No. 05 4999
Victoria Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN

THE CORPORATION OF THE CITY OF VICTORIA

PLAINTIFF

AND

NATALIE ADAMS, YANN CHARTIER, AMBER OVERALL,
ALYMANDA WAWAI, CONRAD FLETCHER, SEBASTIAN MATTE,
SIMON RALPH, HEATHER TURNQUIST
AND DAVID ARTHUR JOHNSTON

DEFENDANTS

AND

THE ATTORNEY GENERAL OF BRITISH COLUMBIA

INTERVENOR

WRITTEN SUBMISSIONS OF THE INTERVENOR
THE ATTORNEY GENERAL OF BRITISH COLUMBIA

GUY McDANNOLD
BRUCE JORDAN
Staples McDannold Stewart
2nd Floor, 837 Burdett Avenue
Victoria, BC V8W 1B3

Counsel for the Plaintiff

IRENE K. FAULKNER
CATHERINE BOIES PARKER
Underhill, Faulkner, Boies Parker
100 – 1124 Fort Street
Victoria, BC V8V 3K8

Counsel for the Defendants

JONATHAN PENNER
VERONICA L. JACKSON
Ministry of Attorney General
100 Douglas Street
Victoria, BC, V8V 1X4

Counsel for the Intervenor
The Attorney General of
British Columbia

TABLE OF CONTENTS

I. SUMMARY OF ATTORNEY GENERAL'S POSITION

1. The Attorney General of British Columbia (the "AGBC") intervenes in this proceeding pursuant to s. 8 of the *Constitutional Question Act*, R.S.B.C. 1996, c. 68.

2. The AGBC says that the Defendants claim a right under s. 7 of the *Canadian Charter of Rights and Freedoms* that goes far beyond what that section comprehends. Specifically:

(a) The Bylaws that the Defendants seek to strike down do not deprive them of any right to life, liberty, or security of the person protected by s. 7 of the *Charter*; and

(b) Even if s. 7 is engaged, any deprivation is in accordance with the principles of fundamental justice.

3. The AGBC says that the solutions to the difficult and challenging circumstances faced by the homeless lie in the hands of the democratically elected legislative and executive arms of government, and not in the courts creating a constitutionally-entrenched "right". The courts are not equipped with the resources or the expertise to address the many challenging issues raised by the phenomenon of homelessness, and ought not to extend the reach of the Canadian constitution in an attempt to moderate the effects of homelessness in a manner that inevitably creates more problems than it can resolve.

II. FACTS

4. The AGBC adopts and relies on the Statement of Facts of the Defendant City of Victoria (the "City"). The AGBC says that the following additional facts are also relevant.

A. AGBC Involvement

5. The AGBC was served with a Notice of Constitutional Question by the Defendants on 20 August 2007. The Notice stated that the Defendants would be seeking to strike down certain unspecified City Bylaws as violating their rights under ss. 2(b), 7, 11(d), 12, and 15 of the *Canadian Charter of Rights and Freedoms* (the "Charter").

6. The AGBC filed a Notice of Appearance on 12 September 2007.

7. That same day, the Defendants advised that they would be restricting their constitutional argument to ss. 7, 12, and 15 of the Charter.

8. The AGBC filed a Notice of Motion on 3 October 2007 seeking to strike the Defendants' constitutional claim on various grounds.

9. On 12 October 2007, in response to a request by the AGBC, the Defendants particularized the provisions of the Bylaws that they sought to strike down.

10. The AGBC drew to the attention of the Defendants that the *Parks Regulation Bylaw* that they sought to impugn had been repealed and replaced in July of 2007. The hearing of the AGBC's application was adjourned to permit the City and the Defendants to reach a common understanding of what is and is not permitted by the current Bylaws.

11. The parties were unable to reach a satisfactory resolution, and the AGBC's application proceeded to a hearing on 3-4 March 2008. On 5 March Madam Justice Gray struck the Defendants' prayer for constitutional relief in the Statement of Defence, but granted them leave to file a Counterclaim. She declined to strike the Defendants' constitutional claim under Rule 19(24) as failing to disclose a reasonable claim.

B. Amended Claim and Particulars

12. The Defendants filed an Amended Statement of Defence and Counterclaim on 31 March 2008. An Amended Notice of Constitutional Question was served on the AGBC on 7 April 2008, stipulating that the Defendants seek the following relief:

a) A declaration that the Bylaws are contrary to ss. 7, 12 and 15 of the *Canadian Charter of Rights and Freedoms* 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 s. 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 places in the City of Victoria without contravening the Bylaws.

13. On 10 April 2008 the City and the AGBC requested particulars of the Defendants' claim. The Defendants responded by letter dated 21 April 2008.

Affidavit of Shirley Connell, sworn 9 June 2008.

14. The City and the AGBC sought particulars of the Defendants' claim that the Bylaws prevent homeless persons from engaging in "life sustaining activities". The Defendants' response was that the term embraced "… preparing, sharing and eating food, recovering from illness, bathing, and disposing of bodily waste",

"sleeping", "providing shelter for themselves", "protecting their belongings", providing "some measure of privacy and security for themselves" and providing "support and protection for each other".

Affidavit of Shirley Connell #1, sworn 9 June 2008, Ex. "C".

14. The City and the AGBC also asked what the Defendants meant when they referred in their pleadings to "public space". The Defendants' response was: "Public places administered or regulated by the City of Victoria".

Affidavit of Shirley Connell, Ex. "C".

15. Finally, the City and the AGBC also asked whether the right that the Defendants were seeking to establish under s. 7 includes the right to live in a group community in public. The Defendants said:

> Absent the bylaws, the Defendants could camp together in public parks. One of the effects of the bylaws is to stop people from sleeping together in tents in the park. This prevents them from being able to provide each other with security and protection.

Affidavit of Shirley Connell, Ex. "C".

16. In that same letter, the Defendants stated: "We can now advise you that the Defendants will not be relying on s. 15 of the *Charter*."

Affidavit of Shirley Connell, Ex. "C".

III. GENERAL CONSTITUTIONAL PRINCIPLES

A. The Presumption of Constitutionality

17. There is a presumption that laws passed by the Legislature or by Parliament are valid and within their respective spheres of constitutional jurisdiction. Any question as to the validity of legislation must be approached on the assumption that it was validly enacted.

> *Nova Scotia (Board of Censors) v. McNeil*, [1978] 2 S.C.R. 662 at 687-688;
>
> *Siemens v. Manitoba (Attorney General),* [2003] 1 S.C.R. 6 at para. 33.

B. Onus of Proof

18. Any party alleging that duly-enacted legislation is unconstitutional bears the onus of proving that unconstitutionality.

> *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110, 1987 CarswellMan 176 at para. 24.

C. Interpretation that Favours Validity to be Preferred

19. Where a challenged law is open to more than one interpretation, the interpretation that favours the validity of the legislation is to be preferred.

> *Siemens v. Manitoba, supra*, at para. 33;
>
> *Metropolitan Stores*, *supra*, at para. 25;
>
> P.W. Hogg, *Constitutional Law of Canada*, 5th ed. Supp., looseleaf (Toronto: Thomson Carswell, 2007) at 15-23.

D. Judicial Restraint

20. Courts ought not to decide constitutional issues unnecessarily.

> *Skapinker v. Law Society of Upper Canada*, [1984] 1 S.C.R. 357;
>
> Phillips v. Nova Scotia (Commissioner, Public Inquiries Act), [1995] 2 S.C.R. 97, 1995 CarswellNS 12 at paras. 9-11.

21. Courts ought not to entertain constitutional arguments that are merely hypothetical, or in the absence of a proper factual foundation.

> *MacKay v. Manitoba*, [1989] 2 S.C.R. 357;
>
> *Danson v Ontario (Attorney General)*, [1990] 2 S.C.R. 1086.

1. Relevance of Bylaws

22. Several of the bylaws that the Defendants seek to strike down are not relevant to their claim.

23. The Defendants claim that the Bylaws prevent homeless people from erecting shelter to protect themselves from the elements when sleeping outside. The only sections of the *Parks Regulation Bylaw* that could plausibly be said to be relevant to such a claim are sections 13(1)(a)(i), 14(1)(c), 14(1)(d), and 16(1).

24. The AGBC will therefore focus in these submissions solely on the *relevant* bylaws, and will not comment on the application of the Defendants' arguments to the other sections of the Bylaws. The Court ought not to address constitutional challenges to Bylaws that are not implicated by the factual situation before it.

2. Claim Disconnected from Underlying Litigation

25. 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. This action actually arose under very different circumstances, however: 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.

26. The claim being made by the Defendants is a *contingent* one. Although the Defendants seem to seek a declaration that the Bylaws are bad on their face, in fact they argue *only* that the Bylaws are unconstitutional in circumstances where certain persons affected by them have “no meaningful option” or “no meaningful alternative” but to breach the Bylaws.

27. 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. Only in such a proceeding would the Court have the necessary factual matrix before it.

IV. SECTION 7

28. The Defendants allege that provisions of the City's by-laws violate their rights under s.7 of the *Charter*.

29. The Defendants' argument on s.7 can be summarized as follows:

a) A restriction on erecting a shelter in a "public space" constitutes state interference with the ability to control and preserve their bodily integrity and violates the Defendants' **security of the person** (Defendants' written submissions para 129);

b) A restriction on the right to choose where to establish their home and to create shelter for themselves is a violation of the Defendants' **liberty** (Defendants written submissions paras 143 and 144);

c) A restriction on erecting a shelter in a public space constitutes state interference with the Defendants' **life** interest (Defendants' submissions para 146);

d) These deprivations are not in accordance with the principles of fundamental justice because the By-laws are **arbitrary and overbroad** (Defendants' written submissions para 149), and because a person can not be punished for or prohibited from engaging in conduct where they have **"no real choice"** but to engage in that conduct (Defendants' written submissions para 163).

30. The AGBC submits that the By-laws do not deprive the Defendants of life, liberty or security of the person as protected under s.7, and that even if s.7 were engaged, any deprivation would be in accordance with the principles of fundamental justice.

31. Because of the nature of s. 7, and what it does and what it does not protect, it is respectfully submitted that the Defendants' claim under s. 7 ought to be dismissed.

A. The Nature of Section 7

32. It is helpful at the outset to examine the nature of the protection afforded by s. 7.

33. Section 7 of the *Charter* provides as follows:

> 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.

34. Section 7 contains only *one* right, and that right only exists "insofar as the claimant is deprived of that right in a manner that is contrary to the principles of fundamental justice." The *right* is the right not to be deprived. In the words of Bastarache J. (in dissent, but not on this point), "Section 7 does not grant a right to security of the person, full stop."

> *Gosselin v. Québec (Procureur général),* [2004] 4 S.C.R. 429, at para. 209;
>
> Hogg, *supra*, at 47-3.

35. Section 7 is one of several *Charter* rights bundled together under the heading of "Legal Rights". These rights, found in sections 7 through 14, have traditionally been interpreted as arising in the context of judicial or administrative proceedings.

36. While not necessarily limited to purely criminal or penal matters, s. 7 has been interpreted as being concerned with restrictions on liberty and security of

the person that occur as a result of an individual's interaction with the justice system and its administration, i.e. some state action.

> *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Canada),* [1990] 1 S.C.R. 1123, 1990 CarswellMan 206 at paras. 60-70;
>
> *Gosselin, supra,* at para. 210;
>
> *Blencoe v. British Columbia (Human Rights Commission),* [2000] 2 S.C.R. 307, 2000 CarswellBC 1860 at paras. 45-46;
>
> *New Brunswick (Minister of Health & Community Services) v. G. (J.),* [1999] 3 S.C.R. 46, 1999 CarswellNB 305 at paras. 58, 65.

37. In those exceptional circumstances where s. 7 has been found to be implicated outside of the criminal law context, it has only been where state action has directly infringed a claimant's life, liberty, or security of the person.

> At the very least, a s. 7 claim must arise as a result of determinative **state action** that **in and of itself** deprives the claimant of the right to life, liberty or security of the person. [emphasis added]
>
> *Gosselin*, *supra*, at para 213.

38. The nature of the protection enshrined in s.7 embraces the concept that persons

> …should, in general, be free from the constraints of the state …
>
> *Gosselin, supra,* at para. 206;
>
> … [or from] state interference with bodily integrity and serious state-imposed psychological stress.
>
> *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 56.

39. 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 their right is *caused* by the state, and that "but for" the state's action, they 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.

40. The Amended Statement of Defence sets out the various causes of the Defendants' homelessness. The causes are diverse, but by the Defendants' own admission they do not include the Bylaws. As such, the condition in which the Defendants find themselves is not the result of state action.

> The reasons individuals are homeless in Victoria vary. Male participants in the 2005 Cool Aid count identified the following: getting evicted, ineligibility for income assistance, addiction, conflict with families and financial difficulties as the reason they were without shelter. 33% 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 campers.
>
> Written Submissions of the Defendants, para 51. See also paras 52-76.

41. The situation in this case is akin to that in *Gosselin,* where the Supreme Court of Canada made the following comments about the threshold issue of causation:

> In this case, the threat to the appellant's right to security of the person was brought about by the vagaries of a weak economy, not by the legislature's decision not to accord her more financial assistance …. [I]n order for s. 7 to be engaged, the threat to the person's right itself must emanate from the state.
>
> *Gosselin, supra*, at paras. 217 – 218.

42. This was also the case in *Brown v. British Columbia (Minister of Health),* a *Charter* claim relating to the government's decision to place AZT on the Pharmacare plan. Mr. Justice Coultas rejected the plaintiffs' s. 7 claim and in doing so made the following comments.

> The plaintiffs suggest that the funding policy is a deprivation under s.7. But this is not a case where the life, liberty or security of the person is directly infringed by the law. The deprivation lies in the fact that they are infected with a debilitating and incurable disease.

Brown v. British Columbia (Minister of Health), [1990] B.C.J. No. 151 (S.C.) at para 138.

See also *Lacey v. British Columbia*, [1999] B.C.J. No. 3168 (S.C.) at paras 1-7 .

43. In any event, 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.

Dykhuizen v. Saanich (District), 1989 CarswellBC 733, 63 D.L.R. (4th) 211 at para. 23 (C.A.)

Community Charter, S.B.C. 2003, c. 26, ss. 8(1), 29.

B. The Nature of the Defendants' Claim

44. The Defendants claim that s. 7 provides them a right to "engage in 'life-sustaining activities' in 'public space'".

a) They define the term as embracing "… preparing, sharing and eating food, recovering from illness, bathing, and disposing of bodily waste", "sleeping", "providing shelter for themselves", "protecting their belongings", providing "some measure of privacy and security for themselves" and providing "support and protection for each other".

b) They define "public space" as "places administered or regulated by the City of Victoria".

Amended Statement of Defence, paras 23 and 26; Particulars provided on 21 April 2008.

45. Regardless of how the Defendants "frame" or "label" their claim, it remains rooted in the notion that there is an obligation on government, in this case the City of Victoria, to provide a positive benefit under s. 7.

46. The Defendants have framed their claim as a contingent one, which is triggered *when* and *to the extent that* government has failed to provide other viable alternatives. The claim is therefore properly characterized as a claim to a right to adequate alternatives to sleeping in public spaces. As Stewart J. stated, in his Reasons granting the City an interim injunction in October 2005:

> 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.
>
> *Victoria (City) v. Doe* (26 October 2005), Victoria No. 05-4999 (B.C.S.C.) at para. 13.

47. The similarities between this case and *Brown* are again helpful in undertaking the analysis in this case.

> While the plaintiffs do not agree, I find that their claim under s.7 rests on economic deprivation … The reasoning is apt, for the plaintiffs are seeking a "benefit" which may enhance life, liberty or security of the person, which s.7 cannot provide.
>
> *Brown v. British Columbia (Minister of Health), supra,* at para 139 and 146.

48. In *Gosselin*, the Supreme Court of Canada examined whether section 7 contained a state obligation to provide a certain level of subsistence income. The majority held:

> 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.
>
> *Gosselin, supra*, at para. 81.
>
> See also: *Chaoulli v. Québec (Procureur général),* [2005] 1 S.C.R. 791, 2005 CarswellQue 3276 at para 104;
>
> *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657, 2004 CarswellBC 2675 at paras. 28, 41;
>
> *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703, 2000 CarswellNat 760 at para. 61;
>
> *Nova Scotia (Attorney General) v. Walsh,* [2002] 4 S.C.R. 325, 2002 CarswellNS 511 at para. 55;
>
> *Hodge v. Canada (Minister of Human Resources Development),* [2004] 3 S.C.R. 357, 2004 CarswellNat 3695 at para. 16.

49. Thus, s.7 only contains a “protective” right, as distinct from a “positive” right. The idea that s.7 entitles individuals to level of positive economic support by the state has been repeatedly rejected by the Supreme Court of Canada.

50. In rejecting a positive obligation aspect to s. 7, the courts have repeatedly affirmed that it is “…the legislature [that] is in the best position to make the allocative choices necessary to implement a policy of social assistance”.

> *Gosselin, supra*, at para 141.

51. It is respectfully submitted that this is also the case with the development of a government response to homelessness. None of the parties dispute that homelessness is a complex issue. People are homeless for a variety of reasons and for varying periods of time. Government response must consider not only factors relating to allocation of resources, but also policy related choices about how to respond in a manner that decreases the incidence of homelessness. These are tasks for which the court is ill-suited. More will be said about this further in the argument.

52. Although the Defendants rely heavily on the Supreme Court of Canada decision in *Chaoulli*, there is at least one fundamental distinction between that decision and the facts of this case. The plaintiffs in *Chaoulli* asked the Court to strike down a law that limited their ability to use their *own* resources in the manner they deemed best in order to safeguard their health. The Defendants in this case, on the other hand, are asking this Court to strike down a law that limits their ability to use *public* property for their own personal purposes.

C. Property Rights Not Protected

53. The Defendants are claiming that s. 7 gives them the right to camp on public property. That this makes their claim one about "property rights" cannot be disputed.

54. Section 7 of the *Charter* does not, however, protect property rights.

> Section 7 protects "life, liberty and security of the person". The omission of property from s. 7 was a striking and deliberate departure from the constitutional texts that provided the models for s. 7. The due process clauses in the 5th and 14th amendments of the Constitution of the United States protect "life, liberty or property". And the due process clause under s. 1(a) of the *Canadian Bill of Rights* protects "life, liberty, security of the person and enjoyment of property".
>
> The omission of property rights from s. 7 greatly reduces its scope. It means that s. 7 affords no guarantee of compensation or even of a fair procedure for the taking of property by government. It means that s. 7 affords no guarantee of fair treatment by courts, tribunals or officials with power over the purely economic interests of individuals or corporations. It also requires, as we have noticed in the earlier discussions of "liberty" and "security of the person", that those terms be interpreted as excluding economic liberty and economic security; otherwise, property, having been shut out of the front door, would enter by the back.
>
> Hogg, *supra*, at 47-17 to 47-18.

55. *Charter* jurisprudence is replete with cases confirming that s.7 does not include any measure of protection for property rights.

> The Applicants say that the amending zoning by-laws are bad in that they infringe "… the right to life, liberty and security of the person …" because they limit a person's right of choice or decisions to live where he wishes. The simple answer is that the evolution of modern urban society does not permit a person who may be inspired by the ideals of the pioneer, the frontiersman or Jean Jacques Rousseau to live where he wants … Further and the total answer to this submission is that s. 7 does not protect property rights as such.

> *Alcoholism Foundation of Manitoba v. Winnipeg (City),* [1988] M.J. No. 431 (Q.B.) at paras. 79-82; s. 7 finding affirmed [1990] M.J. No. 212 (C.A.) at para. 39; leave to appeal to Supreme Court of Canada refused 78 Man. R. (2d) 88n;
>
> *Re Marshall Estate*, 2008 NSSC 93, at para 26;
>
> *IBM Canada Ltd. v. R.*, 2001 FCT 1175 at para 51; affirmed 2002 FCA 420 at para 3.

D. Effect of International Obligations

56. Although the Defendants attempt to expand the nature of the scope of s.7's protection to include economic and property rights through reliance on "international obligations", international documents to which Canada is a party do not assist the Defendants in the circumstances of this case.

57. 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.

> *Canadian Bar Association v. British Columbia,* 2006 BCSC 2193 at paras. 120-121; affirmed 2008 BCCA 92;
>
> *Aerlinte Eireann Teoranta v. Canada*, [1987] 3 F.C. 383, at paras. 49-52;
>
> *Canada (Attorney General) v. Ontario (Attorney General),* [1937] 1 W.W.R. 200 (P.C.) at para 13;

A.U.P.E. v. R. (1980), 120 D.L.R. (3d) 590 at para 95 (Alta. Q.B.)

Hogg, *supra*, at 36-39.

58. Treaties and other international agreements may be referred to as an "interpretive aid," but only where the legislation in question is ambiguous. There is no ambiguity in the By-laws. Camping is prohibited.

National Corn Growers Association v. Canada (Canadian Import Tribunal), [1990] 2 S.C.R. 1324, at paras. 42-44.

E. Nature of Deprivation That Must be Proven

59. The evidence before the Court is that the City's interpretation and application of the Bylaws is such that sleeping *simpliciter* in public spaces is not prohibited, nor is covering oneself with a non-structured shelter.

60. The Defendants claim that their rights under s. 7 are infringed if they are not permitted to erect tents, string up tarps, or make use of cardboard box-like shelters in public spaces.

61. Under these circumstances, the Defendants bear the onus of proving that the deprivation of their life, liberty, or security of the person occurs as a result of the "gap" between what the Bylaws permit and what the Defendants say satisfies their s. 7 rights. In concrete terms, the Defendants must establish, on the basis of admissible evidence, that their life, liberty, or security of the person is jeopardized by the prohibition on erecting these types of structures.

F. Principles of Fundamental Justice

62. Even if the Defendants are able to persuade this Honourable Court that the Bylaws constitute a deprivation of life, liberty or security of the person, s. 7 contemplates that a deprivation of these rights is constitutionally permissible. It

is only if the deprivation is effected in a manner that is not in accordance with the principles of fundamental justice that a claim under s. 7 may succeed.

> 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.

1. Recognized Principles

63. What then are the principles of fundamental justice? They have been described as “the basic tenets of our legal system”.

> *Re British Columbia Motor Vehicle Act*, [1985] 2 S.C.R. 486.

64. The Supreme Court of Canada 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”;

c) The rule must be capable of being “identified with sufficient precision to yield a manageable standard”.

> Hogg, *supra*, at 47-27;
>
> *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571, 2003 CarswellBC 3133 at paras. 112-13.

65. Over time, several principles of fundamental justice have been identified, including abuse of process, judicial impartiality and judicial independence, arbitrariness, vagueness, overbreadth, and involuntariness (which embraces the concepts of strict liability, automatism, duress and intoxication).

2. Principles Alleged by the Defendants

66. In their Amended Statement of Defence (incorporated by reference into their counter-claim) and their most recent Notice of Constitutional Question (dated 7 April 2008) the Defendants assert that the Bylaws are contrary to principles of fundamental justice which they describe as follows:

a) Arbitrariness;

b) The principle that no-one should be subject to sanction for engaging in activities when there is no realistic opportunity to avoid these activities;

c) No-one should be subject to sanction for engaging in activities which are necessary to sustain an individual's safety and well-being.

Amended Statement of Defence, para 27;

Notice of Constitutional Question, para 2

67. Of those, only arbitrariness has been recognized as a principle of fundamental justice.

68. In their written submissions, on the other hand, the Defendants state that the Bylaws are contrary to the principles of fundamental justice of:

a) Arbitrariness;

b) Overbreadth; and

c) "Moral involuntariness".

69. While the language used by the Defendants leaves the AGBC uncertain about precisely which "principles of fundamental justice" are being relied upon, it is assumed that the Defendants are intending to argue arbitrariness, overbreadth, and involuntariness.

a) Arbitrariness

70. The principle of arbitrariness is aimed at avoiding laws which do not serve the purpose for which they were enacted. A deprivation of a right is arbitrary if it bears no relation to or is inconsistent with the state interest that lies behind the legislation.

Chaoulli, *supra*, at para. 130.

71. The By-laws are aimed at maintaining the environmental, recreational and social benefits of urban parks, and they are effective at doing so. This is not disputed.

Affidavit of Lyle Rumpel #1, sworn 13 May 2008;
Affidavit of Fred Hook #1, sworn 16 November 2007;
Affidavit of Gary Darrah #1, sworn 19 November 2007;
Affidavit of Al Cunningham #1, sworn 29 June 2007;
Affidavit of Al Cunningham #2, sworn 16 November 2007;
Affidavit of James Simpson #1, sworn 19 October 2005;
Affidavit of Gordon Smith #1, sworn 19 October 2005.

72. The By-laws apply to all individuals. No group or individual is singled out.

73. In those circumstances it cannot be said that the By-laws are arbitrary, and any claim to the contrary should be rejected.

b) Overbreadth

74. A law may be found to be overbroad if it goes further than necessary to accomplish its objective. Overbreadth was first recognized as a principle of fundamental justice in *R. v. Heywood*.

> *R. v. Heywood*, [1994] 3 S.C.R. 761, 1994 CarswellBC 592 at paras. 49-56.

75. Since *Heywood*, the doctrine has been subject to academic criticism.

> It is hard to disagree with the basic premise of Cory J.'s opinion in *Heywood*, which is that a law that restricts liberty "for no reason" (to use Cory's phrase) offends the principles of fundamental justice. But the doctrine of overbreadth, as applied by the Court, raises serious practical and theoretical difficulties, and confers an exceedingly discretionary power of review on the Court. The doctrine requires that the terms of a law be no broader than is necessary to accomplish the purpose of the law. But the purpose of the law is a judicial construct, which can be defined widely or narrowly as the reviewing court sees fit.
>
> Hogg, *supra*, at 47-53.

76. The criticism seems to have been "heard" by the Court, as numerous overbreadth challenges that followed in the wake of *Heywood* have been dismissed.

> *Ontario v. Canadian Pacific*, [1995] 2 S.C.R. 1031, 1995 CarswellOnt 968;
>
> *R. v. Clay*, [2003] 3 S.C.R. 735, 2003 CarswellOnt 5179;
>
> *Canadian Foundation for Children, Youth and the Law v. Canada*, [2004] 1 S.C.R. 76, 2004 CarswellOnt 252.

77. The objectives of the By-laws would not be served by allowing individuals, alone or collectively, to camp in the City's parks.

78. 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.

R. v. Clay, *supra*;

R. v. Demers, [2004] 2 S.C.R. 489, 2004 CarswellQue 1547.

79. Where various interpretations of a law are possible, the interpretation which favours validity of the law, and avoids overbreadth, is to be preferred.

Ontario v. Canadian Pacific, *supra*.

c) "Moral Involuntariness"

80. "Moral involuntariness" is not a recognized principle of fundamental justice. Indeed, to the contrary, the Supreme Court of Canada has cautioned against using such intangible concepts as "morality" to ground what must be a consensus based identifiable and manageable legal standard.

> Principles of fundamental justice must not, however, be so broad as to be no more than vague generalizations about what our society considers to be ethical or moral.
>
> *Rodriguez v. British Columbia (Attorney General),* [1993] 3 S.C.R. 519, 1993 CarswellBC 228 at para. 26.

81. Voluntariness, without the moral element, has been recognized as a principle of fundamental justice, in the criminal context.

> This Court has stated on many occasions that it is a fundamental principle of criminal law that only voluntary actions will attract findings of guilt … In *R. v. Théroux*, [1993] 2 S.C.R. 5 (S.C.C.), McLachlin J. classified voluntariness as the mental element of the *actus reus* of a crime (p. 17). In *Daviault*, Cory J. also recognized that voluntariness may be linked to the *actus reus* (p. 102) … In *Parks*, *supra*, La Forest J. classified automatism as a sub-set of the voluntariness requirement, which he too recognized as part of the *actus reus* component of criminal responsibility (p. 896) … The law presumes that people act voluntarily. Accordingly, since a defence of automatism amounts to a claim that one's actions were not voluntary, the accused must rebut the presumption of voluntariness. An evidentiary burden is thereby imposed on the accused … The law presumes that people act voluntarily in order to avoid placing the onerous burden of proving voluntariness beyond a reasonable doubt on the Crown. Like

> extreme drunkenness akin to automatism, genuine cases of automatism will be extremely rare. However, because automatism is easily feigned and all knowledge of its occurrence rests with the accused, putting a legal burden on the accused to prove involuntariness on a balance of probabilities is necessary to further the objective behind the presumption of voluntariness. In contrast, saddling the Crown with the legal burden of proving voluntariness beyond a reasonable doubt actually defeats the purpose of the presumption of voluntariness. Thus, requiring that an accused bear the legal burden of proving involuntariness on a balance of probabilities is justified under s. 1. There is therefore no violation of the Constitution.
>
> *R v. Stone*, [1999] 2 S.C.R. 290, 1999 CarswellBC 1064 at paras. 169-180.
>
> See also *R. v. Ruzic*, [2001] 1 S.C.R. 687, 2001 CarswellOnt 1238 (duress);
>
> *R. v. Daviault*, [1994] 3 S.C.R. 63, 1994 CarswellQue 10 (extreme intoxication).

82. In the regulatory context, the principle has been given effect through the jurisprudence surrounding absolute, strict and *mens rea* liability offences.

83. Where a true criminal offence carries the possibility of imprisonment, there must be some element of fault.

84. If the offence in question is a regulatory one, as is the case here, an individual's actions will attract consequences unless the individual can establish due diligence.

85. Whereas a true criminal offence addresses inherently wrongful conduct, a regulatory offence does not imply moral blameworthiness and attracts less social stigma.

86. Based on the City's interpretation, a prosecution for violating the By-laws for sleeping *simpliciter* is unlikely to arise. However, if a prosecution were

commenced, that is the context that is the more appropriate forum and mechanism to consider the individual circumstances of the affected individual(s).

> *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, 1991 CarswellOnt 117;
>
> *Reference re s. 94(2) of Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486, 1985 CarswellBC 398.

87. It should be noted that, save for s.73(1) of the Streets and Traffic By-law, all of the challenged provisions are “ticketing offences”. Under the *Community Charter*, an individual does not face imprisonment if convicted.

> *Community Charter*, S.B.C. 2003, C.26, S.260, 264(1) and 265
>
> Ticket By-law, 06-006, s.2, and Schedule A

88. Even if a breach of the Bylaws were considered an absolute liability offence, which it is submitted it is not, the *Offence Act* makes clear that imprisonment for such a conviction is not permitted.

> *Offence Act*, R.S.B.C. 1996, c. 338, s. 6.

89. The doctrine of voluntariness does not serve to exempt individuals from laws of general application.

> *Rodriguez*, *supra*, at para. 182.

90. The discussion of these issues emphasizes the inappropriateness of the context and forum in which the Defendants are advancing this claim.

91. The evidence indicates that the By-laws are not interpreted or applied in a manner that punishes truly involuntary conduct, such as sleeping. This is a recognition that, at some stage, falling asleep becomes an involuntary activity. This is same recognition that led some American courts (not all American courts did) to strike down municipal laws that prohibited sleeping *simpliciter.*

92. As in the criminal context, it is the individual who has the knowledge and information to establish involuntariness or, in the civil context “due diligence”. In the context of a prosecution for a breach of the By-laws, such a defence would be available if capable of proof.

93. For all of the foregoing reasons, it is submitted that the Defendants’ claim under s. 7 must fail.

V. SECTION 12

94. The Defendants have pleaded a breach of s. 12 of the *Charter* in their Counterclaim and Notice of Constitutional Question, although the only reference to it in their Written Submissions is in passing, at para. 175:

> While U.S. courts have found that punishing these involuntary acts is contrary to the prohibition on cruel and unusual punishment, we submit that it is more consistent with the Canadian jurisprudence to address the issue under s. 7. We have, however, pled a violation of s. 12 in the alternative.

95. It thus becomes necessary to address s. 12. That section provides:

> Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

96. In order to understand why s. 12 is not implicated by the facts in this case, it is necessary to be clear what exactly it is that the Defendants are claiming. They do not impugn the *punishment* to which they may become subject if they contravene one of the Bylaws; rather, they impugn the Bylaws *themselves*, and say that the *prohibition* that the Bylaws effect constitutes a breach of their s. 12 rights.

97. This interpretation of s. 12 simply cannot be sustained.

98. There are several elements which are necessary for section 12 rights to be triggered. First and foremost, there must be a “punishment” or “treatment” by the state. No such punishment or treatment is perpetrated by the mere existence of the Bylaws.

99. The Bylaws’ prohibitions do not constitute either a “punishment” or a “treatment” for the purposes of s. 12.

> *Mussani v. College of Physicians and Surgeons of Ontario*, 2004 CarswellOnt 5433, 248 D.L.R. (4th) 632 at paras. 95-96 (C.A.).

100. "Treatment" is defined as:

> Conduct, behaviour; action or behaviour towards a person, etc.; usage. (Const. *of* the person, etc. who is the object of the action.)
>
> *Oxford English Dictionary Online*, second ed., 1989.

101. Clearly, some *active conduct* is required; a mere prohibition is insufficient. In other words, s. 12 is intended to be a shield against state action against the individual. This interpretation is supported by the placement of the words "not to be subjected to" in front of "any cruel and unusual punishment or treatment" within the text of s. 12.

102. The requirement of state action as an element of s. 12 was affirmed by the Supreme Court of Canada in *Rodriguez*. Considering the statements of the Court in *Rodriguez*, it is clear that s. 12 provides protection against state *action*, not mere *prohibition*.

> However, it is my view that a mere prohibition by the state on certain action, without more, cannot constitute "treatment" under s. 12. By this I should not be taken as deciding that only positive state actions can be considered to be treatment under s. 12; there may well be situations in which a prohibition on certain types of actions may be "treatment" as was suggested by Dickson J. of the New Brunswick Court of Queen's Bench in *Carlston v. New Brunswick (Solicitor General)* (1989), 43 C.R.R. 105, who was prepared to consider whether a complete ban on smoking in prisons would be "treatment" under s. 12. The distinction between that case and all of those referred to above, and the situation in the present appeal, however, is that in the cited cases the individual is in some way within the special administrative control of the state. **In the present case, the appellant is simply subject to the edicts of the *Criminal Code*, as are all other individuals in society. The fact that, because of the personal situation in which she finds herself, a particular prohibition impacts upon her in a manner which causes her suffering does not subject her to "treatment" at the hands of the state. The starving person who is prohibited by threat of criminal sanction from "stealing a mouthful of bread" is likewise not subjected to**

> **"treatment" within the meaning of s. 12 by reason of the theft provisions of the Code, nor is the heroin addict who is prohibited from possessing heroin by the provisions of the *Narcotic Control Act,*** R.S.C., 1985, c. N-1. There must be some more active state process in operation, involving an exercise of state control over the individual, in order for the state action in question, whether it be positive action, inaction or prohibition, to constitute "treatment" under s. 12. In my view, to hold that the criminal prohibition in s. 241(b), without the appellant being in any way subject to the state administrative or justice system, falls within the bounds of s. 12 stretches the ordinary meaning of being "subjected to ... treatment" by the state. [emphasis added]
>
> *Rodriguez, supra*, at para. 182.

103. The Bylaws' mere prohibition of the erection of shelter, then, cannot constitute either "punishment" or "treatment", and the Defendants cannot rely on s. 12.

VI. SECTION 15(1)

104. In response to a Demand for Particulars, the Defendants advised that they were abandoning their s. 15 claim. As the Defendants are unable to establish either that they are treated differently, or that the basis of any differential treatment is based on an enumerated or analogous ground, their decision to resile from reliance on s. 15 was sound.

VII. SECTION 1

105. If the Court is nonetheless persuaded that the Defendants' rights are breached by the Bylaws, the issue then becomes whether the Bylaws are saved under s. 1 of the *Charter*, which reads:

> 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.

106. When a claimant has established that his or her rights under s. 7 have been denied, so that life, liberty, or security of the person has been denied otherwise than in accordance with the principles of fundamental justice, it will be difficult for the government to establish that the law under attack is justified under s. 1.

> *G. (J.)*, *supra* at para. 99.

107. This fact emphasizes the seriousness of a finding that a s. 7 right has been breached in the first place.

108. The test that the City must satisfy was set out in *Canada (Attorney General) v. JTI-Macdonald Corp*., where Chief Justice McLachlin said:

> The main issue with respect to the challenged provisions is whether the government has shown them to be "demonstrably justified in a free and democratic society" under s. 1 of the *Charter* …
>
> 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. … 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.]

Canada (Attorney General) v. JTI-Macdonald Corp., 2007 SCC 30 at paras. 35-36.

109. In determining the elements of the s. 1 analysis, the Court may rely on logic, reason, and, on occasion, social science evidence.

Harper v. Canada (Attorney General), 2004 SCC 33 at para. 78.

A. Importance of Purpose

110. The City has identified the Bylaws' purpose as being the maintenance of the viability of its urban parklands, and has provided voluminous evidence of the importance of this objective.

B. Proportionality

111. As set out above, once a sufficiently important purpose for the Bylaws has been identified, the City must establish proportionality between the purpose and the means used to attain it. This has three elements to it: a rational connection between the two; minimal impairment of the right being breached; and proportionality between the *effects* of the Bylaws and their *objective*.

1. Rational Connection

112. The City's evidence establishes a rational connection between the prohibition on taking up temporary abode and the purpose of maintaining its urban parks, particularly in light of the Defendants' expressed intention of congregating in those parks and erecting "tent cities" in the event that the Bylaws are struck down.

2. Minimal Impairment

113. The City's evidence also establishes that the prohibition on taking up temporary abode impairs only minimally the claimed right of homeless persons to shelter themselves from the elements when sleeping out of doors. Obviously it would be preferable for everyone to have the option of sleeping indoors whenever they so desire, but that is not what this case is about.

3. Proportionality

114. Finally, the fact that the Bylaws' objective or purpose is sufficiently important, and that it impairs only minimally the claimed right to shelter, means that the Bylaws' effects are proportionate to their objective.

Hogg, *supra,* at 38-43.

C. Conclusion on Section 1

115. Although the AGBC says that the Bylaws do not impair the rights of homeless persons under s. 7 of the *Charter*, if the Court finds that there is impairment, the AGBC says that the Bylaws are nevertheless saved under s. 1 of the *Charter*.

VIII. CONSEQUENCES OF RECOGNIZING CLAIMED RIGHT

116. The City has identified a number of consequences that would flow should this Court be persuaded to grant the Defendants the relief that they seek. It is worth exploring some of those consequences, and others.

117. If the homeless are entitled to construct shelter in public parks to protect themselves from the elements, what are the limits to that entitlement? Is it limited to cardboard boxes? Tarpaulins strung between trees? Tents? Wooden lean-tos? What principled basis is there for drawing the line at any particular one of these forms of shelter? Particularly in light of the Defendants' avowed desire and intention to live together in some form of communal housing on public land, what inherent limits are there on the size and nature of the shelter that they are entitled to erect? Would provincial housing standards set out in the Building Code apply? Fire safety legislation?

118. The Defendants' claim is based on a numerical difference between the number of homeless persons and the number of shelter beds available. If the relief they seek were granted, however, it is not clear how the right to erect shelter on public property could be limited or controlled. So long as the numerical difference in question existed, every homeless person would (apparently) have a constitutionally-protected right to erect shelter on public land, even if he or she had not made any attempt to find more appropriate shelter. Indeed, every person who *chose* to do so could claim the same right, whatever other alternatives they might have available to them.

119. While it is not disputed that many people find themselves without a shelter as a result of their personal, sometimes tragic, circumstances, it also cannot be disputed that this is not always the case. It is clear from the evidence that living in a "tent city" in a public park is an attractive, and even preferable, alternative to many homeless people in Victoria.

120. It is inevitable that, if this Court finds a right to erect shelter for oneself in public places, that shelter will become, for some, more or less permanent. The absence of the kinds of strictures associated with traditional shelters, or even apartments or subsidized housing, will make such “housing” especially attractive to those who find accommodating the rights of others particularly restrictive. If the Defendants are right that homeless persons have a constitutional right to erect shelter for themselves on public land when there is a numerical difference between the number of homeless persons and the number of shelter beds available, it seems reasonable to expect that the number of “homeless” persons will rise (independently of any other cause) as parks become, in effect, a “risk-free” housing option, creating a self-fulfilling process that makes it difficult or impossible for government at any level to address the real problem of homelessness.

121. This highlights the difficulty raised by any attempt at defining who is “homeless” for purposes of the Defendants’ argument. The evidence discloses no consensus on a definition such that a Court could determine with any confidence what precisely the number of “homeless” persons is at any given time. The various “counts” of homeless persons invariably suggest that the number is lower than the “true” number because persons who may have a bed for the night of the count are not “securely” housed. Are such persons to be included for purposes of calculating the numerical difference on which the Defendants’ argument hinges? Where is the City, or the Court, to draw the line?

122. Who will be liable if and when a homeless person, or an innocent third party, is injured or killed as a result of a homeless person’s erection of a temporary shelter that is unsafe? Who is responsible for the cost of repairs to property that is damaged or destroyed by a fire caused by the domestic arrangements in the shelter erected by a homeless person, or group of homeless persons? If the erection of such shelters, such “tent cities”, and such

communities truly is constitutionally protected, how can the City discharge its obligation to ensure its citizens a safe and secure environment in its parks?

123. One clear consequence of granting the Defendants the relief they seek will be the Court effectively appropriating public property and transferring control of it to a group of persons with no stake in protecting or preserving that property.[1] The Court has traditionally, and appropriately, been reluctant to engage in the process of determining where and how public funds, and public property, are best allocated. That kind of balancing is most appropriately done, under the Canadian constitution, by those whom citizens have elected to undertake it. Granting the relief sought by the Defendants would be a dramatic departure from that traditional deference, and one that ought not to be lightly undertaken.

[1] If any given public park, or portion thereof, becomes uninhabitable as the result of the actions of the persons occupying it, they will apparently have a constitutionally-protected right to up stakes and move to another park or public place.

IX. REMEDY

124. If this Court considers that the Defendants may have made out a breach of s. 7, an issue arises as to the appropriate remedy. There does not appear to be a remedy, however, that adequately acknowledges the important objective obtained through the Bylaws and limits the potential for harm that flows from the declaration sought by the Defendants.

A. Section 52

125. The Defendants have sought as remedy a declaration of unconstitutionality under s. 52 of the *Constitution Act, 1982*. Any remedy granted under that section, however, would be too broad and warrants being denied on that basis.

126. Section 52, the "supremacy clause" reads as follows:

> (1) 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 and effect.

127. By the Defendants' own admission, the Bylaws are not invalid *per se*. On their face they are subordinate legislation within the legislative competence of the City of Victoria. The Defendants allege only that, in the context of a certain factual matrix, the rights of certain individuals *could* be infringed.

128. The remedy sought by the Defendants, to strike down the Bylaws, is too broad and in effect throws the baby out with the bathwater.

B. Constitutional Exemption

129. 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.

130. 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.

131. If laws were struck down as being "unconstitutional" whenever any hypothetical unconstitutional effect could be demonstrated, virtually every statute would be susceptible to attack on that basis. Such an approach is unrealistic and unnecessary to ensure that rights and freedoms are fully protected.

> *Re Moore and the Queen*, 1984 CarswellOnt 1247, 6 DLR (4th) 294 at para. 21 (H.C.).

132. 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. It is a remedy that strikes a balance between striking down a law in its entirety because the law has or may have limited unconstitutional application, and upholding a law in its entirety even though it has unconstitutional applications for some.

> *Rodriguez v. British Columbia*, [1993] 3 S.C.R. 519;
>
> *R. v. Morrissey*, [2000] 2 S.C.R. 90 at para. 56;
>
> *R. v. Walcot*, 2001 BCCA 342.

133. Section 24 can be relied on to protect rights and freedoms by dealing with cases on a case by case basis where the effects of an otherwise valid law results in a denial of rights.

134. 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 that, given that individual's factual circumstances and the factual circumstances surrounding any alleged illegal activity, the Bylaw infringes that individual's constitutional rights, a constitutional exemption could be granted. A decision by this Court on this contingent and hypothetical claim could inappropriately fetter the discretion of another court.

135. The constitutional exemption is a familiar tool of American jurisprudence. It has been summarized as follows:

> Of course, almost every law … is potentially applicable to constitutionally protected acts; that danger is not ordinarily thought to invalidate the law as such but merely to invalidate its enforcement against protected activity. A plausible challenge to a law as void for overbreadth can be made only when (1) the protected activity is a significant part of the law's target, and (2) there exists no satisfactory way of severing the law's constitutional applications from its unconstitutional applications so as to exorcise the latter clearly in a single step from the law's reach.
>
> Tribe, L. *American Constitutional Law* (New York: The Foundation Press, 1978), at 710-711.

136. These principles make it clear that these proceedings are inapt to obtain the relief sought by the Defendants, and that the constitutional rights they seek to enforce can only be appropriately adjudicated on in the context of proceedings brought against identifiable individuals.

X. CONCLUSION

137. The AGBC says that, although the Defendants have described a real and substantial problem of homelessness, the constitutionally protected right that they claim simply does not fall within the words of the Canadian constitution. They have not demonstrated, and cannot demonstrate, that any right they have under either s. 7 or s. 12 of the *Canadian Charter of Rights and Freedoms* has been infringed. They are not entitled to the relief they seek.

138. The AGBC therefore asks that the Defendants' counterclaim be dismissed, without costs to any party.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: 11 June 2008.

Counsel for the Intervenor

_____
JONATHAN PENNER

_____
VERONICA L. JACKSON