IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *B.C./Yukon Association of Drug War Survivors v. Abbotsford (City),* 2014 BCSC 1817

Date: 20140929
Docket: S159480
Registry: New Westminster

Between:

British Columbia/Yukon Association of Drug War Survivors

Plaintiff

And

City of Abbotsford

Defendant

Corrected Judgment: The text of the judgment was corrected at page one where a change was made on 1 October 2014;

Before: The Honourable Chief Justice Hinkson

Reasons for Judgment

Counsel for the Plaintiff, B.C./Yukon Association of Drug War Survivors:	D. Wotherspoon, K. Nakanishi, D. J. Larkin and J. Johnson
Counsel for the Defendant/Applicant:	J. Yardley, A. D. Price
Counsel for the Abbotsford Police Department	D. G. Butcher, Q.C., A. D. Srivastava
Counsel for British Columbia (Attorney General)	S. E. Lacusta
Place and Date of Hearing:	Vancouver, B.C. July 4, 9, and 14, 2014
Place and Date of Judgment:	New Westminster, B.C. September 29, 2014

Introduction

[1] The plaintiff, who I will refer to as DWS, is a society incorporated under the *Society Act*, R.S.B.C. 1996, c. 433. Many of its over 700 members are drug users or former drug users. Many of its members have no fixed address, nor any predictable safe residence to return to on a daily basis. A number live on the streets or in other places not generally intended for human habitation including public spaces in the City of Abbotsford.

[2] DWS advocates for the rights of the homeless, asserting rights to housing in Abbotsford and elsewhere and for related support services.

[3] The defendant is a local government constituted under the *Community Charter*, S.B.C. 2003, c. 26 and the *Local Government Act*, R.S.B.C. 1996, c. 323. It has an address at 32315 South Fraser Way, Abbotsford, British Columbia. I will refer to it hereafter simply as the City.

[4] The City contends that the plaintiff has no standing to pursue this action and has applied to have the plaintiff's action dismissed or portions of its amended notice of civil claim struck on various grounds.

Background

[5] The City has had, and continues to have a population of persons without a fixed address. The City admits that there is a homeless population in Abbotsford. In an effort to manage this population, the City relies upon three of its Bylaws; Bylaw No. 160-96, *Consolidated Parks Bylaw* (12 February 1996); Bylaw No. 1536-2006, *Consolidated Street and Traffic Bylaw* (10 July 2006); and Bylaw No. 1256-2003, *Consolidated Good Neighbour Bylaw* (25 August 2003) (collectively "the Impugned Bylaws").

[6] In October of 2013, approximately 25 of the City's homeless population erected a camp in a City park known as Jubilee Park. The park is a location where local service providers and religious groups regularly serve meals and provide health

care and other services to low-income and homeless persons including members of the plaintiff society. The camp consisted of tents, tarpaulins, boxes, blankets, or other improvised structures.

[7] The plaintiff alleges in para. 19 of Part 1 of its amended notice of civil claim that, relying upon the Impugned Bylaws, the City employed tactics described by the plaintiff as "displacement tactics" by:

> (a) issuing bylaw enforcement notices on Abbotsford's Homeless requiring them to vacate the public spaces ("Eviction Notices");
>
> (b) enforcing Eviction Notices by way of court ordered injunctions, which injunctions include enforcement provisions pursuant to the *Criminal Code,* R.S.C., 1985, c. C-46;
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> (c) ordering Abbotsford's Homeless to move and/or disperse from various public spaces verbally and without the issuance of Eviction Notices;
>
> (d) selective policing practices, often referred to as proactive policing, in areas known to be frequented by Abbotsford's Homeless;
>
> (e) spraying bear spray by members of the APD into the tents and onto the belongings of some of Abbotsford's Homeless, destroying their Survival Shelters, clothing, hygiene items, food and other personal property;
>
> (f) slashing tents and belongings of some of Abbotsford's Homeless by members of the APD, destroying their Survival Shelters and personal property;
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> (g) spreading chicken manure on a longstanding homeless camp located on Gladys Avenue by Abbotsford employees;
>
> (h) otherwise destroying or disposing of the personal property of Abbotsford's Homeless;
>
> (i) failing to develop needed housing for people who are homeless or at-risk of homelessness.

[8] On October 22, 2013, two homeless Abbotsford persons filed Notices of Claim against the City in the Abbotsford Small Claims Registry of the Provincial Court of British Columbia seeking damages for the alleged destruction of their possessions following the issuance of the injunction order.

[9] On November 21, 2013, the plaintiff and six of the City's homeless persons filed a complaint against the City with the B.C. Human Rights Tribunal alleging what

might loosely be described as discriminatory action against the homeless by the City.

[10] On November 28, 2013, the City brought an action against "Barry Shantz, John Doe, Jane Doe and other persons unknown erecting, constructing, building or occupying tents, shelters or other constructions on the lands known as Jubilee Park, Abbotsford, British Columbia" (the "City's Action"). The City's Action sought injunctive relief in relation to alleged breaches of the *Consolidated Parks Bylaw* and *Trespass Act,* R.S.B.C. 1996, c. 462 related to the erection of structures, the lighting of fires, and the continued occupation of Jubilee Park in Abbotsford.

[11] The defendants' response to the City's action raised challenges to sections of the Impugned Bylaws pursuant to sections 2, 7, and 15 of the *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (U.K.),* 1982, c. 11 [the *Charter*], mirroring those raised by the plaintiff in the amended notice of civil claim in this action.

[12] On December 13 and 20, 2013, the City obtained an interlocutory injunction requiring those members of Abbotsford's homeless at Jubilee Park to vacate the camp, and authorizing, among other things, the City to tear down physical structures and to arrest those believed, upon reasonable grounds, to be interfering with the injunction order.

[13] The relief obtained by the City also included a term that notice of the Order could be given by posting a copy of it on the structures and in and around Jubilee Park. It further ordered that the defendants and all other persons having knowledge of the Order would be prohibited, restrained, and enjoined from interfering with or obstructing any officer, employee, agent, or other person removing any tents, shelters, constructions, or structures, including a large wooden structure, pursuant to the Order.

[14] On March 6, 2014, the plaintiff commenced these proceedings. The City contends that the action does not assert a legal right on behalf of DWS. It contends

that as no individual is named as a plaintiff, and there is no evidence from any individual that he or she wishes DWS to prosecute the action, the action cannot be maintained.

[15] Paragraph 27 of Part 1 of the plaintiff's amended notice of civil claim alleges that the following sections of the three Bylaws relied upon by the City are unconstitutional:

> (a) Sections 14 and 17 of the *Parks Bylaw*, which prohibit sleeping or being present in any park overnight and erecting any form of shelter from the elements;
>
> (b) Sections 10 and 13 of the *Parks Bylaw,* which prohibits gathering and meeting in any park or obstructing any other person from the free use and enjoyment of any park;
>
> (c) The definition of "park" in section 2 of the *Parks Bylaw,* which includes all public places under the jurisdiction of City Council;
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> (d) Subsection 2.7(d) of the *Good Neighbour Bylaw,* which prohibits erecting any form of shelter from the elements in any public place;
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> (e) Subsection 2.7(e) of the *Good Neighbour Bylaw,* which prohibits sleeping in a vehicle on any highway or other public place;
>
> (f) The definition of "Highway or Other Public Place" in Schedule A to the *Good Neighbour Bylaw,* which includes any place to which the public has, or is permitted to have access or is invited; and
>
> (a) Subsections 2.1(d), (h) and (j) of the *Street and Traffic Bylaw,* which prohibit creating any obstruction to the flow of Motor Vehicle, cycle or pedestrian traffic on a Highway, and prohibits any chattel or ware of any nature, or any object from being placed on a Highway.

[16] DWS contends that the rights of Abbotsford's Homeless to peacefully assemble and associate are fundamental freedoms guaranteed by sub-sections 2(c) and 2(d) of the *Charter.*

[17] DWS also contends that the rights of Abbotsford's Homeless to exist and obtain basic necessities of life engage their rights to life, liberty and security of the person guaranteed by section 7 of the *Charter* and that the impugned provisions of the Bylaws and the actions of Abbotsford are arbitrary, overbroad, grossly disproportionate, unjustified and not in accordance with principles of fundamental justice.

[18] DWS further contends that it is a principle of fundamental justice that laws must respect every person's right to exist and obtain the basic necessities of life, and that any law or bylaw that seeks to prohibit the existence of an individual or group or to criminalize the otherwise lawful endeavour of obtaining the basic necessities of life is not in accordance with fundamental justice.

[19] DWS also contends that the effect of the impugned provisions of the Bylaws and the actions of Abbotsford is to marginalize Abbotsford's Homeless and systematically discriminate against them on the grounds of mental and/or physical disability, race, national or ethnic origin, and/or colour, contrary to s. 15 of the *Charter*.

[20] Finally, DWS contends that the various infringements of which it complains cannot be justified pursuant to section 1 of the *Charter*.

[21] The relief sought by DWS in Part 2 of its amended notice of civil claim is:

> 1. The Plaintiff claims, on behalf of all of Abbotsford's Homeless:
>
> (a) A declaration pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the "*Charter*") that the rights of Abbotsford's Homeless to exist and obtain basic necessities of life, including:
>
> (i) warmth and adequate protection from the elements, including Survival Shelter;
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> (ii) rest and sleep;
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> (iii) community and family connection;
>
> (iv) effective access to safe living spaces;
>
> (v) freedom from physical, mental and psychological health risks and effects of exposure to the elements, sleep deprivation, chronic threatened or actual displacement and the isolation and vulnerability related to such displacement;
>
> are each aspects of life, liberty and security of the person guaranteed by s. 7 of the *Charter;*

(b) In addition and in the alternative, a declaration pursuant to s. 24(1) of the *Charter* that the effect of the Abbotsford's response to Abbotsford's Homeless, including the Impugned Provisions and the actions of Abbotsford, including the APD, in enforcing the bylaws and in engaging in the Displacement Tactics, constitutes discrimination under s. 15 of the *Charter* based on mental disability, physical disability, race, national origin, ethnic origin, colour and/or homelessness;

(c) In addition and in the alternative, a declaration pursuant to s. 24(1) of the *Charter* that the rights of Abbotsford's Homeless to peacefully assemble and associate, including in public spaces, are aspects of the freedom of association and assembly secured by sections 2(c) and 2(d) of the *Charter;*

(d) A declaration pursuant to s. 52 of the *Constitution Act 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the *"Constitution Act"),* that the Impugned Provisions are of no force or effect to the extent that they are applied to Abbotsford's Homeless as they violate sections 2, 7 and 15 of the *Charter;*

(e) In addition and in the alternative, a declaration pursuant to s. 24(1) of the *Charter* that the actions of Abbotsford, including the APD, in enforcing the bylaws and in engaging in the Displacement Tactics are unconstitutional as they breach sections 2, 7 and 15 of the *Charter;*

The City's Application

[22] In its application before me, the City seeks the following orders:

1. An order pursuant to the inherent jurisdiction of the Court, that the action be dismissed on the ground that the Plaintiff lacks standing to bring this action.

2. In the alternative, an order pursuant to the inherent jurisdiction of the Court that paragraph 19 of Part 1 of the Amended Notice of Civil Claim (the "NOCC"), all references in the NOCC to "Displacement Tactics", and the relief sought in paragraphs 1(a), 1(b), 1(c), and 1(e) of Part 1 of the NOCC be dismissed because the Plaintiff lacks standing, or in the alternative under Rule 9-5(1)(a) for disclosing no reasonable claim.

3. In the further alternative, an order that the relief sought in paragraphs 1(a) and 1(c) of Part 2 of the NOCC be dismissed on the ground that determination of that relief is not necessary in this action and that

such relief is not available under s. 24(1) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*").

4. In the alternative, an order that the action be dismissed pursuant to Rule 9-5(1)(a) on the basis that it discloses no reasonable claim.

5. In the alternative, an order that those parts of the NOCC that make allegations in respect of and seek relief in relation to the City's Parks Bylaw be dismissed pursuant to Rule 9-5(1)(d) as an abuse of process.

6. Further in the alternative, an order that paragraphs 19(i) and 23 of Part 1 of the NOCC be struck pursuant to Rule 9-5(1)(a) for disclosing no reasonable claim.

7. Further in the alternative, an order that the references to the Displacement Tactics in the NOCC and to "Abbotsford's Homeless" in the s. 24(1) relief sought be struck as embarrassing under Rule 9-5(1)(c) because they do not allege material facts.

8. Further in the alternative, an order that paragraphs 24-26 and 28 of Part 1 of the NOCC and Part 2 paragraphs 1(a) - (e) be struck pursuant to Rule 9-5(1)(a) for disclosing no reasonable claim by failing to plead material facts.

9. In the alternative, an order that the words "...the effect of the Abbotsford's response to Abbotsford Homeless, including..." in paragraph 1(b) of Part 2 of the NOCC be struck pursuant to Rule 9-5(1)(a) for disclosing no reasonable claim.

10. Further in the alternative, an order that paragraph 19(b) of Part 1 of the NOCC and related relief sought in paragraph 1 (b) and (e) of Part 2 of the NOCC is a collateral attack on otherwise conclusive orders of the court in other proceedings and should be struck as an abuse of process under Rule 9-5(1)(d).

11. Further in the alternative an order that that all references in the NOCC to the Abbotsford Police Department or APD be struck pursuant to Rule 9-5(1)(b) and/or Rule 9-5(1)(c).

[23] The allegations in paragraph 19 of the plaintiff's amended notice of civil claim are set out above. Paragraph 23 of Part 1 of the plaintiff's amended notice of civil claim states:

> On February 17, 2014, Abbotsford voted against the development of the Low-Barrier Housing with Mayor Bruce Banman casting the deciding vote against the Low-Barrier Housing, while at the same time acknowledging a great need for this type of housing in Abbotsford.

Discussion

1. Standing

[24] In order to bring this action, DWS bears the burden of establishing standing to raise the *Charter* issues it seeks to pursue: *Christian Labour Association of Canada and General Workers Union v. B.C. Transportation Financing Authority*, 2000 BCSC 727.

[25] There are, of course, two bases upon which such standing can be established; first, a direct or private interest, or second, a public interest.

[26] In *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2008 BCSC 1726, Mr. Justice Ehrcke considered the authorities relating to the issue of standing. At paras. 53 – 58, he wrote:

> [53] Until the mid-1970s it was generally held that an individual has no standing to challenge the constitutional validity of a statute unless he or she is specially affected or exceptionally prejudiced by it. This was known as the rule in *Smith v. Attorney General of Ontario*, [1924] S.C.R. 331. A typical formulation of the rule is found in *Mercer v. Attorney General of Canada* (1972) 24 D.L.R. (3d) 758 (Alta. S.C. App. Div):
>
> > The rule that one who seeks to question the validity of federal or provincial statutes must either be placed in jeopardy by its provisions or be affected by them in a manner different from the ordinary citizen, has its origin in *Smith v. A.-G. Ont*.
>
> [54] What we now speak of as public interest standing was introduced into Canadian law in a series of Supreme Court of Canada cases starting with *Thorson v. Canada (Attorney General)*, [1975] 1 S.C.R. 138. In that case, the Court exercised a discretion to grant Mr. Thorson standing as a taxpayer to seek a declaration that Canada's *Official Languages Act*, R.S.C. 1970, c. O-2 was unconstitutional, even though he could not show private interest standing under the rule in *Smith*.
>
> [55] Next, in *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265, a member of the public was granted standing to challenge Nova Scotia's *Theatres and Amusements Act*, R.S.N.S. 1967, c. 304 on the basis that it was *ultra vires* the provincial legislature and therefore improperly affected what he, and all other members of the public, could and could not see in the theatre. The Court exercised its discretion to grant Mr. McNeil standing, even though he was not a theatre owner and was therefore not directly subject to the regulatory effect of the Act.
>
> [56] Then, in *Canada (Minister of Justice) v. Borowski*, [1981] 2 S.C.R. 575, the Court granted standing to an anti-abortion activist seeking a

declaration under the *Canadian Bill of Rights* that sections of the *Criminal Code* permitting therapeutic abortion were invalid and inoperative. At p. 598, the Court set out three principles governing the discretion to grant public interest standing to a litigant seeking declaratory relief: the litigant must demonstrate that he is directly affected or has a genuine interest in the validity of the legislation, that there is a serious constitutional issue involved, and that there is no other reasonable and effective way to bring the issue before the court.

[57] A few years later, in *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, the Supreme Court extended the discretion to grant public interest standing to include cases involving a challenge to the exercise of administrative authority. Speaking for the Court, Le Dain J., at p. 631, reaffirmed the three criteria for granting public interest standing articulated in *Borowski*, and explained the judicial concerns underlying them:

> The traditional judicial concerns about the expansion of public interest standing may be summarized as follows: the concern about the allocation of scarce judicial resources and the need to screen out the mere busybody; the concern that in the determination of issues the courts should have the benefit of the contending points of view of those most directly affected by them; and the concern about the proper role of the courts and their constitutional relationship to the other branches of government. These concerns are addressed by the criteria for the exercise of the judicial discretion to recognize public interest standing to bring an action for a declaration that were laid down in *Thorson*, *McNeil* and *Borowski*.

[58] The principles for granting public interest standing were again reviewed in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236. Speaking for the Court, Cory J. remarked at p. 252 that "the principles for granting public standing set forth by this Court need not and should not be expanded" and then rearticulated the test at p. 253:

> It has been seen that when public interest standing is sought, consideration must be given to three aspects. First, is there a serious issue raised as to the invalidity of legislation in question? Second, has it been established that the plaintiff is directly affected by the legislation or if not does the plaintiff have a genuine interest in its validity? Third, is there another reasonable and effective way to bring the issue before the court?

a) Serious Issue to be Tried

[27] Dr. Bill MacEwan is a physician, having graduated from the University of British Columbia in or around 1982. He has taught at the UBC Faculty of Medicine since approximately 1986, and became a Clinical Assistant Professor with the UBC

Department of Psychiatry in or around 1998, a Clinical Associate Professor of that Department in or around 2003, and a full Clinical Professor of the same Department in or around 2013 when he became the Associate Head of the Department.

[28] Dr. MacEwan's practice has predominantly consisted of outreach in the Downtown East Side of Vancouver, providing psychiatric care to people with severe mental illness and substance abuse problems. He goes out to the community to find and treat patients where they are living, including in shelters, assisted living centres, single room occupancy ("SRO") buildings and on the street.

[29] Dr. MacEwan deposed in his affidavit of May 2, 2014 that:

> Homeless people in Canada suffer from disproportionately high rates of health problems when compared to the general population, including the following:
>
> (a) Psychiatric illness, especially serious illnesses such as anxiety disorder, depression and psychosis, the symptoms of which can include paranoid delusions, auditory hallucinations (hearing voices that are not produced by a sensory stimulus), and disorganized thoughts, speech and behaviour;
>
> (b) Serious addiction to drugs, including opioids, cocaine, crack cocaine, methamphetamine and alcohol;
>
> (c) Traumatic brain injuries ("TBI"); and
>
> (d) Past trauma, especially among Homeless youth.

[30] He opined that some people who are homeless and living in Abbotsford are suffering from serious medical and psychiatric illnesses, are unable to receive adequate health care in part because they are homeless, and, if intervention to their current circumstances is delayed by months or years, will on the whole suffer worsening medical and psychiatric conditions and ultimately increased rates of mortality.

[31] In *Downtown Eastside Sex Workers United Against Violence Society,* Ehrcke J. rejected the proposition that the first requirement for public interest standing, namely, that there is a serious issue to be tried, is equivalent to the question under Rule 19(24)(a) of whether the pleadings disclose a reasonable cause of action.

[32] He reasoned that while the two questions are obviously related, the question of whether there is a serious issue to be tried need not be determined by first ruling on the Rule 19(24)(a) application. He observed that in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, the Supreme Court of Canada was able to conclude that there was a serious issue as to the validity of the legislation without engaging in the detailed analysis that would have been necessary to reach a conclusion on all the points that had been raised about the adequacy of the pleadings.

[33] Mr. Justice Ehrcke found that many of the alleged defects complained of by the defendants before him, if found to exist, could no doubt be remedied by further amendments to the statement of claim, or through the delivery of particulars and that many of the defendant's arguments in respect of ss. 2(b), 2(d), and 15 of the *Charter* had more to do with the improbability of success of the plaintiffs' position than with actual defects in the pleadings.

[34] Mr. Justice Ehrcke concluded that the plaintiff's claim should not be struck out under Rule 19(24)(a) simply on the basis that it was unlikely to succeed. He ruled, however, that the plaintiff organization should not be granted either public or private interest standing to pursue their challenge. His decision was reversed by the British Columbia Court of Appeal, who granted public interest standing to both the society whose objects included improving conditions for female sex workers in the Downtown Eastside of Vancouver and to one of the former sex workers. The judgment of the British Columbia Court of Appeal is indexed at 2010 BCCA 439.

[35] Leave to appeal the decision of the British Columbia Court of Appeal was granted [2010] S.C.C.A. No 457 and Mr. Justice Cromwell, for the unanimous Supreme Court of Canada (indexed at 2012 SCC 45), commented at paras. 31 – 33:

> [31] The principle of legality refers to two ideas: that state action should conform to the Constitution and statutory authority and that there must be practical and effective ways to challenge the legality of state action. This principle was central to the development of public interest standing in Canada. For example, in the seminal case of *Thorson*, Laskin J. wrote that the "right of the citizenry to constitutional behaviour by Parliament" (p. 163)

> supports granting standing and that a question of constitutionality should not be "immunized from judicial review by denying standing to anyone to challenge the impugned statute" (p. 145). He concluded that "it would be strange and, indeed, alarming, if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication" (p. 145 (emphasis added)).
>
> [32] The legality principle was further discussed in *Finlay*. The Court noted the "repeated insistence in *Thorson* on the importance in a federal state that there be some access to the courts to challenge the constitutionality of legislation" (p. 627). To Le Dain J., this was "the dominant consideration of policy in *Thorson*" (*Finlay*, at p. 627). After reviewing the case law on public interest standing, the Court in *Finlay* extended the scope of discretionary public interest standing to challenges to the statutory authority for administrative action. This was done, in part because these types of challenges were supported by the concern to maintain respect for the "limits of statutory authority" (p. 631).
>
> [33] The importance of the principle of legality was reinforced in *Canadian Council of Churches*. The Court acknowledged both aspects of this principle: that no law should be immune from challenge and that unconstitutional laws should be struck down. To Cory J., the *Constitution Act, 1982* "entrench[ed] the fundamental right of the public to government in accordance with the law" (p. 250). The use of "discretion" in granting standing was "necessary to ensure that legislation conforms to the Constitution and the *Charter*" (p. 251). Cory J. noted that the passage of the *Charter* and the courts' new concomitant constitutional role called for a "generous and liberal" approach to standing (p. 250). He stressed that there should be no "mechanistic application of a technical requirement. Rather it must be remembered that the basic purpose for allowing public interest standing is to ensure that legislation is not immunized from challenge" (p. 256).

[36] In *Victoria (City) v. Adams*, 2009 BCCA 563 at paras. 68 – 69, our Court of Appeal commented upon the counterclaim by the defendants in an action brought by the City of Victoria against individuals who had erected tents in a park in that city:

> [68] The respondents were not asking the court to adjudicate on the wisdom of policy decisions of elected officials on how to best allocate public resources to address the problem of homelessness. The question before the court was whether the provisions of the Bylaws that prohibit the erection of temporary overhead shelter violate the respondents' rights under s. 7 of the *Charter*, in circumstances in which there are insufficient alternative shelter opportunities for the City's homeless.
>
> [69] There is no doubt this is a proper question for a court to address. We do not accede to this ground of appeal.

[37] At paras. 109 – 110 the Court concluded:

> [109] . . . In *Morgentaler*, Wilson J. held that the liberty interest is grounded in fundamental notions of human dignity, personal autonomy, and privacy (at 164-166). We agree with the trial judge that prohibiting the homeless from taking simple measures to protect themselves through the creation or utilization of rudimentary forms of overhead protection, in circumstances where there is no practicable shelter alternative, is a significant interference with their dignity and independence. The choice to shelter oneself in this context is properly included in the right to liberty under s. 7.
>
> [110] We therefore conclude that the trial judge did not err in finding an interference with life, liberty and security of the person. In light of this conclusion, we do not find it necessary to address the two additional liberty arguments raised by the BCCLA.

[38] The issues that DWS wishes to try in these proceedings are certainly no less serious than those in *Adams*, and I find that DWS has met the first criteria for public interest standing, having established that it has presented a serious issue to be tried.

b) Genuine Interest

[39] The second requirement a plaintiff must establish for public interest standing is that he or she or it is directly affected by the legislation or has a genuine interest in its validity. The City contends that none of the purposes of DWS relate to issues of homelessness.

[40] Ann Livingston is one of the founders of DWS. In her affidavit of June 19, 2014 she deposed that DWS holds regular member meetings in both Abbotsford and Surrey. She explained that DWS governs its meetings through three key principles: democracy, inclusion, and reverence. Its members are invited to bring their most pressing issues to the table, and the actions of DWS are determined by vote at member meetings. In her affidavit in these proceedings, Ms. Livingston swore that housing is one of DWS's provincial priorities.

[41] Section 2 of DWS's Constitution sets out the Society's purposes. Subsection 2(e) and (f) state:

> e) To establish an inclusive social justice network for people who use drugs that encourages, supports and welcomes drug users from

> across British Columbia and the Yukon and connects them with drug users across Canada and around the world.
>
> f) To develop networks and coalitions of informed and empowered people, both users and nonusers, which work to improve the health and social conditions of people who use illicit drugs

[42] Barry Shantz is one of the founders of the Abbotsford chapter of DWS. In his affidavit of December 3, 2103, sworn in the City's action, he deposed that DWS has worked with the City, the Fraser Health Authority, the Centre for Disease Control, and other local organizations to bring awareness to the complications around addictions and to raise self-esteem and self-confidence amongst the members of DWS. He further deposed in his affidavit that he has attended all of the Abbotsford Social Development Advisory Committee ("ASDAC") meetings since 2009 or 2010 as a Community Stakeholder. The Committee members include an Abbotsford School Board trustee and two City council members.

[43] In his affidavit, Mr. Shantz also deposed that:

> 14. ASDAC had a shelter working group. The group made recommendations to the City of Abbotsford. Attached as Exhibit C is a copy of minutes from the ASDAC meeting on April 11, 2012 including the Shelter Working Group recommendations, minutes from the Shelter Working Group's meeting and the DWS report on barriers and gaps in the shelter system. I understand that the City has not implemented any of their recommendations.
>
> 15. The above noted gaps and barriers report was prepared by a working group of community service providers, of which I was a part. The only shelter available in Abbotsford is through the Salvation Army so the working group of community service providers sent a delegate, Rod Santiago, to the Salvation Army to address the issues and concerns. Rod Santiago is the Executive Director of Community Services. On his first attempt, he came back with nothing. The group sent him back again and he came back with nothing again and it never got resolved.
>
> The Events Leading up to the Jubilee Park Camp
>
> 16. At the DWS bi-monthly meetings, on many occasions, the members brought forward their stories about the treatment they were receiving from the City by-laws and police department with, for example, tent slashing; pepper spraying; and destroying medicine, prescription eyeglasses, identification cards and other personal property through this process of pushing the members from one spot to another spot.

[44] It is clear from the evidence of Mr. Shantz that DWS has been permitted to participate in the City's discussions relating to social and health issues, including housing. I am satisfied that DWS is no mere busybody and that it has a genuine interest in the issues that it wishes to raise in these proceedings. DWS has thus met the second criteria for public interest standing.

c) Other Reasonable Means

[45] The third question to be answered before granting public interest standing is whether, if standing is denied, there exists another reasonable and effective way to bring the issue before the court. The City submits that DWS has not successfully answered this third question.

[46] In *Downtown Eastside Sex Workers United Against Violence Society* at paras. 71 – 72, Ehrcke J. commented that:

> [71] As Major J. noted in *Hy and Zel's Inc. v. Ontario (Attorney General); Paul Magder Furs Ltd. v. Ontario (Attorney General)*, [1993] 3 S.C.R. 675, at p. 692, it is this component that lies at the heart of the discretion to grant public interest standing:
>
> > The third criteria, that there be no other reasonable and effective way to bring the issue before the court, lies at the heart of the discretion to grant public interest standing. If there are other means to bring the matter before the court, scarce judicial resources may be put to better use. Yet the same test prevents the immunization of legislation from review as would have occurred in the *Thorson* and *Borowski* situations.
>
> [72] In *Canadian Council of Churches* at pp. 252-53, Cory J. said this about the rationale for the third component:
>
> > The increasing recognition of the importance of public rights in our society confirms the need to extend the right to standing from the private law tradition which limited party status to those who possessed a private interest. In addition some extension of standing beyond the traditional parties accords with the provisions of the *Constitution Act*, *1982*. However, I would stress that the recognition of the need to grant public interest standing in some circumstances does not amount to a blanket approval to grant standing to all who wish to litigate an issue. It is essential that a balance be struck between ensuring access to the courts and preserving judicial resources. It would be disastrous if the courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of

> marginal or redundant suits brought by a [*sic*] well-meaning organizations pursuing their own particular cases certain in the knowledge that their cause is all important. It would be detrimental, if not devastating, to our system of justice and unfair to private litigants.
>
> The whole purpose of granting status is to prevent the immunization of legislation or public acts from any challenge. The granting of public interest standing is not required when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant. The principles for granting public standing set forth by this Court need not and should not be expanded. The decision whether to grant status is a discretionary one with all that designation implies. Thus undeserving applications may be refused. Nonetheless, when exercising the discretion the applicable principles should be interpreted in a liberal and generous manner.
>
> [Underlining Added in original.]

Those comments were referred to with approval by Major J. in *Hy and Zel's Inc.* at p. 689.

[47] The City acknowledges that in *Downtown Eastside Sex Workers United Against Violence Society* at para. 51 Mr. Justice Cromwell writing for the Supreme Court of Canada, offered the following instruction on this issue:

> [51] It may be helpful to give some examples of the types of interrelated matters that courts may find useful to take into account when assessing the third discretionary factor. This list, of course, is not exhaustive but illustrative.
>
> - The court should consider the plaintiff's capacity to bring forward a claim. In doing so, it should examine amongst other things, the plaintiff's resources, expertise and whether the issue will be presented in a sufficiently concrete and well-developed factual setting.
> - The court should consider whether the case is of public interest in the sense that it transcends the interests of those most directly affected by the challenged law or action. Courts should take into account that one of the ideas which animates public interest litigation is that it may provide access to justice for disadvantaged persons in society whose legal rights are affected. Of course, this should not be equated with a licence to grant standing to whoever decides to set themselves up as the representative of the poor or marginalized.
> - The court should turn its mind to whether there are realistic alternative means which would favour a more efficient and effective use of judicial resources and would present a context more suitable for adversarial determination. Courts should take a practical and pragmatic approach. The existence of other potential plaintiffs, particularly those who would have standing as of right, is relevant, but the practical prospects of their bringing the matter to court at all or by

> equally or more reasonable and effective means should be considered in light of the practical realities, not theoretical possibilities. Where there are other actual plaintiffs in the sense that other proceedings in relation to the matter are under way, the court should assess from a practical perspective what, if anything, is to be gained by having parallel proceedings and whether the other proceedings will resolve the issues in an equally or more reasonable and effective manner. In doing so, the court should consider not only the particular legal issues or issues raised, but whether the plaintiff brings any particularly useful or distinctive perspective to the resolution of those issues. As, for example, in *McNeil*, even where there may be persons with a more direct interest in the issue, the plaintiff may have a distinctive and important interest different from them and this may support granting discretionary standing.
>
> - The potential impact of the proceedings on the rights of others who are equally or more directly affected should be taken into account. Indeed, courts should pay special attention where private and public interests may come into conflict. As was noted in *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, at p. 1093, the court should consider, for example, whether "the failure of a diffuse challenge could prejudice subsequent challenges to the impugned rules by parties with specific and factually established complaints". The converse is also true. If those with a more direct and personal stake in the matter have deliberately refrained from suing, this may argue against exercising discretion in favour of standing.
>
> [Emphasis added.]

i) Resources and Expertise

[48] The City argues that DWS has provided no evidence about its capacity and resources to pursue this litigation. While that is true, capacity is but one of the considerations mentioned by Cromwell J., and in this case, the plaintiff is represented by a large Vancouver law firm on what is apparently a *pro bono* retainer. I am confident that the firm has both the expertise and the resources to effectively advance the plaintiff's case.

ii) Public Interest

[49] The City also argues that there is no basis for concluding that the case transcends the interests of those affected. I reject this submission. One needs only to list a number of cases such as *Vancouver Parks Board v. Mickelson*, 2003 BCSC 1271, *Vancouver Board of Parks and Recreation v. Sterritt*, 2003 BCSC 1421,

Vancouver (City) v. Maurice, 2005 BCCA 37, *Provincial Capital Commission v. Johnston*, 2005 BCSC 1397, *Victoria (City) v. Adams*, 2008 BCSC 1363, varied on appeal, 2009 BCCA 563, *Johnston v. Victoria (City)*, 2010 BCSC 1707, upheld 2011 BCCA 400, *Vancouver (City) v. O'Flynn-Magee*, 2011 BCSC 1647, where homeless individuals have had resort to the Courts, to appreciate that the issues that DWS wishes to pursue have been litigated in part without benefit to other than specific homeless individuals or groups, and that a broader approach may be needed in order to avoid requiring other homeless groups. That is particularly so if they are as described by Dr. MacEwan and will thus face similar but ever recurring litigation against local governments respecting similar bylaws.

iii) Realistic Alternative Means and Potential Impact on the Rights of Others

[50] Justice Cromwell discussed the effect of other proceedings seeking the same or similar relief in *Downtown Eastside Sex Workers United Against Violence Society* at paras 67 and 71:

> [67] To begin, the importance of a purposive approach to standing makes clear that the existence of a parallel claim, either potential or actual, is not conclusive. Moreover, the existence of potential plaintiffs, while of course relevant, should be considered in light of practical realities. As I will explain, the practical realities of this case are such that it is very unlikely that persons charged under these provisions would bring a claim similar to the respondents'. Finally, the fact that some challenges have been advanced by accused persons in numerous prostitution-related criminal trials is not very telling either.
>
> …
>
> [71] The third concern identified by the chambers judge was that he could not understand how the vulnerability of the Society's constituency made it impossible for them to come forward as plaintiffs, given that they were prepared to testify as witnesses (para. 76). However, being a witness and a party are two very different things. In this case, the record shows that there were no sex workers in the Downtown Eastside neighbourhood of Vancouver willing to bring a comprehensive challenge forward. They feared loss of privacy and safety and increased violence by clients. Also, their spouses, friends, family members and/or members of their community may not know that they are or were involved in sex work or that they are or were drug users. They have children that they fear will be removed by child protection authorities. Finally, bringing such challenge, they fear, may limit their current or future education or employment opportunities (Affidavit of Jill Chettiar, September 26, 2008, at paras. 16-18 (A.R., vol. IV, at pp. 184-85)). As I see

> it, the willingness of many of these same persons to swear affidavits or to appear to testify does not undercut their evidence to the effect that they would not be willing or able to bring a challenge of this nature in their own names. There are also the practical aspects of running a major constitutional law suit. Counsel needs to be able to communicate with his or her clients and the clients must be able to provide timely and appropriate instructions. Many difficulties might arise in the context of individual challenges given the evidence about the circumstances of many of the individuals most directly affected by the challenged provisions.

[51] The evidence of Ms. Livingstone in her affidavit at paras. 31 – 32 is that:

> 31. However, due to their own personal circumstances, namely, being homeless and in situations where their state of health is tenuous, many of these DWS members have told me that they feel too vulnerable to be able to be named individually as plaintiffs. Many of them fear having their name become public, they do not want their family to know they are drug users or homeless or be publically shamed by others, they fear being targeted by authorities, do not have phones or internet access, are in and out of hospital and they fear taking on such a big responsibility to follow through.
>
> 32. Based on my years of experience, I believe that these members need to prioritize their own health at this time, and this may preclude being able to regularly attend at a lawyer's office or at court as an individual plaintiff in this litigation. They are relying on the DWS, which was formed to help support and represent the voices of its members, especially those members who are in circumstances where they are too marginalized to be able to represent themselves on their own.

[52] I reject the City's submission that DWS's action is unnecessary because some individuals who number amongst Abbotsford's homeless have taken proceedings in Small Claims Court respecting the Impugned Bylaws and the conduct of those for whom the City may be vicariously liable. The Small Claims matters are not a more efficient and effective use of judicial resources to address the issues that DWS proposes to litigate, nor are they a practical and pragmatic method of dealing with systemic issues facing Abbotsford's homeless. One need look no further than Dr. MacEwan's evidence to appreciate that many of those amongst Abbotsford's homeless lack the mental health status, the ability to focus on such a process, the resources, or the stamina to pursue the remedies sought by DWS in this action.

[53] More problematic from the plaintiff's point of view is the fact that the City commenced an action against Barry Shantz and other persons unknown erecting,

constructing, building or occupying tents, shelters or other constructions on the lands known as Jubilee Park, Abbotsford, British Columbia wherein Mr. Shantz has placed the City's bylaws and what DWS refers to as the City's displacement tactics in issue. Indeed, Mr. Shantz's response to the City's claim includes the following:

> 20. Abbotsford's bylaws, the actions of Abbotsford, including the APD, in enforcing the bylaws and in engaging in the Displacement Tactics, do not address the housing needs of Abbotsford's Homeless and serve to marginalize, displace and increase their vulnerability.
>
> 21. Abbotsford's bylaws and the actions of Abbotsford, including Displacement Tactics have a disproportionate and negative impact on Abbotsford's Homeless, particulars of which include:
>
> (a) preventing them from existing and obtaining and maintaining the necessities of life in public spaces;
>
> (b) impairing their ability to protect and maintain their own lives, safety, security and health, by preventing them from securing warmth and adequate protection from the elements, including erecting and maintaining Survival Shelters;
>
> (c) destabilizing their lives by making it more difficult for them to perform the basic necessities of life, including resting, sleeping and gaining income;
>
> (d) limiting their ability to access Abbotsford's emergency shelter beds and services;
>
> (e) displacing them from relatively safe public spaces to less safe spaces in Abbotsford and elsewhere;
>
> (f) isolating and preventing their ability to assemble and to live communally;
>
> (g) destroying their Survival Shelters and personal property, including irreplaceable personal items;
>
> (h) causing severe interference with their psychological integrity;
>
> (i) increasing their risk of being victimized by violent crime and property theft; and
>
> (j) humiliating and degrading them.
>
> 22. By systematically marginalizing and displacing Abbotsford's Homeless, limiting their access to Survival Shelter, destroying property used for shelter and survival and breaking up their community groups, Abbotsford has increased and continues to increase Abbotsford's Homeless' risk of morbidity, disability, psychological stress, substance abuse and victimisation by property theft and violent crime.

23. Mr. Shantz and the Defendants challenge the constitutional validity of the following portions of the City of Abbotsford Parks Bylaw, 1996 No. 160-96 (the "Parks Bylaw"):

    (a) Sections 14 and 17 of the Parks Bylaw, which prohibit sleeping or being present in any park over-night and erecting any form of shelter from the elements;

    (b) Section 10 of the Parks Bylaw which prohibits gathering and meeting in any park; and,

    (c) The definition of "park" in section 2 of the Parks Bylaw which includes all public places under the jurisdiction of City Council.

    to the extent that these provisions prevent homeless people from living and sleeping in public places, erecting shelter from the elements or assembling in any public place in Abbotsford.

    (Collectively, the "Impugned Provisions").

and,

Section 7

1. The rights of Abbotsford's Homeless to exist and obtain basic necessities of life engage their rights to life, liberty and security of the person guaranteed by section 7 of the Charter.

2. The Impugned Provisions and actions of Abbotsford, including the Displacement Tactics, are arbitrary, overbroad, grossly disproportionate, unjustified and not in accordance with principles of fundamental justice.

3. It is a principle of fundamental justice that laws must respect every person's right to exist and obtain the basic necessities of life. Any law or bylaw that seeks to prohibit the existence of an individual or group or to criminalize the otherwise lawful endeavour of obtaining the basic necessities of life is not in accordance with fundamental justice.

Section 15

4. The effect of the Impugned Provisions and actions of Abbotsford, including the Displacement Tactics is to marginalize Abbotsford's Homeless and systematically discriminate against them on the grounds of mental and/or physical disability, race, national or ethnic origin, and/or colour.

5. The Impugned Provisions and actions of Abbotsford, including the Displacement Tactics, disproportionately affect Aboriginal individuals among Abbotsford's Homeless because of the historical displacement of Aboriginal persons in Canada.

6. The discriminatory impacts of the Impugned Provisions and actions of Abbotsford, including the Displacement Tactics, also perpetuate and

> exacerbate longstanding, entrenched prejudice, stereotyping, and exclusion of homeless individuals as a group.
>
> 7. The effect of the Impugned Provisions and actions of Abbotsford, including the Displacement Tactics, is to perpetuate prejudice and stereotyping of homeless, disabled and/or Aboriginal people, which is a violation of Abbotsford's Homeless' right to the equal protection and equal benefit of the law without discrimination.
>
> Sub-sections 2(c) and (d)
>
> 8. The rights of Abbotsford's Homeless to peacefully assemble and associate are fundamental freedoms guaranteed by sub-sections 2(c) and 2(d) of the Charter.
>
> 9. As Abbotsford's Homeless generally do not have access to private spaces in which to assemble and associate, in order to exercise their sub-sections 2(d) and (e) rights they must assemble and associate in public spaces.
>
> 10. The Impugned Provisions and actions of Abbotsford, including the Displacement Tactics, by prohibiting any gathering or meeting without the express permission of Abbotsford City Council, violate Abbotsford's Homeless' rights to freedom of peaceful assembly and association secured by sub-sections 2(c) and 2(d) of the Charter.
>
> Section 1
>
> 11. The said infringements of sections 2, 7 and 15 cannot be justified pursuant to section 1 of the Charter, the burden of proof of which lies on the City.

[54] In *Fédération des parents francophones de Colombie- Britannique v. British Columbia (Attorney General),* 2012 BCCA 422 [*Fédération des parents francophones de Colombie- Britannique*] Mr. Justice Groberman, for the Court, found that a not-for-profit organization of some 43 member associations, each of which was associated with a single French-language school, preschool, or daycare program (the "Fédération") should be granted party status, and be added as a party to the litigation commenced by some 33 parents of francophone students. He reasoned that if the Fédération was not granted standing as a plaintiff, the efficiency of the process might well suffer. Far from conserving judicial resources, Groberman J.A. concluded that intervenor standing alone in such a situation would result in inefficiencies. He found that the inclusion of the Fédération as one of the jointly-represented plaintiffs in the case could be expected to conserve judicial resources and be conducive to a full airing of the issues.

[55] The City submits that its action is the proper vehicle within which to address the issues raised by the plaintiff in this action, and to the extent that declaratory relief is sought respecting the Impugned Bylaws, and the conduct of those for whom the City is vicariously liable, that relief can be sought by way of a counterclaim in the City's action.

[56] In my opinion, although the City's action could proceed without the direct participation of DWS, that Society has a genuine contribution to make to the examination of the situation of the homeless in the City, and will be able to make submissions that the defendants in the City's action are unlikely to be able to make.

[57] The *Adams* action was commenced by the City of Victoria, and the principles discussed by the Court were the respondents' response to that claim.

[58] Here, as DWS is not a named party in the City's action, and cannot file a counterclaim in that action, it has commenced these proceedings. Indeed, further consideration of the issues raised in the City's action and in these proceedings seems to have been within the contemplation of Mr. Justice Williams when he granted the City's injunction on December 20, 2013. In his oral reasons at paras. 51 – 54:

> [51] This decision has not been an easy one. My conclusion is, I am confident, in accordance with the applicable legal principles and authorities. However, the circumstances of the defendants are compelling. Many of these persons are truly troubled. They are a very marginalized faction of our society. Their hardships are legitimate and constitute a serious social concern. In my respectful view, those who might be inclined to see them as simply troublemakers and malcontents, people looking for a handout or a free ride, fail to understand that this is a societal problem, one that merits the sincere consideration of members of the public. The gravity of the matter seems especially acute given the time of year. It is the Christmas season, when the spirit of caring and the comfort of home and hearth is uppermost in many minds. The weather conditions are difficult. The situations of these persons seem particularly grim.
>
> [52] The evidence indicates that certain events have occurred in respect of these persons and their experiences in Abbotsford. I refer particularly to allegations that some of them have had chicken manure dumped upon their campsites, that bear spray has been dispersed on them, and that their tents have been slashed. The allegations suggest that agents of the state,

> municipal employees, have been at least in part responsible for such activities.
>
> [53] It is not my responsibility in the context of this application to adjudicate those allegations and I do not purport to do so. However, I will say this: conduct of that sort, if it were to have occurred, is simply and entirely unacceptable. It is deplorable and reprehensible. I cannot imagine that any fair-minded and decent person would think otherwise.
>
> [54] As matters stand the defendants' recourse is best pursued through the litigation process. That is an avenue that is open to them, and in my view if it is to proceed it should be done with dispatch. In aid of that, I would be prepared to recommend that steps be taken to ensure that it proceeds on an expedited basis and to provide for judicial supervision. If counsel believe that to be a worthwhile means of assistance, then the necessary arrangements can and will be made.

[59] In my view, the additional factors set out by the Supreme Court of Canada in *Downtown Eastside Sex Workers United Against Violence Society* apply to the present case. This is public interest litigation raising issues that transcend the plaintiffs' immediate interests. It is a comprehensive challenge that may prevent a multiplicity of individual challenges, and there is no risk of the rights of others with a more personal or direct stake in the issue being adversely affected by a diffuse or badly advanced claim. There is no suggestion that others who are more directly or personally affected have deliberately chosen not to challenge these provisions. Further, the plaintiff has capacity to undertake this litigation and is represented by experienced counsel and Pivot Legal Society, whose expertise was recognized in *Downtown Eastside Sex Workers United Against Violence Society.* The present litigation constitutes an effective means of bringing the issue to court in that it will be presented in a context suitable for adversarial determination: *(Downtown Eastside Sex Workers United Against Violence Society* at paras. 73 –74).

[60] At the same time, the City argues that the wide ranging nature of the plaintiff's amended notice of civil claim is neither an effective nor an efficient use of court resources, and that a more effective and efficient approach would be the focussed inquiry that would result from a claim by an individual litigant. I see no merit to this submission. It is little more than an attempt by the City to limit the scope of the plaintiff's claims, and unless the claims or any of them are without merit, I see no reason why the plaintiff should be constrained as the City proposes.

[61] Given the challenges faced by many members of DWS, I accept that they should not and cannot be expected to mount individual challenges to the City's legislative scheme and related actions on their own. In the result, DWS is the only viable entity by which the City's legislative scheme and related actions can be challenged, so long as DWS can satisfy the other hurdles raised by the City.

[62] In my opinion, DWS has thus established that if it is not granted standing, there is no other reasonable and effective way to bring the issues it has raised before the court. I am thus satisfied that DWS should be granted public interest standing in this case.

2. The City's Requests under Rule 9-5(1)

[63] The City requests a number of orders to dismiss all or part of DWS's claims under various sections of Rule 9-5(1). Rule 9 - 5(1) provides that:

> At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence, as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[64] The City has made applications for the following relief under Rule 9-5(1):

> (i) An order that DWS's action discloses no reasonable claim and should be dismissed in its entirety. Alternatively, the City asks for an order that various portions of DWS's action be dismissed for disclosing no reasonable claim, including:
>
> - Reference to "displacement tactics";
> - Relief sought in paras. 1(a)-(c) and (e) of Part 2;
> - Paragraphs 19(i) and 23 of Part 1; and

- Reference to "the effect of the Abbotsford's [sic] response to Abbotsford's Homeless, including…", in para. 1(b) of Part 2.

(ii) An order that portions of DWS's claim should be dismissed for failing to plead material facts, including:

- Paragraphs 24-26 and 28 of Part 1;
- Paragraphs 1(a)-(e) of Part 2; and
- Reference to displacement tactics and "Abbotsford's Homeless". The City also suggests that these references should be struck on the basis that they are embarrassing.

(iii) An order that portions of DWS's claim should be dismissed as an abuse of process, including:

- Reference to and relief sought in relation to the City's *Consolidated Parks Bylaw*; and
- Paragraph 19(b) of Part 1 and paras. 1(b) and (e) of Part 2, because they constitute a collateral attack on a previous decision.

(iv) That all references to the Abbotsford Police Department be struck as frivolous or embarrassing.

[65] I will deal with each of these applications to dismiss under Rule 9-5(1) below.

a. Reasonable Claim

[66] In *The Canadian Bar Association v. British Columbia*, 2006 BCSC 1342, affirmed 2008 BCCA 92, leave to appeal dismissed, [2008] S.C.C.A. No. 185, [*Canadian Bar Association*] Chief Justice Brenner dismissed an action brought by the Canadian Bar Association for declarations that the Attorney General of Canada, the Government of BC, and the Legal Services Society were providing inadequate civil legal aid services contrary to constitutional and *Charter* provisions, and for orders that the system be improved. The Chief Justice reasoned that the plaintiff lacked standing to bring the action and that the pleadings disclosed no reasonable claim.

[67] At paras. 111, 114 and 115, the Chief Justice found:

> [111] The defendants say that a cause of action under the *Charter* arises only in particular circumstances and that the statement of claim fails to plead material facts that sufficiently disclose the individual circumstances in which particular *Charter* breaches have occurred. This flaw is apparent from the wording of the declaration sought. While the syntax leaves much to be

> desired, the plaintiff appears to seek a declaration that: (i) when Poor People are denied publicly funded counsel in (ii) circumstances where they are faced with legal proceedings where their s. 7 rights are jeopardized, (iii) that denial fails to ensure meaningful access to justice for poor people, and (iv) the failure to ensure such access breaches s. 7.
>
> …
>
> [114] The requirement that *Charter* breaches be pleaded for particular individuals in particular circumstances is not merely a formal requirement arising from the wording of s. 24(1). Without a pleading of individual circumstances, there is no basis on which to make the required causal connection between the government conduct and the alleged breach: see *Operation Dismantle* at paras. 9-10 and 37-38.
>
> [115] As currently framed, the statement of claim in my view discloses no reasonable claim in relation to the alleged ss. 7 and 15 *Charter* breaches.

[68] The City argues that as in the *Canadian Bar Association* case, the allegations in the plaintiff's amended notice of civil claim do not plead any breach for any particular individuals in particular circumstances, and must therefore be dismissed.

[69] In addition, the City argues that the amended notice of civil claim contains no allegation of any instance that any of the Impugned Bylaws breached the *Charter*, which specific bylaw breached which specific section of the *Charter*, nor any material facts about any such breach, and must therefore be dismissed.

[70] Notwithstanding the City's contention, the Court is not to strike a claim, unless it is plain and obvious that there is no basis for the case to continue. As Madam Justice Wilson pointed out in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980:

> . . . the test in Canada governing the application of provisions like Rule 19(24)(a) of the British Columbia *Rules of Court* is the same as the one that governs an application under R.S.C.O. 18, r. 19: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia *Rules of Court* should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).

[71] I find that it is not plain and obvious that there is no reasonable claim contained in DWS's amended notice of civil claim on any of the bases suggested by the City. These parts of the City's application are dismissed.

b. Material Facts

[72] The City complains that there is a lack of specificity in both the definition of "Abbotsford's Homeless" as that term is used in the plaintiff's amended notice of civil claim, and with respect to the displacement tactics complained of. I am unable to see this as a justification for the dismissal of the plaintiff's action. The plaintiffs have filed an application for disclosure of the records of the Abbotsford Police which remains unheard. If the application is successful, then the plaintiffs may be able to identify individuals and individual instances of oppressive tactics employed against specific individuals. It may be that the discovery process will further enable the plaintiff to identify individuals and individual instances of such tactics.

[73] Like Ehrcke J. in *Downtown Eastside Sex Workers United Against Violence Society*, it is my opinion that it is premature to consider the dismissal of the plaintiff's claim based upon a lack of specificity of individuals or the tactics complained of, and I would not accede at this juncture to this ground for the dismissal of the plaintiff's claim.

c. Abuse of Process

[74] Paragraph 27 of Part 1 of DWS's amended notice of civil claim alleges that sections of the City's *Consolidated Parks Bylaw* infringe various sections of the *Charter*. The City argues that because Barry Shantz is privy to DWS, and has advanced the same allegations in other proceedings, it is an abuse of process for DWS to pursue the same relief in these proceedings.

[75] I have already rejected the submission that DWS's action is unnecessary because some individuals who number amongst Abbotsford's homeless have taken proceedings in Small Claims Court respecting the Impugned Bylaws and the conduct of those for whom the City may be vicariously liable. I am also not persuaded that

the City's action against some homeless persons means that the action commenced by DWS is unnecessary.

[76] Paragraphs 19(i) and 23 of Part 1 of DWS's amended notice of civil claim allege that the City's failure to develop needed housing for people who are homeless or at risk of homelessness is a breach of the *Charter*. The City responds to this allegation by reference to the decision of Mr. Justice Lederer in *Tanudjaja v. Canada (Attorney General)*, 2013 ONSC 5410 (Ont. S.C.J.) where he held at para. 59:

> The law is established. As it presently stands, there can be no positive obligation on Canada and Ontario to act to put in place programs that are directed to overcoming concerns for the "life, liberty and security of the person". In this context, there is no fundamental right to affordable, adequate and accessible housing provided through s.7 of the *Charter*. The majority in *Gosselin* does not depart from this view. It confirms what has been understood since the early days of the *Charter*. Our appreciation of its breadth and its limits will continue to evolve. This is no less the case for s. 7 than any of its provisions. It is not for a lower court to step outside the direction past cases provide.

[77] The City argues that the *Charter* does not impose any duty on the government actors to take any positive steps to put into place any programs to accommodate the needs of the homeless.

[78] In *Government of the Republic of South Africa v. Grootboom* (CCT11/00), [2000] ZACC 19 the Constitutional Court of South Africa upheld a claim under that Country's Constitution by homeless persons for their government to provide them with basic shelter or housing.

[79] The Canadian *Charter of Rights and Freedoms* is more limited in scope than the Constitution of South Africa. The *Charter* does not commit our citizens to the attainment of social justice and the improvement of the quality of life for everyone, nor does it declare the founding values of our society to be human dignity, the achievement of equality, and the advancement of human rights and freedoms. I accept the submission of the City that there is no fundamental right to affordable, adequate, and accessible housing to Abbotsford's homeless pursuant to the *Charter.* Neither para. 19(i) nor para. 23 of Part 1 of DWS's amended notice of civil claim

contain any reference to the *Charter*. As with paras. 1(a), (b) and (c) of the relief sought in DWS's amended notice of civil claim, I am unable to accept the submission of the City that these paragraphs are unnecessary for the determination of the other issues in DWS's action, and I will not order that they be struck out.

d. Collateral Attack

[80] Next, the City contends that DWS's attempt to obtain injunctive relief in para. 19(b) of Part 1 and in paragraphs 1(b) and 1(e) of Part 2 of its amended notice of civil claim is an abuse of process because it constitutes a collateral attack on the earlier orders of this Court in the City's action. The defendants in the City's action did not argue that the enforcement of any injunction granted would be contrary to the *Charter*.

[81] The rule against collateral attack was described by the Supreme Court of Canada in *R. v. Wilson*, [1983] 2. S.C.R. 594 at 599 as an attack on an existing order of a court, made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

[82] The parties before Mr. Justice Williams did not include DWS, although some of the defendants in the City's action are clearly members of DWS. The present case does not and cannot challenge the decision of Williams J., and as I have indicated above, his decision seems to have contemplated further consideration of the issues raised in the City's action and in these proceedings.

e. Displacement Tactics of the Abbotsford Police

[83] DWS seeks relief in the current action based upon the conduct of members of the Abbotsford Police Department. The City contends that it is not the proper party to respond to allegations respecting members of the Abbotsford Police Department. This is only partly correct. The City is liable for the negligence of the members of the Abbotsford Police Department pursuant to ss. 20 and 21 of the *Police Act*, R.S.B.C. 1996, c. 367.

[84] It is correct, however, that the City is not liable for the Abbotsford Police Department members for liability based on other causes of action. Those causes of action must be pursued against the Abbotsford Police Department or the members themselves, subject to s. 21 of the *Police Act*, which provides that no action lies against individual police officers unless they are guilty of dishonesty, gross negligence, or malicious and wilful misconduct. As with the pleadings with respect to the displacement tactics, it is my view that the pleadings are adequate for present purposes, but will have to be refined by further particulars once the discovery phase of the action is complete. For now, I am satisfied that the City has a reasonable understanding of what is meant by displacement tactics, and the conduct of those for whom it is vicariously liable, that forms the factual foundation for the pleading.

[85] As I have already stated, it is my opinion that it is premature to consider the dismissal of the plaintiff's claim based upon a lack of specificity of individuals or the displacement tactics complained of, and I would not accede at this juncture to this ground for the dismissal of the plaintiff's claim. Many of the alleged defects complained of by the City, if found to exist, could no doubt be remedied by further amendments to the notice of civil claim, or through the delivery of particulars, but it may be necessary to consider the allegations against the Abbotsford Police, even if they are not liable for those acts, in order to determine other issues in DWS's action.

[86] Many authorities suggest that the City bears no responsibility for other than tortious acts by the members of the Abbotsford Police. The exceptions to this line of authorities include the decision of the Supreme Court of Canada in *Vancouver (City) v. Ward*, 2010 SCC 27, and the decision of Mr. Justice Voith in *Mason v. Turner*, 2014 BCSC 211.

[87] The City contends that in *Ward*, the Supreme Court of Canada did not consider the issue of whether or not relief pursuant to s. 24(1) of the *Charter* was available from a municipality for the conduct of its police officers, rendering the decision *per incuriam*.

[88] The Abbotsford Police Department contends that *Mason* is the only case where considered reasons have resulted in relief being granted against a municipality for the conduct of members of its police department.

[89] I find it unnecessary to resolve the apparent disparity in these authorities. The actions of government or its agents must conform with the *Charter*, failing which a remedy for unconstitutional government action may be sought: see *Inglis v. British Columbia (Minister of Public Safety)*, 2013 BCSC 2309 [*Inglis*] at paras. 355 – 356.

[90] It is clear that the so-called displacement tactics are not alleged to have been taken without, or in excess of statutory authority. In *Canadian Bar Association*, Chief Justice Brenner clarified at paras. 41 – 44 that:

> [41] . . . there can be little doubt that the limitation of public interest standing to legislative challenges is both express and intentional.
>
> [42] This was re-affirmed in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236 at para. 252, where Cory J. for the court observed that "the whole purpose of granting status is to prevent the immunization of legislation or public acts from any challenge". While "public acts" was not defined, the quotation from *Finlay* makes it clear that the Supreme Court intended to extend public interest standing only in those circumstances where a challenge to administrative action was analogous to a challenge to legislation. In other words, public expenditure or other administrative action could be challenged but only on the basis that it was without or in excess of statutory authority.
>
> [43] There are other examples of the Supreme Court extending public interest standing in circumstances that do not involve challenges to specific legislation. In *Finlay* itself, the court concluded that a challenge to public spending on the ground that it was not made in accordance with the applicable statutory authority was justiciable. In *Operation Dismantle v. The Queen,* [1985] 1 S.C.R. 441, a constitutional challenge to a specific decision of the executive was also considered justiciable.
>
> [44] But of significance is that these cases addressed the public interest in the maintenance of respect for the limits of administrative and executive authority, respectively. It is for that reason that they were therefore considered analogous to *Thorson*, *McNeil*, and *Borowski,* all of which addressed the limits of legislative authority. (see *Finlay* at 631).

[91] While it is questionable whether the Abbotsford Police can be sued, it is my opinion that members of the Abbotsford Police cannot, in general, be sued for the lawful execution of their duties. The clarification in the authorities such as *Canadian*

Bar Association, however, shows that DWS can challenge administrative action, and the legislation upon which it is purported to be based, and may even be able to obtain s. 24(1) *Charter* relief, if the actions of those for whom the City is vicariously responsible are unjustified or the legislation is *ultra vires*.

[92] I am therefore not prepared to strike the plaintiff's pleadings respecting so-called displacement tactics on that basis.

f. Embarrassment

[93] The term embarrassing found in Rule 9-5(1)(c) was interpreted by Mr. Justice Abrioux in *Kellogg v. Rouches*, 2013 BCSC 946 at para. 19 to include, "when pleadings are so confusing that it is difficult to understand what is being pleaded". The City asserts that DWS's pleadings are so vague that they do not allege material facts in an intelligible form to enable the defendant to know the case that is to be met and as such are another type of pleading that is subsumed by the term "embarrassing".

[94] It is unnecessary to refine the definition of the term as it is found in Rule 9-5(1)(c). I do not consider DWS's pleadings respecting the displacement tactics to be so vague that they do not allege material facts in an intelligible form to enable the defendant to know the case to be met. As I have indicated above, it is my view that the pleadings are adequate for present purposes, but will have to be refined by further particulars once the discovery phase of the action is complete. For now, I am satisfied that the City has a reasonable understanding of what is meant by displacement tactics, and the conduct of those for whom it is vicariously liable that forms the factual foundation for the pleading.

3. Relief Under s. 24(1) of the *Charter*

[95] Finally, the City asks me to dismiss the relief requested by DWS under s. 24(1) of the *Charter*. The City correctly contends that as *Charter* rights are individual rights, an action based upon s. 24(1) of the *Charter* for breach of such rights cannot be made in the aggregate for a broad class of people.

[96] This proposition is well established. See, for example, *R. v. Big M Drug Mart Ltd.*, [1985] 1 SCR 295; *R. v. Edwards*, [1996] 1 S.C.R. 128. A claim for s. 24(1) *Charter* relief requires not only that the claim be asserted by the individual or individuals whose *Charter* rights are in issue, but also that the alleged *Charter* breaches be pleaded for those particular individuals and their particular circumstances: *Canadian Bar Association* at para. 114.

[97] However, the Court is not to strike a claim, unless it is plain and obvious that there is no basis for the case to continue, as discussed in the passage from *Hunt v. Carey Canada Inc.* set out above.

[98] The City contends the declarations sought pursuant to s. 24(1) of the *Charter* are independent of any alleged *Charter* breach and thus unavailable pursuant to s. 24(1) of the *Charter*. I am unable to accept the submission of the City that such declarations are unnecessary for the determination of the other issues in DWS's action. The request for the declarations even on other than *Charter* grounds may be necessary to resolve the *Charter* issues, and as the Supreme Court of Canada explained in *R. v. Imperial Tobacco Canada Ltd*., 2011 SCC 42 at paras. 19 – 21 [*Imperial Tobacco*], the power to strike thus serves as a valuable housekeeping measure that unclutters the proceedings by weeding out the hopeless claims, but must nonetheless be used with care, because it has the potential to stifle developments in the law:

> [19] The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.
>
> [20] This promotes two goods - efficiency in the conduct of the litigation and correct results. Striking out claims that have no reasonable prospect of success promotes litigation efficiency, reducing time and cost. The litigants can focus on serious claims, without devoting days and sometimes weeks of evidence and argument to claims that are in any event hopeless. The same applies to judges and juries, whose attention is focused where it should be - on claims that have a reasonable chance of success. The efficiency gained by weeding out unmeritorious claims in turn contributes to better justice. The more the evidence and arguments are trained on the real issues, the more likely it is that the trial process will successfully come to grips with the parties' respective positions on those issues and the merits of the case.

> [21] Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.) introduced a general duty of care to one's neighbour premised on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before *Hedley Byrne & Co. v. Heller & Partners, Ltd*., [1963] 2 All E.R. 575 (H.L.), a tort action for negligent misstatement would have been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *Donoghue v. Stevenson*. Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.

[99] I am not persuaded that at this stage of the proceedings, it can be said that the declarations sought at paras. 1(a) - (c), and (e) of Part 2 of the amended notice of civil claim are unnecessary for the determination of the action. I am unable to conclude that DWS's pleadings fail to disclose a reasonable cause of action as discussed in *Imperial Tobacco*.

[100] One must not lose sight of the distinction between a *Charter* challenge of legislation upon which government action is based, and the government action itself discussed by Chief Justice McLachlin in *R. v. Ferguson*, 2008 SCC 6 at para. 61:

> It thus becomes apparent that ss. 52(1) and 24(1) serve different remedial purposes. Section 52(1) provides a remedy for *laws* that violate *Charter* rights either in purpose or in effect. Section 24(1), by contrast, provides a remedy for *government acts* that violate *Charter* rights. It provides a personal remedy against unconstitutional government action and so, unlike s. 52(1), can be invoked only by a party alleging a violation of that party's own constitutional rights: *Big M; R. v. Edwards*, [1996] 1 S.C.R. 128. Thus this Court has repeatedly affirmed that the validity of laws is determined by s. 52 of the *Constitution Act, 1982*, while the validity of government action falls to be determined under s. 24 of the *Charter: Schachter; R. v. 974649 Ontario Inc*, [2001] 3 S.C.R. 575, 2001 SCC 81. We are here concerned with a *law* that is alleged to violate a *Charter* right. This suggests that s. 52(1) provides the proper remedy.

[101] Recent authority from our Court of Appeal has narrowed this seeming constraint to the breadth of a public interest proceeding. In *Fédération des parents*

francophones de Colombie- Britannique, Mr. Justice Groberman, for the Court, held at paras. 34 – 37:

> [34] While, as the chambers judge found, it would be possible for the other plaintiffs to proceed with this case in the absence of the Fédération, the Fédération has a genuine contribution to make. It will be able to assist the other plaintiffs in ensuring that the perspectives presented to the court are complete. Some of the issues in this litigation, such as the provision of space in certain schools for pre-school classes, can only be effectively addressed by the Fédération.
>
> [35] Concerns of judicial efficiency in this case also favour the granting of public interest standing. As the plaintiffs will be jointly represented in the litigation, and are not seeking enhanced procedural rights as a result of the multiplicity of claimants, it is unlikely that the inclusion of the Fédération as a plaintiff will increase either the length or complexity of the trial.
>
> [36] In fact, if the Fédération is not granted standing as a plaintiff, the efficiency of the process may well suffer. If not granted standing as a plaintiff, the Fédération would almost certainly apply for and be granted the right to intervene in this case. As an intervenor, it would, for practical purposes, have to be represented separately from the plaintiffs. Far from conserving judicial resources, such a situation would result in inefficiencies. The inclusion of the Fédération as one of the jointly-represented plaintiffs in this case can be expected to conserve judicial resources and be conducive to a full airing of the issues.
>
> [37] Unfortunately, the decision in *Downtown Eastside Sex Workers* post-dates the chambers judge's decision. Following some of the language of older cases, he applied a strict test in considering the third criterion for public interest standing. If he had, instead, applied the flexible and purposive test that is now mandated, he would have found that the Fédération ought to be granted public interest standing.

[102] DWS also relies upon the decision of Madam Justice Ross in *Inglis* as support for its argument that third parties can pursue s. 24(1) *Charter* relief. I am unable to accept that the case supports that argument. There, two former inmates of the Alouette Correctional Centre for Women ("ACCW") and their children brought an action on their own behalf and on behalf of all provincially incarcerated women who wish to have their babies remain with them while they serve their sentence and the babies of those mothers.

[103] Ross J. concluded that the decision to cancel the Mother Baby Program violated the rights of Ms. Inglis and Ms. Block under s. 7 of the *Charter*, in that it

deprived them of security of the person in a manner not in accordance with the principles of fundamental justice and was not a reasonable limit under s. 1.

[104] She issued a declaration pursuant to s. 24(1) of the *Charter* to that effect, and ordered that the decision to cancel the Mother Baby Program violated the ss. 7 and 15 rights of provincially incarcerated mothers and their infants. The decision to cancel the Mother Baby Program violated s. 7 of the *Charter* in that it deprived provincially incarcerated mothers who wish to have their babies remain with them while they serve their sentence and the babies of those mothers, of security of the person in a manner not in accordance with the principles of fundamental justice. Ross J. found that this violation was not saved by s. 1 of the *Charter.* Ross J. found as well that the decision to cancel the Mother Baby Program violated s. 15 of the *Charter* in that it deprived provincially incarcerated mothers who wish to have their babies remain with them while they serve their sentence and the babies of those mothers, of the equal protection and equal benefit of the law without discrimination, and was not saved by s. 1 of the *Charter*.

[105] It is unclear whether Ross J. would have issued the declarations that she did, had Ms. Inglis and Ms. Block not been parties to the action.

[106] That said, it is not plain and obvious to me that there is no basis for the case to continue. The decision of the Court of Appeal in *Fédération des parents francophones de Colombie- Britannique* is binding upon me, and provides authority for the plaintiff's contention that it can advance a claim for s. 24(1) *Charter* relief for its members.

4. Conclusion

[107] The City's application to refuse standing to DWS is dismissed.

[108] The City's application for the dismissal of the plaintiff's action is dismissed.

[109] The City's application to strike certain of DWS's pleadings is adjourned until the completion of the discovery phase of the proceedings, when it can be renewed if the City wishes to do so.

[110] Given my decision on the issues that have been discussed in these reasons for judgment, it will now be necessary for me to hear DWS's application for disclosure of the records of the Abbotsford Police.

[111] As I have concluded that DWS can pursue its action against the City, there may well be a waste of judicial resources if the action is not at least heard together with the City's action. I therefore direct that the parties should set the plaintiff's application for production of the records of the Abbotsford Police for hearing as soon as possible, and at the same time come prepared to discuss either the consolidation of this action with the City's action, or an order where the two actions will be heard at the same time.

"The Honourable Chief Justice Hinkson"