

Purchasing Privacy and *R v Picard*: Dwelling Places on Public Property

A N D R E A L E T T *

ABSTRACT

Canadian courts recognize elevated privacy rights with respect to dwelling houses. However, individuals experiencing homelessness who maintain a dwelling place in the form of a temporary structure on public property may not enjoy the same s. 8 *Charter* rights expected on private property. This paper asserts that temporary dwelling structures should carry the same privacy rights regardless of their location. This paper examines the relationship between property rights and public space, the effects of poverty in tandem with criminal law, the effects of *Victoria (City) v Adams* on Canadian law, and the shortcomings/alternatives to emergency shelter spaces.

When certain circumstances are present, this paper proposes the application of a “spectrum of legal rights,” where individuals have something more than mere acquiescence from the state to exist on public property. Considering competing interests involving the use of public property, this paper concludes that alternatives to injunctions/cyclical evictions are more effective as long-term solutions. An example of an effective alternative would be prioritizing affordable housing and low-barrier accommodations. In the meantime, until such issues are meaningfully addressed, equal dwelling house protections should apply to all individuals.

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I. INTRODUCTION

Section 8 of the *Canadian Charter of Rights and Freedoms* guarantees the right to be secure against unreasonable search and seizure.¹ With the advent of *Hunter v Southam*, courts have additionally interpreted s. 8 of the *Charter* to manifest in the form of an individual's "reasonable expectation of privacy."² In *R v Wong*, the Supreme Court of Canada ("SCC") established that a reasonable expectation of privacy can be determined by asking: "could the individual whose privacy was intruded legitimately claim that in the circumstances, the agents should not have been able to act as they did without prior judicial authorization?"³

When it comes to an individual's home, or "dwelling place," courts recognize an elevated right with respect to privacy. The SCC stated the following in *R v Tessling*:

The original notion of territorial privacy ("the house of everyone is to him as his castle and fortress" ... developed into a more nuanced hierarchy protecting privacy in the home, being the place where our most intimate and private activities are likely to take place.⁴

The SCC went on to state:

There is no place on earth where a person can have a greater expectation of privacy than within their "dwelling house" ... Such a hierarchy of places does not contradict the underlying principle that s 8 protects "people not places," but uses the notion of place as an analytical tool to evaluate the reasonableness of a person's expectation of privacy.⁵

In *R v Picard*, the British Columbia Provincial Court trial judge determined that a tent on a city sidewalk did not constitute a "dwelling house" largely because there was no legal right to erect a temporary structure on public property.⁶ In this case, the trial judge stated that the City

¹ *Canadian Charter of Rights and Freedoms*, s 8, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].

² *Hunter v Southam*, [1984] 2 SCR 145 at 159, 6 WWR 577 [*Hunter*].

³ *R v Wong*, [1990] 3 SCR 36 at 45, 60 CCC(3d) 460.

⁴ *R v Tessling*, 2004 SCC 67 at para 22 [*Tessling*].

⁵ *Ibid* [emphasis added].

⁶ *R v Picard*, 2018 BCPC 344 at para 24 [*Picard*].

“acquiesced” to Mr. Picard’s tent, despite a bylaw that prohibited such structures.⁷ This acquiescence did not translate to a legal right for Mr. Picard to place his tent on the sidewalk, and therefore precluded Mr. Picard’s temporary structure from meeting the definition of a “dwelling house.”⁸ Once the trial judge established that Mr. Picard’s tent was not a dwelling house, there was no need to obtain a warrant to search his tent and he could not claim the highest level of privacy protection with respect to and s. 8 of the *Charter* as set out in *Tessling*.⁹

The trial judge’s perspective surrounding legal rights, dwelling houses, and public property outlined in *Picard* is problematic. While this case holds little weight in Manitoba, it highlights some harmful perspectives that many Canadians hold regarding the harsh realities of homelessness. Privileged Canadians can easily disregard the challenges or factors that contribute to an individual dwelling on public property. Ultimately, a lack of understanding of homelessness has the potential to leave some of the most vulnerable members society with a markedly lower standard of s. 8 *Charter* rights regarding their most intimate and personal space. Until issues of homelessness are meaningfully addressed by all levels of government, temporary structures on public property should constitute “dwelling places” that afford the highest degree of privacy protections under s. 8 of the *Charter*.

II. REASONING

The following five points/factors illustrate why temporary structures—even on public property—should be considered dwelling places:

- i) individuals experiencing homelessness do not have private property to call their own. This means that they are excluded from private property and must rely on public property.¹⁰
- ii) bylaws that prohibit temporary shelters on public property (such as the bylaws referred to in *Picard*) can be used to easily undermine s. 8 privacy rights. Such bylaws allow courts to state that a structure is “illegally

⁷ *Ibid* at para 40.

⁸ *Ibid*.

⁹ *Tessling*, *supra* note 4 at 22.

¹⁰ J Waldron, “Homelessness and the Issue of Freedom” (1991) 39 *UCLA L Rev* 295 at 300 [“Waldron”].

placed,” without taking into account the lack of options for a “legally placed” temporary structure.

- iii) *Victoria (City) v Adams* and subsequent injunction cases demonstrate the need for shelter and community for individuals experiencing homelessness.¹¹ Injunctions preventing tent communities on public property may address certain public interest issues, however, they are not effective long-term solutions as they tend to simply relocate individuals experiencing homelessness.¹² This does not reduce homelessness in Canada, nor does it address its root causes.
- iv) emergency shelters are necessary but not the only solution to homelessness in Canada. Additionally, emergency shelters may present barriers with respect to accessibility. When considering the shortcomings and difficulties surrounding emergency shelters, individuals should be afforded the right to choose where to live, pursuant to *Godbout v Longueuil*.¹³
- v) if it is true that: (i) public property is meant for the public, including those who experience homelessness; (ii) injunctions relocate but do not effectively address homelessness; (iii) it is unjust to criminalize circumstances of poverty; and (iv) individuals should have the right to choose where they live, then individuals should have something more than mere acquiescence from the state to shelter themselves on public property. A spectrum of rights between acquiescence and a true legal right should be considered.

The following additional points are important to consider when advocating for the privacy rights of individuals experiencing homelessness in Canada:

- i) the need for balance when addressing competing interests; and
- ii) the fact that there is currently no “right to housing” in Canada with respect to the *Charter*.¹⁴

III. BACKGROUND

A. Homelessness in Canada

The *State of Homelessness in Canada 2016* reported that at least 235,000 Canadians experience homelessness in a given year, and approximately

¹¹ *Victoria (City) v Adams*, 2008 BCSC 1363, (2008), 299 DLR (4th) 193 [Adams].

¹² See *Bamberger v Vancouver (Board of Parks and Recreation)*, 2022 BCSC 4 at para 185 [Bamberger].

¹³ *Godbout v Longueuil*, [1997] 3 SCR 844, 152 DLR (4th) 577 [Godbout].

¹⁴ See *Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852 [Tanudjaja v Canada].

35,000 individuals experience homelessness on any given night.¹⁵ In some areas, the number of individuals experiencing homelessness is greater than the number of beds available in the surrounding community shelters, leaving many individuals no choice but to sleep in public spaces.¹⁶ As a result, it is not uncommon for tent communities to emerge as a means for individuals experiencing homelessness to protect themselves from the elements, and provide a support system and sense of community.¹⁷

Even when shelter beds are available, there are reasons folks may choose to not make use of shelter facilities. Some individuals experiencing homelessness have expressed that their possessions (which are few to begin with) are less likely to go missing in a tent community than a homeless shelter.¹⁸ Additionally, tent communities provide a space for individuals to be present during the day, as a place to live and carry out other activities, rather than simply a place to sleep at night.

B. The *Picard* Case

The SCC held in *Hunter* that warrantless searches are presumptively unreasonable, though this presumption may be rebutted.¹⁹ The importance of a warrant when searching a home, in particular, was explained in *R v Evans*:

The sanctity of the home has constituted a bulwark against the intrusion of the state for hundreds of years ... attempts by the police to enforce the law at people's dwellings frequently leads to confrontations that can have far more serious consequences than the evil sought to be dealt with ... This underlines the need of proceeding by warrant whenever possible as the law requires.²⁰

R v Collins states, in order to rebut the presumption, the Crown must establish the following: (1) the search was authorized by law; (2) the law authorizing the search was reasonable; and (3) the search was carried out

¹⁵ Stephen Gaetz et al, "How many people are homeless in Canada?" (accessed 10 April 2022) online: *Homeless Hub* <www.homelesshub.ca/about-homelessness/homelessness-101/how-many-people-are-homeless-canada> [perma.cc/N6QS-JWPZ].

¹⁶ See *Adams*, *supra* note 11 at para 191.

¹⁷ See *Vancouver (City) v Wallstam*, 2017 BCSC 937 at para 60.

¹⁸ See *Vancouver Fraser Port Authority v Brett*, 2020 BCSC 876 at para 24 [*Vancouver Fraser Port Authority*].

¹⁹ *Hunter*, *supra* note 2 at 161.

²⁰ *R v Evans*, [1996] 1 SCR 8 at para 3, 131 DLR (4th) 654.

reasonably.²¹ An example of a search authorized by law can be found in the *Controlled Drug and Substances Act*, which authorizes the warrantless searches of a place where “conditions for obtaining a warrant exist but by reason of exigent circumstances would be impractical.”²²

Mr. Picard initially lived in his tent with his partner in Oppenheimer Park in Vancouver, and relocated to Alexander Street in an area across the street from three emergency shelters.²³ Mr. Picard stated he did not wish to make use of the shelters in the city as they did not accommodate couples and he wanted to remain with his partner.²⁴ Police had placed Mr. Picard’s tent under surveillance and had reason to believe that Mr. Picard was engaging in illegal drug trafficking.²⁵ Both Mr. Picard and his partner were arrested, illegal drugs were found in Mr. Picard’s possession during his personal search, and the tent was subsequently searched without a warrant.²⁶ Mr. Picard asserted that any evidence from the tent should be excluded as it infringed his s. 8 *Charter* rights.²⁷

The trial judge considered the principle set out in *R v Feeney*, SCC stating that searches of a home, even when incident to an arrest, are generally prohibited, subject to “exceptional circumstances.”²⁸ The recent SCC decision *R v Stairs* has since called for the application of a stricter test, stating that ... the common law sets too low a bar for searches incident to arrest inside a home. Privacy demands more. When officers seek to search a home for safety purposes—as they did here—the appropriate standard is a reasonable suspicion of imminent threat to police or public safety.²⁹

Had Mr. Picard’s tent constituted a “home,” the Crown would have applied the relevant test at the time, and would have needed to demonstrate exceptional circumstances to conduct the warrantless search.³⁰ Based on the evidence given, Mr. Picard’s tent met the definition of a dwelling house: Mr. Picard had lived in the tent for two years, considered it his home, kept

²¹ *R v Collins*, [1987] 1 SCR 265 at 278, 38 DLR (4th) 508 [*Collins*].

²² *Controlled Drugs and Substances Act*, SC 1996, c 19, s 11(7) last amended 2019-09-19.

²³ *Picard*, *supra* note 6 at para 8.

²⁴ *Ibid* at para 9.

²⁵ *Ibid* at para 3.

²⁶ *Ibid* at para 3.

²⁷ *Ibid* at paras 4-5.

²⁸ *Ibid* at para 24.

²⁹ *R v Stairs*, 2022 SCC 11 at para 107.

³⁰ *Picard*, *supra* note 6 at para 24.

his belongings in the tent, and possessed control of the tent.³¹ However, Mr. Picard had no legal right to erect his tent on the City sidewalk, as a city bylaw prohibited temporary structures on city property.³²

C. Conclusion

The trial judge determined that the city “acquiesced” to Mr. Picard’s tent, but this did not amount to a legal right for him to place his tent on the sidewalk.³³ This is troubling because it demonstrates an attitude where the presence of the individual experiencing homelessness is seen as a nuisance and their efforts to stay sheltered are seen as a disruption to society. Sheltering oneself is perfectly legal on private property, but what happens to the individual who cannot afford private property? Their existence is seen as non-compliant with the rules of society, even when their circumstances may be beyond their control. *Picard* illustrates how individuals experiencing homelessness have a diminished expectation of privacy regarding their dwelling spaces in comparison to Canadians who are able to afford private property.

D. Discussion

Many Canadians face homelessness, whether chronic or temporary. According to the Canadian Observatory on Homelessness, there are three main factors that contribute to homelessness:

- (1) structural factors such as economic and societal issues. This can include lack of income, or lack of access to affordable housing and health supports;
- (2) system failures such as inadequate discharge plans when individuals leave hospitals, correctional institutions, or mental health and addictions facilities; and
- (3) personal circumstances and relationship problems, which can manifest in the form of traumatic events, mental health or addiction challenges, or domestic violence.³⁴

³¹ *Ibid* at para 37.

³² *Ibid* at para 40.

³³ *Ibid*.

³⁴ See Stephen Gaetz et al, “Causes of Homelessness” (accessed 10 April 2022), online: *Homeless Hub* <www.homelesshub.ca/about-homelessness/homelessness-101/causes-homelessness> [perma.cc/LBL8-WJTX].

Picard does not take into account why individuals experience homelessness and can be interpreted as assigning a degree of blame to those experiencing it. While this case is not binding in Manitoba and does not carry significant weight, it is an example of discrimination from an authority figure tasked with making profoundly influential decisions for unhoused individuals. The attitude of the trial judge towards homelessness deprives Canadians experiencing homelessness of certain privacy rights by using bylaws with which one may not have the resources or option to comply. In other words: the highest level of privacy given to one's home is something that is bought, and those who cannot afford it are out of luck.

III. ANALYSIS

A. Private/Public Property and the Notion of Being “Comprehensively Unfree”

Many Canadians enjoy the reasonable protections that accompany the basic rules of private property: they have the power to exclude others, including members of the state. However, individuals experiencing homelessness do not enjoy such protections, as they do not occupy private property where they can make such exclusions. As a result, those who experience homelessness are excluded from all private property and therefore must rely on common property, shelters, and other public spaces.³⁵ In “Homelessness and the Issue of Freedom,” J. Waldron stated:

The streets and subways, they say, are for commuting from home to office. They are not for sleeping: sleeping is something one does at home. The parks are for recreations like walking and informal ball-games, things for which one's yard is a little too confined. Parks are not for cooking or urinating: again, these are things one does at home ... This complementarity works fine for those who have the benefit of both sorts of places. However, it is disastrous for those who must live their whole lives on common land.³⁶

When an individual who has no private property, and is subsequently excluded from public property, they are effectively excluded everywhere. By not allowing individuals experiencing homelessness to perform basic life tasks such as sleeping, urinating, cooking, etc. in public spaces, society does

³⁵ See Waldron, *supra* note 10 at 300.

³⁶ *Ibid* at 301.

not allow those individuals to carry out basic life tasks in any place. Waldron explains the idea behind this reasoning, stating:

[I]f one is not free to be in a certain place, one is not free to do anything in that place. If I am not allowed to be in your garden (because you have forbidden me) then I am not allowed to eat my lunch, make a speech, or turn a somersault in your garden. Though I may be free to do these things somewhere else, I am not free to do them there. It follows, strikingly, that a person who is not free to be in any place is not free to do anything; such a person is comprehensively unfree.³⁷

In “Equity and Homelessness,” Andy Yu defined the term “homelessness” by examining the link between homelessness and “unfreedom.” He stated:

Homelessness consists in lacking legal rights to property ... Unlike homeowners, street homeless people, who lack legal rights to property, are radically unfree. Their use of property—which they do not own—opens them to liability for trespass, or else it is contingent on the owner’s authorization. They are everywhere subject to potential, if not actual, interference. Similarly, sheltered homeless people, who also lack legal rights to property, are unfree in that they are only at the shelter at the shelter’s pleasure. If they are subject to rules governing when they can be there and what they can do when they are there, where failure to comply warrants eviction, they are clearly unfree. But even if they happen to live in relative comfort and no rules happen to be in place, they are still unfree. They are subject to potential interference. Homeless people lack legal property rights to be where they are or anywhere else where they are not subject to another’s will.³⁸

This definition is helpful as it addresses an individual’s status with respect to property rights rather than their status with respect to shelter. Courts often consider capacity of emergency shelters when determining whether to impose an injunction.³⁹ This is a problematic approach because “the Court would presumably have been satisfied if everyone happened to have shelter, even if they lacked property rights of their own.”⁴⁰ Looking solely at emergency shelter capacity does not address fluctuation in numbers of homelessness, or reasons one might have to specifically avoid an emergency shelter.

With this in mind, it becomes imperative that those experiencing homelessness are given some space to carry out their basic, daily needs. If public space is the only space available to an individual, then society should

³⁷ *Ibid* at 302.

³⁸ Andy Yu, “Equity and Homelessness” (2020) 33 Can JL & Juris 245 at 246-247 [“Yu”].

³⁹ See e.g. *Nanaimo (City) v Courtoreille*, 2018 BCSC at para 34 [Courtoreille]; *Prince George (City) v Stewart*, 2021 BCSC 2089 at para 65 [Stewart].

⁴⁰ Yu, *supra* note 38 at 248.

not purport to exclude them from it, as it effectively excludes them from being anywhere.⁴¹ Asserting that individuals are “illegally” occupying the only space available to them effectively criminalizes them for simply engaging their basic human needs.

B. Problematic Bylaws that Aid in Criminalizing Homelessness

When individuals experiencing homelessness occupy public space with their dwelling places, they are monitored and regulated in ways different to those residing on private property.⁴² For example, an individual experiencing homelessness defecating in a public bush, or engaging in a consensual sexual act on public property, is subject to attract criminal liabilities.⁴³ In contrast, when an individual engages in these basic human activities in a private space, they are not subject legal scrutiny. In many instances, it is not the act itself that is objectionable, but rather the place in which it is done.⁴⁴ For many individuals experiencing homelessness, there is no “legal” place for them to carry out these activities, and they are, unfortunately, viewed as nuisances for their existence in a public space.

There is an inherent lack of privacy and autonomy assigned to those experiencing homelessness. When police officers can easily monitor a tent or tent encampment on public property, they are likely able to determine when illegal activities are taking place. As such, they should be able to provide reasons for obtaining a warrant when necessary. Using a bylaw that prohibits temporary structures to justify a warrantless search is grossly unfair because individuals experiencing homelessness can only exist on public property. Bylaws like the ones in *Picard* not only criminalize individuals for attempting to shelter themselves, they can justify privacy invasions which would be intolerable for many privileged Canadians residing on private property.

Warrants are essential for searches pertaining to dwelling places, and this principle should not be so easily dismissed based on poverty. To say that a lesser degree of privacy is attached to the dwelling places of those

⁴¹ See Waldron, *supra* note 10 at 300.

⁴² See Terry Skolnik, “How and Why Homeless People Are Regulated Differently” (2018) 43 *Queen’s L J* 297 at 322.

⁴³ *Ibid* at 306-07.

⁴⁴ *Ibid* at 306-07.

experiencing homelessness results in an inequality that affects those in the most vulnerable of circumstances.

C. The *Adams* Case

The legality and constitutional implications regarding temporary structures for shelter on public property have been a point of contention in Canadian law, with somewhat mixed results. In the *Adams* case, a bylaw prohibiting temporary structures was read down as unconstitutional. One key factor that persuaded the judge to permit the use of temporary structures between 9pm and 7am was the fact that the population of individuals in need of shelter outweighed the capacity limits offered by the surrounding shelters.⁴⁵ The *Adams* case redirected the narrative regarding the eviction of tent communities and temporary structures. Of note, *Adams* has been critiqued as having concern extended to “homeless bodies” in terms of warmth and security, but no further.⁴⁶ By placing a great deal of emphasis on shelter capacity, the Court demonstrated concern for physical protections, but did not take into account the trauma, personal dignity, or complex circumstances of the individuals involved where they may refrain from using shelter facilities.

There are a number of concerning issues with the *Adams* decision. First, *Adams* seeks to validate shelter from the elements for the purposes of sleeping at night, but does not address the need for protection from the elements during the day. There may be extreme winds, rains and snow during the day, and individuals should be allowed to protect themselves with temporary shelters from extreme conditions at any time. Second, there have been instances where individuals have mobility issues and experience a great amount of difficulty taking their tents and shelters down during the day.⁴⁷ The *Adams* decision does not take into account any of the scenarios. Finally, the validity of a constitutional challenge such as the one seen in *Adams* should not depend so heavily on the availability of shelter. On the *Adams* appeal, the Court stated: “The finding of unconstitutionality is expressly linked to the factual finding that the number of homeless people

⁴⁵ *Adams*, *supra* note 11 at para 191

⁴⁶ See Sarah Buhler, “Cardboard Boxes and Invisible Fences: Homelessness and Public Space in *City of Victoria v Adams*”, Case Comment, (2009) 27 Windsor YB Access to Just 209.

⁴⁷ *Vancouver Fraser Port Authority*, *supra* note 18 at para 20.

exceeds the number of shelter beds.”⁴⁸ This has been frequently cited in cases such as *Johnson v Victoria (City)* when justifying sufficient space in nearby shelters as a key factor when granting an injunction in relation to impugned tent communities.⁴⁹

Shelter space should not be a single determining factor, as there are many valid reasons that an individual may choose not to stay in an emergency shelter, discussed below in “Emergency Shelters and Godbout.” While the *Adams* case marked a step in a more conscious direction, there are still significant gaps in how Canadian law intersects with the harsh realities of homelessness.

1. Responses to Tent Communities After Adams

The British Columbia Court of Appeal stated that it was “yet to be determined” whether or not a prohibition on overhead protection would be constitutional if there were sufficient shelter beds.⁵⁰ This was consistent with the trial judge’s statement:

If there were sufficient spaces in shelters for the City’s homeless, and the homeless chose not to utilize them, the case would be different and more difficult. The court would then have to examine the reasons why homeless people chose not to use those shelters. If the shelters were truly unsafe, it might be that it would still be an infringement of s. 7 to require the homeless to attend at shelters or sleep outside without their own shelter. However, if the shelters were safe alternatives, it may not be a breach of s. 7 for the homeless to be required to make that choice.⁵¹

When sufficient shelter beds have been available, courts have used this reasoning in *Adams* to grant injunctions on tent communities.⁵² *Bamberger* diverged from this reasoning when the British Columbia Supreme Court judge chronicled the history of tent communities in Vancouver’s Downtown Eastside as follows:

- (1) an injunction was granted in Oppenheimer Park in 2014 as there was evidence of sufficient shelter beds available;
- (2) an injunction was granted in Oppenheimer Park in 2020 and the camp was dismantled again;

⁴⁸ *Victoria (City) v Adams*, 2009 BCCA 563 at para 74, 313 DLR (4th) 29 [*Adams Appeal*].

⁴⁹ *Johnston v Victoria (City)*, 2011 BCCA 400 at para 12 [*Johnston*].

⁵⁰ *Adams Appeal*, *supra* note 49 at para 74.

⁵¹ *Adams*, *supra* note 11 at para 191.

⁵² See e.g. *Courtoreille*; *Stewart*, *supra* note 39.

- (3) shortly after the Oppenheimer Park encampment was dismantled in 2020, another encampment formed on land belonging to Vancouver Port Authority where an injunction was then granted;
- (4) soon after the Vancouver Port Authority camp injunction was granted, a camp was established at Strathcona Park. The camp was dismantled in March 2021 under a ministerial order; and
- (5) immediately after the Strathcona Park was dismantled, the encampment in the case at bar was established at CRAB Park.⁵³

When looking at the trend and historical evidence, the Court inferred that “ministerial orders and court injunctions effectively clear out a camp from one location but have not been effective in preventing the re-establishment of camps in another location.”⁵⁴ In other words, uprooting one tent community, regardless of the availability of shelter beds, often led to a camp migration without addressing the issues of homelessness effectively. Displacement and relocation resulted in subsequent injunctions with no long-term solution.

D. Emergency Shelters and *Godbout*

The choice to determine where one wants to live should be protected. If individuals are choosing not to make use of shelter beds it is important to understand the possible reasons for this choice, and to re-evaluate how shelters can more effectively meet the needs of those who may seek to use them. Shelter space should not be the default solution when it comes to addressing homelessness, particularly when individuals have pressing fears and real concerns. While shelter beds are important, many individuals may choose not to make use of their services.

During the COVID-19 pandemic, individuals in Winnipeg utilized public bus shelters as temporary dwellings places as a means to protect themselves from the cold, where outreach workers visited and offered rides to emergency shelters.⁵⁵ Despite these visits and the availability of rides, some individuals preferred to sleep in the transit shelters in cold temperatures. Some couples stated that they wanted to remain together, and

⁵³ *Bamberger*, *supra* note 12 at paras 178-184.

⁵⁴ *Ibid* at para 185.

⁵⁵ See Sam Samson, “Winnipeggers sleeping in bus shacks may decline emergency shelters for good reasons: advocate” *CBC News* (11 January 2022) online: <www.cbc.ca/news/canada/manitoba/winnipeg-transit-shelters-homelessness-1.6310355> [perma.cc/B6ZM-8A6G] [“Samson”].

were afraid of being split up at a shelter.⁵⁶ Others chose to remain in the transit shelters fearing they would be exposed to COVID-19, or expressed concerns about violence in shelters.⁵⁷ There were others still who were dealing with mental health issues and needed more support than what could be offered in the shelters.⁵⁸ Restrictions on pets and belongings, or a detailed intake processes are also reasons that individuals choose not to make use of emergency shelters.⁵⁹

Choosing where to live is a deeply personal choice. When an individual chooses to find protection from the cold by living in a bus shelter as opposed to an emergency shelter space, that individual's concerns and reasons should be taken into consideration. In *Godbout*, the SCC stated:

To put it plainly, choosing where to live will be influenced in each individual case by the particular social and economic circumstances of the person making the choice and, even more significantly by his or her aspirations, concerns, values and priorities. Based on all these considerations, then, I conclude that choosing where to establish one's home falls within that narrow class of decisions deserving of constitutional protection.⁶⁰

The *Godbout* case differs in that it dealt with a choice of residence on private property, specifically what community an individual chose to make their residence. However, the Court in *Godbout* established that the right to choose where one lives is a personal right, protected under s 7 of the *Charter*.

Given the temperatures in Winnipeg in January 2022, a decision to live in a bus shelter or in a semi-protected public space is both deliberate and telling when it comes to some of the shortcomings in emergency shelters. Kris Clemens, Manager of Communications and Community Relations at End Homelessness Winnipeg, stated that “[a]lmost everyone impacted by homelessness wants a warm, private, comfortable and safe place to stay. Congregate emergency shelters cannot offer all of that.”⁶¹ If, and when, an

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ See Kayla Rosen, “The biggest barriers facing Winnipeg’s homeless population” *CTV News Winnipeg* (16 September 2020) online: <winnipeg.ctvnews.ca/the-biggest-barriers-facing-winnipeg-s-homeless-population-1.5106924> [perma.cc/J4RD-YWAG] ["Rosen"].

⁶⁰ *Godbout*, *supra* note 13 at para 68.

⁶¹ Samson, *supra* note 55.

individual chooses to reside on public property instead of a shelter, it is imperative that there are opportunities for them to express their reasons.

IV. LEGAL RIGHT VS. ACQUIESCENCE

The SCC stated in *R v Le* that “[p]eople rightly expect to be left alone by the state in their private spaces,”⁶² but this becomes complicated when one’s private space is not on private property. The court in *Picard* focused heavily on Mr. Picard not having any “legal right to reside on the property.”⁶³ The Court specifically noted that the City “acquiesced” to Mr. Picard’s tent, but this did not give him the legal right to place his tent on City property.⁶⁴ Notably, the Court stated that “[i]n the review of the cases where the courts found that a person’s residence should not be searched without a warrant save for exceptional circumstances, there was a legal right for the occupant to reside on the property upon which lies the residence.”

I would argue that an individual should be afforded something more than acquiescence when a temporary dwelling structure is erected. As discussed above in the *Adams* case, bylaws prohibiting temporary structures for shelter have been, in some circumstances, read down and deemed unconstitutional as they infringed on s. 7 *Charter* rights. Courts have been clear that this does not create a positive right but, given the lack of private property rights and accessibility barriers concerning emergency shelters, a flexible approach with consideration of circumstance should be applied.⁶⁵

I propose that there is not strictly either a “right to shelter” oneself or “mere acquiescence” from the state. These matters should be assessed on a scale, with “no right” at one end, “acquiescence” sitting just above “no right,” and “legal rights” at the other end. If certain circumstances are present, and an individual can establish that certain criteria are met, I would assert that an individual may have something more than mere acquiescence, despite not having a full-fledged “legal right.”

A. Proposed Conditions for “Something More”

If certain conditions are met, an individual should be granted something closer to a legal right than mere acquiescence from the state to

⁶² *R v Le*, 2019 SCC 34 at para 51 [*R v Le*].

⁶³ *Picard*, *supra* note 6at para 39.

⁶⁴ *Ibid* at 40.

⁶⁵ *Adams*, *supra* note 11at para 119.

erect their temporary dwelling structure. This would allot them the elevated privacy rights associated with a dwelling house. If an individual can demonstrate (a) that there is reasonable justification for them not to use available shelter space, and (b) that the temporary structure in question is their personal residence, then dwelling house protections should apply.

1. There is a Reasonable Justification for the Individual Not Using Shelter

Mr. Picard stated that he did not want to make use of the shelter, as it did not accommodate couples.⁶⁶ Others have stated that the shelters do not allow accommodations for their pets.⁶⁷ An individual may not want to abandon their pet as it provides companionship and protection. In some cases, fear of an abusive partner may prevent someone from seeking shelter in a place where they know that their partner may frequent. Such reasons should be taken into consideration, in accordance with *Adams*: “The court would then have to examine the reasons why homeless people chose not to use to use those shelters.”

2. The Individual Can Demonstrate that the Structure is their Personal Residence

In *R v Howe*, the Court found that a tent may constitute a dwelling house for the purposes of s 2 of the *Criminal Code*.⁶⁸ While *Picard* affirms that a tent may be considered a dwelling house, it takes the narrows the scope of a “residence” by giving significant weight to the placement of the tent on public property. This narrow reading based on location does not appear to align with statements made by the SCC, nor does it align with the definition in the *Criminal Code* examined in *Picard*.

The SCC stated in *R v Le*:

Living in a less affluent neighbourhood in no way detracts from the fact that a person’s residence regardless of its appearance or location, is a private and protected place. This is no novel insight and has long been understood as fundamental to the relationship between citizen and state. Over 250 years ago, William Pitt (the Elder), speaking in the House of Commons, described how “[t]he poorest man may in his bid defiance to all the forces of the crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter—the rain

⁶⁶ *Picard*, *supra* note 6at para 9.

⁶⁷ See *Johnston*, *supra* note 49at para 104.

⁶⁸ *R v Howe (No 2)*, 1983 NSJ no 398, 57 NSR (2d) 325 (NSCA) at para 11-12, 16; *Criminal Code*, RSC, 1985, c C-46 [*Criminal Code*].

may enter—but the King of England cannot enter!—all his force dares not cross the threshold of the ruined tenement.”⁶⁹

This quote is particularly important for two reasons: (1) it bestows a private protection onto the residence; and (2) the protection is given “regardless of its appearance or location.” This indicates that the location could be on public property. This could be interpreted to give individuals experiencing homelessness the highest level of privacy protection to their temporary structure, provided it is truly their residence. The phrase “regardless of its appearance or location” should have applied to Mr. Picard’s tent and, as such, his tent should have constituted a “home” for the purposes of elevated privacy rights. The judge stated that while Mr. Picard did have a reasonable expectation of privacy with respect to the tent, it was still not a “home.”⁷⁰ However, when one considers a tent their home, eats and sleeps in the tent, controls access to the tent, and owns the tent (as Mr. Picard did)⁷¹ it should, “regardless of its appearance or location,” be considered a home.

In addition, the definition of a “dwelling house” set out in the *Criminal Code* examined in *Picard* is as follows:

dwelling-house means the whole or any part of a building or structure that is kept or occupied as a permanent or temporary residence, and includes

(a) a building within the curtilage of a dwelling-house that is connected to it by a doorway or by a covered and enclosed passage-way, and

(b) a unit that is designed to be mobile and to be used as a permanent or temporary residence and that is being used as such a residence.⁷²

This definition makes no reference to location, or private as opposed to public property. For these reasons, as long as an individual can establish that a temporary structure is their residence, then the attached rights of a dwelling house should flow.

B. Additional Factors/Points to Consider

1. *Competing Interests*

There are often two opposing interests in cases involving temporary structures and tent communities:

⁶⁹ *R v Le*, *supra* note 62 at para 59.

⁷⁰ *Picard*, *supra* note 6at paras 41-42.

⁷¹ *Ibid* at para 37.

⁷² *Criminal Code*, *supra* note 68s 2.

- (1) the “public interest,” and
- (2) the interests of those individuals seeking shelter in public spaces.

Residents in communities have raised valid concerns surrounding the formation of tent communities. In *Vancouver Fraser Port Authority*, an injunction was granted against a tent encampment when numerous complaints were submitted, involving:

- (i) the continuous burning of open flame fires and smoke entering nearby apartments;
- (ii) the steep increases in garbage and needles in the area around the tent encampment;
- (iii) the health concerns as a result of urination and defecation in the area;
- (iv) the loud music; and
- (v) the residents nearby no longer feeling safe near the park.⁷³

This encampment was dismantled, however shortly after the encampment was abandoned, another encampment was established at Strathcona Park.⁷⁴ Given that injunctions are not effective long-term solution, balancing these competing interests may require the consideration of alternative solutions.

The Advocacy Centre for Tenants Ontario stated that prevention of homelessness is key, proposing an eviction diversion system similar to the diversion programs found in the criminal court systems.⁷⁵ A report from Winnipeg’s public service noted that there was a “critical need” for safe, affordable, culturally appropriate, low barrier housing in the city.⁷⁶ The report stated: “until this gap [in housing] is addressed, the current issues related to unsheltered homelessness and encampments will persist and potentially worsen.”⁷⁷

To meaningfully uphold the public interest, focus should be placed on effective housing, rather than injunction-based procedures. Rather than enacting bylaws that attach harmful stigmas to individuals, prioritizing programs that i) seek to ensure the prevention of homelessness; ii) promote

⁷³ *Vancouver Fraser Port Authority*, *supra* note 18at para 34

⁷⁴ See *Bamberger*, *supra* note 12at para 182-83.

⁷⁵ Advocacy Centre for Tenants Ontario, “Fact Sheet Homelessness in Canada and Ontario” (accessed 11 April 2022) online (pdf): *Advocacy Centre for Tenants Ontario* <www.acto.ca/production/wp-content/uploads/2017/07/Factsheet-4-Homelessness-in-Canada-and-Ontario2.pdf> [perma.cc/KLH7-K7ZE] [“Advocacy Centre”].

⁷⁶ Rosen, *supra* note 59.

⁷⁷ *Ibid.*

accessible, affordable housing options; and iii) offer community support to address trauma, addiction, and mental health concerns, are key. Until governments meaningfully address the reasons behind homelessness, the privacy rights attached to a dwelling house should apply to temporary dwelling structure on public property. This would ensure that a warrantless search of a temporary dwelling structure would need to be justified by exceptional circumstances.

2. *Right to Housing*

As it stands, there is no positive obligation for governments to provide housing. This was addressed when the Ontario Court of Appeal examined issues of government inaction, homelessness, and access to housing in relation to s. 7 *Charter* rights in *Tanudjaja v Canada*. In this case, the applicant did not challenge any specific legislation or policy, but “submitted that the social conditions created by the overall approach of the federal and provincial governments violate[d] their rights to adequate housing.”⁷⁸ The submissions stated that Canada had eroded access to affordable housing by cancelling funding for new housing construction, withdrawing from administration of affordable housing, phasing out funding programs for affordable housing projects, and failing to institute rent supplement programs as other countries have done.⁷⁹ They submitted that the province of Ontario diminished affordable housing access for similar budget cuts and failure to implement accessible programs and schemes.⁸⁰

The motion judge held that the government did not have a positive obligation to sustain life, liberty or security of the person under s 7 of the *Charter*, and therefore there was no deprivation.⁸¹ The majority in the court of appeal in *Tanudjaja* determined that it was not the Court’s place to rule on the matter, as the issues could not be resolved by application of law.⁸² As a result, the issues were deemed “unsuited for judicial review.”⁸³ The appeal was dismissed.

⁷⁸ *Tanudjaja v Canada*, *supra* note 14 at para 10.

⁷⁹ *Ibid* at para 11.

⁸⁰ *Ibid* at para 12.

⁸¹ *Ibid* at para 55.

⁸² *Ibid* at para 33.

⁸³ *Ibid* at para 33.

Notably, the trial judge left the door open to the possibility of a future positive right in special circumstances, as noted by the dissent.⁸⁴ The dissent made reference to the discussion in *Gosselin c Québec*, stating:

One day s. 7 may be interpreted to include positive obligations. To evoke Lord Sankey's celebrated phrase in *Edwards v Attorney-General for Canada*, [1930] A.C. 124 (P.C.), a p. 136, the *Canadian Charter* must be viewed as a "living tree capable of growth and expansion within its natural limits" [... now quoting *Blencoe*] The full impact of s 7 will remain difficult to foresee and assess for a long while yet. Our court should be alive to the need to safeguard a degree of flexibility in the interpretation and evolution of s. 7 of the *Charter*.⁸⁵

From a policy standpoint, investing in assistance and low-income housing can have cost-benefits over the course of time. According to the Advocacy Centre for Tenants Ontario, the average monthly cost for a shelter bed is almost ten times higher than the average monthly cost of social housing.⁸⁶ Additionally, individuals experiencing homelessness have higher rates of illness, resulting in costly hospital bills.⁸⁷ Facilitating affordable housing is an effective way to address issues of homelessness at a preventative stage, rather than at the reactionary stage.

V. CONCLUSION

The factors discussed above, which are notably not in the control of the individual, combine to create a matrix where homelessness is consequently criminalized, and makeshift shelters are seen as "illegal" uses of public space. Revision is needed. A society cannot disregard homelessness as a priority, and then purport to evict and criminalize individuals for carrying out basic human activities.

When dwelling place privacy rights are only enjoyed by those who can afford it, they are no longer rights, but rather privileges.

Movements such as "Built for Zero Canada" powered by the "Canadian Alliance to End Homelessness" have proven that a "housing first" approach is both attainable and effective. For example, Medicine Hat, Alberta

⁸⁴ *Ibid* at para 56.

⁸⁵ *Tanudjaja v Canada*, *supra* note 14 at para 55 quoting *Gosselin c Québec (Procureur general)*, 2002 SCC 84 at para 82; *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 188.

⁸⁶ Advocacy Centre, *supra* note 75.

⁸⁷ *Ibid*.

announced in June 2021 that they had become the first city in Canada to functionally end chronic homelessness.⁸⁸ This accomplishment meant that through a data-driven system, individuals who would otherwise be affected by homelessness were routinely housed, and that the community maintained three consecutive months where there were three or fewer individuals experiencing homelessness at any given time.⁸⁹

Cities like Medicine Hat demonstrate that when governments and communities prioritize housing and support, homelessness is adequately addressed in an effective manner. Hopefully, such milestones are the first of many. Until these larger issues are addressed, courts should be mindful to equally grant rights to all individuals in Canada, regardless of their circumstances.

⁸⁸ Kaitlyn Ranney, “Medicine Hat Becomes first city in Canada to end Chronic Homelessness” (12 July 2021) online: *Community Solutions* <community.solutions/case-studies/medicine-hat-becomes-first-city-in-canada-to-end-chronic-homelessness/> [perma.cc/W7JG-UXLE].

⁸⁹ *Ibid.*