



# **CASE STUDY: HAMILTON**

## **A HUMAN RIGHTS ANALYSIS OF ENCAMPMENTS IN CANADA**

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The opinions, findings, and conclusions or recommendations expressed in this document are those of the author and do not necessarily reflect the views of the Canadian Human Rights Commission or the Federal Housing Advocate.

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# Introduction

Homelessness has been rising in the Greater Toronto Area for several years as the affordable housing crisis has deepened province wide.<sup>1</sup> More recently a rapid rise in homelessness has extended into nearby city Hamilton, Ontario. House prices and rents in Hamilton have risen rapidly as people relocating from Toronto to more affordable areas have flooded the market.<sup>2</sup> Rents are increasing faster than the provincial average, and evictions have also risen at a far greater rate than across Ontario generally.<sup>3</sup> A 2022 report found only one in seven vacant units in the primary rental market were affordable to middle-income renters, and no units were affordable for low-income renters.<sup>4</sup> In 2021 Hamilton was third on the list of least affordable housing markets in North America, behind only Toronto and Vancouver and ahead of Los Angeles and New York. The study found average house prices were 50% more expensive than affordable levels for median-income households in the city.<sup>5</sup>

The latest Hamilton Homeless Count (a Point in Time Connection survey [PiTC]) in November 2021 identified 545 individuals experiencing homelessness, which is likely to be an undercounting because of the widely acknowledged limitations of point-in-time counts.<sup>6</sup> The 2018 survey identified 338 individuals experiencing homelessness. The results demonstrate an increase in people living unsheltered and in encampments compared to earlier surveys in 2016 and 2018—from 34 and 25 respectively to 95 in 2021.<sup>7</sup> The pandemic was a factor in the most recent housing loss for 77 of the 545 individuals surveyed. The survey found the top reasons for housing loss were lack of income, conflict with landlords, and unfit or unsafe housing conditions.

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<sup>1</sup> Steven Ayer, “Toronto’s Vital Signs Report 2019/20: Growing Pains Amid Narrow Gains” *Toronto Foundation* (2020), at 35, online: <[torontofoundation.ca](http://torontofoundation.ca)>.

<sup>2</sup> Desmond Brown, “Rental demand and supply in Hamilton during pandemic is similar to 2019, report says,” *CBC News* (28 January 2021), online: <[www.cbc.ca/news/canada/hamilton/hamilton-rental-demand-and-supply-2020-1.5891632](http://www.cbc.ca/news/canada/hamilton/hamilton-rental-demand-and-supply-2020-1.5891632)>; Sarah Mayo, “Out of Control: Ontario’s Acute Rental Housing Crisis” (June 2018), *Social Planning and Research Council of Hamilton*, online (pdf): <[www.sprc.hamilton.on.ca/wp-content/uploads/2018/05/SPRC-Out-of-Control-rental-housing-report-June-2018-1.pdf](http://www.sprc.hamilton.on.ca/wp-content/uploads/2018/05/SPRC-Out-of-Control-rental-housing-report-June-2018-1.pdf)>; CBC News, “Influx of People From Toronto Impacts Hamilton Both Positively and Negatively, Report Finds,” *CBC News* (6 March 2021), online: <[www.cbc.ca/news/canada/hamilton/hamilton-cmhc-report-1.5938802](http://www.cbc.ca/news/canada/hamilton/hamilton-cmhc-report-1.5938802)>.

<sup>3</sup> Mayo, *supra* note 2.

<sup>4</sup> Bobby Hristova, “Hamilton family struggling to find a place to live in city’s unaffordable rental market,” *CBC News* (10 March 2022), online: <[www.cbc.ca/news/canada/hamilton/hamilton-rent-prices-1.6374922](http://www.cbc.ca/news/canada/hamilton/hamilton-rent-prices-1.6374922)>.

<sup>5</sup> Oxford Economics, “The Dynamics Behind Deteriorating Housing Affordability in North America,” *Oxford Economics* (3 May 2022), online: <[www.oxfordeconomics.com/resource/the-dynamics-behind-deteriorating-housing-affordability-in-north-america/](http://www.oxfordeconomics.com/resource/the-dynamics-behind-deteriorating-housing-affordability-in-north-america/)>.

<sup>6</sup> Hamilton, Healthy & Safe Communities Department, *Everyone Counts 2021—Canada’s National Point in Time Count: Initial Hamilton Results (City Wide)* (Communication Update by Angela Burden, 2 March 2021), at 1, online (pdf): <[www.hamilton.ca/sites/default/files/media/browser/2022-03-07/communication-update-everyonecounts-2021-canadasnationalpointintimecount.pdf](http://www.hamilton.ca/sites/default/files/media/browser/2022-03-07/communication-update-everyonecounts-2021-canadasnationalpointintimecount.pdf)>; Jesse Donaldson, “Point-in-Time Count Toolkit,” *Canadian Observatory on Homelessness* (2017), online (pdf): <[homelesshub.ca/sites/default/files/Point-in-Time\\_Count\\_Toolkit.pdf](http://homelesshub.ca/sites/default/files/Point-in-Time_Count_Toolkit.pdf)>.

<sup>7</sup> Hamilton, Healthy & Safe Communities Department, *supra* note 6 at 2.

Respondents also identified high rents, low income and income assistance, poor conditions, and discrimination as key barriers to finding housing.<sup>8</sup>

During the COVID-19 pandemic, homelessness and encampments have become more visible in Hamilton. The City's attempts to dismantle encampments and enforce anti-camping bylaws have been subject to litigation by residents and advocates. As discussed in detail below, residents successfully sought an injunction against enforcement of anti-camping bylaws in August 2020, which led to a settlement with the City. The settlement included an agreed upon Bylaw Enforcement Protocol (the "Protocol") for encampment removals, which modified enforcement of existing bylaws by requiring the City to provide notice and by addressing people unable to access existing shelter options. The City's decision to repeal the protocol in August 2021 led to further litigation and an ongoing Charter challenge. In the November 2021 injunction decision in *Poff v City of Hamilton*, the court upheld the City's decision to return to regular bylaw enforcement and remove encampments.

This case study first describes some of the main encampments between March 2020 and May 2022. It then sets out the City's bylaw framework and actions between March 2020 and May 2022 and finally examines the legal challenges to the City's removal of encampments and the application of bylaws and trespass law. Legal challenges are likely to continue in Hamilton until the right to housing is realized and all levels of government shift away from temporary shelters and encampment evictions as solutions to an ongoing and deepening housing crisis. Stronger tenant protection, support for deeply affordable and purpose-built rental housing, and a human rights approach to housing are all necessary to address the roots of homelessness in Hamilton.

## **Encampments in Hamilton: March 2020—May 2022**

Encampments have existed in Hamilton since long before COVID-19 hit in March 2020; however, in the past, encampments were largely hidden on the peripheries of communities. For example, encampment residents in Ward 3 often lived deeper in forests and trails away from pedestrians. By 2018, encampments began surfacing closer to communities.<sup>9</sup> During the early months of COVID-19, some park encampments were large; for example, the Ferguson encampment had approximately 80 tents in it prior to the tear down in fall 2020.<sup>10</sup> When the City agreed to the Protocol (discussed in detail below) in September 2020, encampments were limited in size and location and only those people deemed unable to access shelter options were allowed to remain. Thus, encampment evictions continued throughout 2020 and 2021 even before the resumption of regular bylaw enforcement, but in accordance with the terms of the Protocol

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<sup>8</sup> *Ibid* at 3.

<sup>9</sup> Dan Taekema, "Hamilton's homeless campers told to pack up, get out but say there's nowhere to go," *CBC News* (3 August 2018), online: <[www.cbc.ca/news/canada/hamilton/hamilton-homeless-camps-1.4772281](http://www.cbc.ca/news/canada/hamilton/hamilton-homeless-camps-1.4772281)>.

<sup>10</sup> Samantha Craggs, "New agreement will see large tent encampments Dismantled in downtown Hamilton," *CBC News* (30 September 2020), online: <[www.cbc.ca/news/canada/hamilton/ferguson-north-1.5743818](http://www.cbc.ca/news/canada/hamilton/ferguson-north-1.5743818)>.

described in detail below. Table 1 sets out the main encampments and evictions since 2020.<sup>11</sup> The Public Works Department budget showed 262 “encampment cleanups” at 60 unique sites were undertaken in 2021 alone.<sup>12</sup>

| Encampment  | Eviction Date            | Other notes   |
|---|--------------------------|---|
| Jackie Washington<br>Rotary Park                                  | May 2020                 | Largest encampments of the spring of 2020   |
| John A. MacDonald<br>Secondary School                             | June 2020                |   |
| Ferguson<br><br>Escarpment Rail Trail<br><br>First Ontario Centre | October/November<br>2020 | Grew after Jackie Washington and John A. Secondary sites were dismantled, and they were cleared after the injunction was lifted |
| J.C. Beemer Park  | Nov 24 2021              | Fire; two-hour eviction notice; two supporters arrested and four other supporters arrested at later, related protests           |
| Beasley Park<br><br>Clairmont Access<br>Park                      | November 2021            |   |

<sup>11</sup> The information in Table 1 is drawn from the following sources: Don Mitchell, “Spike in Hamilton homeless encampments a ‘difficult challenge,’ says City,” *Global News* (22 July 2020), online: <[globalnews.ca/news/7204646/hamilton-homeless-encampments/](https://globalnews.ca/news/7204646/hamilton-homeless-encampments/)>; Ken Mann, “Hamilton’s large homeless encampments to be gradually removed over the next week,” *Global News* (9 October 2020), online: <[globalnews.ca/news/7384091/hamilton-homeless-encampments-removal/](https://globalnews.ca/news/7384091/hamilton-homeless-encampments-removal/)>; Mathew Van Dongen, “Homeless tent encampment cleared from downtown Hamilton school property,” *The Hamilton Spectator* (28 April 2020), online: <[www.thespec.com/news/hamilton-region/2020/04/28/homeless-tent-encampment-cleared-from-downtown-hamilton-school-property.html](http://www.thespec.com/news/hamilton-region/2020/04/28/homeless-tent-encampment-cleared-from-downtown-hamilton-school-property.html)>; Samantha Craggs, *supra* note 10; Dan Taekema & Sebastian Leck, “‘It makes you feel worthless,’ says woman living in Gage Park as Hamilton moves to clear tents,” *CBC News* (23 February 2022), online: <[www.cbc.ca/news/canada/hamilton/gage-park-encampment-eviction-1.6361713](https://www.cbc.ca/news/canada/hamilton/gage-park-encampment-eviction-1.6361713)>; Bobby Hristova, “Hamilton to begin dismantling large tent encampments throughout city,” *CBC News* (15 October 2020), online: <[www.cbc.ca/news/canada/hamilton/encampments-removed-1.5763089](https://www.cbc.ca/news/canada/hamilton/encampments-removed-1.5763089)>; Teviah Moro, “‘It’s sad’: homeless residents uprooted from months-long East Hamilton encampment,” *The Hamilton Spectator* (12 February 2022), online: <[www.thespec.com/news/hamilton-region/2022/02/12/hamilton-homeless-encampment-red-hill-valley.html?rf](http://www.thespec.com/news/hamilton-region/2022/02/12/hamilton-homeless-encampment-red-hill-valley.html?rf)> [“It’s sad”].

<sup>12</sup> Taekema & Leck, *supra* note 11.

|   |               |  |
|---|---------------|--|
| Durand Park                                       |               |  |
| Bay & Strachan<br>Bishop Park<br>Red Hill Parkway | December 2021 | Red Hill Parkway was a notably long-lasting and well-established encampment site, established by June 2021 |
| Gage Park   | February 2022 |  |
| Queenston Rd.                                     | Spring 2022   |  |

**Table 1: Encampment locations and dates of major evictions, March 2020 to May 2022**

Once the 2020 injunction was lifted and the Protocol was in place, encampments were pushed to less visible areas, and residents described a cycle of constant relocation. Some residents report being moved five to six times.<sup>13</sup> As one woman told CBC after receiving her third notice of eviction, “There’s nowhere to go. Anywhere you go it’s ‘How dare you exist,’” she said. “You’re to disappear out of sight.”<sup>14</sup> Size limitations and the cycle of relocation likely have a significant impact on the formation of any internal governance structure. However, residents of most encampments have close relationships with civil society groups, including those discussed below—the Hamilton Encampment Support Network (HESN), Keeping Six, the Hamilton Social Medicine Response Team (HAMSMaRT), and the legal team at the Hamilton Community Legal Clinic and Ross and McBride LLP.

Dr. Jill Wiwcharuk and Dr. Tim O’Shea of HAMSMaRT explained the different reasons encampment residents may remain outdoors rather than seek temporary shelter indoors in a communication with the City Emergency and Community Services Committee.<sup>15</sup> Prior to the pandemic, reasons included the insecurity of “sleeping in a dorm-style setting,” the inability to bring pets to indoor shelters, people feeling unsettling anxiety or paranoia being in close proximity with others, exposure to substance use, and not being able to use substances in shelters or hotels. These concerns were echoed by residents speaking to *The Hamilton Spectator* who also pointed to the mutual support, safety, and sense of community they found in encampments.<sup>16</sup> Concerns about health and safety in congregate settings worsened during the pandemic.<sup>17</sup> Notably, the 2021 Point in Time survey found that 40% of respondents had a

<sup>13</sup> HESN, “The City of Hamilton has told encampment residents living in Gage Park that they need to move by Wednesday, Feb 23; residents are asking for the eviction to be stopped (or delayed) until they can find more suitable alternatives, or are offered permanent & accessible housing (1/5)” (21 February 2022 at 15:43), online: *Twitter* <[twitter.com/HamOntESN/status/1495861670316498948](https://twitter.com/HamOntESN/status/1495861670316498948)>; *Ibid.*

<sup>14</sup> Taekema & Leck, *supra* note 11.

<sup>15</sup> City of Hamilton, Emergency & Community Services Committee, *Meeting 20-004*, (Addendum, 13 July 2020) at 23, online: *City of Hamilton* <[pub-hamilton.escribemeetings.com/FileStream.ashx?DocumentId=228992](https://pub.hamilton.escribemeetings.com/FileStream.ashx?DocumentId=228992)>.

<sup>16</sup> Teviah Moro, “For those living on Hamilton’s margins, tents instead of shelter beds”, *The Hamilton Spectator* (22 August 2020), online: <[www.thespec.com/news/hamilton-region/2020/08/22/for-those-living-on-hamiltons-margins-tents-are-better-than-shelter-beds.html](https://www.thespec.com/news/hamilton-region/2020/08/22/for-those-living-on-hamiltons-margins-tents-are-better-than-shelter-beds.html)> [“Tents instead”].

<sup>17</sup> *Ibid.*

chronic illness or health condition, some of which could make individuals more vulnerable to COVID-19.<sup>18</sup> Further, as described below, at various stages in the pandemic, shelters restricted the entry of new occupants or prohibited the transfer of shelter occupants, making them less accessible for some.

The City's third quarter 2021 data snapshot from the Housing Services Division stated that Street Outreach had interacted with 506 individuals living in encampments since the start of the pandemic.<sup>19</sup> While the City notes 431 have accessed shelter, only 15% have been housed.<sup>20</sup> The City provides no data on how many of those housed have returned to encampments nor whether they were provided with necessary supports to retain housing. One encampment resident, Gord Smythe, estimated that 25% would return to encampments after losing their housing.<sup>21</sup> HAMS MaRT organizer Marcie McIlveen wrote in the *Hamilton Spectator* about hearing from residents housed from encampments: "They tell me having a house isn't enough. They need a supportive community and an understanding of how to be a neighbour and a tenant."<sup>22</sup> As Medora Uppal, director of operations for YWCA Hamilton, told CBC, the City's numbers do not reflect how many people may have been displaced over the same period, nor the supports required to ensure people can stay in housing.<sup>23</sup> The City's own report indicates that many encampment residents are experiencing chronic homelessness, with an average of 2.6 years of homelessness, and have complex needs and barriers to retaining housing.<sup>24</sup>

## Gender and Homelessness

The PiTC survey results showed a significant increase in the percentage of respondents identifying as a woman, up to 53% from 32% in 2018 and 28% in 2016. The City of Hamilton reported a 150% increase in overnight emergency shelter stays at the YWCA in the first year of the pandemic.<sup>25</sup> Carole Anne's Place, a women's housing service, also saw an average increase of 22 women new to the shelter system each month.<sup>26</sup> Advocates and shelter operators

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<sup>18</sup> Hamilton, Healthy & Safe Communities Department, *supra* note 6.

<sup>19</sup> City of Hamilton, Emergency & Community Services Committee, *supra* note 15 at 8.

<sup>20</sup> Dan Taekema, "15% of encampment residents city interacted with have been housed, Hamilton data shows," *CBC News* (22 September 2021), online: [www.cbc.ca/news/canada/hamilton/encampment-shelter-residents-housing-1.6171469](http://www.cbc.ca/news/canada/hamilton/encampment-shelter-residents-housing-1.6171469) ["15%"].

<sup>21</sup> *Ibid.*

<sup>22</sup> Marcie McIlveen, "People in encampments don't need to be shifted from park to park, they need to be listened to," *The Hamilton Spectator* (12 November 2021), online: [www.thespec.com/opinion/contributors/2021/11/12/people-in-encampments-dont-need-to-be-shifted-from-park-to-park-they-need-to-be-listened-to.html](http://www.thespec.com/opinion/contributors/2021/11/12/people-in-encampments-dont-need-to-be-shifted-from-park-to-park-they-need-to-be-listened-to.html).

<sup>23</sup> Taekema, "15%," *supra* note 20.

<sup>24</sup> Hamilton, Healthy & Safe Communities Department, *supra* note 6 at 9.

<sup>25</sup> Teviah Moro, "COVID-19: Hamilton to extend pandemic measures for shelter system," *The Hamilton Spectator* (4 June 2021), online: [www.thespec.com/news/hamilton-region/2021/06/04/covid-19-hamilton-to-extend-pandemic-measures-for-shelter-system.html](http://www.thespec.com/news/hamilton-region/2021/06/04/covid-19-hamilton-to-extend-pandemic-measures-for-shelter-system.html).

<sup>26</sup> *Ibid.*



commented that the PiTC surveys have likely undercounted women in the past, as they are more likely to experience hidden homelessness and stay in dangerous situations.<sup>27</sup>

The Ending Violence Association of Canada and Anova conducted a study with service providers and advocates working with survivors to understand how the pandemic impacts people experiencing intimate partner violence. Results of the study indicate that 82% of workers noted an increase in the prevalence as well as in the severity of violence, while “34% noticed changes in mental health and well-being” and “20% noticed changes in the tactics used to commit violence and increase control.” Staff and workers reported several ways that the pandemic worsened survivors’ experiences. Some workers noted that COVID-19 protocols triggered survivors, while others had a difficult time accessing services because their partners were preventing them from seeking them out. Moreover, in some cases the pandemic limited the ability of women to use technology or the internet, or to have privacy and space to access supportive services.<sup>28</sup> Canada’s Assaulted Women’s Helpline received over 20,330 calls within a three-month period between October 1<sup>st</sup> and December 31, 2020, compared to just over 12,350 calls in the same timeframe the prior year.<sup>29</sup>

As Stephanie Cox, co-counsel on the Charter challenge discussed below, noted, the constant cycle of eviction and relocation exacerbates the risk of sexual violence for unhoused women.<sup>30</sup> One woman living in the Gage Park encampment told CBC, “It makes you feel worthless. It makes you feel like ... if you go in the forest and somebody kills you, that’s a solution to the problem of you for the city.”<sup>31</sup>

## Disproportionate Indigenous Representation

The City must be guided by its legal and human rights obligations to Indigenous peoples in all engagements with encampment residents. Indigenous peoples have distinct rights and relationships with the lands that are recognized in international and domestic law, and the City has corresponding distinctive obligations. These obligations are grounded in historic treaty relationships, Canadian constitutional law, and international law. The City has specific legal duties to the current treaty holders, the Mississaugas of the Credit First Nation (MCFN), who have identified the right to adequate and safe housing as an area of policy they seek to

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<sup>27</sup> Teviah Moro, “Women spike in Hamilton ‘point-in-time’ homeless count,” *The Hamilton Spectator* (7 March 2022), online: <[www.thespec.com/news/hamilton-region/2022/03/07/women-spike-in-hamilton-point-in-time-homeless-count.html](http://www.thespec.com/news/hamilton-region/2022/03/07/women-spike-in-hamilton-point-in-time-homeless-count.html)>; Aura Carreño Rosas, “53 per cent of people who are homeless in Hamilton are women, new survey shows,” *CBC News* (8 March 2022), online: <[www.cbc.ca/news/canada/hamilton/point-in-time-count-1.6377298](http://www.cbc.ca/news/canada/hamilton/point-in-time-count-1.6377298)>.

<sup>28</sup> AL Trudell & E Whitmore, “Pandemic Meets Pandemic: Understanding the Impacts of COVID-19 on Gender-Based Violence Services and Survivors in Canada,” *Ending Violence Association of Canada & Anova* (2020) at 1, online (pdf): <[www.anovafuture.org/wp-content/uploads/2020/08/Full-Report.pdf](http://www.anovafuture.org/wp-content/uploads/2020/08/Full-Report.pdf)>.

<sup>29</sup> Nicole Thompson, “Reports of domestic, intimate partner violence continue to rise during pandemic,” *CBC News* (15 February 2021), online: <[www.cbc.ca/news/canada/toronto/domestic-intimate-partner-violence-up-in-pandemic-1.5914344](http://www.cbc.ca/news/canada/toronto/domestic-intimate-partner-violence-up-in-pandemic-1.5914344)>.

<sup>30</sup> Taekema & Leck, *supra* note 11.

<sup>31</sup> *Ibid.*

influence.<sup>32</sup> In the MCFN 2017 Strategic Plan, the MCFN prioritized access to more housing as an early infrastructure policy target.<sup>33</sup>

Where a government decision or policy infringes on section 35 rights, the government must show that it is justified.<sup>34</sup> Governments also have a duty to consult and accommodate Indigenous Peoples, as the Supreme Court set out in *Haida Nation*. Forced evictions of Indigenous people do not comply with requirements for meaningful, good faith consultation about any involvement in social programs, nor are they consistent with the recognition of Indigenous self-determination. Canadian courts have recognized that the right to self-determination applies to urban Indigenous peoples and communities.<sup>35</sup> Urban Indigenous communities have the right to equal agency over social programs and decisions that affect them.

A number of articles in the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) are relevant to Hamilton's response to encampments. Article 1 guarantees Indigenous peoples' right to full enjoyment of all human rights and fundamental freedoms recognized in international law. Article 3 recognizes the right of self-determination and the freedom to determine political status and pursue economic, social, and cultural development. Article 10 establishes that Indigenous peoples "shall not be forcibly removed from their lands or territories."<sup>36</sup> Article 21 states that Indigenous peoples have the right to the improvement of economic and social conditions, including housing and sanitation. Article 23 recognizes that self-determination requires Indigenous peoples have the ability to develop and administer health, housing, and other economic and social programs affecting them through their own institutions and in accordance with their needs. The declaration does not differentiate between urban and rural or remote Indigenous populations in recognizing the right to self-determination.

Homelessness and housing insecurity disproportionately affect Indigenous people in Canada.<sup>37</sup> In 2021, 23% of respondents to the Hamilton PiTC survey identified as Indigenous, similar to 22% in the 2018 results and down slightly from 28% in 2016. The City noted the continued over-representation of Indigenous people among the population experiencing homelessness in Hamilton.<sup>38</sup> In November 2021, Audrey Davis, executive director of the Hamilton Regional Indian

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<sup>32</sup> Mississaugas of the Credit First Nation, "Trailblazers: The Mississaugas of the Credit First Nation Strategic Plan" (September 2017) at 39, online (pdf): <[mncfn.ca/wp-content/uploads/2019/11/MCFN-Strategic-Plan-Final.pdf](https://mncfn.ca/wp-content/uploads/2019/11/MCFN-Strategic-Plan-Final.pdf)>.

<sup>33</sup> *Ibid* at 48.

<sup>34</sup> *R v Sparrow*, [1990] 1 SCR 1075, 1990 CanLII 104 (SCC).

<sup>35</sup> *Canada (AG) v Misquadis*, 2003 FCA 370; *Ardoch Algonquin First Nation v Canada (AG)*, 2003 FCA 473.

<sup>36</sup> United Nations General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, 2 October 2007 A/RES/61/295 [UNDRIP].

<sup>37</sup> Caryl Patrick, *Aboriginal Homelessness in Canada: A Literature Review* (Toronto: Canadian Homelessness Research Network Press, 2014) at 15.

<sup>38</sup> Hamilton, Healthy & Safe Communities Department, *supra* note 6.

Centre told CBC they had been in touch with 178 Indigenous people experiencing homelessness in October.<sup>39</sup>

Indigenous leaders and advocates raised concerns about the lack of consultation with First Nations and Indigenous organizations about the management of encampments.<sup>40</sup> Lyndon George (NaWalka Geeshy Meegwun), the Hamilton Community Legal Clinic's Indigenous justice coordinator, noted consultation should include Indigenous encampment residents, local First Nations (Six Nations of the Grand River and Mississaugas of the Credit First Nation), and local Indigenous organizations. However, Davis and the centre had not heard from the City at all. A local organizer and Plains Cree woman, Jordan Carrier, also pointed out the City's practices were not in accordance with Indigenous laws and protocols: "Displacing people from their homes, whether they're in tents [or] encampments, is not how we care for our kin, and that's exactly who they are."<sup>41</sup> She expressed concerns about the City's claims they consulted Indigenous encampment residents.<sup>42</sup>

## COVID-19 and Shelter Space

The COVID-19 pandemic has contributed to the homelessness crisis in Hamilton. Pre-existing economic and social precarity has been exacerbated by job losses, social isolation, long-term health effects, and other disruptions. Seventy-seven of the 545 individuals surveyed in the November 2021 Hamilton Homeless Count cited the pandemic as a factor in their most recent housing loss.<sup>43</sup> Shelter outbreaks occurred regularly in spite of the City of Hamilton's significant pandemic-control measures. The City's control began to waver shortly after the encampment eviction injunction was lifted, with shelter outbreaks increasing dramatically during the second wave and thereafter. Inadequate and insufficient shelter space and housing meant that some people had no meaningful choice but to camp outdoors during the coldest months of the year, despite facing criminalization and a cycle of relocation. Although significant steps were taken during the early pandemic, ultimately the City failed to adopt a human rights-based approach to pandemic safety for unhoused people.

As reported by the *Hamilton Spectator*, Hamilton took early steps to improve the COVID-19 safety of its shelter system in the spring of 2020.<sup>44</sup> These steps likely helped to limit, though not stop completely, the spread of the virus among shelter residents. Public health measures included the use and provision of personal protective equipment, social distancing where possible, and screening.<sup>45</sup> The City of Hamilton worked with the Shelter Health Network to

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<sup>39</sup> Bobby Hristova, "Indigenous community leaders in Hamilton say city lacking consultation about encampments," *CBC News* (24 November 2021), online: <[www.cbc.ca/news/canada/hamilton/encampment-indigenous-consultation-1.6261117](http://www.cbc.ca/news/canada/hamilton/encampment-indigenous-consultation-1.6261117)>.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> City of Hamilton, "Point in Time Connection" (6 June 2022), online: <[www.hamilton.ca/social-services/housing/point-in-time-connection](http://www.hamilton.ca/social-services/housing/point-in-time-connection)>.

<sup>44</sup> Teviah Moro, "Hamilton to extend", *supra* note 25.

<sup>45</sup> City of Hamilton, News Releases, "How to Quarantine and Isolate," *City of Hamilton* (3 May 2021), online: <[www.hamilton.ca/coronavirus/how-quarantine-and-isolate](http://www.hamilton.ca/coronavirus/how-quarantine-and-isolate)>.

provide regular rapid testing.<sup>46</sup> The City also expanded its shelter system to better allow for social distancing, adding 162 to its existing 341 beds at shelter hotels and other temporary sites.<sup>47</sup> The City opened and operated three isolation centres for COVID-positive city residents, including unhoused residents, who were unable to isolate at home.<sup>48</sup> Many shelters adopted a policy of freezing intakes during outbreaks, to prevent transmission between shelters. However, this made an already insufficient shelter system even more inaccessible.<sup>49</sup> Yet when the injunction against encampment evictions was revoked in October 2020, Hamilton’s unhoused community members had few alternatives to the shelter system, even as shelter cases were rising and fewer spaces were available. Notably, no outbreaks were documented in Hamilton’s encampments during the first year of the pandemic.

Between April 2020 and March 2021, the city housed 741 people in 319 households.<sup>50</sup> There were also 162 shelter beds added from pre-pandemic levels during the same period.<sup>51</sup> As of April 2022, there were 693 beds in the emergency shelter system.<sup>52</sup> However, in 2020, the average length of stay within shelters increased 18%.<sup>53</sup> As such, it is not clear that the expansions led to a meaningful increase in shelter availability or adequacy. The City’s Housing and Homelessness Dashboard indicates inflow into the shelter system still exceeds outflow in 2022, and a 2021 Housing Services Division report to Council concluded, “The over-capacity in the shelter system and extent of hotel overflow is not sustainable.”<sup>54</sup> In late 2021 the City acknowledged that the women’s shelter system was “particularly over capacity”, though a new 15-bed shelter for women opened in October 2021.

The shelter system’s first year of outbreaks peaked between January and March 2021, with at least 50 shelter residents and staff contracting the virus.<sup>55</sup> On February 26, 2021, the City of

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<sup>46</sup> Timothy O’Shea et al, “Pandemic Planning in Homeless Shelters: A Pilot Study of a Coronavirus Disease 2019 (COVID-19) Testing and Support Program to Mitigate the Risk of COVID-19 Outbreaks in Congregate Settings,” *Clinical Infectious Diseases* (2021) 72:9, 1639 at 1640; Tim O’Shea, “Protecting Hamilton’s homeless from COVID protects the city,” *The Hamilton Spectator* (1 May 2021), online: <[www.thespec.com/opinion/contributors/2021/05/01/protecting-hamiltons-homeless-from-covid-protects-the-city.html](http://www.thespec.com/opinion/contributors/2021/05/01/protecting-hamiltons-homeless-from-covid-protects-the-city.html)>; see also Jason Allen, “Hamilton shelters Remarkable COVID-19 Free Thanks to Innovative Testing Program,” *Raise the Hammer* (21 December 2020), online: <[raisethehammer.org/article/3797/hamilton\\_shelters\\_remarkably\\_covid-19\\_free\\_thanks\\_to\\_innovative\\_testing\\_program](http://raisethehammer.org/article/3797/hamilton_shelters_remarkably_covid-19_free_thanks_to_innovative_testing_program)>.

<sup>47</sup> Moro, “Hamilton to extend”, *supra* note 25.

<sup>48</sup> City of Hamilton, News Releases, “City of Hamilton COVID-19 Update” (17 March 2020), online: *City of Hamilton* <[www.hamilton.ca/government-information/news-centre/news-releases/city-hamilton-covid-19-update-march-17-2020](http://www.hamilton.ca/government-information/news-centre/news-releases/city-hamilton-covid-19-update-march-17-2020)>.

<sup>49</sup> Teviah Moro, “Rise in coronavirus cases in Hamilton Shelter system raises concerns”, *The Hamilton Spectator* (15 January 2021), online: <[www.thespec.com/news/hamilton-region/2021/01/15/mission-services-working-to-contain-one-covid-19-case-in-hamilton-shelter.html](http://www.thespec.com/news/hamilton-region/2021/01/15/mission-services-working-to-contain-one-covid-19-case-in-hamilton-shelter.html)>.

<sup>50</sup> Moro, “Hamilton to extend”, *supra* note 25.

<sup>51</sup> *Ibid.*

<sup>52</sup> City of Hamilton, Housing Services Division, “Housing and Homelessness Dashboard” (accessed 9 July 2022), online: <[housing-and-homelessness-dashboard-spatialolutions.hub.arcgis.com](http://housing-and-homelessness-dashboard-spatialolutions.hub.arcgis.com)>.

<sup>53</sup> City of Hamilton, Emergency & Community Services Committee, *supra* note 15 at 12.

<sup>54</sup> *Ibid.*

<sup>55</sup> Christine Rankin, “COVID-19 vaccines roll out for workers, residents in Hamilton’s homeless shelter system,” *CBC News Hamilton* (1 March 2021), online: <[www.cbc.ca/news/canada/hamilton/shelter-system-vaccines-covid-19-1.5932031](http://www.cbc.ca/news/canada/hamilton/shelter-system-vaccines-covid-19-1.5932031)>.

Hamilton established mobile clinic teams to work with the Shelter Health Network to vaccinate staff and residents.<sup>56</sup> The Shelter Health Network estimated that 50% of shelter occupants received vaccines during this initial vaccination drive.<sup>57</sup> Following vaccinations, COVID-19 cases were relatively low and stable between April and December 2021, and shelter outbreaks were infrequent.<sup>58</sup>

The omicron variant surge in December 2021 and January 2022 brought by far the largest peak in cases seen at the time. As described in the *Hamilton Spectator*, the outbreak worsened a pre-existing staffing shortage, and overwhelmed the City's testing and isolation capacities.<sup>59</sup> At this time, the City's shelter system capacity was 548 spaces. Widespread shelter outbreaks and the resulting intake freezes meant there was effectively no shelter availability for weeks. In January 2022, the Shelter Health Network operated just 15 isolation beds at the only isolation site designated for unhoused people. Although hundreds of shelter residents were testing positive, the City did not open any surge isolation sites. Many in-person support programs for homeless individuals were suspended during this time as well. Despite sparse reporting, it appears conditions continued to deteriorate through the next, even larger COVID-19 surge in March to May 2022.<sup>60</sup> Overall, it appears that while Hamilton's public health measures helped to lessen, if not completely stop, the spread of the virus among unhoused community members early in the pandemic, more recent waves have increasingly impacted the unhoused population. Further, the City's approach to encampments prevented many community members from making meaningful choices about their own autonomy, health, and safety during overlapping health and housing crises.

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<sup>56</sup> City of Hamilton, News Release, "Hamilton's COVID-19 vaccination program expands to include workers and residents of Hamilton's shelter system," *City of Hamilton* (26 February 2021), online: <[www.hamilton.ca/government-information/news-centre/news-releases/hamiltons-covid-19-vaccination-program-expands-0](http://www.hamilton.ca/government-information/news-centre/news-releases/hamiltons-covid-19-vaccination-program-expands-0)>.

<sup>57</sup> Rankin, *supra* note 55.

<sup>58</sup> Mission Services of Canada, "COVID-19 Updates," online: <[mission-services.com/covid-19-updates/](http://mission-services.com/covid-19-updates/)>; City of Hamilton, "Status of Cases in Hamilton" (15 June 2022), online: <[www.hamilton.ca/coronavirus/status-cases-in-hamilton](http://www.hamilton.ca/coronavirus/status-cases-in-hamilton)>.

<sup>59</sup> Teviah Moro, "Shelters struggle amid outbreaks; Operators scramble to isolate positive cases in their buildings, then keep the ill from the well," *The Hamilton Spectator* (12 January 2022), online: <[www.thespec.com/news/hamilton-region/2022/01/12/covid-19-outbreak-shelter-omicron-homelessness.html](http://www.thespec.com/news/hamilton-region/2022/01/12/covid-19-outbreak-shelter-omicron-homelessness.html)> ["Shelters struggle"]; Teviah Moro, "Hamilton Shelters Halt Admissions Amid COVID-19 Outbreaks," *The Hamilton Spectator* (7 January 2022), online: <[www.thespec.com/news/hamilton-region/2022/01/07/covid-outbreak-homeless-shelter-omicron.html](http://www.thespec.com/news/hamilton-region/2022/01/07/covid-outbreak-homeless-shelter-omicron.html)> ["Hamilton Shelters Halt"].

<sup>60</sup> Moro, "Shelters struggle," *supra* note 59; Moro, "Hamilton shelters halt," *supra* note 59.

# City Responses to Tent Encampments in Hamilton

As with other Canadian cities, Hamilton responded to encampments by invoking its bylaw power to evict encampment residents. The key legal tools include parks bylaws, littering and street bylaws, as well as bylaws prohibiting erecting tents and structures. The current bylaws were not designed and are not implemented with a human rights approach to housing and homelessness. Indeed, they were not designed to address a housing crisis or homelessness at all. They rely on enforcement through trespass law and the criminalization of homelessness. They not only fail to address homelessness, they perpetuate a constant cycle of displacement and relocation thus reinforcing trauma and distrust for residents. In doing so, they undermine the very relationships with encampment residents necessary to ensure they can access and retain housing and the supports they need. While these bylaws are formally in place, the City has considerable discretion about when and how such bylaws should be enforced, and in what manner. Overall, the bylaws and the choice of when and how to enforce them send a strong message that park encampments should not be tolerated, even where there are no safe or accessible options for unhoused residents. The City's actions, while mitigated by the Protocol for several months in the case of some residents, do not reflect a human rights approach. At present Hamilton has returned to full enforcement of the bylaws, even where residents face complex challenges in accessing the shelter system and retaining housing without additional supports.

## Relevant Bylaws

The City of Hamilton Parks Bylaw provides for both broad prohibitions that capture encampment residents' activities and presence in public space, as well as specific prohibitions that expressly ban the establishment of structures and thus encampments in public space.<sup>61</sup> Both types of bylaws are used to manage encampments, and both have significant impacts on encampment residents. These impacts are related in large part to the use of trespass law to enforce bylaws and to the ability to deem encampment residents "trespassers" regardless of the context and the human rights implications.

Broad prohibitions limit access to parks or limit particular activities or behaviours in public space. Section 3 limits the hours of entrance to between 6:00 a.m. and 11:00 p.m. Section 5(d) prohibits any park goer from creating "a nuisance" or interfering with "the peaceful enjoyment of the park by other persons." Peaceful enjoyment of the park is not defined but is generally presumed to include leisure and amenity uses rather than meeting basic needs. Section 15 restricts gatherings of more than twenty people. Encampment residents have cited feelings of safety and community and a sense of belonging as reasons for remaining in encampments where they can form communities and establish mutual support relationships.<sup>62</sup> Thus, the gathering limits can undermine the benefits of encampments where residents have few other social supports and no safe alternatives. This was exacerbated during COVID-19, when section 2.3 of bylaw 20-0256 was introduced on April 8, 2020, outlining regulations regarding

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<sup>61</sup> City of Hamilton, by-law No 01-219, *Parks* (28 October 2020), s 9.

<sup>62</sup> Moro, "Tents instead," *supra* note 16.

physical distancing guidelines.<sup>63</sup> Penalties included \$500 tickets for “fail[ing] to maintain a distance of at least two metres from another person,” even in public spaces, and attending gatherings of more than five people.<sup>64</sup> The Protocol’s limitation on the size of encampments reinforced these limitations and made it difficult for encampment residents to form networks of support.

Some bylaw sections are particularly used to stigmatize encampment residents and reinforce stereotypes. For example, Section 5(a) prohibits “riotous, violent, threatening, or illegal conduct or use of profane or abusive language” in parks. Section 13 targets alcohol use in parks where “no person shall be in possession of, consume, serve or sell alcoholic beverages.” Such bylaws are often unevenly enforced by local authorities and are used to target encampment residents, while housed residents engage in similar activities without facing similar consequences.<sup>65</sup> These bylaws target the activities of encampment residents that are seen as disrupting the peaceful enjoyment of housed neighbours without acknowledging the human rights at stake. The language of nuisance or interference and associated sentiments about what is appropriate in parks is often taken up by housed neighbours or politicians to stigmatize encampment residents and push for eviction. For example, Ward 8 Councillor John-Paul Danko stated in a newsletter: “Encampments can be a major challenge for neighbourhood residents with concerns over erratic or aggressive behaviour by individuals suffering from mental illness or substance abuse, discarded needles, petty property crime and general sanitation.”<sup>66</sup> As discussed below, the association of encampment residents with criminal or undesirable activity also informs judicial decisions, sometimes with little reliable data. Even where there is purported evidence, it largely goes unexamined and is very difficult to contest. As the City’s own report on emergency services at encampments acknowledges, the 502 police events between October 1, 2020, and August 31, 2021, at six known encampment locations are “not necessarily due to the presence of encampments” and can include “events related to trespassing,” and are thus triggered by the City’s enforcement model itself.<sup>67</sup>

Bylaws used to manage encampments also target the personal property of encampment residents. Section 9 prohibits the disposal or dumping of garbage in any park location other than garbage and recycling receptacles. Encampment residents not only have tents and shelters, but

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<sup>63</sup> City of Hamilton, by-law No 20-056, *A By-law to Promote and Regulate Physical Distancing during the COVID-19 Emergency and a By-law to amend City of Hamilton By-law 17-225, being a By-law to Establish a System of Administrative Penalties* (8 April 2020), s. 2.1 [Bylaw 20-056].

<sup>64</sup> *Ibid*, ss 2.1-4.7

<sup>65</sup> COVID-19 Policing & Homelessness, “Policing Homelessness in the Pandemic,” online: <[policinghomelessness.ca](http://policinghomelessness.ca)>. For examples, see “Bylaw unlikely to ticket residents responsibly enjoying a drink in Toronto parks,” *CBC News* (7 May 2021), online: <[www.cbc.ca/news/canada/toronto/alcohol-enforcement-parks-1.6018017](http://www.cbc.ca/news/canada/toronto/alcohol-enforcement-parks-1.6018017)>; Shree Paradkar, “(Mostly) white covidiot at Trinity Bellwoods Park think the rules don’t apply to them. They’re right,” *The Toronto Star* (24 May 2020) online: <[www.thestar.com/opinion/2020/05/24/mostly-white-covidiot-at-trinity-bellwoods-think-the-rules-dont-apply-to-them-theyre-right.html](http://www.thestar.com/opinion/2020/05/24/mostly-white-covidiot-at-trinity-bellwoods-think-the-rules-dont-apply-to-them-theyre-right.html)>.

<sup>66</sup> John-Paul Danko, “Homeless Tent Encampments in Ward 8 Hamilton” (2020), online: *Ward 8 Hamilton* <[ward8hamilton.ca/homeless-tent-encampments-in-ward-8-hamilton/](http://ward8hamilton.ca/homeless-tent-encampments-in-ward-8-hamilton/)>.

<sup>67</sup> City of Hamilton, Planning and Economic Development Department, “Encampment Response Update” (9 September 2021) at 7, online (pdf): <[pub-hamilton.escribemeetings.com/filestream.ashx?DocumentId=282899](http://pub.hamilton.escribemeetings.com/filestream.ashx?DocumentId=282899)>.

also personal belongings and smaller items. The bylaws are used to classify these as a nuisance, or even as waste. Further, while there may be real issues with certain types of waste and materials present in encampments, issues with waste disposal are exacerbated where the City refuses to provide sufficient services to ensure waste is regularly and sufficiently disposed of. This includes access to washrooms. Thus, the City's own refusal to adequately service encampments, or to service them at all in some cases, is at least partially responsible for the issues targeted by the bylaw. Another important set of bylaws is directed to personal property items that are sources of heat and energy for cooking food for encampment residents. Section 14 prohibits any park goer from lighting, constructing, or stoking an open fire and restricts the use of charcoal and solid-fuelled portable barbecues without a permit. This section is particularly notable in the context of a cold climate where winter temperatures are regularly dangerous for months of the year. This took on new importance during the pandemic as shelters declined new clientele when outbreaks were declared, forcing encampment residents to remain outside even in the harshest conditions.<sup>68</sup> Indeed, the main outbreaks occurred in winter months, when temperatures can drop below -10 degrees Celsius, making heat sources necessary for survival.<sup>69</sup>

Finally, anti-camping bylaws directly address the ability of residents to erect shelters, sleep and meet their basic needs in parks. Section 12 prohibits "encroachment" or taking "possession" of any area in a park through the erection of structures without a permit. Section 17 restricts the act of dwelling, camping, or lodging in any park, while section 18 prohibits the installation or erection of "any temporary or permanent tent or structure in any park." The United Nations Special Rapporteur on the Right to Adequate Housing called on Canadian municipalities to repeal any direct prohibitions on sheltering in public space at the outset of the pandemic.<sup>70</sup>

While the construction of encampment residents and their belongings and activities as unlawful through these bylaws is significant in and of itself, enforcement is a key variable in how these types of bylaws impact encampment residents and raise human rights issues. Section 53 empowers police, municipal law enforcement, and designated City employees or contractors to notify and request compliance from individuals, issue orders for compliance, and enforce such orders, including orders to leave the park and remove any animals or items from the park. If a person does not comply, the City can invoke the *Trespass to Property Act*. While these bylaws do provide a legal basis for the City to involve police and to take certain actions in relation to public

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<sup>68</sup> Don Mitchell, "COVID-19: Shelter boss says Omicron pressuring capacity, health in Hamilton's homeless facilities," *Global News* (10 January 2022), online: <[globalnews.ca/news/8500237/covid-shelter-boss-omicron-pressuring-capacity-health-hamilton/](https://globalnews.ca/news/8500237/covid-shelter-boss-omicron-pressuring-capacity-health-hamilton/)>; Christine Rankin, "Shelter outbreaks flag 'dire situation' for homeless in Hamilton, doctors say", *CBC News* (18 January 2021), online: <[www.cbc.ca/news/canada/hamilton/shelter-hamilton-outbreaks-1.5877242](https://www.cbc.ca/news/canada/hamilton/shelter-hamilton-outbreaks-1.5877242)>.

<sup>69</sup> Current Results, "Hamilton Temperatures: Averages by Month," *Current Results* (2021), online, *Publishing*: <[www.currentresults.com/Weather/Canada/Ontario/Places/hamilton-temperatures-by-month-average.php](https://www.currentresults.com/Weather/Canada/Ontario/Places/hamilton-temperatures-by-month-average.php)>.

<sup>70</sup> Leilani Farha & Kaitlin Schwan, "A National Protocol for Homeless Encampments in Canada: A Human Rights Approach," *Make the Shift* (30 April 2020) at 19, online (pdf): [www.make-the-shift.org/wp-content/uploads/2020/04/A-National-Protocol-for-Homeless-Encampments-in-Canada.pdf](https://www.make-the-shift.org/wp-content/uploads/2020/04/A-National-Protocol-for-Homeless-Encampments-in-Canada.pdf).



park lands, they do not require bylaw officers or police to act. Choices about enforcement are discretionary. The City could make different choices about how to engage with encampments and how to address any concerns about the health, safety, and well-being of residents, as well as concerns about use of the park by other users. Parks bylaws were not developed based on the experiences of unhoused people or in light of human rights obligations. These blunt legal tools not only fail to contribute to solving the municipal housing crisis—they also entrench the inequalities at the root of homelessness.

## Encampment Task force

The City of Hamilton established an inter-divisional working group on encampments in June 2018. This Encampment Task Force includes representatives from Municipal Law Enforcement, Paramedics, the Police (Social Navigation Program), Waste, and Parks & Cemeteries. There is limited information on the structure and responsibilities of the Task Force. A brief description obtained by Keeping Six states the goal is to “ensure active encampment sites are known in a timely manner, allowing for person-centred engagement opportunities and individualized housing plans.” The group also identifies “gaps in response efforts” and assessment of risk levels in order to inform action under the City bylaws. Despite this limited information, it is clear this body is the initial contact point regarding encampments and is the central coordinating body that would directly inform the exercise of discretion, as discussed above.<sup>71</sup>

## Evictions

Hamilton’s response to encampments is characterized by an ongoing cycle of evictions and displacement facilitated by the enforcement of the above bylaws. While this was moderated by the Protocol from September 2020 to August 2021, evictions nonetheless continued for many residents, and relocations took place even for those who were assessed as high acuity because of size and location limitations. The following is a brief summary of the evictions noted in Table 1. These are organized into three periods: pre-protocol evictions; protocol evictions; and post-protocol evictions.

### *Pre-Protocol Evictions—May to June 2020*

The first few months of the pandemic saw a string of evictions. On April 18, 2020, the city provided encampment residents at the site of the former Sir John A. MacDonald school with less than one week’s notice to relocate. Advocates with Keeping Six reported that while City outreach engaged with residents to relocate them to shelters during this period, many returned to the encampment within days. The encampment was cleared on April 25, with some residents moving to shelters while others relocated to Jackie Washington, a park on municipal property where they were advised the City could better support encampment residents.<sup>72</sup> However, just two days later, on April 27, Jackie Washington encampment residents were given an eviction

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<sup>71</sup> City of Hamilton, Healthy & Safe Communities Department, “Encampment Response” (20 June 2019), online: <[pub-hamilton.escribemeetings.com/filestream.ashx?DocumentId=195928](https://pub-hamilton.escribemeetings.com/filestream.ashx?DocumentId=195928)>.

<sup>72</sup> Keeping Six Hamilton, “Timeline of Key Events,” *Keeping Six* (2021), online: <[keepingsix.org/encampments/](https://keepingsix.org/encampments/)> [“Timeline”].

notice, and on May 6, the encampment was cleared.<sup>73</sup> Similar to the Sir John A. MacDonald eviction, some residents relocated to a shelter while others moved to a different encampment.

An encampment at York and Bay was subject to “clean up” notices on July 10 and 17, with the threat of heavy machinery. Residents supported by Keeping Six, HAMSMaRT and other community allies were able to clean up enough to call off the machines on the 10<sup>th</sup>, but they were brought in on the 17<sup>th</sup>.<sup>74</sup> Residents were allowed to stay, but some lost personal belongings.<sup>75</sup> On July 28, the City provided notice of evictions for the York and Bay and Ferguson encampments. This led to a successful motion for an injunction against the City being filed to prohibit the dismantling of encampments.<sup>76</sup> The initial 10-day injunction was ultimately extended until October 6 to find a negotiated solution.<sup>77</sup> The resulting settlement included the Bylaw Enforcement Protocol and led to the lifting of the injunction on October 7, 2020.

#### *The Bylaw Enforcement Protocol and Continued Evictions*

The Protocol set out an amended process for bylaw enforcement as initiated through the Task Force. It provided for 14 days’ notice for encampment removals and during this time provided for an assessment process of individual encampment residents by City outreach staff based on the Vulnerability Index—Service Prioritization Decision Assistance Tool to determine the acuity of encampment residents’ needs. The Protocol maintains that outreach workers should implement a rights-based approach when engaging with encampment residents and working on a personalized housing plan, “ensuring dignity and confidentiality is maintained.” The test evaluates and scores the following categories:<sup>78</sup>

- **History of housing and homelessness:** Where they sleep most frequently, how long it has been since they have lived in permanent, stable housing.
- **Risks:** Number of emergency room visits, hospitalizations, use of a crisis service, and frequency of being penalized or criminalized by police in the past six months.
- **Socialization and daily function:** Sources of financial support (i.e., government, pension, inheritance, cash from a job, employment); money owing to past landlords or businesses; meaningful daily activity and self-care.

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<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> Matthew Van Dongen, “Homeless residents on edge as Hamilton clears debris from downtown tent encampment,” *The Hamilton Spectator* (July 17 2020), online: <[www.thespec.com/news/hamilton-region/2020/07/17/homeless-residents-on-edge-as-hamilton-clears-debris-from-downtown-tent-encampment.html](http://www.thespec.com/news/hamilton-region/2020/07/17/homeless-residents-on-edge-as-hamilton-clears-debris-from-downtown-tent-encampment.html)>.

<sup>76</sup> “Hamilton to remove 2 homeless encampments, local agencies file motion for injunction,” *CBC News* (29 July 2020), online: <[www.cbc.ca/news/canada/hamilton/hamilton-to-remove-2-homeless-encampments-local-agencies-file-motion-for-injunction-1.5667807](http://www.cbc.ca/news/canada/hamilton/hamilton-to-remove-2-homeless-encampments-local-agencies-file-motion-for-injunction-1.5667807)>; Teviah Moro, “City can’t break up homeless camps, Superior Court rules,” *The Hamilton Spectator* (30 July 2020), online: <[www.thespec.com/news/hamilton-region/2020/07/30/hamilton-advocates-secure-10-day-injunction-against-the-removal-of-encampments.html](http://www.thespec.com/news/hamilton-region/2020/07/30/hamilton-advocates-secure-10-day-injunction-against-the-removal-of-encampments.html)>.

<sup>77</sup> “Injunction blocking city from forcefully removing homeless encampments extended,” *CBC News* (7 August 2020), online: <[www.cbc.ca/news/canada/hamilton/homeless-encampment-injunction-1.5678126](http://www.cbc.ca/news/canada/hamilton/homeless-encampment-injunction-1.5678126)>.

<sup>78</sup> OrgCode Consulting, “Vulnerability Index- Service Prioritization Decision Assistance Tool (VI-SPDAT)” (2015), online (pdf): <[pehgc.org/wp-content/uploads/2016/09/VI-SPDAT-v2.01-Single-US-Fillable.pdf](http://pehgc.org/wp-content/uploads/2016/09/VI-SPDAT-v2.01-Single-US-Fillable.pdf)>.

- **Wellness:** physical health and chronic health issues that have impacted their housing, or any physical disability that limits the procurement of housing.

A low score or refusal to be assessed results in removal within 14 days from the earliest date of the city or its agents making contact as requested by the Encampment Task Force. Thus, eviction occurred after 14 days from the initial contact with the encampment, not with individual residents who may have arrived later, and regular bylaw enforcement would then resume.<sup>79</sup> Residents with a high score who face particular barriers to accessing shelter or housing were exempted from the 14-day timeline but were nonetheless subject to additional restrictions in the Protocol regarding the size and location of encampments. This included no more than five people, not locating on sidewalks, roadways, or close to playgrounds, schools, or daycares, or in areas with environmental or heritage designation. Notably the Protocol also provided for the City's "sole discretion" to address "health and safety concerns for those living within or adjacent to an encampment" to balance the needs of encampment residents and other community members. It did require the City do so "in good faith."<sup>80</sup> Encampment residents found to have high acuity are understood to need more acute care, closer monitoring, and more attention towards physical and mental health needs.<sup>81</sup> Higher acuity residents represent between 25% to 30% of encampment residents and, overall, 8% of people experiencing homelessness.<sup>82</sup>

Once the Protocol was in place, the City moved to clear the larger encampments, such as Ferguson and the FirstOntario Centre, in October 2020.<sup>83</sup> Advocates attended these evictions and provided suitcases and ensured belongings were not disposed of without consent. As with earlier evictions, some residents did take up shelter offers both in shelters and hotels, while others moved tents to different locations such as John-Rebecca Park.<sup>84</sup> Just days later residents of the encampment at John-Rebecca Park were given just a few hours of notice before police and City staff arrived to dismantle their tents, on the premise that the park was a play area.<sup>85</sup> While some were permitted to remain until October 29, others were displaced to maintain the size limit. The remaining encampment at Jackie Washington Park was also reduced to five tents,

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<sup>79</sup> Dan Taekema, "Borrowed time: Encampment residents say city's 14-day timeline for removal brings challenges," *CBC News* (5 August 2021), online: [www.cbc.ca/news/canada/hamilton/encampment-protocol-timeline-1.6129078](http://www.cbc.ca/news/canada/hamilton/encampment-protocol-timeline-1.6129078) ["Borrowed time"].

<sup>80</sup> City of Hamilton Encampment Response Team, "By-law enforcement protocol" (30 September 2020), online (pdf): [www.hamilton.ca/sites/default/files/media/browser/2020-09-30/bylaw\\_enforcement\\_protocol.pdf](http://www.hamilton.ca/sites/default/files/media/browser/2020-09-30/bylaw_enforcement_protocol.pdf).

<sup>81</sup> Anish R Mitra et al, "How the High Acuity Unit Changes Mortality in the Intensive Care Unit: A Retrospective Before-and-After Study," *Can J Anaesthesia* (2020) 67:11, 1507 at 1507.

<sup>82</sup> City of Hamilton, News Release, "City encampment bylaw in effect starting today" (7 October 2020), online: [www.hamilton.ca/government-information/news-centre/news-releases/city-encampment-bylaw-in-effect-starting-today?fbclid=IwAR18OTsa3973XMouaE7iSfUk7p9DyR3ykVC13xDmPYVw9722TAXCcpf5ZY](http://www.hamilton.ca/government-information/news-centre/news-releases/city-encampment-bylaw-in-effect-starting-today?fbclid=IwAR18OTsa3973XMouaE7iSfUk7p9DyR3ykVC13xDmPYVw9722TAXCcpf5ZY).

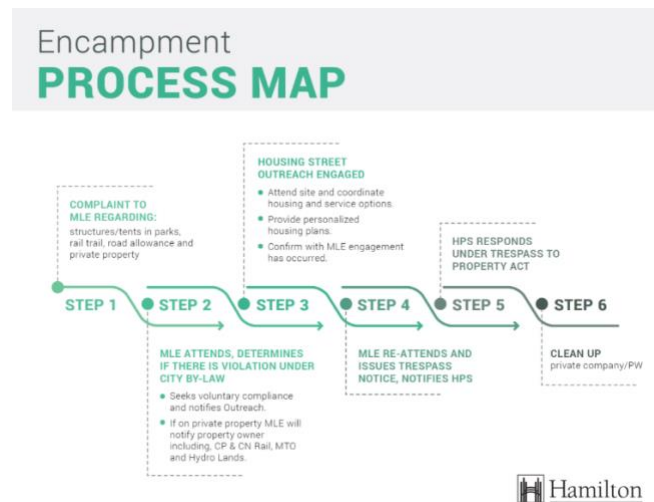
<sup>83</sup> Teviah Moro, "City to close Ferguson Avenue while task force clears encampment," *The Hamilton Spectator* (14 October 2020) online: [www.thespec.com/news/hamilton-region/2020/10/14/city-to-close-ferguson-avenue-while-task-force-clears-encampment.html](http://www.thespec.com/news/hamilton-region/2020/10/14/city-to-close-ferguson-avenue-while-task-force-clears-encampment.html).

<sup>84</sup> Keeping Six Hamilton, *supra* note 72.

<sup>85</sup> Teviah Moro, "City and police converge on encampment in downtown Hamilton park," *The Hamilton Spectator* (23 October 2020), online: [www.thespec.com/news/hamilton-region/2020/10/23/city-and-police-converge-on-encampment-in-downtown-hamilton-park.html](http://www.thespec.com/news/hamilton-region/2020/10/23/city-and-police-converge-on-encampment-in-downtown-hamilton-park.html).

with some residents moved to hotels and others given the 14-day notice. For the balance of 2020 and early 2021, this pattern was maintained, with the City enforcing size and location limits and enforcing assessment and 14-day notice periods, which meant constant relocation for some encampment residents.<sup>86</sup> As advocates pointed out, this made it increasingly difficult to connect with those in encampments and ensure they had access to resources.<sup>87</sup>

On August 9, 2021, Council voted to repeal the Protocol with three weeks' notice. It then introduced a new six-step enforcement plan to reinstate regular enforcement, depicted in Figure 1 below.<sup>88</sup> The process is triggered by a complaint to Municipal Law Enforcement, which investigates the alleged violation. Voluntary compliance is sought, and Housing Outreach is contacted to attend and offer housing support. Once Outreach has reported back, Municipal Law Enforcement returns and issues a verbal trespass notice and notifies police, who then attend to enforce the *Trespass to Property Act*. Finally, a clean-up is coordinated by the Parks and Waste Divisions.<sup>89</sup> The plan does say encampment residents will not be ticketed.<sup>90</sup> It also states that Outreach uses a rights-based approach.<sup>91</sup> It does not address the incompatibility of a trespass and prohibition framework with such an approach. Advocates were quick to point out the new protocol does not address shelter capacity, outbreaks, or the suitability of shelter options for individuals prior to triggering police involvement.<sup>92</sup>



**Figure 1 Encampment Process Map, City of Hamilton<sup>93</sup>**

<sup>86</sup> Taekema, “Borrowed time,” *supra* note 79.

<sup>87</sup> *Ibid.*

<sup>88</sup> City of Hamilton, Planning and Economic Development Department, *supra* note 67.

<sup>89</sup> *Ibid* at 2.

<sup>90</sup> *Ibid* at 3.

<sup>91</sup> *Ibid* at 5.

<sup>92</sup> Christine Rankin, “Hamilton's new process to remove encampments will not result in housing support, say advocates,” *CBC News Hamilton* (9 September 2021), online: <[www.cbc.ca/news/canada/hamilton/encampments-homeless-prohibition-1.6169483](http://www.cbc.ca/news/canada/hamilton/encampments-homeless-prohibition-1.6169483)>.

<sup>93</sup> *Ibid* at 8.

### *Post-Protocol Evictions*

There is less media coverage of evictions immediately following the repeal of the Protocol. However, some details are available on social media. Notice was given to residents at J.C. Beemer and Durand Parks in September 2021, shortly after the repeal. Attempted teardowns took place at both, but community advocates intervened and appear to have held evictions off, though Beasley was later taken down in November. As discussed below, the decision to repeal the Protocol resulted in a new legal challenge by residents and advocates.<sup>94</sup> A motion for an injunction was unsuccessful.<sup>95</sup> Once the decision upholding the City's ability to enforce the bylaw was released, the City announced it would resume enforcement.<sup>96</sup> According to HESN, the City resumed evictions within 24 hours and provided residents with just two hours' notice.<sup>97</sup> The City reported clearing 23 tents from encampments at City Hall, John Rebecca Park, Durand Park, and the Claremont Access Parkette.<sup>98</sup> Residents were once again moving from encampment to encampment, with their tents and belongings being confiscated by the City.<sup>99</sup> Multiple women told reporters the police suggested they move to forests on the Niagara Escarpment.<sup>100</sup>

On November 24, 2021, a fire took place at the five-tent encampment at J.C. Beemer Park and destroyed the tents and belongings of several residents. Luckily, no one was injured. The same day, residents who had been there for approximately six months were served with eviction notices from the City. Residents say no one from Outreach had met with them prior, in accordance with the six-step process, though the City stated staff had visited regularly since June. Police attempted to cordon off the encampment as members of HSEN gathered to protest the eviction. Police responded with force, and protestors were shoved to the ground and two

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<sup>94</sup> CHCH-TV, "City of Hamilton faces a legal battle over its decision to tear down encampments amid a shelter shortage," *CHCH-TV* (18 October 2021), online: <[www.chch.com/city-of-hamilton-faces-a-legal-battle-over-its-decision-to-tear-down-encampments/](http://www.chch.com/city-of-hamilton-faces-a-legal-battle-over-its-decision-to-tear-down-encampments/)>.

<sup>95</sup> Hamilton Community Legal Clinic, "Public Statement of Hamilton Community Legal Clinic in Response to Encampment Injunction Decision," *Hamilton Community Legal Clinic* (2 November 2021), online: <[hamiltonjustice.ca/en/2021/11/02/public-statement-of-hamilton-community-legal-clinic-in-response-to-encampment-injunction-decision/](http://hamiltonjustice.ca/en/2021/11/02/public-statement-of-hamilton-community-legal-clinic-in-response-to-encampment-injunction-decision/)>.

<sup>96</sup> City of Hamilton, News Release, "City to resume enforcement of Park bylaws following court ruling" (2 November 2021), online: <[www.hamilton.ca/government-information/news-centre/news-releases/city-resume-enforcement-park-bylaws-following-court](http://www.hamilton.ca/government-information/news-centre/news-releases/city-resume-enforcement-park-bylaws-following-court)>.

<sup>97</sup> HESN, "Less than 24 hours after the court ruling, the City has sent bylaw and police across #HamOnt giving residents 2 hours notice to move and trashing their belongings. Temperatures are expected to drop below Soo . If you hear of an encampment eviction happening, let us know." *Twitter* (3 November 2021 at 17:38), online: <[twitter.com/HamOntESN/status/1456012987681153027?cxt=HHwWhoC58aKG5rQoAAAA](https://twitter.com/HamOntESN/status/1456012987681153027?cxt=HHwWhoC58aKG5rQoAAAA)>.

<sup>98</sup> Teviah Moro, "Homeless Hamilton residents brace for encampment clearings after court decision," *The Hamilton Spectator* (6 November 2021), online: <[www.thespec.com/news/hamilton-region/2021/11/06/homeless-encampment-hamilton-police-enforcement.html](http://www.thespec.com/news/hamilton-region/2021/11/06/homeless-encampment-hamilton-police-enforcement.html)> ["Homeless Hamilton residents brace"].

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.*

people were arrested.<sup>101</sup> Both were later released on conditions.<sup>102</sup> Videos posted on social media showed a police officer dragging a person by the arm and an individual on the ground with an officer's knee on their neck.<sup>103</sup> According to the City, six people accepted temporary housing and shelter offers while three did not. One resident who lost everything in the fire told CBC he was set up with a bed at a crisis centre but could only stay for four or five days before he would be back on the street again.<sup>104</sup> Two days later, the police arrested Sarah Jama, a supporter of HESN, during another encampment clearing at Beasley Park. A subsequent demonstration outside the central police station resulted in three more arrests.<sup>105</sup> Public outcry about the excessive police force included statements from councillors, MPs, and other community leaders. A group of Black community leaders called for charges to be dropped and linked the arrests to "a policing system that continues to criminalize Black existence and which ultimately sees blackness as a threat."<sup>106</sup> All charges against the advocates were dropped in March.<sup>107</sup>

On December 1, 2021, the City cleared an encampment at Bay and Strachan. HESN reported that at least one resident's tent was cleared in their absence and therefore without an offer of shelter.<sup>108</sup> Another fire resulted in an eviction on December 2 at Bishop Park.<sup>109</sup> Residents at Red Hill were then given notice on December 3 that they would be evicted the following week.<sup>110</sup> Some residents remained, but the last of the encampment was cleared in February 2022.<sup>111</sup> As

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<sup>101</sup> Sebastian Bron, "Housing activists, police clash over encampment evictions following 'fireball' that destroyed belongings," *The Hamilton Spectator* (24 November 2021), online: <[www.thespec.com/news/hamilton-region/2021/11/24/fire-destroys-tents-belongings-at-hamilton-encampment.html](http://www.thespec.com/news/hamilton-region/2021/11/24/fire-destroys-tents-belongings-at-hamilton-encampment.html)>.

<sup>102</sup> Sebastian Bron, "JC Beemer Park cleared following fire, evictions and chaotic protest," *The Hamilton Spectator* (25 November 2021), online: <[www.thespec.com/news/hamilton-region/2021/11/25/last-residents-at-jc-beemer-park-pack-up-following-fire-protest.html](http://www.thespec.com/news/hamilton-region/2021/11/25/last-residents-at-jc-beemer-park-pack-up-following-fire-protest.html)>.

<sup>103</sup> Abby Neufeld, "Hamilton police criticized for alleged use of 'excessive force' during encampment clearings," *CTV News* (29 November 2021), online: <[www.cp24.com/news/hamilton-police-criticized-for-alleged-use-of-excessive-force-during-encampment-clearings-1.5686643?cache=szcuxcmsiqb](http://www.cp24.com/news/hamilton-police-criticized-for-alleged-use-of-excessive-force-during-encampment-clearings-1.5686643?cache=szcuxcmsiqb)>.

<sup>104</sup> Moro, "Homeless Hamilton residents brace," *supra* note 98.

<sup>105</sup> Neufeld, *supra* note 103.

<sup>106</sup> Desmond Brown, "Black community leaders call for recent charges against Hamilton youth to be dropped," *CBC News* (1 December 2021), online: [www.cbc.ca/news/canada/hamilton/hamilton-black-community-leaders-call-for-charges-to-be-dropped-1.6269670](http://www.cbc.ca/news/canada/hamilton/hamilton-black-community-leaders-call-for-charges-to-be-dropped-1.6269670) ["Black community leaders"].

<sup>107</sup> Don Mitchell, "Charges withdrawn against activists involved in Hamilton encampment demonstrations." *Y108* (15 March 2022), online: <[y108.ca/news/8684169/activists-hamilton-encampment-demonstrations-charges-withdrawn/](http://y108.ca/news/8684169/activists-hamilton-encampment-demonstrations-charges-withdrawn/)>.

<sup>108</sup> HESN, "The City is tearing down a tent of a person that hasn't been present all morning. What about this is "person-cantered" and how does it fit into the narrative that the City is working with residents when someone's belongings are being removed without their presence?" *Twitter* (1 December 2021 at 12:52), online: <[twitter.com/HamOntESN/status/1466102873993928704?cxt=HHwWgICzifqy0tgoAAAA](https://twitter.com/HamOntESN/status/1466102873993928704?cxt=HHwWgICzifqy0tgoAAAA)>.

<sup>109</sup> HESN, "This morning residents at Bishop park experienced a fire that destroy their belongings. What did the City do? Enforce an eviction. One person is currently without shelter options and doesn't know where to go. This City's attack on encampment residents must end." *Twitter* (2 December 2021 at 13:51), online: <[twitter.com/HamOntESN/status/1466480168680185858?cxt=HHwWhICzxbL8\\_dkoAAAA](https://twitter.com/HamOntESN/status/1466480168680185858?cxt=HHwWhICzxbL8_dkoAAAA)>.

<sup>110</sup> HESN, "Encampment residents at Red Hill are being told they will be evicted by Thursday of next week. What is striking about this encampment, just like Bay and Strachan, is its proximity to rows and rows of vacant houses slated for demolition (thread). 1/" *Twitter* (3 December 2021 at 15:01), online: <[twitter.com/HamOntESN/status/1466860124606275591?cxt=HHwWjoC95d7gqtsoAAAA](https://twitter.com/HamOntESN/status/1466860124606275591?cxt=HHwWjoC95d7gqtsoAAAA)>.

<sup>111</sup> Moro, "It's sad," *supra* note 11.

noted above, Hamilton shelters froze admissions in January 2022 amidst the Omicron wave.<sup>112</sup> The residents in the Gage Park encampment were given notice on February 18, 2022. One resident showed CBC the notice citing violations of the anti-camping and littering bylaws. She was unable to accept shelter options because she has a pet cat and had already been moved from two other parks. The City stated they were engaging in outreach but that residents had refused engagement and support. HESN reported the shelter offers did not keep residents connected to community and services.<sup>113</sup> After being told to move to the forest, one resident told CBC: “I am treated like a completely worthless [person]. A problem,” she said. “Literally as a piece of garbage that if you dispose of it somewhere far away, that is a solution.”<sup>114</sup>

On March 30, 2022, Council passed a motion to establish a 72-hour timeline for issuance of a Trespass Notice and to notify police and undertake enforcement within 12 to 72 hours of the first complaint about an encampment. Council granted a request from the Bylaw Enforcement Director subsequently for \$416,673.73 to create a dedicated team for encampment enforcement to enforce the new rule.<sup>115</sup>

## Civil Society Responses to Encampments

Three teams have organized support for encampment residents throughout the pandemic: Keeping Six (“K6”), the Hamilton Social Medicine Response Team (HamSMaRT), and the Hamilton Encampment Support Network (HESN), which formed as a coalition later in 2020. K6 is a “Hamilton harm reduction action league [and] community-based organization that defends the rights, dignity, and humanity of people who use drugs.”<sup>116</sup> K6 consists of people who have lived experience of using drugs, who can therefore be more relatable to people experiencing homelessness who also use substances, rather than health professionals or outreach workers who have not. HAMSMaRT is a group of healthcare providers whose aim is “to provide quality healthcare to Hamiltonians.”<sup>117</sup> HESN was formed in November 2020, when community members organized a fourteen-day Freedom Camp occupation of the Hamilton City Hall forecourt to demand that the City defund the Hamilton Police Service and redirect funds to affordable housing.<sup>118</sup>

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<sup>112</sup> Moro, “Hamilton shelters halt,” *supra* note 59.

<sup>113</sup> HESN, “The City of Hamilton has told encampment residents living in Gage Park that they need to move by Wednesday, Feb 23; residents are asking for the eviction to be stopped (or delayed) until they can find more suitable alternatives, or are offered permanent & accessible housing (1/5),” *Twitter* (21 February 2022), online: [twitter.com/HamOntESN/status/1495861670316498948?s=20&t=SfOjeIHCb5RhH12xCGvSXA](https://twitter.com/HamOntESN/status/1495861670316498948?s=20&t=SfOjeIHCb5RhH12xCGvSXA).

<sup>114</sup> Taekema & Leck, *supra* note 11.

<sup>115</sup> Saira Peesker, “Hamilton will spend \$400K on new enforcement staff to deal with encampments,” *CBC News* (31 March 2021), online: [www.cbc.ca/news/canada/hamilton/encampment-evictions-1.6403103](https://www.cbc.ca/news/canada/hamilton/encampment-evictions-1.6403103).

<sup>116</sup> Keeping Six Hamilton, “About Us” (2021), online: [keepingsix.org/about/](https://keepingsix.org/about/).

<sup>117</sup> HAMSMaRT, “Bio,” *Twitter* (October 2016), online: [twitter.com/hamsmarteam?lang=en](https://twitter.com/hamsmarteam?lang=en).

<sup>118</sup> HESN, “HESN Statement on Events of Nov 26, 2021”, online: [docs.google.com/document/d/1s6CaFY3IMd2d9ZcSmLqgsDje5o6cGnJSUy7GdSQBnE0/mobilebasic](https://docs.google.com/document/d/1s6CaFY3IMd2d9ZcSmLqgsDje5o6cGnJSUy7GdSQBnE0/mobilebasic).

These grassroots groups gained significant community and civil society support for their efforts to mitigate the pandemic and homelessness crises, especially during the evictions of major encampments and following the violent arrest of six coalition members in November 2021. They employed a variety of tactics, including the provision of survival resources, public advocacy, and direct action.<sup>119</sup> They engaged city officials, social service agencies, healthcare professionals, and front-line workers to promote a rights-based approach to encampments. Early in the pandemic, they called on the City and Hamilton Police Service to stop ticketing homeless individuals who were not able to comply with pandemic bylaws. When encampments began to grow during the early pandemic, K6 and HAMSMaRT collected sleeping materials like tents, tarps, and sleeping bags to distribute to encampment residents. During evictions, they documented City actions and helped evicted people maintain control over their belongings.

These organizations negotiated with the City to create Hamilton’s Eviction Protocol in order to reduce encampment eviction violence.<sup>120</sup> Though the Protocol was not universally praised, civil society’s response to the City’s unilateral abandonment of the Protocol was resoundingly negative. For example, The Hamilton Centre for Civic Inclusion (HCCI), “a charitable organization driven by a mission to mobilize all Hamiltonians to create an inclusive and welcoming city” organized a letter-writing campaign in opposition to the revocation of the Protocol agreement.<sup>121</sup> HCCI also joined with a coalition of Black community leaders in widespread calls to drop the charges against the six HESN organizers arrested during the November 2021 eviction of J.C. Beemer Park and its aftermath.<sup>122</sup> All three organizations remain active in Hamilton civil society at the time of writing.

## Legal Cases Related to Hamilton Encampment Evictions

After the first round of evictions in 2020, residents supported by civil society allies brought a motion for an injunction to stop the City from enforcing the bylaws against encampment residents. On July 30, 2020, the Superior Court granted an injunction on an urgent *ex parte* motion for 10 days in *Bailey et al. v City of Hamilton*. The order prevented Hamilton from forcibly removing encampment residents from public spaces who for various reasons were unable to accept the housing options presented to them, often shelter spaces or hotels with rules inappropriate for the individual’s needs. The order was extended on August 7, 2020, on consent until the motion could be heard in September 2020. While the City initially voted to challenge the injunction, they ultimately followed staff direction to negotiate, which led to a negotiated settlement on September 30<sup>th</sup>, including the Protocol discussed above.

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<sup>119</sup> Keeping Six Hamilton, “Timeline,” *supra* note 72.

<sup>120</sup> *Ibid.*

<sup>121</sup> Hamilton Center for Civic Inclusion, “#DropTheChargesHamOnt” (11 February 2022), online: <[hcci.ca/dropthechargeshamont/](https://hcci.ca/dropthechargeshamont/)>.

<sup>122</sup> Desmond Brown, “Black community leaders”, *supra* note 106.



When in August 2021 City Council voted to repeal the agreed upon Bylaw Enforcement Protocol and resumed bylaw enforcement without these safeguards, a group of five residents, Ashley Poff, Darrin Marchand, Gord Smyth, Mario Muscato, and Shawn Arnold, once again organized with civil society allies to bring a Charter challenge to stop enforcement of the bylaws. The applicants also alleged violations of the Ontario *Human Rights Code* concerning equal treatment without discrimination with respect to the “occupancy of accommodation” under section 2(1). As an initial step, the applicants filed for an interlocutory injunction while the full Charter challenge could be brought. The motion requested the City be prohibited from taking further steps to evict or remove the applicants and other homeless individuals from encampments in City parks until the full merits of the application could be decided.

While the issue in the broader case (which may be ongoing) would be whether enforcement of the bylaw violates the applicants’ section 7 rights to life, liberty, and security of the person and whether this is justified under section 1, the motion only examined the three stage injunction test: 1) whether there is a serious question to be tried; 2) whether the applicants will suffer irreparable harm; 3) whether the balance of convenience favours the applicants.<sup>123</sup> This means the case does not determine whether the City’s bylaws and their enforcement is in fact Charter compliant.

In the *Poff v City of Hamilton* decision, the court found the applicants had met the first step. In Charter cases, the standard is low, as the court must only determine the application is not frivolous or vexatious. Here that was easily established as they provided “convincing evidence to support their contention that their Charter-protected rights may have been violated.”<sup>124</sup> However, notably, the court found the *Human Rights Code* argument did not have a strong chance of success because the City was not providing a service to encampment residents and because homelessness is not an enumerated ground under the Code.<sup>125</sup>

Despite getting past the first part of the test, the applicants were not found to have met the irreparable harm step. The applicants were all offered support, including housing, emergency shelter and other accommodations.<sup>126</sup> Four of the five applicants were no longer in an encampment at the time of the hearing. Thus, according to the court, the damage could not constitute a harm that could not be quantified or cured. The court refused to consider third parties (including the homeless population at large) at the second stage of the test. Therefore, only harm suffered by the specific named parties was considered.<sup>127</sup> While this was potentially fatal to the application, the court did go on to consider the balance of convenience at the third stage.

At this stage the broader public interest, including the interests of the homeless population at large, can be considered. However, the interests of the City and harms to its interests will also be examined to determine which party will suffer the greater harm.<sup>128</sup> This includes the public

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<sup>123</sup> *RJR-MacDonald v Canada (AG)*, [1994] 1 SCR 311 at para 348, 1994 CanLII 117 (SCC) [*RJR*].

<sup>124</sup> 2021 ONSC 7224 at para 105 [*Poff*].

<sup>125</sup> *Ibid* at paras 99-102.

<sup>126</sup> *Ibid* at para 116.

<sup>127</sup> *Ibid* at para 131.

<sup>128</sup> *Ibid* at para 141; *RJR*, *supra* note 123 at para 342.

interest in enforcing the law, which the court found “weighs heavily in the balance.”<sup>129</sup> A public authority such as a municipality will also have a lesser onus in demonstrating irreparable harm to the public interest, because there is a presumption that a validly enacted law “will produce a public good.”<sup>130</sup> Notably the court in *Poff* adopted the balancing analysis from *Batty v the City of Toronto*. *Batty* is a case about the Occupy Toronto protest encampment which finds that the prohibition on camping in parks fosters the public interest by allowing the City to balance “the different uses everyone wishes to make of parks.” However, in *Poff*, this reasoning is imported without acknowledging the entirely different Charter context of expressive rights under section 2 and the rights protected by section 7 of the Charter, including security of the person.<sup>131</sup>

The Court places significant weight on both police statistics and the affidavit evidence of neighbouring residents about their concerns, in fact appearing to equate generalizations about increases in crime drawn from police statistics with the concerns raised by housed neighbours, including theft, but also noise, waste, and other non-criminal activities drawn from public affidavits.<sup>132</sup> The analysis highlights the rights associated with neighbouring private property rather than the general public interest, including the role of public space in meeting the basic needs of unhoused residents.<sup>133</sup> Further, the court adopted evidence about increases in criminal activity without examining whether what the City deems an “increase” in criminal activity may also be understood as a shift in location, particularly since the increases related to (1) suspected opioid overdoses; (2) trauma and injury, largely to encampment residents themselves; and (3) drug and alcohol overdoses. Overall, the logic of the court perpetuates the stereotyping of encampment residents’ behaviours as incompatible with the proper use of parks and public space, defined as the leisure uses of housed residents. The court adopts this approach without consideration of social context of encampments, substance use, the ongoing impacts of colonialism, and systemic discrimination against Black and Indigenous people in housing and policing.

Crucially the court in *Poff* distinguishes the case from the line of cases in British Columbia where prohibitions on encampments have been found to violate the Charter. Applying the 2020 decision in *Black v the City of Toronto*,<sup>134</sup> the court rejects the applicants’ arguments that the City’s shelters had high barriers to entry and emphasizing the personal “choice” of those who remain outdoors.<sup>135</sup> Therefore, the court concludes the balance of convenience favours the City. This contrasts with the findings in *Prince George (City) v Stewart* around the need for low barrier shelters.<sup>136</sup> It also highlights the concerns regarding the use of data about criminal activity around encampments, much of which was rejected in *Stewart* as hearsay.

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<sup>129</sup> *Poff*, *supra* note 124 at para 226.

<sup>130</sup> *Harper v Canada (AG)*, 2000 SCC 57 at para 9.

<sup>131</sup> *Poff*, *supra* note 124 at para 229; *Batty v City of Toronto*, 2011 ONSC 6862 at paras 91, 95.

<sup>132</sup> *Poff*, *supra* note 124 at para 212.

<sup>133</sup> Sarah E Hamill, “Private Rights to Public Property: The Evolution of Common Property in Canada” (2012) 58:2 McGill LJ 365 at 368-369, 381-382.

<sup>134</sup> 2020 ONSC 6398.

<sup>135</sup> *Poff*, *supra* note 124 at paras 240, 246.

<sup>136</sup> 2021 BCSC 2089 at paras 67-68, 73, 85.

# Key Human Rights Issues Raised by the Hamilton Case Study

- **Failure to Adhere to Federal Human Rights Commitments** — Many City actions are grossly inconsistent with the National Housing Strategy Act, despite the applicability of this federal legislation to all orders of government. The seriousness of these human rights violations is often not well understood by government officials and government actors, and it is not well integrated into decision-making and policy-making regarding encampments. Hamilton has not acknowledged housing as a human right and does not have a human rights-based plan to implement its obligations to realize the right to housing.
- **Meaningful Participation** — Central to the realization of the right to housing is the meaningful participation of people living in homelessness in the design and implementation of the policies, programs, and practices that affect them. Ensuring meaningful participation is “critical to respect for individuals’ autonomy, dignity, agency, and self-determination.”<sup>137</sup> Government collaboration and partnership with lived experts ensure that the experiences of those living in the encampments are taken into account and that they are treated as experts in their own lives and as partners in decision-making.<sup>138</sup> There were few opportunities for people residing in encampments in Hamilton to be meaningfully involved in the development of policy solutions to the homelessness crisis. What does exist is largely due to the advocacy of existing civil society groups, who have made significant efforts to understand the needs, experiences, and goals of encampment residents.
- **Access to Justice** — There is a notable absence of accountability mechanisms through which residents of encampments could seek redress for human rights violations perpetrated against them.<sup>139</sup> This is contrary to the right to housing, which requires governments to implement infrastructure that provides avenues for community members to claim their right to housing and access remedies for unjust or unlawful treatment.<sup>140</sup> The Emergency and Community Services Committee approved setting up a complaints process about the emergency shelter system, but this has not yet been

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<sup>137</sup> Farha & Schwan, *supra* note 70 at 2.

<sup>138</sup> UNHRCOR 43rd Sess, A/HRC/43/4 (2020). See also Farha & Schwan, *supra* note 70.

<sup>139</sup> McCartan et al, “A Scoping Review of International Policy responses to Mental Health Recovery During the COVID-19 Pandemic” (2021) 30:1 Health Research Pol & Systems 58.

<sup>140</sup> UNHRCOR, *supra* note 138. See also N Dragicevic & B Porter, *Human Rights Cities: The Power and Potential of Local Government to Advance Economic and Social Rights*, (Toronto, ON: Maytree, 2020).

- implemented.<sup>141</sup> Further, it would not provide encampment residents with accountability for their treatment outside of being denied shelter access, including regarding loss of belongings, harassment, and lack of services.
- **The Distinct Rights of Indigenous Peoples** — In alignment with international human rights standards, the City of Hamilton’s engagement with Indigenous people residing in encampments must be guided by the obligation to respect, protect, and fulfil their distinct rights.<sup>142</sup> Under both domestic law and UNDRIP, governments must also ensure the participation of Indigenous Peoples in all decision-making processes that affect them.<sup>143</sup> The City’s obligations to respect and protect the distinct rights of Indigenous nations, advance truth and reconciliation, and uphold treaty obligations towards diverse Indigenous nations intersect with broader human rights obligations to secure the right to housing for people who are unhoused and residing in encampments on Indigenous territories.
  - **Provision of Basic Services** — Access to basic services, such as clean water, sanitation facilities, electricity, and heat, is foundational to survival and a cornerstone of a human rights-based approach to homelessness and encampments.<sup>144</sup> The failure of governments to provide these basic services violates a range of human rights<sup>145</sup> and threatens the dignity, safety, health, and well-being of people living in encampments.<sup>146</sup> The City of Hamilton failed to provide sufficient basic services during the pandemic to people residing in encampments, making it even harder for them to meet their basic needs. Indeed, the lack of such services was used against encampment residents in concerns raised by members of the public, politicians, and the courts.
  - **Treatment of Public Space** — In the absence of concrete steps to implement a rights-based approach to encampments and the realization of the right to housing, the City is relying on inappropriate tools to address what it has acknowledged as a housing crisis. The existing structure and content of the bylaws—and the choices made about how, when, and against whom to enforce them—are made by the City. In addition to making different choices about enforcement, the City also has the power to rethink how public space is regulated to be consistent with human rights obligations. While the existing parks bylaws emphasize the City’s role as a property owner, with the right and power to exclude just like any other owner, the City’s primary role is as a government. As a government, it is bound by its human rights obligations to all its residents, both housed and unhoused. Therefore, bylaws and actions grounded in the City’s powers as a

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<sup>141</sup> Desmond Brown, “City Moves to Set Up Complaints Process for People Using Hamilton’s Shelter System,” *CBC News* (8 April 2022), online: <[www.cbc.ca/news/canada/hamilton/hamilton-shelter-system-complaint-resolution-process-councillor-brad-clark-1.6412358](http://www.cbc.ca/news/canada/hamilton/hamilton-shelter-system-complaint-resolution-process-councillor-brad-clark-1.6412358)>.

<sup>142</sup> Farha & Schwan, *supra* note 70.

<sup>143</sup> UNDRIP, *supra* note 36; *Haida Nation v British Columbia (Minister of Forests)*, 2004 3 SCR 511.

<sup>144</sup> UNHRCOR, *supra* note 138.

<sup>145</sup> *Ibid.*

<sup>146</sup> UN Water, “Human Rights to Water and Sanitation,” *UN Water*, online: <[www.unwater.org/waterfacts/human-rights/](http://www.unwater.org/waterfacts/human-rights/)>.

property owner must always account for these primary human rights obligations, including the right to housing. Bylaws that are inconsistent with these obligations should be repealed, and new regulatory frameworks should be developed through collaborative processes led by people with lived experience of homelessness and encampments.