId%3D86116>. See also Victoria Gibson, "Toronto Community Housing Evicted Five Households for Unpaid Rent amid COVID-19 Second Wave—Including One That Landed in a Homeless Shelter", *The Star* (3 February 2021), online: <thestar.com/news/gta/2021/02/03/toronto-community-housing-evicted-five-households-for-unpaid-rent-amid-covid-19-second-wave-including-on-one-that-landed-in-a-homeless-shelter.html> (highlighting COVID-19 induced challenges in the context of shelter evictions).

11 See e.g. Miriam Lafontaine, "Tenants and Housing Advocates Call for Halt on Evictions in Toronto during Coronavirus Outbreak", *The Star* (14 March 2020), online: <thestar.com/news/gta/2020/03/14/tenants-and-housing-advocates-call-for-halt-on-evictions-in-toronto-during-coronavirus-outbreak.html>; Jason Vermes, "Former UN Rapporteur Calls for 'National Moratorium on Evictions' as Some Canadians Struggle to Make Rent", *CBC*

cities complied with this advice initially, but then continued to assert their power to regulate public space throughout the many phases of the pandemic. This included the enforcement of bylaws that prohibit sleeping in parks, loitering, and other actions which disproportionately affect homeless people.[12] These regulatory and enforcement powers are grounded in the status of a municipality as the owner of a particular public space.

Government responses to encampments have not only characterised the rights and interests of encampment residents as peripheral to the underlying ownership of public space; they actively construct them as hostile to the proper role and use of public property. Before and during the pandemic, cities used trespass laws to remove unhoused people and their belongings from public space. Only property owners have recourse to trespass laws as they are rooted in the protection of an owner's ability to control use, access, and decision making about land.[13] They are a tool to defend the *private*/*privacy* dimension of property rights.[14] Thus, turning to trespass laws in relation to public spaces necessarily foregrounds cities as property rights holders rather than as governments with human rights obligations to all residents. As owners, municipalities assert that

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(14 February 2021), online: <cbc.ca/radio/checkup/how-has-covid-19-affected-your-housing-situation-1.5911549/former-un-rapporteur-calls-for-national-moratorium-on-evictions-as-some-canadians-struggle-to-make-rent-1.5913769>.

12 For a discussion on the disparate impact of laws on homeless people, see especially Terry Skolnik, "Homelessness and Unconstitutional Discrimination" (2019) 15:1 JL & Equality 69 at 79–85. For a recent example on bylaw enforcements impacting homeless people in Canada, see e.g., Gabby Rodrigues & Nick Westoll, "Toronto Police, Bylaw Officers Moving to Clear Trinity Bellwoods Park Homeless Encampment", *Global News* (22 June 2021), online: <globalnews.ca/news/7969925/trinity-bellwoods-park-news-encampment-police-city/>.

13 See Philip H Osborne, *The Law of Torts*, 4th ed (Toronto: Irwin Law, 2011) at 294–96.

14 See *Peter Ballantyne Cree Nation v Canada (Attorney General)*, 2016 SKCA 124 at para 128, citing *Mann v Saulnier*, 19 DLR (2d) 130 at 132, 1959 CanLII 360 (NBCA). See also Sarah Ferencz et al, "Are Tents a 'Home'? Extending Section 8 Privacy Rights for the Precariously Housed" (2022) 67:4 McGill LJ 369.

they are empowered to remove encampments because their property rights are exclusive, including the power to say who can and cannot access and use the land, and how and when it can be used.[15] Yet, property rights are more complex and nuanced than they appear in dominant narratives, particularly in the context of public space held by governments for public purposes.[16] Indeed, the state's resort to the blunt tool of trespass to re-assert powers of exclusion illustrates the challenge encampments pose to dominant property relations.[17]

Property rights are never absolute. This is particularly true in the context of government-owned property. In *Commonwealth*, a 1991 decision, the Supreme Court of Canada (SCC) expressly rejected Crown arguments that government ownership of property presumptively includes the same broad right to exclude and control that attaches to private property.[18] To six of the seven justices, contextual limitations attach to government property because a government owner holds that property pursuant to its government functions and obligations and is subject to the

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15 See Larissa Katz, "Exclusion and Exclusivity in Property Law" (2008) 58:3 UTLJ 275; JE Penner, "The 'Bundle of Rights' Picture of Property" (1996) 43:3 UCLA L Rev 711. See also Estair Van Wagner & Alexandra Flynn, "Op-ed: Toronto Uses Doublespeak to Remove Encampment Residents from Parks", NOW Toronto (28 June 2021), online: <nowtoronto.com/news/op-ed-toronto-uses-doublespeak-to-remove-encampment-residents-from-parks/>.

16 See generally Doreen Massey, *For Space* (London: SAGE, 2005); Nicholas Blomley, "Precarious Territory: Property Law, Housing, and the Socio-Spatial Order" (2020) 52:1 Antipode 36.

17 See generally Van Wagner, *supra* note 6. See also Sarah E Hamill, "Property Says No: Relational (In)Equality, Encampments, and Property Rights" (2023) 36:1 J L & Soc Pol'y 119.

18 See *Committee for the Commonwealth of Canada v Canada*, [1991] 1 SCR 139 at 155, 1991 CanLII 119 (SCC) [*Commonwealth*]. In *Commonwealth*, six of seven justices reasoned that freedom of expression under s 2(b) of the *Canadian Charter of Rights and Freedoms*, *Part I of the Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*] applies on government-owned property, although the justices disagreed on the type of government-owned property to which the *Charter* would apply. See also Stepan Wood, "When Should Publicly Owned Land Be Considered Private in Homeless Encampment Cases? A Critique of Recent Developments in BC" (2023) 36:1 J L & Soc Pol'y 64.

requirements of the *Charter*.[19] In the concurring opinion authored by Justice L'Heureux Dubé, the *Charter* applies to government ownership of property to uphold the "crucial function of government and the responsibility it bears to its constituents."[20] Based on this reasoning, governments are not ordinary property owners—they own property for the public and in order to fulfill their governmental obligations. Building on this argument in this paper, these obligations include the protection and fulfillment of human rights, including the right to housing. Thus, encampment residents may be legally understood as "non-owners" in the frame of traditional Anglo-Canadian property law, and peripheral to decisions that flow from ownership. However, their embodied claims to public space for the fulfillment of basic human rights inherently expose the limitations of property relations premised on the primacy of the right to exclude.[21] Encampment residents centre the *public* dimension of these spaces by contesting both the exclusivity in state ownership of property and the primacy of property-owning neighbours in the governance of public space.

The human rights framework surrounding encampments remains contested in Canadian law. Local governments have faced legal challenges to their response to encampments, including their use of trespass laws, their attempts to enforce injunctions, and policing tactics.[22] Starting in the 2000s, courts

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19 See *Commonwealth*, *supra* note 18. See also *Charter*, *supra* note 18, s 7.

20 See *Commonwealth*, *supra* note 18 at 192, L'Heureux-Dubé J, concurring.

21 See generally Van Wagner & Flynn, *supra* note 15; Sarah E Hamill, "Caught Between Deference and Indifference: The Right to Housing in Canada" (2018) 7:1 Can J Hum Rts 67.

22 For early cases, see *Vancouver Parks Board v Mickelson*, 2003 BCSC 1271; *Vancouver Board of Parks and Recreation v Sterritt*, 2003 BCSC 1421. For a line of more recent cases starting with *Victoria (City) v Adams*, 2008 BCSC 1363 [*Adams* SC], see *Victoria (City) v Adams*, 2009 BCCA 563 [*Adams* CA]; *Abbotsford (City) v Shantz*, 2013 BCSC 2612 [*Shantz*]; *Abbotsford (City) v Shantz*, 2015 BCSC 1909 [*Shantz* SC]; *Vancouver Board of Parks and Recreation v Williams*, 2014 BCSC 1926 [*Williams*]; *British Columbia v Adamson*, 2016 BCSC 1245 [*Adamson*]; *British Columbia v Adamson*, 2016 BCSC 584 [*Adamson 2*]; *Saanich (District) v Brett*, 2018 BCSC 1648 [*Brett*]. Several cases were also brought by both encampment residents and cities

heard arguments that evictions contravene fundamental rights recognized under the *Charter.* Parties have implicitly or explicitly invoked international human rights covenants that recognize a right to housing.[23] Courts have generally been reluctant to incorporate international human rights law in advancing social justice and human rights within the *Charter*.[24] Nonetheless, encampment litigation has resulted in limitations on the operation of anti-camping bylaws in specific circumstances. Canadian judges have noted several times that there is no positive right to housing or property under the *Charter*.[25] Yet, the federal government has now enshrined the right to housing in federal law and some cities have expressly committed to it in their own policies, such as the Toronto Housing Charter.[26] Thus, the status of the right to housing in Canada, particularly for those most vulnerable to its violation, remains unclear.

Litigation remains an important vehicle to advance human rights in relation to encampments, particularly in the context of the violence and displacement that can accompany evictions. However, rather than reactively responding to court challenges, municipalities must proactively reorient their relationship to

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during the COVID-19 pandemic, including *Black v Toronto (City)*, 2020 ONSC 6398 [*Black*]; *Poff v City of Hamilton*, 2021 ONSC 7224 [*Poff*]; *Prince George (City) v Stewart*, 2021 BCSC 2089 [*Stewart*]; *Johnny*, *supra* note 2.

23 See e.g. *Adams* CA, *supra* note 22 (the BCCA only recognized a section 7 violation as long as there was a shortage of shelter beds at para 166). See also *Shantz* SC, *supra* note 22 (in a subsequent case citing *Adams*, the BCSC only found bylaws prohibiting camping to be unconstitutional at night but were otherwise enforceable during the daytime. This meant that encampment residents were still displaced during the day).

24 See Margot Young, "*Temerity and Timidity: Lessons from Tanudjaja v Attorney General (Canada)*" (2020) 61:2 Les Cahiers de droit 469.

25 See e.g. *Stewart*, *supra* note 22; *Johnny*, *supra* note 2.

26 See City of Toronto, "Toronto Housing Charter – Opportunity for All" (2019), online (pdf): <toronto.ca/wp-content/uploads/2022/02/948f-Toronto-Housing-Charter-2020.pdf> [*Housing Charter*]. These policies have added importance considering the decision in *The Regional Municipality of Waterloo v Persons Unknown and to be Ascertained*, 2023 ONSC 670 [*Waterloo*]. There, the Court held the interpretation and enforcement of municipal bylaws must be done in light of existing City policies, even if these policies are themselves not bylaws (*ibid* at paras 31, 136).

public space to foreground their obligations to implement and protect the right to housing. In our view, local governments have the opportunity to become *human rights cities*—leaders in clarifying and upholding the right to housing in Canada—starting with their approach to encampments as the most urgent manifestation of the housing crisis.

Cities are bound by legal rights obligations under specific instruments at the international, national, and local scales. These must inform the assertion and exercise of city powers, including with respect to property ownership. Thus, while cities may have to *react* to the legal actions advancing these rights, they are generally better served by taking action to ensure bylaws, policies, and on-the-ground enforcement not only comply with, but advance, the right to housing. As human rights cities, they can work to avoid protracted litigation, expensive and counter-productive policing responses, and harmfully stigmatizing encampment residents through the use of trespass laws and criminalization, all of which undermine the relationships necessary to resolve the underlying issues that lead to encampments. In short, cities are well-positioned to rethink when and how they assert ownership rights with respect to public spaces, particularly where doing so produces "dependence and vulnerability" and deepens existing violations of the right to housing.[27]

In this paper, we first set out how cities regulate encampments, detailing the types of bylaws that, for example, prohibit sleeping in parks, erecting shelters, or loitering. We examine how trespass notices serve as a common bylaw enforcement tool. Second, we outline the specific human rights obligations and instruments that apply to municipalities, including those at the international, national, and local scales. Third, we examine how human rights obligations have been asserted in Canadian courts, briefly examining the jurisprudence that has considered encampments, as well as how cities themselves have responded to their role in advancing human rights. Finally, we examine what it means to be a human rights

[27] See Blomley, *supra* note 16 at 44. See also Van Wagner & Flynn, *supra* note 15.

city—to consistently and unequivocally put the human rights approach to governing public space into practice.

II. HOW DO CITIES REGULATE ENCAMPMENTS?

A. Bylaw Power and Public Space

Bylaws are a powerful weapon against the survival spaces of unsheltered people for a number of reasons: they are often enforced informally by bylaw officers with little accountability, and they are by their nature designed to target the very presence of people and possessions in public space.[28] While different types of bylaws have been applied to encampments and encampment residents, parks bylaws have a particularly long history of being applied to encampments in Canadian cities.[29] While not all encampments are located in parks, these are some of the most commonly cited bylaws when cities are taking action to evict encampments and serve encampment residents with bylaw infractions and trespass notices. For example, the Toronto Municipal Code Chapter 608-13 prohibits camping in parks, stating, "no person shall dwell, camp or lodge in a park" without a permit.[30] Chapter 608-14 prohibits someone from putting up a tent or building structure in the park. It states, "no person shall

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28 See e.g. Joe Hermer, "The Mapping of Vagrancy Type Offences in Municipal By-Laws" (22 July 2020), online: <homelesshub.ca/blog/mapping-vagrancy-type-offences-municipal-laws>; Nicholas Blomley et al, "Law, Urban Space, and Precarious Property: The Governance of Poor People's Possessions" (2023) 50:2 Fordham Urban LJ 223.

29 For a sense of the types of bylaws used to police homelessness, see Joe Hermer & Elliot Fonarev, "Neo-Vagrancy By-Laws Across Canada" (12 July 2020), online: <policinghomelessness.ca/mapOne.html>. This resource includes anti-camping bylaws but also bylaws aimed at loitering, panhandling, obstructing, resting, salvaging, and disorder, what Joe Hermer calls "neo-vagrancy laws". For examples where parks bylaws are engaged, see e.g. *Adams* SC, *supra* note 22; *Adams* CA, *supra* note 22; *Black*, *supra* note 22; *Brett*, *supra* note 22; *Bamberger v Vancouver (Board of Parks and Recreation)*, 2022 BCSC 49 [*Bamberger*]; *Poff*, *supra* note 22.

30 City of Toronto, by-law No 854-2004, *To adopt a new City of Toronto Municipal Code Chapter 608, Parks, and to repeal various by-laws of the former municipalities relating to parks* (29 June 2022), c 608-13.

place, install, attach or erect a temporary or permanent tent, structure or shelter at, in . . . a park" without a permit.[31] The City of Vancouver's bylaws permit tents and temporary structures overnight, but imposes a significant number of limitations, including the size of the temporary dwelling, its location, and the prohibition on the use of any heating source.[32]

Anti-camping bylaws are grounded in the presumptive primacy of the property rights of a municipal government. They position a city as a landowner first, operationalizing the right to exclude as a private right, rather than as corollary to the responsibilities of a government with human rights obligations *vis a vis* housing and public space. Anti-camping bylaws function by making setting up and living in an encampment illegal on the basis that residents have not obtained permission from the owner (the municipality) to use and occupy the land in this way. Without permission, their presence is deemed unlawful. These legal frameworks operate to produce illegality without regard to the broader context of the housing crisis and the city's human rights obligations. Relying on these types of bylaws to address a housing crisis thus produces a distorted relationship between unhoused people and both public space and their governments. For example, City of Toronto communications do not refer to people living in encampments as "residents" or to shelters, like tents, as "homes". Instead, they emphasize the illegal, temporary, and informal nature of encampments.[33] Residents of encampments are characterized as "individuals who were sleeping outside secure permanent housing."[34] On this basis, cities have characterized encampment residents as "trespassers",

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31 *Ibid*, c 608-14.

32 See City of Vancouver, Board of Parks and Recreation, *Park Bylaws (Consolidated)* (21 June 2021) at 8 (discussing the regulations on temporary shelters, s 11B). Note that prior to the decision in *Victoria v Adams* discussed below, Vancouver's bylaw prohibited camping at all. The current bylaw is in response to the Court's decision.

33 See e.g. City of Toronto, "Frequently Asked Questions—Wooden Structures in Encampments" (25 February 2021), online: <toronto.ca/news/faq-wooden-structures-in-encampments/>.

34 *Ibid*.

thus obscuring the nature of their actions and the consequences when encampments are cleared, belongings are destroyed or lost, and human rights are violated.[35]

Enforcement choices have been fundamentally shaped by this grounding of encampment responses in property rights in jurisdictions across Canada. In Toronto, Chapter 608-53 authorizes bylaw officers to act if someone is not complying with parks bylaws. Usually, bylaw officers will issue a ticket for violations of municipal bylaws. However, if the city decides to escalate, municipal officials may involve the police through the issuance of a trespass notice, which allows the police to take actions to clear an encampment. Police may be authorized to remove an "encroachment" and install fencing if orders to leave the park are not complied with. Cities rely on this language to frame clearances not as evictions but simply as a restoration of order.[36] Because residents have no legal right to be there, the narrative goes, the procedural and substantive protections discussed below do not apply. The shelters residents establish are legally characterized as "encroachments" regulated as any other object might be despite their status as homes and sources of protection from the elements. Police may also be empowered to remove personal belongings, including tents and pets, deemed to be part of the bylaw violation. For example, in Toronto, Chapter 608-53(B)(2) authorizes a bylaw officer to "[r]emove from the park to a pound or storage facility any animal or thing owned by

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35 See generally Nicholas Blomley, Alexandra Flynn & Marie-Eve Sylvestre, "Governing the Belongings of the Precariously Housed: A Critical Legal Geography" (2020) 16:1 Annual Rev of L & Soc Science 165; *Hamilton Case Study*, *supra* note 2; *Montreal/Sherbrooke/Gatineau Case Study*, *supra* note 2; *Prince George Case Study*, *supra* note 2; *Toronto Case Study*, *supra* note 2; *Vancouver Case Study*, *supra* note 2.

36 See generally Muriel Draaisma & Angelina King, "City Issues Warning Letter to Toronto CarpenterBbuilding Shelters for Unhoused People", *CBC News* (21 November 2020), online: <cbc.ca/news/canada/toronto/city-legal-action-toronto-carpenter-toronto-tiny-shelters-unhoused-people-1.5811589>; Leyland Cecco, "Why Toronto is Taking Action Against a Carpenter Amid its Homelessness Crisis", *The Guardian* (28 February 2021), online: <theguardian.com/world/2021/feb/28/toronto-tiny-home-homelessness-crisis>.

or in control of the person who the officer believes is or was involved in the contravention".[37]

A report on the encampment clearances in the summer of 2021 released by the Toronto Ombudsman in 2023 found that the city's encampment clearances were led by the Office of Emergency Management, which had no experience dealing with encampments, shelter, or housing and "was only tasked with coordinating the clearing of encampments", while other staff dealt with shelter and housing needs separately.[38] As a result, the operation of the evictions was focused on logistics rather than the people involved. Indeed, direction from the city manager was that encampments must be cleared "at war-time speed."[39] The ombudsman reported that city staff had to be "constantly" reminded that dealing with encampments was "about people and not just about structures and 'footprints.'"[40] Perhaps most glaringly, the report found there was no reference to mental health supports in the operational plans for the 2021 clearances, and no supports were provided on-site.[41]

B. Anti-Camping Bylaws and the *Charter of Rights and Freedoms*: The Landmark Ruling of *Victoria v Adams*

A series of court cases have dealt with *Charter* challenges to municipal overnight camping prohibitions in public space. While in some cases courts have granted cities injunctions allowing evictions on the basis of anti-camping bylaws and trespass laws,[42] a number of decisions have found that in the absence of

37 City of Toronto, municipal code, *Toronto Municipal Code*, ch 608.

38 *Toronto Ombudsman Report*, *supra* note 2 at 22.

39 *Ibid at* 28.

40 *Ibid at* 23.

41 *Ibid* at 26–27.

42 See e.g. *Vancouver (City) v O'Flynn-Magee*, 2011 BCSC 1647; *Victoria (City) v Thompson*, 2011 BCSC 1810; *Shantz*, *supra* note 22; *Williams*, *supra* note 22; *Adamson*, *supra* note 22; *Nanaimo (City) v Courtoreille*, 2018 BCSC 1629; *Brett*, *supra* note 22; *Saanich (District) v Brett*, 2018 BCSC 2068; *Maple Ridge (City) v Scott*, 2019 BCSC 157, leave to appeal to BCCA refused, *Maple Ridge (City) v Copperthwaite*, 2019 BCCA 99; *Black*, *supra* note 22; *Poff*, *supra* note 22.

adequate shelter space and alternative housing, such prohibitions violate the *Charter*.[43]

In *Victoria v Adams*, the BC Court of Appeal squarely considered the constitutional implications of anti-camping bylaws. The city of Victoria's *Parks Regulation Bylaw* and *Streets and Traffic Bylaw* prohibited the erection of any form of temporary overhead shelter at night—"including tents, tarps attached to trees, boxes, or other structure".[44] The encampment residents argued the bylaws violated their section 7 rights to life, liberty, and security of the person in denying them access to a basic human need, shelter, and that this interference could not be justified under section 1 of the *Charter*.[45] At the time, there was a shortage of shelter beds in Victoria, and encampment residents had nowhere else to go. The city argued declaring the bylaws unconstitutional would be an intrusion on the city's jurisdiction to make complex policy choices about the allocation of scarce public resources. The BCCA affirmed the trial judge's characterization of the issue as, in the words of Senior District Judge Atkin in *Pottinger v City of Miami:* "an inevitable conflict between the need of homeless individuals to perform essential, life-sustaining acts in public and the responsibility of the government to maintain orderly, aesthetically pleasing public parks and streets."[46]

The BCCA concluded the prohibition of camping in public parks at night violated the encampment residents' section 7 rights and this violation was not justified under section 1 of the *Charter*, affirming the trial decision.[47] Both levels of court emphasized that encampment residents were among "the most vulnerable and marginalized members of our society".[48] The

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43 See e.g. *Adamson 2*, *supra* note 22; *Vancouver (City) v Wallstam*, 2017 BCSC 937; *Stewart*, *supra* note 22; *Johnny*, *supra* note 2; *Bamberger*, *supra* note 29; *Waterloo*, *supra* note 26; *Shantz* SC, *supra* note 22.

44 *Adams* CA, *supra* note 22 at para 1.

45 See *ibid* at paras 4–5.

46 *Ibid* at para 3, citing *Pottinger v City of Miami*, 810 F Supp 1551 at 1554 (SD Fla 1992).

47 See *Adams* CA, *supra* note 22 at paras 10–11.

48 *Ibid* at para 75.

bylaws "impair[ed] their ability to provide themselves with shelter that affords adequate protection from the elements, in circumstances where there is no practicable shelter alternative".[49] Thus, the bylaws exposed homeless people to a serious risk of harm, including hypothermia and death.[50] The lack of shelter beds was a significant factor in the decision. Though the BCCA agreed an increased number of shelter beds *may* decrease the likelihood of a section 7 violation, whether this factor was determinative was ultimately left for a future decision.[51] Indeed, recent cases go beyond the number of shelter spaces to consider the adequacy and accessibility of the shelter spaces that cities argue are "available".[52] Narrowing the declaration from the trial decision to emphasize the focus on shelter spaces, the BC Court of Appeal held the bylaws were "inoperative insofar and only insofar as they apply to prevent homeless people from erecting temporary overnight shelter in parks when the number of homeless people exceeds the number of available shelter beds in the city of Victoria."[53]

Some cities have responded to these findings by interpreting them as narrowly as possible and permitting only the minimum transient "overnight" shelter in public space. Thus, encampment residents are recharacterized as trespassers each morning; their basic survival is once more subordinated to the property rights of local government. The resulting cycle of displacement can have severe consequences on psychological wellbeing and personal safety.[54] Indeed, the court in *Shantz* SC, found that:

> [T]he result of repeated displacement often leads to the migration of homeless individuals towards more remote, isolated locations as a means to avoid detection. This not only

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49 *Ibid*.

50 See *ibid* at para 102.

51 See *ibid* at paras 71–74.

52 See e.g. *Johnny*, *supra* note 2; *Stewart*, *supra* note 22; *Waterloo*, *supra* note 26.

53 *Adams* CA, *supra* note 22 at para 166.

54 See e.g. *Shantz* SC, *supra* note 22; *Johnny*, *supra* note 2; *Stewart*, *supra* note 22; *Waterloo*, *supra* note 26.

> makes supporting people more challenging, but also results in adverse health and safety risks.[55]

A 2023 Ontario decision cited detailed expert evidence about the harms associated with forced transience, including profound physical and mental health consequences.[56]

Thus, even in jurisdictions where courts have expressly required local governments to consider minimal human rights obligations in regulating encampments, the response has failed to ensure bylaw schemes and enforcement are implemented in a truly human rights compliant manner. The victories in court have in some ways inspired a race to the bottom, with cities crafting responses that implement the least human rights protection possible rather than treating them as a minimum bottom line.[57] Further, in some ways the cases have obscured the need to focus on permanent accessible housing because of the emphasis on temporary shelters as the baseline for *Charter* violations. However, in addition to making different choices about enforcement tactics, cities have the power to rethink how public space is regulated beyond the minimal negative rights standards the courts have outlined. A human rights compliant approach not only avoids lengthy and expensive litigation but is also more likely to effectively address the underlying issues that lead to encampments and provide more long-term solutions.

C. Cities Own Property as Governments

While existing parks bylaws position municipalities as property owners, the primary role of a municipality is as a government. As governments, they have human rights obligations to all residents, both housed and unhoused. In particular, the right to exclude is limited and constrained by the obligation to respect the dignity, security, and safety of unhoused residents. Therefore, bylaws and actions grounded in property rights must always account for these primary obligations. As we detail below, cities must move

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55 *Shantz* SC, *supra* note 22 at para 213.

56 See *Waterloo*, *supra* note 26 at para 54.

57 See e.g. *Johnny*, *supra* note 2; *Stewart*, *supra* note 22.

away from regulating encampments with a property rights framework that relies on trespass and exclusion.

In 1932, the SCC held that municipalities hold title to public property differently than other non-governmental owners:

> Under statutes where the fee simple is vested in them, the municipalities are in a sense owners of the streets. They are not, however, owners in the full sense of the word, and certainly not to the extent that a proprietor owns his land. The land-owner enjoys the absolute right to exclude anyone and to do as he pleases upon his own property.[58]

A municipality holds land, in contrast, "as trustee for the public."[59] This characterization is similarly upheld in some of the judgments in the 1991 *Commonwealth* decision, discussed earlier in this paper. To Chief Justice Lamer and Justice Sopinka, government-owned property differs from private property based on the "nature of the relationship existing between citizens and the elected government" where governments "will own places for the citizens' benefit and use, unlike a private owner who benefits personally from the places he owns."[60] By contrast, Justice McLachlin, who later became the Chief Justice of the SCC, determined that the application of the *Charter* to governmen-owned property was dependent on the government's *use* of that property, which Professor Sarah Hamill calls the "government as owner" approach.[61] In the case of encampments located in public parks and other public spaces, the *Charter* applies regardless of whether the trust or government as owner approaches are used. And, in our view, a municipal government's understanding of their governance of these spaces must be informed by human rights obligations.

As the many ongoing conflicts about encampments in Canadian cities illustrates, parks bylaws cannot serve as de facto housing policy. Trespass notices do not address the structural

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58 *Vancouver (City) v Burchill*, [1932] SCR 620 at 625, 1932 CanLII 29 (SCC).

59 *Ibid*.

60 *Commonwealth*, *supra* note 18 at para 14, Lamer CJ & Sopinka J, concurring.

61 Sarah Hamill, "Private Rights to Public Property: The Evolution of Common Property in Canada" (2012) 58:2 McGill LJ 365 at 392–93.

issues that lead to encampments. In the absence of concrete steps to implement a rights-based approach to encampments and the realization of the right to housing, governments are relying on these ill-equipped tools. However, blunt legal instruments not only fail to contribute to solving the municipal housing crisis—they also entrench the inequalities at the root of homelessness. In doing so, municipalities are failing to uphold their human rights obligations detailed in the following sections.

While these bylaws can provide a legal basis to involve police and to take certain actions in relation to public park lands, they do not require bylaw officers or police to do so. Choices about enforcement are discretionary and should be informed by the broader context, including human rights obligations. Cities could make different choices about how they engage with encampments and how they address any concerns about the health, safety, and well-being of residents, as well as concerns about access to and use of the parks by other users where the public space is serving multiple public interest purposes. Indeed, as we argue below, they are obligated to do so. Therefore, cities must not only discontinue the use of trespass notices and avoid police involvement with encampments, but bylaw schemes should be replaced and revised to be consistent with those obligations and in partnership with unhoused people.

III. CITIES ARE OBLIGATED TO ADOPT A HUMAN RIGHTS APPROACH TO ENCAMPMENTS

A human rights approach to encampments is not aspirational. Municipalities are subject to human rights law to pursuant to numerous sources, including international public law, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the *Charter*, provincial human rights codes, case law, and municipal bylaws. While this paper is not able to canvass every one of these sources, we set out key instruments below to argue that human rights apply to all governments, including municipalities. These legal frameworks and norms preclude the regulation of encampments from the perspective of municipalities as holders of private property absent their larger role as governments with obligations to all residents.

A. THE RIGHT TO HOUSING

In 2019, the federal government recognized a right to adequate housing in domestic legislation under the *National Housing Strategy Act*.[62] Section 4 of the Act states:

> It is declared to be the housing policy of the Government of Canada to
>
> (a) recognize that the right to adequate housing is a fundamental human right affirmed in international law;
>
> (b) recognize that housing is essential to the inherent dignity and well-being of the person and to building sustainable and inclusive communities;
>
> (c) support improved housing outcomes for the people of Canada; and
>
> (d) further the progressive realization of the right to adequate housing as recognized in the International Covenant on Economic, Social and Cultural Rights.[63]

The Act requires an explicit commitment to improving housing outcomes for persons in greatest need, and paragraph 5(2)(d) acknowledges that "vulnerable groups and persons with lived experience[s] of housing need" must be included in decision-making processes.[64]

The right to housing enshrined in the *NHSA* is grounded in Article 11(1) of the *International Covenant on Economic, Social and Cultural Rights*, which Canada ratified in 1976.[65] The *ICESCR* declares that all state parties "recognize the right of everyone to an adequate standard of living", including housing and the continuous amelioration of living conditions.[66] In the UN Global Shelter Strategy, adequate housing is defined to include adequate privacy, space, security, lighting, ventilation, and access to basic

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62 *National Housing Strategy Act*, SC 2019, c 29 [*NHSA*].

63 *Ibid*, s 4.

64 See *ibid*, s 5.

65 *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, Can TS 1976 No 46 (entered into force 3 January 1976, accession by Canada 19 May 1976) [*ICESCR*].

66 *Ibid*, art 11.

infrastructure in a location that is appropriate for work, school, and recreational facilities.[67] Thus, the right to housing is more than mere shelter. Beyond "having a roof over one's head," the *ICESCR* protects "the right to live somewhere in security, peace and dignity."[68] While the right to adequate housing does not require that a member state provide housing to all citizens, it does require that adequate housing options are available to "prevent homelessness" and requires states to prohibit forced evictions and address housing discrimination, obliging states to "focus on the most vulnerable and marginalized groups".[69] Therefore, the scope of the right to housing in international law has particular implications for government responses to encampments. In particular, the consistent resort to clearances and evictions by Canadian municipalities is a clear violation of binding human rights obligations.

While the existence of encampments is itself a violation of the right to housing, the protection of security of tenure extends to informal settlements and is a core element of the right to housing.[70] Indeed, protection from forced or arbitrary evictions is so central to the right to housing it has been a key focus of the UN Committee on Economic Social and Cultural Rights.[71] Further,

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67 Global Shelter Cluster, "Shelter & Settlements: The Foundation of Humanitarian Response: Strategy 2018–2022" (17 July 2018), online: <sheltercluster.org/working-group/strategy-2018-2022>.

68 *General Comment No 4: The Right to Adequate Housing*, UNCESCR, 6th Sess, UN Doc E/1992/23 (1991) [*General Comment 4*]; Office of the United Nations High Commissioner for Human Rights, *The Right to Adequate Housing* (Geneva, Switzerland: United Nations, 2014) at 3 [*Right to Adequate Housing*].

69 *Right to Adequate Housing*, *supra* note 68 at para 7.

70 See *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context*, UNGAOR, 73rd Sess, UN Doc A/73/310 (7 August 2018) [*SR Report 2018*]; *General Comment 4*, *supra* note 68.

71 See *General Comment 4*, *supra* note 68; *General Comment No 7: The Right to Adequate Housing (Art 11(1) of the Covenant): Forced evictions*, UNCESCROR, 16th Sess, UN Doc E/1998/22 (20 May 1997) [*General Comment 7*]. For a helpful summary of the role of the General Comments see Jessie Hohmann, *The Right to Housing: Law, Concepts, Possibilities* (London: Hart Publishing, 2013).

while the right to housing is subject to progressive realization, such basic protections are not. They are immediate and not dependent on the resources of the state. Forced evictions are:

> [T]he permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection. . . . in conformity with the provisions of the International Covenants on Human Rights.[72]

Forced evictions are never justified and are a gross violation of human rights. Indeed, they are also prohibited by the *International Covenant on Civil and Political Rights (ICCPR)*[73] article 17 which declares that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, [or] home".[74] This includes instances where state harassment, intimidation, or threats cause encampment residents to relocate against their will. Evictions falling outside the legal definition of "forced" may only be justified in rare circumstances and nonetheless require that relocation only be carried out with minimal force and after exploring all viable alternatives with residents in accordance with law.[75] Additionally, they must be consistent with the right to housing, and only occur after securing access to safe and adequate indoor shelter space appropriate to a resident's needs rather than leaving individuals unhoused.[76]

Forced evictions may also implicate a broader range of human rights obligations and protections: "the practice of forced evictions may also result in violations of civil and political rights, such as the right to life, the right to security of the person, [and]

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72 *General Comment 7*, *supra* note 71 at para 3.

73 *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976, accession by Canada 19 May 1976) [*ICCPR*].

74 *Ibid*, art 17.

75 See *General Comment 7*, *supra* note 71 at paras 13–15.

76 See *ibid* at para 16.

the right to non-interference with privacy, family and home".[77] Indeed, the right to adequate housing intersects with the principles of human dignity and non-discrimination and thus a range of other rights protected under international law.[78] Forced evictions may compound housing discrimination, which is known to disproportionately affect women, Indigenous people, immigrants, and people of colour.[79] In Canada, housing discrimination means that racialized and Indigenous people, as well as newcomers, are overrepresented in homeless populations.[80] Article 5(e)(iii) of the *International Convention on the Elimination of All Forms of Racial Discrimination* obliges governments "to prohibit and to eliminate racial discrimination in all its forms" and to guarantee the right to housing "without distinction as to race, colour, or national or ethnic origin".[81] Article 14.2(h) of the *Convention on the Elimination of All Forms of Discrimination Against Women* establishes that Canada, as a state party, must "take all appropriate measures to eliminate discrimination against women . . . in relation to housing, sanitation, [and] electricity and water supply".[82] The Canadian Women's Foundation reports that nearly 3,500 women use the shelter system because of lack of safety at home, citing violence

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77 *Ibid* at para 4.

78 See *ibid* at paras 8–10. See also Hohmann, *supra* note 71 at 38–48.

79 See e.g. Canadian Observatory on Homelessness, "Discrimination" (last visited 23 May 2024), online: <homelesshub.ca/about-homelessness/legal-justice-issues/discrimination>; Caryl Patrick, *Aboriginal Homelessness in Canada: A Literature Review* (Toronto: Canadian Homelessness Research Network Press, 2014).

80 See generally Statistics Canada, *Insights on Canadian Society, A Portrait of Canadians Who Have Been Homeless* by Sharanjit Uppal, Catalogue No 75-006-x, (Ottawa: Statistics Canada 2022), online: <www150.statcan.gc.ca/n1/pub/75-006-x/2022001/article/00002-eng.htm>.

81 *International Convention on the Elimination of All Forms of Racial Discrimination*, 4 January 1969, GA Res 2106 (XX), OHCHR (entered into force on 4 January 1969, ratified in 1970), art 5.

82 *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, GA Res 34/180, OHCHR, 27(1), (entered into force 3 September 1981, ratified in 1980).

and abuse as reasons for leaving.[83] While the shelter system supports women fleeing from violence and abuse, women who experience homelessness are at an increased risk of experiencing sexual assault, violence, and harassment.[84] Thus, encampment evictions may force women to return to unsafe relationships or shelters, putting them at even greater risk.

B. International Human Rights Obligations and Municipal Governments

As governments, municipalities have human rights obligations grounded in both domestic and international law. In our view, to be consistent with the *NHSA* and the international obligations that bind all governments, municipalities in Canada must develop policy and programmatic approaches to encampments that are aligned with the right to housing.

International human rights obligations are not merely aspirational. They are expressly grounded in the international laws, treaties, and covenants that Canada has signed and ratified, signifying an obligation for all Canadian governments to follow.[85] International human rights obligations also extend to all levels and branches of government within a state, including municipalities, and any institutions, organs, or agents of the state that exercise governmental authority.[86] For example, Articles 28 and 50 of the *ICESCR* and *ICCPR*, respectively, expressly set out the authority for the extension of obligations beyond the state: "the provisions of the present Covenant shall extend to all parts

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83 See Fred Victor, "8 Challenges Homeless Women Face" (2020), online: <fredvictor.org/2020/03/03/lets-help-homeless-women/>.

84 See YWCA Canada, "When There's No Place Like Home: A Snapshot of Women's Homelessness in Canada" (2012), online: <homelesshub.ca/resource/when-theres-no-place-home-snapshot-womens-homelessness-canada>.

85 See *Quebec (Attorney General) v 9147-0732 Québec inc*, 2020 SCC 32 at para 32 [*Quebec*].

86 See Leilani Farha, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to Adequate Standard of Living, and on the Right to Non-Discrimination in this Context*, UNGAOR, 28th Sess, UN Doc A/HRC/28/62 (2014) at para 9 [*Report of Special Rapporteur*].

of federal states without any limitations or exceptions."[87] Thus, under the *ICESCR*, municipal governments "are obliged to comply, within their local competences, with their duties stemming from the international human rights obligations of the State."[88] This means states and local governments share complementary duties to protect, respect, and fulfil human rights protected under international law.[89]

States, through central government as their representatives, are the primary addressees of international human rights law and hold the authority to ratify international treaties.[90] After ratification the state may delegate the implementation of the treaty terms to lower levels of government, including local government, who are bound by those obligations.[91] It is within the state's sovereign competence to choose how to organize its internal administration. Nonetheless, "for the purposes of international responsibility the conduct of [the State's] institutions . . . [are] attributable to the State, even if those institutions are regarded, in domestic law, as autonomous and/or independent of the central executive government."[92] The division of responsibilities across governments must be consistent with the state's compliance with international human rights obligations.[93] Like the state, local government undertakes the obligations to respect, protect, and fulfil human rights.[94] These obligations "[stem] from the international human rights obligations of the State" and are considered complementary to the state's primary obligation.[95] Complementary does not imply

87 *ICESCR*, *supra* note 65, art 28; *ICCPR*, *supra* note 73, art 50.

88 *Role of Local Government in the Promotion and Protection of Human Rights: Final Report of the Human Rights Council Advisory Committee*, 7 August 2015, UNGAOR, 30th Sess, UN Doc A/HRC/30/49 at para 21 [*Role of Local Government*].

89 See *ibid* at para 17.

90 See *ibid* at para 20.

91 See *ibid* at para 21.

92 *Ibid* at para 18.

93 See *Report of Special Rapporteur*, *supra* note 86 at para 10.

94 See *Role of Local Government*, *supra* note 88 at para 27.

95 *Ibid* at para 21.

any less important, but rather acknowledges that while the central government creates policies and strategies to achieve the state's human rights obligations, local government is charged with implementing them.[96] Commentators have suggested that because local government is close in proximity to the people it serves and the location from which human rights claims originate, local governments are in a better position to fulfil these obligations under international human rights law.[97]

The extension of obligations to all levels of government has been discussed in numerous international law documents. For example, General Comment No.16 of the UN Committee on Economic, Social and Cultural Rights states, "[v]iolations of the rights contained in the Covenant can occur through direct action of, failure to act or omission by State parties, or through their institutions or agencies at the national and local levels."[98] Further, according to Article 27 of the Vienna Convention on the Law of Treaties, "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[99] This means that a federal state like Canada may not defend itself against international human rights complaints by arguing the alleged violation was executed by a lower level of government or agent of the state, even if the act perpetrated was "*ultra vires* or contravene[ed] domestic law and instructions."[100] The draft

96 See *ibid*.

97 See e.g. Klaus Starl, "Human Rights and the City: Obligations, Commitments, and Opportunities" in Barbara Oomen, Martha Davis & Michele Grigolo, eds, *Global Urban Justice: The Rise of Human Rights Cities* (Cambridge: Cambridge University Press, 2016) at 203; Elizabeth McIssac & Effie Vlachoyannacos, "Taking a Human Rights Based Approach to Housing in Toronto" (6 September 2021), online: <maytree.com/stories/taking-a-human-rights-based-approach-to-housing-in-toronto/>; *Role of Local Government*, *supra* note 88 at para 8.

98 UN Committee on Economic, Social and Cultural Rights, *General Comment No 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art 3 of the International Covenant on Economic, Social and Cultural Rights)*, UNESCOR, 34th sess, UN Doc E/C.12/2005/4 (2005), art 42.

99 *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), art 27.

100 *Role of Local Government*, *supra* note 88, at paras 17, 20.

articles on Responsibility of States for Intentionally Wrongful acts states:

> The conduct of any State organ shall be considered an act of the State under international law, whether that organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its characters as an organ of the central government or of a territorial unit of the State.[101]

Therefore, all governments, regardless of level or branch, and all governmental authorities collectively share in and engage the responsibilities of the State Party.[102]

While it is clear from the above that municipal governments are bound by international commitments made by states, there remains significant issues with the enforcement of these obligations vis-a-vis local governments. The mechanisms to monitor treaty compliance are primarily focused on the central government.[103] For example, only states are required to submit the reports required by human rights treaties, and only states can be the subject of a human rights complaint.[104] This, however, does not change the nature of those obligations and how they should shape and inform the development, implementation, and enforcement of municipal powers. In the context of the right to housing, the recent adoption of the right to housing in federal legislation and creation of a Federal Housing Advocate ("Advocate") could provide an important layer of protection and enforcement.[105] It is significant that the Advocate's jurisdiction includes the ability to conduct research, receive submissions, and conduct a review about systemic housing issues generally (not limited to federal jurisdiction).[106] Further, the Advocate is well placed to advise the Minister on the importance of federal

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101 *Report of the International Law Commission*, UNGAOR, 53rd Sess, Supp 10, UN Doc A/56/10 (2001), art 4.

102 See *Report of Special Rapporteur*, *supra* note 86 at para 9.

103 See *ibid* at para 17.

104 See *Role of Local Government*, *supra* note 88 at para 17.

105 See *NHSA*, *supra* note 62, s 7.

106 See *ibid*, ss 13, 13.1(1).

leadership on international human rights obligations, including enforcement and accountability.[107]

Leilani Farha, the former UN Special Rapporteur on the Right to Housing, has noted that the failure to successfully implement the right to housing in Canada implicates all levels of government. She emphasized that central governments may be better positioned to address broad housing issues underlying encampments, such as resource distribution, the creation of national standards, and provision and regulation of financing and oversee taxation. However, local governments responsibilities are directly related to the treatment of encampments, including the provision and management of services such as water, sanitation, electricity and other infrastructure. Land-use planning, zoning, and development bylaws, as well as health, safety, environmental and building standards, also inform the regulation of public space and decisions regarding evictions, displacement and relocation. Further, local governments in Canada deliver emergency shelter services, as well as disaster risk reduction and response policies that are directly linked to the circumstances in which encampments are established.[108] When municipal governments invoke their powers to evict people from encampments and threaten the health and safety of residents who have no other place to go they violate their positive obligation to respond and ensure individuals access adequate housing.[109]

Municipalities are not only subject to legal instruments and obligations flowing from other levels of government. They can create their own local obligations by using international human rights law as a guiding principle for governance or by adopting international human rights law directly into their policies. This "human rights city" model is a way to localize human rights and ensure decisions advance and protect the human rights of

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107 See *ibid*, s 13(g).

108 See *National Encampment Protocol*, *supra* note 4 at paras 12–13.

109 See *ibid* at para 5.

residents.[110] Becoming a human rights city both enables and requires the shift from *owner* to *government* with respect to the regulation of public space and housing.

In the context of decentralization and urbanization, municipal governments are now experiencing more diverse and complex problems while also receiving an increased scope of responsibility.[111] This has empowered municipalities to become more innovative and creative when tackling unprecedented problems, with some leaders turning to human rights law to rise to the challenge.[112] In general, human rights law has seen a rise in profile, and some municipalities have decided to bring the rights closer to home, where arguably they will be better protected, fulfilled, and promoted.[113] Some municipalities have turned to human rights law to realize the economic, social, and environmental sustainability goals enshrined in documents like the New Urban Agenda.[114] Further, some municipalities are turning to international human rights law "as a way of justifying and pursuing more progressive local policies than those of other orders of government."[115] The City of Toronto has incorporated international human rights law into its own instruments, the HousingTO Action Plan and the Toronto Housing Charter. These commitments should guide Toronto's response to encampments, in addition to domestic legal requirements outlined below.[116]

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110 See Human Rights Cities Network, "What is a Human Rights City?" (2021), online: <humanrightscities.net/what-we-do/>; Maytree, "Human Rights Cities" (last visited 3 March 2022), online: <maytree.com/what-we-focus-on/ human-rights-cities/>.

111 See Nevena Dragicevic & Bruce Porter, "Human Rights Cities: The Power and Potential of Local Government to Advance Economic and Social Rights" (December 2020) at 15, online (pdf): <maytree.com/wp-content/uploads/Human_Rights_Cities.pdf>.

112 See *ibid*.

113 See *ibid*.

114 See *ibid* at 17.

115 *Ibid*.

116 See *ibid*. See also our discussion of *Waterloo*, *supra* note 26.

C. International Law Informs the Interpretation of Domestic Law

Municipal governments also have obligations under domestic law. As we noted above, this includes *Charter* obligations, but municipal governments also have human rights obligations related to Indigenous rights and interests protected by section 35 of the Constitution, provincial statutory obligations under the human rights codes, and, more recently obligations informed by the *NHSA* which incorporates the right to housing into domestic law.[117] As discussed below, domestic human rights obligations are informed by Canada's international human rights obligations.

The SCC has established that the *Charter* is generally "presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified."[118] Thus, even where provisions of international conventions have not been expressly incorporated into Canadian law, they nevertheless substantively inform the interpretation of domestic law and review of government decision making. The application of international conventions formed part of the landmark SCC decision in *Baker v Canada* in which the Court noted "[t]he important role of international human rights law as an aid in interpreting domestic law" as well as its role as "a critical influence on the interpretation of the scope of the rights included in the *Charter*".[119] Justice L'Heureux-Dubé emphasized that:

> [The] *Charter* is the primary vehicle through which international human rights achieve a domestic effect. In particular, s. 15 (the equality provision) and s. 7 (which guarantees the right to life, security and liberty of the person) embody the notion of respect of human dignity and integrity.[120]

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117 See e.g. *Human Rights Code of British Columbia*, RSBC 1996, c 210; *Human Rights Code*, RSO 1990, c H.19; *NHSA*, *supra* note 62, s 4.

118 *Reference Re Public Service Employee Relations Act (Alta)*, 1987 CanLII 88 at para 59 (SCC). Aff'd most recently in *Quebec*, *supra* note 85 at para 31.

119 *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 at para 70 (SCC) [*Baker*].

120 *R v Ewanchuk*, 1999 CanLII 711 at para 73 (SCC) [citations omitted].

Justice L'Heureux-Dubé noted, "the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review."[121] This has significant implications for state responses to encampments, and perceptions of property, as discussed next.

IV. LITIGATION ABOUT ENCAMPMENTS IN CANADIAN CITIES

International covenants such as the *ICESCR* have been cited in case law concerning encampments, including *Victoria v Adams* discussed above.[122] The Court of Appeal expressly affirmed the use of international human rights instruments as an interpretive aid to inform the scope and content of section 7 of the *Charter*. Thus, municipal decisions regarding encampments and the realization of the right to housing must be grounded in international human rights obligations.

A. TREATMENT OF INTERNATIONAL HUMAN RIGHTS LAW IN *ADAMS*

At trial, Justice Ross referred to several international human rights instruments including the *ICESCR*. She concluded that "while the various international instruments do not form part of the domestic law of Canada, they should inform the interpretation of the *Charter* and in this case, the scope and content of section 7."[123] In rejecting the BC Attorney General's argument that international legal instruments provided no assistance, Ross J emphasized that the SCC had long recognized the interpretive value of international human rights law in interpreting the *Charter.*[124] Indeed she noted Canada's own responses to the United Nations Committee reviews of Canada's human rights record in which they acknowledged they were bound by the Supreme Court's findings that the *ICESCR* could inform section 7 interpretation, including that people are not

121 *Baker*, *supra* note 119 at para 70.

122 See *Adams* CA, *supra* note 22 at para 33.

123 *Adams* SC, *supra* note 22.

124 See *ibid* at para 95, citing *Baker*, *supra* note 119 at para 70.

deprived of the basic necessities of life.[125] In examining the scope of Article 11.1 of the *ICESCR* Ross J specifically pointed to the importance of security of tenure and protection against forced eviction.[126] The trial judge also cited *Suresh v Canada (Minister of Citizenship and Immigration)*[127] in which the SCC held that the principles of fundamental justice are informed by both the Canadian experience and international human rights instruments, including declarations, covenants, conventions, decisions from international tribunals, and customary norms.[128]

Despite there being no issue raised on appeal about reference to international instruments in the trial decision, the BCCA expressly accepted the BCSC's analysis on the application of international human rights law. The Court noted that the SCC had long settled the question.[129] Using international human rights instruments as interpretive aids, they stated, "is well-established in Canadian jurisprudence", particularly with respect to section 7.[130] Thus, the treatment of international human rights instruments in *Adams* is instructive for municipalities and should inform their approach to encampments long before any litigation arises. The design and enforcement of *Charter* compliant bylaws must be informed by the obligations set out in the *ICESCR*, including section 11.1 and protections against forced eviction.

B. The Application of International Human Rights Law Since *Adams*

Courts in British Columbia and Ontario have heard several cases about the application of the *Charter* in relation to municipal

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125 See *Adams* SC, *supra* note 22 at para 99. See also *Irwin Toy Ltd v Québec (Attorney General)*, [1989] 1 SCR 927 at 1003, 1989 CanLII 87 (SCC).

126 See *Adams* SC, *supra* note 22 at para 89, citing General Comment No 4 on Article 11.1 of the *Covenant, the Committee on Economic, Social and Cultural Rights*, 6th Sess, UN Doc E/1992/23, Annex III (1991) at 114.

127 2002 SCC 1.

128 See *Adams* SC, *supra* note 22 at paras 161–62.

129 See *Adams* CA, *supra* note 22 at paras 33–35.

130 *Ibid* at para 35.

bylaws and encampments since *Adams*.[131] However, many subsequent decisions have not similarly highlighted international human rights obligations. In part, this is likely due to the majority of cases being heard in the context of injunction applications by encampment residents or municipal governments.[132] Such proceedings occur on an expedited basis and do not consider *Charter* claims on their merits, providing only a cursory analysis as to whether there is a genuine legal issue at stake.[133]Another obstacle faced by litigants is the lack of a constitutionally protected right to housing in Canada.[134] While express or implied constitutional rights to housing have been mobilized (albeit with limitations) in other jurisdictions, including South Africa and India,[135] claims to bring the right within the scope of the *Charter* have so far been unsuccessful in

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131 For those encampment-related decisions that explicitly consider challenges to municipal bylaws on section 7 *Charter* grounds see e.g. *Johnston v Victoria (City)*, 2010 BCSC 1707, *Johnston v Victoria (City)*, 2011 BCCA 400, *Shantz* SC*, supra* note 22, and *Waterloo*, *supra* note 26. As explored below, these are distinct from cases including *Williams*, *supra* note 22, *Adamson*, *supra* note 22, *Black*, *supra* note 22, and *Poff*, *supra* note 22, which considered *Charter* arguments as only a cursory part of the 'balance of convenience' test established within interlocutory injunction applications. While *Batty v City of Toronto*, 2011 ONSC 6862, *Vancouver (City) v Zhang*, 2009 BCSC 84, and *Vancouver (City) v Zhang*, 2010 BCCA 450, also involve encampments and *Charter* challenges to municipal bylaws, those cases focused on the guarantee to freedom of expression under section 2(b) of the *Charter* and not on the right to shelter or housing.

132 See Nikolas Koschany, "An Inconvenience Truth—RJR MacDonald, and the Rubber-Stamping of 'Public Interest'" (8 April 2022), online (blog): Environmental Justice and Sustainability Clinic <ejsclinic.info.yorku.ca/2022/04/an-inconvenience-truth-rjr-macdonald-and-the-rubber-stamping-of-public-interest/>.

133 See e.g. *Black*, *supra* note 22. See also *RJR-MacDonald Inc v Canada*, 1994 CanLII 117 (SCC) (where the SCC accepted and explicated a three-part injunction test which included an assessment of whether the applicant will suffer irreparable harm if the injunction is not granted).

134 See *Tanudjaja v Attorney General (Canada) (Application)*, 2013 ONSC 5410 at para 32.

135 See Hohmann, *supra* note 71; AJ van der Walt, *Property in the Margins* (London: Hart Publishing, 2009) (discussing the limitations of the South African approach).

Canadian courts. We note, however, the issue has never been fully considered on the merits by a Canadian court and deserves renewed attention in light of the adoption of the *NHSA*, which expressly enshrines the right to housing at international law in federal legislation.

In 2014, a right to housing *Charter* claim under sections 7 and 15 was dismissed by the Ontario Court of Appeal on a motion to strike brought by the provincial and federal governments.[136] As noted by Justice Feldman in her strong dissent, the thousands of pages of evidence produced by the applicants in *Tanudjaja v Attorney General (Canada)*[137] to support their argument that section 7 and section 15 ground a right to housing, including the role of international legal obligations, were never considered by the motions judge or the Court of Appeal.[138] While the SCC denied leave to appeal,[139] given the failure to meaningfully engage with the merits, we do not view the issue as settled in Canadian law. Unfortunately, *Tanudjaja* has been cited by some courts dealing with encampments to continue to narrowly define government obligations to people who have been unhoused.[140] In our view, Canada's international obligations should inform a more substantive engagement with the scope of the right to housing by policy makers and courts alike.

Since *Adams*, Canadian law has continued to develop regarding the reception of international human rights law in section 7 analysis and the *Charter* generally. In the 2020 decision in *Quebec (Attorney General) v 9147-0732 Quebec inc*, the Supreme Court provided a "principled" and hierarchical framework for how international legal instruments should be used to interpret the *Charter*.[141] The majority used the comments of Dickson CJ in *Re PSERA* that international human rights law

136 See Heffernan, Faraday, & Rosenthal, *supra* note 8.

137 2014 ONCA 852 [*Tanudjaja* ONCA], leave to appeal to SCC refused, 36283 (25 June 2015) [*Tanudjaja* LTA].

138 See *Tanudjaja* ONCA, *supra* note 137. See also Heffernan, Faraday, & Rosenthal, *supra* note 8.

139 See *Tanudjaja* LTA, *supra* note 137.

140 See e.g. *Shantz* SC, *supra* note 22.

141 *Quebec*, *supra* note 85 at paras 26–27.

"must . . . be relevant and persuasive sources for interpretation of the *Charter*'s provisions" as their starting point.[142] They emphasized Dickson's reference to *ratified* human rights documents in affirming the "presumption of conformity", which operates to ensure the *Charter* is interpreted in accordance with the obligations therein.[143] As noted above, this means provisions of the *Charter* must be presumed to provide at least as much protection as that provided in binding international instruments—ratified instruments and those pre-dating the *Charter*—unless there is a clear contrary statutory provision.[144] The majority also clarifies the role of instruments that pre-date the *Charter* and therefore form part of its context, which may be given greater weight even where not ratified.[145] Non-binding sources carry less weight and require a court to explain why and how they are being used.[146]

Separate reasons written by Justice Abella rejected the hierarchical framework, drawing on a wide range of international sources to reach the same substantive conclusion as the majority.[147] Indeed, there remains a lack of clarity in the majority of the decision about whether binding international law is limited to a "support or confirm role" in *Charter* interpretation. As Amarnath and Harris have pointed out, this is inconsistent with previous statements by the Court. In *Kazemi Estate v Islamic Republic of Iran*,[148] the SCC clarified and expanded on the approach to using international human rights law to assess novel principles of fundamental justice.[149] There the SCC explained that the presumption of conformity with binding international law assists courts in "delineating the breadth and scope of *Charter*

142 *Ibid* at para 30, citing *Re Public Service Employee Relations Act (Alta)*, 1987 CanLII 88 at para 57 (SCC).

143 *Quebec*, *supra* note 85 at para 31.

144 See *R v Hape*, 2007 SCC 26 at para 37.

145 *Quebec*, *supra* note 85 at para 41.

146 *Ibid* at para 40.

147 Abella's reasons were supported by Karakatsanis and Martin JJ.

148 *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62.

149 See *ibid* at paras 135–67.

rights."[150]Amarnath and Harris note, "[I]t is difficult to see how a particular source can help in *delineating the scope* of a Charter right if it is limited to confirming a Charter right interpretation *only once* arrived at independently".[151] Regardless of these ongoing questions about the role of international law in Canadian courts, the decision in *Quebec* makes it clear that international human rights instruments are highly relevant to any legal action related to encampments and should inform a court's understanding of section 7 and section 15. The enactment of the *NSHA* leaves little doubt that the international instruments in which the right to housing is articulated, including the *ICESCR*, are binding in Canada. While it is federal legislation, it sends a strong message that Canada recognizes the binding nature of its obligations with respect to housing. It is therefore incumbent on municipal governments to ensure their bylaws and implementation operate in accordance with international human rights law.

Further developments in Canadian case law around positive obligations and international law may also have implications for *Charter* cases involving housing specifically. A September 2022 court decision allowed a hearing to go ahead on human rights grounds, after the United Nations Human Rights Committee found that Canada violated its international commitments.[152] Even though the Committee's decisions are not legally binding on signatory countries, including Canada, government responses by signatories can be assessed to ensure that they do not violate the

150 See *ibid* at para 150.

151 Ravi Amarnath & Courtney Harris, "Rigour Required: Recent Direction from the Supreme Court of Canada on Binding and Non-Binding Sources of International Law in Charter Interpretation" (2022) 104 SCLR (2d) 123 at 138.

152 See *Toussaint v Canada (Attorney General)*, 2022 ONSC 4747. See also *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2348/2014*, HRC Dec 2348/2014, UNHRC, 2018, CCPR/C/123/D/2348/2014.

Charter and that they reflect good faith attempts to implement treaty obligations.[153]

C. Human Rights Obligations and Recent Encampment Decisions

While a detailed review of the case law post-*Adams* is beyond the scope of this paper, we do want to briefly draw attention to three interrelated developments in recent case law. These pandemic-era decisions underline the need for Canadian municipalities to design and implement human rights compliant approaches to encampments. While these decisions are not expressly grounded in international legal obligations, they nonetheless underline some of the key principles outlined in international legal instruments. First, the protection of procedural rights for encampment residents and the need for meaningful engagement. Second, the unique constitutional rights of Indigenous Peoples and the disproportionate representation of Indigenous people in encampments. Third, the obligation to understand and address the particular needs of unhoused individuals in assessing whether housing options are accessible to individuals and the increasing judicial scrutiny of municipal shelter systems.

1. Meaningful Engagement

In *Bamberger v City of Vancouver*, encampment residents brought a judicial review application regarding the eviction of an encampment in CRAB Park, located on federal lands leased by the City of Vancouver and operated as a city park.[154] The BC Supreme Court quashed the decision of the General Manager to enforce a trespass notice.[155] While it was not brought as a *Charter* claim akin to *Adams*, the judge was expressly informed by section

153 Martha Jackman and Bruce Porter, "The Housing Tell: Toussaint's Ground-Breaking Victory for Human Rights in Canada", The National Right to Housing Network (28 September 2022), online: <housingrights.ca/tousssaint-victory-2022/>.

154 *Bamberger*, *supra* note 29.

155 See *ibid* at para 216.

7—through finding that residents had a right to notice and an opportunity to be heard before being ordered to leave. *Bamberger* highlights the role of administrative law in ensuring substantive and procedural fairness for encampment residents. Nonetheless, the decision does not go as far as the human rights obligations enshrined in international law for notice, meaningful participation in decision making, and the prohibition on forced evictions.[156] Indeed, given the context of federal ownership of the lands it could have been directly informed by the concept of meaningful engagement and the robust participation called for under the *NHSA* and international law.[157] As discussed below, meaningful engagement has become a powerful tool for enforcing economic rights in other jurisdictions.[158] For example, in South Africa, "engagement orders" have been used to enforce consultation with residents of informal settlements and to provide court oversight, including what Brian Ray calls "a remedy-management device" in the context of litigation about evictions.[159] Thus *Bamberger* was a missed opportunity to clarify the role of human rights obligations in the use of trespass orders, particularly the role of procedural protections to ensure meaningful engagement is undertaken prior to any removals and to enforce transparency requirements. However, it will not be the last opportunity to raise these arguments and bring international obligations into the fore. The crisis of the pandemic and the

156 See *National Encampment Protocol*, *supra* note 4 at 16.

157 See *Occupiers of 51 Olivia Road v City of Johannesburg*, 2008 (3) SA 208 (CC), at para 21 [*Olivia Road*]; *Grootboom and Others v Government of the Republic of South Africa and Others*, Constitutional Court Order (CCT38/00), 2000 ZACC 19 [*Grootboom*]; Michèle Biss et al, "Progressive Realization of the Right to Adequate Housing: a Literature Review" (2022) at 7, online (pdf): <housingrights.ca/wp-content/uploads/NHC-Progressive-Realization-Paper_EN.pdf>.

158 Brian Ray, "Engagement's Possibilities and Limits as a Socioeconomic Rights Remedy" (2010) 9 Wash U Glob Stud L Rev 399 at 400.

159 *Ibid* at 413.

increase in encampments across Canada has put the lack of housing for the most vulnerable residents in sharp view.[160]

Indeed, the importance of engaging directly with encampment residents was also raised in the 2023 *Waterloo* decision. The court was asked to provide direction to the regional government on how to enforce its legal rights to evict unhoused persons living in an encampment on municipally-owned lands in breach of their bylaw.[161] While the Region brought the application with respect to a specific encampment, it proposed to use the court's decision as a precedent for the treatment of other encampments. The decision is the first Ontario ruling to apply the *Adams* section 7 analysis to restrain a municipality from clearing an encampment. In *Waterloo*, the Court criticized the risk assessment tool developed by the municipality as inadequately researched and failing to adequately analyze the types of "incidents" included.[162] Perhaps most significantly, the judge noted the failure to consult any of the encampment's residents or include any comparative consideration of potential risks of eviction for encampment residents in the analysis.[163] The judge concluded the risk assessment "has no way to measure the relative risk of choosing between eviction, allowing the Encampment residents to stay, or pursuing other options."[164]

Going forward, these decisions clarify that it is incumbent on Canadian municipalities to meaningfully engage with encampment residents and to undertake a balanced assessment of risks about the impact of encampments and the impact of evictions on encampment residents. Indeed, the 2023 Ombudsman Toronto Investigation Report into the 2021 encampment clearings recommends adopting a clear definition of engagement and creating an engagement strategy that will

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160 See *National Encampment Protocol*, *supra* note 4. See also David DesBaillets and Sarah E Hamill, "Coming in from the Cold: Canada's National Housing Strategy, Homelessness, and the Right to Housing in a Transnational Perspective" (2022) 37:2 CJLS 273.

161 *Waterloo*, *supra* note 26.

162 *Ibid* at paras 37, 39, 43–44.

163 *Ibid* at paras 37–46.

164 See *ibid* at para 46.

"seek and incorporate feedback from people living in encampments".[165] This is a key component of fulfilling what the Report calls, "a high duty of fairness" to encampment residents.[166] The Report notes that while Toronto has committed to both a housing-first and a human-rights-based approach, key components of meaningful engagement, such as "building rapport, equity, respect, and empathy. . . . were conspicuously absent during [the 2021] clearings."[167]

2. The Rights of Indigenous Peoples

We note that the specific constitutional rights of Indigenous Peoples have been largely ignored in in encampment decisions. This omission is particularly glaring because of the overrepresentation of Indigenous people in encampments.[168] Indigenous people make up only 5% of Canada's population but made up 35% of respondents in a 2022 point-in-time count of unhoused persons.[169] Further, not only are Indigenous people overrepresented in the population experiencing homelessness, but they are also disproportionately unsheltered and living in encampments compared to non-Indigenous people experiencing homelessness.[170] As the UN Special Rapporteur found, homeless services "replicate patterns of colonial oppression" and thus are

165 *Toronto Ombudsman Report*, *supra* note 2 at 4.

166 See *ibid* at 62.

167 See *ibid* at 44.

168 See Statistics Canada, *Violent victimization and perceptions of safety: Experiences of First Nations, Métis and Inuit women in Canada*, by Loanna Heidinger (Ottawa: Statistics Canada, 26 April 2022), online: <www150.statcan.gc.ca/n1/pub/85-002-x/2022001/article/00004-eng.htm>.

169 Statistics Canada, *Everyone Counts 2020–2022: Preliminary Highlights Report* (Ottawa: Statistics Canada, last modified 28 April 2023), online: <infrastructure.gc.ca/homelessness-sans-abri/reports-rapports/pit-counts-dp-2020-2022-highlights-eng.html>.

170 *Ibid*.

inaccessible to Indigenous people.[171] This is particularly acute for Indigenous women who may avoid shelters for fear of violence and because of the lack of culturally appropriate services, or who may simply not have accessible options in rural or remote areas.[172] They remain the group most likely to experience hidden or concealed homelessness.[173] Municipalities have particular obligations to Indigenous Peoples under section 35 of the Constitution which recognizes and protects existing Aboriginal and treaty rights, and under international obligations set out in the UNDRIP and the instruments recently incorporating it into Canadian law.[174]

As we have argued elsewhere, forced evictions of Indigenous people do not comply with requirements for meaningful, good-faith consultation about and involvement in the development and delivery of social programs.[175] Nor are they consistent with recognition of self-determination under the UNDRIP.[176] Canadian courts have recognized the right to

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171 *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and the Right to Non-discrimination in this Context*, UNGA, 74th Sess, UN Doc A/74/183 (2019) at para 27.

172 See generally Kaitlin Schwan et al, *The Pan-Canadian Women's Housing & Homelessness Survey* (Toronto: Canadian Observatory on Homelessness, 2021); Canada, National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, vol 1a* (June 2019), online (pdf): <mmiwg-ffada.ca/wpcontent/uploads/2019/06/Final_Report_Vol_1a-1.pdf>.

173 Julia Christensen, "'Our Home, Our Way of Life': Spiritual Homelessness and the Sociocultural Dimensions of Indigenous Homelessness in the Northwest Territories (NWT), Canada" (2013) 14:7 Soc Cultural Geo 804.

174 See *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44 [*DRIPA*]; *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 [*UNDRIP Act*] (implementing UNDRIP in BC and Canada, respectively).

175 Alexandra Flynn et al, "Overview of Encampments Across Canada: A Right to Housing Approach" (2020) at 52, online (pdf): <homelesshub.ca/sites/default/files/attachments/Overview%20of%20Encampments%20Across%20Canada_EN_1.pdf>.

176 GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2007). For incorporating legislation in BC and Canada, see *DRIPA*, *supra* note 174; *UNDRIP Act*, *supra* note 174.

self-determination applies to urban Indigenous Peoples and communities.[177] Therefore, while there is limited case law regarding Indigenous people and encampments, municipalities must consider both their obligations to Indigenous encampment residents and to Indigenous Nations with relevant territorial rights and requirements under Indigenous laws and protocols. This is echoed by the *Toronto Ombudsman Report*, which concluded engagement with Indigenous encampment residents must be culturally appropriate, "trauma-informed, acknowledge their unique relationship with the land, and recognize the distinct constitutional rights of Indigenous Peoples."[178]

Two cases in Prince George highlight the connection between colonialism and Indigenous homelessness. In *Stewart*, the Court refused municipal requests to clear an encampment and then in *Johnny* held the city to account for doing so in violation of the decision.[179] In *Stewart*, the Court expressly considered the disproportionate number of Indigenous people amongst the encampment population and the context of colonialism, including the legacy of residential schools.[180] Crucially, the *Stewart* and *Johnny* decisions recognize the significant and complex barriers to existing housing options and shelters faced by Indigenous encampment residents and reject simplistic quantitative approaches to the analysis of shelter availability put forward by governments.

In Ontario, the *Black* decision in Toronto ultimately upheld the city's right to evict encampment residents on an injunction application; however, the judge accepted that there was a serious issue to be tried with respect to potential violations of equality rights under section 15 of the *Charter* and the *Ontario Human Rights Code*, specifically noting the disproportionate number of Indigenous people living in encampments.[181] The Court expressly refused to apply the *Tanudjaja* analysis rejecting "homelessness"

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177 *Canada (AG) v Misquadis*, 2003 FCA 370 [*Misquadis*]; *Ardoch Algonquin First Nation v Canada (AG)*, 2003 FCA 473 at para 36 [*Ardoch*].

178 *Toronto Ombudsman Report*, *supra* note 2 at 46.

179 *Stewart*, *supra* note 22; *Johnny*, *supra* note 2; *Waterloo*, *supra* note 26.

180 *Stewart*, *supra* note 22 at paras 69–71.

181 *Black*, *supra* note 22 at para 61.

as an analogous ground under section 15 in the context of encampments at the injunction stage of the application.[182] However, the subsequent *Waterloo* decision expressly adopted *Tanudjaja*, finding that "[o]ther than poverty, which is not an analogous ground . . . there are no common characteristics that define those individuals experiencing homelessness in the Region."[183] Thus, the residents were not entitled to section 15 protection. In our view, the failure to specifically mention Indigenous Peoples, to engage in analysis about their unique constitutional status and rights, or to consider adverse effects discrimination through an intersectionality lens is a serious omission in the court's analysis. These cases not only raise important questions about future section 15 equality arguments but also implicate the broader issues around constitutional requirements for consultation and the provision of culturally appropriate services.

3. Scrutinizing Shelter Systems

As noted above, the *Adams* analysis has been narrowly applied in subsequent decisions to emphasize the number of shelter spaces. Some decisions have largely deferred to municipal data and treated the number of claimed spaces as determinative;[184] however, judges in other decisions have subjected the data to significant scrutiny with respect to transparency and accountability, as well as accuracy.[185] In *Sanctuary et al v Toronto (City)* a coalition of advocacy groups applied for an injunction prohibiting the ccity from operating shelters which failed to adhere to social distancing rules.[186] A settlement between the parties required regular reporting, but a court later found the city was refusing to answer questions about the shelter system and

182 *Black*, *supra* note 22 at para 62.

183 *Waterloo*, *supra* note 26 at para 126.

184 See *Black*, *supra* note 22; *Poff*, *supra* note 22.

185 *Sanctuary et al v Toronto (City) et al*, 2020 ONSC 6207 [*Sanctuary*]; *Waterloo*, *supra* note 26; *Bamberger*, *supra* note 29; *Stewart*, *supra* note 22.

186 *Sanctuary*, *supra* note 185.

ordered them to provide answers.[187] A later decision held the city was in breach of the settlement agreement and enforced the reporting requirements.[188] While the city was not held to have acted in bad faith, the decision emphasized the need for accountability and exposed underexamined issues with the shelter system.[189] In *Bamberger*, the Court decided the decision to evict the encampment at CRAB Park was unreasonable because the Parks Board did not have accurate information about the availability of appropriate housing for encampment residents.[190]

The Courts in both *Stewart* and *Bamberger* also considered whether shelter spaces were meaningfully available to encampment residents with their diversity of needs and circumstances. A lack of "low-barrier" or accessible spaces was held in both cases to undermine government claims that there were enough shelter spaces to accommodate encampment residents.[191] In *Stewart*, the Court noted that shelters imposed eligibility criteria excluding persons who used illicit substances or with mental health issues, as well as requiring forms of identification or personal records commonly unavailable to encampment residents.[192] The decision also expressly contemplates daytime sheltering, which pushes back on narrow interpretations of *Adams* as only protecting overnight uses of public space. The subsequent *Johnny* decision rejected the city's argument that it had satisfied the court's conditions for clearing the encampment and specifically noted the limited daytime facilities.

In *Waterloo*, the Court treated the region's evidence about shelter spaces with greater scrutiny than earlier decisions,

187 See *ibid* at paras 6–10, 145–47.

188 *Sanctuary*, *supra* note 185 at paras 214–16.

189 See *ibid* at paras 142–59.

190 See *Bamberger*, *supra* note 29 at para 97. Notably, the court also held an appropriate number of shelter spaces needed only be available for unhoused persons across the entire city, not just those in the park which the city hoped to evict.

191 See *Stewart*, *supra* note 22 at para 74.

192 See *ibid* at paras 67–68, 73.

providing a detailed analysis of where, when, and for whom, space has actually been available. The "fluctuating and variable capacity of the system" undermined the region's claims.[193] More importantly, from a human rights perspective, the court held it was "simply not a matter of counting the number of spaces. To be of any real value to the homeless population, the space must meet their diverse needs, or in other words, the spaces must be truly accessible."[194] Because the shelters were not low barrier or accessible the Court was not satisfied there was adequate capacity. Further, the Court did not limit sheltering to overnight hours, as the risks to the life, liberty, and security of the person of encampment residents were present at all hours of the day, and competing daytime uses were not present as in cases involving encampments in park land.[195]

In our view, while the failure to comply with human rights obligations makes cities vulnerable to legal action, municipalities should not wait for judicial decisions to affirm the importance of such obligations. These cases point to the need for cities to proactively reorient their approach to encampments to put human rights before property ownership. The next section considers how municipalities can put this into practice.

V. PUTTING THE HUMAN RIGHTS APPROACH INTO PRACTICE: WHAT DOES IT MEAN TO MOVE FORWARD AND BUILD HUMAN RIGHTS-BASED RELATIONSHIPS

In this section, we examine what it means to put the human rights approach to governing public space into practice from the perspective of municipalities as governments, including what it means to move forward and build human rights-based relationships with unhoused persons and encampment residents.

A. MUNICIPALITIES AS GOVERNMENTS

193 See *Waterloo*, *supra* note 26 at para 94.

194 See *ibid* at para 93.

195 *Ibid* at para 105.

While the federal government has enshrined the right to adequate housing in federal law in the *NHSA*, provincial governments have been reluctant to adopt similar rights-based approaches. Given that many elements of housing policy fall under provincial jurisdiction, and are often then delegated to municipal governments, this lack of corresponding legal and policy frameworks to implement the right to housing is significant.[196] Municipal governments argue that they do not have access to permanent, adequate housing for the most vulnerable, including encampment residents.[197] They acknowledge the lack of available housing, yet they nonetheless engage in displacement through ticketing, arrest, forced eviction, and the destruction of tents and personal property. Relying on inadequate, unsafe, and often full temporary shelters, governments justify clear human rights violations as balancing competing public interests.[198] Yet the human rights at stake—the right to life, security of the person, and to live a dignified life—are the most basic rights on which all other *Charter* rights depend.[199] The complexity of the problem, the polarization of views amongst stakeholders, the cross-departmental and

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196 See e.g. *1193652 BC Ltd v New Westminster (City)*, 2021 BCCA 176 at paras 11–13:

> In British Columbia, the *Residential Tenancy Act* governs residential tenancy relationships. Its purpose, broadly speaking, is to regulate residential tenancies and, in doing so, to balance the rights of landlords and tenants . . . . The scheme established by the *Residential Tenancy Act* prescribes standard terms and requirements for every tenancy agreement: ss. 12–14. It also prescribes rights, obligations and prohibitions that apply to all landlords and tenants.

197 See Akshay Kulkarni, "Who is Responsible for Tent Cities and Homeless Encampments in BC?", *CBC News* (last modified 18 March 2023), online: <cbc.ca/news/canada/british-columbia/homeless-encampments-bc-1.6783020>.

198 See e.g. *Black*, *supra* note 22 at paras 142–44; *Poff*, *supra* note 22 at paras 115, 141–45, 190, 241, 253; *Bamberger*, *supra* note 29 at para 5; *Stewart*, *supra* note 22 at paras 41, 65–75.

199 See Martha Jackman, "Poor Rights: Using the *Charter* to Support Social Welfare Claims" (1993) 19:1, Queens LJ 65 at 66. See also Martha Jackman & Bruce Porter, "Socio-Economic Rights Under the Canadian Charter" (2007) in Malcolm Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: Cambridge University Press, 2008) 209 at 209.

inter-jurisdictional issues raised in the housing context, and the absence of inter-governmental coordination have entrenched a largely punitive response to encampments across Canada.

On a practical level, these approaches do not work. Encampment residents may temporarily disperse, but the overarching problem remains: these residents have nowhere to go.[200] People relocate to other public spaces, sometimes hidden to avoid further displacement.[201] For example, as Justice Kirchner noted in Bamberger:

> This recent history demonstrates a continuous pattern of encampments in the Downtown Eastside. Ministerial orders and court injunctions effectively clear out a camp from one location but have not been effective in preventing the re-establishment of camps in another location.[202]

Encampment residents' belongings are stolen and destroyed during encampment evictions, including tents, objects of memory, identification, and warm clothing, leaving people even more vulnerable.[203] This cycle of violence and displacement can and should be replaced with another model. While this cannot fall to municipalities alone, local governments can be leaders in this work. Indeed, they are well-suited to do so given their proximity to the issues. By taking leadership, municipalities can set the agenda for discussions with other levels of government about the progressive realization of the right to housing.

Municipalities are responsible for distributing both federal and provincial funds to the services and programs central to the domestic implementation of international human rights obligations.[204] They also play a critical role in advancing housing

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200 See e.g. *Memorandum of Understanding on Support for Unsheltered Vancouver Residents* (31 March 2021) online (pdf): <parkboardmeetings.vancouver.ca/files/MOU-SupportingUnsheltered VancouverResidents-BC-COV-PB-20210331.pdf>.

201 *Ibid*.

202 *Bamberger*, *supra* note 29 at para 185.

203 See *Ferencz et al*, *supra* note 14.

204 See Social Rights Ontario, "Bringing Human Rights to the City: Municipal Human Rights Charters in Canada" (last visited 4 May 2023), online: <socialrightsontario.ca/jurisprudence-2/>.

strategies and policies as the actors who transform "policies into practical application."[205] Courts have recognized the governmental role of municipalities: local governments have long been subject to the *Charter* and municipal decisions are afforded considerable deference.[206] While some courts have distinguished between municipal bylaws that are more akin to legislative versus quasi-judicial decisions, a consistent theme in jurisprudence is the observation that municipal bylaws are enacted through democratic processes.[207] Municipalities are "democratic institutions",[208] not the simple agents of provincial government in its responses to housing and homelessness. As democratic governments, municipalities must be innovative and forward thinking when responding to complex human rights issues.

Some municipalities have designed and implemented novel programs and services focused on housing precarity that respond to local realities. For example, the City of New Westminster enacted a bylaw that restricted landlords' ability to evict tenants for renovation purposes.[209] The bylaw specifically stated that landlords could not give notice to their tenants due to renovations unless every relevant permit had been obtained according to city bylaws and unless the landlord had entered a new tenancy agreement with the tenant on the same terms or could return to their original unit once renovations were

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205 Alan Broadbent & Elizabeth McIsaac, "Recommendations on Strengthening the Capacity of Local Governments to be Effective in Delivering on the Obligations of the ICESCR" (February 2016) at 4, online (pdf): <maytree.com/wp-content/uploads/Maytree_Submission_Geneva-1.pdf>.

206 See *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2.

207 See *Shell Canada Products Ltd v Vancouver (City)*, 1994 CanLII 115 (SCC).

208 *Pacific National Investments Ltd v Victoria (City)*, 2000 SCC 64 at para 33; Alexandra Flynn, "Un-Democratizing the City? Unwritten Constitutional Principles and Ontario's Strong Mayor Powers", SCLR [forthcoming in 2024].

209 See City of New Westminster, "Renovictions, Tenant Protection and Resources" (last visited: 6 May 2023), online: <newwestcity.ca/housing/renovictions-tenant-protection-and-resources#:~:text=WHAT%20IS%20THE%20STATUS%20OF,doing%20any%20type%20of%20renovation>.

complete. This bylaw was upheld by the BCCA.[210] Another example of novel programming is the City of Toronto's introduction of the Streets to Homes program, which initiated and implemented the "Housing First" model that was later lauded by the federal government.[211] However, these initiatives have not always translated into human rights-compliant encampment responses. As the experience of Toronto in 2021 demonstrates, when encampments are managed as property and logistical problems, human rights obligations are obscured and subordinated, resulting in profoundly traumatic and conflictual outcomes.[212]

As noted above, municipalities have discretion about whether and how to enforce such bylaws. Municipalities can decide to *not* enforce loitering violations against unhoused people who are not able to pay for the sanctions. For example, in Calgary, former City Solicitor (now Justice) Ola Malik and Megan Van Huizen stated, in relation to public space, that, "[y]es, our public parks belong to parents with strollers, families on an outing, people walking their dogs or playing with their kids. *And they also belong to our homeless.*"[213] Instead of using bylaws to criminalize and exclude, this approach promotes an understanding of the "public" as inclusive of unhoused people who have few if any options but to contravene municipal bylaws. Governments can choose to prioritize upholding the rights of encampment residents to safety, security, and human dignity by responding to encampments without relying on policing and punitive or exclusionary measures.

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210 See *1193652 BC Ltd v New Westminster (City)*, 2021 BCCA 176.

211 See Nick Falvo, *Homelessness, Program Responses, and Assessment of Toronto's Streets to Homes Program* (Toronto: Canadian Policy Research Networks Inc and Social Housing Services Corporation, 2009).

212 See *Toronto Ombudsman Report*, *supra* note 2.

213 Ola Malik & Megan Van Huizen, "Is there Space for the Homeless in our City's Parks? A Summary and Brief Commentary of *Abbotsford (City) v Shantz*" (17 November 2015), online (blog): <ablawg.ca/2015/11/17/is-there-space-for-the-homeless-in-our-citys-parks-a-summary-and-brief-commentary-of-abbotsford-city-v-shantz/> [emphasis in original].

Local governments must do more than assert their interests as property holders and maintain the minimum requirements set by courts. While courts have made important decisions about the application of the *Charter* to encampments, these minimum legal standards should not be understood by municipalities as the baseline. Not only do these weak standards leave cities vulnerable to legal challenges through ongoing litigation, they undermine the relationships between municipal staff and leaders and community members, including encampment residents, that are required to deal with the underlying housing crisis.[214] Instead, cities should be proactively moving towards human rights frameworks. Below, we set out some key components local governments should consider as they take on this important work.

B. THE PROTOCOL: A ROADMAP FOR IMPLEMENTATION

The tools to adopt a human rights framework and implement a different response to encampments are readily available to municipal governments. We argue that these frameworks are best suited to address encampments, not the punitive approaches used through the enforcement of bylaws. The *National Protocol on Homeless Encampments in Canada*, released in March 2020 by Dr Kaitlin Schwan and then United Nations Special Rapporteur on the right to adequate housing, Leilani Farha, includes eight principles for a rights-based approach to encampments.

> **Principle 1: Recognize residents of homeless encampments as rights holders:** This principle accepts that all government action is guided by a commitment to upholding the human rights and human dignity of their residents. A rights-based approach redirects criminalization and penalization of residents toward an approach that includes residents in decision making.
>
> **Principle 2: Meaningful engagement and effective participation of homeless encampment residents:** This principle holds that all people experiencing homelessness should be included in discussions regarding the design and

214 See *Toronto Ombudsman Report*, *supra* note 2.

implementation of policies, programs, and practices that may affect their lives. Meaningful engagement and participation should begin when an encampment is established and continue throughout the process of securing housing. Based on this principle, ongoing support, services, resources, and access to information pertaining to their rights must be provided to anyone experiencing homelessness.

Principle 3: Prohibit forced evictions of homeless encampments: Pursuant to international law, the forced eviction and obstruction of an encampment resident is not permitted. Laws and policies that sanction evictions and penalize encampment residents must be repealed.

Principle 4: Explore all viable alternatives to eviction: Governments must meaningfully engage with residents about the future of an encampment. Options for relocation must be discussed with residents prior to eviction and must be done in a way that respects and considers the rights of residents.

Principle 5: Ensure that relocation is human rights compliant: Relocation must be rooted in the principle that the right to remain in one's home and community is central to the right to housing.

Principle 6: Ensure encampments meet basic needs of residents consistent with human rights: Basic and minimum standards for encampments include: access to safe and clean drinking water, access to hygiene and sanitation facilities, resources and support to ensure fire safety, waste management systems, social supports and services, guarantee of personal safety of residents, facilities and resources that support food safety, resources to support harm reduction, and rodent and pest prevention.

Principle 7: Ensure human rights-based goals and outcomes, and the preservation of dignity for homeless encampment residents: This principle focuses on outcomes, stating that governments have an obligation to bring about positive human rights outcomes in all of their activities and decisions concerning homeless encampments.

Principle 8: Respect, protect, and fulfill the distinct rights of Indigenous Peoples in all engagements with [homeless] encampments: Under this principle, there must be recognition

> of the distinct relationship that Indigenous Peoples have to their lands and territories, and their right to construct shelter in ways that are culturally, historically, and spiritually significant. There must be meaningful engagement, participation and consultation with Indigenous encampment residents that recognizes their rights to self-determination and self-governance. [215]

These principles are premised on the fundamental view that encampment residents are rights holders and, therefore, have rights before, during, and after involvement with governments. This reframing shifts the narrative in critical ways. As Nicholas Olson and Bernadette Pauly write:

> Instead of citing concerns of safety, crime, mental health, and substance use as public health rationale for displacement of encampments, public health officials should recognize encampment residents as rights holders—people with a right to housing, self-determination and basic determinants of health.[216]

This reframing necessarily results in a different form of engagement with encampment residents, moving away from bylaw enforcement and trespass to practices that preserve dignity and ensure evictions are a last resort, only when all other possible options have been explored and residents have the services and support they need. This kind of "meaningful engagement" is emerging as part of the right to housing jurisprudence in other jurisdictions.

Meaningful engagement has been developed most robustly in case law from jurisdictions where the right to housing is constitutionally protected. It has been used by South African courts to enforce substantive guarantees of adequate alternative accommodation where residents face homelessness or intolerable conditions in the context of proposed evictions of informal settlements.[217] It draws directly on the recognition of

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215 *National Encampment Protocol*, *supra* note 4 at 1–3 [emphasis in original, citations omitted].

216 Nicholas Olson & Bernadette Pauly, "Homeless Encampments: Connecting Public Health and Human Tights" (2021) 112:6 Can J Pub Health 988 at 989.

217 See *Grootboom*, *supra* note 157 at paras 44, 69, 95, 99; Sandra Liebenberg, "Participatory Justice in Social Rights Adjudication" (2018) 18:4 Human Rights L Rev 623 at 642.

persons in informal settlements as rights bearers entitled to respect for their dignity.[218] As Sandra Liebenberg has noted, the South African cases have "closely linked" meaningful engagement to "the substantive requirements that people should not be left homeless" and the need to pay particular attention to vulnerable groups.[219] Court imposed "engagement orders" can be highly detailed and prescriptive, including consideration of the consequences of eviction and potential mitigation; interim steps to make the site safe and healthy while alternative housing is provided; sanitation, waste and fire safety services; and court-monitored timelines.[220] Government authorities seeking to evict an informal settlement in South Africa are required to provide the court with a "complete and accurate account" of engagement, contributing to both compliance and transparency.[221] Indeed, "a prior process of meaningful engagement with those affected" is a presumptive requirement.[222] Further, the challenges of engaging with vulnerable persons require that the process "be managed by careful and sensitive people".[223] We note that while eviction orders are granted in the South African cases where informal settlements are being evicted to allow for new housing development, the courts have used meaningful engagement as a kind of remedy to enforce requirements related to alternative accommodation and service provision.[224] These engagement orders have required temporary housing units be provided and set out detailed adequacy standards, including construction materials, electricity, sewerage, fresh water, transportation for persons and possession, ongoing transport to amenities, schools,

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218 See *Port Elizabeth Municipality v Various Occupiers*, [2004] ZACC 7 (SAFLII) at paras 39, 41, 43.

219 Liebenberg, *supra* note 217 at 642.

220 See *Olivia Road*, *supra* note 157 at paras 14, 25.

221 *Ibid* at para 21.

222 *Liebenberg*, *supra* note 217 at 640.

223 *Olivia Road*, *supra* note 157 at para 15.

224 See *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others*, [2009] ZACC 16 (SAFLII) [*Joe Slovo*].

health care and work, and support for permanent housing.[225] In one case, the Court required that evicted residents be allocated a large proportion of the housing being developed on the site being cleared.[226]

While there are limitations to the South African experience, Rays argues those decisions have clarified an expectation that "political engagement" will be built into decision making and policy development by governments and established a role for the courts as a "backstop" to evaluate whether the processes uphold substantive constitutional rights.[227] Thus, meaningful engagement should be conceptualized as more than procedural. Rather, it is a core element of shifting towards a rights-based approach to complex questions of socioeconomic rights. As Bruce Porter notes, this aligns well with the Canadian model under the *NHSA*.[228] However, based on our analysis in this article, we join Porter and other commentators on the South African cases in approaching meaningful engagement with a note of caution about the risks of "dilut[ing]" the normative substance of the right to housing through an emphasis on the procedures of engagement.[229] Meaningful engagement creates the opportunity for partnership in determining which reasonable outcomes are consistent with the substantive guarantees of the right to housing in the circumstances; it does not substitute the process for the realization of substantive rights-based outcomes. Crucial to the promise of engagement in the South African context has been the incorporation of effective oversight, including "a baseline substantive interpretation" of a rights-based

225 See *ibid* at para 7.

226 See *ibid* at para 105.

227 Ray, *supra* note 158 at 418. See also *Joe Slovo*, *supra* note 224.

228 Bruce Porter, "Implementing the Right to Adequate Housing Under the *National Housing Strategy Act*: The International Human Rights Framework" (March 2021), online (pdf): <socialrights.ca/2021/Porter%20-%20NHSA%20&%20IHRL.pdf>.

229 *Ibid* at 44. See also *Liebenberg*, *supra* note 217; Kristy McLean, "Meaningful Engagement: One Step Forward or Two Back? Some Thoughts on Joe Slovo" (2010) 3 Constitutional Court Rev 22; Brian Ray, "Proceduralisation's Triumph and Engagement's Promise in Socio-economic Rights Litigation" (2011) 27:1 South African J Human Rights 107.

framework.[230] Indeed, the experience of Indigenous Peoples in Canada with the duty to consult and accommodation is a cautionary tale about the important distinction between consultation and meaningful engagement.

All governments in Canada have a constitutional duty to uphold the honour of the Crown under section 35, which recognizes and affirms Aboriginal and treaty rights, including the prospective obligation to consult and accommodate Indigenous Peoples.[231] The duty is triggered when the Crown has "knowledge, real or constructive, of the potential existence of Aboriginal right or title" and considers conduct that "might adversely affect" these rights.[232] The Supreme Court has clarified that consultation must be "meaningful" and in good faith.[233] Central to this is the idea that the Crown must be open to changing its plans or position to address and accommodate Indigenous concerns.[234] Therefore, the duty has emerged as a significant tool for Indigenous Peoples to assert their rights in the face of Crown action.[235] Yet, while it is important to note this example of requirements for meaningful and good faith consultation in Canadian law, in our view, it should be distinguished from the concept of meaningful engagement. As Porter points out, consultation is distinct from meaningful engagement because it occurs in relation to decisions made by others rather than requiring partnership in decision making, and because it is procedurally focused without regard to substantive outcomes.[236] Further, the duty applies along a "spectrum" from

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230 Brian Ray, "*Residents of Joe Slovo Community v Thubelisha Homes and Others*: The Two Faces of Engagement" (2010) 10:2 Human Rights L Rev 360 at 368–69.

231 See *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [*Haida Nation*].

232 *Ibid* at para 64.

233 *Ibid* at para 41. See also *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at para 23.

234 See *Haida Nation*, *supra* note 231 at para 46.

235 See Michael Coyle, "From Consultation to Consent: Squaring the Circle?" (2016) 67 UNBLJ 235 at 247.

236 See Porter, *supra* note 228 at 43.

mere notice to "deep consultation", which is determined by the Crown and accomplished through a Crown-controlled process.[237] It is not shaped by, nor must it account for, Indigenous laws and legal processes.[238] Though the process is reviewable by the courts, even where consent or accommodation may be required, the Crown can justify an infringement of section 35 by balancing the constitutionally protected Indigenous right against broadly defined "valid legislative objectives".[239] Indeed, in the context of the duty to consult and accommodate, the Supreme Court has emphasized the duty does not guarantee any particular outcomes for Indigenous Peoples.[240] Most importantly, it does not change the decision-making structure and does not incorporate the free prior informed consent standard set out in the UNDRIP. Indeed, recent case law on the duty has resisted the importation of the consent analysis.[241] Thus, in our view, meaningful engagement in the context of encampments can learn from the context of the duty to consult; however, it should push beyond the proceduralism of current doctrine towards a more robust standard of engagement.

A further challenge is that in practice the duty to consult and accommodate has not been applied in the context of encampments. The doctrine has been developed largely in the context of land-based claims and natural resource extraction, rather than urban Indigenous social and economic rights cases.[242] Further, section 35 rights are collective rights. While the Supreme Court has recognized there may be "an individual aspect" of section 35 rights, individuals are not generally the

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237 *Haida Nation*, *supra* note 231 at paras 43–45.

238 See Coyle, *supra* note 235 at 255.

239 *Delgamuukw v British Columbia*, 1997 CanLII 302 at paras 165, 202 (SCC).

240 The Supreme Court has expressly stated that the duty to consult does not give Aboriginal groups a veto over what can be done with land "pending final proof of the claim": *Haida Nation*, *supra* note 231 at para 48. We do not think this language is useful and so have not reproduced it in the text. Rather, the central question is when consent is required

241 See *Gitxaala v British Columbia (Chief Gold Commissioner*), 2023 BCSC 1680.

242 Jula Hughes & Roy Stewart, "Urban Aboriginal people and the Honour of the Crown—A Discussion Paper" (2015) 66 UNBLJ 263 at 268.

rights holders to whom the duty is owed.[243] We have argued elsewhere that the duty should nonetheless inform the context of encampments in two ways: first, respect for the self-determination of urban Indigenous communities, and second, the Nations with section 35 rights to the relevant territory must be treated as decision makers.[244] As noted above, application of the duty in this context should be informed by the consent framework required by the *UNDRIP* in order to align with our calls for meaningful engagement with encampment residents.

A few municipalities have introduced measures to comply with some human rights standards. While the *Toronto Ombudsman Report* concluded that the clearings of encampments in Trinity Bellwoods, Alexandra, and Lamport Stadium Parks displayed "insufficient regard" for the people it moved out of the parks.[245] The Report also noted that a different approach to encampments taken later in 2021 had several features that mitigated some of the shortcomings of the status quo. Specifically, the Dufferin Grove initiative expressly implemented the Housing First approach in the encampment context in order to "promote client self-determination" and build relationships based on trust and rapport with residents.[246] Staff with relevant expertise and longstanding relationships led the initiative, which included onsite "mental and physical health supports, meaningful engagement [with encampment residents], relationship building, and opportunities to provide feedback".[247] Based on the city's own reporting and feedback from encampment residents, the Ombudsman concluded that the Dufferin Grove approach "should be adopted as a best practice

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243 *Behn v Moulton Contracting*, 2013 SCC 26 at paras 35, 30; *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 35.

244 Alexandra Flynn & Estair Van Wagner, "The Rights of Unhoused Indigenous People: Linking the Right to Housing and Indigenous Rights in Canadian Responses to Encampments" [forthcoming in 2025]. Please contact the authors for the text.

245 *Toronto Ombudsman Report*, *supra* note 2 at 27.

246 *Ibid* at 56.

247 *Ibid* at 60.

moving forward."[248] While the approach has not been formally adopted as the city's encampment response, it appears to have been subsequently adapted to two more encampments, though on a temporary basis in at least one location.[249]

Elements of the Dufferin Grove initiative have also been emulated in approaches taken in other Ontario municipalities such as Thunder Bay. On 13 April 2023, the City of Thunder Bay published a report in response to a higher prevalence of encampments in the city as of 2021. The report included five recommendations to inform Thunder Bay's response protocol.[250] Specifically, the recommendations focused on decentralizing law enforcement, interjurisdictional collaboration, dialogue with encampment residents, recognition of Indigenous rights, and providing encampment residents with basic social services.[251] In arriving at these recommendations, the Thunder Bay Report explicitly referenced the UN Special Rapporteur's eight guiding principles and the *Toronto Ombudsman Report*.[252] Likewise, in Hamilton, the city is exploring the restatement of an encampment protocol, which would allow encampments of certain sizes and in certain locations, while further exploring the establishment of city-run encampment sites, which would provide on-site services including sanitary facilities, electricity,

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248 *Ibid* at 4.

249 *Toronto Ombudsman Report*, *supra* note 2, at 59. *Contra* Chris Moise, "Allan Gardens Encampment Update" (24 May 2023) online: <chrismoise.ca/allangardens_05242023/> ("[o]ur exhaustive efforts now conclude me to believe [sic] we are wasting city resources on prolonged and ineffective 'engagement', rather than providing a framework that would ensure the safe transition into stable shelter even in the event of refusal of services").

250 See City of Thunder Bay, *Response to Unsheltered Homelessness—A Protocol for the City of Thunder Bay* (Thunder Bay: City of Thunder Bay, 2023) online: <pub-thunderbay.escribemeetings.com/filestream.ashx?DocumentId=2186> [*City of Thunder Bay*].

251 See *City of Thunder Bay*, *supra* note 250 at 4.

252 See *ibid* at 3–4.

and storage.[253] Further, London recently voted to establish temporary "service depots" that provide food, water, harm reduction supplies, and sanitary facilities to encampment residents.[254]

Municipalities in other provinces are also being guided by a housing-first approach. Winnipeg's Homeless Strategy explicitly refers to the *National Encampment Protocol* and creates a process whereby no encampments or temporary shelters are removed unless there is an immediate risk to life or public safety.[255] Lastly, in British Columbia, the provincial government, through its Belonging in BC Homelessness Plan, is entering memorandums of understanding (MOUs) with various municipalities, to provide encampment residents with increased support services and shelter spaces. These services are intended to be provided in partnership between the Ministry of Housing, municipal staff, First Nations, and Indigenous groups. As of 14 June 2023, the province has entered an MOU with Prince George to expedite the construction of affordable housing units and coordinate culturally appropriate encampment responses.[256]

These examples are a promising start in their unique approaches. However, this is not to suggest the movement

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253 See Bobby Hristova, "Your Questions Answered on Encampments and Hamilton's Proposed Plans", *CBC News* (29 June 2023), online: <cbc.ca/news/canada/hamilton/encampment-meeting-questions-answered-hamilton-1.6891130>. Note that Hamilton previously had an encampment protocol that was revoked prior to the injunction proceedings. See *Poff*, *supra* note 22 at paras 10–14.

254 See Andrew Lupton, "4 Service Depots Open as 'Life-saving Measure' for Londoners in Homeless Encampments", *CBC News* (5 July 2023), online (news): <cbc.ca/news/canada/london/4-service-depots-open-as-life-saving-measure-for-londoners-in-homeless-encampments-1.6896725>.

255 See City of Winnipeg, "Non-Emergent Encampment Support Process" (2021), online (pdf): <winnipeg.ca/sites/default/files/2022-12/Encampment-Support-Process-Master.pdf>.

256 See BC Housing, "Encampment & Homelessness Response: HEART & HEARTH" (last visited 16 July 2023), online: <bit.ly/4bjXMUu>. For the memorandum of understanding between the provincial government and Prince George see BC Office of the Premier, News Release, "New Supports Coming for People Experiencing Homelessness in Prince George" (16 June 2023) online: <news.gov.bc.ca/releases/2023PREM0036-000959>.

towards a rights-based approach to encampments is a predetermined outcome. Various municipalities have continued to resort to policing and displacement tactics while rejecting housing-first options. In Kingston, Ontario, the city council refused to create sanctioned encampment sites in 2022, and has now filed an application for an injunction against its encampment residents.[257] In Abbotsford, British Columbia, as of 26 June 2023, the city was actively dismantling an encampment despite the lack of available shelter space for those residents.[258] Vancouver and Victoria recently performed similar encampment clearances with police presence, for purported public safety reasons.[259]

Encampment residents have not been treated as rights holders by Canadian cities outside of a few limited initiatives. They have had their rights to housing violated through the forced evictions of residents from encampments, the lack of meaningful and effective participation in decision making, and from the lack of vital service provision. Evictions of encampments in Canadian cities have also failed to address the underlying problem: a lack of secure shelter, including social and affordable housing. As governments, Canadian municipalities must move beyond

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257 See Dylan Chenier, "Kingston City Council Votes Against sanctioned Encampments", *Kingstonist* (30 June 2022) online: <kingstonist.com/news/city/kingston-city-council-votes-against-sanctioned-encampments>. See also City of Kingston, News Release, "City Seeks Ontario Superior Court of Justice Order to Remove Belle Park Encampment" (1 June 2023), online: <cityofkingston.ca/city-hall/news-public-notices/-/news/70af927fea/b9670cb392/City-seeks-Ontario-Superior-Court-of-Justice-order-to-remove-Belle-Park-encampment/AfyQxF11xa1f>.

258 See Nathan Griffiths, "Are Evictions from Abbotsford Homeless Camp Illegal? Lawyers Think So", *Prince George Post* (26 June 2023), online (news): <princegeorgepost.com/news/local-news/experts-call-abbotsford-evictions-illegal>. Perversely, one of the reasons used to justify the encampment's destruction, was to facilitate the construction of affordable housing on site.

259 See Brendan Strain, "Victoria Police Help Bylaw Officers Clear Homeless Encampment, Some Vow to Return", *CTV News* (11 April 2023), online: <vancouverisland.ctvnews.ca/victoria-police-help-bylaw-officers-clear-homeless-encampment-some-vow-to-return-1.6351662>. See also *Hastings Street Encampment*, *supra* note 2.

property rights and build collaborative, human rights-based approaches to addressing homelessness, including encampments.

VI. CONCLUSION

Despite a national housing crisis that features high eviction rates and insufficient social and affordable housing, homelessness is managed through exclusion and policing. Cities displace those living in encampments based on a narrow and incorrect understanding of property rights in relation to public space. Encampments are primarily framed as contraventions to bylaws rather than as human rights claims. Trespass laws are invoked to *balance* basic human rights against other public interests. Encampment residents are forced to disperse temporarily but have nowhere else to go. The result is further precarity for already marginalized encampment residents.

In Canada, unlike many other jurisdictions, there is no legislation that clearly and definitively sets out a right to housing that binds local governments. The *NHSA* enshrines it in federal law, but this has yet to be adopted by provincial governments or commented on by the courts. Instead, courts are asked to decide whether municipal actions contravene the *Charter* or residents' procedural rights. These court cases have resulted in reactive municipal actions, none of which have solved the issues underlying encampments. As encampments proliferated during the pandemic, courts raised the bar for governments responding to encampments, including the requirement that municipalities ensure "accessible" housing for unhoused people and offer greater engagement prior to eviction. Yet, even with the risk of further litigation, municipalities often do the bare minimum required by the courts, resulting in more conflict and more court challenges. Without adequate housing for encampment residents, the inevitable cycle continues.

The emphasis on property rights through encampment evictions and minimal attention to encampment conditions has led to human rights violations that compound the failure to realize the right to housing in Canada, itself a violation of basic human rights. This is a misunderstanding of the role of

governments as property owners. Not only are property rights never absolute, governments hold property to fulfill their government functions and obligations, and are subject to constitutional limits. These limits include the protection and fulfillment of human rights enshrined under the *Charter* as informed by Canada's international human rights obligations.

In our view, cities must urgently work to reorient their responses to encampments by advancing and affirming the human rights of unhoused residents and by understanding their role as human rights actors. As we have outlined, domestic and international law point to a better human-rights-compliant framework. While litigation has been used as a necessary but ineffective vehicle to guarantee human rights, municipalities must proactively reorient their relationship to public space to foreground their obligations to implement and protect the right to housing. We suggest that local governments act as *human rights cities*, as leaders in clarifying and upholding the right to housing in Canada. Indeed, if the human rights of encampment residents are to be respected, there is no other way.