

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Victoria (City) v. Adams,***
2008 BCSC 1363

Date: 20081014
Docket: 05-4999
Registry: Victoria

Between:

The Corporation of the City of Victoria

Plaintiff

And

**Natalie Adams, Yann Chartier, Amber Overall,
Alymanda Wawai, Conrad Fletcher, Sebastien Matte,
Simon Ralph, Heather Turnquist and David Arthur Johnston**

Defendants

And

The Attorney General of British Columbia

Intervener

And

British Columbia Civil Liberties Association

Intervener

Before: The Honourable Madam Justice Ross

Reasons for Judgment

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Date and Place of Trial:

June 16-19, 2008
Victoria, B.C.

TABLE OF CONTENTS

<u>Section</u>	<u>Page</u>
I INTRODUCTION	4
II HISTORY OF THE LITIGATION	6
III THE BYLAWS	15
IV FACTS	20
A. The Homeless in Victoria	20
1. The Number of Homeless in Victoria	20
2. Profile of the Homeless Population	21
3. Shelter Beds in Victoria	23
4. Causes of Homelessness	29
B. Expert Evidence	33
V PRELIMINARY OBJECTION	37
VI ANALYSIS	39
A. Section 7	39
1. Overview	39
2. Canada's International Obligations	42
3. Does this Claim Follow Within the Scope of Section 7?	48
(a) Is there Sufficient State Action?	48
(b) Is the State Action the Cause of the Deprivation?	50
(c) Is this a Claim for a Positive Benefit?	53
(d) Is this Claim about Property Rights?	59
(e) Is there a Risk of Harm?	62
4. Is there a Deprivation of One of the Protected Rights?	65
(a) Life	65
(b) Liberty	67
(b) Security of the Person	69
(d) Summary	71
5. Is the Deprivation in Accordance with the Principles of Fundamental Justice?	72
(a) Overview	72

(b)	Application in Non-Criminal Legislation	76
(c)	Overbreadth	78
(d)	Arbitrary Provisions	79
(e)	The Rationale for the Provisions	80
(f)	The Defendants' Response	83
(g)	Position of the AGBC	85
(h)	Analysis	86
6.	Conclusion Regarding Section 7	91
B.	Section 1	92
1.	Overview	92
2.	Important Objective	94
3.	Proportionality	95
(a)	Rational Connection	95
(b)	Minimal Impairment	96
(c)	Is the Impact Disproportionate?	97
4.	Conclusion Regarding Section 1	101
VII	REMEDY	101
VIII	DISPOSITION	111

I INTRODUCTION

[1] This litigation arises from what Senior District Judge Atkins in *Pottinger v. City of Miami*, 810 F. Supp. 1551 at 1554 (S.D. Fla. 1992) described as:

...an inevitable conflict between the need of homeless individuals to perform essential, life-sustaining acts in public and the responsibility of the government to maintain orderly, aesthetically pleasing public parks and streets.

[2] The particular issue in this litigation concerns the prohibition against erecting temporary shelter on public property that is contained in the Parks Regulation Bylaw and the Streets and Traffic Bylaw (the “Bylaws”) of the City of Victoria (the “City”). Natalie Adams, Yann Chartier, Amber Overall, Alymanda Wawai, Conrad Fletcher, Sebastien Matte, Simon Ralph, Heather Turnquist and David Arthur Johnston (the “Defendants”), who are all homeless people living in the City, contend that this prohibition infringes the rights of homeless people to life, liberty and security of the person in a manner not in accordance with the principles of fundamental justice, contrary to s. 7 of the *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982*, [Charter] being Schedule B to the *Canada Act 1982*, (U.K.), 1982, c. 11. The intervener, the British Columbia Civil Liberties Association (the “BCCLA”), supports the defendants in this contention.

[3] The intervener, the Attorney General for the Province of British Columbia (the “AGBC”), and the City, contend that the claim does not fall within the scope of s. 7 of the *Charter*, that the prohibition does not infringe s. 7 and that in any event any infringement is justified pursuant to s. 1 of the *Charter*. The City contends that the prohibition is necessary to preserve and maintain the City’s parks.

[4] The following findings were made on the basis of the evidence submitted at trial:

- (a) There are at present more than 1,000 homeless people living in the City.
- (b) The City has at present 104 shelter beds, expanding to 326 in extreme conditions. Thus hundreds of the homeless have no option but to sleep outside in the public spaces of the City.
- (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.

[5] On the basis of this evidentiary record and for the reasons that follow, I have found that a significant number of people in the City of Victoria have no choice but to sleep outside in the City's parks or streets. The City's Bylaws prohibit those

homeless persons from erecting even the most rudimentary form of shelter to protect them from the elements. The prohibition on erecting shelter is in effect at all times, in all public places in the City. I have found further that the effect of the prohibition is to impose upon those homeless persons, who are among the most vulnerable and marginalized of the City's residents, significant and potentially severe additional health risks. In addition, sleep and shelter are necessary preconditions to any kind of security, liberty or human flourishing. I have concluded that the prohibition on taking a temporary abode contained in the Bylaws and operational policy constitutes an interference with the life, liberty and security of the person of these homeless people. I have concluded that the prohibition is both arbitrary and overbroad and hence not consistent with the principles of fundamental justice. I finally have concluded further that infringement is not justified pursuant to s. 1 of the **Charter**.

II HISTORY OF THE LITIGATION

[6] This action was commenced by the City in October 2005 as an action to obtain a civil injunction to enforce municipal bylaws respecting parks and public space.

[7] The City established and maintains a public park named Cridge Park. In October 2005, a tent city was established at Cridge Park (the "Tent City") by a number of homeless people, including the named Defendants. A group of up to 70 people occupied the park, setting up more than 20 tents. Two large kitchen areas were constructed using tables and electrical cords that ran from the cooking area to

an outdoor electrical outlet in the church building located adjacent to the north side of the park.

[8] Relying on two City bylaws, the Parks Regulation Bylaw and the Streets and Traffic Bylaw, which at that time prohibited, *inter alia*, loitering or taking up temporary abode overnight in public parks, the City commenced enforcement proceedings under s. 274(1)(a) of the **Community Charter**, S.B.C. 2003, c. 26. To this end, it filed a writ seeking an injunction, *inter alia*, declaring the use and occupation of Cridge Park by the occupants of the Tent City to be in contravention of the Bylaws; restraining the Defendants and others from contravening the Bylaws; and authorizing and empowering the police to arrest those found contravening the Bylaws.

[9] On October 14, 2005, a notice was distributed to the persons who were occupying the park. The notice stated:

NOTICE TO ILLEGAL OCCUPIERS OF CRIDGE PARK

We are the solicitors for the City of Victoria and advise you of impending injunction proceedings that have been authorized by Council with respect to this matter. This means that we will obtain a Court Order requiring you to remove yourself and your possessions off Cridge Park. In particular, we advise that persons who are presently loitering and/or camping at Cridge Park, and any other park within the City of Victoria, are in contravention of the City's Parks Regulation Bylaw.

In particular, Section 28 of the Parks Regulation Bylaw No. 91-19 states that:

- (1) No person may ... loiter or take up a temporary abode overnight on any portion of any park, or obstruct the free use and enjoyment of any park by any other person, or

violate any bylaw, rule, regulation or notice concerning any park.

- (2) Any person conducting himself as aforesaid may be removed from a park and is deemed to be guilty of an infraction of this bylaw.

Accordingly, you are ordered to vacate Cridge Park immediately, and in any event no later than Monday, October 17, 2005 at 10:00 a.m. Failure to do so may result in the confiscation of your camping equipment and other personal property. It will further result in investigatory and injunction proceedings without further notice to you.

We further advise you that damage to trees, gardens and other City property will result in criminal and civil sanctions.

We urge you to avoid the loss of your possessions by moving to temporary housing operated by the Victoria [C]ool Aid Society at either one of the following two locations:

1. Streetlink Emergency Shelter (co-ed)
1634 Store Street ph: 383-1951
2. Sandi Merriman House (adult woman)
809 Burdett Street ph: 480-1408

Please use the above services if you are in any need of food and shelter.

Finally, be advised that you are not permitted to move yourself or your belongings to any other City park or public access way within the jurisdiction of the City of Victoria. Again, you risk the confiscation of your personal property.

Thank you in advance for your anticipated cooperation.

[emphasis in original]

[10] The persons who were staying in the Tent City did not respond to the notice.

The City then brought an application for an interlocutory injunction pursuant to s. 274 of the **Community Charter**. The City sought injunctive relief in the following terms:

- (1) The defendants and anyone else having notice of this order be restrained from loitering or taking up a temporary abode overnight in

any portion of lands legally described as, and commonly known as Cridge Park; ...

- (2) The defendants and anyone else having notice of this order be restrained from posting any advertisements or handbills of any kind in any portion of Cridge Park within the City of Victoria;
- (3) The defendants and anyone else having notice of this order be restrained from erecting any tent or shelter in any portion of Cridge Park within the City of Victoria;
- (4) The defendants and anyone else having notice of this order remove from Cridge Park within the City of Victoria any items, including, but not limited to, signs, chattels, tents, tarps, swings, personal belongings of any type and other thing which in any way encumbers or obstructs the free use and enjoyment of any portion of Cridge Park or has been otherwise placed in contravention of the bylaws, and in the event the defendants or anyone else having notice of this order fail to remove such obstruction or thing, that the plaintiff be at liberty to do so at the cost of the defendants or other person having notice of this order;
- (5) Authorizes and empowers any peace officer to arrest and remove any person the peace officer has reasonable and probable grounds to believe is contravening or has contravened the provisions of any order issued by this honourable court.

[11] The Defendants opposed the application and sought to raise the **Charter** as a defence. Mr. Justice Stewart granted an interim interlocutory order on October 26, 2005, in the terms sought by the City. The order he granted was to expire on August 31, 2006, in order to ensure that the City had some interest in bringing the case to trial.

[12] The persons who were occupying Cridge Park were informed of the order of the court and left the park shortly thereafter on October 28, 2005. There was no attempt to resume camping or occupation of Cridge Park after the occupiers left in response to the injunction granted by Mr. Justice Stewart.

[13] The City filed a Statement of Claim on November 29, 2005. A Statement of Defence was filed on July 21, 2006. In the Statement of Defence, the Defendants asserted that provisions of the Bylaws that prohibit sleeping overnight in any public space in the City of Victoria violate the Defendants' rights pursuant to ss. 2(b), 7, 11(d), 12 and 15 of the **Charter**, cannot be justified pursuant to s. 1 of the **Charter** and are of no force and effect pursuant to s. 52 of the **Constitution Act, 1982**, being Schedule B to the **Canada Act 1982** (U.K.), 1982, c. 11.

[14] After confirming the availability of counsel for the City, the Defendants set the trial date in this matter for nine days commencing on September 4, 2007. The Notice of Trial was issued on March 5, 2007, and served on the City on May 28, 2007.

[15] Then on July 5, 2007, the City served an application for a declaration and a permanent injunction by means of a summary trial pursuant to Rule 18A of the **Rules of Court**, B.C. Reg. 221/90. The City sought a declaration that the Defendants' use and occupation of Cridge Park contravened the City's Parks Regulation Bylaw and Streets and Traffic Bylaw by:

- (a) Injuring or destroying turf and trees in Cridge Park;
- (b) Depositing waste or debris into or upon or otherwise fouling Cridge Park;
- (c) Selling or exposing for sale or gift refreshments in Cridge Park without the express permission of counsel of the Plaintiff, City;
- (d) Carrying a firearm or weapon of any description; and

- (e) Obstructing the free use and enjoyment of Cridge Park by any other person.

[16] The City applied for a permanent injunction restraining the Defendants and anyone else having notice of such order from using Cridge Park in a manner described above. The Defendants then proposed that the entire matter, including both the City's application and the constitutional question, be determined pursuant to Rule 18A and served a Notice of Motion pursuant to Rule 18A on July 25, 2007.

[17] The City's application for a permanent injunction came before Mr. Justice Johnston on August 13, 2007. He refused to grant the permanent injunction on the basis that the matter was not suitable for summary determination in the circumstances for the following reasons:

- (a) there was no evidence of ongoing unlawful conduct or of any apprehension of the resumption of any of the activities that had formed the basis of the interim injunction;
- (b) it would be unwise to grant a permanent injunction in such circumstances when the constitutionality of the very bylaws at issue was to be determined at trial;
- (c) the injunction sought by the City was too broadly worded; and
- (d) the trial would not be shortened appreciably if the injunction were to be granted.

[18] Mr. Justice Johnston noted that the permanent injunction was "rather carefully crafted to avoid seeking an injunction to prevent folks from sleeping in public spaces". In fact, since the interim injunction had been granted, the City had repealed and replaced the Parks Regulation Bylaw at issue in the litigation on August 9, 2007. The provisions of the Bylaw no longer prohibited loitering in public

places. However, counsel did not inform either the court or counsel for the Defendants of the changes to the Bylaw at the hearing before Johnston J.

[19] A pre-trial conference was held before Master McCallum on August 17, 2005, at which counsel for the City stated he now had instructions to apply for leave to discontinue the action.

[20] The Defendants served the AGBC with a Notice of Constitutional Question on August 20, 2007.

[21] On August 29, 2007, the City filed a Notice of Discontinuance. The Defendants applied to have the Notice of Discontinuance set aside. On September 7, 2007, Master Keighley set aside the Notice of Discontinuance stating:

The key issue underlying this case is the defendants' assertion that the City's bylaws offend the Charter. It seems to me that at least by the time the defendants set down their 18A application for hearing, possibly by the time Johnston J. considered the defendants' constitutional arguments and possibly even at the time of the hearing before Stewart J. when the plaintiff had notice of the underlying social/constitutional issues, the plaintiff had ceased to be master of its own suit. Certainly by the time the plaintiff purported to have filed its Notice of Discontinuance the constitutional issue had become the dominant issue in this litigation. In the circumstances, it would be an abuse of the process of this court to deprive the defendants of their right to have their position decided on the merits, particularly in light of the time and energy expended to this point. Evidence suggests that the defendants and others have refrained from exercising what they assert are their constitutional rights even since the expiration of the "interim interlocutory" injunction in the belief that this court would eventually adjudicate the issue. It would not be appropriate, in circumstances such as these, to allow the plaintiff to "escape by a side door and avoid the contest." Accordingly, I confirm my conclusion that the plaintiff's Notice of Discontinuance dated August 29, 2007 must be set aside.

[22] On September 10, 2007, the City applied for an adjournment of the Defendants' summary trial application, arguing, *inter alia*, that it was necessary to adjourn in order to have the benefit of the report of the Mayor's Task Force on Breaking the Cycle of Mental Illness, Addictions and Homelessness (the "Mayor's Task Force Report"), which was forthcoming.

[23] The AGBC filed a Notice of Appearance on September 12, 2007. The Defendants advised the parties that they would be restricting their constitutional argument to ss. 7, 12 and 15 of the **Charter**.

[24] On October 3, 2007, the AGBC brought a motion to have the Defendants' Rule 18A application dismissed pursuant to Rule 19(24). That application was scheduled to be heard on October 30, 2007. In the AGBC's reply submissions, delivered shortly before the hearing, the AGBC raised the fact that in August 2007 the Parks Regulation Bylaw had been amended so that it no longer prohibited "loitering" in public parks. The AGBC asserted that as a result, the Bylaw did not prohibit sleeping in public spaces.

[25] Prior to the commencement of the hearing, the Defendants requested the position of the City on the effect of the change in the Bylaw. The application was adjourned to allow counsel for the City to take instructions and to advise the parties of the City's position with respect to what is permitted and what is prohibited by the current Bylaws.

[26] The City later indicated that "operational policy of the Victoria Police" for enforcement of the Bylaws allowed for sleeping in public in some circumstances but

that the use of any tents, tarps, boxes or other structures was prohibited, although a simple, individual, non-structural, weather repellent cover (such as a sleeping bag; blanket; other soft material) that is removed once a person is awake is allowed.

[27] At the hearing of the AGBC's Rule 19(24) application, counsel for the City suggested that the Bylaw allowed the use of "small" tarps, as long as they were not attached to trees. On March 17, 2008, the Defendants sought clarification of the City's position on the interpretation of the Bylaws and whether some form of shelter was allowed. On March 18, 2008, the City advised that it would provide its position "at the appropriate time".

[28] The AGBC's application under Rule 19(24) was dismissed. However, Madam Justice Gray held that to the extent that the Defendants sought a declaration that the Bylaws were of no force and effect, they were required to file a Counterclaim. That Counterclaim was filed, and is the basis for this hearing. The Defendants did not pursue a claim with respect to s. 15 of the *Charter*.

[29] The Counterclaim seeks the following relief:

- (a) A declaration that the Bylaws are contrary to the *Charter* and of no force and effect pursuant to s. 52 of the *Constitution Act, 1982*, to the extent that they prohibit homeless people from engaging in life sustaining activities, including the ability to provide themselves with shelter, in public.
- (b) In the alternative, pursuant to section 24(1) of the *Constitution Act, 1982*, an order in the nature of a constitutional exemption for homeless persons, such that they can sleep and provide themselves with shelter in some or all public spaces in the City of Victoria without contravening the Bylaws;
- (c) That the Plaintiff pay to the Defendants the costs of this proceeding on a full indemnity basis.

[30] The British Columbia Civil Liberties Association (the “BCCLA”) brought an application for an order granting it intervener status. The application was heard and the order granted at the outset of this proceeding.

III THE BYLAWS

[31] The City is authorized to regulate, prohibit and impose requirements in relation to public places pursuant to ss. 8(3) and 62 of the **Community Charter**, which provide:

Fundamental Powers

S 8(3) A council may, by bylaw, regulate, prohibit and impose requirements in relation to the following:

- (a) municipal services;
- (b) public places;
- (c) trees;
- (d) firecrackers, fireworks and explosives;
- (e) bows and arrows, knives and other weapons not referred to in subsection (5);
- (f) cemeteries, crematoriums, columbariums and mausoleums and the interment or other disposition of the dead;
- (g) the health, safety or protection of persons or property in relation to matters referred to in section 63 [*protection of persons and property*];
- (h) the protection and enhancement of the well-being of its community in relation to the matters referred to in section 64 [*nuisances, disturbances and other objectionable situations*];
- (i) public health;
- (j) protection of the natural environment;

- (k) animals;
- (l) buildings and other structures;
- (m) the removal of soil and the deposit of soil or other material.

...

Public place powers

62 The authority under section 8 (3) (b) [*spheres of authority — public places*] includes the authority in relation to persons, property, things and activities that are in, on or near public places.

[32] The City has enacted Parks Regulation Bylaw No. 07-059. Under the provisions of this current Parks Regulation Bylaw, sleeping in parks or public spaces is no longer prohibited. The Bylaw does prohibit taking up a temporary abode. The Parks Regulation Bylaw provides in part:

Damage to environment, structures

- 13 (1)** A person must not do any of the following activities in a park:
- (a) cut, break, injure, remove, climb, or in any way destroy or damage
 - (i) a tree, shrub, plant, turf, flower, or seed, or
 - (ii) a building or structure, including a fence, sign, seat, bench, or ornament of any kind;
 - (b) foul or pollute a fountain or natural body of water;
 - (c) paint, smear, or otherwise deface or mutilate a rock in a park;
 - (d) damage, deface or destroy a notice or sign that is lawfully posted;
 - (e) transport household, yard, or commercial waste into a park for the purpose of disposal;

- (f) dispose of household, yard, or commercial waste in a park.
- (2) A person may deposit waste, debris, offensive matter, or other substances, excluding household, yard, and commercial waste, in a park only if deposited into receptacles provided for that purpose.

Nuisances, obstructions

14 (1) A person must not do any of the following activities in a park:

- (a) behave in a disorderly or offensive manner;
- (b) molest or injure another person;
- (c) obstruct the free use and enjoyment of the park by another person;
- (d) take up a temporary abode over night;
- (e) paint advertisements;
- (f) distribute handbills for commercial purposes;
- (g) place posters;
- (h) disturb, injure, or catch a bird, animal, or fish;
- (i) throw or deposit injurious or offensive matter, or any matter that may cause a nuisance, into an enclosure used for keeping animals or birds;
- (j) consume liquor, as defined in the *Liquor Control and Licensing Act*, except in compliance with a licence issued under the *Liquor Control and Licensing Act*.

(2) A person may do any of the following activities in a park only if that person has received prior express permission under section 5:

- (a) encumber or obstruct a footpath;

...

...

Construction

16 (1) A person may erect or construct, or cause to be erected or constructed, a tent, building or structure, including a temporary structure such as a tent, in a park only as permitted under this Bylaw, or with the express prior permission of the Council,

Offence

18 A person who contravenes a provision of this Bylaw is guilty of an offence and is liable on conviction to the penalties imposed by this Bylaw and the Offence Act.

[33] The Streets and Traffic Bylaw No. 92-84 provides in part:

- 73. (1) Except the agents, servants or employees of the City acting in the course of their employment, no person shall excavate in, disturb the surface of, cause a nuisance in, upon, over, under, or above any street or other public place, or encumber, obstruct, injure, foul, or damage any portion of a street or other public place without a permit from the Council, who may impose the terms and conditions it deems proper.
- 74. (1) Without restricting the generality of the preceding section or of section 75, no person shall place, deposit or leave upon, above, or in any street, sidewalk or other public place any chattel, obstruction, or other thing which is or is likely to be a nuisance, or any chattel which constitutes a sign within the meaning of the Sign Bylaw and no person having the ownership, control or custody of a chattel, obstruction or thing shall permit or suffer it to remain upon, above or in any such street, sidewalk or other public place.

[34] Mike McCliggott, Acting City Manager, deposed that the City's policy concerning the interpretation and application of the Parks Regulation Bylaw and the Streets and Traffic Bylaw as reflected in the operational policy of the Victoria Police is as follows:

- (a) Parks Regulation Bylaw — when police encounter people sleeping in a park [during daytime hours] and there is no

evidence of those persons taking up temporary abode in the park, they are not awoken or asked to move on;

- (b) Streets and Traffic Bylaw — where police encounter homeless people sleeping in public spaces between the hours of 11:00 p.m. and 7:00 a.m., they do not generally awake or request the person(s) to move on if they are not obstructing a sidewalk, street or other right-of-way, or interfering with the use of a public amenity such as a bus shelter;
- (c) In both cases, when concerned about a person's welfare, police may need to waken the person in order to assess their health condition.

[35] He deposed that the City does not prohibit people from creating shelter for themselves so long as a person is not taking up a temporary abode. People are allowed to protect themselves from the elements and to stay warm while they are sleeping through simple, individual, non-structural, weather repellent covers that are removed once the person is awake. He deposed that it is the City's position that the Parks Regulation Bylaw prohibits the taking up of a temporary abode overnight and accordingly no tents, tarps that are attached to trees or otherwise erected, boxes or other structures are permitted.

[36] The parties agreed to proceed on the basis that the current state of the law is reflected in the combination of the Bylaws and the operational policy described by Mr. McCliggott. The focus of the constitutional inquiry is directed to the gap between what is permitted by the Bylaws and operational policy of the City and what is prohibited by those Bylaws and the policy.

IV FACTS

A. The Homeless in Victoria

1. The Number of Homeless in Victoria

[37] There have been several recent studies that have attempted to identify the number of homeless people in Victoria. All of the studies recognised the difficulties in conducting an accurate survey of this population such that all efforts to count are likely to result in underestimates. The most recent, thorough and comprehensive of these studies is the Mayor’s Task Force Report.

[38] The Mayor’s Task Force Report, published on October 19, 2007, concluded that at least 1,200 people are homeless in or near downtown Victoria and another 300 are living in extremely unstable housing situations. The Gap Report of the Analysis Team’s included in the Mayor’s Task Force Report noted that the baseline statistics for determining homeless numbers in Victoria are likely an under-reporting and that current planning efforts to address the needs of the chronically homeless should be calculated based upon 1,500 individuals.

[39] The Mayor’s Task Force Report concluded at p. 7 that “without the addition of sufficient supported housing units, the homeless population in Victoria is expected to increase by 20-30 percent per annum”, or an additional 300–450 people per year.

[40] A survey of the homeless in Victoria was conducted on January 15, 2005, in which 150 community volunteers were assigned to survey specific geographical routes in the Greater Victoria area between the hours of midnight and 6:00 a.m. On

that night the temperatures dropped to minus 10°C. The survey identified 700 homeless people. One hundred and sixty-eight people were found sleeping outside. The survey identified 47 children dependent upon someone who was homeless.

2. Profile of the Homeless Population

[41] The Homeless Needs Survey taken in 2007 and cited in the Mayor's Task Force Report provided further information with respect to the composition of the homeless population in Greater Victoria.

[42] The Gap Analysis Report included the following results of that survey at p. 7:

Table 1: Homeless and unstably housed people identified through Homeless Needs Survey

	Adults			Youth (16-25)	Children (<16)	Total
	Male	Female	Transgender			
Homeless	480	142	2	108	59	791
Unstable Housing	172	133	3	59	84	451
Total	652	275	5	167	143	1,242

[43] As noted in this chart, that survey identified 791 persons who were homeless, as opposed to being unstably housed. Of those, 108 were youths between the ages of 16 – 25 and 59 were children under the age of 16. The surveyors, however, were of the view that this represents a significant underestimate and that the correct figure for homeless young people is likely between 250–300. The survey identified 74 homeless people who had children staying with them. Nineteen percent of those

persons surveyed with children were homeless as opposed to being unstably housed.

[44] The Mayor's Task Force Report contained a Report of the Expert Panel. The Report of this group concluded at pp. 7-8:

- Within the Capital Regional District, 1,242+ residents are homeless, which includes residents of all ages, including children and seniors, with a peak age for men between 31 and 49
- 75 percent of homeless residents are male
- Two-thirds of homeless residents are absolutely homeless
- 30 percent of homeless residents are high risk for health needs; 70 percent are low to moderate risk for health needs
- Mental illness and substance use are the norm with at least 40 percent suffering from diagnosable mental illness
- At least 50 percent of homeless residents are struggling with problematic substance use including alcohol, drugs that are injected (most commonly heroin and cocaine), and drugs that are smoked (including crack cocaine and crystal methamphetamines)
- There are an estimated 1,500 to 2,000 injection drug users in Victoria, of whom at least 40 percent are homeless or unstably housed
- The injection drug population is relatively young; 75 percent are male and 20 percent are Aboriginal
- One survey found that 13 percent are infected with HIV and 74 percent are infected with Hepatitis C virus
- Victoria has a problem with public injection; 30 percent of injection drug users report that the street is the place they most commonly inject drugs
- 25 percent of homeless residents have co-occurring disorders (mental illness and substance use problem)

3. Shelter Beds in Victoria

[45] The Report of the Gap Analysis Team described the number and distribution of shelter beds in Victoria at p. 15:

There are 141 permanent shelter beds in Victoria:

- 10 beds for youth
- 131 beds for adults
- 20 beds for women only
- 21 beds for men only
- 90 beds for both men and women

An additional 30 emergency youth mats are provided through the Out of the Rain Shelter during the colder months. When the Extreme Weather Protocol is activated, there are an additional five beds for women and 130 mats available across a number of locations. Of the 135 Extreme Weather spaces, 110 are located in Victoria and 25 are located in Saanich. At the height of extreme weather, 326 residents can be sheltered, leaving the remaining 1,200 plus homeless residents out in the rain.

[46] It is clear that even including the Extreme Weather Protocol shelter spaces, the number of homeless people in Victoria substantially exceeds available shelter space. In addition, shelters have restrictions on the number of nights a person can stay and often bar those who are addicted to alcohol or drugs.

[47] The City submits that in fact the number of shelter beds is sufficient to meet demand, at least during the time when the Extreme Weather Protocol is in effect.

The City relied upon the rough draft of the 2007/08 Victoria Area Extreme Weather Protocol Final Report in support of this contention. [Note: the final draft of this Report was not in evidence.] The Report notes that the Extreme Weather Protocol

was in effect on 81 nights during the period between November 21, 2007, and April 20, 2008. The Report states at p. 57:

Shelter Capacity

The EWP [Extreme Weather Protocol] shelter system nearly reached capacity a few times, hovering around 90-95% at various points in January. Technically speaking, we never sheltered 130 people, because even when all the other shelters were full, the Sobering Centre was not. The Sobering Centre has a policy that only people under the influence may stay, so it always had a few beds in reserve. On the ground, however, the EWP was out of beds when the Salvation Army, Our Place, and the Native Friendship Centre were full. The EWP Capacity Chart (below) illustrates how close we came to capacity throughout the year.

[48] However, in my view, it cannot be concluded from the fact that the shelter spaces were not 100 percent occupied during the period when the Extreme Weather Protocol was in effect that the demand for shelter was met. This is evident from the commentary provided in the Report under the heading “Shelter Details” at p. 59 which states:

Shelter Details:

The Salvation Army was used well from the beginning of the season, filling up quickly and efficiently. Because the Salvation Army operates a shelter year round, it is well-equipped to staff, set up, and dismantle an EWP shelter. The Chapel was running at or near capacity for 64 of the 81 EWP nights, making it the most used shelter in the protocol.

The Native Friendship Centre had a difficult beginning, opening several times with very few or no clients. Staffing the centre was problematic at times, and the fact that it was not within walking distance from town meant that homeless people were initially reluctant to travel to it. These problems were addressed by persistently driving around at night, inviting people to catch a ride to Saanich. By January, the Centre was becoming a preferred location, filling up several times. Staffing the Centre remained a problem throughout the rest of the year, however.

Our Place sheltered the most people because of its high capacity and proximity to downtown. People also felt more comfortable with this location because it was well-established and familiar. Keeping Our Place clean, however, was a major obstacle. The blankets that were being used became very dirty, but no laundry facilities could be found. The Salvation Army helped by washing the blankets a few times, but consistent laundry facilities were never established. The mats were constantly disappearing, and needed replenishing from the EWP storage room (At the Salvation Army) regularly. Our Place was given over a hundred mats throughout the year, and returned 29 at the end of the season. Our Place only reached the maximum capacity once, on November 26.

The Sobering Centre was barely used this year. It was important to have an option for clients who were intoxicated, but in the whole year, only 4 people were sheltered, 2 on December 6th, and 2 on Feb 4th.

[49] Thus, it is not possible to determine if the fact that there were spaces not occupied on any given night was due to lack of demand or to operational difficulties with the shelters. For example, the summary chart attached to the draft Report shows that on November 26, 2007, the temperature was minus 1.9°C with a wind chill of minus 4. Both the Salvation Army and Our Place were completely full. The shelter capacity utilized was noted to be 80 percent because no one was at the Native Friendship Centre. This likely reflected the difficulties encountered during the early opening period for the Centre. It does suggest that on this night all the spaces that were realistically available for use were being used. After that night, Our Place was never at full capacity although both the Salvation Army and, later, the Native Friendship Centre were at full capacity on many occasions. However, it is not clear whether the attendance at Our Place was a function of a lack of demand or of the operational difficulties outlined in the draft Report.

[50] The City also places considerable reliance on the affidavits filed by and in support of the Defendants in this proceeding. A number of the Defendants deposed that, for various reasons, they do not use shelters. For example, Yann Chartier deposed that, “I’ve never lived in shelters. They won’t take my dog. The shelters also have strict bedtimes and sign rules, and you lose your bed if you don’t follow them.”

[51] Mark Smith deposed that he does not want to live in a shelter because they are miserable and not safe. Saera, a homeless person, deposed that:

Although I have been in shelters, I have never slept in a shelter. I am afraid to sleep in shelters. I have only heard bad stories about shelters. I have heard that there is no personal space and a lot of theft, violence and drugs in shelters. There is no sense of community in shelters and they are always full. In shelters, people who are suffering and angry surround you. I do not want to sleep in fear. I would rather sleep under the trees and with a community of friends who I can trust with my personal safety.

[52] Simon Ralph deposed that the rules of the shelter are not adequate for those who are trying to work. Thomas Davies deposed that, “The times when I have stayed in shelters I have not stayed long because of the noise, fights, theft and other disturbances.”

[53] Sebastien Matte deposed:

I don’t want to go back to Streetlink. I repeat that I love and respect the staff there, but it is not my place. They have trouble dealing with 55 beds, and they are supposed to add 40 more, opening the rooms to 4-people occupation. It’s really hard to have a quiet night of sleep there, absolutely no privacy. Outside, people wander helplessly and hopelessly, begging cigarettes or dope, and shoppers and restaurants’ clients are afraid of them, and me too I am afraid of them, even when I stayed there. I couldn’t let go of sight of my backpack for more than 30

seconds, or someone would have stolen it, this and my gear within being my only possessions. I witnessed some theft that I couldn't say a thing about, for fear of reprisal. I've seen many people asking back for all kind of belongings that were stolen inside the shelter, some even while they were sleeping, or taking a shower. There are all these problems with mental illnesses and addictions, and they wear on me, drain me. I don't have addictions, I don't want them, and people suffering from them have an extremely basic and brutal behavior. I feel threatened by that atmosphere. Anything that has happened in Tent City is better than that. We take care of each other, sharing in ways which is not possible in the shelters.

I won't go back to Streetlink, even at the cost of sleeping outside and alone, and of breaking the law. That place has nothing for me that my tent and friends cannot provide. Except a shower.

[54] However, it is also the case that many of the deponents stated that they have sought accommodation at the shelters, but been turned away. For example, Thomas Davies deposed that he has tried to stay in shelters, but there are often no beds available. Daniel, a homeless person, reported that he has stayed in shelters, but you can't always get into them. Faith, who is also known as Amber Overall, deposed:

After being evicted from Tent City I continued to be homeless until April of 2006. My life was horrible. I still miss Tent City and consider it the only true home I have ever had. From October 2005 until April 2006 I lived on the streets, often sleeping in doorways or under bushes or under a bridge. On these nights it was commonplace to be found by police, woken and moved on. When possible I stayed at the youth shelter, but it opened late that year due to funding problems and it was often full. It was a very difficult winter.

[55] This evidence is consistent with the data reported in the Homeless Needs Survey taken in 2007 in which two out of three of the people who used shelters reported being turned away from the shelters. The most common reason for being

turned away was no available beds, a reason reported by 80 percent of respondents.

[56] In addition, there are significant gaps in the shelter spaces available in Victoria to particular groups. Two such gaps are with respect to youths and families. Shelters in Victoria do not accept children. There are very few spaces for youth. Couples cannot access shelter services together. These gaps are described in the evidence of several of the Defendants. For example, Amber Overall deposed:

Because I am 17, I am too young to be able to go to the shelters. Shelters such as Open Door are for 19 years and older. I am also too young for women's shelters, because I would have to be 18. For people who are younger, the only place to sleep is doorways. There are a lot of places for food but no place to sleep if you are underage.

The only shelter I am able to access is Out of the Rain that operates from November to February. It operates 7 days a week and moves from church to church. It is not stationary. I have seen people turned away (even though they tell the public that no one is turned away) and people are not allowed in if they are too drunk or too lethargic.

[57] Alymanda Wawai deposed that:

The notice which the City of Victoria delivered to the people at Tent City says that we are not permitted to move ourselves or our belongings to any other City park or public access way in the City of Victoria. But there is no where else for us to go. The shelters that they tell us to go to are usually full or have only a very few beds available. And many people, myself included, do not feel safe in the shelters. Also if I were to go to a shelter I would be forced to be separated from my husband.

[58] It is abundantly clear from the evidence – in particular the Mayor's Task Force Report – and I find, that there are currently many more homeless people in Victoria than can be accommodated in the available shelters. While some homeless people

choose not to seek accommodation in the shelters, the fact is that there are not sufficient spaces in the shelters to accommodate those who seek shelter. Thus hundreds of people are left to sleep in the public places in the City.

4. Causes of Homelessness

[59] There are many factors that contribute to homelessness, both personal to the individual and social. Male participants in the 2005 Cool Aid count identified the following as reasons they were without shelter: getting evicted, ineligibility for income assistance, addiction, conflict with families and financial difficulties. Thirty-three percent of female participants identified abuse as the reason they were without shelter. Eviction, addiction and conflict with families were also cited. This is consistent with the evidence of the Defendants. Many of the participants in the Cool Aid count stated that they have suffered abuse and neglect in families and relationships, sometimes over a period of many years. Relationship breakdowns have led to both men and women being on the street. This is also consistent with the evidence of the Defendants.

[60] In the Homeless Needs Survey taken in 2007, the three most commonly reported contributing factors to participants' current housing situation were all health related: alcohol or drug use, illness or medical reasons, or social or emotional challenges. Women were more likely than men to be homeless because they had fled domestic violence (34 percent of women surveyed) or unsafe housing (25 percent of those surveyed).

[61] The factor most frequently cited as contributing to youth homelessness was conflict, violence or neglect by family members, friends or caregivers (55 percent of youth surveyed). A total of 33 percent of the youth were Aboriginal and 56 percent of the youth who were “aging out of foster care” were Aboriginal.

[62] The Mayor’s Task Force Report noted at p. 12 that “just 15 years ago there was very little visible homelessness in downtown Victoria. Shelters and street drop-ins were in place and while busy even then, they were generally able to accommodate the comparatively small number of people who were homeless at the time”. The authors of the Report concluded at pp. 12-14 that the following factors have contributed to what the authors characterized as the current “crisis of homelessness” in Victoria:

Deinstitutionalisation: Starting in the 1960s and intensifying in the 1980s, governments across Canada and the U.S. underwent a major shift in thinking around the treatment of people with mental illness and developmental disabilities. With the best of intentions, large institutions were closed down that in the past had housed people with chronic illness and disability, many of whom were unable to care for themselves. In B.C., institutions such as Riverview psychiatric hospital and the Tranquille and Woodland institutions for people with developmental disabilities had housed 5,000 or more people before they were phased out.

The intent of deinstitutionalisation was to provide support for people right in their own communities, rather than force them to live sometimes hundreds of kilometres away from their family in impersonal institutions. And initially, that is what happened. The burden of care also shifted to regional psychiatric wards as the large provincial institutes closed down.

But during the 1990s, community services fell victim to budget cuts, particularly for people with mental illness (support for those with developmental disabilities has remained more consistent). In some cases, promised community services simply never got off the ground. People too disabled to manage their lives in a healthy, functioning fashion suddenly

found themselves on their own. Many fell onto the streets and into an addiction, and ended up frequent visitors to hospital emergency departments.

...

Federal withdrawal from social housing: The federal government began withdrawing from the social-housing sector in the early 1990s, after having been actively involved for several decades through the Canada Mortgage and Housing Corporation (CMHC). The government's plan had been for the private sector to take over the work of building social housing, but the rates of return on investment did not turn out to be high enough to attract private investment.

The result was a steep decline in the number of social housing units being built in Canada: from an average 12,675 annually in 1989-93, to 4,450 annually in 1994-98. CMHC estimates that at least 22,500 units of affordable housing would need to be built every year in Canada to meet current demands.

In the same period, construction of new rental and co-op housing in Canada also fell dramatically. During 1989-93, rental housing accounted for 20 per cent of all completed housing construction projects. By 1994-98, that percentage had declined to less than 10 per cent. New co-op housing construction declined 78 per cent.

The number of rental units being built in Canada has fallen from 25,000 units a year in the early 1990s to fewer than 8,400.

Housing costs up, earning power down: The cost of housing across Canada, and particularly in Greater Victoria, have risen much faster over the past 15 years than the incomes of low- and middle-income earners. The purchasing power of a minimum wage job has fallen by as much as 20 per cent across Canada from its peak in the mid-1970s. Soaring land costs have also left non-profit housing providers scrambling for sufficient funds to launch new projects.

More than 1.7 million Canadian households - one in seven - are now considered to have insecure housing. A fifth of Canadian households spend more than half of their income on rent, an increase of 43 per cent from the early 1990s.

Policy changes to federal transfer payments: In 1996, the federal government announced a new policy around transfer payments to the provinces that offset some of the costs of providing social programs. Previously, provinces had been required by the federal government to maintain funding to social services at a specified level. Provinces were

granted the freedom to establish their own levels of social spending in 1996. Virtually every province responded to the policy change by cutting social spending.

Also in the mid-1990s, policy changes to the federal Employment Insurance program resulted in far fewer people qualifying for benefits. In 1990, more than three-quarters of unemployed workers were collecting unemployment insurance; by 1995, that number had dropped to 49 per cent.

Changes to B.C.'s income assistance policy: In the mid-1990s, B.C. launched an aggressive strategy to reduce the number of employable people in the province on income assistance. Further policy changes were introduced in 2002 to reduce the caseload even further. Between 2001 and 2005, more than 105,000 people lost their welfare benefits.

The two-year "independence" test introduced in 2002 is a particular challenge to those with chronic mental illness, addiction and other ongoing barriers. To be eligible for income assistance, people either have to prove they have a permanent disability - a challenging and lengthy process - or show proof of having worked for at least two years in a row earning \$7,000 or working 840 hours minimum in each of those years.

There is considerable disagreement as to whether the change in income-assistance policy has led to increased problems of homelessness. Two surveys of homeless people in Vancouver appear to indicate a link. A 2001 survey in the city found 15 per cent of people who were homeless were not receiving income-assistance benefits. A similar survey four years later found that figure had grown to 75 per cent.

[footnotes omitted]

[63] The AGBC and the City stressed evidence filed by the Defendants in support of the proposition that being homeless is a matter of personal choice for some. For example, Tomiko Rae Koyama deposed that she lived and worked on Salt Spring Island prior to coming to Victoria. She packed up camp at Salt Spring to go to Tent City to run the kitchen and help out. Her evidence was consistent with a political aspect to her participation. She deposed that:

I feed people, give out blankets and try to remind people that people have lived outside for thousands of years and we are allowed to do this.

[64] David Johnston deposed that he first came to Victoria in 1996. He was at the time working as a baker. He deposed that he had an enlightenment that led to the adoption of a monkish lifestyle. He has lived homeless on the street of Victoria since November 2000. During this time he has engaged in counselling, food distribution and educational activities.

[65] This evidence supports the conclusion that there are some individuals who choose to be homeless. However, the overwhelming weight of the evidence introduced by the parties, and in particular the conclusions of the Mayor's Task Force Report, makes it clear that such individuals are the minority of the population of the homeless.

[66] The evidence with respect to this issue is consistent. There is a substantial and growing population of people in Victoria who because of complex social, economic and personal factors are homeless. While there may be some people for whom urban camping is a lifestyle choice, it is clear that this is not the situation of the majority of the population of Victoria's homeless. Rather, these are people who do not have practicable alternatives.

B. Expert Evidence

[67] Dr. Stephen Hwang of the Department of Medicine, University of Toronto provided an expert opinion. Dr. Hwang is a specialist in general internal medicine

with training in public health and epidemiology. His primary research interests are homelessness and health, access to home care for homeless persons and housing as a determinant of population health. The opinion that Dr. Hwang provided is as follows:

People who become homeless often have physical and mental health problems which worsen over the period that they are homeless. This deterioration in health is related to numerous factors, including a lack of stable housing, an adverse social environment, the near impossibility of maintaining health-promoting behaviours in the face of homelessness, and barriers to accessing appropriate health care. The state of being homeless also has direct adverse effects on health through an increased exposure to infectious and communicable diseases (e.g., tuberculosis and insect infestations such as bed bugs and scabies) and an increased risk of violence and victimization while living in shelters and on the street. For those living outside, exposure to the elements can lead to a number of serious and potentially life-threatening conditions. Homeless people are at risk for severe sunburn and heatstroke during the summer months. During cold weather, frostbite and hypothermia are major problems.

Homeless people often suffer from sleep deprivation due to an inadequate number of hours of sleep, as well as disturbed or fragmented sleep. For homeless people sleeping outside, sleep fragmentation is often related to external stimuli, such as bright lights, loud noises, and intentional efforts by other people to awaken or disturb them. A large body of research evidence has shown that inadequate sleep has numerous adverse health effects, including an increased risk of diabetes, cardiovascular disease, obesity, depression, and injuries, as well as the more commonly recognized problems of impaired alertness, attention, and concentration.

If homeless people who sleep outside are prohibited from erecting even the most rudimentary forms of shelter from the elements (e.g. tent, tarpaulin, or cardboard barriers), this would have clear and direct adverse impacts on their health. First, a lack of protection from wind and rain would increase the wind chill effect, which would greatly increase the risk of hypothermia. As has been documented in the research literature, homeless people are at particularly high risk of death from hypothermia, and half of all such deaths occur when the air temperature is above freezing ("Accidental hypothermia and death from cold in urban areas," *International Journal of Biometeorology*, 1991). The wind chill effect plays a key role in such deaths. Second,

prolonged exposure to cold and dampness increases the risk of skin breakdown and skin infections, particularly in the feet. In homeless people, exposure of the feet to wet and cold conditions can lead to immersion foot or trench foot, a serious condition that was first described among soldiers serving in the trenches during World War I. Third, recent research has shown that exposure to the cold increases the risk of developing respiratory tract infections, which are a major health problem among people experiencing homelessness. Fourth, a lack of shelter from the sun would greatly increase homeless people's risk of severe sunburn and heatstroke during the summer months. Fifth, the lack of a tent or other structure to provide even a minimal degree of protection from the elements, light, and noise would result in even more disturbed and fragmented sleep, with the adverse health effects detailed above.

In summary, if homeless people who sleep outside are prohibited from erecting any form of shelter such as a tent, tarpaulin, or cardboard box, it is absolutely clear that this would have a substantial and potentially severe adverse effect on their health.

[68] Brooks Hoga, a wilderness guide and primary care paramedic, provided an expert opinion concerning the health risks associated with sleeping outdoors, how these risks can be minimized and the sufficiency of individual, non-structural, water repellent covers with respect to these risks. Mr. Hoga's opinion is as follows:

Hypothermia

The normal core temperature of the human body is 37° Celsius. If the body temperature drops to 35° Celsius or below a person is at risk of developing hypothermia. Hypothermia can occur at any time of the year, including summer months, particularly when it is raining or below freezing, but there is, of course a much higher risk in winter.

Individuals who are malnourished or dehydrated are at greater risk of hypothermia. In order to prevent hypothermia it is important to have proper clothing and equipment, to stay dry, and to have sufficient caloric and fluid intake.

With respect to equipment, when sleeping outdoors, at a minimum one should have extra clothing, a sleeping bag, a ground insulator in the form of a Theramarest™ or closed cell foam pad, and overhead protection in the form of a tent, or a bivy sack and tarp. A bivy sack is a waterproof fabric shell designed to slip over a sleeping bag, providing

additional insulation and forming an effective barrier against wind and rain. A tarp is then strung over the bivy sack forming a tent-like protection. The size of the tarp required would depend on weather conditions. For example, a 2m x 3m tarp may suffice in mild weather, while a 4m x 4m tarp may be required in stormy weather conditions.

Sleeping on the ground causes significant conductive heat loss to the body. A sleeping bag on its own is not sufficient to protect against this. Thus it is important to have insulation under a sleeping bag in the form of a Theramarest™ or closed cell foam.

In the wilderness we always avoid sleeping on rock whenever possible. Sleeping on a surface such as rock or concrete accelerates conductive heat loss. A body will never warm up rock or concrete. The rock or concrete will keep sucking heat from the body. It is imperative to have good insulation if sleeping on such a surface.

After having appropriate gear, keeping nourished is the most important way to guard against hypothermia. Most adults living in a climate controlled environment utilize about 1,500 to 2,500 calories a day. Sleeping on the ground, without proper insulation and protection, can burn a few thousand calories, or more the colder and less protected the person is overnight.

In my experience as a wilderness guide, I have dealt with mild hypothermia on many occasions. The early signs of hypothermia include feeling cold, shivering and malaise. It is imperative that one take action right away to prevent this progressing. When caught in the early stage [a] person's body temperature can be warmed up by applying heat to the body (for example applying hot water bottles), wrapping the body in more blankets or sleeping bag, and feeding hot food and liquids.

There is also a risk of frostbite in winter conditions when the temperature drops below 0° Celsius, or at higher temperatures in windy conditions. Frostbite occurs when the skin is exposed to cold. Skin exposed to wind cools more dramatically and frostbite can occur in temperatures when it is windy and below freezing.

There is little risk of contracting heatstroke (hyperthermia) in Victoria, except it [sic] perhaps on a few occasions in extremely hot weather. However, even in the summer there is risk of hypothermia developing if one were to get wet on cool a night. It is still important to have proper equipment when sleeping outside in the summer.

Is a simple, individual, nonstructural, weather repellent cover such as a sleeping bag, blanket or other soft material sufficient protection from the elements when sleeping outside in Victoria?

In my opinion a simple, individual, nonstructural, weather repellent cover such [as] a sleeping bag, blanket or other soft material is not sufficient protection from the elements when sleeping outside in Victoria, or anywhere in our West Coast climate, except perhaps on the warmest of dry summer nights. To safely sleep outside in this climate one requires appropriate protection in the form of a tent or other structure to protect against rain, wind and snow. In addition, ground insulation is necessary to protect against conductive heat loss. [emphasis in original]

[69] In summary, based upon the evidentiary record, I make the following findings of fact:

- (a) there are at present more than 1,000 homeless people living in the City;
- (b) there are at present 141 permanent shelter beds in the City, expanded to 326 when the Extreme Weather Protocol is in effect;
- (c) the number of homeless people exceeds the available supply of shelter beds;
- (d) exposure to the elements without adequate shelter such as a tent tarpaulin or cardboard box is associated with a number of substantial risks to health including the risk of hypothermia, a potentially fatal condition; and
- (e) adequate shelter for those sleeping outside in the West Coast climate requires both ground insulation and appropriate overhead protection in the form of a tent or tent-like shelter.

V PRELIMINARY OBJECTION

[70] The AGBC takes the position that this litigation is not an appropriate forum for the relief sought by the Defendants. The AGBC submits that in this case the

Defendants claim that the City, through its Bylaws, has attempted to deprive homeless people of the opportunity to create their own shelter in public places. The AGBC submits that this action, however, actually arose under very different circumstances: the City sought to dismantle a “tent city” that had been erected by a group of homeless people, and which went far beyond the mere “shelter” to which the Defendants claim a right.

[71] The AGBC submits that a more appropriate forum for seeking the type of relief that the Defendants claim would be proceedings in which the City attempted to prosecute identifiable individuals for breaching the Bylaws in question by attempting to erect shelter to protect themselves from the elements. The AGBC submits that only in such a proceeding would the court have the necessary factual matrix before it.

[72] In my view, the preliminary objection is, in effect, an effort to circumvent the decisions of Justices Johnston and Gray and Master Keighley. While it is the case that the litigation arose in response to the Tent City in Cridge Park, at issue in the present summary trial application is the Counterclaim initiated by the Defendants.

[73] Further, in my view it is not appropriate to require citizens who believe that a law infringes their rights to violate that law in order to have the constitutionality of the provision adjudicated. Finally, with respect to the factual matrix, the parties have had ample opportunity to place whatever evidence they choose before the Court. There has been no suggestion from the parties that important evidence is not available. I am satisfied that the evidence is sufficient for the purpose.

[74] In my view this is an appropriate forum for the determination of the issues raised by the Defendants in their counterclaim. I do not accede to the AGBC's preliminary objection.

VI ANALYSIS

A. Section 7

1. Overview

[75] Section 7 of the **Charter** provides:

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.

[76] The traditional approach to the analysis proceeds in two steps as described by La Forest J. in **R. v. Beare; R. v. Higgins**, [1988] 2 S.C.R. 387 at p. 401, as follows:

To trigger its operation there must first be a finding that there has been a deprivation of the right to "life, liberty and security of the person" and, secondly, that that deprivation is contrary to the principles of fundamental justice.

[77] In **Charkaoui v. Canada (Citizenship and Immigration)**, 2007 SCC 9, [2007] 1 S.C.R. 350 [**Charkaoui**], Chief Justice McLachlin, for the Court, added the qualification that the issue in relation to the first step is whether "there has been or could be a deprivation of the right to life, liberty and security of the person" (para. 12).

[78] It should be noted that the traditional approach embodies a conception that s. 7 of the **Charter** contains negative rights of non-interference and cannot be invoked absent a specific government action. There is also a school of thought, as exemplified in the dissent of Justice Arbour in **Gosselin v. Quebec (Attorney General)**, 2002 SCC 84, [2002] 4 S.C.R. 429 [**Gosselin**] that properly construed, s. 7 includes a positive dimension that may in certain circumstances impose positive obligations upon government. However, I have concluded, as discussed below, that this case does involve an issue of interference by state action. Accordingly, the analysis adopted in the present case is the traditional analysis.

[79] Pursuant to this traditional analysis, a claimant must therefore first establish that there has been or could be a deprivation of life, liberty or security of the person. With respect to this first step, the Defendants submit that the prohibition on erecting shelter in public spaces, in circumstances in which there are insufficient alternative shelter opportunities for the City's homeless, interferes with s. 7 interests in several ways. First, interfering with the ability to erect shelter interferes with the provision of the basic necessities of life. Second, preventing homeless persons from creating shelter for themselves in public spaces interferes with their liberty interests. Third, preventing homeless persons from erecting shelter for themselves interferes with their basic bodily integrity, and thus constitutes interference with security of the person.

[80] The BCCLA submits that the Bylaws attack the key values of dignity and personal autonomy underlying the liberty right so as to interfere with the ability of the affected persons to truly be free and to participate meaningfully in the democratic

process. Both the Defendants and the BCCLA submit that the **Charter** must be interpreted and applied in a manner consistent with Canada's international obligations, which include those obligations that recognize adequate housing or shelter as a fundamental human right.

[81] With respect to the first step of the s. 7 analysis, the AGBC submits that for a s. 7 right to be implicated, the deprivation must arise as a result of *state action*. The claimant must prove that the deprivation of his or her right is *caused* by the state, and that "but for" the state's action, he or she would not be so deprived. A s. 7 claim is *not* made out where, as a result of the impugned state inaction or insufficient action, the claimant merely remains in a state of insecurity. It is the AGBC's submission that the Bylaws do not cause the Defendants to be homeless; hence, the condition in which they find themselves is not the result of state action.

[82] The AGBC submits that the real nature of the claim is rooted in the notion that the City is required to provide a positive benefit. However, the AGBC submits the notion that s. 7 entitles individuals to a level of positive economic support has been rejected by the Supreme Court of Canada. The AGBC submits that the essence of the claim is really about property rights, which are not protected by s. 7. Finally, the AGBC submits that international agreements which have not been implemented through domestic legislation cannot be enforced in Canadian courts and hence do not assist the Defendants.

[83] Both the City and the AGBC submit that the Defendants have not met the burden to establish that their rights under s. 7 are infringed by the gap between what is permitted under the Bylaws and what is prohibited.

[84] I will first address the general objections raised by the AGBC and the City with respect to whether the claim falls within the scope of s. 7 protections. In that regard the first issue to be addressed is the significance, if any, to be given to Canada's international obligations.

2. Canada's International Obligations

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

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

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

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

[87] Similarly, Article 11.1 of the *International Covenant on Economic, Social, and Cultural Rights*, 16 December 1966, 999 U.N.T.S. 3, Can. T.S. 1976 No. 46, 6

I.L.M. 360, (the “*Covenant*”) declares:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

[88] Article 2.1 of the *Covenant* outlines the obligation of each state party to the *Covenant* to take steps, “to the maximum of [its] available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant”.

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

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

[emphasis in original]

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

[91] The United Nations Conference on Human Settlements (Habitat II), 3-14 June, 1996, which produced the Habitat Agenda, U.N. Doc. A/Conf. 165/14 (June 14, 1996) addressed “adequate shelter for all” as a theme of global importance.

Article 3 of the Habitat Agenda states:

...access to safe and healthy shelter and basic services is essential to a person’s physical, psychological, social and economic well-being and should be a fundamental part of our urgent actions for the more than one billion people without decent living conditions. Our objective is to achieve adequate shelter for all.

[92] Furthermore, the Habitat Agenda recognizes at Article 11 that “inadequate shelter and homelessness are growing plights in many countries, threatening standards of health, security and even life itself.” The commitment of the state parties is outlined in Article 39:

We reaffirm our commitment to the full and progressive realization of the right to adequate housing, as provided for in international instruments. In this context, we recognize an obligation by Governments to enable people to obtain shelter and to protect and improve dwellings and neighbourhoods. We commit ourselves to the goal of improving living and working conditions on an equitable and sustainable basis, so that everyone will have adequate shelter that is healthy, safe, secure, accessible and affordable and that includes basic services, facilities and amenities, and will enjoy freedom from

discrimination in housing and legal security of tenure. We shall implement and promote this objective in a manner fully consistent with human rights standards

[93] The AGBC submits that the international documents to which Canada is a party do not assist in this case, noting that international agreements do not have a normative effect. They are not equivalent to domestic law, nor do they have the power of law, unless they have been implemented via domestic legislation. They cannot be enforced in Canadian courts: see *The Canadian Bar Assn. v. British Columbia*, 2006 BCSC 1342, 59 B.C.L.R. (4th) 38 at paras. 120-21; aff'd 2008 BCCA 92, 76 B.C.L.R. (4th) 48; *Aerlinte Eireann Teoranta v. Canada (Minister of Transport)*, [1987] 3 F.C. 383. at paras. 49-52, 9 F.T.R. 29 (T.D. aff'd) (1990), 68 D.L.R. (4th) 220, 107 N.R. 129 (F.C.A.) *A.G. Can. V. A.G. Ont. Et al.*, [1937] 1 D.L.R. 673 at pp. 678-79, W.W.R. 299 (P.C.); *Re Alberta Union of Provincial Employees et al. and the Crown* (1980), 120 D.L.R. (3d) 590 at p. 619, 81 C.L.L.C. 14 (Alta. Q.B.).

[94] The AGBC submits further that treaties and other international agreements may be referred to as an "interpretive aid", but only where the legislation in question is ambiguous: see *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324 at pp. 1371-72. Here, however, there is no ambiguity in the Bylaws – camping is prohibited.

[95] However, the Defendants are not seeking to enforce the international covenants in this proceeding, nor are they seeking to use the international covenants as an aid in the interpretation of the Bylaws. Rather they seek to have

reference to the international covenants as an aid in the interpretation of the meaning and scope of rights under the **Charter**. In that regard, the Supreme Court of Canada has confirmed on numerous occasions the informative value of international human rights norms to the interpretation of s. 7 of the **Charter**. For example, L'Heureux-Dubé J. in **Baker v. Canada (Minister of Citizenship and Immigration)**, [1999] 2 S.C.R. 817, asserted at para. 70 that international human rights law is “a critical influence on the interpretation of the scope of the rights included in the *Charter*”: **Slaight Communications**, *supra*; **R. v. Keegstra**, [1999] 3 S.C.R. 697. She maintained this position in **R. v. Ewanchuk**, [1999] 1 S.C.R. 330 stating “[o]ur *Charter* is the primary vehicle through which international human rights achieve a domestic effect...[i]n particular, s. 15...and s. 7...embody the notion of respect of human dignity and integrity.”

[96] In **United States v. Burns**, 2001 SCC 7 at para. 80, [2001] 1 S.C.R. 283, a unanimous Supreme Court of Canada endorsed the statement of Dickson C.J., citing **Reference re Public Service Employee Relations Act (Alta.)**, [1987] 1 S.C.R. 313:

The various sources of international human rights law — declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms — must, in my opinion, be relevant and persuasive sources for interpretation of the *Charter*'s provisions.

[97] Dickson C.J. stated further in **Reference re Public Service Employee Relations Act (Alta.)**, at p. 349:

... [T]he *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.

[98] The federal government has expressed the view that s. 7 of the **Charter** must be interpreted in a manner consistent with Canada's obligations under the **Covenant** to not deprive persons of the basic necessities of life, in its response to a question from the Committee on Economic, Social, and Cultural Rights: *Summary Record of the 5th Meeting*, ESC, 8th Sess., 5th Mtg., U.N. Doc. E/C.12/1993/SR.5 (25 May 1993). The question arose from the report submitted to the Committee by Canada in 1993, pursuant to its **Covenant** obligations. The federal government assured the Committee at para. 21 that:

While the guarantee of security of the person under section 7 of the Charter might not lead to a right to a certain type of social assistance, it ensured that persons were not deprived of the basic necessities of life.

[99] This position was again asserted in 1998: Government of Canada "Federal Responses", *Review of Canada's Third Report on the Implementation of the International Covenant on Economic, Social, and Cultural Rights* (November 1998) online: Canadian Heritage, Human Rights Program, <http://www.pch.gc.ca/progs/pdp-hrp/docs/cesc/responses/fd_e.cfm>. The Committee asked whether the answer given in 1993 was still the position of all Canadian governments. In reply, the federal government gave the following answer at Question 53:

The Supreme Court of Canada has stated that section 7 of the Charter may be interpreted to include the rights protected under the Covenant (see decision of *Slaight Communications v. Davidson* [1989] 1 S.C.R.

1038). The Supreme Court has also held section 7 as guaranteeing that people are not to be deprived of basic necessities (see decision of *Irwin Toy v. A.-G. Québec*, [1989] 1 S.C.R. 927). The Government of Canada is bound by these interpretations of section 7 of the Charter.

[Emphasis added]

[100] I conclude that while the various international instruments do not form part of the domestic law of Canada, they should inform the interpretation of the **Charter** and in this case, the scope and content of s. 7.

3. Does this Claim Follow Within the Scope of Section 7?

(a) Is There Sufficient State Action?

[101] I turn next to the first of the AGBC and City's contentions that s. 7 is not engaged; namely the submission that there is not sufficient state action to trigger s. 7 protection.

[102] It is now clear that the scope of s. 7 is not limited to purely criminal or penal matters. In *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307 [*Blencoe*], Justice Bastarache stated at paras. 45 and 46:

Although there have been some decisions of this Court which may have supported the position that s. 7 of the *Charter* is restricted to the sphere of criminal law, there is no longer any doubt that s. 7 of the *Charter* is not confined to the penal context. This was most recently affirmed by this Court in *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, where Lamer C.J. stated that the protection of security of the person extends beyond the criminal law (at para. 58). He later added (at para. 65):

... s. 7 is not limited solely to purely criminal or penal matters. There are other ways in which the government, in the course of

the administration of justice, can deprive a person of their s. 7 rights to liberty and security of the person, i.e., civil committal to a mental institution: see *B. (R.)*, *supra*, at para. 22.

Thus, to the extent that the above decisions of *Nisbett* and *Canadian Airlines* stand for the proposition that s. 7 can never apply outside the criminal realm, they are incorrect. Section 7 can extend beyond the sphere of criminal law, at least where there is "state action which directly engages the justice system and its administration" (*G. (J.)*, at para. 66).

[103] In *Gosselin*, Chief Justice McLachlin, writing for the majority, discussed the scope of s. 7 as follows at para. 77:

As emphasized by my colleague Bastarache J., the dominant strand of jurisprudence on s. 7 sees its purpose as guarding against certain kinds of deprivation of life, liberty and security of the person, namely, those "that occur as a result of an individual's interaction with the justice system and its administration": *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at para. 65. "[T]he justice system and its administration" refers to "the state's conduct in the course of enforcing and securing compliance with the law" (*G. (J.)*, at para. 65). This view limits the potential scope of "life, liberty and security of the person" by asking whom or what s. 7 protects against. Under this narrow interpretation, s. 7 does not protect against all measures that might in some way impinge on life, liberty or security, but only against those that can be attributed to state action implicating the administration of justice: see *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 (the "*Prostitution Reference*"), at pp. 1173-74, *per* Lamer J. (as he then was), writing for himself; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at paras. 21-23, *per* Lamer C.J., again writing for himself alone; and *G. (J.)*, *supra*, for the majority. This approach was affirmed in *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44, *per* Bastarache J. for the majority.

[104] The Bylaws at issue prohibit certain conduct. Section 18 of the Parks Regulation Bylaw provides that a person who contravenes the provisions commits an offence and is liable to penalties imposed by the Bylaw and the **Offence Act**, R.S.B.C. 1996, c. 338. In my view, the Bylaws at issue in this proceeding constitute

state action that directly engages the justice system and is sufficient in order to fall within the scope of s. 7.

(b) Is the State Action the Cause of the Deprivation?

[105] The AGBC and the City submit that the source of the deprivation at issue is the condition of being homeless and not the Bylaws and therefore the claim does not fall within the scope of s. 7 since any deprivation of protected interests is not the result of state action. In *Blencoe*, Justice Bastarache, writing for the majority, emphasized that the harm to the protected interests must result from state action.

[106] It is true that many of the problems experienced by the homeless are the direct result of their homeless state. However, the state action was not the cause of the medical problems that were the factual matrix at issue in *Gosselin*. The state's action did not cause the need to receive an abortion at issue in *R. v. Morgentaler*, [1988] 1 S.C.R. 30. In both those cases, the state action at issue was legislation that impaired the ability of persons in need to alleviate or address that need.

[107] In *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, [*Rodriguez*], a case that addressed the constitutionality of the *Criminal Code*, R.S.C. 1985, c. C-46, provisions dealing with assisted suicide, Justice Sopinka flatly rejected the notion that s. 7 was not engaged because the appellant's problems were caused by her terminal illness and not state action. Writing for the majority, Justice Sopinka stated at pp. 584-85:

As a threshold issue, I do not accept the submission that the appellant's problems are due to her physical disabilities caused by her

terminal illness, and not by governmental action. There is no doubt that the prohibition in s. 241(b) will contribute to the appellant's distress if she is prevented from managing her death in the circumstances which she fears will occur. Nor do I accept the submission that the appellant cannot avail herself of s. 7 because she is not presently engaged in interaction with the criminal justice system, and that she will likely never be so engaged. It was argued that the comments concerning security of the person found in *R. v. Morgentaler*, [1988] 1 S.C.R. 30, and the *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, were not applicable to this case and that the appellant could not seek the protection of s. 7 at all, as that section is concerned with the interaction of the individual with the justice system. In my view, the fact that it is the criminal prohibition in s. 241(b) which has the effect of depriving the appellant of the ability to end her life when she is no longer able to do so without assistance is a sufficient interaction with the justice system to engage the provisions of s. 7 assuming a security interest is otherwise involved.

[108] Homeless people are exposed to a number of risks to their lives, health and security of the person because of their homeless condition. Those risks that are associated with the state of being homeless are not at issue in this litigation. In the present case, the allegation is that the Bylaws at issue impair the ability of the homeless to address their need for adequate shelter. This is a particular state action that is alleged to create a particular deprivation. In my view, this satisfies the need for the deprivation to have been caused by state action.

[109] The AGBC submits further that even in the absence of the Bylaws, the City, which holds title to the lands on which public parks within the municipality are situated, would have the right under the common law to bring an action in trespass against persons erecting shelters within the parks. Thus it cannot be said that the Bylaws have created a situation in which the Defendants are precluded from erecting shelter in public places: see *Dykhuzen v. Saanich (District)* (1989), 63

D.L.R. (4th) 211 at p. 216, (B.C.C.A.) [*Dykhuisen*]; *Community Charter*, S.B.C. 2003, c. 26, ss. 8(1), 29.

[110] *Dykhuisen* was a case concerning the quantum of damages for the cutting of trees on public land. One issue on appeal concerned the availability of punitive damages. Mr. Justice Taylor, for the Court stated at p. 216:

It was also contended for the appellant that since the municipality could, if it wished, have prosecuted Mr. Dykhuisen for breach of its Boulevard Protection By-law, it ought not to be allowed to claim punitive damages in this action. No authority was cited for this proposition, and I do not think it supportable. The power granted to a municipality to make by-laws, and the exercise of that power, must, I think, normally be regarded as ancillary to the municipality's rights at common law. I cannot accept the proposition that the existence of a punitive power for protection of its lands - at least so long as the municipality chooses not to exercise that power - can limit its remedies in trespass.

[111] *Dykhuisen* does stand for the proposition that the municipality has both the power to make and enforce bylaws and rights at common law. If an action alleging trespass were to be commenced by the City, arising from the same factual matrix as that under consideration in the present case, the court would have to address a number of issues including relevant defences and the effect of the *Charter*. The court would have to address how to apply the applicable common law principles in a manner consistent with the values embodied by the *Charter*. The court would also have to consider whether the matter involved government action such that the *Charter* applied directly.

[112] This is not a case in trespass and those issues are not before this Court. What is before this Court is a question concerning the Bylaws that the City has

chosen to enact. I see nothing in *Dykhuisen*, or any other authority cited by the AGBC, to suggest that the existence of some other potential cause of action has the effect of immunizing legislation from review.

[113] In summary, I conclude that the provisions at issue have caused a deprivation such that s. 7 is engaged.

(c) Is this a Claim for a Positive Benefit?

[114] The City and the AGBC submit that the essence of the Defendants' claim is really a claim for a positive benefit, an obligation of government to provide an adequate alternative to sleeping in the street. It is their submission that s. 7 deals with deprivations of rights and not positive benefits, citing a number of authorities including *Brown v. B.C. (Min. of Health)* (1990), 42 B.C.L.R. (2d) 294 (S.C.) and *Gosselin*. They submit further that development of a government response to the complex issue of homelessness is an area of policy that is the sphere of the legislature, not the courts.

[115] The AGBC relies upon Mr. Justice Stewart's observations in his reasons granting the interim injunction in which he stated:

To me, the unspoken major premise that must lie behind [the order sought by the defendants] in the circumstances of this case is that *Charter* s. 7 includes positive obligations, positive obligations grounded in economics and the allocation of resources by the state. And that is exactly what the Supreme Court of Canada failed to make part of the law of Canada in *Gosselin v. Quebec, supra*.

[116] It is, however, important to note, as counsel for the AGBC did not, that what was before Stewart J. was a very different application for relief by the Defendants.

In the hearing before Stewart J. the Defendants sought an interim order:

That the City of Victoria designate a suitable area near the downtown core where the defendants and others can sleep overnight and create suitable shelter until the constitutional issues in this action are determined.

That relief was clearly seeking a positive benefit; namely, the creation by the City of suitable shelter. However, that is not the relief that is presently under consideration.

In addition, Stewart J. noted that “no point of law, no point of fact, is finally decided at an interim hearing such as this”, drawing a contrast between the relief that it is appropriate to grant in the context of an application for interim relief and that which can be obtained following a trial of the matter.

[117] With respect to the question of the scope of s. 7, Chief Justice McLachlin, writing for the majority in ***Gosselin***, stated at para. 81 what the jurisprudence had determined to date; namely that s. 7 had been interpreted to restrict the state’s ability to deprive people of life, liberty and security of the person:

Even if s. 7 could be read to encompass economic rights, a further hurdle emerges. Section 7 speaks of the right not to be deprived of life, liberty and security of the person, except in accordance with the principles of fundamental justice. Nothing in the jurisprudence thus far suggests that s. 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, s. 7 has been interpreted as restricting the state's ability to deprive people of these. Such a deprivation does not exist in the case at bar. [emphasis in original]

[118] The Chief Justice went on to state at paras. 82-83 that this was not to be taken to foreclose a conclusion in the future that s. 7 includes positive obligations:

One day s. 7 may be interpreted to include positive obligations. To evoke Lord Sankey's celebrated phrase in *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136, the *Canadian Charter* must be viewed as "a living tree capable of growth and expansion within its natural limits": see *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, at p. 180, per McLachlin J. It would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases. In this connection, LeBel J.'s words in *Blencoe*, *supra*, at para. 188 are apposite:

We must remember though that s. 7 expresses some of the basic values of the *Charter*. It is certainly true that we must avoid collapsing the contents of the *Charter* and perhaps of Canadian law into a flexible and complex provision like s. 7. But its importance is such for the definition of substantive and procedural guarantees in Canadian law that it would be dangerous to freeze the development of this part of the law. The full impact of s. 7 will remain difficult to foresee and assess for a long while yet. Our Court should be alive to the need to safeguard a degree of flexibility in the interpretation and evolution of s. 7 of the *Charter*.

The question therefore is not whether s. 7 has ever been – or will ever be – recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards.

I conclude that they do not.

[119] In my view, the Defendants do not seek positive benefits in this action and it is therefore not necessary for the Court to consider whether s. 7 includes a positive right to the provision of shelter. The Defendants are not seeking to have the City compelled to provide the homeless with adequate shelter. Rather, the claim is that in the present circumstances, in which the number of homeless people exceeds

available shelter space, it is a breach of s. 7 for the City to use its Bylaws to prohibit homeless people from taking steps to provide themselves with adequate shelter.

[120] The role of the factual matrix in this case is in my view analogous to the circumstances in *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791 [*Chaoulli*]. At issue in *Chaoulli* were the prohibitions against taking out insurance to obtain in the private sector services that are available under Quebec's public health care plan. Justice Deschamps held that the provisions were inconsistent with the provisions of the *Quebec Charter of Human Rights and Freedoms*, R.S.Q., c. C-12 (the "*Quebec Charter*"). Chief Justice McLachlin, and Justices Major and Bastarache concurred and held that in addition, the prohibition violated s. 7 of the *Charter* and was not justified under s. 1.

[121] With respect to the application of the *Charter*, Chief Justice McLachlin and Justice Major stated at paras. 103-04:

The appellants do not seek an order that the government spend more money on health care, nor do they seek an order that waiting times for treatment under the public health care scheme be reduced. They only seek a ruling that because delays in the public system place their health and security at risk, they should be allowed to take out insurance to permit them to access private services.

The *Charter* does not confer a freestanding constitutional right to health care. However, where the government puts in place a scheme to provide health care, that scheme must comply with the *Charter*. We are of the view that the prohibition on medical insurance in s. 15 of the *Health Insurance Act*, R.S.Q., c. A-29, and s. 11 of the *Hospital Insurance Act*, R.S.Q., c. A-28 (see Appendix), violates s. 7 of the *Charter* because it impinges on the right to life, liberty and security of the person in an arbitrary fashion that fails to conform to the principles of fundamental justice.

[122] Finally, with respect to the submission that it is not the role of the court to intrude upon complex policy decisions, I agree that homelessness is a serious social issue, with many causes and no clear or simple solution. It is also the case that it is the role of government to determine how best to allocate scarce resources. Each level of democratic government is entitled to deference in the policy choices it makes, especially when dealing with such significant and complex issues. It is, however, the responsibility of government, in making these decisions, to act in conformity with the constitution. As Chief Justice McLachlin stated in *Charkaoui* at para. 1:

Yet in a constitutional democracy, governments must act accountably and in conformity with the Constitution and the rights and liberties it guarantees.

[123] However, this case is not about the allocation of scarce resources, it is about the constitutionality of a prohibition contained in particular Bylaws. The determination of this issue falls squarely within the role and responsibility of the courts. As Madam Justice Wilson stated in *R. v. Morgentaler* at p. 164:

The *Charter* is predicated on a particular conception of the place of the individual in society. An individual is not a totally independent entity disconnected from the society in which he or she lives. Neither, however, is the individual a mere cog in an impersonal machine in which his or her values, goals and aspirations are subordinated to those of the collectivity. The individual is a bit of both. The *Charter* reflects this reality by leaving a wide range of activities and decisions open to legitimate government control while at the same time placing limits on the proper scope of that control. Thus, the rights guaranteed in the *Charter* erect around each individual, metaphorically speaking, an invisible fence over which the state will not be allowed to trespass. The role of the courts is to map out, piece by piece, the parameters of the fence.

[124] In any event, it is not the case that choices of the legislature that involve complex issues of policy are immune from review. Justice Iacobucci, writing for the majority, explained the relationship between the legislature and the court that has been created by the passage of the *Charter* in *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at paras. 134-35, 138 and 142 as follows:

To respond, it should be emphasized again that our *Charter's* introduction and the consequential remedial role of the courts were choices of the Canadian people through their elected representatives as part of a redefinition of our democracy. Our constitutional design was refashioned to state that henceforth the legislatures and executive must perform their roles in conformity with the newly conferred constitutional rights and freedoms. That the courts were the trustees of these rights insofar as disputes arose concerning their interpretation was a necessary part of this new design.

So courts in their trustee or arbiter role must perforce scrutinize the work of the legislature and executive not in the name of the courts, but in the interests of the new social contract that was democratically chosen. All of this is implied in the power given to the courts under s. 24 of the *Charter* and s. 52 of the *Constitution Act, 1982*.

...

As I view the matter, the *Charter* has given rise to a more dynamic interaction among the branches of governance. This interaction has been aptly described as a "dialogue" by some (see e.g. Hogg and Bushell, *supra*). In reviewing legislative enactments and executive decisions to ensure constitutional validity, the courts speak to the legislative and executive branches. As has been pointed out, most of the legislation held not to pass constitutional muster has been followed by new legislation designed to accomplish similar objectives (see Hogg and Bushell, *supra*, at p. 82). By doing this, the legislature responds to the courts; hence the dialogue among the branches.

...

Democratic values and principles under the *Charter* demand that legislators and the executive take these into account; and if they fail to do so, courts should stand ready to intervene to protect these democratic values as appropriate. As others have so forcefully stated, judges are not acting undemocratically by intervening when there are

indications that a legislative or executive decision was not reached in accordance with the democratic principles mandated by the *Charter* (see W. Black, "Friend, Rights and Democracy" (1996), 7 *Constitutional Forum* 126; D. M. Beatty, "Law and Politics" (1996), 44 *Am. J. Comp. L.* 131, at p. 149; M. Jackman, "Protecting Rights and Promoting Democracy: Judicial Review Under Section 1 of the *Charter*" (1996), 34 *Osgoode Hall L.J.* 661).

[125] Simply put, the fact that the matter engages complex policy decisions does not immunize the legislation from review by the courts pursuant to the ***Charter***.

(d) Is this Claim About Property Rights?

[126] The AGBC and the City contend that the Defendants claim the right to camp on public property and that this makes the claim in essence about property rights. They submit further that property rights do not fall within the scope of s. 7, citing ***Alcoholism Foundation of Manitoba v. Winnipeg (City)***, [1988] 6 W.W.R. 440, 59 Man. R. (2d) 83 (Q.B.), rev'd on other grounds (1990), 69 D.L.R. (4th) 697, 65 Man. R. (2d) 81 (C.A.); ***Marshall Estate (Re)***, 2008 NSSC 93, 263 N.S.R. (2d) 347; and ***IBM Canada Ltd. v. Canada***, 2001 FCT 1175, 212 F.T.R. 70, aff'd 2002 FCA 420, 298 N.R. 399. In their submission, the Defendants' claim is tantamount to an appropriation of public property for private use.

[127] In my view, this objection rests upon a mischaracterization of the matters at issue in this summary trial. 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.

[129] In that regard, I agree with the submission of counsel for the Defendants that the AGBC and the City cannot and do not take issue with the proposition that homeless people must sleep, and, given the current situation in Victoria, that some of them must sleep on public property. The use of some public property by the homeless is unavoidable. Whether or not they are allowed to keep themselves dry with a simple tent or a cardboard box, as opposed to lying with a tarp on top of their faces, does not change the nature of that utilization of public space.

[130] Related to this is the nature of the use of the property at issue. Unlike the distribution of public funds, the use of park space by an individual does not necessarily involve a deprivation of another person's ability to utilize the same "resource". If monies are spent to provide social assistance or the funding of a specific drug, they cannot be used elsewhere. If, on the other hand, a piece of park property is used for someone to sleep at night with shelter, this does not mean that it

cannot be used by others for other recreational uses during the day. There is simply no evidence that there is any competition for the public “resource” which the homeless seek to utilize, or that the resource will not remain available to others if the homeless can utilize it.

[131] The nature of the government interest in public property has most often been discussed in the context of freedom of expression. In that context, the Supreme Court of Canada has definitively rejected the idea that the government can determine the use of its property in the same manner as a private owner. Public properties are held for the benefit of the public, which includes the homeless. The government cannot prohibit certain activities on public property based on its ownership of that property if doing so involves a deprivation of the fundamental human right not to be deprived of the ability to protect one’s own bodily integrity: see ***Committee for the Commonwealth of Canada v. Canada***, [1991] 1 S.C.R. 139; Jeremy Waldron, “Homelessness and Community” (2000) 50 U.T.L.J. 371.

[132] I conclude that the Defendants are not asserting a property right. They do not claim that the homeless can exclude anyone from any City property, or determine the use of any City property. They do not seek to have public property allocated to their exclusive use. What they are seeking does not amount to an appropriation of public property. They are simply saying that the City cannot manage its own property in a manner that interferes with their ability to keep themselves safe and warm.

(e) Is there a Risk of Harm?

[133] The final submission of the AGBC and the City in relation to their contention that this case does not fall within the scope of s. 7 is that there is no evidence that the prohibition causes harm or the risk of harm.

[134] The City submits that the evidence shows that some homeless people may prefer to live in “tent cities” rather than in shelters or rather than actively participating in efforts to find them housing. The City submits that therefore it is not established on the evidence that the City’s Bylaws have an adverse impact on the life, liberty and/or security of a person merely by limiting the nature of the abode that persons may construct in public places. As discussed earlier in these Reasons, it is the case that some of the Defendants deposed that they preferred the Tent City in Cridge Park to accommodation in shelters.

[135] However, the fact remains that there are many more homeless people in Victoria than available shelter. It therefore does not really matter whether some homeless people prefer to sleep in shelters or not – there is not sufficient room for them in the shelters. Moreover, as noted earlier, many of the Defendants deposed that they have been turned away from shelters. This is consistent with the other evidence before the Court. I note further that the Mayor’s Task Force Report submitted into evidence by the City did not conclude that there are sufficient shelter spaces for all who wish to use them.

[136] It is correct that it does not follow from the fact that there are insufficient shelter spaces to accommodate the homeless that the Bylaws create an adverse

impact. In order to analyse this issue it is necessary to examine the expert evidence and its implications with respect to the limitations on shelter imposed by the Bylaws and the operational policy. With respect to the limitations on shelter, the City submits that the only item excluded from the minimum equipment that in Mr. Hogya's opinion is required for necessary minimum protection, is string; the implication is that the equipment the City permits is sufficient to protect against the risks associated with exposure to the elements.

[137] Mr. Hogya's opinion is that in addition to ground insulation, the necessary minimum protection includes overhead protection in the form of either a tent or a bivy sack and tarp that is strung up to erect a tent-like protection. The size of the tarp-like protection necessary depends upon weather conditions, ranging from 2m x 3m in mild weather to 4m x 4m in stormy weather. In addition, Dr. Hwang referred to shelter in the form of a tent, tarpaulin or cardboard box.

[138] The point of each alternative is that it is necessary to secure overhead protection. However, the Bylaw and the operational policy prohibit the erection of even temporary overhead protection in the form of tents, tarps strung up or cardboard boxes. I find that the difference between what is prohibited and what is permitted is not string, but overhead protection, and it is in my view clear on the evidence that overhead protection is required to provide protection from the risk of exposure.

[139] The AGBC submits that any deprivation does not arise from state action, but from the condition of homelessness. However, the City confirms that there is a ban

on erecting any form of shelter, even a tarp strung up or otherwise “erected” or a cardboard box that is used to shield someone from the wind and rain. The expert evidence in this case establishes that the prohibition on erecting such shelter interferes with the bodily integrity and health of homeless persons who have no other shelter. Dr. Hwang’s medical opinion is that:

...if homeless people who sleep outside are prohibited from erecting any form of shelter such as a tent, tarpaulin, or cardboard box, it is absolutely clear that this would have a substantial and potentially severe adverse effect on their health.

[140] The risks that Dr. Hwang identified include hypothermia. He noted that homeless people are at particularly high risk of death from hypothermia, that half of all such deaths occur when the air temperature is above freezing and that lack of protection from wind and rain greatly increase the risk.

[141] Mr. Hoga’s opinion is that a simple, individual, non-structural, weather repellent cover is not sufficient protection from the elements when sleeping outside in Victoria. Appropriate protection in the form of a tent or other structure to protect against rain, wind and snow in addition to ground insulation is required for safety.

[142] The Bylaws prohibit the use of a shelter that is erected including a tent, tarp that is strung up or a cardboard box. I find that compliance with the Bylaws exposes homeless people to a risk of serious harm, including death from hypothermia. This risk does not flow from the state of homelessness, but from the state action in prohibiting the erection of shelter.

4. Is there a Deprivation of One of the Protected Rights?

(a) Life

[143] In ***Federated Anti-Poverty Groups of BC v. Vancouver (City)***, 2002 BCSC 105, 40 Admin L.R. (3d) 159, Mr. Justice Taylor 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. Justice Taylor concluded as follows at paras. 201-202:

Thus, I conclude that the ability to provide for one's self (and at the same time deliver the "message") is an interest that falls within the ambit of the s. 7 provision of the necessity of life. Without the ability to provide for those necessities, the entire ambit of other constitutionally protected rights becomes meaningless.

As noted by Martha Jackman in her 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".

[144] In ***PHS Community Services Society v. Attorney General of Canada***, 2008 BCSC 661, 293 D.L.R. (4th) 392, a case dealing with the Vancouver Safe Injection Site, Mr. Justice Pitfield discussed the right to life at paras. 140-142 as follows:

Section 4(1) of the *CDSA*, which prohibits injection within the confines of Insite, engages the right to life because it prevents healthier and safer injection where the risk of mortality resulting from overdose can be managed, and forces the user who is ill from addiction to resort to unhealthy and unsafe injection in an environment where there is a significant and measurable risk of morbidity or death. The risk of death as a consequence of the use of narcotics is well-chronicled: see the report of the Coroner, *supra*, para. 20.

Not every threat to life commends itself to *Charter* scrutiny. The threat must flow from the actions of the state. As I appreciate its argument, Canada says that the threat to life results from an individual's choice to inject a harmful and dangerous narcotic rather than state action.

With respect, the subject with which these actions are concerned has moved beyond the question of choice to consume in the first instance. As I have said elsewhere in these reasons, the original personal decision to inject narcotics arose from a variety of circumstances, some of which commend themselves to choice, while others do not. However unfortunate, damaging, inexplicable and personal the original choice may have been, the result is an illness called addiction. The failure to manage the addiction in all of its aspects may lead to death, whether from overdose or other illness resulting from unsafe injection practices. If the root cause of death derives from the illness of addiction, then a law that prevents access to health care services that can prevent death clearly engages the right to life.

[145] In the present case, I conclude that the ability to provide oneself with adequate shelter is a necessity of life that falls within the ambit of the s. 7 provision "life". The uncontradicted expert evidence establishes 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. The Bylaws and the operational policy prohibit the erection of the overhead protection that is necessary to protect the individual from this risk. I conclude that the Bylaws and the operational policy of the City engages the right to life.

(b) Liberty

[146] The concept of “liberty” within the scope of s. 7 of the **Charter** was defined by Justice Wilson in **R. v. Morgentaler** at pp. 164-66 as follows:

The *Charter* and the right to individual liberty guaranteed under it are inextricably tied to the concept of human dignity. Professor Neil MacCormick, Regius Professor of Public Law and the Law of Nature and Nations, University of Edinburgh, in his work entitled *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (1982), speaks of liberty as “a condition of human self-respect and of that contentment which resides in the ability to pursue one’s own conception of a full and rewarding life” (p. 39). He says at p. 41:

To be able to decide what to do and how to do it, to carry out one’s own decisions and accept their consequences, seems to me essential to one’s self-respect as a human being, and essential to the possibility of that contentment. Such self-respect and contentment are in my judgment fundamental goods for human beings, the worth of life itself being on condition of having or striving for them. If a person were deliberately denied the opportunity of self-respect and that contentment, he would suffer deprivation of his essential humanity.

...

The idea of human dignity finds expression in almost every right and freedom guaranteed in the *Charter*. Individuals are afforded the right to choose their own religion and their own philosophy of life, the right to choose with whom they will associate and how they will express themselves, the right to choose where they will live and what occupation they will pursue. These are all examples of the basic theory underlying the *Charter*, namely that the state will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life.

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.

[147] In *R. v. Parker*, (2000) 49 O.R. (3d) 481, 188 D.L.R. (4th) 385 (C.A.) the Ontario Court of Appeal held that the prohibition against the possession of marijuana for the treatment of epilepsy violated s. 7 of the *Charter* and was not saved by s. 1. Mr. Justice Rosenberg, for the Court, discussed the liberty interest at paras. 92 and 102-103 as follows:

Accordingly, I believe that I am justified in considering Parker's liberty interest in at least two ways. First, the threat of criminal prosecution and possible imprisonment itself amounts to a risk of deprivation of liberty and therefore must accord with the principles of fundamental justice. Second, as this case arises in the criminal law context (in that the state seeks to limit a person's choice of treatment through threat of criminal prosecution), liberty includes the right to make decisions of fundamental personal importance. Deprivation of this right must also accord with the principles of fundamental justice. I have little difficulty in concluding that the choice of medication to alleviate the effects of an illness with life-threatening consequences is such a decision. Below, I will discuss the principles of fundamental justice that would justify state interference with that choice.

...

In my view, Parker has also established that the marijuana prohibition infringed the second aspect of liberty that I have identified the right to make decisions that are of fundamental personal importance. As I have stated, the choice of medication to alleviate the effects of an illness with life-threatening consequences is a decision of fundamental personal importance. In my view, it ranks with the right to choose whether to take mind-altering psychotropic drugs for treatment of mental illness, a right that Robins J.A. ranked as "fundamental and deserving of the highest order of protection" in *Fleming v. Reid* (1991), 4 O.R. (3d) 74 at p. 88, 82 D.L.R. (4th) 298 (C.A.).

To intrude into that decision-making process through the threat of criminal prosecution is a serious deprivation of liberty.

[148] The majority of homeless people in Victoria have no choice but to sleep on public property. There is no other place for them to go. I agree with the submission of the Defendants that creating shelter to protect oneself from the elements is a

matter critical to an individual's dignity and independence. The state's intrusion in this process interferes with the individuals' choice to protect themselves and is a deprivation of liberty within the scope of s. 7.

(c) Security of the Person

[149] Security of the person has been held to include the protection of physical and psychological integrity. In **Rodriguez**, Mr. Justice Sopinka, for the majority, held at pp. 587-88:

In my view, then, the judgments of this Court in *Morgentaler* can be seen to encompass a notion of personal autonomy involving, at the very least, control over one's bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress. In *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, *supra*, Lamer J. (as he then was) also expressed this view, stating at p. 1177 that "[s]ection 7 is also implicated when the state restricts individuals' security of the person by interfering with, or removing from them, control over their physical or mental integrity". There is no question, then, that personal autonomy, at least with respect to the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity are encompassed within security of the person, at least to the extent of freedom from criminal prohibitions which interfere with these.

[150] In **Chaoulli**, Chief Justice McLachlin and Justice Major stated at paras. 123-24:

Not every difficulty rises to the level of adverse impact on security of the person under s. 7. The impact, whether psychological or physical, must be serious. However, because patients may be denied timely health care for a condition that is clinically significant to their current and future health, s. 7 protection of security of the person is engaged. Access to a waiting list is not access to health care. As we noted above, there is unchallenged evidence that in some serious cases, patients die as a result of waiting lists for public health care. Where

lack of timely health care can result in death, s. 7 protection of life itself is engaged. The evidence here demonstrates that the prohibition on health insurance results in physical and psychological suffering that meets this threshold requirement of seriousness.

We conclude, based on the evidence, that prohibiting health insurance that would permit ordinary Canadians to access health care, in circumstances where the government is failing to deliver health care in a reasonable manner, thereby increasing the risk of complications and death, interferes with life and security of the person as protected by s. 7 of the *Charter*.

[151] In *R. v. Parker*, the Court noted at paras. 94-97:

In *R. v. Monney*, [1999] 1 S.C.R. 652 at p. 685, 133 C.C.C. (3d) 129 at p. 156, Iacobucci J. held, relying upon *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177, 17 D.L.R. (4th) 422, that "state action which has the likely effect of impairing a person's health engages the fundamental right under s. 7 to security of the person".

....

...I conclude that deprivation by means of a criminal sanction of access to medication reasonably required for the treatment of a medical condition that threatens life or health constitutes a deprivation of security of the person.

[footnote omitted]

[152] In *R. v. Morgentaler*, Justice Beetz described security of the person as follows at p. 90:

If a rule of criminal law precludes a person from obtaining appropriate medical treatment when his or her life or health is in danger, then the state has intervened and this intervention constitutes a violation of that man's or that woman's security of the person. "Security of the person" must include a right of access to medical treatment for a condition representing a danger to life or health without fear of criminal sanction. If an act of Parliament forces a person whose life or health is in danger to choose between, on the one hand, the commission of a crime to obtain effective and timely medical treatment and, on the other hand,

inadequate treatment or no treatment at all, the right to security of the person has been violated.

[153] In the present case, Victoria does not have sufficient shelter spaces for the homeless. Large numbers of homeless people are therefore left to shelter themselves on public property. The City has prohibited the erection of temporary shelter in the form of overhead protection, thereby exposing the homeless to a risk of significant health problems or even death. As in *Parker*, the state action by means of a sanction has deprived the homeless of access to the shelter required for adequate protection from the elements. As in *Morgentaler*, the homeless person is left to choose between a breach of the Bylaws in order to obtain adequate shelter or inadequate shelter exposing him or her to increased risks to significant health problems or even death.

[154] I find that this prohibition by the City constitutes a deprivation of the security of the person.

(d) Summary

[155] In summary, I have concluded that the prohibition in the Bylaws against the erection of temporary shelter in the form of tents, tarpaulins, cardboard boxes or other structures exposes the homeless to a risk of significant health problems or even death. The prohibition constitutes a deprivation of the rights to life, liberty and security of the persons protected under s. 7. The next issue is to determine whether that infringement is in accordance with the examples of fundamental justice.

5. Is the Deprivation in Accordance with the Principles of Fundamental Justice?

(a) Overview

[156] The next step in the analysis is to determine if the interference with the life, liberty or security of the person is contrary to the principles of fundamental justice. The Supreme Court of Canada in, *R. v. Malmo-Levine; R. v. Caine*, 2003 SCC 74 at para. 113, [2003] 3 S.C.R. 71 [*Malmo-Levine*]; see also *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76, has established three criteria that must be satisfied in order for a rule or principle to qualify as a principle of fundamental justice:

- a) The rule must be a legal principle;
- b) There must be a “significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate”; and
- c) The rule must be capable of being “identified with sufficient precision to yield a manageable standard”.

[157] In *Cunningham v. Canada*, [1993] 2 S.C.R. 143, Justice McLachlin, as she then was, writing for the Court, noted that a consideration of the principles of fundamental justice requires consideration of the fairness of the balance struck between the interests of the individual and the protection of society, stating at pp. 151-52:

The principles of fundamental justice are concerned not only with the interest of the person who claims his liberty has been limited, but with the protection of society. Fundamental justice requires that a fair balance be struck between these interests, both substantively and procedurally (see *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at pp. 502-3, *per* Lamer J.; *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at p. 212, *per* Wilson J.; *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869, at p. 882, *per* Iacobucci J.). In my view the balance struck in this case conforms to this requirement.

[158] The Court returned to the theme of balancing in relation to the principles of fundamental justice in ***Suresh v. Canada (Minister of Citizenship and Immigration)***, 2002 SCC 1, [2002] 1 S.C.R. 3 [***Suresh***]. The Court stated at paras. 45 and 47:

The principles of fundamental justice are to be found in "the basic tenets of our legal system": *Burns, supra*, at para. 70. "They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system": *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 503. The relevant principles of fundamental justice are determined by a contextual approach that "takes into account the nature of the decision to be made": *Kindler, supra*, at p. 848, *per* McLachlin J. (as she then was). The approach is essentially one of balancing. As we said in *Burns*, "[i]t is inherent in the...balancing process that the outcome may well vary from case to case depending on the mix of contextual factors put into the balance" (para. 65). Deportation to torture, for example, requires us to consider a variety of factors, including the circumstances or conditions of the potential deportee, the danger that the deportee presents to Canadians or the country's security, and the threat of terrorism to Canada. In contexts in which the most significant considerations are general ones, it is likely that the balance will be struck the same way in most cases. It would be impossible to say in advance, however, that the balance will necessarily be struck the same way in every case.

...

Determining whether deportation to torture violates the principles of fundamental justice requires us to balance Canada's interest in combatting terrorism and the Convention refugee's interest in not being deported to torture. Canada has a legitimate and compelling interest in

combatting terrorism. But it is also committed to fundamental justice. The notion of proportionality is fundamental to our constitutional system. Thus we must ask whether the government's proposed response is reasonable in relation to the threat. In the past, we have held that some responses are so extreme that they are *per se* disproportionate to any legitimate government interest: see *Burns*, *supra*. We must ask whether deporting a refugee to torture would be such a response.

[159] While recognising the balancing of individual and societal interests that informs the analysis of the principles of fundamental justice, the Supreme Court of Canada has noted that it is important that the consideration of the principles of fundamental justice under s. 7 not be conflated with the s. 1 analysis. In *Charkaoui*, Chief Justice McLachlin stated at paras. 21-22:

Unlike s. 1, s. 7 is not concerned with whether a limit on life, liberty or security of the person is *justified*, but with whether the limit has been imposed in a way that respects the principles of fundamental justice. Hence, it has been held that s. 7 does not permit "a free-standing inquiry...into whether a particular legislative measure 'strikes the right balance' between individual and societal interests in general" (*Malmo-Levine*, at para. 96). Nor is "achieving the right balance...itself an overarching principle of fundamental justice" (*ibid*). As the majority in *Malmo-Levine* noted, to hold otherwise "would entirely collapse the s. 1 inquiry into s. 7" (*ibid*). This in turn would relieve the state from its burden of justifying intrusive measures, and require the *Charter* complainant to show that the measures are not justified.

The question at the s. 7 stage is whether the principles of fundamental justice relevant to the case have been observed in substance, having regard to the context and the seriousness of the violation. The issue is whether the process is fundamentally unfair to the affected person. If so, the deprivation of life, liberty or security of the person simply does not conform to the requirements of s. 7. The inquiry then shifts to s. 1 of the *Charter*, at which point the government has an opportunity to establish that the flawed process is nevertheless justified having regard, notably, to the public interest.

[emphasis in the original]

[160] In *Malmo-Levine*, Justices Gonthier and Binnie, writing for the majority on the same subject, noted at para. 98:

The balancing of individual and societal interests within s. 7 is only relevant when elucidating a particular principle of fundamental justice. As Sopinka J. explained in *Rodriguez, supra*, "in arriving at these principles [of fundamental justice], a balancing of the interest of the state and the individual is required" (pp. 592-93 (emphasis added)). Once the principle of fundamental justice has been elucidated, however, it is not within the ambit of s. 7 to bring into account such "societal interests" as health care costs. Those considerations will be looked at, if at all, under s. 1. As Lamer C.J. commented in *R. v. Swain*, [1991] 1 S.C.R. 933, at p. 977:

It is not appropriate for the state to thwart the exercise of the accused's right by attempting to bring societal interests into the principles of fundamental justice and to thereby limit an accused's s. 7 rights. Societal interests are to be dealt with under s. 1 of the *Charter*, where the Crown has the burden of proving that the impugned law is demonstrably justified in a free and democratic society

[161] In the context of interpreting s. 7 of the *Charter*, it has been held that international human rights instruments can inform a court's understanding of the principles of fundamental justice. In *United States v. Burns*, the Court referred to Justice Lamer's statement in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, as follows at para. 79.

In *Re B.C. Motor Vehicle Act, supra*, Lamer J. expressly recognized that international law and opinion is of use to the courts in elucidating the scope of fundamental justice, at p. 512:

[Principles of fundamental justice] represent principles which have been recognized by the common law, the international conventions and by the very fact of entrenchment in the *Charter*, as essential elements of a system for the administration of justice which is founded upon the belief in the dignity and worth of the human person and the rule of law.

[162] This position was affirmed in **Suresh** at para. 46 where the Court cited **United States v. Burns** as authority for the following:

The inquiry into the principles of fundamental justice is informed not only by Canadian experience and jurisprudence, but also by international law, including *jus cogens*. This takes into account Canada's international obligations and values as expressed in "[t]he various sources of international human rights law — declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, [and] customary norms": *Burns*, at paras. 79-81...

(b) Application in Non-Criminal Legislation

[163] The reasons of Justices La Forest, L'Heureux-Dubé and McLachlin, as she then was, in **Godbout v. Longueuil (City)**, [1997] 3 S.C.R. 844 [**Godbout**], provide very useful guidance with respect to the approach to be taken to the issue of the principles of fundamental justice in considering legislation that does not engage the criminal law.

[164] At issue in that case was a resolution that the municipality had adopted requiring all new permanent employees to reside within its territorial limits. Ms. Godbout signed a declaration promising that she would establish her residence within the municipal boundaries and that she would continue to reside there for as long as she remained in her employment as a condition of obtaining permanent employment. Some time later she moved out of the municipality and her employment was terminated.

[165] Justices La Forest, L'Heureux-Dubé and McLachlin decided that the resolution was an infringement of Ms. Godbout's rights under both s. 7 of the

Charter and s. 5 of the **Quebec Charter**. Justices Gonthier, Cory and Iacobucci and Chief Justice Lamer and Justices Sopinka and Major, in separate reasons, concluded that the resolution violated Ms. Godbout's rights under the **Quebec Charter** and did not address s. 7 of the **Charter**.

[166] With respect to s. 7 of the **Charter**, Justice La Forest rejected the argument that the nature of the claim was in relation to economic rights beyond the scope of the **Charter**. Justice La Forest concluded that the right to choose where to establish one's home falls within the scope of the liberty interest protected by s. 7 as part of the irreducible sphere of personal autonomy where individuals may make inherently private choices free from state interference. In reaching this conclusion, Justice La Forest J. had regard to the fact that the right to choose where to establish one's home is afforded explicit protection in the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47, to which Canada became a party in 1976.

[167] With respect to the principles of fundamental justice, Justice La Forest concluded it was necessary to weigh the right at issue against the interests pursued by the state in causing the infringement. In that regard, the municipality submitted that the residence requirement was imposed to ensure high quality local service to residents. Justice La Forest concluded that such an interest was not a sufficient basis to intrude upon the employees' private life. In addition, he noted that it was not clear that the requirement would necessarily have the desired effect and that the municipality could have taken less drastic measures.

[168] The second reason advanced by the municipality was that the requirement created economic benefits for the municipality. Justice La Forest concluded that this was not a sufficient interest to override the constitutional guarantee. The final reason advanced was that the requirement was important for the functions performed by employees in certain key positions. Justice La Forest noted that such a requirement could, in appropriate circumstances, survive constitutional scrutiny. The restriction at issue, however, could not because it was overbroad in that it captured all permanent employees, not just those occupying critical positions and because Ms. Godbout did not occupy such a critical position.

In the result Justice La Forest concluded that the infringement did not conform to the principles of fundamental justice.

(c) Overbreadth

[169] One principle of fundamental justice that has been identified by the Supreme Court of Canada is that restrictions on life, liberty and security of the person must not be more broadly framed than necessary to achieve a legislative purpose, as discussed in *Godbout* above. In *R. v. Heywood*, [1994] 3 S.C.R. 761, Justice Cory, for the majority, described the principle of overbreadth as follows at pp. 792-93:

Overbreadth analysis looks at the means chosen by the state in relation to its purpose. In considering whether a legislative provision is overbroad, a court must ask the question: are those means necessary to achieve the State objective? 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.

(d) Arbitrary Provisions

[170] Another principle of fundamental justice is that a law must not operate to limit the rights protected by s. 7 in an arbitrary manner. In **Chaoulli**, Chief Justice McLachlin and Justice Major stated at paras. 129-31:

It is a well-recognized principle of fundamental justice that laws should not be arbitrary: see, e.g., *Malmo-Levine*, at para. 135; *Rodriguez*, at p. 594. The state is not entitled to arbitrarily limit its citizens' rights to life, liberty and security of the person.

A law is arbitrary where "it bears no relation to, or is inconsistent with, the objective that lies behind [it]". To determine whether this is the case, it is necessary to consider the state interest and societal concerns that the provision is meant to reflect: *Rodriguez*, at pp. 594-95.

In order not to be arbitrary, the limit on life, liberty and security requires not only a theoretical connection between the limit and the legislative goal, but a real connection on the facts. The onus of showing lack of connection in this sense rests with the claimant. The question in every case is whether the measure is arbitrary in the sense of bearing no real relation to the goal and hence being manifestly unfair. The more serious the impingement on the person's liberty and security, the more clear must be the connection. Where the individual's very life may be at stake, the reasonable person would expect a clear connection, in theory and in fact, between the measure that puts life at risk and the legislative goals.

[171] In **Rodriguez**, Justice Sopinka stated, for the majority at pp. 594-95:

Where the deprivation of the right in question does little or nothing to enhance the state's interest (whatever it may be), it seems to me that a breach of fundamental justice will be made out, as the individual's rights will have been deprived for no valid purpose. This is, to my mind, essentially the type of analysis which E. Colvin advocates in his article "Section Seven of the Canadian Charter of Rights and Freedoms" (1989), 68 *Can. Bar Rev.* 560, and which was carried out in *Morgentaler*. That is, both Dickson C.J. and Beetz J. were of the view that at least some of the restrictions placed upon access to abortion had no relevance to the state objective of protecting the foetus while protecting the life and health of the mother. In that regard the

restrictions were arbitrary or unfair. It follows that before one can determine that a statutory provision is contrary to fundamental justice, the relationship between the provision and the state interest must be considered. One cannot conclude that a particular limit is arbitrary because (in the words of my colleague, McLachlin J. at pp. 619-20) "it bears no relation to, or is inconsistent with, the objective that lies behind the legislation" without considering the state interest and the societal concerns which it reflects.

(e) The Rationale for the Provisions

[172] Applying these principles to the present case, the first issue to be addressed is the state's interest in the Bylaws and the societal concerns they reflect. The City's rationale for the Bylaws and operational policy that prohibit the taking up of a temporary abode overnight is set out in the affidavit of Mr. McCliggott as follows:

- (a) Sleeping simpliciter is not prohibited;
- (b) While sleeping, persons can protect themselves against the elements and stay warm [with sleeping bags, blankets, other soft waterproof and weather repellent material that are removed once the person is awake];
- (c) In cold or severe weather, the City's severe weather protocol also ensures there [are] sufficient shelters and beds for all who require them;
- (d) Protecting the park, its natural environment and amenities from damage or harm;
- (e) Ensuring that parks and public spaces are available for the use and enjoyment to all members of the public generally;
- (f) Public health considerations;
- (g) Respecting the public interest in the purpose and rationale for the creation of parks and public spaces.

[173] The AGBC and the City identified the objective of the Bylaws and the operational policy to be the maintenance of the environmental, recreational, social

and economic benefits of urban parks. The City submits that parks and public spaces positively affect the quality of urban life, contributing tangible and intangible benefits to the community. If these spaces are not protected and maintained for all, and these benefits are lost, the vitality of a community's commercial and residential life is weakened, as is its desirability as a place to live, work or visit. It is the City's submission that absent the Bylaws, there will be an inevitable colonization of public spaces with a devastating impact to the economic viability of adjacent areas.

[174] The City submits further that the affidavits filed by those who were occupying Cridge Park in 2005 indicates that they prefer camping together to staying in a shelter. The City submits the evidence indicates that for many people urban camping creates a viable option to seeking help through shelters operating within the City. It seems clear the City submitted that, if permitted, many urban campers would choose to congregate in one area thereby recreating the situation arising in Cridge Park in 2005 on at least that scale.

[175] The City submits that the evidence also clearly reveals that many homeless people have mental health issues and/or addictions. The City submits that permitting seriously troubled people to camp and live in parks amounts to a public provision of free but unsafe shelter. The lack of a limit will compound the problems that arise in public parks when people live in them and use them as their bedrooms, kitchens and bathrooms. Campers will arguably be unnecessarily exposed to a greater degree of unsafe and unsanitary conditions than exist with the limits in place.

[176] In the City's submission the Bylaw measures prohibiting taking up abode in parks are aimed at conditions that will likely overwhelm public spaces if the limit on taking up abode is eliminated. It is the City's submission that the evidence clearly shows that urban camping creates an unhealthy mess in places meant to foster health and well-being, causes damage to parks that may be irreparable and prevents public spaces from being used for the purposes for which they were created.

[177] Fred Hook, who holds the position of Parks Environmental Technician for the City, provided evidence of the City's concerns. Mr. Hook deposed that:

It is my experience that significant damage is being done to the natural areas of City parks as a result of people sleeping and/or camping over night in those parks.

Most of the natural areas within the City of Victoria's parks are part of the endangered Garry Oak ecosystem. It is recognized that Garry Oak ecosystems are among British Columbia's most valuable and most threatened ecosystems. They are of tremendous importance to the biodiversity of British Columbia as they are home to over 90 species that have been designated as "at risk" in this Province. Almost one quarter of those species are also listed as being "at risk" on a national scale.

In Beacon Hill Park alone, a botanical survey in 2005 found at least 7 endangered plant species grow there.

One of the two remaining patches of the endangered species of Howell's *Triteleia* in Beacon Hill Park has been repeatedly trampled by people making their way to a camp/sleeping site in a nearby thicket.

In both Beacon Hill Park and Summit Park, the endangered plant species Elegant Rein Orchard is located in areas frequented by campers/sleepers.

In Summit Park, it is my experience that campers/sleepers often spend the night directly on top of a patch of the endangered plant species Yellow Montane Violet.

All of these endangered plants are directly harmed by slow compaction and disturbance even when they are not in visible active growth.

Most of the natural thickets located in these and other City of Victoria parks have been used as shelter by sleepers/campers. This is evident to me because of the obvious signs of trampling or removal of most of the ground cover plants that grew in the centre of these thickets. Compacted soil is evident and is also a detriment to the larger trees and shrubs in the area. In my experience, these sites are often strewn with large quantities of debris including plastic, metal and organic materials.

In my experience, the presence of sleepers/campers in these areas, and the disturbance and waste, also reduces the opportunity for birds to use the areas for shelter, food and nesting.

The bluffs off Dallas Road within the City of Victoria are part of the Coastal Bluff ecosystem and are also suffering significant damage as a result of sleeping/camping. In my experience, people wishing to sleep/camp near the beach are digging holes into the bluffs for protection. This excavation potentially disrupts the stability of the bank and eliminates plant cover to the detriment of the plants and the bank.

In one area, I examined a pit approximately 2 metres² and almost 2 metres deep was dug into one of the lower terraces of the bluff. An area surrounding it of approximately 4 metres x 10 metres was cleared of all vegetation.

(f) The Defendants' Response

[178] With respect to the objective of protection of the parks from damage or harm, the Defendants submit that there is no reason why a homeless person using, for example, a cardboard box or a free-standing tent to protect themselves from the wind and rain would cause any more damage to the park than a person simply sleeping on the ground with a multitude of wet blankets. The latter conduct is not prohibited, but the former is. This, the Defendants submit, is arbitrary.

[179] With respect to the objective of ensuring that parks and public spaces are available for use and enjoyment to all members of the public, the Defendants submit

that there is no reason why prohibiting homeless people from using cardboard boxes, freestanding tents or erected tarps to protect themselves from weather conditions would interfere with other park users, at least to any greater extent than homeless people sleeping with blankets and tarps laid across their faces. This is especially true if the shelters were only used overnight and required to be removed in the morning, or if they were restricted to certain areas. There is no benefit to other park users in ensuring that homeless people without other forms of shelter sleep only with sleeping bags and unerected tarps, rather than under a rudimentary shelter that would actually provide them with warmth, protection from wind, snow and rain, and perhaps even a measure of privacy.

[180] With respect to the concern for public health considerations, the Defendants submit that while there may be public health considerations that arise from the fact that homeless people have nowhere to engage in certain necessary activities, such as eating or urinating, these concerns are not connected to the form of shelter in which they sleep overnight. These concerns arise because there is a significant homeless population and a lack of infrastructure to support them, and not because of the impact of any shelter which these people may be allowed to create. Indeed, allowing homeless people to erect some form of effective shelter will reduce public health concerns since it will reduce the health risks associated with sleeping without protection, as outlined in Dr. Hwang's affidavit.

[181] With respect to the final interest, respecting the public interest in the purpose and rationale for the creation of parks and public spaces, the Defendants submit that there is nothing in the evidence that establishes any connection between denying

homeless people the ability to create rudimentary overnight shelter in some portion of the City and the ability of people to enjoy the benefits of parks and public spaces. The Defendants submit that while some people may be uncomfortable in parks because of homeless people living there, this is not related to the form of shelter that the homeless people are allowed to create, but to their very existence. In addition, the parks are of fundamental importance to the homeless people, who are also part of the community.

[182] The Defendants submit that there is no real connection between the societal interests that are purported to be advanced by the Bylaws and operational policy and the prohibition on erecting shelter. The prohibition is arbitrary and overbroad and thus contrary to the principles of fundamental justice.

(g) Position of the AGBC

[183] The AGBC submits that the Bylaws and operational policy are aimed at maintaining all the benefits of urban parks and they are effective at achieving this purpose. They apply to all individuals. No group or person is singled out. The Bylaws serve their purpose and therefore cannot be said to be arbitrary.

[184] With respect to the issue of overbreadth, it is the submission of the AGBC that the objectives of the Bylaws would not be served by allowing individuals, alone or collectively, to camp in the City's parks. Where a narrower prohibition would not be effective or where there is a rational basis for extending the prohibition to all users, a law will not be held to be overbroad: see *R. v. Clay*, 2003 SCC 75; [2003] 3 S.C.R. 735; *R. v. Demers*, 2004 SCC 46, [2004] 2 S.C.R. 489.

(h) Analysis

[185] The AGBC asserts that the Bylaws are effective for their purpose. However, as is evident from the analysis of Justice La Forest in *Godbout*, that is no answer to the question of whether the infringement is contrary to the principles of fundamental justice. The AGBC asserts that no less restrictive alternative would be effective.

However, I am not persuaded that is the case. Indeed it seems to me that there are any number of less restrictive alternatives that would further the City's concerns; for example, requiring the overhead protection to be taken down every morning, and creating certain zones in sensitive park regions where sleeping was not permitted.

[186] The AGBC submits further that where various interpretations of a law are possible, the interpretation that favours validity of the law and avoids overbreadth is to be preferred, citing *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031.

That proposition does not assist in the resolution of the issues in the present case since no one has contended that there are various or alternative interpretations of the Bylaws at issue.

[187] The submissions of the AGBC and the City suffer from a number of difficulties. First, they are premised on the notion that the issue is a choice between the Bylaws' absolute ban on the erection of overhead shelter on the one hand and chaos on the other. The City, for example, stated in its submissions that:

Without the bylaw limitations that would prevent people from living in encampments in public spaces, the City, and the Court risk becoming enablers that promote drug abuse, crime, self-destruction, disease, and death.

...

If the homeless can camp in public places, can anyone? How is the City to differentiate? Are the truly homeless to be issued free passes? What is to prevent a family camping trip stopping at a park near you? What is to stop the overnight grad party or the prostitute's tent? Are all our beaches to be open to addicts who may pass out in the sand where their syringes will fall? Is public land to be allocated and partitioned as so many campsites? Where will businesses go and who will pay taxes when the tourists willing to pay for accommodation are gone? What happens when the public land is all parceled out? If camping is permitted, are foundations and generators and fireplaces far behind? Who will be responsible for safety when danger is courted by such conduct? Who will be liable if unsafe accommodation in a City park results in a fire causing personal injury and property damage? How will the spread of bacterial or viral diseases due to poor sanitation and hygiene be prevented? Are City of Victoria taxpayers to pay for the provision of tents and amenities? What will the City need to spend to protect its parks when they are colonized?

[188] The problem is that this is a false dichotomy. The Defendants do not suggest that all laws should be suspended with respect to homeless people in parks.

Moreover, the Defendants do not suggest that there can be no regulation with respect to the shelter that homeless people create in public spaces. They did not submit that the City is precluded from regulating what kind of shelter can be created, how long it can stay in one place or what kinds of activities can be engaged in by the homeless people who sleep in the shelters. The issue is much more specific: that being the complete prohibition on taking a temporary abode including overhead protection.

[189] The next difficulty is that the AGBC and the City focus their submissions on the problems they allege to be associated with tent cities. However, it is conceded that the Bylaws are not limited to a prohibition of tent cities; they go much farther and prohibit any form of erected shelter, even a cardboard box that is removed in the

morning. Therefore, to the extent to which the purpose of the Bylaws is to prohibit tent cities, they are clearly overbroad.

[190] The submissions of the AGBC and the City suggest that without the Bylaws the numbers of people sleeping in parks will grow, thereby increasing the problems associated with homelessness. This submission is based in part on the evidence that some of the homeless people preferred to sleep in the tent city rather than go to a shelter. However, I agree with the submission of the Defendants that the fact that some people choose to live outside rather than go to shelters, which are often full, does not mean that the prohibition on shelter does not have an adverse effect on the life, liberty and security of the person.

[191] 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.

[192] There is simply no evidence that people would flock to sleep in the parks once they were allowed to cover themselves at night with cardboard boxes or tarps. Moreover, that is not an inference that I am prepared to draw. It seems to me to be unlikely in the extreme and contrary to the evidence of the complex causes of homelessness to suggest that such a change would result in an increase in the number of persons sleeping in public places.

[193] The harm caused to the parks described in the evidence is arbitrary, in that it is not related to the conduct at issue that is prohibited by the Bylaws. Mr. Hook describes the damage as resulting from people sleeping and/or camping overnight, making their way to a camp/sleeping site and, sleepers/campers digging holes into the bluffs. All of this damage occurs at present with the Bylaws in place. There is no evidence and no reason to believe that any of the damage described would be increased if homeless people were allowed to cover themselves with cardboard boxes or other forms of overhead protection while they slept. In particular:

- (a) Damage from sleeping/camping in sensitive ecosystems. This is a significant concern, however the restriction is overbroad in that it relates to all public space in the City not just to sensitive ecosystems. In addition, the damage reported – compaction and trampling of sensitive and endangered plants – is the result of sleeping and walking, activities that are not the subject of the prohibition. There is no suggestion that the erection of temporary overhead protection in the form of tarps, tents or cardboard boxes would in any way increase or contribute to the damage.

- (b) Disturbance of the birds. Again, this concern is said to arise from the presence of what Mr. Hook describes as sleepers/campers in the sensitive areas, not from the erection of temporary overhead protection. Thus, the prohibition is not related to the concern. The damage described does not result from the erection of overhead protection.
- (c) Damage to the bluffs from excavation. This concern is also unrelated to the prohibition. The Defendants do not seek the right to excavate. There is no relationship between the prohibition against erecting temporary overhead protection and the damage to the bluffs. Also, there is an aspect of overbreadth here since the prohibition applies to the entire public space in the City, not just to the sensitive areas such as the bluffs.
- (d) A concern is expressed with respect to litter left in parks by the homeless people. I do not doubt that this is the case but again, it does not follow that if homeless people are allowed to cover themselves with temporary overhead protection at night they will leave more litter in the parks.
- (e) The City expressed a concern with respect to syringes left in parks. This is without question a significant issue of public health. The evidence summarized in the Mayor's Task Force Report is that there are between 1,500 to 2,000 injection drug users living in Victoria. At

least 40 percent of this group is homeless or unstably housed. Three quarters of this group is infected with Hepatitis C and 13 percent with HIV. One-third of the users reported that the street is the most common place for them to inject. However, while the concern is significant, there is no relationship between the prohibition and the concern. There is no reason to believe that the prohibition has any effect on either the number or habits of injection drug users. Therefore with respect to this concern, the prohibition is unrelated to the state interest and hence arbitrary.

- (f) The City also expressed concern over damage to the turf, making particular reference to the damage associated with the tent city in Cridge Park. Damage to the turf that occurs as a result of homeless people sleeping in the parks is the result of what is permitted, namely, sleeping and placing waterproof ground cover on the grass, not what is prohibited, that is erecting overhead protection. However, in my view, a more fundamental problem is that the concern with respect to the condition of the turf in parks is simply not of sufficient magnitude to justify the infringements of the s. 7 rights at issue.

6. Conclusion Regarding Section 7

[194] I have found that a significant number of people in the City of Victoria have no choice but to sleep outside in the City's parks or streets. The City's Bylaws prohibit those homeless persons from erecting even the most rudimentary form of shelter to

protect them from the elements. The prohibition on erecting shelter is in effect at all times, in all public places in the City. I have found further that the effect of the prohibition is to impose upon those homeless persons, who are among the most vulnerable and marginalized of the City's residents, significant and potentially severe additional health risks. In addition, sleep and shelter are necessary preconditions to any kind of security, liberty or human flourishing. I have concluded that the prohibition on taking a temporary abode contained in the Bylaws and operational policy constitutes an interference with the life, liberty and security of the person of these homeless people. Finally, I have concluded that the prohibition is both arbitrary and overbroad and hence not consistent with the principles of fundamental justice.

B. Section 1

1. Overview

[195] The next issue to be addressed is whether the City can establish that the Bylaws are justified pursuant to s. 1 of the **Charter**, which provides:

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.

[196] In **Canada (Attorney General) v. JTI-Macdonald Corp.**, 2007 SCC 30,

[2007] 2 S.C.R. 610, Chief Justice McLachlin set out the test for whether a provision is justified pursuant to s. 1 as follows at para. 36:

This engages what in law is known as the proportionality analysis. Most modern constitutions recognize that rights are not absolute and can be limited if this is necessary to achieve an important objective and if the limit is appropriately tailored, or proportionate. The concept of proportionality finds its roots in ancient and scholastic scholarship on the legitimate exercise of government power. Its modern articulations may be traced to the Supreme Court of Germany and the European Court of Human Rights, which were influenced by earlier German law: A. Barak, "Proportional Effect: The Israeli Experience" (2007), 57 *U.T.L.J.* 369, at pp. 370-371. This Court in *Oakes* set out a test of proportionality that mirrors the elements of this idea of proportionality - first, the law must serve an important purpose, and second, the means it uses to attain this purpose must be proportionate. Proportionality in turn involves rational connection between the means and the objective, minimal impairment and proportionality of effects. As Dickson C.J. stated in *Oakes*, at p. 139:

There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance". [Emphasis deleted.]

[197] It has been held that infringements of the rights under s. 7 that have been found to be contrary to the principles of fundamental justice will only be justified in rare circumstances. For example, in *Re B.C. Motor Vehicle Act*, Justice Lamer stated, for the majority at p. 518:

Section 1 may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of s. 7, but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like.

[198] In *Charkaoui*, Chief Justice McLachlin, for the Court, quoted this statement of Justice Lamer and stated further, at para. 66:

The rights protected by s. 7 – life, liberty, and security of the person – are basic to our conception of a free and democratic society, and hence are not easily overridden by competing social interests. It follows that violations of the principles of fundamental justice, specifically the right to a fair hearing, are difficult to justify under s. 1: *G. (J.)*. Nevertheless, the task may not be impossible, particularly in extraordinary circumstances where concerns are grave and the challenges complex.

2. Important Objective

[199] In *R. v. Advance Cutting & Coring Ltd.*, 2001 SCC 70, [2001] 3 S.C.R. 209, at para. 255, Justice LeBel provided further clarification with respect to the first component of the test, the identification of the impugned law's objective, as follows:

In any s. 1 analysis, courts must identify the objectives of the impugned law with care. (See *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199.) The purposes of the legislation at the time of its enactment must be fully identified to make sure that they remain consonant with *Charter* values (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 331). Furthermore, the state must justify the specific infringing measure, not simply the law as a whole. (See *RJR-MacDonald*, per McLachlin J., at paras. 143-44.) At the same time, however, the analysis should not be carried out in a vacuum. The place and function of the challenged provisions in the legislative scheme must be carefully identified. The nature of the system and its broader objectives have to be kept in mind. The analysis should not consider the infringing provision apart from its legislative context. (See *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at paras. 101-3.)

[200] The City in the present case did not differentiate between the objective of the Bylaws as a whole and the particular provisions at issue. The purpose identified by the City was the preservation of urban parks. The City submits that parks provide

significant environmental, recreational, social and economic benefits to the community. I accept that the preservation of parks is an important objective.

3. Proportionality

[201] The next step in the s. 1 analysis requires the government to show that, on a balance of probabilities, the means chosen are reasonable and demonstrably justified. This is, as Chief Justice Dickson stated in *R. v. Oakes*, [1986] 1 S.C.R. 103, a form of proportionality test. The impugned provision must have been “carefully designed to achieve the objective in question” and the law must not be “arbitrary, unfair or based on irrational considerations”: *Oakes* at p. 139. There are three components to this proportionality inquiry.

(a) Rational Connection

[202] The first step in the proportionality analysis requires an analysis of the connection between the impugned provisions and the objective of the legislation. The measures adopted must be rationally connected to the objective: see *Oakes* at p. 139.

[203] The City’s submissions with respect to this issue relate to what it termed the inevitable colonization of public spaces that the Bylaws are intended to prevent and the various harms associated with homeless persons living in public spaces. The City submits that the City’s Bylaws are rationally related to the legitimate and reasonable interests of preserving parks and other public places for the uses for which they were intended as well as protecting the safety and economic vitality of

the City. These measures address real urban problems that come with homeless encampments, including drug use and sales, public elimination of bodily waste, vandalism, litter, and crimes by and against homeless people.

[204] I accept that the question of what sort of shelter homeless people will be permitted to erect is encompassed in the issue of urban encampments and, in that sense, the provision has a rational connection to the purpose identified by the City. However, what the City identified as the “real urban problems” that come with homeless encampments – drug use and sales, public elimination of bodily waste, vandalism, litter, crimes by and against homeless people – are not matters that are related to the sort of shelter homeless people are permitted to erect. These are rather matters related to the presence of a population of homeless people and the services available for that population. In that respect, the provision is not rationally connected to the objective.

(b) Minimal Impairment

[205] The next step in the proportionality analysis requires that the impugned provision “impair ‘as little as possible’ the right or freedom in question”: see **Oakes** at p. 139. In that regard, the City submits that under the City’s Bylaws, homeless people remain free to use public property on the same terms as all other members of the community. The Bylaws do not prevent anyone from entering public property or from merely falling asleep.

[206] The City submits that tents or strung-up tarps are structures that provide for a degree of permanency that the Bylaws seek to avoid. These structures provide an

increased possibility or opportunity for an extended stay in one spot. Such structures also expand the size of the “footprint” of such a stay. The City submits that Bylaws are focused narrowly on reducing these outcomes. Reducing these outcomes has the corresponding effect of limiting the possibility of lingering and congregation by campers from night to day that both concentrates and expands the impact of the deleterious effects of urban camping. The Bylaws, in the City’s submission, therefore foster an opportunity for the natural park environment to recover from the presence of persons sleeping there. The City submits that the Bylaws also allow a better opportunity for sharing of the public space by all members of the community. Finally, the City submits that the Bylaws seek to strike a balance between competing interests of its citizens and while they may not perfectly achieve this goal, they are within the realm of reasonable alternatives.

[207] In my view, the provisions do not satisfy this minimal impairment requirement, largely for the reasons set out above in my discussion of the overbreadth as a principle of fundamental justice. The professed concern is for preservation of parks, yet the provision applies to all public land. The professed concern is for structures that provide for a degree of permanence yet all overhead protection, included that taken down every morning, is prohibited.

(c) Is the Impact Disproportionate?

[208] The final step in the s. 1 analysis is to weigh the purpose of the limitation against its deleterious effects in light of the values underlying the *Charter*. see *Oakes* at pp. 139-40. In balancing the impact against the advantages, the court

must keep in mind the importance of the rights at issue. As Chief Justice Lamer, for the majority of the Court, stated in ***New Brunswick (Minister of Health and Community Services) v. G.(J.)***, [1999] 3 S.C.R. 46:

First, the rights protected by s. 7 – life, liberty, and security of the person – are very significant and cannot ordinarily be overridden by competing social interests.

The City submits that there is proportionality between the effects of its Bylaw measures and its objectives for the same reasons that the measures meet the minimum impairment test. The City submits that salutary effects of the shelter limitations are attained at the cost of what it describes as a minimal difference between the type of shelter permitted by the Bylaws and that advocated for by the Defendants.

[209] The City submits the Bylaws affect all citizens in that none may take up temporary abode in public. Those who are homeless do not suffer a disproportionately severe result where they are not prevented from sleeping and protecting themselves from the elements. Being homeless can be a severe condition but the City submits that it has not been shown that the Bylaws, in and of themselves, contribute to that condition. Limiting the “permanency” of the non-residential use of public spaces is not in the City’s submission a disproportionate response. Further, the City submits that the evidence suggests that a lack of such a limit will likely concentrate and exacerbate many ill effects of homelessness and interfere with efforts to shelter and/or house people. The resulting tent cities will

provide no better answers to the problems of homelessness at the expense of public spaces and parks.

[210] The City submits that given the coordinated efforts it is leading to address the problems of homelessness, a limitation on activities that will likely hinder those efforts to provide adequate permanent shelter does not represent a disproportionately severe effect on homeless people.

[211] However, as I have found, the difference between what is permitted and what is prohibited is not, as the City contends, string – but rather overhead protection. Further, as I have found, the prohibition against overhead protection does prevent homeless people who are sleeping outdoors from providing themselves with adequate protection from the elements. Accordingly, their lives and health are put at risk. This is not a minimal impact.

[212] The City suggests that the real concern is limiting the permanency of the use of public space; however, as noted earlier, the prohibition is against all forms of overhead protection. As to the contentions that the absence of such a limit will concentrate and exacerbate the ill effects of homelessness and interfere with efforts to shelter and house homeless people, in my view, the evidence does not support these conclusions. I can see no basis to conclude that permitting homeless people who are sleeping outdoors to erect a temporary shelter will concentrate and exacerbate the ill effects of homelessness. It would, however, temper some of the ill effects by permitting them to protect themselves from the elements.

[213] The Defendants are not seeking to have the City create more spaces in the shelters. They are not seeking any other expenditure of public funds. They are not seeking in this litigation the right to establish permanent tent cities in the public parks. Accordingly, I do not see how the lack of such a limit would interfere with efforts by the City to shelter or house homeless people.

[214] There is no question that there are significant problems associated with the homeless people in Victoria. These problems are consuming considerable resources. The Mayor's Task Force Report concluded, for example, that:

- The homeless problem is the result of societal changes and years of policy shifts that have created a perfect storm of unprecedented social challenges.
- Homeless people with severe mental illnesses and/or substance use problems are generating significant public disorder complaints in the downtown core.
- Tourism Victoria, the hotel and restaurant industry and the Downtown Victoria Business Association (DVBA) all report increased complaints from visitors about the visible homeless in the downtown.
- Although actual criminal activity in the downtown has decreased, drug activity and the downtown homeless problem were recently identified as the number one issue by Victoria residents.

- Significant city and police resources are being spent managing and cleaning up after the downtown street population – at the cost of providing services elsewhere in the community.

[215] However, these concerns are the consequence of a large population of homeless people with the associated problems described in the Report, who are living in the public areas of the community. These problems will not be exacerbated if the homeless are permitted to protect themselves from the elements with temporary shelter. On the other hand, the condition of the homeless people will be improved by such shelter.

4. Conclusion Regarding Section 1

[216] In the result, I conclude that the impact of the provisions at issue is disproportionate to the advantages. The rights at issue are very significant. The impairment is not minimal.

[217] I find that the Bylaws, to the extent to which they prohibit the erection of overhead protection, have not been justified as a reasonable limit.

VII REMEDY

[218] The Defendants submit that the City has taken the position that should persons camp or erect shelter on City property, they would be in contravention of the following Bylaws:

Parks Regulation Bylaw No. 07-059

- 13 (1) A person must not do any of the following activities in a park:
 - (a) cut, break, injure, remove, climb, or in any way destroy or damage
 - (i) a tree, shrub, plant, turf, flower, or seed, or
 - ...
- (2) A person may deposit waste, debris, offensive matter, or other substances, excluding household, yard, and commercial waste, in a park only if deposited into receptacles provided for that purpose.
- 14 (1) A person must not do any of the following activities in a park:
 - (a) behave in a disorderly or offensive manner;
 - ...
 - (c) obstruct the free use and enjoyment of the park by another person;
 - (d) take up a temporary abode over night;
 - ...
- (2) A person may do any of the following activities in a park only if that person has received prior express permission under section 5:
 - (a) encumber or obstruct a footpath;
 - ...
- 16 (1) A person may erect or construct, or cause to be erected or constructed, a tent, building or structure, including a temporary structure such a tent, in a park only as permitted under this Bylaw, or with the express prior permission of the Council,

Streets and Traffic Bylaw No. 92-84

- 73 (1) ...no person shall...cause a nuisance in, upon, over, or above any street or other public place, or encumber, obstruct, injure, foul, or damage any portion of a street or other public place...
- ...

- 74 (1) Without restricting the generality of the preceding section or of section 75, no person shall place, deposit or leave upon, above, or in any street, sidewalk or other public place any chattel, obstruction, or other thing which is or is likely to be a nuisance, or any chattel which constitutes a sign within the meaning of the Sign Bylaw and no person having the ownership, control or custody of a chattel, obstruction or thing shall permit or suffer it to remain upon, above or in any such street, sidewalk or other public place.

[219] The Defendants submit that to the extent the Bylaws have the effect of prohibiting homeless people from erecting shelter, they are of no force and effect. If this Court finds the impugned provisions of the Bylaws to be inconsistent with the **Charter**, the Court is obliged to strike the law down pursuant to s. 52(1) of the **Constitution Act, 1982** which states:

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.

[220] Accordingly, the Defendants seek a declaration that the foregoing provisions of the Bylaws are unconstitutional and of no force and effect in their entirety, or, alternatively a declaration that the Bylaws are of no force and effect insofar as they apply to prevent homeless persons from erecting shelter. In the Defendants' submission it would be inappropriate for the Court to attempt to define what specific kinds of shelter, or size of tarpaulin, a homeless person might be allowed to erect, or specifically where such a shelter might be erected. The Defendants submit that either of the declarations sought would leave the Mayor and Council free to deal with the homeless situation in any way it might see fit, consistent with the **Charter**, citing

Schachter v. Canada, [1992] 2 S.C.R. 679 [**Schachter**]; **R. v. Sharpe**, 2001 SCC 2, [2001] 1 S.C.R. 45; and **R. v. Grant**, [1993] 3 S.C.R. 223.

[221] The Defendants claim, in the alternative, a “constitutional exemption” pursuant to s. 24(1) of the **Charter**, “the remedy clause”. That provision states:

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.

[222] The AGBC submits that a declaration under s. 52 is unwarranted since the Bylaws are not invalid per se. Rather, the invalidity arises only in relation to certain individuals in a certain factual matrix.

[223] The AGBC submits that a remedy under s. 24 is responsive to the type of situation the Defendants allege, i.e. when an individual’s rights are infringed through the application of an otherwise valid law of general application. It is limited in its application, however, to those cases where an individual’s rights have been infringed or denied. In this way it provides a remedy, but only in circumstances where an infringement, and the facts to support it in the individual’s case, have been proven.

[224] The AGBC submits further that if laws are struck down as being unconstitutional whenever any hypothetical unconstitutional effect could be demonstrated, virtually every statute would be susceptible to attack on that basis. The AGBC submits that such an approach is unrealistic and unnecessary to ensure that rights and freedoms are fully protected, citing **Re Moore and the Queen** (1984), 6 D.L.R. (4th) 294, 10 C.C.C. (3d) 306 (Ont. H.C.J.) [cited to D.L.R.]. Section 24, the

AGBC submits, can be relied on to protect rights and freedoms on a case by case basis where the effects of an otherwise valid law results in a denial of rights.

[225] The AGBC submits that the Supreme Court of Canada and our Court of Appeal have recognized the validity of the constitutional exemption as a means of protecting otherwise valid legislation. In appropriate circumstance it is a remedy that strikes a balance between striking down a law in its entirety because the law has or may have a limited unconstitutional application, and upholding a law in its entirety even though it has unconstitutional applications for some, citing **Rodriguez, R. v. Morrissey**, 2000 SCC 39, [2000] 2 S.C.R. 90 and **R. v. Walcot**, 2001 BCCA 342, 154 C.C.C. (3d) 385.

[226] In the submission of the AGBC, in the present case the appropriate manner in which this issue ought to be addressed would be on a case by case basis, if and when charges are actually laid alleging a violation of the Bylaws. In such a case, if it is proven, given that individual's factual circumstances and the factual circumstances surrounding any alleged illegal activity, that the Bylaws infringe that individual's constitutional rights, a constitutional exemption could be granted. The AGBC submits that a decision by this Court on a contingent and hypothetical claim could inappropriately fetter the discretion of another court.

[227] I did not find **Re Moore and the Queen** or the cases it cites on this point to be of much assistance in resolving the issue of the appropriate remedy in the present case. That case involved an application to have the provisions of the **Criminal Code** dealing with Dangerous Offenders declared *ultra vires*, brought by

an offender facing an application by the Crown to have the court declare her to be a dangerous offender. Mr. Justice Ewaschuk determined that the provisions did not offend the **Charter** and dismissed the application. The passage relied upon by the AGBC in the present case is not in relation to remedy, but to a determination of whether the legislation constitutes cruel and unusual punishment contrary to s. 12 of the **Charter**. In concluding that the legislation does not, Mr. Justice Ewaschuk states at p. 300:

Fourthly, does it accord with public standards of decency and propriety or does it shock the general conscience so as to be intolerable in fundamental fairness? In response, it is difficult to comprehend how the dangerous offender provisions of the *Criminal Code* would shock the general conscience so as to be intolerable in fundamental fairness given all the requirements and safeguards written into the process. Not only is the dangerous offender eligible for parole long before a life offender, but he or she has greater rights of appeal.

In deciding that the carefully crafted dangerous offender provisions accord with public standards of decency and propriety, I gauge those provisions not on the "worst case scenario" to the Crown, but on what I consider to be an "average" or "normal" dangerous offender, and where all the statutory conditions have been met. In assessing Charter applications, it is generally socially unrealistic to consider only the possible worst case where such case is not before the court. Indeed, it is only too easy for the creative legal imagination to concoct bizarre examples that never come to court. Where the worst case comes before the court, then the preferable practice is not to invalidate otherwise valid legislation but to hold it inoperative in the particular case.

[citations omitted]

[228] It seems to me that the situation in the present case is just the reverse of the facts before Mr. Ewaschuk. He concluded the provisions did not offend standards of decency on the facts before him and cautioned against deciding the case on the basis of an imagined worst case scenario while noting that even in such a case, the

court will be able to fashion an appropriate remedy. I have concluded, not on the basis of some imagined hypothetical, but on the evidence before me, that the provisions infringe s. 7 rights and do not accord with the principles of fundamental justice. It is the AGBC who seeks to have the remedy structured on the basis of some imagined hypothetical – the flood of persons who in theory would, absent the prohibition, flock to the parks to sleep under the shelter of cardboard boxes.

[229] The AGBC relies upon the dissenting reasons of Chief Justice Lamer in ***Rodriguez*** as providing support for the notion that a constitutional exemption is the appropriate remedy. However, Chief Justice Lamer would have granted a constitutional exemption only during the period of suspended declaration of invalidity. He stated at p. 576:

The scope of the constitutional exemption, then, has been limited by the majority of this Court: an over-broad blanket prohibition should not be tempered by allowing judicially granted exemptions to nullify it, and the criteria on which the exemption would be granted must be external to the *Charter*. That is, the fact that the application of the legislation to the party challenging it would violate the *Charter* cannot be the sole ground for deciding to grant the exemption; rather, there must be an identifiable group, defined by non-*Charter* characteristics, to whom the exemption could be said to apply.

[230] The concerns with respect to the constitutional exemption as a remedy that gave rise to these limitations were described by Lamer C.J. as follows at pp. 573-74:

Different members of the Court have returned to the constitutional exemption described by Dickson C.J. In *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232, McLachlin J., for the Court, noted that allowing exemptions from unconstitutionally over-broad legislation would have a chilling effect, preventing people from engaging in lawful behaviour because the prohibition remains "on the books".

In *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, a case concerning a challenge to the federal provisions prohibiting public servants from working for or against candidates or political parties, Wilson J., for herself and L'Heureux-Dubé J., wrote (at pp. 76-77) that once legislation is found to be over-inclusive, infringes a *Charter* right and cannot be justified under s. 1,

the Court has no alternative but to strike the legislation down or, if the unconstitutional aspects are severable, to strike it down to the extent of its inconsistency with the Constitution. I do not believe it is open to the Court in these circumstances to create exemptions to the legislation (which, in my view, presupposes its constitutional validity) and grant individual remedies under s. 24(1) of the *Canadian Charter of Rights and Freedoms*. In other words, it is not, in my opinion, open to the Court to cure over-inclusiveness on a case by case basis leaving the legislation in its pristine over-inclusive form outstanding on the books.

[231] The AGBC also relies upon *R. v. Morrisey*, a case concerning mandatory minimum sentence provisions, in support of its contention that a constitutional exemption would be the appropriate remedy in the present case. This case is not helpful however as the Court concluded there was no violation of the *Charter*. The only discussion of the constitutional exemption was the statement that it was not necessary to consider it. Finally, the AGBC cited *R. v. Walcot*, another decision concerning mandatory minimum sentences in which Mr. Justice Lambert, for the Court, concluded at para. 75:

The trial judge did not find it necessary to declare the minimum sentence for this offence with a firearm unconstitutional because there will undoubtedly be many cases where Parliament's intention can be served by the imposition of such a sentence without offending against *Charter* s. 12. Instead, the trial judge granted the accused a constitutional exemption. I am not satisfied the trial judge was wrong in doing so.

[232] In my view, these cases are authority for the proposition that an exemption is available as a form of remedy in an appropriate case. They do not assist however in the determination of whether such a remedy is appropriate in the present case.

[233] I have concluded that a constitutional exemption is not the appropriate remedy in the circumstances of the case at bar. First, it is not being proposed as a temporary measure during the period of suspended declaration of invalidity, but as the sole remedy. It is thus inconsistent with the limitations discussed by Chief Justice Lamer in *Rodriguez*. The prospect of a chilling effect is evident. In addition, the notion that the police would be directed to enforce Bylaws that have been found to be unconstitutional, leaving it to the homeless to raise the *Charter* as a defence, is in my view antithetical to the values expressed in the *Charter* and the rights it is meant to protect.

[234] In *Schachter*, Chief Justice Lamer, for the majority, noted that pursuant to s. 52 of the *Constitution Act*, the court is to define the extent of the inconsistency of the law, not the words expressing the law, stating at p. 699:

There is nothing in s. 52 of the *Constitution Act*, 1982 to suggest that the court should be restricted to the verbal formula employed by the legislature in defining the inconsistency between a statute and the Constitution. Section 52 does not say that the words expressing a law are of no force or effect to the extent that they are inconsistent with the Constitution. It says that a law is of no force or effect to the extent of the inconsistency. Therefore, the inconsistency can be defined as what is left out of the verbal formula as well as what is wrongly included.

[emphasis in original]

[235] He noted that in considering the appropriate remedy the court is to respect the role of the legislature and to intrude upon that role only where it is necessary, stating at p. 705-706:

...In some cases, the question of how the statute ought to be extended in order to comply with the Constitution cannot be answered with a sufficient degree of precision on the basis of constitutional analysis. In such a case, it is the legislature's role to fill in the gaps, not the court's. This point is made most clearly in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 169:

While the courts are guardians of the Constitution and of individuals' rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional.

[236] The first step in determining a remedy under s. 52, as directed by the Court in ***Schachter***, is for the court to define the extent of the inconsistency. In the present case, the inconsistency is the prohibition of homeless people from erecting temporary shelter.

[237] In the present case I am mindful of the fact that there are many different ways in which the City could approach the reconciliation of the rights of the homeless with the objectives of preservation of parks. In these circumstances I have concluded that the course that is most appropriate is to grant a declaration that the Bylaws are of no force and effect insofar as they apply to prevent homeless people from erecting temporary shelter.

[238] The next question is whether the declaration of invalidity should be temporarily suspended. I note that the City did not request such a suspension.

Chief Justice Lamer in **Schachter** stated that this issue should turn on a consideration of the effect of an immediate declaration on the public. He stated that a suspension is appropriate where the striking down poses a danger to the public, or would threaten the rule of law or where the concern is underinclusiveness as opposed to overbreadth. Here the concern is overbreadth of the provisions and no danger to the public has been identified resulting from an immediate declaration. I have concluded that this is not an appropriate case to suspend the declaration of invalidity.

VIII DISPOSITION

[239] Accordingly, this Court declares that:

- (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.

[240] In light of the conclusion that I have reached with respect to s.7, I have not addressed s. 12 of the ***Charter***.

[241] The parties are at liberty to make further submissions with respect to the issue of costs.

“Ross J.”