

Mayor and Council
City of Victoria
1 Centennial Square
Victoria, B.C. V8W 1P6

Via Email

July 30, 2024

Dear Mayor and Council of the City of Victoria,

RE: Bylaw No. 24-038, Amendment to Parks Regulation Bylaw No. 07-059

It has come to our attention that Victoria City Council has recently voted in favour of banning sheltering in additional parks in the City of Victoria (the "Amendments"). The Amendments, which severely restrict options for outdoor sheltering by prohibiting sheltering in nearly all parks in the City of Victoria do not accord with either existing B.C. jurisprudence or the *Canadian Charter of Rights and Freedoms*.

Pivot Legal Society and the BC Civil Liberties Association have connected with advocates on the ground concerning the Amendments. Based on the feedback we received, it is clear that the Amendments will cause significant harm to Victoria's most marginalized community members, particularly given the City's lack of adequate housing and safe, legal, indoor places to use drugs. Also evident is the complete lack of engagement during Council's legislative process with people sheltering outside in your community.

The Amendments as drafted are unlikely to withstand constitutional scrutiny. Certainly, they do not center the safety and dignity of people sheltering outside in your community. Further, given the clarity of existing Charter jurisprudence and the clear facts of lack of available and accessible shelter in Victoria, the City also runs a risk of liability for Charter damages to all those impacted given the arguable bad faith and clear disregard for constitutional rights.

We urge you to refrain from bringing the Amendments into force and to engage in serious conversation with the people the Amendments will impact.

Background: Homelessness in Victoria and Across Canada

Homelessness has been on the rise across this country for decades. A recent study commissioned by the Office of the Federal Housing Advocate calculates that Canada has a

total shortage of 4.3 million homes affordable to very low- and low-income households.¹ Nearly every region has been hit, and Victoria is no exception.

The housing “crisis” is new, but land management has been used to control and contain unwanted peoples in this country since the moment of its inception. The laws and policies that allow this mounting crisis to continue are rooted in colonization – in the systems built to take land from Indigenous peoples and move it into profit-based systems.

The colonial legacy of this country is clearly reflected in who is currently homeless in your community. Indigenous people make up around 5.0% of Victoria’s total population, but a third of people who are homeless in the city.² Likewise, other oppressed communities are disproportionately represented among people sheltering outside. For example, from the most recent Point-in-Time count:

- 12% identified as 2SLGBTQI+
- 44% had diverse abilities including ADHD, learning disabilities, cognitive limitations, etc
- 45% had a physical disability
- 33% had been in foster care³

The Amendments are Likely Unconstitutional

Section 7 of the *Charter* protects the right to life, liberty, and security of the person. The caselaw interpreting this right has extended protection to unhoused people sheltering in public spaces. The weight of current caselaw makes clear that municipalities cannot evict encampment residents, even during the day, unless there is sufficient “truly accessible” shelter space.⁴ Not only is there insufficient shelter space for unhoused people in your community,⁵ it is clear that the available beds are not accessible to many who need them. Among other concerns, much of Victoria’s supposedly “low barrier” shelter in fact prohibits any substance use, does not allow for couples, lacks adequate storage for people’s belongings, and requires them to leave the shelter during the day.

Justice Valente recently set out the question of “accessibility” in a case regarding a tent city in Waterloo, Ontario:

¹ Office of the Federal Housing Advocate, “New Report Reveals that Canada is Missing 4.4M Affordable Homes for People in Housing Need” (2 November 2023), online: <https://www.housingchrc.ca/en/canada-is-missing-4-4-million-affordable-homes-for-people-in-housing-need>.

² Davis, Lauren et al, 2023 Greater Victoria Point-in-Time Homeless Count and Housing Needs Survey (Victoria: Capital Regional District, 2023), online (pdf): www.crd.bc.ca/docs/default-source/housing-pdf/housing-planning-and-programs/2023-point-in-time-count-report.pdf, at p. 6.

³ *Ibid* at pp. 6 and 21.

⁴ See for example, *Abbotsford (City) v. Shantz*, 2015 BCSC 1909; *Prince George (City) v. Stewart*, 2021 BCSC 2089; *Bamberger v. Vancouver (Board of Parks and Recreation)*, 2022 BCSC 49 [“Bamberger”]; *The Regional Municipality of Waterloo v. Persons Unknown and to be Ascertained*, 2023 ONSC 670 [“Waterloo”]; *Prince George (City) v. Johnny*, 2022 BCSC 282.

⁵ *Supra* note 2 at pp. 5-6. The report itself acknowledges this is a definite undercount at pp. 4, 16 and 19.

To be of any real value to the homeless population, the space must meet their diverse needs, or in other words, the spaces must be truly accessible. If the available spaces are impractical for homeless individuals, either because the shelters do not accommodate couples, are unable to provide required services, impose rules that cannot be followed due to addictions, or cannot accommodate mental or physical disability, they are not low barrier and accessible to the individuals they are meant to serve. Although not binding on me, I adopt and follow the decisions of the British Columbia Supreme Court in *Shantz, Prince George (City) v. Stewart*, 2021 BCSC 2089, 57 B.C.L.R. (6th) 118 [Stewart], and *Bamberger*, all of which hold that in order for the shelter spaces to be truly available, they must in fact be low barrier or accessible to accommodate the homeless population.⁶

While a City has some authority to restrict locations for sheltering outdoors, it is decidedly *not* a City's legal prerogative to remove nearly all spaces accessible to the local homeless population, as the City of Victoria has done. The list of prohibited sheltering spaces⁷ demonstrates that the City is moving to prohibit sheltering in nearly all parks in the district, and the few remaining parks are significantly further from the resources unhoused people rely upon to survive. In *Bamberger v. Vancouver (Board of Parks and Recreation)*, 2022 BCSC 49, the Supreme Court of B.C. stopped the Vancouver Park Board from shutting a third park to overnight sheltering near the Downtown Eastside of Vancouver.⁸ The Honourable Justice Kirchner cautioned that "Simply assuming that those sheltering in CRAB Park [tent city] can find "another place to go" fails to accord the necessary priority to their s. 7 rights and ensure minimal impairment of those rights."⁹

By prohibiting sheltering not only during daytime hours but also overnight in almost all public spaces, the City replicates circumstances that have given rise to previous *Charter* litigation: constant displacement of unhoused and inadequately housed people from all public space without adequate alternatives in place. These circumstances have been found to violate all three parts of Section 7: the right to life, the right to liberty, and the right to security of the person.¹⁰ Promises from the city to provide storage options (such as sea-cans in sheltering parks, or storing belongings for 14 days¹¹), moreover, do nothing for people who need their possessions every day to survive, just like every other person in Victoria. Temporary storage fails to solve the underlying issue of inadequate sheltering spaces in your community.

⁶ Waterloo, *supra* note 7 at para. 93.

⁷ City of Victoria, bylaw No 07-059, *Parks Regulation Bylaw* (14 December 2023), section 16A(2)(b), online: <https://www.victoria.ca/media/file/parks-regulation-bylaw-07-059>; See also City of Victoria, bylaw No 24-038, *Parks Regulation Bylaw, Amendment Bylaw (No 19)*, (27 June 2024), online: <https://pub-victoria.escribemeetings.com/filestream.ashx?DocumentId=98004>

⁸ *Bamberger*, *supra* note 7 at paras. 139-147.

⁹ *Ibid* at para. 146.

¹⁰ Waterloo, *supra* note 7 at paras. 95-107.

¹¹ City of Victoria, bylaw No 23-105, *Administration of Property in City Custody Bylaw* (7 December 2023), Section 5.

That B.C. faces a nearly 8-years-old toxic drug crisis exacerbates the harms posed by the Amendments, particularly as Victoria has inadequate safe, legal, indoor places to use drugs¹² with the community resisting the establishment of overdose prevention sites.¹³ Prohibiting sheltering in most public places, as the Amendments have, simultaneously limits the application of B.C.'s updated decriminalization policy, which protects people who possess drugs of up to 2.5 grams only when "sheltering in accordance with all applicable laws." The B.C. Supreme Court recently found that "When people are isolated and out of sight, they are at a much higher risk of dying from an unreversed overdose," and that a law banning most public drug consumption could not stand, given that it would create irreparable harm to people who use drugs.¹⁴ The Amendments similarly drive isolation among unhoused people, and could lead to increased drug poisoning fatalities.

The Gap Between "Charter Compliant" and Respecting Human Rights

To be clear, not violating the *Charter* is the lowest bar a government is required to meet. In the unlikely case a court held that the Amendments were consistent with *Charter* jurisprudence, this would not equate to a finding that they respect human rights or even constitute good policy.

Housing and human rights experts who have reviewed the state of encampments in this country have clearly stated that the actions of governments such as yours violate people's rights and endanger them.

In 2020 the UN Special Rapporteur on the right to adequate housing published *A National Protocol for Homeless Encampments in Canada*, a 40-page document that clearly sets out what it means to engage with encampment residents in a human rights-based way.¹⁵ Among the key directives:

- (1) Recognize residents of homeless encampments as rights holders.
- (2) Residents are entitled to meaningful participation in the design and implementation of policies, programs, and practices that affect them.
- (3) Prohibit forced evictions of homeless encampments.

In February of this year, after conducting extensive engagement with people sheltering outside, Canada's own Federal Housing Advocate issued a report echoing the findings of the UN Special Rapporteur, and making the harm of your bylaw amendments unflinchingly clear:

"Forced encampment evictions make people more unsafe and expose them to a greater risk of harm and violence. Evictions destabilize people, remove them from

¹² Roxanne Egan-Elliott, "In Victoria, services for drug users not keeping pace, advocates say" (4 June 2023) *Times Colonist*, online: <https://www.timescolonist.com/local-opioid-crisis-news/in-victoria-services-for-drug-users-not-keeping-pace-as-toxic-drug-crisis-deepens-7075136>.

¹³ Curtis Blandy, "Not in my backyard: Petition launched to stop safe-consumption site from opening in Victoria" (17 July 2024) *Victoria Buzz*, online: https://www.victoriabuzz.com/2024/07/not-in-my-backyard-petition-launched-to-stop-safe-consumption-site-from-opening-in-victoria/#google_vignette.

¹⁴ Harm Reduction Nurses Association v. British Columbia (Attorney General), 2023 BCSC 2290.

¹⁵ United Nations Special Rapporteur on the Right to Adequate Housing Leilani Farha and Dr. Kaitlin Schwan, "National Protocol on Homeless Encampments in Canada" (30 April 2020), online: <https://www.make-the-shift.org/wp-content/uploads/2020/04/A-National-Protocol-for-Homeless-Encampments-in-Canada.pdf>

their support systems, and cause them to lose the tools and equipment they need to survive.”¹⁶

Homelessness and drug poisoning deaths are on the rise across Canada, and your actions are consistent with the violence unhoused and inadequately housed people face in every region of this country.

The Amendments, and enforcement actions taken pursuant to them, leave the City open to legal action.

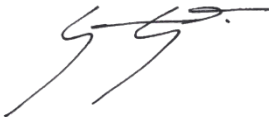
Sincerely,



Anna Cooper, Staff Lawyer
Pivot Legal Society



Caitlin Shane, Staff Lawyer
Pivot Legal Society



Ga Grant, Staff Litigation Counsel
BC Civil Liberties Association

¹⁶ The Office of the Federal Housing Advocate, 2024. Upholding dignity and human rights: the Federal Housing Advocate’s review of homeless encampments – Final report. Ottawa: The Office of the Federal Housing Advocate. Online at: <https://www.housingchrc.ca/en/publications/upholding-dignity-and-human-rights-federal-housing-advocates-review-homeless>