



CASE STUDY: VANCOUVER

A HUMAN RIGHTS ANALYSIS OF ENCAMPMENTS IN CANADA

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*I am grateful for the suggestions and corrections from Anna Cooper and Fiona York on earlier versions of this draft. All errors and omissions are my own.

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This report is part of a series of reports on encampments commissioned by the Office of the Federal Housing Advocate (OFHA). The other reports in the series can be found on the OFHA website and on the Homeless Hub at homelesshub.ca/OFHA.

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.

Le présent document existe également en version française sous le titre, Étude de cas : Vancouver – Une analyse des campements au Canada axée sur les droits de la personne. Elle est disponible sur le site du Bureau de la défenseure fédérale du logement et sur le Rond-point de l'itinérance.

How to cite this report:

Flynn, A. 2022. *Case study: Vancouver—A human rights analysis of encampments in Canada*. The Office of the Federal Housing Advocate.

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Cat. No.: Pending

ISBN: Pending

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Introduction

While the crisis of people experiencing homelessness is by no means isolated to a single urban context, it is particularly acute and widespread in Vancouver. The 2019 Vancouver Homeless Count identified 2,223 individuals experiencing homelessness, which the report recognizes as an underestimate resulting from methodological limitations.¹ Vancouver has also been the site of several legal battles over the dismantling of encampments. This case study first describes the encampments at Vancouver’s Create a Real Available Beach (CRAB) Park. Next, it sets out legal challenges related to encampments, including two recent legal cases concerning government efforts to evict residents in CRAB Park through the use of trespass law and injunctions. I conclude that these legal actions will continue until governments address the lack of secure housing for people experiencing homelessness and recognize that temporary shelters and encampment evictions are inadequate solutions that exacerbate the harms of homelessness.

CRAB Park

CRAB Park is a green space located near Vancouver’s port, adjacent to the principal docking location for incoming yachts in the city’s downtown, as shown in Figure 1. The area is in close proximity to both Gastown, one of the city’s busiest tourist destinations, and Vancouver’s poorest area, the Downtown Eastside. CRAB Park was established in 1987 following extensive advocacy for the creation of a park for nearby residents in the Downtown Eastside, who otherwise have very little park space.²



Figure 1: Pre-encampment Google Earth Pro satellite image of the vicinity of the encampment in *VFPA v Brett*.³ Imagery © 2022 CNES / Airbus, Maxar Technologies, Map data © 2022. Used in accordance with Google Geo Guidelines. <https://about.google/brand-resource-center/products-and-services/geo-guidelines/>.

¹ The Homelessness Services Association of BC, the BC Non-Profit Housing Association & Urban Matters CCC, “Vancouver Homeless Count 2019” (November 2019) at 28, online (pdf): vancouver.ca/files/cov/vancouver-homeless-count-2019-final-report.pdf.

² See <https://www.portvancouver.com/land/>

³ Stepan Wood, “When Should Public Land be Considered Private Property in Homeless Encampment Litigation? A Critique of Recent Developments in BC” (forthcoming, *Journal of Law and Social Policy*).

There are two important jurisdictional issues in relation to CRAB Park: its location on Indigenous lands and the federal government's role. CRAB Park lands, like many in British Columbia, are unceded and not subject to treaties or other agreements. The Government of Canada also claims CRAB Park and adjacent space as federal land, which is relevant given the federal government's recent recognition of a right to housing in the *National Housing Strategy Act* (NHS Act), which came into force in 2019 and is relevant to tent encampments.⁴

Section 4 of the NHS Act states:

It is declared to be the housing policy of the Government of Canada to

1. Recognize that the right to adequate housing is a fundamental human right affirmed in international law;
2. Recognize that housing is essential to the inherent dignity and well-being of the person and to building sustainable and inclusive communities;
3. Support improved housing outcomes for the people of Canada; and
4. Further the progressive realization of the right to adequate housing as recognized in the International Covenant on Economic, Social and Cultural Rights.

CRAB Park is on Indigenous Land and Serves a Predominately Indigenous Community

Tent encampments are directly connected to colonialism and the ongoing displacement of Indigenous Peoples and, owing to this tragic legacy, Indigenous peoples are disproportionately represented in encampment populations.⁵ As Jesse Thistle explains:

Racism and discrimination aimed at Indigenous peoples are firmly entrenched in Canadian society, producing impenetrable systemic and societal barriers, such as a lack of affordable and appropriate housing, insufficient and culturally inappropriate health and education services, irrelevant and inadequate employment opportunities, and a crumbling infrastructure in First Nations, Inuit, and Métis communities. The fiduciary abandonment of Indigenous communities by the state, which has greatly contributed to Indigenous homelessness, is manifested by chronic underfunding by the federal, provincial and territorial governments of Canada.⁶

Canada and British Columbia have adopted the Declaration on the Rights of Indigenous Peoples (UNDRIP) to guide relationships with Indigenous peoples and, in the case of both Canada and BC, to commit to consistency between domestic laws and the Declaration.⁷ In addition, the City

⁴ *National Housing Strategy Act*, SC 2019, c 29, s 313.

⁵ *Prince George (City) v. Stewart*, 2021 BCSC 2089 at 69-71.

⁶ Jesse Thistle, *Definition of Indigenous homelessness in Canada* (Homeless Hub, 2017), online: <<https://www.homelesshub.ca/sites/default/files/attachments/COHIndigenousHomelessness-summary.pdf>>.

⁷ See *United Nations Declaration on the Rights of Indigenous Peoples Act* (SC 2021, c 14) ("The Government of Canada must, in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure that the laws

of Vancouver endorsed UNDRIP in 2013 and, in 2021, struck a task force to develop recommendations on how the City can implement UNDRIP at a local level.⁸

Article 10 of UNDRIP states that:

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the [I]ndigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 32(1) of UNDRIP states that:

Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

UNDRIP does not differentiate between urban, rural, or remote Indigenous populations in recognizing the right to self-determination. Canadian courts have recognized that the right to self-determination applies to urban Indigenous people and communities.⁹ Urban Indigenous communities have the right to equal agency over social programs and decisions that affect them. Under UNDRIP, Indigenous peoples have the right to be involved in the development of policy, including responses to encampments and homelessness, and should not be displaced without consent.¹⁰

The Union of BC Indian Chiefs (UBCIC) has said in relation to encampments, “The forced decampment and removal of campers, including Indigenous people, is in direct opposition to statements made by the Park Board, [the] City’s commitment to reconciliation and BC’s commitment to the implementation of the *Declaration on the Rights of Indigenous Peoples’ Act*.”¹¹ In an open letter, the UBCIC, Pivot Legal Society, the BC Civil Liberties Association, Aboriginal Front Door, and the former UN Special Rapporteur on the Right to Housing have acknowledged that “the forced displacement of Indigenous peoples from the CRAB encampment is out of step with reconciliation and contravenes their human rights to free, prior

of Canada are consistent with the Declaration” at 5); *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44 (“In consultation and cooperation with the Indigenous peoples in British Columbia, the government must take all measures necessary to ensure the laws of British Columbia are consistent with the Declaration” at 3).

⁸ Jesse Thistle, *Definition of Indigenous homelessness in Canada* (Homeless Hub, 2017), online: <<https://www.homelesshub.ca/sites/default/files/attachments/COHIndigenousHomelessness-summary.pdf>>.

⁹ *Canada (AG) v Misquadis*, [2002] FCA 370 [Misquadis]; *Ardoch Algonquin First Nation v Canada (AG)*, [2004] 2 FCR 108, [2003] FCA 473 at para 36 [Ardoch].

¹⁰ See for example the Musqueam Community Rental Complex project in Vancouver: musqueamcapital.ca/development-projects/lelem/. See also the Indigenous National Housing Strategy developed by the Indigenous Housing Caucus Working Group, Canadian Housing and Renewal Association (2018), online (pdf): <chra-achru.ca/wp-content/uploads/2015/09/2018-06-05_for-indigenous-by-indigenous-national-housing-strategy.pdf>.

¹¹ Fiona York, PRESS RELEASE, “I don’t know where they expect you to go”: Heavy enforcement against unhoused people at CRAB Park happening now (22 July 2021).

and informed consent.”¹² A First Nation or Indigenous person could challenge the jurisdiction of the city officials to enact and enforce eviction orders.¹³

CRAB Park Is Public, Federal Land

CRAB Park is located on land owned by the federal government under Canadian law. The federal Crown owns CRAB Park and adjacent lands on behalf of the Vancouver Fraser Port Authority, a federal government agency that oversees the management of most of the lands.¹⁴ The Port Authority is responsible for the lands and waters that make up the Port of Vancouver.¹⁵ Since 2011, during most of the year, the Port Authority has used much of the space for activities related to the cruise ship industry and otherwise leased the lands. As will be explained later, the ongoing attempts to remove encampment residents in CRAB Park shows the lack of implementation of the *National Housing Strategy Act* and of the progressive realization of the right to housing on federal land.¹⁶

CRAB Park’s governance is different. The Port Authority leased CRAB Park to the City of Vancouver, and the space is designated as a temporary public park.¹⁷ Under the *Vancouver Charter*, the legislation that frames the City of Vancouver’s powers, the ability to manage CRAB Park falls under the control of the Vancouver Board of Parks and Recreation (the “Park Board”).¹⁸ The Park Board has possession and control of all areas designated as permanent and temporary public parks.¹⁹ While the Park Board and the City of Vancouver have a relationship, the Park Board has an elected board that makes decisions regarding the management of parks, as well as staff members who execute the board’s decisions.

Governments, including the federal government, do not hold property as a private individual, business, or corporation. The Supreme Court of Canada (SCC) has rejected arguments that government ownership of property is the same as private ownership, including the right to exclude and control that comes with private property.²⁰ The government is also subject to the requirements of the *Charter of Rights and Freedoms* [Charter], discussed later in this case study.²¹ The Charter applies to government ownership of property to uphold the “crucial function of government and the responsibility it bears to its constituents.”²² The

¹² See https://docs.google.com/document/d/19VuR9lRtk-4_TFcafMNgq-DD-9GiEnRF6VD7rRX5ark/edit

¹³ Wawmeesh Hamilton, “Homeless people explain decision to camp by CRAB Park as they prepare to fight port authority injunction”, *CBC News* (2 June 2020), online: <<https://www.cbc.ca/news/canada/british-columbia/new-homeless-camp-crab-park-vancouver-1.5593987>>.

¹⁴ Letters Patent of the Vancouver Fraser Port Authority (effective 1 January 2008), in Order in Council PC 2007-1885, (2007) C Gaz I (22 December, Supp), 3 (VFPA Letters Patent).

¹⁵ *Vancouver Fraser Port Authority v Brett*, 2020 BCSC 876 (CanLII), <<https://canlii.ca/t/j86hq>>, retrieved on 2022-05-29 [Brett].

¹⁶ See The National Right to Housing Network, “Right to Housing Legislation in Canada”, online: <https://housingrights.ca/right-to-housing-legislation-in-canada/>

¹⁷ *Vancouver Fraser Port Authority v Brett*, 2020 BCSC 876 (CanLII) at para 76.

¹⁸ Part 23 of the *Vancouver Charter*, SBC 1953 c 55.

¹⁹ *Vancouver Charter*, SBC 1953 c 55 at s 488 (1)-(8).

²⁰ See eg *Committee for the Commonwealth of Canada v Canada*, 1991 CanLII 119 (SCC).

²¹ *Committee for the Commonwealth of Canada v Canada*, 1991 CanLII 119 (SCC).

²² *Committee for the Commonwealth of Canada v Canada*, 1991 CanLII 119 (SCC).

acknowledgment of the public character of public property has important implications for the choices governments make when responding to encampments. In *Victoria (City) v Adams*, Justice Ross noted, “Public properties are held for the benefit of the public, which includes the homeless.”²³ Even so, the courts have deferred to the idea of governments as “owners” of public property, rather than stewards acting for the benefit of the public.²⁴

In some legal cases, government-owned lands have been distinguished based on the *use* they are put to rather than the *ownership* of land by a government. Even if the land is owned by government, the property may be seen to have a more “private” character.²⁵ This distinction may influence what actions governments take in relation to encampments. Federal lands being used for particular purposes might be considered “essentially private.” For example, an air traffic control tower, a designated railway, or a military base is likely to be considered akin to private land because the “actual function” requires limitations on public access to the land.²⁶ A park or a public square is likely to be seen as more “public” in nature and thus attract a higher level of protection for public use and access. This means that an analysis of government action in relation to public property means considering *both* the nature and function of the property *and* the nature and purposes of the implicated rights.

Responses to tent encampments in CRAB Park

City Responses

CRAB Park has been the site of tent encampments since at least 2003.²⁷ In 2011, the Park Board ordered 40 tents cleared and encampment residents were forced to move. An encampment established in nearby Oppenheimer Park in July 2014 was the subject of litigation in *Vancouver Board of Parks and Recreation v Williams*.²⁸ The Court granted an interlocutory injunction requiring the residents of the Oppenheimer Park to disassemble the encampment and vacate

²³ *Victoria (City) v Adams*, 2008 BCSC 1363 at para 131.

²⁴ Sarah Hamill, “Private Rights to Public Property: The Evolution of Common Property in Canada” (2012) 58:2 [*Hamill* 2012]. See also Stepan Wood, “When should land be considered private property in homeless encampment litigation: A critique of recent developments in BC” (forthcoming) JLSJ 2022.

²⁵ While there were several sets of reasons in *Committee for the Commonwealth of Canada v Canada* (concurring in result), the subsequent decision in *Montréal (City) v 2952-1366 Québec Inc*, 2005 SCC 62 (CanLII) [*Montréal (City)*] noted the majority (6 of 7 judges) agreed that the “type of property” was essential to whether freedom of expression would be protected on government-owned property. Nonetheless, they adopted a test that, while considering the “historical or actual function of the place,” emphasizes the purposes for which expression has been protected under the Charter. Further, as discussed below, the “type of property” analysis has been applied without attention to the distinction between section 2(b) and section 7, and without application of the *Montréal (City)* analysis about the purpose of Charter protection of particular activities.

²⁶ The Supreme Court has found “federally controlled property,” held by Crown bodies but not in their role as a Crown agent, to be distinct from lands in which the federal government has a “proprietary interest”. Such lands are not, for the purposes of s 91(1A) of the Constitution, “public property”. See *British Columbia (Attorney General) v Lafarge Canada Inc*, 2008 SCC 23, at para 61 where the Vancouver Fraser Port Authority was managing lands expressly deemed “not federal land” in their letters patent.

²⁷ See Matthew Ramsey, “Tent City refuses to fold: Protesters call for meeting with mayor and premier,” *The Vancouver Sun*, 21 Jul 2003. See also See Trevor Crawley, “Crab Park advocate attacks potential ‘tent city’ incursion,” *Vancouver Courier*, 31 Mar 2010.

²⁸ *Vancouver Board of Parks and Recreation v. Williams*, 2014 BCSC 1926.

the park.²⁹ The injunction was enforced and the encampment dismantled, but, in the following years, it was gradually re-established in the same location.³⁰ This encampment was again dismantled in May 2020 following Ministerial Order M128, citing purported concerns over the safety of encampments during the pandemic.³¹ A subset of the residents from Oppenheimer Park sought to establish another encampment in a parking lot adjacent to CRAB Park, but this was also dismantled following the interlocutory injunction granted to the Port Authority (discussed next).³²

By June 2020 there were an estimated 79 structures and about 130–150 people living in the park.³³ Other accounts suggest between 35 and 100 encampment residents.³⁴ Encampments continue after each eviction because the underlying issue has not been resolved.

Amidst a series of court battles surrounding encampments in British Columbia, the Park Board amended the *Park Control Bylaw* to remove bans on erecting temporary structures and on sheltering overnight in park space.³⁵ A July 2020 report discussing the proposed amendments noted that the existing bylaw provisions were unconstitutional given these court decisions.³⁶ The report also noted that these provisions had not been enforced following this change in case law, with “those experiencing homelessness [being] able to seek temporary overnight shelter in parks, with Park Rangers requesting tents be removed each morning and only intervening if there is a concern around safety, park access, or impacts to other park uses.”³⁷

The *Park Control Bylaw* was amended in September 2020 to provide an exception for people experiencing homelessness.³⁸ This exception allowed temporary shelters from dusk until

²⁹ *Vancouver Board of Parks and Recreation v. Williams*, 2014 BCSC 1926 at para 62.

³⁰ *Vancouver Fraser Port Authority v Brett*, 2020 BCSC 876 (CanLII), <<https://canlii.ca/t/j86hq>>, retrieved on 2022-05-29 at para 13.

³¹ Simon Little, “Camp Cleared at Vancouver’s Oppenheimer Park, but Advocates say Housing Fight ‘Not Over’” *Global News* (9 May 2020), online:<globalnews.ca/news/6925785/oppenheimer-park-encampmentcleared/>.

³² *Vancouver Fraser Port Authority v Brett*, 2020 BCSC 876 (CanLII) at paras 116-118.

³³ See Keith Fraser, “CRAB Park camp; same factors that drove conditions in Oppenheimer Park, lawyers say,” *The Vancouver Sun*, 05 Jun 2020.

³⁴ See eg Jen St Denis, “Why the Crab Park Campers Can Stay Put,” *The Tyee* (17 January 2022); Denise Ryan, “Homeless encampment residents at CRAB Park face intimidation, advocates say,” *Vancouver Sun* (11 October 2021); and Eva Uguen-Csenge, “Residents ‘overwhelmed’ after judge rules they can stay in CRAB Park encampment,” *CBC News* (14 January 2022).

³⁵ Vancouver, A By-law to Amend the Parks Control By-law Regarding Temporary Shelters in Parks (15 September 2020), online (pdf): <parkboardmeetings.vancouver.ca/files/BYLAWParksControlBylawTemporaryShelters-20200915.pdf>.

³⁶ Memo from General Manager – Vancouver Board of Parks and Recreation to Park Board Chair and Commissioners (July 7, 2020), online (pdf): <parkboardmeetings.vancouver.ca/2020/20200713/REPORT-ParksControlBylaws-TemporaryShelter-20200713.pdf>.

³⁷ Memo from General Manager – Vancouver Board of Parks and Recreation to Park Board Chair and Commissioners (July 7, 2020), online (pdf): <parkboardmeetings.vancouver.ca/2020/20200713/REPORT-ParksControlBylaws-TemporaryShelter-20200713.pdf> at 3.

³⁸ Memo from General Manager – Vancouver Board of Parks and Recreation to Park Board Chair and Commissioners (July 7, 2020), online (pdf):

7:00 AM the following day, with those taking temporary shelter having until 8:00 AM to dismantle their shelter and move, along with many other restrictions on where and how shelters may be established.³⁹ Vancouver's amended *Park Control Bylaw* does not necessarily provide clarity on the overall approach to encampments. While the bylaw recognizes the right of those experiencing homelessness to shelter themselves, the requirement for shelters to be dismantled daily does not allow for the operation of encampments and the communal benefits cited by their residents and proponents. An enforcement of the bylaw still results in the continual dismantling of encampments and all the resultant harms as cited by Justice Hinkson. He noted in *Abbotsford v Shantz*, "The result of repeated displacement often leads to the migration of homeless individuals towards more remote, isolated locations as a means to avoid detection. This not only makes supporting people more challenging, but also results in adverse health and safety risks."⁴⁰ There remain many people experiencing homelessness in Vancouver who literally have nowhere to go, meaning that displaced residents must re-establish shelters in new locations after they are evicted. The bylaw amendment does not solve homelessness.

Civil Society Responses

CRAB Park encampments are primarily supported through independent volunteers and community-led initiatives. Volunteer involvement ranges from mutual aid work⁴¹ to providing pro bono legal services. For example, in *Bamberger v Vancouver*, three pro bono lawyers assisted CRAB Park residents in their petition for a judicial review of eviction orders.⁴² Outside of the courtroom, there are also community-led advocacy initiatives that solicit public support against eviction orders for the homeless population in CRAB Park through protests⁴³ and petitions. Notably, a petition on change.org titled "Respect People—No Eviction at CRAB Park" received more than 700 signatures.⁴⁴ There are also non-governmental organizations that offer intermittent support to encampments, which is sometimes welcome and sometimes unwelcome, as NGOs can be complicit in evictions.⁴⁵

Despite support from non-governmental organizations, volunteers, and community members, homeless encampments tend to be unpopular with a vocal set of nearby residents and may

parkboardmeetings.vancouver.ca/2020/20200713/REPORT-ParksControlBylaws-TemporaryShelter-20200713.pdf.

³⁹ Memo from General Manager – Vancouver Board of Parks and Recreation to Park Board Chair and Commissioners (July 7, 2020), online (pdf):

parkboardmeetings.vancouver.ca/2020/20200713/REPORT-ParksControlBylaws-TemporaryShelter-20200713.pdf.

⁴⁰ *Abbotsford (City) v. Shantz*, 2015 BCSC 1909, paras 213 and 219.

⁴¹ Sarah Grochowski, "Lacking suitable housing alternatives, city can't evict tents from CRAB Park, Supreme Court rules," *Vancouver Sun* (9 February 2022), online: <https://vancouversun.com/news/lacking-suitable-housing-alternatives-city-cant-evict-tents-from-crab-park-supreme-court-rules>

⁴² *Ibid.*

⁴³ Aly Laube, "Make Camp, Get Kicked out. Vancouver Rousts Crab Park, Again," *The Tyee* (12 July 2021), online: https://thetyee.ca/News/2021/07/12/Vancouver-Rousts-Crab-Park-Again/?utm_source=daily&utm_medium=email&utm_campaign=130721&fbclid=IwAR3oKTr4gqijAB7fyym9yrWvUbfzCa_Cle0yqLsX7Y8fd94C7elzWRgEGU

⁴⁴ See <https://www.change.org/p/vancouver-park-board-respect-people-no-eviction-at-crab-park?redirect=false>

⁴⁵ See <https://vancouver.ca/files/cov/homelessness-contacts-poster-dtes.pdf>

attract hostile responses.⁴⁶ Though this problem is not unique to CRAB Park residents, it nonetheless poses a political challenge to CRAB Park encampment residents and advocates.

Legal Cases Related to CRAB Park Encampment Evictions

In the past two years, there have been two important legal cases involving encampments in CRAB Park.

Background on Encampment Cases

The *Charter of Rights and Freedoms* [the Charter] is a part of Canada's Constitution.⁴⁷ Section 7 of the *Charter* reads, "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."⁴⁸ Section 7 has been the main basis by which those living in tent encampments have challenged laws and bylaws that seek to remove them from parks and other places where they are located.

In 2009, the BC Court of Appeal made an important decision in a case called *Victoria (City) v Adams*. The court decided that where there were inadequate shelter spaces to accommodate people genuinely experiencing homelessness, those people are legally allowed to set up overnight shelters in public parks under section 7 of the Charter.⁴⁹ The decision in *Adams* was a significant milestone in the development of section 7 in the context of encampments. The court acknowledged the benefits of encampments, including improved health, access to services, safety of people and possessions, sense of community, and responsiveness to concerns raised by the police and fire departments. These findings were based on testimony from service providers, community organizations, and encampment residents, and they confirm arguments advanced by frontline groups and scholars.⁵⁰

However, the court also restricted the rights of homeless people in two important ways: first, homeless people can only camp outdoors if there are not enough indoor shelter spaces; and second, the right to erect a temporary shelter is confined to overnight hours, which is extremely challenging for unhoused people. Many cases have been brought since *Adams*, especially in British Columbia. Since *Adams*, courts have decided that shelter conditions and restrictions such as curfews, restrictive rules about alcohol and drugs, and violence can be interpreted as leading to "insufficient accessible shelter space."⁵¹

A review of the case law reveals core themes and trends. Arguments by parties seeking an injunction against encampments focus on claims of inadequate safety and the exclusion of other

⁴⁶ <https://www.bchousing.org/research-centre/library/transition-from-homelessness/homeless-encampments-in-british-columbia&sortType=sortByDate>, page 9.

⁴⁷ *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [Charter].

⁴⁸ *The Constitution Act, 1982* at s 7.

⁴⁹ 2009 BCCA 563, aff'g 2008 BCSC 1363 [*Adams*].

⁵⁰ *Victoria (City) v Adams*, 2009 BCCA 563 at paras 125-179.

⁵¹ *Abbotsford (City) v Shantz*, 2015 BCSC 1909 at paras 46-82, 100, 107-115 [*Abbotsford v Shantz*].

users from parks where encampments are located, focusing on stigmatizing descriptions of substance abuse and poor living conditions. Arguments by encampment residents and proponents centre on the safety, security, and psychological benefits provided by encampments, as well as pervasive barriers to access to the shelter system, along with challenging and sometimes unsafe conditions for those who do gain access to the system. These concerns have been further heightened during the COVID-19 pandemic.

In encampment cases, the courts tend to engage in a balancing exercise, with the government's right to exclude on one side and the rights of encampment residents to survive and protect themselves from the elements on the other.⁵² Until the *Bamberger* decision, discussed later, these have tried to equally balance the interests of encampment residents, on one side, with the interests of the general public access for leisure and amenity purposes on the other. In other words, the courts have equally considered the rights of members of the public and encampment residents in the use of public space like parks.⁵³

Vancouver Port Authority v Brett

This case involved an encampment on Port Authority lands on May 8, 2020, a year after the NHS act was enacted. It is important to note that this case took place during the coronavirus pandemic. The Port Authority sought an injunction to stop those in encampments from occupying the lands. The Port Authority asserted the common law of trespass as the basis for the injunction, arguing that the *Port Authorities Operations Regulations* prohibited the use of the lands for encampments. The judge summarized the common law of trespass with the following principles: "A landowner whose title is not in issue is entitled to an injunction to restrain trespass on his land, whether or not the trespass harms him."⁵⁴ The Port Authority argued that this violation entitled them to an injunction, which would allow them to remove the encampments.⁵⁵

After hearing the arguments, the judge decided that the encampment residents were trespassers. He decided that Port Authority lands are not like public parks, but instead are like private property. He stated that the laws and regulations expressly prohibited the use of the Port Authority lands for residences. The judge determined that simply because the property is government-owned does not mean that the public has access to it unequivocally. Instead, the court has to look to the intended purposes of government-owned property.⁵⁶ The judge examined the various rules that applied to the land and decided that encampment residents took part in disallowed activities (i.e., causing a fire and building, placing, moving, or removing

⁵² *Batty v City of Toronto*, 2011 ONSC 6862; Hamilton. See *Hamill 2012*, *supra* note 24 at 385.

⁵³ *Abbotsford (City) v Shantz*, 2015 BCSC 1909.

⁵⁴ *Vancouver Fraser Port Authority v Brett*, 2020 BCSC 876 (CanLII), <<https://canlii.ca/t/j86hq>>, retrieved on 2022-05-29.

⁵⁵ *Vancouver Fraser Port Authority v Brett*, 2020 BCSC 876 (CanLII), <<https://canlii.ca/t/j86hq>>, retrieved on 2022-05-29 at para 41.

⁵⁶ *Vancouver Fraser Port Authority v Brett*, 2020 BCSC 876 (CanLII), <<https://canlii.ca/t/j86hq>>, retrieved on 2022-05-29 at para 52.

structures on the land) and therefore could be removed from CRAB Park.⁵⁷

The judge also rejected the application of section 7 Charter rights, including the claims of two experts concerning the psychological and mental health benefits of encampments.⁵⁸ The judge decided that that the City and Province have developed a comprehensive plan to make alternative living arrangements and emergency accommodation, along with other supports.

Bamberger v. Vancouver (Board of Parks and Recreation)

In May and June 2021, another encampment was set up in CRAB Park by Vancouver residents, many of whom had been previously evicted from nearby tent encampments, including CRAB Park.⁵⁹ The general manager of the Park Board made two orders to evict encampment residents, including the one in Figure 2.



Figure 2: Notice, General Manager of the Parks Board (July 2021), photograph by Fiona York

The encampment residents argued that the decision to evict them was “unreasonable” because there were no suitable indoor spaces available to those who resided at the park when the orders were made.⁶⁰ The conclusion reached by the general manager was that there were suitable indoor spaces available based on advice from BC Housing, the provincial body that administers temporary shelters and social and supportive housing. The Park Board argued that it

⁵⁷ *Vancouver Fraser Port Authority v Brett*, 2020 BCSC 876 (CanLII), <<https://canlii.ca/t/j86hq>>, retrieved on 2022-05-29 at para 56.

⁵⁸ *Vancouver Fraser Port Authority v Brett*, 2020 BCSC 876 (CanLII), <<https://canlii.ca/t/j86hq>>, retrieved on 2022-05-29 at para 71 and 72.

⁵⁹ The second issue was an application for a statutory injunction by the Park Board to compel the park residents to comply with the General Manager’s September 7, 2021 Order.

⁶⁰ *Bamberger v. Vancouver (Board of Parks and Recreation)*, 2022 BCSC 49 at para 75.

was reasonable for the general manager to rely on BC Housing’s information, at least partly because the availability of indoor shelter spaces is outside of the general manager’s expertise, and she must therefore rely on the informed advice of BC Housing.⁶¹ However, the court decided that the information was insufficient, and that the general manager should not have relied on it. Therefore, the orders were found to be unreasonable, and the matter was sent back to the Park Board to make a new decision.

The judge who presided over the *Bamberger* decision stated that three things must be true for the general manager’s conclusion to be reasonable:

1. There must be enough indoor spaces for the number of homeless persons who were sheltering in CRAB Park,
2. The indoor spaces must be available to those sheltering, and
3. The indoor spaced must be suitable to those sheltering in CRAB Park.

The court determined that these requirements were not met. In particular, the general manager had no specific information about what indoor sheltering was available when the orders were made. The court also ruled that BC Housing’s advice to the general manager did not give enough detail to allow her to reasonably determine that there was an adequate number of suitable shelter spots.⁶²

Charter Analysis

The Charter was important to the judge’s decision. The court ruled that in order to be reasonable, the general manager must consider the constitutional rights of encampment residents.⁶³ When making an order that engages and has potentially significant and harsh consequences for the constitutional rights to life, liberty, and security of a highly vulnerable population, reasonableness requires “more than an unquestioned reliance” on the statements provided by BC Housing.⁶⁴ Given that the constitutional rights of the vulnerable residents were in the hands of the general manager, reasonableness in those circumstances required her to do more than simply accept the statements of BC Housing before making the orders.⁶⁵ The judge acknowledged the Charter when finding that the procedures needed to be better. By simply issuing the order, encampment residents weren’t given proper notice or a chance to explain the impact of the decision. Justice Kirchner stated:

At stake for them is nothing less than their s. 7 *Charter* right to life, liberty, and security of the person. This elevates their right to be heard above ordinary users of the Park, or even particular users of the Park, such as (to take counsel’s example) a soccer team whose game is cancelled when a field is closed for maintenance.⁶⁶

The court rejected the Park Board’s argument that even if there were no suitable indoor shelter spaces, the Charter rights of encampment residents were not unreasonably impacted because

⁶¹ *Bamberger v. Vancouver (Board of Parks and Recreation)*, 2022 BCSC 49 at para 76.

⁶² *Bamberger v. Vancouver (Board of Parks and Recreation)*, 2022 BCSC 49 at para 151.

⁶³ *Bamberger v. Vancouver (Board of Parks and Recreation)*, 2022 BCSC 49 at para 97.

⁶⁴ *Bamberger v. Vancouver (Board of Parks and Recreation)*, 2022 BCSC 49 at para 97.

⁶⁵ *Bamberger v. Vancouver (Board of Parks and Recreation)*, 2022 BCSC 49 at para 123.

⁶⁶ *Bamberger v. Vancouver (Board of Parks and Recreation)*, 2022 BCSC 49 at para 63.

they could shelter at any number of other parks in the city, and that people experiencing homelessness do not have a right to shelter in a specific park.⁶⁷

The Court disagreed. They noted that if CRAB Park were closed, this would be the third Downtown Eastside Park to close, leaving only two other parks open in the area. Encampment residents showed that being near the Downtown Eastside is essential because of access to services and amenities.⁶⁸ The Court noted it is well known that the Downtown Eastside has many services directed at the vulnerable population residing in that area. The Park Board “simply assuming” that the CRAB Park residents can find somewhere else to go does not give their section 7 rights the necessary priority and ensure minimal impairment of those rights. As a result, the Court stated that the general manager must ensure that removing the CRAB Park encampment would not “adversely affect” the ability of encampment residents to get the services they need to survive. The court concluded that there was no evidence that the general manager turned her mind to these important issues.

The *Bamberger* decision is important for encampment litigation in general and CRAB Park residents in particular. First, it holds staff members who issue decampment orders accountable. They cannot simply say that they are following the bylaw. Instead, they must ensure that they are using appropriate information on shelter spaces, including that these spaces meet the standards of what are acceptable.⁶⁹ Second, the decision acknowledges the particular needs of encampment residents in the Downtown Eastside, including the importance of being able to access local services. Third, the decision calls into question the balancing of rights under the Charter by acknowledging that encampment residents are vulnerable. However, these decisions do not solve the problem of homelessness, nor do they ensure that CRAB Park residents will be protected from removal orders in the future. There remain significant human rights issues in relation to CRAB Park.

Human Rights and the CRAB Park Case Study

Given the lack of adequate housing for Vancouver’s most marginalized residents, who are repeatedly and systematically oppressed, it is clear that encampments will continue in CRAB Park and other nearby parks throughout the Downtown Eastside. In response, advocacy efforts and litigation will continue. Encampments are the result of both absolute homelessness and the poor conditions of the temporary shelters and low-income housing provided to unhoused people.⁷⁰ The legal approach to encampments at CRAB Park is pushing the boundaries of encampment evictions and calling attention to the lack of adequate housing and the inadequacy of temporary shelters for people experiencing homelessness. This is an evolving area of law and policy which directly impacts the life and liberty of unhoused people, but even so, the threats of eviction and displacement continue on a daily basis.

⁶⁷ *Bamberger v. Vancouver (Board of Parks and Recreation)*, 2022 BCSC 49 at para 139.

⁶⁸ *Bamberger v. Vancouver (Board of Parks and Recreation)*, 2022 BCSC 49 at paras 141-143.

⁶⁹ [Cross link to the Prince George case study]

⁷⁰ See esp Boyd, J., Cunningham, D., Anderson, S., & Kerr, T. “Supportive housing and surveillance” (2016) 34 *International Journal of Drug Policy* 72-79; Fast, D., & Cunningham, D., ““We Don’t Belong There”: New Geographies of Homelessness, Addiction, and Social Control in Vancouver’s Inner City” (2018) 30(2) *City & Society*, 237-262.

The situation in CRAB Park shows the lack of implementation of the *National Housing Strategy Act* and of the progressive realization of the right to housing on federal land.⁷¹ The legal cases brought over the last two years have not brought human rights issues into focus. The 2020 *Brett* decision was uninformed by a human rights analysis and by the NHS act. The decision is especially striking because the port lands were unused vacant industrial lands with few, if any, competing public uses. Even so, the human rights and corresponding federal obligations are rendered irrelevant because the lands were deemed to be operating in the “private” sphere. In the 2022 *Bamberger* decision, while federal ownership is acknowledged, CRAB Park is treated as municipal land without regard to the federal government’s obligations. Once again, the NHS act and the progressive realization of the right to housing are not acknowledged in the decision.

DECAMPMENT REPORT CARD

Based on National Protocol for Homeless Encampments in Canada

This tool is for tent city residents to grade the government’s decampment plan. Assign a grade to each question; then decide on the overall grade at the end. Bullet points are to assist you in grading, but you are welcome to consider other factors. A final “Report Card” will be issued to government actors after answers have been collected. For questions concerning this tool see the bottom of the back page.

Are the distinct rights of Indigenous peoples being respected?

A B C D E F

- Officials recognize Indigenous peoples’ right to create and organize shelter and housing in ways that incorporate their lived histories, cultures and experiences.
- Officials are genuinely working with Indigenous residents to find appropriate, culturally-safe, long-term housing, and do not force people into housing via eviction from encampment.
- Officials consult with Indigenous encampment residents to get informed consent before making any decisions, including eviction.
- Police are not present when officials engage with Indigenous encampment residents.
- Officials recognize that Indigenous peoples have high rates of homelessness and poverty.

Is there meaningful engagement with and leadership by encampment residents?

A B C D E F

- Officials engage in ongoing and meaningful engagement with residents that act as resident leaders.
- Encampment leaders are empowered to make decisions about actions that affect them, including through resident-led meetings and processes.

- Residents are given enough time to consider information provided by government and to give their direction.
- There is a clear resident-approved process to challenge decisions, propose alternatives, and articulated demands and priorities.
- Officials ensure resources are available to support full participation in decision-making, including Indigenous cultural supports, literacy supports, translation, mobility supports, PPE, food, and access to information.
- Residents are provided with independent legal advice, information concerning human rights, and the specific rights of Indigenous peoples.

Are there prohibitions of forced evictions of encampments?

A B C D E F

- Officials have declared an end to all forced evictions and ban harassment, intimidation, or threatening of people living outside, which includes ensuring police, fire services, bylaw officers, and other agents of the state only engage and respond using a trauma informed, culturally safe and harm-reduction approach.
- Officials supply access to safe drinking water hygiene sanitation, food, harm reduction supplies, waste management, electricity and heat.
- Government actors protect and respect belongings and privacy, including personal property and tents.

Figure 3: Decampment Report Card based on the National Protocol for Homeless Encampments in Canada

The *Bamberger* decision recognizes part of the right to housing because it acknowledges the lack of consultation with residents before the orders and the lack of opportunities to be heard.

⁷¹ *Supra* note 16, The National Right to Housing Network, “Right to Housing Legislation in Canada.”

Section 7 informed the conclusion that residents had a right to notice and an opportunity to be heard before being ordered to leave. However, the *Bamberger* decision only applies to CRAB Park, because only CRAB Park is overseen by the Park Board. It does not mean that encampment residents have long-term protection in CRAB Park, and *Bamberger* does not apply on other parts of the Port Authority lands.

This case could have been—and should be in the future—informed by the concept of meaningful engagement and the robust participation called for under the NHS act and the role of the Federal Housing Advocate.⁷² This is a missed opportunity to move the right to housing forward. While *Bamberger* is important, the judge does not outline the required consultation process, including adherence to Indigenous consultation requirements. The decision does not go as far as the human rights obligations enshrined in international law, as illustrated in the decampment report card in Figure 3, which is based on the principles and recommendations in Kaitlin Schwan and Leilani Farha’s *National Protocol for Homeless Encampments in Canada*.⁷³ When applied in nearby Strathcona Park, local officials received a D for the recognition of encampment residents as human rights holders.⁷⁴

There is an opportunity for the federal government to proactively acknowledge their human rights obligations in respect to federal lands, including CRAB Park and Port Authority lands. This would mean that basic and fundamental rights are protected on federal lands, regardless of who oversees the management of the lands, whether the Port Authority, a third-party lease holder, or the Park Board.

⁷² See *Grootboom and Others v Government of the Republic of South Africa and Others* – Constitutional Court Order (CCT38/00), 2000 ZACC 14 and Michèle Biss et al, “Progressive Realization of the Right to Adequate Housing: a Literature Review” (2022), online (pdf): <housingrights.ca/wp-content/uploads/NHC-Progressive-Realization-Paper_EN.pdf> at 7.

⁷³ Leilani Farha & Kaitlin Schwan, *National Protocol for Homeless Encampments in Canada: A Human Rights* (2020), <https://www.make-the-shift.org/wp-content/uploads/2020/04/A-National-Protocol-for-Homeless-Encampments-in-Canada.pdf>.

⁷⁴ See https://www.pivotlegal.org/strathcona_camp_human_rights_report_card.