No. 159480
New Westminster Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

BRITISH COLUMBIA/YUKON ASSOCIATION OF DRUG WAR SURVIVORS

PLAINTIFF

AND:

CITY OF ABBOTSFORD

DEFENDANT

AND:

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

INTERVENOR

[style of cause continued on next page]

WRITTEN SUBMISSIONS OF THE INTERVENOR, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Counsel for the Intervenor, British Columbia Civil Liberties Association

Alison M. Latimer
Farris, Vaughan, Wills & Murphy LLP
PO Box 10026, Pacific Centre South
25th Floor, 700 West Georgia Street
Vancouver BC V7Y 1B3
Tel: 604.684.9151 / Fax: 604.661.9349

Dates of Trial: June 29-August 11, 2015
Place of Hearing: New Westminster BC
Prepared by: Farris LLP

-and-

No. 156820
New Westminster Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

CITY OF ABBOTSFORD

PLAINTIFF

AND:

BARRY SHANTZ, JOHN DOE, JANE DOE, and other persons unknown erecting, constructing, building or occupying tents, shelters or other constructions on the land known as Jubilee Park, Abbotsford, British Columbia

DEFENDANTS

AND:

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

INTERVENOR

Counsel for the Plaintiff, British Columbia/Yukon Association of Drug War Survivors and the Defendants, Barry Shantz et al.

David Wotherspoon and DJ Larkin
Fasken Martineau DuMoulin LLP
2900 – 550 Burrard Street
Vancouver BC V6C 0A3
Tel: 604.631.3131 / Fax: 604.632.3179

Counsel for the Plaintiff/Defendant, City of Abbotsford

James G. Yardley and Anthony Price
Murdy & McAllister
11th Floor, Two Bentall Centre
555 Burrard Street
PO Box 49059
Vancouver BC V7X 1C4
Tel: 604.689.5263 / Fax: 604.689.9029

INDEX

**WRITTEN SUBMISSIONS OF THE INTERVENOR,
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION**

PART I. OVERVIEW AND STATEMENT OF FACTS

1. The British Columbia Civil Liberties Association ("BCCLA") is a non-profit, non-partisan, unaffiliated advocacy group whose objects include the promotion, defence, sustainment and extension of civil liberties and human rights throughout British Columbia and Canada. The BCCLA intervenes in this proceeding with leave granted by this Court on January 20, 2015.

2. The defendants in New Westminster Registry Action No. 156820 and the plaintiff in New Westminster Registry Action No. 159480 (collectively, the "*Charter* Claimants") challenge, *inter alia*, the constitutional validity of the definition of "park" in s. 2 of the *Parks Bylaw*[1] and ss. 10, 14, 17 of the *Parks Bylaw*, ss. 2.7(d), 2.7(e) and the definition of "Highway or Other Public Place" in Schedule A of the *Good Neighbour Bylaw*,[2] and ss. 2.1(d), (h) and (j) of the *Street and Traffic Bylaw*[3] (collectively, the "impugned laws").

3. The BCCLA submits that the impugned laws unjustifiably infringe s. 7 of the *Charter*.[4] The BCCLA adopts the statement of facts of the *Charter* Claimants and submits that the issues at stake must be considered in light of evidence supporting the following key facts.

4. For many years, Abbotsford has had and continues to have a population of people without a fixed address, or a predictable, safe residence to return to on a daily basis, a number of whom live on the streets or in other places not generally intended for human habitation, including in camps in public spaces ("Abbotsford's Homeless").

---

[1] City of Abbotsford *Parks Bylaw 1996*, Bylaw No. 160-96, Joint Book of Authorities ("JBoA") Vol. 13, Tab 94
[2] City of Abbotsford *Good Neighbour Bylaw 2003*, Bylaw No. 1256-2003, JBoA Vol. 13, Tab 94
[3] City of Abbotsford *Street and Traffic Bylaw 2006*, Bylaw No. 1536-2006, JBoA Vol. 13, Tab 95
[4] *Canadian Charter of Rights and Freedoms*, s. 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the "*Charter*"), JBoA Vol. 13, Tab 98

5. The Homeless Survey is a 24-hour snapshot survey of people who lived homeless in Abbotsford on March 11 and 12, 2014.[5] The Homeless Survey, is an undercount of the number of homeless people in Abbotsford.[6]

6. The homeless people surveyed in the Homeless Survey were largely male in the 30-49 year age group who have lived in Abbotsford for 11 years or longer.[7]

7. According to the Homeless Survey, Abbotsford's homeless count in 2014 was 151.[8]

8. Thirty percent of the homeless population in Abbotsford, are experiencing relative long-term or chronic homelessness (i.e., have been homeless for more than one year).[9]

9. Over 51% of those surveyed did not use shelter accommodation or the couches of family or friends. For these individuals, makeshift shelters and other outdoor places were considered home.[10] Tents provide privacy and tents serve as protection from the elements.[11] The reasons given for not using a transition house or shelter the previous night included: "too many rules"; "feels too much like an institution"; "don't like the curfew"; "do not feel safe"; and "turned away."[12]

10. For the vast majority of homeless people who are the very visible/chronic/absolute homeless (including those camped on Gladys or other public sites in Abbotsford), it is very difficult to find accessible and appropriate housing.[13]

---

[5] Summary Report – 2014 Homelessness Count and Homelessness Surveys, p. 73 ("Summary Report" or "Homeless Survey"), Plaintiff's Opening Statement in SCBC New Westminster Registry No. 159480 ("Plaintiff's Opening"), Tab B2
[6] Direct Examination of Jesse Wegenast, June 29, 2015 (a.m.)
[7] Summary Report, pp. 83, 84, Plaintiff's Opening, Tab B2
[8] Summary Report, p. 75, Plaintiff's Opening, Tab B2
[9] Summary Report, p. 78, Plaintiff's Opening, Tab B2
[10] Summary Report, p. 79, Plaintiff's Opening, Tab B2
[11] Direct Examination of Nick Zurowski, July 6, 2015 (p.m.); Direct Examination of Holly Wilm, July 8, 2015 (p.m.)
[12] Summary Report, p. 79, Plaintiff's Opening, Tab B2
[13] Direct Examination of Jesse Wegenast, June 29, 2015 (a.m.)

11. Many of Abbotsford's Homeless struggle with mental health and addictions issues that present barriers to being housed.[14] Many of Abbotsford's Homeless have physical disabilities that present barriers to relocation.[15]

12. There are over a dozen homeless sites in Abbotsford.[16]

13. Many of the listed market housing units are not affordable for people on social assistance.[17] The conditions of housing that costs what those on income assistance can afford to pay are "deplorable."[18] One of the primary property companies, Main Street Property Management, that rents to low income people require a $200 application fee, which many people cannot afford.[19]

14. A number of shelters and second-stage housing available in Abbotsford are directed at specific demographics that will exclude many homeless persons individually or because of their

---

[14] Direct Examination of Nick Zurowski, July 6, 2015 (p.m.); Direct Examination of Rene Labelle, July 8, 2015; Direct Examination of Norm Caldwell, July 8, 2015 (p.m.); Direct Examination of Colleen Aitken, July 9, 2015 (p.m.); Direct and Cross-examination of Doug Smith, July 14, 2015 (p.m., but before lunch); Examination for Discovery of Barry Shantz, April 8, 2015, Questions 172, 677-79; Direct Examination of Jesse Wegenast, June 29, 2015 (a.m.); Summary Report, p. 77, Plaintiff's Opening, Tab B2; Direct and Cross Examination of Dennis Steel, June 30, 2015 (a.m. and p.m.); Direct Examination of Rod Santiago, July 14, 2015 (p.m.); Read-ins, Examination for Discovery of George Murray, February 5, 2015, Questions 259-71; Direct Examination of Christoph Stahl, July 10, 2015 (p.m.); Direct Examination of Shane Wiens, July 14, 2015 (p.m.); Read-ins, Examination for Discovery of Jake Rudolph, May 15, 2015, Questions 501-11, 514-17 and 520-52; Expert Report of Dr. Gordon William MacEwan ("MacEwan Report"), undated, served April 2, 2015, pp. 2-5; Expert Report of Dr. Christy Sutherland ("Sutherland Report"), pp. 2-3, 7; Cross-examination of Dena Kae Beno, July 27, 2015 (p.m.); Cross-examination of Jeannette Billabough, July 24, 2015 (a.m.); Direct and Cross-examination of Sharon Forbes, July 24, 2015 (a.m.)

[15] Direct and Cross-examination of Nana Tatoosis, July 8, 2015 (a.m.); Direct Examination of Colleen Aitken, July 9, 2015 (p.m.); Direct Examination of Doug Smith, July 14, 2015 (p.m., but before lunch); Direct Examination of Jesse Wegenast, June 29, 2015 (a.m.); Direct and Cross Examination of Dennis Steel, June 30, 2015 (a.m. and p.m.)

[16] Cross-examination of Jesse Wegenast, June 29, 2015 (p.m.); Direct Examination of Dennis Steel, June 30, 2015 (a.m.); Direct Examination of Christoph Stahl, July 10, 2015 (p.m.)

[17] Direct Examination of Nate McCready, June 30, 2015 (p.m.); Direct Examination of Rene Labelle, July 8, 2015 (a.m.); Direct Examination of Colleen Aitken, July 9, 2015 (p.m.)

[18] Direct Examination of Jesse Wegenast, June 29, 2015 (a.m. and p.m.); Cross-examination of Nana Tatoosis, July 8, 2015 (a.m.)

[19] Direct Examination of Jesse Wegenast, June 29, 2015 (a.m. and p.m.)

family status.[20] A number of shelters in Abbotsford have barriers to access such as a requirement for sobriety,[21] curfews that interfere with work,[22] length of stay limits[23] and settings that are reminiscent of prison or lockdown facilities.[24] There is no daytime shelter space available in Abbotsford.[25]

15. Treatment centres are not housing.[26]

16. There is no one at the City who knows the number of shelter beds available in Abbotsford at any given time. Neither does anyone at the City know how many people are homeless in Abbotsford at any given time.[27]

17. Abbotsford Council has not established a policy on homeless encampments.[28] City workers have limited or no training regarding homeless issues.[29]

---

[20] See e.g. Sentinel Group Home, Autumn House, Christine Lamb Residence, Cyrus Centre, George Schmidt Centre: Agreed Statement of Facts dated June 29, 2015, para. 44; Direct Examination of Holly Wilm, July 8, 2015 (p.m.); Cross-examination of Dena Kae Beno, July 27, 2015 (p.m.); Direct and cross-examination of Rod Santiago, July 14, 2015 (p.m.); Direct Examination of Jesse Wegenast, June 29, 2015 (p.m.); Direct Examination of Milton Walker, July 17, 2015 (a.m.); Direct Examination of Nate McCready, June 30, (p.m.)

[21] See e.g. the vast majority of Raven's Moon Resource Society, Salvation Army independent living facility, the Sentinel Group Home, Autumn House, Christine Lamb Residence, George Schmidt Centre, Firth Residence: Direct and cross-examination of Rod Santiago, July 14, 2015 (p.m.); Direct Examination of Milton Walker, July 17, 2015 (a.m.); Direct Examination of Colleen Aitken, July 9, 2015 (p.m.)

[22] Centre of Hope, Firth Residence: Direct Examination of Nate McCready, June 30, 2015 (p.m.); Direct Examination of Jesse Wegenast, June 29, 2015 (p.m.); Direct Examination and Cross-examination of Shane Calder, June 30, 2015 (a.m.); Direct Examination of Colleen Aitken, July 9, 2015 (p.m.)

[23] Centre of Hope: Direct Examination of Nate McCready, June 30, 2015 (p.m.)

[24] Direct Examination of Nick Zurowski, July 6, 2015 (p.m.); Direct Examination of Doug Smith, July 14, 2015 (p.m. but before lunch)

[25] Direct Examination of Nate McCready, June 30, 2015 (p.m.)

[26] Direct Examination of Milton Walker, July 17, 2015 (a.m.)

[27] Read-ins, Examination for Discovery of Jake Rudolph, May 15, 2015, Questions 522-25

[28] Read-ins, Tab 4, Question 380 and Tab 7, Questions 52-53 and Examination for Discovery of George Murray, February 6, 2015, Questions 434-38; Read-ins, Examination for Discovery of Jake Rudolph, May 15, 2015, Questions 380-81 and Tab 4, Request 380-81

[29] Read-ins, Tab 7, Question 56 and Tab 9, Question 69; Read-ins, Tab 9, Question 70; Read-ins, Tab 9, Question 72; Read-ins, Tab 9, Question 71 and Read-ins, Examination for Discovery of Jake Rudolph, May 15, 2015, Question 494

18. City workers sometimes report homeless camps to bylaw enforcement and sometimes to police including when homeless people are observed sleeping in parks in the daytime.[30]

PART II. ARGUMENT

A. Section 7

19. In order to demonstrate a violation of s. 7 of the *Charter*, the claimants must first show that the law interferes with, or deprives them of, their life, liberty or security of the person. Once they have established that s. 7 is engaged, they must then show that the deprivation in question is not in accordance with the principles of fundamental justice.[31]

20. The BCCLA endorses the submissions of the *Charter* Claimants with respect to the impugned laws impact on s. 7 rights. In addition, the BCCLA submits that the impugned laws engage s. 7 in the following ways.

21. In addition to the deprivations of life and security of the person explained by the *Charter* Claimants, the impugned laws deprive homeless individuals of their right to liberty. The liberty right is engaged by state interference with the liberty to choose to protect oneself from the elements and the liberty to choose to protect oneself by being in a group encampment. The liberty right is further engaged by the effect of the impugned laws excluding the homeless from both the benefits and the responsibilities of citizenship.

22. Further, these deprivations offend the principles of fundamental justice that laws not be overbroad or grossly disproportionate. The evaluation of these principles should be informed by the notion that public spaces are held in trust by government for the use of its citizens. The homeless, like all citizens, have a right to access and use those spaces, subject only to reasonable regulation. Regulation of public spaces is not reasonable where it prevents the homeless, who have no access to private spaces, from engaging in necessary life sustaining activities.

23. Third, the deprivations of liberty do not accord with the principle of fundamental justice that laws reasonably accommodate the disabled.

---

[30] Cross-examination of Paul Priebe, July 17, 2015 (a.m.); Exhibits 54 and 44 at Tab 5
[31] *Carter v. Canada (Attorney General)*, 2015 SCC 5 [*Carter*], para. 55, JBoA Vol. 3, Tab 19

24. While the City is under no positive obligation to provide adequate housing for its citizens, having failed to do so, it is constitutionally limited in its ability to interfere with those citizens' choices about how to care for themselves.

i) Liberty

25. As is explained below, this case engages Abbotsford's Homeless liberty interests with respect to: (a) shelter; (b) gathering; and (c) democratic participation.

Shelter and Gathering

26. While liberty and security of the person are distinct interests, in cases such as this one, it is of assistance to consider them together.[32] Underlying both the right to security of the person and the right to liberty is a concern for the protection of individual autonomy and dignity.[33]

27. Liberty protects "the right to make fundamental personal choices free from state interference."[34] Security of the person encompasses, among other things, "a notion of personal autonomy involving... control over one's bodily integrity free from state interference" and it is engaged by state interference with an individual's physical or psychological integrity, including any state action that causes physical or serious psychological suffering.[35]

28. As the *Charter* Claimants have argued, the impugned laws interfere with their bodily integrity and cause physical or serious psychological suffering. The BCCLA submits that the laws have these serious impacts on security of the person by interfering with the *Charter* Claimants' ability to make fundamentally important personal decisions – in other words, by depriving them of their liberty interests.

---

[32] *Carter*, para. 64, JBoA Vol. 3, Tab 19

[33] *Carter*, para. 64, JBoA Vol. 3, Tab 19; see also *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 [*Children's Aid Society*], para. 121, Tab A; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 [*Blencoe*], para. 49, JBoA Vol. 1, Tab 10; *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844 [*Godbout*], para. 66, JBoA Vol. 5, Tab 33; *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35 [*Chaoulli*], JBoA Vol. 3, Tab 20

[34] *Carter*, para. 64, JBoA Vol. 3, Tab 19; see also *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 163-66, JBoA Vol. 10, Tab 68; *Children's Aid Society*, para. 121, Tab A; *Blencoe*, para. 49, JBoA Vol. 1, Tab 10; *Godbout*, para. 66, JBoA Vol. 5, Tab 33; *Chaoulli*, JBoA Vol. 3, Tab 20

[35] *Carter*, para. 64, JBoA Vol. 3, Tab 19

29. The first aspect of fundamentally important personal decision-making at issue in this case relates to shelter. As the BC Court of Appeal held in *Victoria (City) v. Adams*:

> [107] Clearly, the claimant in *Parker* did not "choose" to have epilepsy. This, however, did not prevent his decision with respect to treatment from being protected under s. 7. Similarly, the fact that homelessness is not a choice does not mean that a homeless person's decision to provide him or herself with some form of shelter is not protected under s. 7. Treatment is as much a "necessary response" to illness as sheltering oneself is to the state of being homeless. The fact that a claimant has not chosen their underlying situation does not mean that a decision taken in response to it is not protected by the s. 7 liberty interest.
>
> ….
>
> [109] We also reject the alternative argument that the choice to erect shelter to protect oneself from the elements is not a decision of "fundamental personal importance". In *Morgentaler*, Wilson J. held that the liberty interest is grounded in fundamental notions of human dignity, personal autonomy, and privacy (at 164-166). We agree with the trial judge that prohibiting the homeless from taking simple measures to protect themselves through the creation or utilization of rudimentary forms of overhead protection, in circumstances where there is no practicable shelter alternative, is a significant interference with their dignity and independence. The choice to shelter oneself in this context is properly included in the right to liberty under s. 7.[36]

30. It is the impugned laws that prevent the homeless from erecting temporary shelters in public spaces and it is the impugned laws that accordingly subject Abbotsford's Homeless to decreased dignity and independence and increased physical and psychological harm.

31. "Practicability" of shelter is an adjective describing the ability to put something into practice feasibly.[37] As explained above, the evidence makes clear that Abbotsford's Homeless face a variety of often insurmountable obstacles to accessing practicable shelter alternatives including but not limited to availability of beds, the individual's demographic profile, the individuals sobriety, cost, pets and time of day.[38]

---

[36] *Victoria (City) v. Adams*, 2009 BCCA 563], JBoA Vol. 13, Tab 89, paras. 107 and 109 [emphasis added]

[37] Shorter Oxford English Dictionary, 3d ed, *sub verbo* "practicable"

[38] See e.g. Summary Report, p. 79, Plaintiff's Opening, Tab B2; Expert Report of Marie-Eve Sylvestre ("Sylvestre"), p. 29; Direct and cross-examination of Rod Santiago, July 14, 2015 (p.m.); Direct Examination of Jesse Wegenast, June 29, 2015 (p.m.); Direct Examination of Milton Walker, July 17, 2015 (a.m.); Direct Examination of Nate McCready, June 30, (p.m.)

32. The s. 7 liberty interest is thus engaged by the impugned laws that interfere with the fundamentally important personal decision to shelter oneself in circumstances where there is no practicable alternative shelter.

33. Like the use of shelter for protection, evidence supports that a number of Abbotsford's Homeless gather together for protection and companionship and that there are risks associated with living alone homeless.[39] An individual's decision to provide him or herself with some form of protection in numbers by congregating together in a public place is protected under s. 7.

34. Prohibiting the homeless from taking simple steps to protect themselves through association, in circumstances where there is no practicable alternative, is a significant interference with their dignity and independence.

35. These liberty interests are closely associated with the security of the person interests raised by the *Charter* Claimants.

Democratic Participation

36. A third aspect of the liberty interest engaged in this case arises because in standing between the individual and his or her ability to take shelter or protect his or herself by gathering or associating, the state also weakens or destroys the ability of affected persons to participate in democratic society.

37. In *Children's Aid Society*, La Forest J. relates the concept of "liberty" to the role of individuals in a democratic society:

> At bottom, I think "liberty" means the ordinary liberty of free men and women in a democratic society to engage in those activities that are inherent to the individual.[40]

---

[39] See e.g. Direct Examination of Norm Caldwell, July 8, 2015 (p.m.); Direct Examination of Colleen Aitken, July 9, 2015 (p.m.); Expert Report of Dr. Nicholas Blomley, dated March 2015 ("Blomley Report"), p. 12; Sylvestre, p. 29; Direct Examination of Nick Zurowski, July 6, 2015 (p.m.); Direct Examination of Dennis Steel, June 30, 2015 (a.m.)

[40] *Children's Aid Society*, para. 121, Tab A

38. The concept of democracy adds a different, yet equally important, dimension to the impacts experienced by individuals who are denied the ability to shelter themselves or gather in groups on public land for protection.

39. The concept of democracy is closely connected with inclusion in public life. As the Supreme Court of Canada explained in *Reference re Secession of Quebec*:

> 63 Democracy is commonly understood as being a political system of majority rule. It is essential to be clear what this means. The evolution of our democratic tradition can be traced back to the *Magna Carta* (1215) and before, through the long struggle for Parliamentary supremacy which culminated in the English *Bill of Rights* of 1689, the emergence of representative political institutions in the colonial era, the development of responsible government in the 19th century, and eventually, the achievement of Confederation itself in 1867. "[T]he Canadian tradition", the majority of this Court held in *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, at p. 186, is "one of evolutionary democracy moving in uneven steps toward the goal of universal suffrage and more effective representation". Since Confederation, efforts to extend the franchise to those unjustly excluded from participation in our political system - such as women, minorities, and aboriginal peoples - have continued, with some success, to the present day.[41]

40. This principle is reflected throughout the *Charter* which includes a guarantee of numerous rights essential to meaningful participation, for example the right to vote (s. 3), the right of free expression and association (ss. 2(b) and (d)), and the right of free assembly (s. 2(c)). While each of these is a free standing right in the *Charter* with its own content and meaning, each is also inextricably linked and to some extent dependent upon the overarching rights guaranteed by s. 7. Put another way, an individual cannot truly avail themselves of the democratic and participatory rights guaranteed by the *Charter* unless he or she possesses "life, liberty and security of the person" within the meaning of s. 7. In this sense, s. 7 is a lynchpin for the attainment of this "evolutionary democracy" envisioned by the Court because its protection is essential to the exercise of other fundamental rights and freedoms.[42]

---

[41] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, JBoA Vol. 11, Tab 72, para. 63 [emphasis added]

[42] Blomley Report, pp. 18-19

41. Thus it should be a matter of constitutional concern under s. 7 that groups historically excluded from public participation – such as aboriginal people[43] and people with disabilities[44] – continue to be overrepresented in the homeless population. Rather than extending the franchise to these individuals, laws like the impugned laws render it increasingly difficult for Abbotsford's Homeless to participate in democratic society. As Dr. Blomley has opined:

> Critics contend that even where the goal of displacing homeless people is not explicitly stated, the relocation of the homeless population is, in fact, a central object of the civility laws... 'Increasingly, it seems, civility is to be achieved through the exclusion of the incivilities; the public realm is to be secured for the respectable through the exclusion of unrespectable; and the city becomes increasingly hostile to difference'.... Regardless of their intent, these laws undoubtedly have the effect of criminalizing common behaviors – such as drinking, sleeping and urinating – when those behaviors occur in public spaces, and therefore have a disproportionate impact on the homeless...[45]

42. As Dr. Blomley notes:

> The particular predicament of the homeless person is that he or she is compelled to engage in activities that are otherwise conducted in private space, and to do so with limited security and financial resources. The literature notes several 'survival strategies' that the homeless engage in, it being noted that it is precisely such strategies that expose stress people to regulation. Survival may thus become criminalized. Research also reveals the powerful effects and experience of stigmatization that such regulation often generates. Moreover, an array of negative secondary effects for both regulators and those regulated are also noted. An already marginalized population may find itself further excluded, with the possibilities of social reintegration harder to attain. Health and wellbeing may suffer, as homeless people are pushed further into the shadows, both metaphorically and spatially.[46]

43. The effect of the impugned laws is to prevent homeless people from making decisions to protect their physical and psychological integrity and to otherwise alleviate some of the harm resulting from the homeless condition. Already vulnerable people are thus further marginalized. In effect, they are treated as non-citizens unworthy of even the dignity of self-preservation and pushed further to the margins of the community.

---

[43] Expert Report of Dr. Yale D. Belanger, dated April 12, 2015, p. 2
[44] see *fn* 14-15
[45] Blomley Report, p. 9 [emphasis added]
[46] Blomley Report, p. 5 [emphasis added]; see also pp. 14, 21-26, 33

44. Additionally, interference with the ability to have a homeless encampment may itself be an interference with an opportunity for democratic participation. Encampments of homeless people may provide important support for homeless people supportive of evolutionary democracy. As Dr. Blomley explains:

> [W]hile such spaces are often far from ideal, they nevertheless may provide important forms of support for homeless people… Homeless settlements may be 'wrested out of waste spaces and discarded materials in the precarious margins of the urban landscape', yet 'by an alchemy born out of necessity' these 'outlaw spaces' have been turned into 'places of habituation, respite, and even hope'... Loftus-Farren (2011) argues that encampments can 'provide residents with community, potential for self-governance, security, stability, and increased self-reliance and autonomy.[47]

45. Thus, in addition to the life and security of the person interests the liberty interests of the *Charter* Claimants is engaged and infringed by the impugned laws.

ii) Principles of Fundamental Justice

Overbreadth and Gross Disproportionality

46. The deprivation is not in accordance with the principle of fundamental justice that laws not be overbroad and that laws not be grossly disproportionate in their effects.

47. Overbreadth deals with a law that is so broad in scope that it includes *some* conduct that bears no relation to its purpose. Overbreadth addresses the situation where there is no rational connection between the purposes of the law and *some*, but not all, of its impacts.[48]

48. The jurisprudence requires the object of the impugned law to be defined precisely for the purposes of s. 7.[49] The object of the law should be confined to measures directly targeted by it.[50] The BCCLA endorses the articulation of the laws' objectives set out by the *Charter* Claimants.

49. These objectives and the measures taken in aid of their attainment must be considered in the context in which they arise – that is regulation public space. The preamble of the *Parks*

---

[47] Blomley Report, p. 12 (citations omitted), see also p. 14
[48] *Canada (Attorney General) v. Bedford*, 2013 SCC 72 [*Bedford*], para. 112, JBoA Vol. 2, Tab 14
[49] *Carter*, para. 78, JBoA Vol. 3, Tab 19
[50] *Carter*, para. 78, JBoA Vol. 3, Tab 19; *Bedford*, para. 132, JBoA Vol. 2, Tab 14

Bylaw, states: "the City holds certain property for the pleasure, recreation, or community uses of the public."

50. Abbotsford's Homeless are part of the "public" and part of the "community." The law recognizes the right of citizens to access and use public spaces. This right stems not from s. 7 of the *Charter*, but rather is inherent in the status of citizenship. The right of access to public spaces has been most often recognized in the context of freedom of expression cases in which citizens claim access to such spaces in order to engage in some form of public expression. However, the right is not restricted to that context. The right of access is rooted in the inherent nature of public property as being held by the government for the benefit of all of its citizens and is not limited by the purpose for which access is sought.

51. As Lamer C.J. said in *Committee for the Commonwealth of Canada v. Canada:*

> In my opinion, this analytical approach [which equates government ownership of land with private ownership] contains inherent dangers…. The very nature of the relationship existing between citizens and the elected government provides that the latter will own places for the citizens' benefit and use, unlike a private owner who benefits personally from the places he owns. The "quasi-fiduciary" nature of the government's right of ownership was indeed clearly set out by the U.S. Supreme Court in *Hague v. Committee for Industrial Organization, supra,* at pp. 515-16:
>
> > 'Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."[51]

52. As such, these spaces serve an important function. As Dr. Blomley has explained:

> Public space is not simply a conduit for trouble free transportation, or a tidy and "Disneyfied" aesthetic realm. As a spatial manifestation of the all-important public sphere, it can and should serve valuable civic functions… To cleanse it of difference, and to render it devoid of alternative forms of expression is to empty of it of its most crucial purposes, it is argued. At least two are worthy of note. Firstly, as argued below (p 23), public space is a site in which issues of pressing collective concern may enter into public view. Secondly, encounters with people, ideas and behaviors that are not familiar are valuable to the extent that they teach

[51] *Committee for the Commonwealth of Canada v. Canada,* [1991] 1 S.C.R. 139 [*Committee for the Commonwealth of Canada*] at 154, JBoA Vol. 4, Tab 25

> us to acknowledge and respect the diversity that is fundamental to membership in the polity. For both of these valuable ends to be realized, however, it is essential that we accommodate differences – of people, behavior and ideas – in public space.… Without the complicated, subtle interactions that characterise everyday interactions, as Jane Jacobs (1961) argued, urban life becomes dead. It is in public spaces where this becomes possible. Such public spaces, by definition, must be to some extent open and accessible to all. Pseudo-public spaces, where difference is policed, and the marginal excluded, threaten this crucial and valuable function, it is argued…[52]

53. While public property is held in trust for the public, the right to access and use public spaces is not absolute. Governments may manage and regulate public spaces, provided that such regulation is reasonable and accords with constitutional requirements.[53] Reasonableness must be assessed in light of the public purpose described.

54. In the case at bar, the City has chosen to regulate public spaces by enacting presumptive blanket prohibitions against *inter alia*, gathering or doing any other thing likely to cause a public gathering or attract public attention, the erection of any shelter or construction whatever and the occupation of any park between one hour after sunset on one day and one hour before sunrise on the following day. It has done so, it says, "to regulate the use of parks and other public places within its jurisdiction."[54]

55. The City's approach *might* be justifiable if every person had access to private space; however, that is not the case. In Abbotsford, there are a significant number of homeless people who have no access to private spaces and who are compelled to sleep in public spaces.[55] Professor Sylvester opined:

> Sheltered homeless people rely on public spaces, from the moment the shelter requires them to leave in the morning, to the first line-up in front of the community health clinic, food bank, or soup kitchen, to the employment centre or a community organization to get social support, and then back to the final line-up in front of the shelter in the evening. Public spaces are even more important in the case of unsheltered homeless people. Their lack of or limited access to emergency shelters as well as their general lack of private spaces means that they rely on public spaces for basically everything, from meeting their most basic and

---

[52] Blomley Report, pp. 17-18
[53] *Committee for the Commonwealth of Canada*, at 165-66, JBoA Vol. 4, Tab 25
[54] Amended Notice of Civil Claim in Action No. 156820, filed June 9, 2014, para. 2
[55] Blomley Report, p. 19

> fundamental needs such as sleeping, eating, urinating and protecting oneself against physical or material threats, to using survival strategies such as panhandling, squeegeeing, and other street-level activities such as consuming alcohol or drugs and being involved in the sex trade. By definition, homeless people are always on the move and always exposed – hence the French word "itinerant." They are highly dependent on being able to use such spaces, yet at the same time are vulnerable to discriminatory treatment in them.[56]

56. Nor does the evidence support that the presence of Abbotsford's Homeless excludes others from using public spaces including for overnight camping.[57]

57. Nor can the impugned laws serve any purpose in their application to Abbotsford's Homeless. This is because the effect of displacing homeless people simply provides "temporary relief to some areas of town while putting pressure on others". Thus, "[t]he use of bylaw enforcement is generally inefficient to end citywide conflicts related to homeless people's occupation of public spaces." Because Abbotsford's Homeless have no private place to go, it only serves to "displace the problem to other public spaces or neighbourhoods within the city."[58] Further, to the extent the City hopes to deter public gathering or overnight camping, the tactics cannot have this effect with respect to the homeless because the impugned laws "refer to homeless people[s]' most fundamental needs or strategies of survival, such as sleeping or ensuring their own life and security by erecting a temporary abode or camp to protect themselves from the elements." These laws "will only render them more vulnerable."[59]

58. For related reasons, the laws are grossly disproportionate in their effects. The gross disproportionality analysis is concerned with circumstances where "the law's effects on the life, liberty or security of the person are so grossly disproportionate to its purposes that they cannot rationally be supported."[60]

---

[56] Sylvestre Report, p. 20
[57] Direct Examination of Carla Soltis, July 16, 2015 (a.m.); Direct Examination of Heidi Enns, July 15, 2015 (a.m.)
[58] Sylvestre Report, p. 28
[59] Sylvestre Report, p. 29
[60] *Bedford*, para. 120, JBoA Vol. 2, Tab 14

59. In this case, the purpose of providing temporary relief to one area of town by dispersing homeless people to another raises important life and security issues for the persons dispersed. As Dr. Sylvester explains:

> Displacements and dispersals can mean at least two things in this context: first, homeless people are forced to move away from basic social services offered to them, generally located in specific areas of town where they tend to gather, and street workers need to go in new and disperse locations in order to find them and provide basic social services; secondly, displacements lead them to more isolated and remote locations where they may find themselves more exposed to violence, have limited access to community support and resources, face more health problems, and have less access to police protection should they require so.[61]

60. These impacts are grossly disproportionate to the city's objective.

Reasonable Accommodation of the Disabled

61. The City stated in its opening that there was a fundamental distinction between prohibition and regulation. They City says the impugned laws are regulation because use and camping permits are available from the City.[62] The fee to book a park during the day time is $15 per hour. Insurance must also be obtained.[63] There is a $10 charge per tent or vehicle each night for overnight camping. Camping permit requests are not always approved.[64]

62. To book a City park, you must have a valid credit card. In reviewing applications to book park areas, the following is considered: the availability of the requested location; whether it is an appropriate space; dates; and the number of people. If the individual requesting a booking does not have a set timeframe then they cannot make a booking. If there is no information about a specific park, then it is impossible to make a booking.[65]

63. The City's witness, Ms. Soltis, could not point to an appropriate facility for a homeless person to camp in a park after making a booking. She testified that damage to the park is a consideration when determining whether to approve a booking. She was not aware of any

---

[61] Sylvestre Report, p. 29
[62] Direct Examination of Carla Soltis, July 16, 2015 (a.m.)
[63] Direct Examination of Carla Soltis, July 16, 2015 (a.m.); Exhibit 47, Tab 60
[64] Direct Examination of Carla Soltis, July 16, 2015 (a.m.); Exhibit 41, Tab 6
[65] Cross-examination of Carla Soltis, July 16, 2015 (a.m.)

request to book a City park by a homeless person. The park at the intersection of Riverside and South Fraser Way cannot be booked.[66]

64. The BCCLA submits that from a pragmatic perspective, there is sufficient evidence for this Court to draw the inference that the impugned laws constitute a prohibition against, *inter alia,* gathering or doing any other thing likely to cause a public gathering or attract public attention, the erection of any shelter or construction whatever, and the occupation of any park between one hour after sunset on one day and one hour before sunrise on the following day.

65. In the alternative, if this Court is inclined to give weight to the availability of applying for a camping permit from the City for the Abbotsford Homeless as a pragmatic form of regulation, the BCCLA submits that the process is nevertheless insufficient as it offends the principle of fundamental justice that requires laws to reasonably accommodate persons with disabilities. The over-representation of the mentally ill and addicted amongst Abbotsford's Homeless and the impact this disability has on their ability to access housing or otherwise comply with the City's requirements for making a request to use public space, brings this principle to the fore.

66. The principles of fundamental justice are to be found in the basic tenets of the legal system.[67] The principles of fundamental justice are not closed. Courts consider three criteria for the recognition of a principle of fundamental justice: (1) it is a legal principle; (2) there is sufficient consensus that it is "vital or fundamental to our societal notion of justice"; and (3) it is capable of being identified with precision and applied to provide predictable results.[68] The accommodation principle satisfies all three criteria.

67. It is a legal principle that persons with disabilities must be reasonably accommodated - i.e., accommodated to the point of undue hardship. The concept of reasonable accommodation

---

[66] Cross-examination of Carla Soltis, July 16, 2015 (a.m.)
[67] *Re B.C. Motor Vehicle Act,* [1985] 2 S.C.R. 486 [*Re B.C. Motor Vehicle Act*] at 503, JBoA Vol. 11, Tab 70
[68] *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General),* 2004 SCC 4 [*Canadian Foundation*], para. 8, JBoA Vol. 2, Tab 15

recognizes the right of persons with disabilities to the same access as those without disabilities, and imposes a duty on others to do whatever is reasonably possible to accommodate this right.[69]

68. A principle will be a legal principle when it can be found in domestic or international law.[70] The purpose of this requirement is to avoid bringing matters of pure policy within s. 7's scope.[71] The accommodation principle is entrenched in Canadian and international law.

69. In Canadian law, the principle finds expression in s. 15 of the *Charter* and in human rights legislation. The *Charter,* by way of s. 15, has given constitutional recognition to anti-discrimination principles. *Eldridge*[72] illustrates the existence of a duty on the part of the state, recognized under s. 15, to accommodate disabilities. In that case, hospitals were obliged to provide sign language interpreters to accommodate patients with hearing disabilities. Each province and Canada has enacted human rights legislation, in which the reasonable accommodation principle finds expression. Although the "undue hardship" standard may be expressed in these statutes in various terms, the courts have adopted "undue hardship" as a unifying standard by which to understand the myriad forms of statutory language that express the principle.[73] The concept of "reasonable accommodation" has been fleshed out in the jurisprudence. The "undue hardship" standard guides the application of the principle. The point of undue hardship is reached when reasonable means of accommodation are exhausted and only unreasonable or impracticable options for accommodation remain.[74]

70. International human rights instruments in addition to informing the substantive content of *Charter* rights, also inform the court's understanding of the principles of fundamental justice.[75]

---

[69] *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15 [*VIA Rail*], JBoA Vol. 4, Tab 26, para. 121

[70] *Canadian Foundation*, para. 9, JBoA Vol. 2, Tab 15; *R. v. D.B.*, 2008 SCC 25 [*D.B.*], paras. 47-60, JBoA Vol. 9, Tab 60

[71] *Canadian Foundation*, para. 8, JBoA Vol. 2, Tab 15

[72] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, JBoA Vol. 5, Tab 30

[73] see *VIA Rail,* paras. 127, 129, following *British Columbia (Superintendent* of *Motor Vehicles) v. British Columbia (Council of Human Rights),* [1999] 3 S.C.R. 868 (a B.C. human rights case), para. 21, JBoA Vol. 4, Tab 26

[74] *VIA Rail*, para. 130, JBoA Vol. 4, Tab 26

[75] *Re B.C. Motor Vehicle Act*, at 512-13, JBoA Vol. 11, Tab 70; *United States v. Burns*, 2001 SCC 7 [*Burns*], JBoA Vol. 12, Tab 82, para. 79; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, JBoA Vol. 12, Tab 78, para. 46, citing *Burns*, paras. 79-81

International law has echoed and affirmed the state's obligation to accommodate disabilities. For decades, international declarations and other instruments have reflected the accommodation principle.[76] Thus, in international law, as in Canadian law, the undue burden standard provides the benchmark by which states' obligation to accommodate will be measured.

71. Second, the accommodation principle is vital or fundamental to our societal notion of justice. The accommodation principle is constitutional (in s. 15), and quasi-constitutional (in human rights legislation).[77] The importance and special status of human rights principles in our legal system is such that where human rights legislation is in conflict with other legislation, the human rights legislation will prevail.[78] Moreover, as discussed above, international law corroborates the respect for the accommodation principle that our domestic law amply demonstrates.[79]

72. Third, the accommodation principle is clearly capable of being identified with precision and applied to provide predictable results. It has done so by frequent application in the human rights context.

73. A presumptive prohibition coupled with the application process at issue here is not reasonably accommodating.

74. Many of Abbotsford's Homeless are disabled insofar as they suffer from mental illness and addiction issues. On the question of barriers faced by the homeless population to accessing treatment, support services, shelter and housing, Dr. MacEwan stated that such severe psychiatric illness and substance abuse is detrimental not only for a person's physical health, but their cognitive function as well and appears to invite surroundings of a cyclical nature.[80]

---

[76] see the *Declaration on the Rights of Disabled Persons*, , Proclaimed by General Assembly resolution 3447(XXX) of 9 December 1975, Articles 2-3, 6 and 8], International Book of Authorities, Tab 1, and the *Standard Rules on the Equalization* of *Opportunities for Persons with Disabilities* (1993), Rules 14 and 15; *Convention on the Rights* of *Persons with Disabilities*, Article 5, International Book of Authorities, Tab 5

[77] *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, JBoA Vol. 12, Tab 81, para. 33

[78] *VIA Rail*, para. 115, JBoA Vol. 4, Tab 26

[79] see, similarly, *D.B.*, paras. 61-68, JBoA Vol. 9, Tab 60

[80] MacEwan Report, p. 3

75. Abuse of substances and stimulants as drugs of choice among this population is an overwhelmingly common occurrence begetting another common occurrence: agitation and extreme behavioural difficulties, which render the individual's ability to assess, understand and properly manage their need for health and mental health care an uphill battle. This results in difficulty finding housing:

> Often the person's behaviours as well as disorganization leads them to have to be housed in "low barrier" housing which by definition is a place which has no restrictions regarding the use of substances, is more tolerant of behaviours such as violence and is a much poorer physical setting. This is extremely common in the Downtown Eastside of Vancouver and was exactly the situation I observed in the homeless camps of the homeless people in Abbotsford.[81]

76. The interplay between addiction as a brain disease and homelessness was described by Dr. Sutherland. In short, addiction causes changes to the brain that result in addicted persons being unable to normally organize thoughts and make appropriate decisions. As a result, patients are unable to organize themselves and prioritize spending to do ordinary tasks like attend work, pay rent or make appointments.[82]

77. These same individuals for the same reasons, it is submitted, would have significant difficulty navigating the City's bureaucracy to apply for a permit each night to camp in public spaces. Fundamental justice requires laws that would deprive persons of their s. 7 interests by reason of their addiction or mental illness to provide some reasonable accommodation.

78. The impugned laws are unaccommodating. They set a blanket presumptive prohibition with no practical exceptions. This is the antithesis of accommodation. There would be no undue hardship in crafting an exemption for Abbotsford's Homeless. There is no evidence that the demand to camp in Abbotsford's parks increases as a result of homeless encampments. The impugned laws violate s. 7 of the *Charter*.

B. Conclusion

79. The BCCLA recognizes and respects the role of democratically elected governments in dealing with the myriad of social problems associated with homelessness. This case however is

---

[81] MacEwan Report, p. 4
[82] Sutherland Report, pp. 4-5; see e.g. Cross-examination of Norm Caldwell, July 8, 2015 (p.m.)

not about how best to allocate government resources. It is not a claim for positive rights nor is it an attempt to have the Court supplant the role of government. It is about a specific governmental action (the impugned laws) directed at Abbotsford's Homeless that has the effect of depriving Abbotsford's Homeless of the dignity to chose to protect themselves and thereby increasing psychological and physical harm. These are the principles that should inform the court's assessment of the impugned laws and augur in favour of striking those laws down.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: 31 Jul 2015

Signature of lawyer for Intervenor, British Columbia Civil Liberties Association
Alison M. Latimer

List of Authorities

Description

Cases

B.(R.) v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315

Blencoe v. British Columbia (Human Rights Commission), 2000 SCC 44

Canada (Attorney General) v. Bedford, 2013 SCC 72

Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), 2004 SCC 4

Carter v. Canada (Attorney General), 2015 SCC 5

Chaoulli v. Quebec (Attorney General), 2005 SCC 35

Committee for the Commonwealth of Canada v. Canada, [1991] 1 S.C.R. 139

Council of Canadians with Disabilities v. VIA Rail Canada Inc., 2007 SCC 15

Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624

Godbout v. Longueuil (City), [1997] 3 S.C.R. 844

R. v. D.B., 2008 SCC 25

R. v. Morgentaler, [1988] 1 S.C.R. 30

Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486

Reference re Secession of Quebec, [1998] 2 S.C.R. 217

Suresh v. Canada (Minister of Citizenship and Immigration), 2002 SCC 1

Tranchemontagne v. Ontario (Director, Disability Support Program), 2006 SCC 14

United States v. Burns, 2001 SCC 7

Victoria (City) v. Adams, 2009 BCCA 563

Statutes, Bylaws, and International Instruments

Canadian Charter of Rights and Freedoms, ss. 2(b)-(d), 3, 7, 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11

Description

Declaration on the Rights of Disabled Persons, Proclaimed by General Assembly resolution 3447(XXX) of 9 December 1975, Articles 2-3, 5-6 and 8

Good Neighbour Bylaw, 2003, Bylaw No. 1256-2003, ss. 2.7(d), 2.7(e) and Schedule A

Parks Bylaw 1996, Bylaw No. 160-96, ss. 2, 10, 14, 17

The Standard Rules on the Equalization of Opportunities for Persons with Disabilities, Adopted by the United Nations General Assembly, forty-eighth session, resolution 48/96, annex, of 20 December 1993, Rules 14 and 15

Street and Traffic Bylaw 2006, Bylaw No. 1536-2006, ss. 2.1(d), (h) and (j)