



VIA Email

February 12, 2024

Dear Mayor Wells and City Council

Re: Parks and Open Spaces Bylaw No. 3121

Ban on daytime sheltering contravenes life, liberty, and security of the person

The *Canadian Charter of Rights and Freedoms* (“*Charter*”) takes precedence over all other Canadian legislation. The Courts have repeatedly recognized the human right to shelter and held that people have the right to set up temporary shelter where there are insufficient alternatives.¹ These alternatives must be accessible to individual people. There are many reasons why available shelter might not be accessible to an individual person. For example, gender, family status, or disability needs. Alternative shelter must be responsive to the specific issues faced by individuals experiencing homelessness.² Therefore, “it is not just the number of available indoor sheltering spaces that frames the right but also whether those spaces are truly accessible to those sheltering in parks.”³

Politicians at all levels of government have acknowledged that Canada is suffering from a housing crisis. Disparate access to affordable housing has only worsened since the Covid-19 pandemic and the soaring cost of living. As a result of economic and political decisions beyond their control, people have been experiencing homelessness in record numbers across Canada. In Comox Valley, the unhoused population has doubled since 2020, ballooning to over 272 people in the region.⁴ More than half of the unhoused people counted cited their inability to afford rent as the reason they were sleeping rough.⁵ That number is only increasing.

¹ *Victoria (City) v. Adams*, 2009 BCCA 563 (CanLII), *Abbotsford (City) v Shantz*, 2015 BCSC 1909 (CanLII), *Prince George (City) v Stewart*, 2021 BCSC 2089 (CanLII), and *Bamberger v Vancouver (Board of Parks and Recreation)*, 2022 BCSC 49 (CanLII).

² *Bamberger v Vancouver (Board of Parks and Recreation)*, 2022 BCSC 49, online: <<https://canlii.ca/t/jlqf6>>, para 122 [*Bamberger*].

³ *Ibid.*, paras 194-195.

⁴ <https://vancouverisland.ctvnews.ca/comox-valley-homeless-population-doubles-since-2020-report-1.6599982#:~:text=New%20data%20shows%20a%20huge.They're%20not%20just%20numbers.>

⁵ *Ibid.*

Given the current housing crisis, until there is adequate and accessible shelter or accommodation for people experiencing homelessness, evicting people who set up temporary shelter, whether at night or during the day, violates their Section 7 right to life, liberty and security of the person. That violation is not justified under section 1 of the *Charter*.⁶

The enactment and enforcement of proposed Bylaw No. 3121 violates the *Charter* rights of residents sheltering in parks and open spaces because:

1. There is insufficient accessible shelter space in Courtenay to adequately house all the City's unhoused people.
2. Consequently, people experiencing homelessness must sleep outside in public spaces.
3. The harm resulting from being forced to take down their shelter and pack up their belongings every day only exacerbates the harm experienced from sleeping outside every night.
4. Unhoused people represent some of the most vulnerable and marginalized members of our society.
5. Due to the lack of adequate and accessible shelter, Bylaw No. 3121 impedes the ability of unhoused people to adequately shelter during the day.

In *Shantz*, the Court expressly recognized “there is a legitimate need for people to shelter and rest during the day.”⁷

In *Stewart*,⁸ the Court held that there was a need for daytime sheltering when there are insufficient daytime options.⁹ The trial judge held that temporary shelters during the day were permissible, given that there were insufficient alternatives provided by the City:

I am satisfied that the COVID-19 pandemic has resulted in the closure of normally accessible shelter spaces, and that in the result, scores of people have nowhere to shelter themselves except outdoors in either the daytime or the nighttime.¹⁰

[...] The City's application for a declaration that the respondents have contravened the *Zoning Bylaw* by using the encampments as campgrounds contrary to the permitted zoning is dismissed on the basis that absent other suitable housing and daytime facilities, the occupants of those encampments must be permitted to stay at the encampments.¹¹

Courtenay does not have a shelter let alone accessible places to shelter during the day. Where there is insufficient accessible shelter for people experiencing homelessness, a complete ban on daytime sheltering infringes their section 7 rights.

Furthermore, Bylaw No. 3121 does not reflect the ruling in *Bamberger* which acknowledged procedural rights of unhoused residents. The Court found that prior to the City attempting any

⁶ *Victoria (City) v. Adams*, 2009 BCCA 563 (CanLII), para 10 [*Adams*].

⁷ *Abbotsford (City) v Shantz*, 2015 BCSC 1909, online: <<https://canlii.ca/t/glps4>> [*Shantz*].

⁸ *Prince George (City) v Stewart*, 2021 BCSC 2089, online: <<https://canlii.ca/t/jjz14>>, [*Stewart*].

⁹ *Ibid.*

¹⁰ *Ibid.*, para 73.

¹¹ *Ibid.*, para 115.

eviction, residents must be given notice, the opportunity to be consulted and heard, and the decision must be transparent.

A complete ban on daytime sheltering is grossly disproportionate

Gross disproportionality ensures that “even where the impact on the s. 7 interest is connected to the purpose of the law, this impact cannot be so severe that it violates our fundamental norms.”¹² “State actions or legislative responses to a problem must be so extreme as to be disproportionate to any legitimate government interest. The focus is not on the impact of the measure on society or the public, but on its impact on the rights of the claimant.”¹³

Courtenay’s proposed Bylaw No. 3121 intends to regulate the use of parks and open spaces to ensure that they are accessible, safe, and enjoyable for all members of the public, and to preserve environmental and cultural areas. The section on temporary sheltering intends to “regulate the use of temporary sheltering within parks and open spaces to ensure that it is done in a safe and healthy manner.”¹⁴ Therefore, the thrust of the Bylaw is to ensure enjoyment, safety and well-being.

The complete ban on daytime sheltering subjects people experiencing homelessness to “decreased dignity and independence and increased physical and psychological harm.”¹⁵ Many unhoused people have disabilities which impede their ability to dismantle their shelter, pack up their belongings, and become mobile every day. Without adequate accessible daytime shelter, people experiencing homelessness have nowhere to go, have nowhere to store their belongings, and are forced to wander the City, negatively impacting their physical and mental well-being. In some cases, forced decampments and the lack of accessible shelter has led to serious bodily harm and even death.

In *Shantz*, the Court found that the constant movement of the unhoused “exacerbates their already vulnerable position, causes them impaired sleep, and serious psychological pain and stress, and creates a risk to their health.”¹⁶ The Court further held that constant displacement inhibits the ability of the service providers who endeavor to help unhoused people, to locate them and provide help.¹⁷ The Court concluded that the effect of denying the City’s unhoused people access to public spaces without permits and not permitting them to erect temporary shelters without permits was grossly disproportionate to any benefit the City might derive from furthering its objectives.¹⁸

We believe these findings are applicable to Bylaw No. 3121. Without accessible daytime shelter, the harm caused by the City’s daily displacement of people experiencing homelessness directly undermines the proposed Bylaw’s intention to ensure their safety and well-being.

¹² Ibid., para 192.

¹³ Ibid., para 204.

¹⁴ Courtenay’s proposed *Parks and Open Spaces Bylaw No. 3121*, section 7.1.

¹⁵ *Shantz*, para 188.

¹⁶ Ibid., para 219.

¹⁷ Ibid., para 209.

¹⁸ Ibid., 224.

A complete ban on daytime sheltering is not saved by s. 1 of the Charter

Given the current case law, Bylaw No. 3121 is not minimally impairing the section 7 rights of people experiencing homelessness in Courtenay. The deleterious effects of the Bylaw and its enforcement far outweigh its beneficial effects. The Bylaw does nothing to accommodate people experiencing homelessness, exacerbates physical and psychological health by constantly displacing them, and causes them to lose or damage items essential for their survival. Constant displacement fundamentally disrupts access to support services and undermines any stability established within the unhoused community.

Other Charter right violations

Many people experiencing homelessness have physical disabilities and other mental health conditions. For a variety of reasons, they cannot carry their belongings around all day. Furthermore, due to settler-occupation, land dispossession, and removal policies such as residential schools, it has been well established that Indigenous people are disproportionately represented in the homeless population. Therefore, the Bylaw also engages section 15 *Charter* protected equality rights.

The Court has recognized the negative impact continuous displacement has on the psychological well-being of people experiencing homelessness. The frequent encounters with enforcement officers, repeated street sweeps, evictions, and displacement, without anywhere else to go, are hugely traumatic events. Consequently, we believe this Bylaw also engages section 12 *Charter* rights against cruel and unusual treatment.

Do not adopt Bylaw No. 3121

We urge the City of Courtenay to not adopt the proposed *Parks and Open Spaces Bylaw No. 3121*, as it is susceptible to legal challenge, and violates the *Charter* of the City's most vulnerable and marginalized residents. Legal challenges to similar actions have been launched in British Columbia, Alberta, Ontario, and Quebec.

Courts across Canada have recognized the human right to shelter, the precarious position of the unhoused, and how state action, including decampments, threatens the life, liberty, and safety of people experiencing homelessness. Until unhoused people have access to adequate shelter, a ban on sheltering in parks and open spaces during the day is a direct violation of their section 7 *Charter* rights.

We urge the City of Courtenay to consider developing innovative solutions to the housing problem, in consultation with people with lived experience. People experiencing homelessness are in the best position to describe the specific challenges they face and identify whether a course of action is likely to make an effective change.

Additionally, the City should engage in meaningful consultation with Indigenous groups consistent with its obligations under the *UN Declaration of the Rights of Indigenous People*, and with

organizations providing frontline service and support for the unhoused community. This includes meeting with the grassroots groups and individuals that work with and are trusted by the unhoused community, not solely state-funded non-profit organizations.

Life is invaluable. Where life and dignity are on the line, care and compassion are paramount. The City has the opportunity to truly be leading edge in developing an innovative solution to a complex issue, rather than implementing a demonstrably ineffective model.

Sincerely,

A handwritten signature in black ink, appearing to read 'Latoya Farrell', written in a cursive style.

Latoya Farrell
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