

# KEEPING CURRENT

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## Restrictions on encampments on public land do not violate US Constitution (*City of Grants Pass, Oregon v. Johnson*)

By Stephen Thiele

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Worldwide, countries and cities are suffering an apparent affordable housing crisis. In Canada, our largest urban centres are experiencing the establishment of temporary and arguably permanent encampments in various locations, such as in city parks, underneath bridges and on sidewalks. Although, in general, municipal by-laws exists to prohibit the establishment of temporary or permanent encampments on public lands, some governments have done little to remove these encampments from city parks or elsewhere, thereby excluding others from enjoying these city spaces, which are intended to be used by everyone.

In the United States, the rights of municipalities to adopt laws restricting encampments on public property and imposing penalties for breach of these laws were found, in [\*City of Grants Pass, Oregon v. Johnson, No. 23-175, June 24, 2024\*](#), to not breach the Cruel and Unusual Punishments Clause of the Constitution of the United States of America, thereby paving the way for US cities to remove illegal encampments from their public lands without the threat of being enjoined from doing so.

At issue in this case was a by-law (known as an ordinance in the US) enacted by the City of Grants Pass which restricted encampments on public property. More specifically, the by-law prohibited “[c]amping” on “any sidewalk, street, alley, lane public right of way, park, bench, or any other publicly-owned property or under any bridge or viaduct.” A “campsite” was defined as “any place where bedding, sleeping bag, or other material used for bedding purposes, or any stove or fire is placed, established, or maintained for the purposes of maintaining a temporary place to live” and included sleeping in “any vehicle”. As well, the by-law prohibited camping in public parks, including the “[o]vernight parking” of any vehicle.

Violators of the by-law could be fined \$295, increasing to \$537.60 if unpaid, and once a person was cited twice for breaching the by-law within a one-year period, a violator could be barred from a park for 30 days. Violators who continued to camp in a park, after having received an exclusion order from doing so, committed criminal trespass and could be imprisoned for a maximum of 30 days.

Two individuals filed a putative class action lawsuit on behalf of the City's homeless population against the City on the grounds that the by-law breached the Eighth Amendment of the US Constitution, which prohibited Cruel and Unusual Punishments. The class action lawsuit was certified by a lower court, which also granted an injunction against the City from enforcing its by-law. Based on the previous decision in *Martin v. Boise*, 920 F.3d 584 (2019), the lower court ruled that everyone without shelter in the City was 'involuntarily homeless' and that the Eighth Amendment barred the enforcement of the City's by-law whenever the number of homeless individuals in a jurisdiction exceeded the number of "practically available" shelter beds.

The lower court's injunction was upheld by a divided panel of the Ninth Circuit court, and the City brought the matter to the United States Supreme Court for determination.

The evidence before the Court indicated that as the number of homeless individuals had grown in the United States, so too did the number of encampments. While some campers valued the freedom that encampment living provided, others valued encampments for their sense of community.

For some campers, encampments provided "dependable access to illegal drugs." City officials indicated that the encampment facilitated the distribution of heroine and fentanyl, and that the encampments forced adults and children, where the encampments existed, to navigate around used needles, human waste, and other hazards to make their way to school, the grocery or work.

The City and others in support of its proceeding argued that the overall threat of issuing injunctions against their by-laws inappropriately limited their ability to deal with homelessness

and encampments, and paralyzed commonsense and good faith efforts. Furthermore, they contended that rather than alleviating the homelessness crisis, the injunctions contributed to it based on the increasing numbers of unsheltered homelessness.

While the City focused on the penalty provisions, the campers argued that the by-law represented cruel and unusual punishment because they were being targeted based on their "status" rather than on whether they were committing an unlawful act. The campers relied on *Robinson v. California*, 370 U.S. 660 (1962), in which it had been determined that a statute providing that "[n]o person shall...be addicted to the use of narcotics" was unconstitutional and unenforceable on the grounds that it punished a person based on their status.

With respect to the Eighth Amendment, the majority of the Court explained that the US Constitution and its Amendments, imposed limits on what governments could declare to be criminal behaviour and how they could enforce criminal laws. The Cruel and Unusual Punishments Clause was one of these limits.

In the majority's view, this Clause had been adopted to ensure that the United States would never resort to punishments such as "disemboweling, quartering, public dissection and burning alive", which had been tolerated under 18<sup>th</sup> century English law. Those punishments were viewed as "cruel" because they were calculated to "superad[d]" "terror, pain, or disgrace", and were "unusual" because when the Eighth Amendment was adopted, they were no longer used.

The fines and other penalty provisions under the City's by-laws simply did not qualify as being "cruel" and "unusual" and therefore did not breach the Eighth Amendment.

While the minority of the Court found that the



by-law was unenforceable because the campers were being punished based on their status, the majority distinguished the *Robinson* decision, noting the City's by-law applied whether the person was homeless, a backpacker, a vacationer or a student who abandoned a dorm room to camp out in protest on a public space.

Based on *Powell v. Texas*, 392 U.S. 514 (1968), in which the US Supreme Court was required to determine whether the state could make it a crime to “get drunk or be found in a state of intoxication in any public place”, the majority accepted that the Eighth Amendment only prevented a State from enforcing laws that criminalized “a mere status”, but did nothing to curtail a State's power to convict someone of committing an act that society had an interest in preventing. A person could not rely on an “involuntary act” to be excused from “moral accountability” for an otherwise criminal act based on their “condition” or “status”.

The case presented many competing visions for dealing with homelessness, but overall, as a matter of public policy, the majority concluded that the Eighth Amendment did not grant federal judges the primary responsibility for assessing the homelessness crisis and devising responses to the crisis. The majority of the court concluded:

The Constitution's Eighth Amendment serves many important functions, but it does not authorize federal judges to wrest those rights and responsibilities from the American people and in their place dictate this Nation's homelessness policy.

In Canada, we have also seen cases dealing with encampments in public places. In some cases, the courts have permitted the encampments to be removed.

However, in [The Regional Municipality of](#)

[Waterloo v. Persons Unknown and to be Ascertained, 2023 ONSC 670 \(CanLII\)](#), the court found that campers living in an encampment in a public park could not be removed therefrom notwithstanding the Region's by-law which prohibited a homeless person from erecting shelters and living on public property because to do so would breach their rights under [section 7](#) of the [Canadian Charter of Rights and Freedoms](#).

[Section 7](#) of the [Charter](#) guarantees that 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. The court held the campers' section 7 rights were breached by the by-law.

The court also found that the Region's by-law was not saved under section 1 of the Charter and ruled that the Region's by-law was “inoperative, insofar, and only insofar, as it applie[d] to prevent the residents of the Encampment from living on and erecting temporary shelters without a permit on [public land] when the number of homeless persons exceed[ed] the number of available shelter beds in the Region.”

This decision was not appealed.

In light of the decision by the US Supreme Court in the *City of Grants Pass* and, more particularly, the Ontario decision in the [University of Toronto \(Governing Council\) v. Doe, 2024 ONSC 3755 \(CanLII\)](#), which determined that the Charter does not apply to an illegal trespass, it remains to be seen if Canadian cities will continue to follow *The Regional Municipality of Waterloo* or take steps to enforce their by-laws and remove encampments from our public parks.

In regard to public spaces, competing rights are at issue, and there is a divide among residents on how to deal with the blight created by these encampments in our precious public parks. Politically, the growing number of encampments