# IN THE SUPREME COURT OF BRITISH COLUMBIA

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

Date: 20151021
Dockets S156820; S159480
Registry: New Westminster

Docket: S156820

Between:

**City of Abbotsford**

Plaintiff

And

**Barry Shantz, John Doe, Jane Doe and Other Persons Unknown Erecting, Constructing, Building or Occupying Tents, Shelters or Other Constructions on the Land Known as Jubilee Park, Abbotsford, British Columbia**

Defendants

- and -

Docket: S159480

Between:

**British Columbia/Yukon Association of Drug War Survivors**

Plaintiff

And

**City of Abbotsford**

Defendant

And

**British Columbia Civil Liberties Association**

Intervenor

Before: The Honourable Chief Justice Hinkson

## Reasons for Judgment

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| Counsel for British Columbia/Yukon Association of Drug War Survivors, B. Shantz, John Doe and Jane Doe | D. Wotherspoon, D. J. Larkin, R. Cooper and A. Crabtree |
| Counsel for the City of Abbotsford: | J. G. Yardley, A. D. Price |
| Counsel for the Intervenor B.C. Civil Liberties Association | A. Latimer |
| Place and Date of Hearing: | New Westminster, B.C.<br>June 29–30, July 2, 3, 6–10, 13–17, 21–24, 27, 31, August 4–6, 2015 |
| Place and Date of Judgment: | New Westminster, B.C.<br>October 21, 2015 |

## INTRODUCTION

[1] In Action No. 159480, the City of Abbotsford (‘the City”) seeks a permanent injunction in relation to events that occurred at Jubilee Park in Abbotsford. In addition, the City seeks damages against the personal defendant, Barry Shantz.

[2] In Action No. S159480, the British Columbia/Yukon Association of Drug War Survivors (“DWS”), challenges the constitutional validity of various bylaws passed by the City. DWS seeks a number of declarations respecting sections of the City’s *Consolidated Parks Bylaw*, the *Consolidated Streets and Traffic Bylaw* and the *Good Neighbour Bylaw* and damages against the City based upon various asserted rights under 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 [*Charter*].

[3] The two proceedings were heard together as result of an order that I made on November 10, 2014. These reasons deal with both proceedings.

## ISSUES

[4] I would phrase the issues raised in these proceedings as follows:

a) whether the interlocutory injunction granted to the City in respect of Jubilee Park should be made permanent; and

b) whether the City is entitled to recover damages from Mr. Shantz, and if so, what damages, and in what amount;

c) whether the right to obtain the basic necessities of life is a foundational principle of fundamental justice;

d) whether the s. 7 rights of the City’s homeless include the right, without permit, to erect temporary, non-obstructing, shelter during the day as well as at night, on City park lands and public spaces;

e) whether certain provisions of the City’s bylaws, as they affect homeless persons breach one or more of sections 2(c), 2(d), 7 and 15 of the *Charter* and, if they do, what relief should be ordered;

f) whether certain acts of City employees and others, affecting the City’s homeless breach the *Charter* and, if they do, what relief should be ordered.

[5] For the reasons which follow, in Action No. S156820, I decline to grant the permanent injunction sought by the City. In addition, I dismiss the claim for damages brought by the City against Mr. Shantz.

[6] For the reasons that follow, in Action No. S159480, I declare that portions of the bylaws passed by the City which prohibit sleeping or being in a park overnight without permits or erecting a temporary shelter without permits violate the guarantee the right to life, liberty and security of the person set out in s. 7 of the *Charter*. I decline to issue other declaratory relief sought by DWS or to award any damages.

## THE PARTIES

[7] The City 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. The City has a population of approximately 140,000.

[8] Barry Shantz is a resident of the City and is a director of DWS.

[9] DWS is a society incorporated under the *Society Act*, R.S.B.C. 1996, c. 433. It asserts that some of its members are drug users or former drug users, and that some have no fixed addresses, or any predictably safe residences to return to on a daily basis. DWS asserts that a number of its members live on the streets or in other places not generally intended for human habitation, including public spaces in the City.

[10] By order dated September 29, 2014, I granted public interest standing to DWS on the basis that it had raised serious issues to be tried, that it had a genuine interest in the issues that it wished to raise in these proceedings, and that if it was not granted standing, there was no other reasonable and effective way to bring the issues that it has raised before the court, *B.C./Yukon Drug War Survivors Association v. Abbotsford (City)*, 2014 BCSC 1817 (“Standing Decision”).

[11] On January 20, 2015, I granted intervenor standing to the British Columbia Civil Liberties Association ("BCCLA"). The BCCLA supports the positions advanced by DWS.

## BACKGROUND

### The City's Parks

[12] The City holds numerous parcels of land, amounting to some 2,534 acres of parkland. Lands administered by the City's Parks, Recreation and Culture Department include 80 playgrounds, 60 sports fields, several community centres, swimming pools, 2 arenas, 4 cemeteries, a golf course, Exhibition Park, and a civic centre precinct that includes the Reach Art Gallery, City Hall, the police station and the Courthouse.

[13] The City classifies its parklands into 4 broad categories:

1. Neighbourhood parks. These are local in scale, are mainly used for socialization, serve an area equivalent to an elementary school catchment area, and are intended to be located within 500 meters or a ten minute walk of residents.
2. Community parks. These are typically larger parks, serving an area equivalent in area to a high school catchment. Community parks typically contain amenities such as sports fields and splash parks.
3. City wide parks. These are parks for events and interests that bring people together. These include Exhibition Park, Mill Lake Park and the civic centre precinct. Facilities at these parks include sports fields, legacy buildings, picnic sites and special purpose buildings, such as art galleries, institutional buildings and historic houses.
4. Open space. This consists of mountainsides, ravines and other lands that are not developable.

[14] Some of the City's parklands are also used for storm water detention ponds, and during periods of heavy precipitation are unusable.

**The City's Trails**

[15] The City also holds and maintains 105 kilometers of maintained trails.

**The City's Highways**

[16] There are approximately 945 kilometers of highways in the City.

## THE IMPUGNED BYLAWS

[17] Pursuant to the *Community Charter*, the City has enacted three bylaws for managing its parks and streets. It is portions of these bylaws which are at issue in these proceedings:

a) *Consolidated Parks Bylaw*, 1996, No. 160-95 ("*Parks Bylaw"*);

b) *Consolidated Street and Traffic Bylaw, 2006,* Bylaw No. 1536-2006 ("*Street and Traffic Bylaw*");

c) *Good Neighbour Bylaw*, Bylaw No. 1256-2003 (*"Good Neighbour Bylaw")*

(collectively, "Impugned Bylaws").

[18] The relevant sections of the Impugned Bylaws are reproduced in Appendix "A" which is attached to these Reasons for Judgment.

[19] The objectives of the *Parks Bylaw* provisions are to assist in the regulation, prohibition and imposition of requirements in relation to the management, maintenance, improvement, operation, control and use of property held by the City as a park, with a view to ensuring that parks are available to current and future members of the public, for pleasure, recreation, or similar community uses.

[20] The objectives of the *Street and Traffic Bylaw* provisions are to assist in the regulation, prohibition and imposition of requirements in relation to the management, operation and use of City's streets and highways with view to ensuring that they may be safely and efficiently used by all members of the public for mobility, transportation and commercial activities.

[21] The objectives of the provisions from the *Good Neighbour Bylaw* are to assist in the regulation of individuals who engage in activities that interfere with, or disrupt, the public's quiet use and enjoyment of property.

[22] Those wishing to use outside areas in parks in the daytime, or camp overnight in the parks, must apply for a discretionary permit from the City. The person applying must have a valid credit card. Private bookings in the parks during the daytime cost $15/hour, and commercial bookings cost $35/hour. Insurance must also be obtained for such bookings. There is a $10 charge per vehicle or tent each night for overnight camping. In considering whether to exercise its discretion to grant permits, the City considers the dates, number of people, whether that site has already been booked, whether the space is appropriate, whether the facilities are large enough, and whether the proposed use might cause damage to the park.

[23] Along with the parks booking system, the *Parks Bylaw* allows people to apply to the City to erect structures, including tents, in its parks. The *Parks Bylaw* sets out in section 30 the following criteria for reviewing such requests:

a) the impact such activity will have on other members of the public;

b) the impact such activity will have on the environment and around the subject park;

c) public safety issues; and

d) the nature, duration and size of the activity.

[24] The DWS allege that the following sections of the Impugned Bylaws 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 without permits;

b) Sections 10 and 13 of the *Parks Bylaw*, which prohibit 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 the City;

d) Subsection 2.7(d) of the *Good Neighbour Bylaw*, which prohibits erecting any form of shelter from the elements in any public place;

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

g) 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.

[25] DWS contends that the Impugned Bylaws are arbitrary, overbroad, and grossly disproportionate in effect, as they function to continually displace the City's homeless from public spaces, and thereby prevent them from obtaining the basic necessities of life including survival shelter, rest and sleep, community and family, access to safer living spaces, and freedom from the risks and effects of exposure and sleep deprivation.

**CHRONOLOGY OF EVENTS**

[26] On June 4, 2013, some City employees orchestrated the eviction of some of the City's homeless from a camp on Gladys Avenue ("the Happy Tree Camp") by spreading chicken manure on the campsite.

[27] In or around October 20, 2013, Barry Shantz and others entered into Jubilee Park, one of the City's parks, and set up a tent camp where they remained, without written permission from the City.

[28] On December 12, 2013, many of the occupants of the tent camp moved into a wooden structure ("Structure") that had been erected in the parking lot of Jubilee Park.

[29] On December 13, Mr. Justice Blok ordered that the Structure be vacated.

[30] On December 20, 2013, Mr. Justice Williams granted an interim injunction that among other terms enjoined the erection, placement, construction or building of tents, shelters, and other constructions in Jubilee Park and ordered the removal from the park of the Structure and any tents, shelters, and other constructions in the park, and permitted the arrest of those with knowledge of his order who failed to comply with its terms.

[31] When the Order to vacate Jubilee Park was posted at the tent camp, the occupants of the camp left Jubilee Park. Thereafter, many moved from one public or private space to another, often due to notices or verbal requests to do so by City staff. Some found housing. Two or three of the homeless came to the Salvation Army's Shelter (the "Salvation Army Shelter") and one obtained a rent supplement. BC Housing offered housing supplements to some of the people who had camped at Jubilee Park subject to a precondition that housing was actually available. Some of the City's homeless have camped on City land, private land or on land belonging to the Province. Some have erected tents, tarps, boxes, blankets or other improvised structures to protect themselves from the elements. Sometimes some of the homeless live in proximity to each other, while others prefer to live alone.

[32] After December 21, 2013, several people erected tents along the west side of Gladys Avenue in the City adjacent to the intersection of Gladys Avenue and Cyril Street (the "Gladys Avenue Camp"). City staff has tolerated the presence of the campers since then. To some extent, the City and some charitable organizations have also accommodated the presence of the campers by providing some garbage removal, supplies and food. In January 2015, there were at least 12 people at this location, but the number of people observed there by the City's employees has varied from 5 to about 20.

## DEFINITION OF HOMELESSNESS

[33] The Mennonite Central Council ("MCC") Homeless Count includes persons who are living and sleeping outside, persons who are in emergency shelters, safe houses, and transition houses, and persons who "couch surf' (meaning they sleep at a friend's or family member's place for a night or two or three, and then move on to another place). Of these people, the majority are men aged 30-49, about 32 (21%) self-identify as Aboriginal, and just over 76 (51%) are living and sleeping outside. Approximately 30% of the City's homeless further suffer from "chronic homelessness" (defined as having been homeless for more than one year), a proportion significantly higher than in other municipalities (10–15%) and overall in Canada (15– 20%).

[34] The MCC Homeless Count determined that there were 226 homeless in the City in 2004, 235 in 2008, and 117 in 2011. The most recent count which was conducted in 2014 tallied 151 homeless individuals living in the City. Of the 151 identified in 2014, 62 reported sleeping outside any building on the evening of March 11 – 12, 2014, the date of the count.

[35] DWS submits that the appropriate definition of homelessness is:

> a population of people without a fixed address, or a predictable safe residence to return to on a daily basis, a number of whom live on the streets or in other places not generally intended for human habitation including in public spaces.

[36] The City contends that while it is necessary to define the term “homeless”, it rejects the definition proposed by DWS. The City contends that the term “homeless” should be defined by the factor that has been placed at issue in this proceeding: the use of public land for habitation.

[37] When asked to define homelessness, Pastor Wegenast of the 5 and 2 Ministries stated that BC Housing outlines several definitions, the primary one being individuals with no fixed address. He considers as homeless the people camping on Gladys Avenue or sleeping under overpasses, in bushes or in cars, as well as people without control over their housing conditions or length of stay at a location. The latter he called “hidden homeless”, who include people trading sex for shelter or people living in transition homes.

[38] The DWS submitted an expert report prepared by Dr. Yale Belanger in which Dr. Belanger stated that:

> 6.97% of urban Aboriginal people in Canada are considered to be homeless compared with 0.78% of the mainstream population. More than one in fifteen urban Aboriginal people are homeless, compared to one out of 128 non-Aboriginal Canadians.

[39] Dr. Belanger noted that Aboriginal people may experience homelessness differently than others due to generational trauma. He uses the construct “spiritual homelessness” to contextualize Aboriginal homelessness, emphasizing the effects of “separation from traditional land, separation from family and kinship networks, and/or crisis of personal identity whereby an individual’s understanding or knowledge of how one relates to country, family and Aboriginal identity systems is confused.”

[40] I am not persuaded that “spiritual homelessness” is relevant to the actions that I am dealing with. While it may be a factor affecting the aboriginal population, it is not an issue that I can address within the parameters of the litigation before me. In respect of the specific needs of Aboriginal homeless in the City, the issues and remedies are beyond the remedies that I can entertain in the proceedings presently before the Court.

[41] I adopt the definition of homeless accepted by the Court of Appeal in *Victoria (City) v. Adams*, 2009 BCCA 563 [*Adams BCCA*] at para. 161:

> … a person who has neither a fixed address nor a predictable safe residence to return to on a daily basis.

[42] The homeless population in the city is not homogeneous. Physical and mental illness, addiction to drugs and alcohol, poverty, and personal trauma or some combination of these challenges are common to many of the homeless in the City, and the group is overrepresented by members of First Nations.

[43] Constable Stahl, a member of the Abbotsford Police Department ("APD") gave evidence that he had been to over 30 homeless camps in the City between 2013 and 2014, albeit some of which appeared to have been abandoned. He recorded seeing over 90 people living in homeless encampments in the City during 2014.

[44] While encampments have tended to cluster along Gladys Avenue, they have also been located on public lands throughout the City including at Jubilee Park, in the Clearbrook area, at Grant Park, Mill Lake Park, Oriole Park, Gardner Park, Lonzo Park, and Century Park.

[45] Constable Stahl also acknowledged that there were homeless camps on Forest Terrace, behind 7th Avenue, behind the south of Fraser Way, across from the Salvation Army Shelter, at McCallum/Homeview, on the south side of Highway 1, at West Railway, south of Fraser Way, behind the University of the Fraser Valley, under the power lines, behind 3370 Morrey Avenue next to the tracks, and at 2771 Emerson Street. He confirmed that generally the individuals he observed residing in the camps were occupants at some point and not simply just found there. Encampments have also been found on lands not owned by the City, such as under the Highway One overpass, and on private land behind Save On Foods.

## HOMELESSNESS IN THE CITY

[46] While the City contended that there was no evidence before me of any present homelessness, I find that homeless individuals remain in the City. I reach this finding based on the evidence of the City's Homelessness Coordinator, Dena Kae Beno, and in part upon the conduct of the City creating the Abbotsford Social Development Advisory Committee, in planning for future housing to address the problem of homelessness, and in creating the position of Homelessness Coordinator for the City in April of this year.

### Available Shelter Space

[47] DWS submits that available shelter means shelter that is accessible shelter. For many of the City's homeless, available shelter is that which is low barrier or low threshold shelter, designed to limit the personal, service and structural barriers to shelter that prevent the City's homeless from being housed on any given night. For the most chronically homeless, emergency shelter may not be accessible at all.

[48] The City takes the position that there is sufficient shelter for those who are presently sleeping in public or private property in the City; however, a report by Cherie Enns, consultant to the City on social issues, confirms that there is a lack of shelter and housing in the City. In her report titled "2014 Homeless, the City of Abbotsford Role and Response, Next Steps" which was admitted into evidence, Ms. Enns advised that "the number of shelter beds per 100,000 people in Abbotsford is much lower at approximately 20 beds than the provincial average of 79" and that "Abbotsford lacks a comprehensive and coordinated low-no barrier housing first program".

[49] Mr. Walker, the Executive Director of the Kinghaven Treatment Centre ("Kinghaven") and the Peardonville House Women's Center ("Peardonville") acknowledged in cross examination that, "in Abbotsford, it is very difficult for us to find transitional housing that respects the needs of the clients and treats them in an honourable and respectful manner."

[50] Since April 2015, the City has employed a Homelessness Coordinator, Ms. Dena Kae Beno. In addition, a Deputy City Manager, Jake Rudolph, was given the "special project" of dealing with issues surrounding homelessness. The City had a Homelessness Task Force between April and October of 2014, and as of December 2014 the City has a Homelessness Action Advisory committee.

[51] There are three basic types of indoor shelter or housing options potentially available to the City's homeless: emergency shelter, second stage housing, and market housing. No shelter or housing options are funded by the City. The options that do exist range from temporary to permanent, low barrier to high barrier and from free to conditional upon the payment of monthly rent.

**Emergency Shelter**

[52] The only emergency shelter for adults in the City is the one operated by the Salvation Army on Gladys Avenue. The Salvation Army has a contract with BC Housing to provide 20 emergency high-barrier shelter spaces, only six of which are designated for women. The Salvation Army funds five more beds itself. The Salvation Army Shelter's maximum occupancy in 2014 was 139 percent; the equivalent of 35 people. People are turned away when the shelter is full; this happens regularly. There is also a 30-day limit on the length of stay.

[53] Once someone is in the Salvation Army Shelter for the night, they cannot leave and be allowed back in. If they stayed the previous night and are not there by 9:30 p.m. the next night, they lose their bed. People must leave the Salvation Army Shelter at 7:30 a.m.

[54] Until early 2014, clients faced numerous barriers to access, including drug abstinence and sobriety, a 6:00 pm curfew, and temporary bans for minor rule infractions, sometimes of indeterminate lengths. Prior to early 2014, there were on average approximately 37 people banned from the Salvation Army Shelter.

[55] Since a change in leadership in January 2014, the Salvation Army Shelter has moved from being "high-barrier" to "low-barrier". This has resulted in fewer

people being turned away, forced to leave or banned for lack of sobriety or violation of other rules and conditions. If the shelter is full, the only option is to send people to a shelter in a nearby community such as Mission or Chilliwack. If someone came to the Salvation Army Shelter in the middle of the day to sleep, that request could be accommodated.

[56] The Salvation Army Shelter keeps track of how many clients enter the shelter for the first time. On average there are 94 unique clients per month arriving at the Salvation Army Shelter. Only about 1 in 4 to 1 in 5 (23%) of the people who access the Salvation Army Shelter move on to securing more permanent housing, and only about 50% of *those* people maintain that housing for more than six months.

[57] The Salvation Army also operates a 14 suite supportive independent living facility, for which the rent is $375 per month, which is the maximum amount provided for rent to those receiving social assistance.

[58] The Salvation Army also administers 20 rental subsidies which are funded by BC Housing, and Abbotsford Community Services administers another 20 rental subsidies.

[59] The Cyrus Center has space restricted to young people.

[60] Raven's Moon operates several houses in the City with spaces for over 70 people in 16 locations for rent of $450/month. One of its houses is a low barrier men’s house. Raven’s Moon has housed people who were living on the streets. It is largely abstinence-based housing; it is although tolerant of those who relapse. Its homes are consistently full or nearly full, including in 2014 when the last homeless count was done.

[61] Kinghaven is an abstinence-based intensive treatment centre requiring a referral and treatment-readiness. It has space for up to 62 men, including detox beds for people who are actively under the influence of drugs or alcohol, and some of Kinghaven's residents have entered the Centre from homelessness. There are usually 4 to 6 beds available, and as of July 2015 there were spaces for 4 people but

neither shelter nor long-term housing. Kinghaven does not have a program to assist clients to find housing following treatment.

[62] Peardonville has 40 beds and provides addiction treatment with similar rules and timelines as Kinghaven, although beds are not as frequently available as beds at Kinghaven. Women can be referred from the Salvation Army and some of the women who attend Peardonville need assistance in looking for a place to go when they leave Peardonville.

[63] The Extreme Weather Response Program (”EWRP”) is in operation when the temperature drops below zero degrees Celsius, or there is heavy precipitation. Under the EWRP, more shelter space is opened in the City at the Salvation Army Shelter, the Cyrus Center, various secondary sites at churches, and the City’s Agriculture Recreation site, if there is overflow.

**Second Stage Shelter**

[64] There is second stage housing for people who have been sober. There is the George Schmidt Center, the Christine Lamb Residence, and Lynnhaven. Although this is second stage housing, there is evidence of some DWS witnesses who accessed these facilities, such as Colleen Aitken, who stayed at Lynnhaven for 3 to 4 months.

[65] The George Schmidt Centre has 30 single beds for men 19 and older who have committed to long-term recovery from addiction through an abstinence-based program. Individuals stay an average of six to seven months, and beds become available only when a resident chooses to leave.

[66] The Assertive Community Treatment (“ACT”) Team has rental supplements for 35 people in the City.

### Market Housing

[67] I also heard evidence about the availability of market housing in Abbotsford. Two witnesses explained that such housing was unsuitable on the basis that they couldn't afford any of them unless they shared with someone else.

[68] The availability of “market housing” to the City’s homeless is limited by supply, the monthly amount they receive in income assistance/welfare, by requirements for the payment of application fees, and by other things, such as whether they are actively using drugs or alcohol. Any market housing that is available to those with the limited incomes of the City’s homeless is often in deplorable condition.

## Cause of Homelessness

### *Harvey Clause*

[69] Harvey Clause testified that he lived in Grant Park in the summer of 2013 and was given several weeks advance notice by the City to vacate that space. He moved to another outdoor location where he was assaulted by someone he lived with before moving to Jubilee Park in November 2013. While staying at Jubilee Park, BC Housing offered him a housing supplement to obtain housing but because the location of the housing was not identified to him, Mr. Clause declined the offer. Mr. Clause eventually moved to the Gladys Avenue Camp where he stayed for over a year, during which time, he testified, he turned down a housing opportunity from a Salvation Army worker because he would not have been allowed to have guests. He eventually moved from the Gladys Avenue Camp because a stronger “criminal element” moved to the site, and because it was getting to be “chaos”. He first moved to a friend’s cabin for 2 or 3 months, then to "the catacombs" under the west side of the Hwy 1 overpass, then to the east side of the overpass and then to a shelter in North Vancouver. Mr. Clause now lives in a house in Lytton.

***Nicholas Zurowski***

[70] Nicholas Zurowski testified that tents are important both during the evening and daytime hours. He indicated that there were situations in which he needed to watch out for someone for an extended period of time, where he was unable to take that person to the Salvation Army because they would not be able to obtain adequate sleep there. Having a tent has allowed him to take care of that person and others and to ensure they have food and water. Mr. Zurowski testified that he started sleeping outdoors on 2006, that it felt like "freedom", and that he preferred sleeping outside compared to the Salvation Army Shelter, which he likened to a prison. Mr. Zurowski now lives in Chilliwack.

***Norman Caldwell***

[71] Norman Caldwell testified that he could go back and live with his daughter, but he doesn't wish to impose on her and her family. He also testified that he doesn't like the Salvation Army Shelter because he doesn't like being around other people. Mr. Caldwell testified that certain groups tend to cluster based on common drug preferences, while different groups of people do not all get along. When Mr. Clause was moved out of Grant Park in 2013, he moved under the Sumas highway overpass on a more obscure hillside. While he was there he was assaulted by another homeless person. Mr. Clause also testified that following his eviction from beneath the Sumas overpass, he took drugs in order to stay awake throughout the night because he had nowhere to go and was afraid to fall asleep. He ultimately moved to Jubilee Park during the encampment as he considered it to be a safer option.

***Colleen Aitken***

[72] Colleen Aitken testified that she preferred living in a tent to being in a shelter. Ms. Aitken gave evidence that she overdosed 13 times over a one-year span. She emphasized that, were it not for her visibility and the community around her, no one would have been around to assist her and she would not be alive today.

***Other Witnesses***

[73] Holly Wilm gave evidence that she has the option of moving to Duncan, but as that would mean leaving the place where and with which she is familiar, she has not exercised that option. Ms. Wilm also testified that she likes privacy. Rene Labelle testified that he prefers to live alone and Nanna Tootoosis testified that it "was okay" when he lived alone. Some witnesses testified that violence is not uncommon at the Salvation Army Shelter. Both Rene Labelle and Doug Smith admitted in their oral testimonies to partaking in and at times being banned for such violence. Nate McCready stated that on the Thursday prior to him testifying in this proceeding, four people were banned for violent behaviour.

[74] DWS alleges that there are a number of barriers faced by the City's homeless in accessing shelter and housing; onerous requirements set by these facilities that include sobriety, abstinence, and curfews; a lack of permanent support services and resources; and individual circumstances such as criminal records, physical or mental health issues, addictions, and a distrust of others. There was significant variation to the extent to which those residing on public lands expressed a desire to be in groups or on their own, and in open places versus hidden locations. Reasons given during the Homeless Count for not using a transition house or shelter the previous night included, "too many rules"; "feels too much like an institution"; "don't like the curfew"; "do not feel safe"; and "turned away". While the shift from abstinence to low barrier for the Salvation Army Shelter has increased the accessibility of the shelter for some, it has created problems for others who do not wish to stay in the shelter due to its lower barriers.

[75] Some of the City's homeless prefer to seek and set up shelter out of sight; other of the City's homeless prefer to gather together in homeless camps. When the City's homeless shelter together, in small groups of two or three or in larger and more stable homeless encampment, this allows them to both "take care of each other", and to gain in the visibility needed for service providers to find them and

address their basic needs, from garbage pickup, to accessible washrooms, to the provision of fire extinguishers.

[76] The City contends that some of what are characterized by DWS as barriers are really more of a disinclination on the part of individuals to rules, and that while that disinclination may be genuinely held by the individual, it does not justify the individual either not accepting, or leaving available shelter, to go and live on public lands.

[77] The City submits that the evidence supports findings that there is a degree of choice in sleeping outside, with many individuals expressing a preference to sleep outside over other viable options; that those who testified that they currently sleep outside do stay inside at times; that there was no evidence of a group of homeless who permanently sleep outside in the City because there is either no space for them inside or because the spaces inside are effectively inaccessible to them; and that some of those who are characterized as homeless often involuntarily change the locations where they live for reasons unrelated to acts of the City.

[78] In *Canada (Attorney General) v. Bedford*, 2013 SCC 72 [*Bedford*], the Court unanimously rejected the defendant's argument that prostitutes "choose" to engage in inherently risky activities and can therefore avoid both the inherent risk of the activity and any increased risk that the laws impose simply by choosing not to engage in the activity. At para. 86 – 87, the Court expressly disagreed with the notion that choice, and not the law, constituted the real cause of injury to prostitutes in Canada and held:

> [86] First, while some prostitutes may fit the description of persons who freely choose (or at one time chose) to engage in the risky economic activity of prostitution, many prostitutes have no meaningful choice but to do so. Ms. Bedford herself stated that she initially prostituted herself "to make enough money to at least feed myself" (cross-examination of Ms. Bedford, J.A.R., vol. 2, at p. 92). As the application judge found, street prostitutes, with some exceptions, are a particularly marginalized population (paras. 458 and 472). Whether because of financial desperation, drug addictions, mental illness, or compulsion from pimps, they often have little choice but to sell their bodies for money. Realistically, while they may retain some minimal power of choice — what the Attorney General of Canada called "constrained choice"

> (transcript, at p. 22) — these are not people who can be said to be truly "choosing" a risky line of business (see *PHS*, at paras. 97-101).
>
> [87] … even accepting that there are those who freely choose to engage in prostitution, it must be remembered that prostitution — the exchange of sex for money — is not illegal. The causal question is whether the impugned laws make this lawful activity more dangerous. An analogy could be drawn to a law preventing a cyclist from wearing a helmet. That the cyclist chooses to ride her bike does not diminish the causal role of the law in making that activity riskier. The challenged laws relating to prostitution are no different.

[79] In *Adams BCCA*, the Court of Appeal dealt with matters of choice at paras. 107 and 109:

> [107] Clearly, the claimant in *Parker* did not "choose" to have epilepsy. This, however, did not prevent his decision with respect to treatment from being protected under s. 7. Similarly, the fact that homelessness is not a choice does not mean that a homeless person's decision to provide him or herself with some form of shelter is not protected under s. 7. Treatment is as much a "necessary response" to illness as sheltering oneself is to the state of being homeless. The fact that a claimant has not chosen their underlying situation does not mean that a decision taken in response to it is not protected by the s. 7 liberty interest.
>
> …
>
> [109] We also reject the alternative argument that the choice to erect shelter to protect oneself from the elements is not a decision of "fundamental personal importance". 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.

[80] In my view, it is overly simplistic to assert that members of the City's homeless community are living outside, or in the other places they find themselves, as a result of personal choice. Ms. Beno, the City's newly recruited Homelessness Coordinator, testified that there is an immediate and critical need for shelter in the City.

[81] In addition, to assert that homelessness is a choice ignores realities such as poverty, low income, lack of work opportunities, the decline in public assistance, the

structure and administration of government support, the lack of affordable housing, addiction disorders, and mental illness. I accept that drug and alcohol addictions are health issues as much as physical and other mental illnesses. Nearly all of the formerly homeless witnesses called by DWS gave evidence relating to some combination of financial desperation, drug addiction, mental illness, physical disability, institutional trauma and distrust, physical or emotional abuse and family breakdown which led, at least in part, the witness becoming homeless.

[82] Given the personal circumstances of the City's homeless, the shelter spaces that are presently available to others in the City are impractical for many of the City's homeless. They simply cannot abide by the rules required in many of the facilities that I have discussed above, and lack the means to pay the required rents at others. While some of those who are amongst the City's homeless have declined available shelter, I am satisfied that at the present time there is insufficient accessible shelter space in the City to house all of the City's homeless persons.

**Difficulties With Homeless Encampments**

[83] The encampment in Jubilee Park was present for about 2 months in 2013. Although some former occupants spoke favorably of the encampment, the evidence shows that it was neither safe nor clean. There was a violent assault in a teepee, used needles were continually strewn over the ground, a fire occurred in a tent, there was an accumulation of garbage and the site became increasingly muddy.

[84] The City has not enforced its bylaws for most of the last year with respect to the Gladys Avenue Camp, and indeed has provided fire safety education and garbage collection services.

[85] Despite this, the evidence does not establish that the circumstances of the people at the Gladys Avenue Camp are materially better than they were at Jubilee Park. Although the City provides garbage collection and there are sharps containers for the safe disposal of used needles, the ground is littered with garbage (e.g., batteries, used propane tanks, rotten food, drug paraphernalia, and human waste)

and there are many used needles on the ground. There have been rats at and around the camp. There have been fights between occupants and medical emergencies. Weapons have been found and there are regular signs of fires. There have been numerous instances of tents burning and nearby trees catching on fire. Propane cylinders are frequently reported at camps. The use of candles and other open flames in tents has also been frequently reported.

[86] Harvey Clause testified that he had never had more things stolen than at the Gladys Avenue Camp and he left in part because of an increase in a criminal element there and because it was “chaos”. Mr. Shantz gave evidence at his examination for discovery, which was read into evidence at trial, that he has witnessed what he believed to be the sale of drugs at the Gladys Avenue Camp.

[87] Ted Maine, a City Fire Prevention Officer, has visited the Gladys Avenue Camp weekly since September of 2014. Mr. Maine testified that he has seen propane tanks there. He noted that when propane tanks explode because of exposure to open flames, a giant fire ball is created. To date there is no evidence that this has occurred, but the risk of exploding propane tanks cannot be ignored. Mr. Maine also testified that he saw between 100 and 500 used syringes on his visits, the majority of which have been left on the ground. He also reported seeing between 10 and 15 rats on each of his visits.

[88] The Gladys Avenue Camp has been in existence since approximately December 2013. I am satisfied on the evidence that the conditions of the Gladys Avenue Camp are unsafe for the people who are living there, for the people who attend there to provide services to the City’s homeless (e.g., the City’s employees and people who work or volunteer with various community organizations), and for the citizens of the City generally.

[89] The City has chosen to regulate public spaces by enacting presumptive blanket prohibitions against gathering or doing any other thing likely to cause a public gathering or attract public attention, the erection, without permit, of any shelter or construction whatever and the occupation of any park between one hour after

sunset on one day and one hour before sunrise on the following day. It has done so, it says, “to regulate the use of parks and other public places within its jurisdiction.”

## DISPLACEMENT TACTICS

[90] DWS submits that the City’s employees and members of the APD have employed various policies in their efforts to deal with the homeless population in the City. DWS contends that the City’s employees and members of the APD participated in ongoing efforts to harass the City’s homeless by keeping them moving from one space to another, with no attempt to see that they indeed had anywhere that they could find shelter or a place to stay.

[91] DWS alleges that the City employed the following displacement tactics:

a) issuing bylaw enforcement notices on the City’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;

c) ordering the City's Homeless to move and/or disperse from various public spaces verbally and without the issuance of Eviction Notices;

d) selective policing practices in areas known to be frequented by the City’s homeless;

e) spraying bear spray by members of the APD into the tents and onto the belongings of some of the City’s homeless,

f) destroying their Survival Shelters, clothing, hygiene items, food and other personal property;

g) slashing tents and belongings of some of the City’s homeless by members of the APD;

h) spreading fish fertilizer on near homeless encampments;

i) spreading chicken manure on a longstanding homeless encampment located on Gladys Avenue;

j) otherwise destroying or disposing of the personal property of the City’s homeless;

k) failing to develop needed housing for people who are homeless or at-risk of homelessness.

(collectively, “Displacement Tactics”)

[92] At the present time, the City has no designated needle exchange or a safe injection site. City staff, however, continually raise concerns regarding the presence of needles, condoms, and other paraphernalia in public parks and grounds. The City does not provide garbage clean up to any homeless encampments other than the Gladys Avenue Camp. It does not make public washrooms accessible during evening hours, nor does it put portable washrooms in its parks. There are limited daytime services for the City’s homeless, including indoor spaces to rest or sleep, find adequate nutrition and meals, and accessible toilet and shower facilities. Outhouses were put in at the Gladys Avenue Camp approximately one year ago. Prior to that, there were no 24-hour-access washrooms available.

[93] Jake Rudolph, the City employee responsible for issues relating to homelessness, referred in his oral testimony to homelessness as “a very visible issue.” When asked to describe the nature of the problem, he said “people are very visual and see things and they note if people are outdoors in public areas or on streets, gates or sidewalks in the downtown … [T]hat is a problem.”

**Bylaw Enforcement and Evictions**

[94] The City regularly enforces its bylaws to displace the City’s homeless after receiving calls from the public. The City has multiple protocols and policies with regard to removing homeless camps. The City’s Integrated Services Enforcement Team developed such a protocol which was in effect until late 2013. The City has enforced the Impugned Bylaws to remove numerous homeless camps.

[95] According to Magda Laljee, who gave evidence for the City, during her tenure with Bylaw Services, the City did not actively seek out bylaw contraventions, but they responded to calls for services when the City received them. A call for service is a call from the public or a complaint or concern from the public with regards to allegations of a bylaw contravention. The calls for service could also come from other City employees or departments such as the Parks crews, Engineering,

Planning or Transportation. Although Ms. Laljee said that in direct examination that Bylaw Officers only responded to complaints, on cross-examination she testified that the City did not only respond to complaints from the public, it also responded sometimes to complaints made by the City's bylaw officers.

[96] With respect to homeless people in public spaces, the City's employees do issue verbal and written notices to vacate. The notices are requests for voluntary compliance which is what the City's bylaw department normally seeks with respect to bylaw breaches generally. Ms. Laljee testified that the City's bylaws department issues up to 100 written requests to property owners per month for voluntary compliance on other matters. With respect to encampments, the evidence is that people almost always comply with the requests to move on although it is acknowledged that they are really given no choice but to comply.

[97] Dwayne Fitzgerald, a bylaw officer employed by the City, testified at the trial. Mr. Fitzgerald approached camp occupants and verbally requested that they move along. If they failed to comply, Mr. Fitzgerald would return to post eviction notices. He testified to being present when two tents were pepper sprayed.

[98] He also arranged for letters to be sent to property owners requiring that they enforce the *Good Neighbour Bylaw* by removing homeless people from camping on private property. The letters included a threat to undertake certain work on the property at the expense of the property owner if they failed to comply with the demands stipulated. The letter also included an attachment on tactics to deter 'squatting', which included cutting back bushes to open up sightlines in order to discourage homeless camping. Mr. Fitzgerald acknowledged that there have been a number of occasions where brush has been cut around homeless camps to open up the sightlines and to discourage homeless people from camping. He agreed that these measures are a practice of the City.

[99] With respect to private property, including land under the jurisdiction of the Ministry of Highways, the City does not seek the removal of an encampment but may deal directly with the property owner with respect to issues such as

unsightliness. Before 2014, Mr. Fitzgerald actively assisted the Ministry of Highways with respect to encampments.

**Use of Bear or Pepper Spray**

[100] Constable Stahl of the APD testified to spraying bear or pepper spray into two empty tents located on private lands in the City. While his actions in so doing cannot be condoned, there was no evidence that his use of the pepper spray affected any member of DWS, and thus no evidentiary basis upon which to find that this misconduct gives rise to any claim by DWS.

**Damaging Tents and Personal Property**

[101] DWS submits that one of the tactics employed by the City and the APD involved damaging tents and other personal property belonging to the City's homeless.

[102] Constable Wiens testified that on one occasion he cut some straps that held up a tent at a camp located north of McLure St., along the railroad tracks and just west of Highway 11. He explained that he did so out of frustration with the mess created by the occupant. The tent belonged to a man identified as Brian Bushweed. As a member of the APD, Constable Wiens must exercise greater self-control, and his conduct in this regard cannot be condoned; however, the evidence does not support a finding that Constable Wiens' conduct gives rise to a *Charter* breach. In addition, given that Mr. Bushweed is not a named party to these proceedings, that there is no evidence before me that he is a member of DWS; and that a claim for damages was not pleaded, I am unable to award damages. There may be other venues to seek redress for the damage to Mr. Bushweed's tent; my conclusion should not act as an estoppel of such claims.

[103] On April 24, 2013, Constable Stahl attended the area behind the Milestones and noticed a tent that was in disrepair and appeared unoccupied as it was wide open and seemed to be sagging or falling apart. The tent was closed and it had a lock on the zipper to the entrance. This was the first time Constable Stahl had ever

seen a lock on the zipper and he claims he was concerned what or who might be inside due to the nature of individuals living outdoors. Constable Stahl cut an approximately 4 to 6 inch “L shape” along bottom right hand corner of the zipper seam near the door to look inside the tent. He looked inside the tent and left the area. Constable Stahl did not have any safety concerns with this tent and he did not know who owned the tent. Constable Stahl acknowledged in cross-examination that Doug Smith made a complaint that his tent was cut.

[104] The cutting of the tent does not appear to have had any particular impact on Mr. Smith. When asked what he thought about it, his response was that he wondered why anyone would do that. When pressed further and asked if it changed his relationship with the police, he answered that it did not; he said he never really got along with authority figures. The evidence of Constable Stahl’s misconduct in respect of Mr. Smith’s tent is not sufficient to be the basis of a *Charter* breach. In addition, given that Mr. Smith is not a named party to this proceeding, there is no evidence before me as to whether or not he is a member of DWS and a claim for damages in respect of Mr. Smith was not pleaded, I am unable to award any damages. There may be other venues to seek redress for the damage to Mr. Smith’s tent; my conclusion should not act as an estoppel of such claims.

[105] Constable Stahl also testified that he suspected one of the pepper sprayed tents was Denise Eremenko’s tent. He sprayed the tent because he had dealt with her on previous locations at other campsites which were large and had a lot of garbage around them. I do not condone Constable Stahl’s conduct; however, Ms. Eremenko is not a named party to these proceedings, there is no evidence before me that she is a member of DWS and no claim for damages was made on behalf of Ms. Eremenko. In the result, I am unable to award damages for the spraying of her tent. There may be other venues in which to seek redress for the damage to Ms. Eremenko’s tent; my conclusion should not act as an estoppel of such claims.

**Use of Fish Fertilizer**

[106] The DWS asserts that one of the tactics employed by the City to displace the City's homeless was applying fish fertilizer to an area on Gladys Avenue which was frequented by the City's homeless. I find that the limited evidence that fish fertilizer may have been spread on some homeless encampments fails to meet DWS' evidentiary burden of proving that such conduct occurred.

**Spreading Chicken Manure**

[107] In the early morning of June 4, 2013, City staff arrived at the Happy Tree Camp which was located along Gladys Avenue. The Happy Tree Camp had been frequented by some homeless people and had been an ongoing issue in terms of clean up. The City took the position that the people at the Happy Tree Camp had been given advance notice that they would need to pack up and leave by being told to leave approximately 1.5 to 2 hours before chicken manure was spread.

[108] After this direction, City employees spread chicken manure at the Happy Tree Camp.

[109] Mr. Zurowski testified that he slept at the Happy Tree Camp with Mr. Caldwell and Nana Tootoosis on the evening of June 3, 2013. He testified that he had been camping there since about April or May 2013. He gave evidence that he was awakened by the noise of trucks and people shouting at him, saying "better move."

[110] According to Mr. Zurowski, the truck carrying the manure was a flat-bed city truck with 2 feet by 10 feet rails. People were throwing manure out of the truck as Mr. Zurowski and others were packing their things. Mr. Zurkowski testified that he, Mr. Caldwell and Mr. Tootoosis had to walk through the chicken manure to get to their carts. He testified that Mr. Fitzgerald provided no concrete warning prior to the events, but had stated vaguely in the preceding month that bylaws were going to make things "really uncomfortable" for those camped out there.

[111] Mr. Zurowski testified that he recognised Dwayne Fitzgerald, a Mr. Cross (the person in charge of garbage for the City) and an APD officer. It appeared that they were there to watch the spreading of chicken manure where Mr. Zurowski, Nana Tootoosis and Mr. Caldwell had been sleeping.

[112] Mr. Arden, the City's Director of Parks Services authorized the spreading of chicken manure at the Happy Tree Camp. He testified that he was taking the health of the citizens of the City into consideration when he endorsed the plan. I reject this evidence. When asked how he took into account the health of citizens of the City when approving the plan, Mr. Arden responded "they were sleeping on the curb, putting their head on the curb". He agreed in cross-examination that he did not see anyone lying on the roadway on June 4, 2013.

[113] Mr. Dennis Steel, a volunteer with the 5 and 2 Ministry, gave evidence that as he hurried to assist Mr. Caldwell to pick up his belongings, there were no efforts by City employees to attend to visibly disturbed occupants of the encampment, whose clothing and sleeping gear were soiled. Mr. Steel's evidence, which I accept, was that when he arrived at the camp:

> … There were uniformed officers there, a dump truck. I rode up to Norm—he was in a state of panic, flailing, trying to gather his stuff. I kept asking what I could do. He didn't know what to do. He was in a panic state. His arms were flailing and he was trying to dig through the bramble. I had to walk through the manure the guy was throwing off the dump truck. Nana was just sitting there in a daze off to the side. I asked what I could do and I couldn't understand why no one else was helping. Nana seemed to be in shock…
>
> There looked to be a city worker in the back of the dump truck. He was shoveling out the last of the manure… He was standing; he had a shovel and was shoveling it out.
>
> … I was more focused on Norm—I could see that there was manure everywhere. I was worried about Norm and all his stuff which was now lost and covered in manure. He was wondering how he'd ever sleep there again.
>
> … His belongings were right in it. He had a spot near the happy tree. The manure was spread all around where they were…his tools, his bedding, his clothes were all covered.

[114] Mr. Tootoosis gave evidence in the trial. He testified that he developed a foot infection after the chicken manure incident. I am not persuaded that the foot infection suffered by Mr. Tootoosis around the time of this incident has been proven to be the result of contact with chicken manure. There is no medical evidence that would support this claim. In addition, the condition of the Happy Tree Camp was such that there are many equally likely causes of the difficulties that Mr. Tootoosis suffered in relation to his foot.

[115] The spreading of the chicken manure at the Happy Tree Camp was disgraceful and worthy of the Court's disapproval. I am unable, however, to find that it was sufficient to found a breach of the *Charter* rights of any individual. In addition, on the evidence before me I am unable to find that this activity physically injured a party to this proceeding; therefore, I am unable to award any damages due to this event.

**Destruction or Disposition of Personal Property**

[116] The DWS submits that the City collected and disposed of personal property belonging to the City's homeless and that this was one of the tactics used in responding to the City's homeless. In the past, the City has disposed of personal property belonging to the City's homeless including tools, medication, clothing, shelter and tents, sleeping bags, knives, pipes, rain gear, recycling, bicycles, wallets and identification, along with the containers used to store these things in, such as shopping carts and garbage bags.

[117] I accept that for the most part, the City's general practice was only to dispose of items at homeless encampments after giving advance notice or obtaining the consent of people when removing items. Prior to 2014, Mr. Fitzgerald's experience was that people would be in attendance at the time of a clean up to indicate what they wanted and if they were not there, he would set aside some items of value. Starting in 2014, there has been a standard practice of storing items at the City's works yard and there was specific evidence of items being packed up and taken to the works yard where they could be retrieved by the property owners without charge.

[118] Since September 2014, the City has also arranged for a weekly refuse clean ups at the Gladys Avenue Camp. The process involves engaging with the occupants and ensuring that nothing that they want to keep is thrown away. Ted Main testified that he first seeks permission to enter the camp and then he goes from tent to tent asking people what can be thrown away. If someone is not there to give consent, Mr. Main testified he would wait for next week, and that this occurred once with Mr. Caldwell. The Gladys Avenue Camp is the only location where weekly refuse cleanups are arranged by the City.

[119] On the evidence before me I am unable to find that the disposal of personal property injured a party to this proceeding. Given that a claim for damages was not pleaded, I am unable to award any damages for such disposal of personal property. There may be other venues to seek redress and my conclusions should not create an estoppel.

**The Failure by the City to Develop Housing**

[120] The DWS submits that the City has failed to take necessary action with respect to the homeless in the City. I am satisfied that a number of the City employees, most notably Mr. Schmidbauer, have shown compassion and understanding for the City's homeless.

[121] Additional housing is being developed in the City, including the 20 bed low barrier shelter for men by Abbotsford Community Services and the temporary weather shelter being pursued by the Homeless Action Advisory Committee ("HAAC").

[122] The City also successfully advocated for the creation of the ACT Team for the City which began operating in March 2015. The ACT Team is a multidisciplinary team whose members include a psychiatrist, nurses, social workers, counselors, an occupational therapist, outreach workers and peer support workers. The ACT Team provides wrap-around support to its clients, which are people with severe and persistent mental illnesses that impair their functioning in community living. The ACT

Team operates under standards set by the Ministry of Health. The ACT Team Coordinator, Joan Cooke, testified that the team spends about 75 percent of its time in outreach work, visiting people where they live, providing a wide range of medical, work related, daily living and peer support services. The ACT Team has 35 rental supplements available for its clients, presently has 30 clients and, to date, has housed several people who were homeless.

[123] It is not for this Court to wade into the political arena to assess the City's reaction to the need for housing, including what was described by DWS as a "Dignity Village" or services, such as a Sobering Centre, or needle exchange for its homeless. The scope of the Court's jurisdiction is to address a narrow issue similar to that which was before Madam Justice Ross in *Victoria (City) v. Adams*, 2008 BCSC 1363 [*Adams BCSC*]. I would phrase it as follows:

> When the number of homeless people exceeds the number of available shelter beds, does a bylaw that prohibits homeless people from sleeping in public spaces without securing a permit from the City and erecting any form of temporary overhead shelter at night, including tents, tarps attached to trees, boxes or other structure without securing a permit from the City, violate those persons constitutional rights to life, liberty and security of the person under s. 7 of the *Canadian Charter of Rights and Freedoms.*

## ***VICTORIA (CITY) V. ADAMS***

[124] Given the similarities between the proceedings before me and the proceedings in *Adams* an understanding of that case is useful for this proceeding. The findings of fact made at trial by Ross J. were that there were more people living homeless in Victoria than there were available shelter spaces, but that the homeless people were nonetheless prohibited by the City's *Parks Regulation Bylaw* and the *Street and Traffic Bylaw* from erecting temporary shelter on public property. Ross J., found that by preventing the claimants from erecting temporary overnight shelter in public spaces, Victoria had violated their s. 7 rights.

[125] Ross J. recognized the limited scope of the remedy sought by the homeless in at paras. 127 – 128 of her reasons:

> [127] … The litigation had its origins in the Tent City erected in Cridge Park. It is also the case that many of the Defendants deposed that they wanted to be able to set up and maintain a camp in a park and that for a variety of reasons they preferred the camp in Cridge Park to accommodation in shelters. However, in this summary trial application, the relief sought by the Defendants is not what the AGBC and the City contend is the right to camp on public property. In other words, the issue of the right to camp in public spaces in the sense of a right to set up a semi-permanent camp, like the one established in Cridge Park, is not before the Court.
>
> [128] Rather, the issue is the prohibition on erecting even a temporary shelter taken down each morning in the form of a tent, tarp or cardboard box that is manifested in the current Bylaws and operational policy of the City. In my view, the issue before the Court on this summary trial application is not an assertion by the Defendants of a right to property as contended by the AGBC and the City.
>
> [Emphasis added.]

[126] At para. 191, Ross. J. indicated that questions as to why people do not use shelters were questions for another day:

> There are not enough shelter spaces available to accommodate all of the City's homeless; some people will be sleeping outside. Those people need to be able to create some shelter. If there were sufficient spaces in shelters for the City's homeless, and the homeless chose not to utilize them, the case would be different and more difficult. The court would then have to examine the reasons why homeless people chose not to use those shelters. If the shelters were truly unsafe, it might be that it would still be an infringement of s. 7 to require the homeless to attend at shelters or sleep outside without their own shelter. However, if the shelters were safe alternatives, it may not be a breach of s. 7 for the homeless to be required to make that choice. That, however, is not the case here, where there is a significant shortfall of shelter spaces.

[127] Ross J. made the following declarations at para. 239:

> (a) Sections 13(1) and (2),14(1) and (2), and 16(1) of the Parks Regulation Bylaw No. 07-059 and ss. 73(1) and 74(1) of the Streets and Traffic Bylaw No. 92-84 violate s. 7 of the Canadian Charter of Rights and Freedoms in that they deprive homeless people of life, liberty and security of the person in a manner not in accordance with the principles of fundamental justice, and are not saved by s. 1 of the Charter.
>
> (b) Sections 13(1) and (2),14(1) and (2), and 16(1) of the Parks Regulation Bylaw No. 07-059 and ss. 73(1) and 74(1) of the Streets and Traffic Bylaw No. 92-84 are of no force and effect insofar and only

> insofar as they apply to prevent homeless people from erecting temporary shelter.

[128] On appeal, *Adams BCCA*, the Court of Appeal described the issue in the following terms at para. 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*?

[129] At para. 28, the Court of Appeal found that the trial judgment was based on five critical findings of fact:

> (a) There are at present more than 1,000 homeless people living in the City.
>
> (b) The City has at present 141 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.
>
> (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.
>
> (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.
>
> (e) The expert evidence also establishes that some form of overhead protection is part of what is necessary for adequate protection from the elements.

[130] At para. 74, the Court of Appeal held that:

> Thus, the decision did not grant the homeless a freestanding constitutional right to erect shelter in public parks. The finding of unconstitutionality is expressly linked to the factual finding that the number of homeless people exceeds the number of available shelter beds. If there were sufficient shelter spaces to accommodate the homeless population in Victoria, a blanket prohibition on the erection of overhead protection in public parks might be constitutional. That question is yet to be determined.

[131] The Court of Appeal upheld the finding that there was a violation of the claimants' s. 7 rights, however, it varied Ross J.'s declaration to refer only to the *Parks Regulation Bylaw* and to say that homeless people have the right to cover themselves with temporary overhead shelter while sleeping overnight in parks and only when there are not enough shelter spaces available to accommodate all of Victoria's homeless.

[132] *Adams BCSC* and *Adams BCCA* thus established that in circumstances where there is no practicable shelter alternative, homeless people are exposed to a risk of serious harm; including death and that the risk of this harm is an interference with a homeless person's rights to life, liberty and security of the person.

## POSITIONS OF THE PARTIES

[133] In its written submissions the City recognizes that homelessness is a social problem worthy of concern. The City also acknowledges that there is a population of persons in the City who at various times have resided on and, in some cases, continue to reside on City owned lands.

[134] DWS seeks declarations that the City's homeless have a *Charter* right to exist 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.

[135] DWS contends that when living and sleeping outside, the erection of a temporary or improvised shelter is the only way for the homeless to ensure a measure of security and protection of body and belongings from the wind, the cold, the heat, and the rain. Some forms of shelter can also provide some security, protection, and privacy from other people, by lessening the chances that they, or their belongings, will be seen as an easy target for violence, vandalism, or theft.

[136] The City responds that it regulates camping with an opportunity for people to apply to camp in parks, whereas in Victoria there was a complete prohibition on overnight shelter. DWS contends that the Impugned Bylaws and the Displacement

Tactics are more restrictive as the effect is an absolute prohibition, preventing the City's Homeless from camping in any public space during the day or night, no matter whether shelter space is available or not.

[137] The City contends that this case is distinguishable from the decision in *Adams* due to the fact that the shelter provided by the Extreme Weather Program in place in the City addresses the risks to safety from cold and hypothermia that were found to exist in *Adams BCSC.* This is only so, however, when temperatures fall below zero and emergency shelter is made available on a temporary basis.

**Lawful But Risky Activities**

[138] DWS contends that the Impugned Bylaws relating to homelessness in the City make a lawful act more dangerous. DWS asserts that the City has a duty to not only refrain legislating in a way that endangers the health and safety of its citizens, but must act in a way that respects the barriers faced by its citizens in accessing shelter, health and safety resources.

[139] In *Adams BCSC*, Ross J. found that there was uncontradicted expert evidence that established that exposure to the elements without adequate shelter, and in particular without overhead protection, can result in a number of serious and life threatening conditions, most notably hypothermia. But Ross J. had earlier accepted at paragraph 5 that "sleep and shelter are necessary preconditions to any kind of security, liberty or human flourishing".

[140] DWS did not lead evidence that established that a specific member of the City's homeless faced an increased risk of death or injury as a result of the Impugned Bylaws, but argues that the evidence in this proceeding shows that the Impugned Bylaws and Displacement Tactics create a real risk of death as well as infringe the liberty and security of the person of the City's homeless.

[141] DWS contends that the City cannot follow a regime whereby homeless individuals are expected to "choose" between trying to access shelter and housing that is full or rejects them due to their financial situation, mental health issues or

addiction; and remaining homeless without access to basic necessities or the liberty to seek out the basic necessities for themselves.

[142] In *Bedford*, the Supreme Court of Canada found that prohibitions that impose dangerous conditions on prostitution, a risky but legal activity, negatively impacted or limited the applicants' security of the person and engaged s. 7 rights.

[143] At paras. 74 – 76 the Supreme Court of Canada considered whether specific sections of the *Criminal Code* negatively impacted the s. 7 rights of prostitutes. Chief Justice McLachlin, for the unanimous Court, referred to three possible standards for a causal connection between the laws and the risks faced by prostitutes:

> (1) "sufficient causal connection", adopted by the application judge (paras. 287-88);
>
> (2) a general "impact" approach, adopted by the Court of Appeal (paras. 108-9); and
>
> (3) "active, foreseeable and direct" causal connection.

[144] At paras. 75 – 76 and 78, the Chief Justice concluded that:

> [75] […] the "sufficient causal connection" standard should prevail. This is a flexible standard, which allows the circumstances of each particular case to be taken into account. Adopted in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, and applied in a number of subsequent cases (see e.g. *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3), it posits the need for "a sufficient causal connection between the state-caused [effect] and the prejudice suffered by the [claimant]" for s. 7 to be engaged (*Blencoe*, at para. 60 (emphasis added)).
>
> [76] A sufficient causal connection standard does not require that the impugned government action or law be the only or the dominant cause of the prejudice suffered by the claimant, and is satisfied by a reasonable inference, drawn on a balance of probabilities (*Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at para. 21). A sufficient causal connection is sensitive to the context of the particular case and insists on a real, as opposed to a speculative, link. Understood in this way, a sufficient causal connection standard is consistent with the substance of the standard that the Court of Appeal applied in this case. While I do not agree with the Court of Appeal that causation is not the appropriate lens for examining whether legislation -- as opposed to the conduct of state actors -- engages s. 7 security interests, its "practical and pragmatic" inquiry (para. 108) tracks the process followed in cases such as *Blencoe* and *Khadr*.

> …
>
> [78] Finally, from a practical perspective, a sufficient causal connection represents a fair and workable threshold for engaging s. 7 of the Charter. This is the port of entry for s. 7 claims. The claimant bears the burden of establishing this connection. Even if established, it does not end the inquiry, since the claimant must go on to show that the deprivation of her security of the person is not in accordance with the principles of fundamental justice. Although mere speculation will not suffice to establish causation, to set the bar too high risks barring meritorious claims. What is required is a sufficient connection, having regard to the context of the case.

[145] I find that homelessness is a risky, but legal activity and enforcement of the Impugned Bylaws heightens the health and safety risks that the City's homeless face.

## CHARTER ARGUMENTS

[146] DWS submits that the Impugned Bylaws and the Displacement Tactics violate ss. 2(c), 2(d), 7, and 15 of the *Charter*, and that those violations are not saved or justified under s. 1.

[147] These sections of the *Charter* provide:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> 2. Everyone has the following fundamental freedoms:
>
> …
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
>
> (c) freedom of peaceful assembly; and
>
> (d) freedom of association.
>
> …
>
> 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.
>
> …
>
> 15. (1) 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.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[148] In seeking remedies that require the City to have regard to the *Charter* rights of the City's homeless, DWS is not seeking to impose any positive obligations on the City. Indeed such a remedy was held to be non-justiciable by the Ontario Court of Appeal in *Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852 [*Tanudjaja ONCA*], aff'g *Tanudjaja v. Canada (Attorney General)* [*Tanudjaja ONSC*], leave to appeal refused, [2015] S.C.C.A. No. 39. Rather, it asserts that while the City may have no obligation to provide housing or services to the City's homeless, the City does have an obligation to respect the guarantees of freedom of assembly, freedom of association, life, liberty, security of the person and equality of all of its citizens, including the City's homeless.

[149] DWS contends that the evidence supports the need for more than overnight shelter to protect oneself from the elements during the day, sleep during the day, work during the evening and to allow the City's homeless some consistency of location in aid of their safety, need for rest and sleep, community connections and their ability to maintain adequate shelter and contact with outreach workers and service providers.

**Section 2 and Fundamental Freedoms**

[150] I accept DWS' submission that constitutional freedoms function differently than constitutional rights. The fundamental freedoms enshrined in s. 2 of the *Charter* function to create and protect spaces within which one can pursue one's own ends free from governmental interference, individually and in community with others.

[151] The s. 2 freedoms have been specifically designated as "fundamental" within the text of the *Charter.* Thus they provide the foundation from which the other enumerated rights derive their purpose and meaning, and recognize and protect the

autonomy, dignity, and capacity of every human. The use of the word “freedom” rather than “right”, means that these freedoms do not depend on the legal or political system for recognition or approval. Once a freely chosen activity is recognized as falling within the protection of s. 2, the state has a “duty” to, at minimum, recognize and not interfere with its free exercise, limited only by law, regulation, or state action that is reasonable, proportional, and demonstrably justifiable.

[152] In *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 [*MPAO*] at para. 47, the Supreme Court of Canada recently affirmed that courts must interpret the fundamental freedoms, like all *Charter* rights, purposively, generously, and contextually, by:

> having regard to ‘the larger objects of the *Charter* ..., to the language chosen to articulate the ... freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*’.

***Section 2(b)***

[153] Although s. 2(b) is not relied upon by DWS, the jurisprudence that has considered this subsection is instructive with respect to subsections 2(c) and 2(d).

[154] In *Montréal (City) v. 2952-1366 Québec Inc.,* [2005] 3 S.C.R. 141 [*Montreal*], the Court set out a three part analysis for the application of section 2(b) when dealing with public spaces:

> [56] Does the City’s prohibition on amplified noise that can be heard from the outside infringe s. 2(*b*) of the *Canadian Charter*? Following the analytic approach of previous cases, the answer to this question depends on the answers to three other questions. First, did the noise have *expressive content*, thereby bringing it within s. 2(*b*) protection? Second, if so, does the *method or location* of this expression remove that protection? Third, if the expression is protected by s. 2(*b*), does the By-law *infringe* that protection, either in purpose or effect?

[155] In considering if the location of government owned property removes the protection afforded by s. 2(b), the Court in *Montréal* further explained at para. 74:

> The basic question with respect to expression on government-owned property is whether the place is a public place where one would expect constitutional protection for free expression on the basis that expression in that place does not conflict with the purposes which s. 2 (*b*) is intended to serve, namely (1) democratic discourse, (2) truth finding and (3) self-fulfillment. To answer this question, the following factors should be considered:
>
> (a) the historical or actual function of the place; and
>
> (b) whether other aspects of the place suggest that expression within it would undermine the values underlying free expression.

[156] I accept that the historical and actual functions of parks are leisure and recreational activities by the public, while in the case of highways they are the movement of people and goods. Public parks and highways are not lands that have historically been used for people to pursue the necessities of life or reside, nor are they generally designed for camping uses. Certainly the highways are not so designed.

***Section 2(c)***

[157] DWS contends that s. 10 of the *Parks Bylaw* is a direct and clear infringement of s. 2(c), in both purpose and effect, and certainly contrary to a broad and generous approach to the fundamental freedom of peaceful assembly, as it restrains any and all gatherings of people, of any kind and for whatever purpose, in all public spaces in the City.

[158] The freedom of peaceful assembly in s. 2(c) is a direct protection and guarantee of access to and use of public spaces. These include the public parks, squares, sidewalks, roadways, bridges, and buildings around which public life unfolds. Notwithstanding its importance in a free and democratic society, there is almost no case law on the nature or scope of the freedom of peaceful assembly in Canada.

[159] DWS asserts that taken together, the Impugned Bylaws and Displacement Tactics violate the City's homeless' s. 2(c) rights by attempting to decrease their public visibility, and by restricting or prohibiting their right to engage in necessary

and legitimate non-violent activities in public spaces which they cannot perform elsewhere, having very little property of their own.

[160] Permitting parks to be used for residential purposes could conflict with the assembly by other members of the community for various expressive activities.

[161] While DWS argues that the presence of the homeless in the City's public spaces, with their belongings throughout the day, and in and under shelters overnight, is not a matter of inconvenience, but one of necessity, I do not accept that s. 2(c) is engaged by such a presence. The Impugned Bylaws affect the s. 2(c) rights of all of the City's citizens equally. All are restrained from accessing and using public property at the same times and with respect to the same activities.

[162] Viewed purposively, s. 2(c) protects the freedom of everyone to be in, access, use, and enjoy all public spaces for any and all non-violent activities and purposes. In my view it would be an unreasonable distortion of the freedom of peaceful assembly to use it to ground a *Charter* breach of DWS members. It is not their right of assembly that is in issue, but rather their right to the use of public space for a purpose for which it is not generally intended. If such a right exists, it must be found in another subsection of s. 2 of the *Charter*, or in Sections 7 or 15 thereof.

***Section 2(d)***

[163] DWS next argues that the Impugned Bylaws and Displacement Tactics violate the fundamental freedoms of the City's homeless under s. 2(d). The freedom of association in s. 2(d) protects the choice to join with others, in spaces both public and private, recognizing the empowerment that comes from joining together in community and in pursuit of common goals.

[164] The BCCLA expands this argument by asserting that the prohibition on the homeless from taking simple steps to protect themselves through association, in circumstances where there is no practicable alternative, is a significant interference with their dignity and independence. It contends that in standing between the individual and his or her ability to take shelter or protect his or herself by gathering or

associating, the state also weakens or destroys the ability of affected persons to participate in democratic society.

[165] The BCCLA cites *R.B. v. Children's Aid Society of Metropolitan Toronto,* [1995] 1 S.C.R. 315 [*R.B.*] and comments by Mr. Justice La Forest relating to the concept of "liberty" to the role of individuals in a democratic society . I do not consider the reference to have application to the circumstances in issue before me. In *R.B.*, Mr. Justice La Forest stated at para. 121:

> At bottom, I think "liberty" means the ordinary liberty of free men and women in a democratic society to engage in those activities that are inherent to the individual.

[166] With respect, the excerpt relied upon by the BCCLA must be taken in context, and not read as the creation of a broader *Charter* freedom. Its context includes the observations of La Forest J. at para. 80:

> The above-cited cases give us an important indication of the meaning of the concept of liberty. On the one hand, liberty does not mean unconstrained freedom; see *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 (per Wilson J., at p. 524); *R. v. Edwards Books and Art Ltd*., [1986] 2 S.C.R. 713 (per Dickson C.J., at pp. 785-86). Freedom of the individual to do what he or she wishes must, in any organized society, be subjected to numerous constraints for the common good. The state undoubtedly has the right to impose many types of restraints on individual behaviour, and not all limitations will attract Charter scrutiny. On the other hand, liberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance. In *R. v. Morgentaler*, [1988] 1 S.C.R. 30, Wilson J. noted that the liberty interest was rooted in the fundamental concepts of human dignity, personal autonomy, privacy and choice in decisions going to the individual's fundamental being. She stated, at p. 166:
>
> > Thus, an aspect of the respect for human dignity on which the Charter is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty. Liberty, as was noted in Singh, is a phrase capable of a broad range of meaning. In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance.

[167] The s. 2(d) freedom has mainly been developed in the context of collective bargaining rights, and was recently summarized in *MPAO* as follows at para. 66:

> In summary, s. 2(d), viewed purposively, protects three classes of activities: (1) the right to join with others and form associations; (2) the right to join with others in the pursuit of other constitutional rights; and (3) the right to join with others to meet on more equal terms the power and strength of other groups or entities.

[168] The City's homeless have not been prevented from joining with those with whom they choose to associate. Indeed, they have formed DWS. These proceedings are evidence of the fact that the City's homeless have joined to pursue what they assert to be their constitutional rights, and indeed, they have been assisted by DWS, who was granted public interest standing to participate in the proceedings. I am not persuaded that the ability of the City's homeless to join with others to meet on more equal terms the power and strength of other groups or entities has been infringed. The evidence before me shows that many of the City's homeless have come together from time-to-time to live in small groups in public spaces for various reasons. As with DWS' submissions respecting s. 2(c), it is not the right of association of the City's homeless that is in issue, but rather their right to the use of public space for a purpose for which it is not generally intended. If such a right exists, it must be found in another section of the *Charter.*

**Section 7 and Principles of Fundamental Justice**

[169] The Impugned Bylaws do not interfere with the ability of people to engage in democratic participation or public life more generally. People who may be homeless are able to use public spaces to the same extent as other members of the community. None of the witnesses who gave evidence at the trial of these actions expressed any concerns with being denied democratic participation.

[170] DWS contends that at a constitutional minimum, the protection of the lives, liberty and security of the City's homeless require that they have a right to obtain the necessities of life which it contends includes that following:

(a) warmth and adequate protection from the elements, including Survival Shelter;

(b) rest and sleep;

(c) community and family connection;

(d) effective access to safe living spaces;

(e) 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.

[171] In order for a principle to be recognized as a principle of fundamental justice, three criteria must be met: (1) the principle must be a legal principle; (2) there must be a consensus that the principle is fundamental to the way in which the legal system ought fairly to operate; and (3) the principle must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person: *Canadian Foundation for Children, Youth and the Law,* 2004 SCC 4 at para. 8.

[172] A “legal principle” is a principle within the inherent domain of the judiciary and not within the realm of general public policy (*R v. Malmo-Levine*, 2003 SCC 74 [*Malmo-Levine*] at para. 112 to 114).

***International Instruments***

[173] DWS argued that a number of international instruments (e.g., The Universal Declaration of Human Rights, and the International Covenant on Economic, Social, and Cultural Rights) and foreign authorities were relevant to the s. 7 analysis required in this proceeding. Similar submissions were made to Ross J. in *Adams*. Ross J. held that while international instruments can inform the interpretation of the *Charter*, they do not form part of the domestic law. In *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62 the Supreme Court of Canada accepted that the international instruments were useful interpretative aids, but, writing for the majority, Justice Lebel cautioned against equating the commitments in international instruments with principles of fundamental justice. At para. 150, he, writing for the majority, explained as follows:

> […] not all commitments in international agreements amount to principles of fundamental justice. Their nature is very diverse. International law is ever changing. The interaction between domestic and international law must be managed carefully in light of the principles governing what remains a dualist system of application of international law and a constitutional and parliamentary democracy. The mere existence of an international obligation is not sufficient to establish a principle of fundamental justice. Were we to equate all the protections or commitments in international human rights documents with principles of fundamental justice, we might in effect be destroying Canada's dualist system of reception of international law and casting aside the principles of parliamentary sovereignty and democracy.

***Foreign Authorities***

[174] I find that the foreign authorities relied upon by DWS for the proposed new principle of fundamental justice are of no real assistance. While the African cases cited by DWS such as *In Government of the Republic of South Africa and Others v. Grootboom and Others*, (CCTII/00) [2000] ZACC 19, 2001 (1) SA 46; *Susan Waithera Kariuki v. The Town Clerk, Nairobi City Council*, Petition 66 of 2010 (2011) KLR 1; and *Social and Economic Rights Action Centre (SERAC) and Another v. Nigeria*, (2001 AHRLR 60 conclude that the homeless have a right to housing, they do so relying on provisions in their constitutions or other legislation which provide such rights. No such right is provided for in the *Charter.*

[175] The two European decisions relied upon by DWS, *Case of Buckley v. The United Kingdom* (Application no. 20348/92), ECHR, Strasbourg (29 September 1996) and *International Covenant on Civil and Political Rights: Georgopoulos et al. v. Greece*, CCPR /C/99/D/1799/2008 (29 July 2010), both turned on specific legislative protections which have no equivalent in this proceeding. Similarly, the authorities from the United States cited by DWS are far from consistent, but rely principally upon the Constitution of the United States and various rights under state legislation. As with the other foreign authorities relied on by DWS, I find that the American authorities to be of no real assistance as a result of different statutory regimes which provide for different rights.

***Analysis of Section 7***

[176] I accept that the framers of the Canadian constitution made a deliberate choice to not include property and related economic rights in the *Charter*: see P. Hogg, *Constitutional Law of Canada*, at pp. 381–383. The ability to pursue the necessities of life on government property has not previously been accepted as fundamental to the operation of a fair legal system.

[177] There has been no recognition by courts in Canada that the *Charter* creates positive obligations in relation to social and economic interests (see *Tanudjaja*). Although DWS referred to the requirements to provide the necessaries of life under s. 215 of the *Criminal Code*, this is confined to certain defined relationships, such as between a parent and child (see *R. v. S.J.*, 2015 ONCA 97).

[178] In *Adams BCSC* at para. 143, Ross J. referred to paras. 201 – 202 in the decision of Mr. Justice Taylor in *Federated Anti-Poverty Groups of BC v. Vancouver (City)*, 2002 BCSC 105, where Taylor J. addressed the meaning to be given the s. 7 "life" provision in a case that dealt with challenges to a City of Vancouver bylaw that regulated panhandling. Included in the passage was the following reference to Martha Jackman's article, "*The Protection of Welfare Rights Under the Charter*" (1988) 20 Ottawa Review 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".
>
> Even if some of the Impugned Acts could be described as resulting in a deprivation under s. 7, they may not amount to a breach of s. 7.

[179] In *Trang v. Alberta (Edmonton Remand Centre*), 2007 ABCA 263, leave to appeal denied, the Alberta Court of Appeal considered whether vans used to transport prisoners within Alberta resulted in breaches of s. 7 of the *Charter* because

they were in a state of disrepair. In finding that no *Charter* breach had occurred, the Court emphasized that the principles of fundamental justice were not engaged for all acts of government employees:

> [35] A finding of a breach of s. 7 depends on the identification of an impact on the life, liberty or personal security of the applicant by state action. If that impact arose from state action within the sphere of a fundamental principle of justice, and that state action was arbitrary or irrational, then a breach of the s. 7 right could be shown….Section 7 does not enable the review for rationality of all government action that has an impact on life, liberty or personal security. It only protects against infringements of those interests once some separate principle "on which our system of justice is grounded" has been identified.
>
> …
>
> [38] The principles of fundamental justice relate primarily to the procedures and methods by which the legal rights of the citizens are engaged. Section 7 does not engage any general obligation to design government programs only after adverting to the interests of all those potentially affected. The argument that government activity that overlooks or minimizes some interest is "arbitrary", and therefore not in accordance with the principles of fundamental justice, is an unwarranted extension of the scope of s. 7. The appellants accurately note that s. 7 has primarily been used to review legislation, not government actions or policies. This is a reflection of the core reach of s. 7. Those few cases that have reviewed government action for compliance with s. 7 have concerned state action that directly engages "assumptions on which our system of justice is grounded.

[180] I agree, however, that positive measures taken to protect oneself from the elements are better considered under security of the person consideration, rather than as a matter of liberty.

[181] I am not persuaded on the evidence in these proceedings that the right to obtain the basic necessities of life is a foundational principle underlying the guarantees of s. 7 of life, liberty and security of the person.

[182] Liberty does, however, protect "the right to make fundamental personal choices free from state interference." Security of the person encompasses, among other things, "a notion of personal autonomy involving ... control over one's bodily integrity free from state interference" and it is engaged by state interference with an individual's physical or psychological integrity, including any state action that causes

physical or serious psychological suffering, *Carter v. Canada (Attorney General)*, [2015] 1 S.C.R. 331 [*Carter*] at para. 64

[183] In order to establish a breach of section 7 of the *Charter*, DWS must satisfy the Court that:

(1) there is a deprivation of life, liberty or security of the person caused by state action; and

(2) such deprivation is contrary to the principles of fundamental justice.

See *Carter* at para. 55.

[184] The burden is on the claimant to establish the breach for both stages (see *Bedford* at para. 78).

[185] In *Carter,* the Court concluded that the right to life was engaged in a narrow set of circumstances, such as where there was evidence that state action increased an individual's risk of death:

> [62] This Court has most recently invoked the right to life in *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791, where evidence showed that the lack of timely health care could result in death (paras. 38 and 50, per Deschamps J.; para. 123, per McLachlin C.J. and Major J.; and paras. 191 and 200, per Binnie and LeBel JJ.), and in *PHS*, where the clients of Insite were deprived of potentially lifesaving medical care (para. 91). In each case, the right was only engaged by the threat of death. In short, the case law suggests that the right to life is engaged where the law or state action imposes death or an increased risk of death on a person, either directly or indirectly. Conversely, concerns about autonomy and quality of life have traditionally been treated as liberty and security rights. We see no reason to alter that approach in this case.

[186] Concerns about autonomy and quality of life are treated as liberty and security of the person issues. Underlying both of these rights is the concern for the protection of individual autonomy and dignity.

[187] A person's s. 7 liberty interest is engaged when there are statutory duties to not loiter in or be near certain areas such as school grounds, playgrounds, public parks and bathing areas. (*R. v. Heywood*, [1994] 3 S.C.R. 761 [*Heywood*].)

[188] It is the Impugned Bylaws that prevent the homeless from camping in public spaces without permits or erecting, without permit, temporary shelters in public spaces that are asserted to subject the City's homeless to decreased dignity and independence and increased physical and psychological harm. The s. 7 liberty interest is thus engaged by the Impugned Bylaws that interfere with the fundamentally important personal decision to shelter one's self in circumstances where there is no practicable alternative shelter. The Impugned Bylaws and Displacement Tactics are alleged to impact the City's homeless' s. 7 rights because their effect is to continually displace the City's homeless from public spaces.

[189] The standard against which an allegation of engagement of a s. 7 life, liberty or security of the person interest in relation to a law or government action is evaluated is that of sufficient causal connection, having regard to the context of the case. There needs to be a sufficient causal connection between the state-caused effect and the prejudice suffered by the claimant. Laws or actions do not have to be the only or dominant cause of the prejudice suffered by the City's homeless to engage their s. 7 rights.

[190] Arbitrariness, overbreadth and gross disproportionality all compare the rights infringements caused by the law or actions with the objective of the law or actions and not their effectiveness.

[191] The inquiry does not consider how well the law achieves its objective or how much of the population the law benefits; there is no consideration of ancillary benefits to the general population that is considered under s. 1. A grossly disproportionate, overbroad or arbitrary effect on only one person is sufficient to establish a breach of s. 7. The balancing of an individual versus society's interest within the s. 7 analysis is only relevant when elucidating a principle of fundamental justice.

[192] In *Bedford*, the Court held that arbitrariness, overbreadth and gross disproportionality are directed against two different evils. On the one hand, the norms of arbitrariness and overbreadth address the absence of a connection

between the infringement of rights and what the law seeks to achieve. Gross disproportionality on the other hand, ensures that even where the impact on the s. 7 interest is connected to the purpose of the law, this impact cannot be so severe that it violates our fundamental norms.

***Arbitrariness***

[193] Arbitrariness describes the situation where there is no real connection on the facts between the effect and the object of the law or actions. For example, in *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 [*PHS*], the Supreme Court found that the Minister of Health's decision not to extend a safe injection site's exemption from drug possession laws was arbitrary. The purpose of drug possession laws was the protection of health and public safety, and the services provided by the safe injection site actually contributed to these objectives. Thus, the effect of not extending the exemption was contrary to the objectives of the drug possession laws.

[194] The principle of arbitrariness was summarized in *Bedford*, where the Court stated the following:

> [98] Arbitrariness was used to describe the situation where there is no connection between the effect and the object of the law. In *Morgentaler*, the accused challenged provisions of the *Criminal Code* that required abortions to be approved by a therapeutic abortion committee of an accredited or approved hospital. The purpose of the law was to protect women's health. The majority found that the requirement that all therapeutic abortions take place in accredited hospitals did not contribute to the objective of protecting women's health and, in fact, caused delays that were detrimental to women's health. Thus, the law violated basic values because the effect of the law actually contravened the objective of the law. Beetz J. called this "manifest unfairness" (*Morgentaler*, at p. 120), but later cases interpreted this as an "arbitrariness" analysis (see *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791, at para. 133, *per* McLachlin C.J. and Major J.).
>
> [99] In *Chaoulli*, the applicant challenged a Quebec law that prohibited private health insurance for services that were available in the public sector. The purpose of the provision was to protect the public health care system and prevent the diversion of resources from the public system. The majority found, on the basis of international evidence, that private health insurance and a public health system could co-exist. Three of the four-judge majority found that the prohibition was "arbitrary" because there was no real connection on the facts between the effect and the objective of the law.

> [100] Most recently, in *PHS*, this Court found that the Minister's decision not to extend a safe injection site's exemption from drug possession laws was arbitrary. The purpose of drug possession laws was the protection of health and public safety, and the services provided by the safe injection site actually contributed to these objectives. Thus, the effect of not extending the exemption — that is, prohibiting the safe injection site from operating — was contrary to the objectives of the drug possession laws.

[195] DWS asserts that the Impugned Bylaws in the *Parks Bylaw* and *Street and Traffic Bylaw* are arbitrary because their objects are not rationally connected to their effects. The law is clear that in determining arbitrariness, the question is whether the effect of the law is rationally connected to the object or purpose of the law or action.

[196] As Lamer C.J. said in *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139:

> ... The very nature of the relationship existing between citizens and the elected government provides that the latter will own places for the citizens' benefit and use, unlike a private owner who benefits personally from the places he owns. The "quasi-fiduciary" nature of the government's right of ownership was indeed clearly set out by the U.S. Supreme Court in *Hague* v. *Committee for Industrial Organization, supra,* at pp. 515-16:
>
> > Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

[197] Although public property is held in trust for the public, the right to access and use public spaces is not absolute. Governments may manage and regulate public spaces, provided that such regulation is reasonable and accords with constitutional requirements. Reasonableness must be assessed in light of the public purpose described.

[198] I reject the submission of DWS that there is no rational connection between holding parks land for the pleasure, recreation or community use of all of the City's citizens and absolute evictions of the City's homeless from any City land. While the City's homeless are part of the citizenry, for whom the City holds its parks property,

they are not the only citizens entitled to the use of that property. I find that the City must be permitted to balance the needs of all of its parks users.

[199] In *Malmo-Levine* the Court rejected an arbitrariness challenge to a prohibition against the recreational consumption of marihuana holding (at para. 136) that "The prohibition is not arbitrary but is rationally connected to a *reasonable apprehension of harm*." In this case, the City has at least a reasonable apprehension that harm will flow from the unregulated use of public property; therefore, I conclude that the Impugned Bylaws are not arbitrary.

***Overbreadth***

[200] An overbroad law is a law that is broader than necessary to accomplish its purpose. The overbreadth inquiry asks whether a law that takes away rights in a way that generally supports the object of the law, goes too far by denying the rights of some individuals in a way that bears no relation to the object.

[201] In *Bedford*, the Supreme Court described the overbreadth doctrine in the following terms:

> [112] Overbreadth deals with a law that is so broad in scope that it includes *some* conduct that bears no relation to its purpose. In this sense, the law is arbitrary *in part*. At its core, overbreadth addresses the situation where there is no rational connection between the purposes of the law and *some*, but not all, of its impacts. For instance, the law at issue in *Demers* required unfit accused to attend repeated review board hearings. The law was only disconnected from its purpose insofar as it applied to permanently unfit accused; for temporarily unfit accused, the effects were related to the purpose.
>
> [113] Overbreadth allows courts to recognize that the law is rational in some cases, but that it overreaches in its effect in others. Despite this recognition of the scope of the law as a whole, the focus remains on the individual and whether the effect on the individual is rationally connected to the law's purpose. For example, where a law is drawn broadly and targets some conduct that bears no relation to its purpose in order to make enforcement more practical, there is still no connection between the purpose of the law and its effect on the *specific individual*. Enforcement practicality may be a justification for an overbroad law, to be analyzed under s. 1 of the *Charter*.
>
> …
>
> [117] Moving forward, however, it may be helpful to think of overbreadth as a distinct principle of fundamental justice related to arbitrariness, in that the

> question for both is whether there is no connection between the effects of a law and its objective. Overbreadth simply allows the court to recognize that the lack of connection arises in a law that goes too far by sweeping conduct into its ambit that bears no relation to its objective.

[202] In *Adams BCSC*, Ross J. applied the test in *Heywood* for overbreadth and the Court of Appeal approved of the use of the test that she applied. If the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.

[203] I conclude that the Impugned Bylaws that deny the City's homeless overnight access to public spaces without permits and prevent them from erecting temporary shelters without permits are overbroad.

***Gross Disproportionality***

[204] Gross disproportionality describes state actions or legislative responses to a problem that are so extreme as to be disproportionate to any legitimate government interest. This principle is infringed if the impact of the restriction on the individual's life, liberty or security of the person is grossly disproportionate to the object of the measure. As with overbreadth, the focus is not on the impact of the measure on society or the public, which are matters for s. 1, but on its impact on the rights of the claimant.

[205] Ms. Wilm, Mr. Caldwell and Mr. Clause all spoke about the negative impact on their sense of wellbeing due to being continually displaced and evicted when they were homeless. Ms. Wilm testified that displacement negatively impacts her ability to find housing. She stated that:

> We're constantly having to move. We're constantly searching for a place to move to. We had five appointments to go look at places that we couldn't even look at because we had to get everything out [of our campsite], otherwise we lose everything.

[206] State-induced serious psychological pain and stress is a breach of an individual's right to security of the person. (*Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46; *Blencoe*; *Inglis v. British Columbia (Minister of Public Safety)*, 2013 BCSC 2309 at paras. 395 and 397; *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 55 – 56 and 60.)

[207] In order to advance a valid claim based on security of the person, a claimant must establish that: (1) they are subject to "state imposed" harm; and (2), the harm is "serious". (*Blencoe* at paras. 55 – 57.)

[208] In *Bedford*, the Court discussed the threshold that a claimant had to meet in order to establish that the state was responsible for an alleged deprivation. On the question of causality, the Court again cautioned against speculation:

> [76] A sufficient causal connection standard does not require that the impugned government action or law be the only or the dominant cause of the prejudice suffered by the claimant, and is satisfied by a reasonable inference, drawn on a balance of probabilities (*Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at para. 21). A sufficient causal connection is sensitive to the context of the particular case and insists on a real, as opposed to a speculative, link.

[209] I find that this constant movement of the homeless exacerbated their already vulnerable positions, as it inhibited the ability of the service providers who endeavoured to help the City's homeless to actually locate them and provide help. I thus find that the evidence supports a finding that the Impugned Bylaws have had a serious effect on the psychological or physical integrity of the City's homeless.

[210] In *PHS* at para. 133, Chief Justice McLachlan wrote:

> … Insite saves lives. Its benefits have been proven. There has been no discernable negative impact on the public safety and health objectives of Canada during its eight years of operation. The effect of denying the services of Insite to the population it serves is grossly disproportionate to any benefit that Canada might derive from presenting a uniform stance on the possession of narcotics.

[211] At para. 113 in *PHS*, Chief Justice McLachlin stated that: “The availability of exemptions acts as a safety valve that prevents the *CDSA* from applying where such application would be arbitrary, overbroad or grossly disproportionate in its effects.”

[212] While there is nothing improper about narrowing the ambit of a prohibition through a discretionary safety valve, I reject the City’s contention that it would be impossible to enact a law that dealt with the highly variable personal situation of the homeless, or that the safety valve in ss. 17 and 30 of the *Parks Bylaw* ensures that there is an administrative discretion to prevent this from happening, and which could itself be subject to review by the courts.

[213] Mr. Steel also described how he fears for the safety of the City’s homeless when they are driven further from site and into locations where they are not easily found. This makes it more difficult to provide services to the City’s homeless. Pastor Wegenast also testified, and I accept his view, that the result of repeated displacement often leads to the migration of homeless individuals towards more remote, isolated locations as a means to avoid detection. This not only makes supporting people more challenging, but also results in adverse health and safety risks.

[214] Dr. Gordon William MacEwan, who was accepted as an expert in psychiatry or mental illness for the homeless or those precariously housed observed that:

> The degree of psychiatric illness and substance abuse within the subjects who are in these studies as well as my clinical population is severe. The difficulties in their day-to-day functioning are extreme. Many of these individuals are not able to maintain basic levels of daily living activities, they are often living in very deteriorated living situations and are often not able to attend to the most basic of their needs including adequate nutrition, healthcare, and safety. In the Hotel Study 70% of the individuals were infected with Hepatitis C and 18% were infected with HIV. Any one of these areas of difficulty, on its own, would be considered very serious for an individual. The fact is that many of these individuals suffer from multi-morbid illness including physical health problems, severe psychiatric problems such as schizophrenia and bipolar disorder, and severe substance abuse which often consumes the person's day-to-day activities in terms of either finding drugs, obtaining money to purchase drugs or using drugs.

[215] The City submitted the report of Dr. Shaoyhhua Lu which was critical of Dr. McEwan's opinon. Dr. Lu, like Dr. MacEwan, was qualified as an expert in psychiatry or mental illness, but discounted Dr. MacEwan's views because Dr. MacEwan did not conduct full psychiatric workups on any of the City's homeless. I did not find Dr. Lu's critique of Dr. MacEwan's views to be of assistance. While I am unable to accept the application of Dr. MacEwan's comments to any specific homeless person in the City, I accept that they likely apply to at least some of the City's homeless.

[216] Dr. Christy Sutherland is an expert in addiction treatment. I accept as a general proposition her evidence that "[h]omelessness leads to worse outcomes for those with addiction, and addiction contributes to unstable housing and is a barrier to housing" and "Addiction causes underlying changes to neurocircuitry … evidence demonstrates that drugs of abuse change the structure of the brain as well as the content of brain cells. Thus, the brain's ability to function is impaired."

[217] Dr. Paul Sobey is also an expert in addiction medicine, who was called by the City to rebut the views expressed by Dr. Sutherland. His evidence did not dispute the general statements by Dr. Sutherland that I have mentioned.

[218] Dr. Belanger was qualified as an expert in Aboriginal homelessness in Canada. He provided expert evidence regarding the prevalence of Aboriginal people in urban homeless populations and the unique experience of homelessness on Aboriginal people.

[219] I am satisfied that the evidence led by DWS establishes that continual displacement of the City's homeless causes them impaired sleep and serious psychological pain and stress and creates a risk to their health.

[220] The sustainable use of publicly owned property requires that there be some constraints on the way in which it is used. The evidence establishes that activities of people camping in City parks can and has caused damage to that property, with the consequences being shifted onto the City and ultimately taxpayers. In these

circumstances, it cannot be said that the Impugned Bylaws bear no relation to their objectives.

[221] Sections 14 and 17 of the *Parks Bylaw*, together limit the erection of any structures in City parks, and camping or the taking up of a temporary abode in parks without permit. While the regulations expressly grant a discretion to the General Manager of Parks, Recreation and Culture (in the case of s. 17) or the City Council (in the case of s. 14, and acting pursuant to s. 30 of the *Parks Bylaw*) to give an exemption from the *Parks Bylaw*, this is of no practical benefit to the City's homeless: they are unable to avail themselves of the discretionary procedure provided for in the *Parks Bylaw*.

[222] While I accept that the choice to erect an outdoor shelter without permit, when there are other accessible options, is not a fundamental personal choice engaging dignity concerns, I have found that there are, at present, insufficient viable and accessible options for all of the City's homeless.

[223] Although it is strictly speaking correct that the Impugned Bylaws are not directed at group encampments as compared to individual encampments, the effect of their application affects the homeless far more than it affects others. That said, the decision to erect a shelter outside, whether individually or in a group, if there are other viable and accessible options, cannot justify permitting the City's homeless to sleep and erect shelters in public spaces as a fundamental personal choice engaging dignity concerns.

[224] I conclude that the effect of denying the City's homeless access to public spaces without permits and not permitting them to erect temporary shelters without permits is grossly disproportionate to any benefit that the City might derive from furthering its objectives and breaches the s. 7 *Charter* rights of the City's homeless.

**Section 15**

[225] DWS argues that the Impugned Bylaws and the Displacement Tactics discriminate against the City's homeless, perpetuating and exacerbating substantive

inequality and thus violating s. 15 equality guarantees and imposing a disproportionate and discriminatory burden on them, and imposing a direct discriminatory impact on the City's homeless because they are targeted as a discrete minority on the basis of their personal characteristics which have led them to be unhoused. DWS also contends that the Impugned Bylaws and the Displacement Tactics violate s. 15 by discriminating against the City's homeless by preventing them from obtaining the basic necessities of life in public spaces, and imposing a disproportionate and discriminatory burden on homeless persons who have disabilities, who are Aboriginal, and/or who are impacted by a synthesis of factors leading to their homelessness, including their disabilities, racial backgrounds, and their economic and social status.

[226] The foundation for the test to establish a breach of s. 15 was discussed in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 and *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497. The current two part framework for s. 15 used by courts today is as set out by the Court in *R v. Kapp*, 2008 SCC 41 at para. 17:

> (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?

[227] A central issue to be determined in a s. 15 case is whether the impugned laws or state actions violate the norm of substantive equality. The Supreme Court of Canada has accepted that the past focus on a comparator group approach has led to a formal "treat likes alike" analysis, which detracts from the focus of s. 15 – substantive equality and reaffirmed the supremacy of the pursuit of substantive equality.

[228] Subsequent to *Withler v. Canada (Attorney General)*, [2011] 1 S.C.R. 396, courts have analysed s. 15 without the use of comparator groups; *Quebec (Attorney General) v. A.*, 2013 SCC 5 [*Quebec v. A.*]; and *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30.

[229] Courts have recognized claims for discrimination which are based on multiple grounds, requiring an assessment of the impact of the interaction or intersection between these grounds. The barriers faced by the City's homeless vary from person to person, but they share important intersections between disability, addiction and Aboriginal ancestry that have driven them towards, and for some, perpetuated their state of homelessness. It is the confluence of those factors together with the fact of the person's homeless status that DWS asserts to underpin its claim.

[230] In *Quebec v. A*, Madam Justice Abella, citing *Janzen v. Platy Enterprises Ltd*., [1989] 1 S.C.R. 1219, clearly stated at para. 354 that heterogeneity within the claimant group does not defeat a claim of discrimination:

> … discrimination does not require uniform treatment of all members of a particular group. It is sufficient that ascribing to an individual a group characteristic is one factor in the treatment of that individual. If a finding of discrimination required that every individual in the affected group be treated identically, legislative protection against discrimination would be of little or no value.. It is rare that a discriminatory action is so bluntly expressed as to treat all members of the relevant group identically. In nearly every instance of discrimination the discriminatory action is composed of various ingredients with the result that some members of the pertinent group are not adversely affected, at least in a direct sense, by the discriminatory action. To deny a finding of discrimination in the circumstances of this appeal is to deny the existence of discrimination in any situation where discriminatory practices are less than perfectly inclusive. It is to argue, for example, that an employer who will only hire a woman if she has twice the qualifications required of a man is not guilty of sex discrimination if, despite this policy, the employer nevertheless manages to hire some women.

[231] I agree with the rejection of the argument that "homelessness" is an analogous ground as concluded by Mr. Justice Lederer in *Tanudjaja ONSC* at paras. 129 – 130 and 134 and 135:

> [129] The reliance of the applicants on Falkiner misses a fundamental point. In Falkiner, the analogous ground was the receipt of social assistance. This is not, strictly speaking, immutable. The identity of the people who are eligible to collect these benefits will change as the vagaries of life impact on the individuals involved, for good or ill. The fact remains that, at any moment in time, it is possible to identify those who are collecting social assistance. In the circumstances of this Application, it is not possible to identify who is "homeless". As I have already observed, homelessness is not, for the purposes of this Application, restricted to those without homes. Three of the

> four individual applicants have homes. It may be that what is being referred to as "the homeless" includes those without "affordable, adequate and accessible" housing. What is adequate housing? Presumably, this depends on the circumstances of the individuals involved. What is adequate for a single mother with two children (the applicant, Jennifer Tanudjaja) is different from what would be adequate for a family of six. The difference would be more pronounced if two of the four children in the family of six were disabled and even more pronounced if one of the children required a wheel chair (the applicant, Ansar Mahmood). The need of the wheelchair introduces a need for accessibility. It does not seem out of line to suggest that a determination of what is adequate housing may be a matter to be decided on an individual basis.
>
> [130] Being without adequate housing is not a personal characteristic ("race, national or ethnic origin, colour, religion, sex, age or mental or physical disability") or a fact that can be determined on objective criteria ("social assistance recipient", "marital status", "Aboriginality-residence (off-reserve band members)", "employment status", and "citizenship"). There will be a subjective component that arises from the circumstances of the individual and what they and others believe is "adequate" or "accessible". The lack of adequate or accessible housing is not a shared quality, characteristic or trait.
>
> …
>
> [134] Homelessness is not a term that, in the context of this case, can be understood. Without an understanding of the common characteristics which defines the group, it cannot be established as an analogous ground under s. 15(1) of the *Charter.* Poverty or economic status, which is seemingly the only common characteristic, is not an analogous ground.
>
> …
>
> [136] Homelessness is not an analogous ground under s. 15(1) of the *Charter.* The Application does not propose to protect "discreet and insular minorities". It is an attempt to take "disparate and heterogeneous groups" and treat them as an analogous ground under s. 15 (1) of the *Charter.* Such groups do not obtain this protection.

[232] DWS contends that the City's homeless are being discriminated against on the basis of the following grounds:

(a) Disability;

(b) Race – the evidence establishes that a disproportionate number of the City's Homeless are Aboriginal and that their experience of homelessness may be unique as a result of their cultural history; and,

(c) An analogous ground consisting of the intersection of the grounds of disability and race with the state of being homeless.

in the following two ways:

(a) Through the Impugned Bylaws, which have a disproportionate impact on the City's homeless by preventing them from fairly accessing public; and

(b) Through the Displacement Tactics, which directly discriminate against the City's homeless by targeting them while they are in public spaces.

[233] I find that the evidence in this case establishes that at least some of the City's homeless have mental and/or physical disabilities. I find that some suffer from addictions which, as I have commented above, I accept as medical conditions, or a component of disability, see, for example *PHS*.

[234] Although, s. 15 requires equal treatment of disparate groups, I am not persuaded that an infringement of any of DWS' members' s. 15 *Charter* rights has been made out.

[235] The Impugned Bylaws are regulatory prohibitions, subject to exemptions, and are neutral on their face. While there has been historic mistreatment of Aboriginal people and the disabled, it does not follow that they, as compared to other groups, have been prejudiced in some manner that is connected to the Impugned Bylaws. Nor is the enforcement of the Impugned Bylaws against the homeless treatment that differs from the enforcement of the Impugned Bylaws against anyone else.

[236] While the effect of the Impugned Bylaws may have a greater impact on those who are homeless, that is not because they are being treated any differently than those who are not homeless, disabled or due to their racial backgrounds. DWS has not established that the Impugned Bylaws have the effect of perpetuating disadvantage or prejudice. I am not persuaded that an infringement of any of DWS' members' s. 15 *Charter* rights has been made out on the evidence before me.

**Section 1 Analysis**

[237] Having found that the Impugned Bylaws breach the rights in s. 7, the focus must now move to whether the breach can be justified under s. 1 of the *Charter*. It is

difficult to justify a s. 7 violation. The rights protected are fundamental and not easily overridden by competing social interests. And it is hard to justify a law that runs afoul of the principles of fundamental justice and is thus inherently flawed.

[238] The analytical framework for a s. 1 analysis is well-known:

(1) Is the limit as prescribed by law?

(2) Is the purpose for which the limit is imposed pressing and substantial?

(3) Are the means by which the legislative purpose is furthered proportionate?

(a) Is the limit rationally connected to the purpose?

(b) Does the limit minimally impair the *Charter* right?

(c) Is the law proportionate in its effect?

***Prescribed by Law***

[239] The burden is on the City to justify the infringement. There is no issue that the provisions of the Impugned Bylaws are prescribed by law. The Impugned Bylaws were duly enacted by the City according to powers now conferred on it by the *Community Charter*, S.B.C. 2004, c. 26.

***Pressing and Substantial Need***

[240] Similarly, no party takes issue with the proposition that the Impugned Bylaws address a pressing and substantial need: the need of the City to manage lands it owns for the benefits of its citizens. The activities of those who camp on lands owned by the City have, in fact, caused the very harms the Impugned Bylaws attempt to prevent by appropriating public space to the exclusion of others, constructing structures on public lands, damaging public lands, creating nuisances on public lands, and creating unsightliness on public lands.

***Rational Connection***

[241] Although argued, I do not accept that there is no rational connection between the prohibitions against erecting permanent or semi-permanent encampments in parks without permit, and the objectives of the *Parks Bylaws*. This is the same prohibition that Ross J. was dealing with in *Adams BCSC* and she found that there was a rational connection there (*Adams BCSC* at para. 204). I have come to the same conclusion in these proceedings: there is a rational connection between the prohibitions in the Impugned Bylaws and the objectives the Impugned Bylaws purport to meet.

***Minimal Impairment***

[242] The City submits that the Impugned Bylaws are minimally impairing within the meaning of s. 1 of the *Charter*. I accept that the City must regulate the use of its parks, streets and other public property, without stipulating every form of permissible or impermissible conduct based upon the personal circumstances of each individual who might be subject to regulation, or every situation that might arise.

[243] In determining what alternatives exist towards reaching the City's legislative goals, I have considered the approaches used by other jurisdictions that were referred to in the evidence. Those include the following other approaches identified in the report of Dr. Blomley which show more impairing responses than as seen in the approaches used by the City:

(a) the use of ticketing and enforcement under the *Safe Streets Acts* of British Columbia and Ontario;

(b) the use of "trespass exclusion" zones in Seattle that apply at all times for a designated duration of time;

(c) the designation of exclusionary "red zones" for people released on bail;

(d) bans under the *Anti-Social Behaviour Act* of the United Kingdom on persons using public space that can be enforced by police order;

(e) restrictions on the use of streets by squeegee kids;

(f) the "criminalization" of homeless persons through the use of aggressive ticketing and incarceration upon failure to pay fines.

[244] The fact that the City has chosen less impairing means does not mean that the means that it has chosen are consistent with s. 1 of the *Charter*.

[245] I accept that the salutary effects of the Impugned Bylaws are to prevent the negative impacts noted above on public lands, including highways, associated with encampments on public lands, but I do not accept that the deleterious consequences of the Impugned Bylaws are minimal.

[246] Certain kinds of regulation of public spaces, which by definition limit citizens' fundamental freedoms, may be necessary and justifiable. But the protection of s. 7 rights and freedoms will advance the dignity and autonomy of the City's homeless, by safeguarding their safety and security.

[247] I accept that the Impugned Bylaws have a pressing and substantial objective, and that the means of regulation are rationally connected to that objective. I find, however, that the Impugned Bylaws fail to minimally impair DWS' members' s. 7 freedoms and rights, and lack overall proportionality between the benefits and the burdens of the effects of those regulations as they do almost nothing to accommodate the City's homeless' s. 7 freedoms and rights. In the result, I conclude the that City has failed to justify the infringement of the s. 7 rights of the City`s homeless.

## CONCLUSIONS

### The City's Claim for Damages Against Mr. Shantz

[248] The City seeks damages against Mr. Shantz in respect of the activities that took place at Jubilee Park in 2013.

[249] Mr. Shantz did not give evidence at trial. The City read into evidence at trial some of Mr. Shantz' evidence from his examination for discovery. This evidence included his admission that he was one of the organizers of the tent city at Jubilee

Park, as a result of the dumping of chicken manure at the Happy Tree Avenue Camp.

[250] The Jubilee Park tent camp was a protest camp in response to the treatment of the City's homeless and considered as such by the City. It was designed at least in part to pressure the City into establishing a "dignity village" and occupied by a number of people identified as being homeless and in need of shelter, housing and services.

[251] The following questions and answers were included in the evidence read into the record at trial from Mr. Shantz's examination for discovery:

> Q And tell me about that. How is it that you became aware that the wooden structure was going to be erected?
>
> A My -- my involvement in outreach familiarity with this population of people caused many instances of loved ones looking for daughters, looking for mothers, looking for sons, for reasons from "Please come home" to "We got a bed in a treatment centre." And so people from different places would come to the area and they -- people would tend to point them toward me and I would help them locate people. One such event or one such circumstance -- like that caused a degree of compassion towards the struggle that people on the streets were having and people were, no pun intended, coming out of the woodwork to offer different types of support all the way from blankets to what can we do to help make them safer? So one particular individual brought somebody that had bigger pockets, and then he did, and they said "What can we do to help?" And I said "The problem is, is that they keep kicking us out everywhere and there's nowhere for everybody to go." And one of the constants of what has become known as "the Abbotsford shuffle" is that you get evicted from -- well, even that particular parking lot. Roy has been evicted from one corner of the parking lot to the other corner of the parking lot to the other corner of the parking lot to the other corner. So it stood to reason that we may as well do a - - another Abbotsford shuffle from the park into the parking lot to be in compliance with the injunction and to go to another location.
>
> If you remember the weather was very, very cold. Heavy, heavy wind. Even some snow and stuff like that. So the logistical complications of creating a safe environment on a flat tarmacked surface is very problematic. So I had some thoughts with attaching to the concrete barriers for structural strength and the gentleman that had larger pockets said "What if I prefab the walls and made a wall..." -- I said "We got no money." He says "Take -- "

Q Sorry. Who was the gentleman with larger pockets?

A All I know is Paul.

Q Paul. Where did you meet him?

A I met him on the day of this conversation that we're discussing.

Q Okay.

A The gentleman who brought him I was more familiar with, because he's associated with an AA/NA type of organization and repeatedly he would come to the neighbourhood looking for so and so or looking for so and so.

Q Sorry. What is AA/NA?

A Alcoholics Anonymous, Narcotics Anonymous. So it's like a religious based -- religious abstinence based programming. So his enthusiasm to want to help caused him to bring somebody who had deeper pockets. And this gentleman said "What if I put a wall up, wall up, wall up?" I said "We got no money." He said that he can take it out of the ingredients. I said "It would be perfect." He said "Done."

Q Do you recall when this occurred when you had this meeting?

A Days before the situation, the injunction to move. The whole thing transpired within days.

Q So when you say days are you talking about 2 days? 10 days?

A I would believe it would be more like let's say 5, 6, 7, 8. I have no record of this, but logistically there was a bit of time purchasing material, prefabbing, doing stuff like that I know it wasn't overnight. I know it wasn't 2 or 3, but 7 maybe. .

[252] After the erection of the tent camp in Jubilee Park, the Defendants were present in Jubilee Park from time to time between one hour after sunset and one hour before sunrise the following day without prior permission from the City under the *Parks Bylaw*. On November 25, 2013, the City demanded by service of a notice that the Jubilee Park occupants remove the tent camp from Jubilee Park and cease carrying out certain specified activities in Jubilee Park, with a deadline of November 27, 2013. The Jubilee Park occupants did not comply with the notice. Mr. Shantz was served with the notice, and upon being served said “bring it on” and “see you in court”. Mr. Shantz was aware in advance that the Structure would be erected at the parking lot in Jubilee Park.

[253] The City submits that an adverse inference should be drawn that he was involved in arranging for it to be erected at the parking lot. I decline to draw such an inference. Mr. Shantz was examined for discovery and could have been called by the City as an adverse witness at trial.

[254] The City submits that its response to the occupation of Jubilee Park was reasonable and justifiable bearing in mind the deliberate nature of the trespass, the impacts the occupation had on the City and the use of public space by others, and the provocative escalation of the situation by the erection of the Structure.

[255] I find that Mr. Shantz trespassed on the City property described as Jubilee Park. While damages for trespass could restore the plaintiff to as nearly as possible to the same position it would have been in had the trespass not occurred, the trespass complained of was not by Mr. Shantz alone.

[256] I have concluded that the City has not established its claim for damages against Mr. Shantz. While Mr. Shantz agreed that the City spent the funds it alleges, he did not admit the reasonableness of those expenditures, or his responsibility for them.

[257] I find that the City has not established that the expenditures claimed were reasonably related to the Jubilee Park encampment or what portion, if any, resulted from Mr. Shantz's conduct, and accordingly, I dismiss the City's claim for damages against Mr. Shantz.

**Permanent Injunction Sought by the City**

[258] I decline to order the permanent injunction sought by the City. To begin with, it would be inconsistent with the conclusions I have reached above.

[259] In addition, if granted, it could result in arrest and prosecution pursuant to s. 127 of the *Criminal Code* for anyone found breaching the order. Though the injunction would arguably impact the City's homeless most profoundly, the

vagueness of its language means that it could apply to an overly broad, unspecific group of people and an equally wide ranging spectrum of activity.

**Declaratory Relief Sought By DWS**

[260] On behalf of the City's Homeless, DWS seeks, in part, remedies pursuant to s. 24 and s. 52 of the *Charter*:

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, that the rights of the City's homeless to exist and obtain basic necessities of life, including:

   (i) warmth and adequate protection from the elements, including Survival Shelter;

   (ii) rest and sleep;

   (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 Impugned [Bylaws] and/or the actions of the City 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 original, 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 the City's homeless to peacefully assemble and associate, including in publics paces, 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*, that the Impugned [Bylaws] are of no force or effect to the extent

that they are applied to the City'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 the City in enforcing the bylaws and engaging in the Displacement Tactics are unconstitutional as they breach sections 2, 7 and 15 of the *Charter*.

[261] Section 24(1) of the *Charter* provides that:

> Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[262] Section 52(1) of the *Charter* provides that:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

[263] Section 24(1) provides remedies for governmental acts that violate the *Charter* while 52(1) of the *Charter* provides remedies for unconstitutional laws. In *R. v. Ferguson*, 2008 SCC 6, the Supreme Court explained that when s. 24(1) is read in context, it is apparent that the intent of the framers of the Constitution was for it to function primarily as a remedy for unconstitutional government acts under the authority of legal regimes that are accepted as fully constitutional, *i.e.*, where s. 52(1) does not apply. It is possible, however, for litigants to seek both a s. 24(1) and a s. 52(1) remedy for an unconstitutional law and governmental acts under that law.

[264] The City asserts that there was no evidence at trial as to why s. 24(1) relief should be granted to DWS when DWS is not the party which suffered the breach. The City submits that there was no evidence as to whether or not the individual witnesses who were subject to the Displacement Tactics were members of DWS, were unable to pursue the individual actions, and wanted the relief granted to DWS with respect to what happened to them.

[265] Section 24(1) is a provision that exists to provide remedies. There is no principled basis upon which a litigant with public interest standing must necessarily be foreclosed from relief for state action under s. 24(1). This is certainly true in circumstances where, as here, DWS is made up of individuals who assert that their *Charter* rights have been infringed. As stated in the Standing Decision in this matter, DWS is the only viable entity that can challenge the City's actions; a finding reflective of the Court of Appeal in *Adams BCCA*, which acknowledged that due to the extremely limited means of the litigants, requiring a multiplicity of proceedings does not provide a reasonable remedy.

[266] DWS seeks declaratory relief with direction as to the content of the rights of the City's homeless and submits that the Court may impose any timeline or conditions deemed appropriate and just in the circumstance. DWS does not seek an unconstrained right to use public space, only the recognition of the rights of people who require those spaces for shelter and a balancing of those rights with the interests of other users of those public spaces.

[267] As I have explained above, I am not persuaded that the s. 2(c) or 2(d) *Charter* rights of any of DWS' members have been infringed by either the Impugned Bylaws or the Displacement Tactics, and I therefore decline to make the declaration sought that the rights of the City'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*, and dismiss the application for this declaration.

[268] *Adams* demonstrates that the right to shelter oneself can be necessary to both life and health. There, that right was predicated on the right to sleep and rest, the necessity of which was implicit and went unchallenged in the analysis. Ross J. specifically found that the City of Victoria could not manage its land in a way that interfered with a homeless citizen's ability to keep him or herself safe and warm.

[269] I am not prepared to make the broad s. 24(1) declaration sought with respect to the content of the "basic necessities of life" under s. 7. I accept the guidance

found in *Doucet-Boudreau v. v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, where the Court expressed at paragraph 34 that:

> … in the context of constitutional remedies, courts must be sensitive to their role as judicial arbiters and not fashion remedies which usurp the role of the other branches of governance ….

[270] In my view, the broad declaration sought by DWS with respect to the right to the "basic necessities of life" would be to effectively read in substantive rights under the *Charter* and thus usurp the role of legislative branch.

[271] The obligation to provide housing for the homeless, if it exists, is not a burden that the City must discharge in these proceedings. I therefore decline to make a declaration that the rights of the City's homeless to exist and obtain basic necessities of life, and dismiss the application for such a declaration. As I have explained above, I am unable to accept that an infringement of any of DWS' members' s. 15 *Charter* rights has been made out. I therefore decline as well to make the s. 24(1) declaration sought that Impugned Bylaws and/or the actions of the City in enforcing the Impugned Bylaws and in engaging in the Displacement Tactics, constitute discrimination under s. 15 of the *Charter*, based on mental disability, physical disability, race, national original, ethnic origin, colour and/or homelessness.

[272] I am also not persuaded that the provisions in ss. 10 or 13 or the definition of "park" in s. 2 of the *Consolidated Parks Bylaw*, or Subsection 2.7(e) or the definition of "Highway or Other Public Place" in Schedule A of the *Good Neighbour Bylaw*, or subsections 2.1(d), (h) and (j) of the *Street and Traffic Bylaw* infringe on the *Charter* rights or freedoms of any DWS members, and I therefore decline to make the declarations sought by DWS to that effect.

[273] Some of the City's homeless have possessions such as tents and sleeping bags which are heavy, and being required to move each day means carrying heavy belongings, and possibly having to move long distances to access daytime shelter is a hardship for them.

[274] The evidence about the Gladys Avenue Camp satisfies me that it is unsafe for the homeless and other residents of the City to permit any sustained occupation of a particular space by the homeless. The sustained presence of the homeless at the Gladys Avenue Camp has resulted in the accumulation of between 100 and 500 used syringes in a matter of days, human feces and rotting garbage left throughout the encampment, the presence of rats, and violence and criminal activity following the establishment of the encampment.

[275] Following the decision of the Court of Appeal in *Adams,* the City of Victoria passed new bylaws, one of which limited overnight stays in that city's parks to the hours of 7:00 p.m. to 7:00 a.m. from November to February and from 8 p.m. to 7 a.m. from March to October.

[276] I conclude that allowing the City's homeless to set up shelters overnight while taking them down during the day would reasonably balance the needs of the homeless and the rights of other residents of the City. The evidence shows, however, that there is a legitimate need for people to shelter and rest during the day and no indoor shelter in which to do so. A minimally impairing response to balancing that need with the interests of other users of developed parks would be to allow overnight shelters to be erected in public spaces between 7:00 p.m. and 9:00 a.m. the following day.

[277] The question then becomes, in which public spaces the shelters should be permitted between those times. I have given serious thought to granting an order that specific park land in the City be designated for use by the homeless. Indeed, DWS seeks an order designating specific lands for overnight camping, namely Lonzo Park and/or the Triangle. While the designation of specific public parkland for use by the homeless would afford a degree of certainty to the homeless, and the City, as well as to residents of the City, it is my view, that this is a legislative choice, and not an order that is open to me to make.

[278] Distinguishing non-developed parks and other public spaces from developed parks may allow the City to legislate areas where more than overnight camping is

permitted. A balanced and minimally impairing approach would take into consideration the proximity of such spaces to services for the City's homeless and whether certain areas should be designated as environmentally sensitive, while ensuring that space exists in which the City's homeless can sleep, rest, shelter, stay warm, eat, wash and attend to personal hygiene. Whether such areas may be occupied on a consistent or rotating basis must be determined after consideration of each unique area.

[279] I will however declare, pursuant to s. 52 of the *Constitution Act, 1982*, that ss. 14 and 15 of the *Consolidated Parks Bylaw*, and subsection 2.7(d) of the *Good Neighbour Bylaw* to the extent that they apply to the City's homeless and prohibit sleeping or being in a City park overnight or erecting a temporary shelter without permits violate s. 7 of the *Charter,* and are of no force or effect, and are not saved by s. 1 of the *Charter*.

[280] Given the difficulties with the homeless encampments that I have described above, I find that any declaration respecting overnight sleeping in the City's public spaces and the erection of shelters without permits in such spaces cannot be unlimited. I will therefore limit the declaration to overnight stays between 7:00 p.m. and 9:00 a.m. the following day.

[281] The needs of those who are truly homeless in the City are immediate. For that reason, I decline to suspend the order that will flow from my reasons for judgment for any period of time to provide the City time to draft new regulations to respond to such an order.

[282] I also decline to limit the order that will flow from my reasons for judgment to only those who do not have any other options. I regard such a limitation as unworkable, particularly given the inability of the parties to even agree on who is and who is not homeless.

## DISPOSITION

[283] I decline to order the permanent injunction sought by the City in respect of Jubilee Park.

[284] I dismiss the City's claim for damages against Mr. Shantz.

[285] I declare, pursuant to s. 52 of the *Constitution Act, 1982*, that the ss. 14 and 15 of the *Consolidated Parks Bylaw*, and subsection 2.7(d) of the *Good Neighbour Bylaw* to the extent that they apply to the City's homeless and prohibit sleeping or being in a City park overnight or erecting a temporary shelter without permits violate s. 7 of the *Charter,* and are of no force or effect, and are not saved by s. 1 of the *Charter*. The declaration is limited to overnight stays between 7:00 p.m. and 9:00 a.m. the following day.

[286] I decline to make any other declaratory relief sought by the DWS.

"The Honourable Chief Justice Hinkson"

## APPENDIX "A"

***Consolidated Parks Bylaw, 1996***
*Bylaw No. 160-95*

**2. Interpretation**

[…]

"Park" includes public parks, playgrounds, driveways, boulevards, beaches, swimming pools, community centres, golf courses, play fields, linear parks, including hiking, biking and riding trails, buildings, and other public places under the custody, care, management, and jurisdiction of the Council;

**10. Parades/Assemblies**

No person shall in any park:

(a) take part in any procession, march, drill, performance, ceremony, concern, gathering, or meeting;

(b) make a public address or demonstration, or do any other thing likely to cause a public gather or attract public attention; or

(c) operate any amplifying system or loud speaker

without the prior written permission of the Council. In determining whether to grant its permission, Council may consider the matters set out in Section 30.

**13. General Prohibition**

No person shall:

(a) obstruct the free use and enjoyment of any park by any other person; or

(b) violate any Bylaw, rule, regulation, posted notice, or command of the Council or a person in control of, or maintaining or supervising, any park. In addition to any other penalty under this Bylaw, any person who violates this Section may be removed from the park.

**14. Erecting Structures**

No person shall erect, construct, or build, or cause to be erected, constructed, or built, in or on any park any tent, building, shelter, pavilion, or other construction whatsoever without the prior written permission of the Council. In determining whether to grants its permission, Council may consider the matters set out in Section 30.

**17. Curfew/Camping**

No person shall:

(a) enter, occupy, or be present in any park at any time between one hour after sunset on one day and one hour before sunrise the following

day, with the exception of any of the outdoor park facilities with lights listed in Schedule "D" of this Bylaw while such facility is open for use and the lights operating; or (B/L 1923-2010)

(b) take up temporary abode or camp overnight in or on any parts of a park without the prior permission of the General Manager. In determining whether to grant permission, the General Manager may consider the following:

(i) the impact such activity will have on other members of the public;

(ii) the impact such activity will have on the environment and around the subject park;

(iii) public safety issues; and

(iv) the nature, duration, and size of the activity.

***Consolidated Street and Traffic Bylaw, 2006***
*Bylaw No. 1536-2006*

**Restrictions on Use – Permit Required**

2.1 No person shall:

[…]

(d) place, construct or maintain a loading platform, skids, rails, mechanical devices, buildings, signs, or any other structure or thing, on a Highway;

[…]

(h) obstruct or in any way create an obstruction to the flow of Motor Vehicle, cycle or pedestrian traffic on a Highway;

[…]

(j) place or permit to be placed any fuel, lumber, earth, topsoil, sand, gravel, rocks, merchandise, chattel or ware of any nature, or any object on a Highway;

or carry out any other temporary or permanent Highway Use, unless that person first:

(i) makes application for, and obtains from the City, a Permit under this Bylaw for the proposed Highway Use; and

[…]

**Schedule "A" - Definitions**

"Highway" includes:

(a) every Highway within the meaning of the *Highway Act,*

(b) every road, street, lane or right-of-way designed or intended for or used by the general public for the passage of Vehicles, and for the purposes of Part III of this Bylaw includes every private place or passageway to which the public, for the purpose of the parking or servicing of Vehicles, has access or is invited;

***Good Neighbour Bylaw***
*Bylaw No. 1256-2003*

**Use of Highways**

2.7 No person shall:

[…]

(d) camp or erect a tent or other camping facilities on a Highway or Other Public Place;

**Schedule "A" - Definitions**

"Highway or Other Public Place" includes every street, road, land, boulevard, sidewalk, lane, bridge, viaduct and any other way open to public use and. any park, building, conveyance, private place or passageway to which the public has, or is permitted to have access or is invited