

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

BRITISH COLUMBIA/YUKON ASSOCIATION OF DRUG WAR  
SURVIVORS

PLAINTIFF

AND:

CITY OF ABBOTSFORD

DEFENDANT

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**OPENING STATEMENT OF THE PLAINTIFF, BRITISH COLUMBIA YUKON  
ASSOCIATION OF DRUG WAR SURVIVORS**

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## Overview

1. At its core, this case is quite simple: there are not enough suitable shelter spaces or housing to accommodate the needs of those people who are living homeless in Abbotsford—in particular those who struggle with mental health challenges, addiction challenges, and often both. In such circumstances, laws and state action that prohibit those people from sleeping in public spaces and erecting basic survival shelters do not meet Constitutional minimum standards required by 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 (UK), 1982, c 11 (Charter)*.
2. A conservative estimate indicates that there were at least 151 people living homeless in Abbotsford as of March 2014; this is a 29% increase since 2011. In spite of those numbers, Abbotsford has just 25 shelter beds for adults.
3. The foundation for this claim was established in *Victoria (City) v. Adams*, 2008 BCSC 1363; 2009 BCCA 563 (Tabs E-7, E-8). In *Adams*, the Court found that in the absence of sufficient shelter spaces, which leaves some people to live outside, a bylaw prohibiting the erection of rudimentary shelter constitutes an interference with life, liberty and security of the person. The Court also held that such a bylaw is not saved by s.1 of the *Charter*.
4. It is axiomatic that if someone living homeless has a right to create rudimentary shelter to protect themselves from the elements, they must be able to do so somewhere. Bylaws that deny that right, and state action that interferes with that right, we will argue, are *prima facie* unconstitutional.
5. Rather than acknowledge and accommodate this reality, the City of Abbotsford (the “City”) has engaged in a pattern of forced evictions without consideration of the effects of such evictions on Abbotsford’s Homeless. As a result, we will argue those individuals have been left with no safe options – no safe place where they can lawfully be and obtain the necessities of life and attend to their biological necessities such as sleep.
6. The *Adams* decision is modest in its reach, as the issue before the court was modest. As framed by the Court of appeal:

[1] This appeal addresses a narrow issue: when homeless people are not prohibited from sleeping in public parks, and the number of homeless people exceeds the number of available shelter beds, does a bylaw that prohibits homeless people from erecting any form of temporary overhead shelter at night – including tents, tarps attached to trees, boxes or other structure – violate their constitutional rights to life, liberty and security of the person under s. 7 of the *Canadian Charter of Rights and Freedoms*?
7. The goals of DWS and Mr. Shantz are to advance the jurisprudence beyond *Adams* while not advancing a claim of positive rights as was attempted in *Tanudjaja v. Canada (Attorney General)*. That case sought, as a remedy, the implementation of a national and provincial strategy to reduce and eliminate homelessness and inadequate housing (*Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852, leave to appeal to SCC

refused, 2015 S.C.C.A. No. 39, Tab E-6). DWS and Mr. Shantz say this claim, by contrast, strikes a proper balance; the incremental evolution of the law based in sound precedent, while not straying beyond the jurisdiction of the Court into the realm of legislators and policy makers.

8. In keeping with jurisprudence from the Supreme Court of Canada and various international treaties to which Canada is a signatory, DWS and Mr. Shantz seek:
  - (a) Declarations confirming that Abbotsford's Homeless are entitled to participate in life sustaining activities in public spaces;
  - (b) To have bylaws declared unconstitutional when they impair the ability of Abbotsford's Homeless to participate in life sustaining activities in public spaces; and,
  - (c) To have state action declared unconstitutional when it impairs the ability of Abbotsford's Homeless to engage in life sustaining activities in public spaces.
9. In making these declarations we will ask the Court to consider what constitutes "available" shelter, bearing in mind the barriers faced by some of Abbotsford's Homeless as well as the need to shelter oneself from the elements during the daytime.
10. The goal of this litigation is neither to allow unrestricted occupation of parks and other public spaces, nor to seek a positive obligation from government to provide shelter and housing. Rather, this litigation seeks to properly balance the interests of those who rely on public spaces for their survival with the interests of the broader public in accessing and enjoying such spaces. We anticipate the evidence will demonstrate that there exists a spectrum of options by which the City might achieve this balance. Not included in that spectrum are the current bylaws and tactics of the City, which fail to meet constitutional standards.
11. Both the trial judge (Tab E-7 at 143) and the Court of Appeal (Tab E-8 at 75) in *Adams* quoted from Martha Jackman in her article "The Protection of Welfare Rights Under the *Charter*" (1988) 20 Ottawa L. Rev. 257 at 326:

... [A] person who lacks the basic means of subsistence has a tenuous hold on the most basic of constitutionally guaranteed human rights, the right to life, to liberty, and to personal security. Most, if not all, of the rights and freedoms set out in the *Charter* presuppose a person who has moved beyond the basic struggle for existence. The *Charter* accords rights which can only be fully enjoyed by people who are fed, are clothed, are sheltered, have access to necessary health care, to education, and to a minimum level of income. As the United Church's brief to the Special Joint Committee declared: "Other rights are hollow without these rights".
12. Both levels of court in *Adams* also referred to international human rights instruments to which Canada is a party (*Adams CA*, Tab E-8 at para. 33 to 35). These were referenced as aids to the interpretation and meaning under the *Charter*. Quoting from the trial judgment:

[85] Canada is a party to several international human rights instruments which recognize adequate housing as a fundamental right. The *Universal Declaration of Human Rights*, GA Res. 217(III), U.N. GAOR, (3d) Sess., Supp. No. 13, U.N. Doc. A/810 (1948) 71, at Article 25(1) states:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

[86] The *Universal Declaration of Human Rights* proclaims it is “a common standard of achievement for all peoples and all nations” and states that:

...every individual and every organ of society...shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

...

[89] The United Nations has determined that all persons should possess a degree of security of housing tenure that guarantees legal protection against forced eviction and that forced eviction constitutes a gross violation of human rights. The United Nations affirmed that security of tenure takes a variety of forms, including informal settlements, such as occupation of land or property. In its General Comment No. 4 on Article 11.1 of the Covenant, the Committee on Economic, Social and Cultural Rights 6th session, U.N. Doc. E/1992/23, annex III (1991) at 114 recognized at para. 18:

[T]hat instances of forced eviction are *prima facie* incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law.

[emphasis in original]

[90] Although Article 11.1 of the *Covenant* is perhaps the most comprehensive and significant expression of the obligation of states to recognize adequate housing as a basic and fundamental human right, there are also a wide variety of other international covenants and declarations that establish the different dimensions of the right to adequate housing and enshrine it as a fundamental principle of international law.

### *Admissions and the anticipated evidence*

13. With that brief introduction, we will review the anticipated evidence as it relates to the issues before the court, beginning first with an overview of the number of people living

homeless in Abbotsford, the number of available shelter spaces, and the tactics used by the City to discourage Abbotsford’s Homeless from existing in public spaces.

14. While the anticipated evidence overlaps with that which was before the Court in *Adams*, it goes beyond that evidence as well; it will show that Abbotsford’s Homeless are seen, individually and collectively, to be a nuisance—a problem to be policed rather than assisted. In particular, those with barriers to accessing the Salvation Army shelter are both targeted and disproportionately affected by the laws and state action at issue. They are specifically targeted in a way that undermines their safety and their ability to participate in life sustaining activities and to perform biological necessities.
15. Returning to *Adams*, the following table illustrates the similarity between the facts in this case and those found by Justice Ross in *Adams*:

| <i>Adams</i>  | <i>DWS/Shantz</i>   |
|---|---|
| 4(a) There are at present more than 1,000 homeless people living in the City.   | It is anticipated that the evidence will show, according to the most recent homeless count in 2014, that there are at least 151 people living homeless in Abbotsford  |
| 4(b) The City has at present 104 shelter beds, expanding to 326 in extreme conditions. Thus hundreds of the homeless have no option but to sleep outside in the public spaces of the City.  | It is anticipated that the evidence will show that there are 25 shelter beds at the Salvation Army shelter, expanding during extreme weather with the exact number varying depending on volunteer resources.  |
| 4(c) The Bylaws do not prohibit sleeping in public spaces. They do prohibit taking up a temporary abode. In practical terms this means that the City prohibits the homeless from erecting any form of overhead protection including, for example, a tent, a tarp strung up to create a shelter or a cardboard box, even on a temporary basis. | Abbotsford’s bylaws, in addition to prohibiting the erection of any form of tent or structure, do not permit any person to enter or occupy any park between one hour after sunset one day and one hour before sunrise the next.                                 |
| 4(d) The expert evidence establishes that exposure to the elements without adequate protection is associated with a number of significant risks to health including the risk of hypothermia, a potentially fatal condition.   | In addition to relying on the findings in <i>Adams</i> , it is anticipated that the evidence will show that the health circumstances of people living homeless in Abbotsford are compromised and put at risk because of inadequate shelter, among other things. |
| 4(e) The expert evidence also establishes   | In addition to relying on the findings in   |

|   |   |
|---|---|
| that some form of overhead protection is part of what is necessary for adequate protection from the elements. | <i>Adams</i> , it is anticipated that the evidence will show that Abbotsford's Homeless erect survival structures and rely on them for their personal safety. |
|---|---|

16. As is stated above, this case is different in scope and breadth from *Adams*, despite numerous similarities between the two cases.
17. The City admits that there is a population of homeless people in Abbotsford (Response para. 7), that those individuals build shelters from time to time (Response para. 11), and that they sometimes live in proximity to one another (Response para. 12). The City does not know:
  - (a) the number of shelter beds available in Abbotsford at any given time (Examination for Discovery of Jake Rudolph, Deputy City Manager, May 15, 2015, Q. 522-523, Tab C-7);
  - (b) the number of people homeless in Abbotsford at any given time (Examination for Discovery of Jake Rudolph, May 15, 2015, Q. 524-525, Tab C-7);
  - (c) whether there is an adequate number of shelter beds to accommodate homeless people in Abbotsford (Examination for Discovery of Jake Rudolph, May 15, 2015, Q. 606-608 Tab C-8);
  - (d) what health care or social services are provided to Abbotsford's Homeless after an eviction from a homeless encampment (Examination for Discovery of George Murray, City Manager, Response to Request 27 dated April 24, 2015, Tab C-19);
  - (e) what the meaning of the term "homeless encampment" is in relation to a city policy document entitled "Homeless Encampments on Public Lands, Closure, Protocol, Roles and Responsibilities" disclosed in this litigation (Examination for Discovery of George Murray, Response to Request 13 dated April 24, 2015, Tab C-18);
  - (f) the definition of homeless. The City has no definition of or policy defining the term "homeless" (Examination for Discovery of Jake Rudolph, April 23, 2015, Q. 26-27, Tab C-1).
18. The City admits that City staff sometimes post notices and verbally request Abbotsford's Homeless to vacate a specific public space (Response paras. 8(a), (c)). The City does not, however:
  - (a) maintain a protocol to support homeless people who are evicted from homeless encampments (Examination for Discovery of George Murray, Response to Request 29 dated April 24, 2015, Tab C-19);

- (b) assess the welfare of the occupants of homeless camps in deciding whether to close a camp (Examination for Discovery of George Murray, Response to Request 30 dated April 24, 2015, Tab C-19);
  - (c) take the mental health of an occupant into account when deciding whether or not to evict people from a camp (Examination for Discovery of George Murray, Response to Requests 31-33 dated April 24, 2015, Tab C-19);
  - (d) have any policy established by City Council in relation to homeless encampments (Examination for Discovery of George Murray, Response to Requests 52-53 dated April 24, 2015, Tab C-20); or,
  - (e) employ, now or ever, any outreach workers (Examination for Discovery of George Murray, Response to Request 57 dated April 24, 2015, Tab C-20).
19. The Deputy City Manager, Jake Rudolph is responsible for issues related to homelessness in the City of Abbotsford and serves as the primary contact person for related matters (Examination for Discovery of Jake Rudolph, May 15, 2015, Q. 250, Tab C-3). Mr. Rudolph deposed:
- (a) Between May 2014 and into 2015, he spent an estimated 30 to 50% of his time on issues related to homelessness (Examination for Discovery of Jake Rudolph, May 15, 2015, Q.266-271, Tab C-3).
  - (b) George Murray, City Manager, delegated to Mr. Rudolph responsibility for issues relating to homelessness (Examination for Discovery of Jake Rudolph, May 15, 2015, Q.250-251, Tab C-3).
  - (c) He did not receive any specific direction from the City Manager relating to his mandate (Examination for Discovery of Jake Rudolph, May 15, 2015, Q.252, Tab C-3).
  - (d) He describes his mandate in relation to homelessness as having no specific documentation, but being generally to coordinate around issues of homelessness. He includes receiving letters and phone calls in the general nature of public complaints or concerns, managing agendas and coordinating a homelessness committee, and that he is ultimately responsible for bylaw enforcement in relation to homelessness (Examination for Discovery of Jake Rudolph, May 15, 2015, Q.252-262, Tab C-3).
  - (e) He has not taken any training or courses in relation to homelessness (Examination for Discovery of Jake Rudolph, May 15, 2015, Q494, Tab C-6).
  - (f) In relation to a Report to Council, authored by him, which states, "Homelessness in the city has long been a problem within the City of Abbotsford", he describes the longstanding "problem" of homelessness in the minds of the community as one that is "visible" or "visual." He cites as problems the visibility of people

“outdoors in public areas or on streets, gates, and sidewalks in the downtown,” as well as phone calls from the public about occupancy of parks and visibility of tents on Gladys Avenue. He further characterizes the “problem” of homelessness as an “impact to businesses in the downtown area” (Examination for Discovery of Jake Rudolph, May 15, 2015, Q.347-360, Tab C-4).

- (g) Upon being asked to provide a full and complete list detailing the “problem” of homelessness in Abbotsford referred to in his Report to Council, he further provided only that the problem refers to the “occupation of public and other spaces by people.” (Examination for Discovery of Jake Rudolph, response to request question 360 dated June 17, 2015, Tab C-11).
  - (h) He does not know the number of homeless people or number of shelter beds available in Abbotsford at any given time, nor whether there exists an adequate number of shelter beds to accommodate homeless people in Abbotsford (Examination for Discovery of Jake Rudolph, May 15, 2015, Q. 522, 524, Tab C-7 and 606-607, Tab C-8).
  - (i) Regarding a man perceived to display symptoms of mental illness, Mr. Rudolph deposed that he was informed and aware that this man has lived in different locations around the city, that he has a long history on the street and no structured permanent housing, but that the City had not taken a role to seek out housing for him, or for anybody else (Examination for Discovery of Jake Rudolph, April 23, 2015, Q. 77-83, Tab C-2 and May 15, 2015, Q. 710-716, Tab C-10).
20. By Mr. Rudolph’s own admissions outlined above, his mandate, as the senior manager in Abbotsford’s bureaucracy responsible for homelessness, does not include assisting anyone to find housing or places where people can lawfully exist upon being forcibly evicted from an encampment, to supervise outreach workers, to know the health and welfare of Abbotsford’s Homeless, to know how many people are homeless in Abbotsford, how many shelter beds are available or how many are needed.

### ***Abbotsford’s Homeless***

- 21. It is important to understand the lives and circumstances of some of the people living homeless in Abbotsford. With respect to those who have come forward to testify, we recognize the burden they have taken on and the complications in their lives that may preclude some of them from appearing before the Court.
- 22. While we hope and expect that all of the witnesses among Abbotsford's Homeless will have their opportunity to testify, at this point we can only highlight some of the evidence we expect the Court will hear, knowing that there remains uncertainty.
- 23. Each person is unique, having their own pathway into homelessness, and each has their own struggles and strengths. The Court will hear how drug and alcohol use, health complications, loss of income, family breakdown and institutionalization form part of the life trajectories of people living on the street.



24. For many of those living homeless in Abbotsford, being introduced to drugs or alcohol at an early age is a common experience. For one of those individuals, this introduction arose out of a deep dedication to protecting and supporting his mother, a residential school survivor who relied on her son to inject her with drugs when she was unable to do so herself.
25. For others living homeless in Abbotsford, time spent in institutional facilities at a young age—whether in foster care, youth detention, or prison—has also affected their lives in detrimental ways. For one single parent among this group, life changed drastically after the death of his mother and he was led, ultimately, to the street.
26. Safety, as well as the ability to care for oneself and one's family and friends, are central to the lives of Abbotsford's Homeless. The Court will hear from a man who keeps an extra blanket, tent, clothing, and food for others needing rest and warmth. The Court will also hear from people who camp together for safety and the protection of their belongings and from people who rely on their shelters during the day to guard against the cold and rain, heat and sun.
27. These witnesses will testify to the effects of being repeatedly told to move, of being forcibly evicted, and of feeling that they have nowhere to go and nowhere to exist. Testimonies will include experiences of being moved from relatively safe places into harm's way and of having previous encampments made unusable or inaccessible by the City and police. The Court will hear how cutting trees and brush exposes people to the elements, removes relatively safe options, and leaves people vulnerable to passers-by who harass and abuse them.
28. While used clothing, tarps, tents, food, and recyclables may, to an outsider, appear to be of little or no value, our witnesses will testify to the serious consequences of having such belongings destroyed or disposed of by the City and police. Evidence will be led to show that belongings of some of Abbotsford's Homeless have been destroyed or disposed of, sometimes without warning, often while their camps are left unattended. The Court will also hear that personal items such as woodworking tools, pictures, and medication have been lost and that personal belongings such as multi-tools are permanently confiscated without reasonable grounds or paperwork to show where they have gone.
29. These witnesses will explain the hurt and harm caused by having their tents slashed and having manure spread around them. They will give evidence of the physical and emotional implications of those events and the negative effects on their trust in both City staff and police.
30. DWS and Mr. Shantz will lead evidence to demonstrate that Aboriginal people are disproportionately represented among Abbotsford's Homeless and furthermore that their experience of homelessness is unique. Given the history of trauma shared by our Aboriginal communities, such as with Residential School and foster care, Aboriginal people are disproportionately negatively affected by the laws and conduct at issue.

***The 2014 Homeless Count***

31. As in *Adams*, the evidence to be led includes the number of homeless in Abbotsford and the number of shelter beds. Two of the key documents that will be relied on are the 2011 and 2014 Homeless Counts prepared by Ron van Wyk of the Mennonite Central Committee (“MCC”) (Tab B-1 and B-2). The 2014 document is an appendix to and constitutes background information to the strategic directions in the City’s Homeless Action Plan, approved by the Executive Committee of Council.
32. Mr. van Wyk is the Director of Programs, Thrift and Human Resources for the MCC, which prepares a count and analysis of homelessness in the Fraser Valley, including in Abbotsford, every three years. Mr. van Wyk holds a PhD in sociology and oversees the Fraser Valley Homeless Count, which took place most recently in 2014.
33. The methodology of the count is a 24-hour snapshot survey used to enumerate, as accurately as possible, the number of homeless people in Abbotsford. Following the methodology of the 2004, 2008 and 2011 Fraser Valley Regional District counts and prior research in other communities, the survey includes both daytime and night-time data collection.
34. Mr. van Wyk notes in the 2014 report (summarized at page 89 of the report, at pages 68-106 of document 1.5015, Tab B-2) that:
  - (a) 151 people were counted as living homeless in Abbotsford in 2014. This is understood to be an underestimate of the actual total number of people living homeless in Abbotsford;
  - (b) There was a 29% increase in homelessness in Abbotsford between 2011 and 2014;
  - (c) 51% of respondents lived outside in survival shelters or other outdoor places;
  - (d) 21% of respondents self-identified as Aboriginal;
  - (e) 39% reported welfare or disability and 17.5% reported binning or panhandling as their source of income, 11.8% reported no source of income;
  - (f) 41% reported substance addictions;
  - (g) 49% of those who lived outside reported disliking the Salvation Army shelter because of its rules, feeling institutionalized, or not wanting to be around people with mental health issues or addictions;
  - (h) 22% self-identified as having mental health issues; and,
  - (i) 12% reported having both addictions and mental health issues.
35. Mr. van Wyk concludes (summarized at pages 90-91 of the 2014 report, pages 68-106 of document 1.5015, Tab B-2) that:

- (a) Homelessness is a vector for disease as a result of a number of factors including cold and damp, inadequate sleeping arrangements and poor sanitation that increase the risk of health problems and decrease life expectancy;
- (b) A proportion of Abbotsford's Homeless are unable to function in traditional housing without supports. Those individuals get evicted and may be chronically homeless;
- (c) People are more willing to consider treatment and other solutions if they feel trusted and understood and have relationships that create a sense of belonging and self-worth;
- (d) Those with the most complex needs often get left out of the system of services and care, which aggravates the already inadequate care for those who live homeless; and,
- (e) Emergency shelters do not seem to be the most effective and efficient way to deal with chronically homeless persons who live with mental health issues, substance addictions, or, as is frequently the case, both.

***Insufficient shelter space in Abbotsford***

- 36. Nate McCready is the Community Ministries Director at the Salvation Army. Mr. McCready will give evidence that the Salvation Army provides the only adult shelter beds in Abbotsford. It provides 20 beds that are funded by BC Housing and five more that the Salvation Army funds itself - only about a quarter of which are for women. No funding comes from the City of Abbotsford.
- 37. Prior to January 2014, the Salvation Army shelter was what is known as a "high barrier" shelter; in other words, there were a variety of rules in place, including that occupants had to be clean and sober. Mr. McCready has since changed the rules and practices so that the Salvation Army shelter now has fewer barriers and assesses people based on their behaviour rather than on strict entrance requirements. Ironically, while this makes the facility more accessible to some, it also makes it less accessible to others, who feel more vulnerable in a lower barrier shelter. These changes have also resulted in higher occupancy rates at the shelter, such that it operates at or above capacity much of the time.
- 38. Mr. McCready will also give evidence that there is insufficient shelter space in Abbotsford to house all of Abbotsford's Homeless.
- 39. Rod Santiago is the Executive Director of Abbotsford Community Services ("ACS"). Mr. Santiago and ACS have been actively involved in a variety of efforts to assist people living homeless or near-homeless in Abbotsford. These efforts include addiction support groups and food bank services. Mr. Santiago was involved in a Housing First proposal to build 20 units of low barrier housing to support people with a desire to work towards wellness and independence. BC Housing agreed to provide the funding; ACS agreed to provide staffing and land. This project was scuttled in February of 2014 by City Council.

While a new project is in the works, it will not be operational until at least the summer of 2016.

40. Our witnesses will give evidence about their attempts to access the Salvation Army shelter and being turned away because the shelter is full.

***Inaccessible shelter and housing in Abbotsford***

41. The existence of a shelter bed or mat does not necessarily make that shelter an accessible and viable option. Our witnesses will provide evidence of the reasons why they may not access the Salvation Army shelter, which relate in part to behavioural and sobriety requirements, the need to earn income during evening hours, incompatibility with other occupants, the increased danger faced by some people if they are turned away or forced to leave during the night, and the lack of appropriate couples shelter.
42. Many of our witnesses will also testify that they have been, at times, temporarily banned from the Salvation Army shelter, meaning that they are left without any indoor emergency shelter options.
43. Pastor Jesse Wegenast is a minister with the 5&2 Ministries, a church that ministers to vulnerable and marginalized people in Abbotsford and builds relationships in the community based on mutual respect and caring. Pastor Wegenast will give evidence of his efforts to improve people's safety and health, to help people access housing, the types of housing and supports with which he tries to connect people, and his struggles to find shelter and housing—especially for people who may have more complex support needs.
44. The Court will also hear evidence of the time required to build a trusting relationship with marginalized individuals such that they may become ready to accept outreach, services and shelter and the negative effect of displacement and mistreatment on those relationships.

***State action***

45. Evidence will also be led to demonstrate that the City of Abbotsford deals with the “undesirables”—a term that its employees sometimes use to refer to Abbotsford's Homeless—by forcibly evicting them from their encampments, moving them along, despite there not being any place else for those people to move along to. This state action is detrimental to the health and safety of Abbotsford's Homeless and impairs their ability to obtain the basic necessities of life. Evidence will be led to demonstrate the City has employed the following tactics to discourage camping in public spaces by Abbotsford's Homeless:
  - (a) Spreading fish fertilizer on known homeless camp locations;
  - (b) Spreading chicken manure on a homeless camp;
  - (c) Slashing tents of homeless people;
  - (d) Spraying pepper spray on the belongings of homeless people;

- (e) Disposing of people's belongings;
  - (f) Limbing branches and trimming brush to expose areas used for camping to make them less desirable or safe; and
  - (g) Blocking access to camps previously used by Abbotsford's Homeless.
46. DWS and Mr. Shantz will show that the City has not undertaken alternatives that would balance the rights of its homeless and non-homeless citizens without infringing on the rights of Abbotsford's Homeless.
47. Finally, we anticipate the lay evidence will also show that little progress has been made by the City to address the housing needs of Abbotsford's Homeless. The City has created multiple committees and task forces, which have made numerous recommendations that have not been implemented. It has also failed to take advantage of opportunities to provide safer alternative options for Abbotsford's Homeless.

***Expert evidence***

48. Briefly summarized, we intend to enter expert evidence from the following witnesses. The City has objected to the admissibility of all the reports.
49. Dr. Christy Sutherland, addictions specialist, will provide evidence of the relationship between substance addiction and homelessness, including the effect of some drugs on people's ability to seek "normal rewards" such as food. Based on her involvement in the Mental Health Commission of Canada's At Home/Chez Soi project, she will further provide her opinion on the health, social, and societal benefits of providing housing and supports to people with addictions, without the prerequisites of sobriety or commitment to treatment.
50. Dr. Keith Ahamad, addictions specialist, will provide evidence in a reply report relating to the individual nature of addictions and varying trajectories for persons with active substance use disorder. His evidence describes the relatively poor outcomes from addiction treatment, a relapse rate of between 40 and 60% of patients, and a lack of evidence-based care for many street entrenched people.
51. Dr. William MacEwan, psychiatrist, will provide evidence of his experience working with marginalized and homeless patients, the prevalence of psychiatric illness, addiction, and brain injury among the homeless population, the resulting barriers those individuals face in accessing housing and services, and the ways by which those barriers can be minimized. He will provide evidence of his preliminary observations of some of Abbotsford's Homeless and his opinion of their mental and physical health circumstances.
52. Professor Nicklos Blomley, legal geographer, has reviewed the North American literature relating to government regulation of public spaces, including law enforcement, increased surveillance, alterations to the physical environment, and the displacement of homeless people. He will comment, based on the literature, on the effect that such regulation has on

individuals who are compelled to engage in necessary human activities in public spaces. He will also provide his opinion on the extent to which the laws and state actions in Abbotsford reflect the concerns raised in the literature.

53. Dr. Marie-Eve Sylvestre, Vice-Dean of Research and Communications and professor in the Civil Law Section of the University of Ottawa Faculty of Law, will explain her research on the use of bylaws on marginalized populations in various jurisdictions, the impact of those laws, the extent to which the laws and state action in Abbotsford reflect the issues raised in her research, and the predominant misconceptions faced by homeless people that are used to justify punitive actions taken against them. These misconceptions include the belief that homeless people are necessarily harmful, that they are “undesirable,” or that they are homeless by choice.
54. Professor Yale Belanger, associate professor at the Department of Political Science at the University of Lethbridge, will analyze the national and local prevalence of Aboriginal people amongst homeless populations and the unique pathways to and experience of homelessness by Aboriginal people as a result of their lived history of trauma, institutionalization, and colonization.

### ***Alternatives***

55. DWS and Mr. Shantz will argue that there is a spectrum of viable alternatives to the complete prohibition on sleeping in a park or setting up a survival structure in any public space. While the Court is not being asked to order that any of these specific alternatives be pursued, a matter that is the domain of government, the Court may consider the availability of these alternatives in assessing the constitutionality of the complete prohibition on these necessary and life sustaining activities.
56. Unlike Abbotsford, in 2009, the City of Victoria amended its bylaws in response to *Adams*, allowing its homeless citizens to take measures to protect their lives, liberty and security of the person. Victoria has been functioning under that legal regime since.
57. Further, on June 4, 2015, the Governance and Priorities Committee of the City of Victoria (“Victoria Committee”) passed a resolution recommending that City Council approve the Action Plan for Housing Supports & City Services for Sheltering in City Parks (“Victoria Plan”). The Victoria Plan acknowledges that the lack of adequate housing for the homeless in Victoria has resulted in many people sheltering in parks and that people will continue to take shelter in City parks until there are adequate housing options available. The plan aims to better balance the needs of homeless people with the need to mitigate impacts arising from sheltering activities (City of Victoria, Action Plan for Housing Supports & City Services for Sheltering in City Parks, Tab D-1, page 1 and Governance and Priorities Committee Minutes, June 4, 2015 (“Victoria Minutes”), Tab D-2 pages 15-17).
58. The Victoria Plan recognizes the need for both temporary solutions and the underlying need for housing and support. Options discussed by the Victoria Committee included additional shelter mats, extended washroom hours, provision of security for washroom facilities, storage of property, and using a parkade as a daily overnight sheltering space.

This discussion also reflected the fact that some people's behaviour is not compatible with shelter and some people are dealing with mental health and addiction issues (Victoria Minutes, pages 15, 17).

59. The Victoria Plan includes a host of alternatives including increasing the supply of shelter beds, municipal funding, micro-housing units, designating specific areas for overnight camping and possible sites for more than overnight sheltering with access to toilets, potable water, cooking areas, garbage receptacles and collection services, and storage in addition to access to social and health services and outreach among other things. All of these alternatives are to be undertaken in the interim while advocacy for housing and supports is ongoing (Victoria Plan, pages 3-8). DWS and Mr. Shantz will argue that all of these options may balance the need to manage parks for all members of the public with the *Charter* rights of the people who rely on those parks for their survival.
60. Abbotsford has had the opportunity to consider safer alternatives. The evidence will show that alternatives such as allowing small wind breaks to be erected around tents during the winter, creating small heated cabins, or developing a village where people can stabilize and begin to transition into housing have been brought to the attention of the City and that the City has in turn failed to actively pursue or support those initiatives.
61. Likewise evidence will be advanced that the City has not taken action to guard the life and safety of Abbotsford's Homeless by providing regular garbage pick up, sharps containers, access to bathrooms, potable water, or fire safety measures.
62. To the extent that the City may say that some of these measures are in place at Gladys Avenue, such as contracted garbage pick up, it is the City's position that the Gladys camp is being treated differently than other homeless encampments. This camp, on the side of a road and backed by a railway line, has been allowed to exist because it is, in the opinion of Jake Rudolph, related to this ongoing litigation and is being treated as a protest camp. The residents are not being evicted unless and until direction is received from Council. Many other homeless camps, however, are closed without direction from Council (Examination for Discovery, Jake Rudolph, May 15, 2015, Q. 387, 394-396, Tab C-5). DWS and Mr. Shantz will argue that the residents of the Gladys camp are protected for the time being by this litigation, not the City.

### ***Anticipated Argument***

63. It is on the basis of this anticipated evidence that DWS and Shantz will say in closing that there is insufficient shelter space to house Abbotsford's Homeless engaging their *Charter* rights, not just on a numbers basis, but on the basis of accessibility and suitability of shelter and housing. In other words, some of Abbotsford's Homeless cannot access shelter on a consistent basis, not just because there are insufficient spaces available, but also because their specific constellation of disabilities and circumstances cannot always be accommodated within the available spaces.
64. DWS and Mr. Shantz say that the bylaws engage the rights of Abbotsford's Homeless in relation to sections 2, 7 and 15 of the *Charter*. These will be briefly addressed below.

*Charter s. 2*

65. The fundamental freedoms enshrined in s. 2 of the *Charter* create and protect spaces within which people can pursue their own ends free from government interference, both individually and in community with others. Any state regulation of these spaces is presumptively a limitation of a fundamental freedom and must therefore be justified with reference to the purpose of the freedoms, their fundamental nature, and the broader public good (*Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1, Tab E-5).
66. Sub-sections 2(c) and 2(d) provide:
  2. Everyone has the following fundamental freedoms:
    - (c) freedom of peaceful assembly; and
    - (d) freedom of association.
67. One major purpose for the protection of the fundamental freedoms in s. 2 of the *Charter* is to guarantee access to public spaces—to the physical, geographic, expressive, discursive, and communicative spaces—which are the visible manifestation of the existence of a free and democratic society. The freedom of assembly articulated in s. 2(d) is a direct protection and guarantee of access to the most visible and accessible of all public spaces: the public parks, squares, sidewalks, roadways, infrastructure, and buildings around which public life in our towns and cities is built.
68. In combination, the freedoms of association (s. 2(d)) and peaceful assembly (s. 2(c)) protect the visible manifestation of democracy: free and open access to and use of public space for everyone, without discrimination. These protections extend equally to everyone in Canada, regardless of personal circumstance or individual access to private spaces in which they can also pursue their own ends. Indeed, for those who do not otherwise have access to private spaces, these protections literally guarantee a lawful existence.
69. DWS and Mr. Shantz will argue that the bylaws and City's actions in issue in this case are particularly egregious in the context of the freedoms of association and peaceful assembly. These bylaws and state action prohibit Abbotsford's Homeless from accessing public spaces individually or in association with others. Pursuant to ss. 2(c) and (d), no person should be denied the space—including the literal physical space—necessary for the pursuit of basic human needs and activities within our society, fundamental values of which include the recognition of the worth, freedom, dignity and autonomy of all.
70. DWS and Mr. Shantz will further argue that the freedom of peaceful assembly is premised on the notion that the visibility of an individual or group in public is itself a means of empowerment. Thus, the City's displacement of Abbotsford's Homeless as an attempt to make homeless people invisible strikes at the very core of the guarantee of peaceful assembly.



*Charter s. 7*

71. Bylaws that prohibit Abbotsford's Homeless from being in public spaces and state action that displaces them deprive Abbotsford's Homeless of their ability to attain the basic necessities of life violate their rights to life, liberty and security of the person guaranteed under s. 7 of the *Charter*.
72. DWS and Mr. Shantz will argue that Abbotsford's Homeless have a *Charter* right to exist in public spaces and obtain the basic necessities of life, including survival shelter, rest and sleep, community and family, access to safe living spaces, and freedom from the risks and effects of exposure, sleep deprivation, and displacement.
73. Section 7 provides:
  7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
74. A s. 7 *Charter* claim requires the following two-step analysis to determine whether legislation or other state action infringes a section 7 right:
  - (1) Is there an infringement of the right to life, liberty and or security of the person?
  - (2) If so, is the infringement contrary to the principles of fundamental justice?
75. This case shares fundamental similarities to the s. 7 rights recognised by *Adams*. *Adams* establishes that where there are more people living homeless than available shelter spaces, as was the case in *Adams* (and as we submit will be found in this case), people living homeless are entitled, at a minimum, to build rudimentary shelter to protect themselves from the elements.
76. However, DWS and Mr. Shantz will also argue that Abbotsford's Homeless' s. 7 rights includes a right to erect temporary shelter during the day as well as at night. They will also argue that Abbotsford's Homeless have the right to erect temporary shelter in City-managed public spaces and not just City parks. The evidence will show that there is a need to shelter in places other than parks, to shelter from the elements during the day, and that there are insufficient daytime shelter options.
77. DWS and Mr. Shantz will also ask this court to determine what it means for shelter spaces to be "available". While, as was the case in *Adams*, the evidence will show that the physical number of shelter beds available in Abbotsford are insufficient to accommodate all of the homeless in the City, DWS and Mr. Shantz will argue that "available shelter" means shelter--whether emergency, temporary or permanent--that is "accessible shelter". For many of Abbotsford's Homeless, in order to be considered "available" shelter, spaces must be of the low barrier or low threshold variety, which are designed to overcome the personal, service, and structural barriers to shelter.

78. Evidence will be led in support of the argument that the bylaws prohibiting Abbotsford's Homeless from existing in public spaces and City's forcible evictions at issue in this proceeding engage the s. 7 rights to life, liberty and security of Abbotsford's Homeless. They create a real risk of serious physical harm, psychological pain and stress, increased risk of negative health outcomes and a risk of death.
79. DWS and Mr. Shantz will argue that the City's interference with the s. 7 interests of Abbotsford's Homeless is not in accordance with the principles of fundamental justice.
80. Principles of fundamental justice are found in the basic tenets of our legal system (*Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 503, Tab E-1). The three most oft-cited principles of fundamental justice are arbitrariness, overbreadth, and gross disproportionality. These three principles are intended to address the situation where a law is inadequately connected to its objective or in some sense goes too far in seeking to attain that objective (*Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para. 107, Tab E-2).
81. DWS and Mr. Shantz will argue that the bylaws and City's actions are arbitrary as enforced against Abbotsford's Homeless as there is no real connection on the facts between the effect and the object of the bylaws and the state action.
82. DWS and Mr. Shantz will also argue that the bylaws are broader than necessary to accomplish their purposes. There is no rational connection between the purposes of the bylaws and some of its impacts on Abbotsford's Homeless.
83. DWS and Mr. Shantz will further argue that the effects of the bylaws and the City's actions are so grossly disproportionate to any purpose of these bylaws or state action that these effects cannot rationally be supported. The effects implicate concerns of human dignity and personal security. Purposes such as preventing the overuse of parks and public spaces and preventing aesthetic nuisances cannot trump a risk of serious harm and even death.

*Charter s.15(1)*

84. Section 15(1) of the *Charter* states that:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination, and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
85. The Supreme Court of Canada has consistently affirmed that the purpose of section 15(1) is to foster substantive equality. Unlike formal equality, substantive equality recognizes that in order to achieve equality, different individuals and groups must, in certain circumstances, be treated differently. The Court in *Withler v. Canada (Attorney General)*, 2011 SCC 12 ("*Withler*") provides insight into this at paragraph 39 (Tab E-9):

The focus of the inquiry is on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group. The result may be to reveal differential treatment as discrimination because of prejudicial impact or negative stereotyping. Or it may reveal that differential treatment is required in order to ameliorate the actual situation of the claimant group.

86. To these ends, the Court has formulated a two part test for assessing a section 15(1) claim:
- 1) Does the law create a distinction based on an enumerated or analogous ground?
  - 2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? (*R. v. Kapp*, 2008 SCC 41 at para. 17, Tab E-4)
87. As Anatole France said in 1894 “In its majestic equality, the law forbids rich and poor alike to sleep under bridges, beg in the streets and steal loaves of bread.” [Translated from “*La majestueuse égalité des lois, qui interdit au riche comme au pauvre de coucher sous les ponts, de mendier dans les rues et de voler du pain.*”]. In Abbotsford, likewise neither the rich nor the poor may sleep in a park, under a bridge or in a tent. The section 15 question is whether those laws burden Abbotsford’s homeless and housed alike.
88. Thus, the *Kapp* test must be interpreted with the underlying purpose of section 15(1) – substantive equality – in mind. As such, a law that may appear on its face to be neutral may still violate section 15(1) if it adversely impacts a group characterized by a certain ground. This law thus creates a distinction resulting in a disadvantage through this adverse impact. In this circumstance, as the Court in *Withler* notes, “identical treatment may produce serious inequality” (para. 42).
89. DWS and Mr. Shantz will argue that the bylaws at issue in this case have such an adverse impact on Abbotsford’s Homeless on the basis of the grounds of disability, race, and an analogous ground. This analogous ground arises from the constellation of factors that have led to their homelessness – including disabilities, racial backgrounds, and economic and social status. For Abbotsford’s Homeless, this constitutes a constructively immutable characteristic worthy of the equality protection of s. 15.
90. In addition, beyond the adverse impact of apparently neutral bylaws, DWS and Mr. Shantz will argue that the City of Abbotsford’s actions to enforce these bylaws, namely their tactics employed to discourage camping in public spaces, have explicitly discriminated against Abbotsford’s Homeless by targeting them on the basis of their disabilities, their race, and the combination of factors leading to an analogous ground.
91. More specifically, the anticipated evidence in this case will show that Abbotsford’s Homeless disproportionately have mental and/or physical disabilities, and are disproportionately Aboriginal. This disproportionate representation arises, in part from the historical decline of services and housing for people with mental and/or physical disabilities, as well as the increasing cost of housing compared to relatively unchanged

rates of income for people with disabilities. The overrepresentation of Aboriginal people among this population is furthermore perpetuated by a history of residential schools, foster care and historic and current prejudice against Aboriginal people.

92. Further, as found in *Adams*, “homelessness is a serious social issue, with many causes and no clear or simple solution.” (*Adams BCSC* at para. 122, Tab E-7). This finding is equally apposite to this case – for Abbotsford's Homeless, their state of being homeless is a result of a number of factors, and is, in many cases, connected to their disabilities and racial backgrounds. This state is not a characteristic or circumstance that is easily remedied, and the anticipated evidence will show that this specific type of homelessness is as immutable as, for instance, marriage or citizenship, which were noted by the Court in *Withler* as being analogous grounds for discrimination.
93. The bylaws, by effectively preventing Abbotsford’s Homeless from participating in life sustaining activities, thus have a disproportionately adverse impact on individuals with disabilities, or who are Aboriginal, or who face a specific type of homelessness. The City’s tactics to enforce these bylaws also have a disproportionate impact on individuals with these characteristics, and in addition are connected to prejudice and stereotyping about these individuals, which is based in a certain historical context. This context, as our evidence will demonstrate, informs the way in which the bylaws, and the City’s actions, have operated to discriminate against Abbotsford’s Homeless.

#### *Charter s. 1*

94. The City claims that its legislation and actions are reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. It has not pled any facts in support of this claim. DWS and Mr. Shantz will argue that the bylaws and City’s actions do not present a pressing and substantial purpose, nor are their laws and action rationally related to their purpose. Further, we expect the evidence to show that there exists a spectrum of options available to the City that would be more minimally impairing, and DWS and Mr. Shantz will argue that City’s objectives are not proportional to the deleterious effects of the measures taken.

#### ***Conclusion***

95. DWS and Mr. Shantz seek to advance the jurisprudence beyond that established in *Adams*. They seek to do so while respecting that the Court may not trench into that which is properly the realm of government.
96. While the government may not have a legally imposed obligation to provide shelter or housing, and while it may be outside the ambit of the Court to order such a remedy, in the absence of sufficient and available shelter or housing, laws that prohibit the ability to take action to protect one’s own safety and to obtain the basic necessities of life such as sleep and shelter do not meet minimum constitutional standards.

***Costs***

97. As a final point, we anticipate seeking special costs of the entire proceeding. Special costs are awarded in public interest cases where certain factors are established. In closing submissions we anticipate advancing the argument that special costs should be awarded.