No. 05 4999
Victoria Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

THE CORPORATION OF THE CITY OF VICTORIA

PLAINTIFF

AND:

JANE DOE, JOHN DOE and persons unknown and NATALIE ADAMS, YANN CHARTIER, AMBER OVERALL, ALYMANDA WAWAI, CONRAD FLETCHER, SEBASTIEN MATTE, SIMON RALPH, HEATHER TURNQUIST and DAVID ARTHUR JOHNSTON

DEFENDANTS

AND:

THE ATTORNEY GENERAL OF BRITISH COLUMBIA

INTERVENOR

WRITTEN SUBMISSIONS OF THE DEFENDANTS DEFENDANTS' APPLICATION PURSUANT TO RULE 18A

I. Introduction

1. This action arose out of a "tent city" which was set up at Cridge Park by a number of homeless people (the "campers"), including the named Defendants, in October of 2005. The bylaws relied on by the City of Victoria (the "Plaintiff" or the "City") to obtain an injunction against the campers prohibited, *inter alia*, "loitering or taking up temporary abode" in a public park. In their counterclaim, the Defendants have challenged the constitutionality of the bylaws relied on by the City. This is the hearing, by way of 18A application, of that counterclaim.

2. At the time the injunction was issued, there did not appear to be any dispute that the bylaws relied on by the City prohibited sleeping in all public spaces in Victoria. In resisting the original injunction, and in the numerous preliminary applications which have been brought on in this case, the Defendants have argued that a bylaw which constitutes a complete ban on sleeping in public places is unconstitutional, given that the number of homeless in Victoria far exceed the space available in shelters. Until last November, the Plaintiff never suggested that its bylaws did not prohibit sleeping in public places. However, at that time the City stated that the Parks bylaw, which had been amended in August 2007 such that it no longer prohibited "loitering", no longer prohibited sleeping in public parks. Until recently City maintained that the Parks bylaw continued to prohibit the use of tarps, but not blankets, by those forced to sleep outside because of lack of shelter. In an affidavit delivered in May, 2008, the City now says that its bylaws allow for the use of tarps, but that these cannot be in any way erected. It also says that its bylaws prohibit the use of any other form of "erected" shelter, such as a cardboard box.

3. The question before this court thus becomes - is it constitutionally permissible for the City to impose an absolute ban on the ability of homeless people to erect shelter for themselves, as long as they are able to wrap themselves in a blanket or soft waterproof material (if they can manage to obtain it)? Can the City, recognizing that hundreds of people are without shelter, prohibit people from erecting any form of overnight shelter for themselves even if it is as rudimentary and portable and easily removed as a piece of cardboard?

4. The Defendants' concern remains a simple one - that homeless people have the ability to get through the night in a manner that does not compromise their health. While the City appears to now concede that homeless people, who have nowhere else to go, must be allowed to sleep in public spaces, we say that if one is not allowed to take simple steps to protect against the elements, such an ability to sleep may prove illusory or, worse, downright dangerous. There is uncontradicted expert medical evidence before the Court that the prohibition against erecting shelter, as described in the City's materials, will have

clear, direct, substantial and potentially severe adverse effects on the health of homeless people. We submit that it thus constitutes an interference with the security of the person and liberty interests of homeless people protected by section 7 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*").

5. We further submit that the prohibition is not in accordance with the principles of fundamental justice in two respects. First, it is overbroad and, as a result, arbitrary. The City has cited a number of factors which it says constitute a rationale for the prohibition, including the importance of preventing harm to the parks, public health concerns, and the preservation of enjoyment of the parks by the public generally. However, it has not and cannot demonstrate that allowing homeless people to use, for example, a freestanding tent, a supported tarp or a cardboard box will raise more significant concerns in this regard than simply letting people sleep outside wrapped in blankets, perhaps with a tarp lying on their face. . For a multitude of reasons, the homeless are left with nowhere to sleep but parks and streets. In these circumstances, the public interest in parks is not enhanced by denying them simple, effective, temporary shelter through the night.

6. Second, we say that it is a principle of fundamental justice that laws cannot punish people for engaging in activities when they have no realistic choice to refrain from doing so. Shelter is a basic human need, which Canada has recognized and agreed to fulfill in numerous international instruments. In circumstances where the number of homeless significantly exceed the shelter spaces available, the acts of the homeless in taking simple steps to protect themselves from the elements cannot be considered avoidable, morally voluntary and culpable activities.

7. We are not suggesting that the City is prohibited from regulating what kind of shelters can be used by the homeless, or where they can be erected. We are saying that this blanket prohibition on any form of shelter, which would deny those left out in the cold the meagre comfort of a piece of cardboard, is not consistent with the constitutional guarantee given to all Canadians that, regardless of their circumstances, the state will not deprive them of the essential ability to maintain their own bodily integrity.

II. History of the litigation

8. In order to understand the positions of the parties and the evidence as they relate to the constitutional issues, it is necessary to briefly review the history of the case.

9. As noted above, this case arose when a number of homeless persons erected a "tent city" in Cridge Park. Relying on two City Bylaws, the Parks Regulation Bylaw and the Streets and Traffic Bylaw (the Bylaws@), which prohibited, *inter alia*, "loitering or taking up temporary abode in public parks", the City commenced enforcement proceedings under s. 274(1)(a) of the *Community Charter*. To this end, it filed a writ seeking an injunction *inter alia* declaring the Defendants' use and occupation of Cridge Park" to be in contravention of the Bylaws; restraining the Defendants and others from contravening the Bylaws; and authorizing and empowering the police to arrest those found contravening the Bylaws.

10. The notice which was delivered to the Defendants by the City=s lawyers ordering them to vacate Cridge Park stated:

> Finally, be advised that you are not permitted to move yourself or your belongings to any other City park or public access way within the jurisdiction of the City of Victoria.
>
> ***Affidavit of Gordon Smith, Exhibit "C"***.

11. The City's application for an injunction pursuant to s. 274 of the *Community Charter* was argued before Stewart J. on October 25, 2005. The Defendants resisted the application and led evidence that at that time there were more than 700 homeless people in Victoria and only about 170 shelter beds. Accordingly, the Defendants argued, by criminalizing their ability to sleep together outside and provide shelter for themselves, when they have no other viable alternatives for safe shelter, the bylaws deprive homeless people of their right to liberty and security of the person. Because their conduct is not properly characterized as voluntary, this deprivation is not in accordance with the principles of fundamental justice. The Defendants relied on U.S. cases which have struck down similar ordinances in that country.

12. Mr. Justice Stewart. granted the injunction on October 26, 2005. In granting the injunction, Stewart J. observed that he considered himself bound by two previous decisions of the B.C. Supreme Court that involved analogous applications for injunctions brought by the City of Vancouver. In rendering his decision, he expressly limited the duration of the injunction to a period of ten months "in an effort to see that the plaintiff has some interest in getting the trial heard."

Reasons for Judgement of Stewart J., pronounced October 26, 2005, paras. 5-10.

13. After confirming the availability of counsel for the City, the Defendants set the trial date in this matter for 9 days commencing on September 4, 2007. On or about July 5, 2007, the Defendants were served with an application on behalf of the Plaintiff City pursuant to Rule 18A, wherein the Plaintiff City sought a declaration and a permanent injunction restraining the Defendants from occupying Cridge Park in a manner that might contravene sections of the Bylaws which prohibit certain property damage (the "property offences") – provisions which the City alleged would not engage *Charter* protections.

Affidavit of Catherine J. Boies Parker #1, para. 7 and 8.

14. On or about July 10, 2007, the Defendants proposed to the Plaintiff that the entire matter be determined at a summary trial pursuant to Rule 18A over 4 days during the week of September 10, 2007 – dates which were already booked for the trial. On July 25, 2007 the Defendants delivered a Notice of Motion pursuant to Rule 18A.

Affidavit of Catherine J. Boies Parker #1, para. 9, Ex. B

15. The Defendants, through counsel, wrote to counsel for the City on July 16, 2007, seeking clarification of the City's position with respect to its Bylaws.. That letter specifically asked if the prohibiting on sleeping outside in public spaces was to be repealed.

Affidavit of Catherine J. Boies Parker #1, para. 10, Ex. "C".

16. The Plaintiff's application under Rule 18A was argued before Johnston J. on August 13, 2007. The Plaintiff sought a declaration that the Defendants= use and occupation of Cridge Park contravened the Plaintiff=s Parks Regulation Bylaw and Streets and Traffic

Bylaw by:

(a) Injuring or destroying turf and trees in Cridge Park;

(b) Depositing waste or debris into or upon, or otherwise fouling, Cridge Park;

(c) Selling or exposing for sale or gift refreshments in Cridge Park without the express permission of Council of the Plaintiff;

(d) Carrying a fire arm or weapon of any description; and

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

(the "property offences")

17. The Plaintiff further applied for a permanent injunction restraining the Defendants and anyone else having notice of such Order from using Cridge Park in a manner described above. The Plaintiff argued that a permanent injunction enjoining the Defendants from using Cridge Park in contravention of the "property offences" would end the matter and would thus render the constitutional issues moot. Johnston J. dismissed the Plaintiff's application, holding that to grant such an injunction would be "not just, not convenient and not appropriate". In dismissing the Plaintiff's application Johnston J. viewed the issues of the "property offences" as inextricably intertwined with those portions of the bylaws which may arguably infringe *Charter* rights. Johnston J. held that it would be inappropriate to issue an injunction based on bylaws which may in a month's time be declared unconstitutional.

Reasons for Judgment of Johnston J., August 13, 2007, paras. 13, 20.

18. As stated by Mr Justice Johnston, the permanent injunction was "rather carefully crafted to avoid seeking an injunction to prevent folks sleeping in public spaces." However, counsel for the City did not at any time in that application suggest that the City's bylaws had been changed to allow for sleeping in public places.

Reasons for Judgment of Johnston J., August 13, 2007, para. 12.

19. On August 29, 2007 the City filed a Notice of Discontinuance. The Defendants applied to have the City's Notice of Discontinuance set aside. On Friday, September 7, 2007, Master Keighley delivered Oral Reasons granting the Defendants' application and setting aside the Notice of Discontinuance. Master Keighley held that the Plaintiff was no longer

dominus litis in the litigation and that the filing of the Notice of Discontinuance was an abuse of the court's process. Again, at no time during the proceeding before Master Keighley did the Plaintiff's counsel indicate that the bylaw had been changed such that sleeping in public was no longer prohibited.

Reasons for Judgement of Master Keighley.

20. On September 10, 2007, the City applied for an adjournment of the Defendants' 18A application, scheduled to be heard that day. The City argued, *inter alia*, that it was necessary to adjourn in order to have the benefit of the Report of the Mayor's Task Force of Homelessness, which was forthcoming.

21. The report of the Mayor's Task Force was issued on October 19, 2007 (the "Mayor's Task Force Report"). It confirmed that there are approximately 1,500 homeless people in Greater Victoria. It also confirmed that the current Extreme Weather protocol, which expands the number of indoor beds and mats on the floors, provide shelter for a maximum of 326 people, leaving over 1,000 homeless residents to sleep outdoors.

Affidavit of Stan Schopp, para 6 and Exhibit "A", Executive Summary, pp. 6 & 7.

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

23. Prior to the commencement of the hearing, the Defendants requested the position of the City on the effect of the change in the bylaw. The application was adjourned to allow counsel for the City to take instructions. The City indicated that "the police operational policy" for enforcement of the bylaws allowed for sleeping in public in some circumstances but that the use of any tents, tarps, boxes or other structures was prohibited, although a simple, individual, nonstructural, weather repellant cover (such as a sleeping

bag; blanket; other soft material) that is removed once awake is allowed.

Affidavit of Susan Sillem #5, Exhibits "A" and "B"

24. At the hearing of the AGBC's 19(24) application on February 18, 2008, counsel for the City suggested that the bylaw allowed the use of "small" tarps, as long as they were not attached to trees. On March 17, 200 the Defendants sought clarification of the City's position on the interpretation of the bylaws and whether some form of shelter was allowed. On March 18, 2008, the City advised that it would provide its position "at the appropriate time."

Affidavit of Susan Sillem #5, Exhibit "C"

25. The AGBC's application under Rule 19(24) was dismissed. However, Madam Justice Gray held that to the extent that the Defendants sought a declaration that the bylaws were of no force and effect, they were required to file a counterclaim That counterclaim was filed, and is the basis for this hearing. The counterclaim seeks the following relief:

(a) A declaration that the Bylaws are contrary to the *Charter* and of no force and effect pursuant to s. 52 of the *Constitution Act,* 1982, to the extent that they prohibit homeless people from engaging in life sustaining activities, including the ability to provide themselves with shelter, in public.

(b) In the alternative, pursuant to section 24(1) of the *Constitution Act, 1982*, an order in the nature of a constitutional exemption for homeless persons, such that they can sleep and provide themselves with shelter in some or all public spaces in the City of Victoria without contravening the Bylaws;

(c) That the Plaintiff pay to the Defendants the costs of this proceeding on a full indemnity basis

26. The City's evidence on the hearing of the counterclaim was received on May 15, 2008. The City's position on the interpretation of the bylaw is set out in the affidavit of Mike McCliggot. That affidavit states that the Bylaw forbid the erection of any form of shelter,

such that "no tent, tarps which are attached to trees or otherwise erected, boxes or other structures are permitted."

***Affidavit of Mike McCliggot*, para. 6.**

III. Facts

27. Given the nature of the Defendants' argument under s. 7 of the *Charter*, it is necessary to canvas, in some detail, the circumstances of homeless people in Victoria who are forced to seek shelter outside, and to examine the causes of homelessness.

A. The Number of Homeless in Victoria

28. As noted above, the Mayor's Task Force Report found that at least 1200 people are homeless in or near downtown Victoria. An additional 300 people live in extremely unstable housing situations.

Affidavit of Stan Schopp, Exhibit "A". Executive Summary, p. 7 and Report of the Steering Committee, p. 7.

29. This is consistent with other studies on the number of homeless in Victoria. The 2005 homeless count, which the Defendants relied on before Stewart J., estimated that there were at least 700 homeless people in Victoria. The most recent Homeless Needs Survey, conducted in 2007, estimates the number of homeless and inadequately housed at 1242.

Affidavit of Reverend Al Tysick, Exhibits "C" & "J".

30. The Mayor's Task Force Report concludes that an estimated 300 to 450 additional people may be falling into homelessness every year

Affidavit of Stan Schopp, Exhibit "A". Executive Summary, page 8.

31. In addition to those counted and surveyed, there are numerous "hidden" homeless – those sleeping at the homes of family or friends, or living in cheap motel rooms. Reverend Al

Tysick, who has worked with the homeless in Victoria for over 20 years, has testified that many homeless people avoid the counts. Many do not want to be counted for various reasons – fear of being identified, mental health issues or anger at once again being "studied" as opposed to being housed.

Affidavit of Reverend Al Tysick, para. 22.

32. The majority of the homeless in the Capital Regional District can be found in the downtown core. It is in the downtown core that the services they require are located. As homeless people don't usually have access to transportation it is necessary for their survival that they

'live' within walking distance of the services which they rely on for survival.

Affidavit of Reverend Al Tysick, para. 24.

B. Profile of the Homeless Population

33. The homeless are a highly diverse group - while there was once some truth to the stereotype that the homeless were mostly older single men, there are now many women, children and young people who are homeless.

Affidavit of Reverend Al Tysick, paras. 25 & 26
Affidavit of Kathy Stinson, Exhibit "B", page 23.

34. The age range of the individuals surveyed in the 2007 Homeless Needs Survey was 14 to 77 years. 64 per cent of the respondents were male and 34 per cent female.

Affidavit of Kathy Stinson, Exhibit "B" page 24.

35. The belief that the homeless in Victoria move to the city from outside the Capital Regional District appears to be a myth, as 73 per cent had lived in the Capital Regional District when they last had stable housing and another 16 per cent were from nearby cities, such as Duncan and Vancouver.

Affidavit of Kathy Stinson, Exhibit "B", page 23.

36. 25 percent of the homeless in Victoria are young women ages 21 to 30. A total of 28 per cent of the women in the survey had children staying with them and most had more than one child. 10 per cent of the men, had children staying with them. Of those with children, 19 per cent were homeless (as opposed to unstably housed).

Affidavit of Stan Schopp, Exhibit "A", Report of the Expert Panel, pages 8 and 57; Affidavit of Kathy Stinson, Exhibit "B", page 24.

37. The Mayor's Task Force report found that Aboriginal people are over-represented in every category related to homelessness. Aboriginal people account for just two to three per cent of the population in Greater Victoria, but at least 20 per cent of the people on the streets. Street statistics are prone to under-represent aboriginal homelessness, as this group often avoids the dangers of cross-cultural contact at the street level, especially at vulnerable times such as when they are sleeping.

Affidavit of Stan Schopp, Exhibit "A", Report of the Steering Committee, page 9.

38. One hundred and eight youth (aged 14 to 24 years) were counted in the Homeless Needs Survey but the surveyors believe that the true number is between 250 and 300. Youth are commonly undercounted in homeless surveys as they tend to "couch-surf " and are less visible than other homeless subpopulations.

Affidavit of Kathy Stinson, Exhibit "A", pages 27-28 & 26.

39. A total of 17 per cent of those surveyed were employed (work where a T4 was issued) and 41 per cent engaged in non-traditional work, such as binning, panhandling, sex work or illegal activities.

Affidavit of Kathy Stinson, Exhibit "B", page 48.

40. A total of 65 per cent were on some sort of assistance from the provincial government and 10 per cent were on federal government assistance.

Affidavit of Kathy Stinson, Exhibit "B", pages 46 & 48.

C. Homelessness and Health

41. Homeless people suffer from a wide variety of health problems, and have a greatly increased risk of dying prematurely. They are more at risk for infectious disease, acute illness and chronic health problems than the general population They are also at higher risk for suicide, mental health problems and drug or alcohol addiction.

Affidavit of Dr. Stephen Hwang, Exhibits "D " and "E";
Affidavit of Reverend Al Tysick, Exhibit "F" page 6.

42. Once a person is on the streets, any pre-existing illness, mental or physical, may worsen or occur more frequently due to a variety of factors such as the difficulty or impossibility of obtaining adequate health care, exposure to the elements, insect and rodent bites, malnutrition, and the absence of sanitary facilities for sleeping, bathing or cooking.

Affidavit of Reverend Al Tysick, para. 58.

43. There is a higher likelihood of experiencing violence or trauma on the street or in shelter. Rates of violence and trauma are significantly higher among the homeless population than the general population, and this is especially true of women. The majority of homeless women have experienced physical and sexual abuse, with rates as high as 90 per cent. One study showed that women who are homeless face a three fold increase in risk of violence

Affidavit of Stan Schopp, Exhibit "A", Report of the Expert Panel, page 80;
Affidavit of Dr. Stephen Hwang, Exhibit "E" page 25;
Affidavit of Natalie Adams, paras. 4, 9, 11, 12, 13, 15, 16, 20, 21, 26;
Maria Foscarinis, "Downward Spiral: Homelessness and its Criminalization" (1996) 14 Yale Law &Policy Review 1 at 57 ("Foscarinis").
See also: Wellesley Institute, *Physical and Sexual Violence Rates for Homeless Many Times Higher Than Housed* (Toronto: May 8, 2007) [Defendants' Brandeis Brief, Tab 6].

44. A Toronto survey showed that 40% of homeless individuals had been assaulted and 21% of homeless women had been raped in the previous year. Homeless men are about 9 times more likely to be murdered than their counterparts in the general population.

Affidavit of Dr. Stephen Hwang, Exhibit "D" page 231.

45. The Mayor's Task Force Report found that of Victoria's 1,500 homeless residents, approximately 650 have a substance use disorder, approximately 420 have a mental

illness, and some 430 are thought to have co-occurring disorders. Up to 10 per cent may be developmentally challenged and have a borderline IQ.

Affidavit of Stan Schopp, Exhibit "A", Executive Summary, page 6.

46. The Mayor's Task Force Report states that 30 per cent of homeless residents are high risk for health needs; 70 per cent are low to moderate risk for health needs. The Report found that mental illness and substance use are the norm with at least 40 per cent suffering from diagnosable mental illness.

Affidavit of Stan Schopp, Exhibit "A", Report of the Expert Panel, page 7.

47. An earlier City of Victoria publication also recognized that many of the homeless have special needs related to mental illness, substance misuse, HIV/AIDS, multiple diagnosis, fetal alcohol syndrome/fetal alcohol effect, attention deficit disorder, brain injuries and involvement with the criminal justice system. This is consistent with the evidence of the campers.

Affidavit of Reverend Al Tysick, paras. 57 to 59 & Exhibit "D", page 2; Affidavit of Dajah Doe #1, para 7; Affidavit of Amber Overall "Faith" #1, para 15; Affidavit of Jeremy (John Doe) #1, para 7; Affidavit of Natalie Adams "Karma" #1, paras 5-6; Affidavit of Simon Ralph #1, para 5; Affidavit of Reverend Al Tysick, Exhibit "D"; Affidavit of Luc Lortie #1, para 3.

48. It has been estimated that one of the "costs of being homeless" in the US is losing roughly 20 years of life expectancy. A study in Toronto in 1995 concluded that young homeless men in that city are eight times more likely to die than men the same age in the general population.

Affidavit of Dr. Stephen Hwang, Exhibit "D" page 230;
Affidavit of Rev Al Tysick, Exhibit F: page 6.

49. In 2005 Reverend Al officiated at the funerals of 56 people, more than one per week. In 2006, he buried, on average, 2 people per week.

Affidavit of Rev Al Tysick, para 60.

50. The evidence of the campers is that living together, rather than as individuals dispersed through public spaces in the City, allowed many of them to avoid drug use, to avoid physical confrontation with police, to keep their belongings safe, to shield them from

much of the violence which they experienced on the street, and provided them with a sense of hope and belonging.

Affidavit of Amber Overall "Faith" #1, para 17; Affidavit of Natalie Adams "Karma" #1, paras 25-29; Affidavit of Dajah Doe #1, paras 10-11; Affidavit of Tomiko Rae Koyama #1, para 7; Affidavit of Simon Ralph #1, paras 8-10; Affidavit of Yann Chartier #1, para, 9-10; Affidavit of Luc Lortie #1, para 4; Affidavit of Saera #1, paras 5-9; Affidavit of Mark Smith #1, paras 12-13; Affidavit of John Davies #1, paras 8-12;; Affidavit of Alymanda Wawia' Affidavit of Tomiko Rae Koyama #2.

D. Causes of Homelessness

51. 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. Many of the men and women have suffered abuse and neglect in families and relationships, sometimes over a period of many years. Relationship breakdowns have led to both men and women being on the street. This is consistent with the evidence of the campers.

Affidavit of Natalie Adams "Karma" #1, paras 3-4, 9-13, 16 and 18; Affidavit of Amber Overall "Faith" #1, para 4; Affidavit of Dajah Doe #1, paras 4-5; Affidavit of Jeremy (John Doe), para 3; Affidavit of Yann Chartier #1, para 4.

52. In the 2007 Homeless Needs Survey, the three most commonly reported contributing factors to participants' current housing situation were all health related : alcohol or drug use, illness or medical reasons, or social or emotional challenges.

Affidavit of Kathy Stinson, Exhibit "B'. page 40.

53. Women are more likely than men to be homeless because they had fled domestic violence (34 per cent of women surveyed) or unsafe housing (25 per cent of those surveyed).

Affidavit of Kathy Stinson, Exhibit "B", page 24.

54. The factor most frequently cited as contributing to youth homelessness was conflict,

violence or neglect by family members, friends or caregivers (55 per cent of youth surveyed). A total of 33 per cent of the youth were Aboriginal and 56 per cent of the youth who were "aging out of foster care" were Aboriginal.

Affidavit of Kathy Stinson, Exhibit "A", pages 27 & 26.

55. However, the causes of the rise in homelessness are societal. As one publication of the British Columbia government states:

> Housing and employment markets have changed dramatically since the 1970s and government restraint in the 1990s has affected the nature and amount of support provided to people in need and to agencies that assist them. There are fewer affordable housing options and fewer permanent full-time jobs. At a time when people are more in need, there are fewer personal, community and public supports. These factors, not personal factors, determine the *rate* and *extent* of homelessness. Schwartz and Carpenter point out that differences between people who are and are not homeless at any point in time pertain to the question of who becomes homeless but not the cause of the rise in homelessness over time.

Affidavit of Reverend Al Tysick, Exhibit "F", page 7.

56. In that report, titled Homelessness - Causes and Effects, the authors state:

> If there were adequate, affordable and appropriate housing, sufficient income (employment or income assistance), and appropriate services for those who need them, there would not be widespread homelessness. The lack of one or any combination of these three creates the necessary preconditions for homelessness.

Affidavit of Reverend Al Tysick, Exhibit "F", page 8.

57. 1,800 people in the Capital Region are on the wait list for subsidized housing. The need for affordable housing has been on the rise for several years in the region, even while supply is dwindling. With land prices at all-time high, older low-rent apartments are increasingly being converted into upper end housing. The region saw a net reduction of 200 rental units in the last year alone.

Affidavit of Stan Schopp, Exhibit "A", Report of the Steering Committee, p. 8.

58. On April 1, 2007 there were 236 families on the Capital Regional District/ BC Housing waitlist who met the definition of homelessness. The primary reasons given by families for homelessness were fleeing violence or unaffordable rent.

Affidavit of Stan Schopp, Exhibit "A", Report of the Expert Panel, page 57.

59. Youth in particular are challenged with obtaining adequate, affordable housing due to low income, discrimination, drug and alcohol use, lack of life skills, complex eligibility rules, mistrust of adults and general alienation. The Mayor's Task Force states that there is growing agreement that youth in transition to adulthood—roughly ages 19 to 25—are falling through the cracks as access to child health, education and welfare services ends and their access to adult services begins.

Affidavit of Stan Schopp, Exhibit "A", Report of the Expert Panel, page 83.

60. A number of societal factors have combined to cause what the Mayor's Task Force Report recognizes as a crisis in homelessness. The Report noted some of the following:

1. Deinstitutionalisation

61. Starting in the 1960s and intensifying in the 1980s, governments across Canada and the U.S. underwent a major shift in thinking around the treatment of people with mental illness and developmental disabilities. Large institutions were closed down that in the past had housed people with chronic illness and disability, many of whom were unable to care for themselves.

Affidavit of Stan Schopp, Ex. "A", Report of the Steering Committee, p. 12.

62. In B.C., institutions such as Riverview psychiatric hospital and the Tranquille and Woodland institutions for people with developmental disabilities had housed 5,000 or more people before they were phased out.

Affidavit of Stan Schopp, Ex. "A", Report of the Steering Committee, p. 12.

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

Affidavit of Stan Schopp, Ex. "A", Report of the Steering Committee, p. 12.

64. During the 1990s, community services fell victim to budget cuts, particularly for people with mental illness. In some cases, promised community services simply never got off the ground. People too disabled to manage their lives in a healthy, functioning fashion suddenly found themselves on their own. Many fell onto the streets and into an addiction, and ended up frequent visitors to hospital emergency departments.

Affidavit of Stan Schopp, Ex. "A", Report of the Steering Committee, p. 12.

65. Governments are now acknowledging that the shift away from large institutions was poorly managed. In his 2006 speech to the Union of B.C. Municipalities, Premier Gordon Campbell called deinstitutionalisation "a failed experiment."

Affidavit of Stan Schopp, Ex. "A", Report of the Steering Committee, p. 12.

2. Federal Withdrawal from social housing

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

Affidavit of Stan Schopp, Ex. "A", Report of the Steering Committee, p. 13.

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

Affidavit of Stan Schopp, Ex. "A", Report of the Steering Committee, p. 13.

68. During 1989-93, rental housing accounted for 20 per cent of all completed housing construction projects. By 1994-98, that percentage had declined to less than 10 per cent. New co-op housing construction declined 78 per cent.

Affidavit of Stan Schopp, Ex. "A", Report of the Steering Committee, p. 13.

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

Affidavit of Stan Schopp, Ex. "A", Report of the Steering Committee, p. 13.

3. Housing costs up, earning power down

70. The cost of housing across Canada, and particularly in Greater Victoria, have risen much faster over the past 15 years than the incomes of low- and middle-income earners. The purchasing power of a minimum wage job has fallen by as much as 20 per cent across Canada from its peak in the mid-1970s.

Affidavit of Stan Schopp, Ex. "A", Report of the Steering Committee, p. 13.

71. Soaring land costs have also left nonprofit housing providers scrambling for sufficient funds to launch new projects.

Affidavit of Stan Schopp, Ex. "A", Report of the Steering Committee, p. 13.

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

Affidavit of Stan Schopp, Ex. "A", Report of the Steering Committee, p. 13.

4. Policy changes to federal transfer payments

73. In 1996, the federal government announced a new policy around transfer payments to the provinces that offset some of the costs of providing social programs. Previously, provinces had been required by the federal government to maintain funding to social

services at a specified level. Provinces were granted the freedom to establish their own levels of social spending in 1996. Virtually every province responded to the policy change by cutting social spending.

Affidavit of Stan Schopp, Ex. "A", Report of the Steering Committee, p. 13.

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

Affidavit of Stan Schopp, Ex. "A", Report of the Steering Committee, p. 13.

5. Changes to B.C.'s income assistance policy

75. In the mid-1990s, B.C. launched an aggressive strategy to reduce the number of employable people in the province on income assistance. Further policy changes were introduced in 2002 to reduce the caseload even further. Between 2001 and 2005, more than 105,000 people lost their welfare benefits. The two-year "independence" test introduced in 2002 is a particular challenge to those with chronic mental illness, addiction and other ongoing barriers.

Affidavit of Stan Schopp, Ex. "A", Report of the Steering Committee, p. 14.

76. To be eligible for income assistance, people either have to prove they have a permanent disability—a challenging and lengthy process—or show proof of having worked for at least two years in a row earning $7,000 or working 840 hours minimum in each of those years.

Affidavit of Stan Schopp, Ex. "A", Report of the Steering Committee, p. 14.

E. Other Impacts of Homelessness

77. Regardless of the causes, health and addiction problems are clearly exacerbated by homelessness and the isolation which can accompany it. Employability problems are also exacerbated by homelessness, because of the significant barriers to finding a job when one

has no legal address or telephone. In order to participate in employment programs, one must have a stable address. As one court noted, the employment problem is worsened by the fact the homeless "must spend an inordinate amount of time waiting in line or searching for seemingly basic things like food, a space in a shelter bed, or a place to bathe." Without a home, it is difficult to find a job. Without a job it is difficult to find a home. Nevertheless, many homeless people are working.

> ***Affidavit of Reverend Al Tysick, para. 45; Affidavit of Heather Turnquist, paras. 11-12; Affidavit of Daniel #1, para 5; Affidavit of Chris Presley #1, para 2; Affidavit of Simon Ralph #1, paras 2 and 4; Affidavit of Kathy Stinson, Exhibit "B", pp. 48-49; Pottinger v. City of Miami, 810 F. Supp. 1551 (S.D.Fla. 1992) ("Pottinger") at page 10.***
>
> **See also: Canadian Institute for Health Information, *Improving the Health of Canadians: Mental Health and Homelessness*, (Ottawa: CIHI 2007), at pp. 13-17 [Defendants' Brandeis Brief, Tab 4];**
> **Centre for Applied Research in Mental Health and Addiction, Simon Fraser University, *Housing and Support for Adults with Severe Addictions and/or Mental Illness in British Columbia* (Burnaby: CARMHA February 2008) at pp. 20-21 [Defendants' Brandeis Brief Tab 5].**

78. Homeless people face insurmountable barriers in searching for adequate housing. Prospective landlords usually require a reference from a previous landlord, a favourable credit rating, first and last month's rent deposit and an employment reference. Homeless people, especially youth, most of whom have fled from abusive households, commonly have no references, no credit rating and often no employment reference, and in many cases no identification. If they are relying on social assistance, their shelter allowance is at so low a level that it is virtually impossible to find rental accommodation with the amount provided by social services.

> ***Affidavit of Reverend Al Tysick, para 34; Affidavit of Rose Henry, paras 8-13 & 18-21; Affidavit of Heather Turnquist, para. 13; Affidavit of Terry Cound #1, para. 5; Affidavit of Stan Schopp, Exhibit "A", Executive Summary, pages 8-9.***

79. Waitlists for subsidized housing in Victoria are so long that most applicants have no hope of being housed within a decade. Young people are not allowed to apply for subsidized housing until they are sixteen years old. 1,800 people in the Capital Region are on the waitlist for subsidized housing.

> ***Affidavit of Reverend Al Tysick, para 35;***
> ***Affidavit of Stan Schopp, Exhibit "A", Report of the Steering Committee, p. 8.***

80. There are profound difficulties with protecting one's possessions while homeless. As the court found in *Pottinger*, supra, while the loss of one's personal effects may be a minor inconvenience for many people, such loss can be "devastating " for the homeless.

Affidavit of Dajah Doe #1, para 8; Affidavit of Mark Smith #1, para 8; Affidavit of Thomas J. Davies #1, para 8; Affidavit of Chris Presley #1, para 2; Pottinger, supra, at page 6; Affidavit of Rose Henry, para. 43-45; Affidavit of Reverend Al Tysick, para.53-56.

81. The lack of a home can also affect the ability to access government income assistance, since an address may be required to do so.

Affidavit of Saera #1, para 4; Affidavit of Alymanda Wawia, para. 7; Affidavit of Reverend Al Tysick, para 52.

F. Shelter Spaces in Victoria

82. There are 141 permanent shelter beds in Victoria. Ten of these beds are for youth and 131 are for adults. Of the 131 adult shelter beds, 20 beds are for women only, 21 beds are for men only, and 90 beds for either men and women.

Affidavit of Stan Schopp, Exhibit "A", Report of the Gap Analysis Team, p. 15.

83. Shelters have restrictions on the number of nights a person can stay and often bar those who are addicted to alcohol or drugs.

Affidavit of Reverend Al Tysick, para. 29;
Affidavit of Kathy Stinson, paras. 11-14 & paras. 21-23.

84. There are no shelters that accommodate couples or families. People in relationships often feel safer sleeping rough together than being separated in different shelters.

Affidavit of Reverend Al Tysick, para. 30;
Affidavit of Rose Henry #2, para. 16;
Affidavit of Alymanda Wawia, para. 10.

85. The shelters in Victoria usually operate at or close to capacity, resulting in people being turned away when they are full.

Affidavit of Kathy Stinson, paras 9, 14, 21;
Affidavit of Terry Cound #1, para. 23.

86. In the 2007 Homeless Needs Survey, 2/3 of people who used shelters reported being turned away from shelters at times. The most common reason for being turned away was no beds (80%), followed by alcohol or drug use (13%) and behaviour (10%).

Affidavit of Kathy Stinson, Exhibit "B".

87. There are significant gaps in services for youth, Aboriginal people, women struggling with addictions, women with children, and older persons with addiction and mental health problems. Youth cannot access the emergency shelters. Families and married couples cannot access shelter services together. Some people do not feel safe in the shelters.

Affidavit of Amber Overall "Faith" #1, para 11-12; Affidavit of Alymanda Wawia, para 10; Affidavit of Thomas J. Davies #1; Affidavit of Saera #1; Affidavit of Sebastien Matte; Affidavit of Terry Cound #1, para. 23; Affidavit of Rose Henry #2, para. 16; Affidavit of Reverend Al Tysick, Exhibit "D".

88. Shelters are not always safe and healthy places where an individual can get a night's sleep. There are high incidences of theft and violence in the shelters, where 6 or more individuals may share a room. A night in a shelter may be noisy and chaotic.

Affidavit of Reverend Al Tysick, para. 29.

89. Those who work at paid employment face additional barriers in getting a bed in a shelter – if a person is working at the time the shelters open to take bookings then the beds will often be fully booked before he or she is finished working.

Affidavit of Reverend Al Tysik, para. 33.

90. The "Extreme Weather Protocol" is a collaborative community-based program involving housing providers and social service agencies in Victoria aimed at increasing shelter capacity during the wet, winter months. About 10 shelter and social service agencies in Victoria participate in the program and ensure that if extreme weather conditions are forecasted and "stage one" beds are full, organizations communicate with each other and implement the next stages of the protocol. Previously called the Cold Weather Protocol, the program was initiated in 2004

Affidavit of Reverend Al Tysick, para. 40.

91. Our Place operates as a Stage 3 Last Resort temporary shelter during the extreme weather. During the winter of 2006-2007 Our Place opened on approximately 20 nights and operated at capacity

Affidavit of Reverend Al Tysick, para. 42.

92. At the height of extreme weather, 326 residents can be sheltered. As the Mayor's Task Force Report notes, this leaves over 1,000 plus homeless residents out in the rain.

Affidavit of Stan Schopp, Exhibit " A", Executive Summary, page 7.

93. The difficulties in meeting the needs of the homeless have been obvious for some time. A study conducted by the Victoria Downtown Service Providers Group in 2003 showed that 61% of agencies reported more people asking for help with basic survival skills and 91% of agencies reported increased stress among the people they serve. Agencies reported "significant decreases in resources available in the community (and in their agencies) to deal with the spike in the demand for services." The report noted that "The biggest issue is there are many more people and the services are spread too thin."

Affidavit of Reverend Al Tysick, Exhibit "B" pages 8-9.

94. The same report stated:

> The same things are heard over and over again. Food, the ability to maintain one's body, shelter, safe housing, health care and emotional support are the basis of life. According to psychologist Abraham Maslow, no one can move higher in the hierarchy of need without having all of their survival needs satisfied first. Agencies serving these clients know this well. It is what they do.

Affidavit of Reverend Al Tysick, Exhibit "B" page 10.

95. As a direct result of the lack of housing and shelter beds in the Capital Regional District, hundreds of homeless people sleep "rough" in Victoria every night. They sleep in parks, in doorways, in alleyways, in ravines, sometimes on private property, but often on public property.

Affidavit of Reverend Al Tysick, para 37;
Affidavit of Terry Cound #1, para 24.

96. It is very difficult for homeless people to find a place out of the rain. Staying dry is of critical importance. Once wet it is very difficult to find a place to become dry.

Affidavit of Terry Cound #1, para 19.

97. It is a common occurrence for those trying to sleep on public property to be roused out of doorways or from under bushes by police and moved along. Many have had their property confiscated. Thus, for many homeless people, "a good night's sleep" is seldom, if ever, a reality. Once woken, a homeless person will often spend the night walking the streets. This is a source of great stress and anxiety for people.

Affidavit of Reverend Al Tysick; para. 37;
Affidavit of Terry Cound #1, paras. 10 , 15, 19;
Affidavit of Terry Cound #3.

IV. Argument

A. Introduction

98. Section 7 of the *Charter* provides:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

99. In order to succeed under s. 7, a claimant must show (a) that there has been a deprivation of life, liberty or security of the person, or some combination thereof, and (b) that this deprivation is not in accordance with the principles of fundamental justice.

100. We submit that the prohibition on erecting shelter in public spaces, in circumstances where there are insufficient alternative shelter opportunities for the City's homeless, interferes with section 7 interests in several ways. First, preventing homeless people from

erecting shelter for themselves interferes with their basic bodily integrity, and thus constitutes interference with security of the person. Second, preventing homeless persons from creating shelter for themselves in public spaces interferes with their liberty interests. Third, interfering with the ability to erect shelter interferes with the provision of the basic necessities of life.

101. In addition, we submit that these deprivations are not in accordance with the principles of fundamental justice because the complete prohibition on erecting shelter is arbitrary, overbroad, and contrary to the principle that persons should not be punished for taking steps necessary to maintain their physical well-being, steps which are, in the circumstances, not properly characterized as voluntary.

102. Before addressing each of these arguments, however, it is important to examine two overarching factors. First, the impact of the factual evidence, set out above, which we say establishes that there are insufficient shelter opportunities for the homeless. Second, Canada's international obligations regarding shelter.

B. The Impact of the Shelter Shortfall - *Chaoulli v. Quebec*

103. The lack of available shelter is critical to the Defendant's claim that prohibiting them from creating their own shelter is contrary to s. 7. In this regard, this case is very similar to *Chaoulli v. Quebec (Attorney General),* [2005] 1 S.C.R. 791 ("*Chaoulli*"). In that case, the Supreme Court of Canada held that, in the face of long waiting lists in the public health care system, Quebec's prohibition on the purchase of private insurance was a breach of s. 7 of the *Charter.*

104. Mr. Chaoulli was a physician and Mr. Zeliotis was a patient in Quebec. They applied for a declaration that s. 15 of the *Health Insurance Act*, R.S.Q., C.A.-29 and s. 11 *Hospital Insurance Act*, R.S.Q. c. A-28 were unconstitutional and invalid. The effect of the impugned provisions was to prohibit the purchase of private medical insurance for services covered by Quebec's public insurance plan. Mr. Chaoulli argued that the prohibition violated ss. 7, 12 and 15 of the *Charter.* A majority of the Court held that the

legislation was an interference with rights under the Canadian *Charter* and/or the *Quebec Charter* because, in the face of the lengthy waiting lists in the public health care system, a prohibition on the purchase of private insurance interfered with security of the person.

105. In *Chaoulli*, Deschamps J. held that the prohibition was contrary to the *Quebec Charter*, and so did not consider the arguments under the Canadian *Charter*. Chief Justice McLachlin, Major J. and Bastarache J. held that the prohibition was contrary to s. 7 and not justified under s. 1. The remaining three judges, in dissent, held that while the prohibition may constitute a deprivation of life, liberty and security of the person, any such deprivation was in accordance with the principles of fundamental justice.

106. In *Chaoulli*, the appellants had established, on the evidence, that delays in the delivery of public health care are "widespread and have serious, sometimes grave consequences." However, as noted by the Chief Justice and Major J., the appellants did not seek an order that the government expend public funds addressing those waiting lists. Rather, they sought a ruling regarding the constitutionality of the prohibition on private medical insurance in the face of such delays:

> The appellants do not seek an order that the government spend more money on health care, nor do they seek an order that waiting times for treatment under the public health care scheme be reduced. They only seek a ruling that because delays in the public system place their health and security at risk, they should be allowed to take out insurance to permit them to access private services.
>
> ***Chaoulli, supra*, at para 103**.

107. However, in the analysis under s. 7, the Chief Justice and Major J. made it clear that the **fact** of long waiting lists was critical to their finding of unconstitutionality:

> In sum, the prohibition on obtaining private health insurance, while it might be constitutional in circumstances where health care services are reasonable both as to quality and timeliness, is not constitutional where the public system fails to deliver reasonable services.
>
> ***Chaoulli, supra*, at para 158.**

108. Similarly, in this case, the Defendants do not seek an order requiring the government to provide adequate alternative shelter. However, they do argue that the prohibition on sleeping outside and erecting shelter to protect oneself from the elements is, in the circumstances where alternative shelter is not available, unconstitutional. The same prohibition might be constitutional in circumstances where adequate, safe shelter was available.

109. In this case, we are not asking the Court to tell the City what it must do to address its homeless problem. We are asking the Court to determine whether there is a constitutional limit on the City's power to legislate – that is, can it prohibit sleeping outside and providing oneself with shelter when it is virtually impossible for homeless people to conform to the prohibition? As stated by the U.S. Ninth Circuit Court of Appeals in a similar challenge to a City of Los Angeles ordinance:

> We do not suggest that Los Angeles adopt any particular social policy, plan, or law to care for the homeless. *See Johnson v. City of Dallas*, 860 F. Supp. 344, 350-51 (N.D.Tex. 1994), *rev'd on standing grounds*, 61 F.3d 442 (5th Cir.1995). We do not desire to encroach on the legislative and executive functions reserved to the City Council and the Mayor of Los Angeles. There is obviously a "homeless problem" in the City of Los Angeles, which the City is free to address in any way that it sees fit, consistent with the constitutional principles we have articulated. *See id.* By our decision, we in no way dictate to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets of Los Angeles at any time and at any place within the City. All we hold is that, so long as there is a greater number of homeless individuals in Los Angeles than the number of available beds, the City may not enforce section 41.18(d) at all times and places throughout the City against homeless individuals for involuntarily sitting, lying, and sleeping in public. Appellants are entitled at a minimum to a narrowly tailored injunction against the City's enforcement of section 41.18(d) at certain times and/or places.
>
> ***Jones v. City of Los Angeles* 44 F3d 1118 (2006).**

110. The Defendants' claim is that because, according to the City's own documents, there are many people who have no choice but to sleep outside on public property, the City cannot make it illegal to provide shelter for oneself on all public property. The City is not precluded from regulating the shelter which homeless people can create, but it cannot

make it illegal to create any effective shelter, anywhere in the City. If there were some forms of effective shelter which could be erected, or one or more designated areas where effective shelters could be set up overnight, this same argument could not made. If there were an adequate numbers of safe and secure shelter spaces for the homeless, this argument could not be made.

111. However, given the current factual context, we submit that it is not necessary to determine whether a particular individual does or does not have a choice whether or not to sleep outside on a particular night. Like *Chaoulli*, this case does not depend on the circumstances of any individual, but on the fact that there is significant gap between the number of homeless and the shelter beds available. If the By-laws are unconstitutional because of the "generic" argument regarding the lack of available shelter (to use the term from *Chaoulli*) they will be of no force and effect.

112. In *Chaoulli*, the court had specifically found that while Mr. Zeliotis had faced delays in receiving medical treatment, these were not due to systemic waiting lists. Nevertheless, that was the basis of the Plaintiff's challenge. The minority opinion, which would have upheld the legislation as being in accordance with the principle of fundamental justice, acknowledged the systemic nature of the claim in its discussion on why the Plaintiffs were properly given public interest standing:

> Third, the appellants advance the broad claim that the Quebec health plan is unconstitutional for *systemic* reasons. They do not limit themselves to the circumstances of any particular patient. Their argument is not limited to a case-by-case consideration. They make the generic argument that Quebec's chronic waiting lists destroy Quebec's legislative authority to draw the line against private health insurance. From a practical point of view, while individual patients could be expected to bring their own cases to court if they wished to do so, it would be unreasonable to expect a seriously ailing person to bring a systemic challenge to the whole health plan, as was done here. The material, physical and emotional resources of individuals who are ill, and quite possibly dying, are likely to be focused on their own circumstances. In this sense, there is no other class of persons that is more directly affected and that could be expected to undertake the lengthy and no doubt costly systemic challenge to single-tier medicine. Consequently, we agree that the appellants in this case were rightly granted public interest standing.
>
> ***Chaoulli, supra*, at para 189**.

113. Similarly, in this case, the named Defendants challenge the bylaw on the basis that the systemic problem of inadequate shelter renders the complete prohibition on sleeping outside unconstitutional.

C. Canada's International Obligations

114. The Supreme Court of Canada has recently confirmed the principle that the *Charter* should be interpreted to provide at least as much protection as Canada's international obligations.

> ***Health Services and Support – Facilities Subsector Bargaining Association et al v. British Columbia* 2007 SCC 27 at para. 70.**

115. Reliance on international human rights law has become a prominent and significant feature of constitutional interpretation. In *Baker*, L'Heureux-Dubé J. noted that international human rights law has "a critical influence on the interpretation of the scope of the rights included in the *Charter*."

> ***Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 70 [*"Baker"*].**

116. In the *United States v. Burns*, a unanimous Supreme Court of Canada endorsed the statement of Dickson C.J. in the *Alberta Reference* that:

> The various sources of international human rights law – declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms – must, in my opinion, be relevant and persuasive sources for interpretation of the *Charter*'s provisions.
>
> ***Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 ("*Alberta Reference*"), at para. 57; *United States v. Burns,* [2001] 1 S.C.R. 283 at para. 144.**

117. The right to adequate housing is recognized as a fundamental human right in the

Universal Declaration of Human Rights, the *International Covenant on Economic, Social, and Cultural Rights*, and in numerous other human rights instruments to which Canada is a party Article 25.1 of the *Universal Declaration* states:

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

118. Article 11.1 of the International Covenant on Economic, Social and Cultural Rights provides:

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

119. The obligation of the State parties to ensure that its citizens enjoy the rights set out in the Covenant is set out in Article 2.1. This includes the obligation to take steps, by all appropriate means, to the maximum of a state's available resources, to progressively achieve a full realization of the right. In addition, there is a core obligation for each state, regardless of economic development, to provide minimum essential levels of the right. The Office of the United Nations High Commissioner for Human Rights has stated:

> A State party in which any significant number of individuals is deprived of basic shelter and housing is, prima facie, failing to perform its obligations under the Covenant.
>
> **Affidavit of Janet Bradley #1, Exhibit "F".**

120. The failure to protect this right in Canada has been the subject of specific comment by the U.N. In a 1998 report, the UN Committee on Economic, Social and Cultural Rights stated:

> The Committee is gravely concerned that such a wealthy country as Canada has allowed the problem of homelessness and inadequate

> housing to grow to such proportions that the mayors of Canada's 10 largest cities have now declared homelessness a national disaster.
>
> **Affidavit of Janet Bradley #1, Exhibit "G", para. 24.**

121. The obligation set out in the Covenant specifically extends to restrain governments from interfering with the ability of citizens to create their own shelter. The Office of the United Nations High Commissioner for Human Rights has stated:

> The duty to respect the right to adequate housing means that Governments should refrain from any action which prevents people from satisfying this right themselves when they are able to do so. **Respecting this right will often only require abstention by the Government from certain practices and a commitment to facilitate the "self-help" initiatives of affected groups**. **In this context, States should desist from restricting the full enjoyment of the right to popular participation by the beneficiaries of housing rights, and respect the fundamental right to organize and assemble.**
>
> In particular, the responsibility of respecting the right to adequate housing means that States must abstain from carrying out or otherwise advocating the forced or arbitrary eviction of persons and groups. States must respect people's rights to build their own dwellings and order their environments in a manner which most effectively suits their culture, skills, needs and wishes. Honouring the right to equality of treatment, the right to privacy of the home and other relevant rights also form part of the State's duty to respect housing rights. (Emphasis added)
>
> **Affidavit of Janet Bradley, Exhibit "F" page 155.**

122. Modern domestic legal systems are beginning to find positive entitlements to basic necessities in their Constitutions. In its landmark ruling, *Grootboom v. Oostenberg Municipality Cape Metropolitan Council*, the South African Constitutional Court interpreted section 26 of the South African Constitution as requiring the government to take reasonable legislative and other measures to protect a right to shelter and housing. In coming to this internationally lauded decision, the Court stated the following at para. 2:

> The case brings home the harsh reality that the Constitution's promise of dignity and equality for all remains for many a distant dream.

The Court went on to state, at para. 23, the proposition that "[t]here can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter."

Grootboom v. Oostenberg Municipality Cape Metropolitan Council, Constitutional Court of South Africa, CCT/11/00.

123. These same values underlie our own Constitution. As Chief Justice Dickson stated in *Big M.*:

> A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the Charter. Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person.
>
> ***R. v. Big M. Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 336.**

124. The Defendants are not arguing in this case that section 7 involves a positive obligation on the state to provide shelter for its citizens. However, we do submit that Canada's international obligations to ensure that its citizens are adequately housed are relevant to the determination of whether section 7 protects a right to erect the most temporary shelter in order to provide protection from the elements, when there are no other forms of shelter available.

D. Security of the person

125. It is well understood that security of the person includes the protection of physical and psychological integrity. In *Rodrigeuz v. British Columbia (Attorney General),* [1993] 3 S.C.R. 519, speaking for a majority of the Supreme Court of Canada,. Sopinka J. held at para. 136:

> In my view, then, the judgments of this Court in *Morgentaler* can be seen to encompass a notion of personal autonomy involving, at the very least, control over one's bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress. In *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, supra, Lamer J. (as he then was) also expressed this view, stating at p. 1177 that "[s]ection 7 is also

> implicated when the state restricts individuals' security of the person by interfering with, or removing from them, control over their physical or mental integrity". **There is no question, then, that personal autonomy, at least with respect to the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity are encompassed within security of the person**, at least to the extent of freedom from criminal prohibitions which interfere with these. (Emphasis added)

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

127. In *Blencoe v. British Columbia (Human Rights Commission)* [2000] 2 S.C.R. 307, Bastarache J., writing for a majority of the Supreme Court of Canada held:

> Although there have been some decisions of this Court which may have supported the position that s. 7 of the Charter is restricted to the sphere of criminal law, there is no longer any doubt that s. 7 of the Charter is not confined to the penal context. This was most recently affirmed by this Court in New Brunswick (Minister of Health and Community Services) v. G. (J.), [1999] 3 S.C.R. 46, where Lamer C.J. stated that the protection of security of the person extends beyond the criminal law (at para. 58). He later added (at para. 65):
>
> > ... s. 7 is not limited solely to purely criminal or penal matters. There are other ways in which the government, in the course of the administration of justice, can deprive a person of their s. 7 rights to liberty and security of the person, i.e., civil committal to a mental institution: see B. (R.), supra, at para. 22.
>
> Thus, to the extent that the above decisions of *Nisbett* and *Canadian Airlines* stand for the proposition that s. 7 can never apply outside the criminal realm, they are incorrect. Section 7 can extend beyond the sphere of criminal law, at least where there is "state action which directly engages the justice system and its administration" (G. (J.), at para. 66)

128. In *Chaoulli*, even the minority agreed there was an interference with security of the person,

notwithstanding that the legislation was entirely removed from the criminal context: As noted by the minority, the courts have moved away from a narrow approach to s. 7, which would limit it to legal rights as set out in ss. 8-14 of the *Charter*. The minority emphasized that "The real control over the scope and operation of s.7 is to be found in the requirement that the applicant identify a principle of fundamental justice."

***Chaoulli, supra,* at paras. 197-199.**

129. Security of the person thus protects against state interference with the ability to control and preserve one's bodily integrity. In this case, we submit that prohibiting homeless people from erecting even the most rudimentary forms of shelter constitutes an interference with security of the person.

130. As set out above, the evidence establishes that homeless persons face greatly increased risks of health problems and premature death. The City has confirmed that there is a ban on erecting any form of shelter, even a tarp is which strung up or otherwise "erected" or a cardboard box which is used to shield someone from the wind and rain. The expert evidence in this case establishes that the prohibition on erecting shelter interferes with the bodily integrity and health of homeless persons who have no other shelter.

Affidavit of Mike McCliggot;
Affidavit of Brooks Hogya;
Affidavit of Stephen Hwang.

131. The evidence of Brooks Hogya, a wilderness guide with expertise on the safety aspect of outdoor sleeping, is that the kind of shelter permitted by the City under the bylaws is insufficient to protect against the elements:

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

heat loss. (Emphasis added.)

Affidavit of Brooks Hogya

132. The expert evidence of Dr. Stephen Hwang, a doctor with expertise in the health aspects of being homeless, establishes that the restrictions on erecting shelter set out by the City constitute an interference with the bodily integrity of homeless persons. Dr. Hwang's uncontradicted medical opinion is that:

> If homeless people who sleep outside are prohibited form erecting any form of shelter such as a tent, tarpaulin or cardboard box, it is absolutely clear that this would have a substantial and potentially severe adverse effect on their heath.
>
> ***Affidavit of Dr. Stephen Hwang, Exhibit "C", p. 2.***

133. Dr. Hwang notes that exposure to the elements can lead to "a number of serious and potentially life threatening conditions" including frostbite and hypothermia. He notes that a lack of protection from wind and rain would increase the wind chill effect, which would greatly increase the risk of hypothermia.

Affidavit of Dr. Stephen Hwang, Exhibit "C".

134. Dr. Hwang testifies that homeless people are at particularly high risk of death from hypothermia, and that half of all such deaths occur when the air temperature is above freezing.

Affidavit of Dr. Stephen Hwang, Exhibit "C", p. 2.

135. Dr. Hwang notes that inadequate sleep has numerous adverse health effects, including an increased risk of diabetes, cardiovascular disease, obesity, depression and injuries. He states that "a lack of tent or other structure to provide even a minimal degree of protection form the elements, light and noise would result in even more disturbed and fragmented sleep" with associated negative health impacts.

Affidavit of Dr. Stephen Hwang, Exhibit "C", p. 2.

136. Dr. Hwang also testifies that exposure to the elements will increase homeless person's risks of skin breakdowns and skin infections, respiratory tract infections and sunburn and heatstroke. He states unequivocally that preventing homeless people from erecting even the most rudimentary forms of shelter will have "clear and direct adverse impacts on their health." Dr. Hwang was not cross-examined, and no evidence has been offered to contradict his opinion.

Affidavit of Dr. Stephen Hwang, Exhibit "C", p. 2.

137. In *R. v. Morgentaler*, [1988] 1 S.C.R. 30 Beetz J. held at p. 90:

> Generally speaking, the constitutional right to security of the person must include some protection from state interference when a person's life or health is in danger. The *Charter* does not, needless to say, protect men and women from even the most serious misfortunes of nature. Section 7 cannot be invoked simply because a person's life or health is in danger. The state can obviously not be said to have violated, for example, a pregnant woman's security of the person simply on the basis that her pregnancy in and of itself represents a danger to her life or health. There must be state intervention for "security of the person" in s. 7 to be violated.
>
> If a rule of criminal law precludes a person from obtaining appropriate medical treatment when his or her life or health is in danger, then the state has intervened and this intervention constitutes a violation of that man's or that woman's security of the person. "Security of the person" must include a right of access to medical treatment for a condition representing a danger to life or health without fear of criminal sanction. If an Act of Parliament forces a person whose life or health is in danger to choose between, on the one hand, the commission of a crime to obtain effective and timely medical treatment and, on the other hand, inadequate treatment or no treatment at all, the right to security of the person has been violated.

138. In this case, we do not suggest that the City is responsible for the health impacts of being homeless. However, with the prohibition on erecting shelter, the state has intervened, and that intervention constitutes a violation of security of the person. Preventing a person from erecting appropriate shelter may have serious health impacts, in the same manner as preventing access to appropriate medical treatment may have health impacts. The Bylaws force a homeless person to choose, on the one hand, between the commission of an offence, and on the other, inadequate shelter or no shelter at all, with concomitant negative

effects for the person's health.

See also *R. v. Parker* [2000] O.J. No. 2787 (C.A.) at para 107 110.

139. In addition to the health benefits of shelter, allowing homeless people, especially women, to create some rudimentary temporary cover may provide them with a degree of privacy and thus some protection from the risk of violence they face on the street.

140. In this case, the state has not provided adequate access to shelter for the City's homeless. However, the homeless must be able to access shelter in order to protect their physical and psychological well-being. We submit that prohibiting the homeless from erecting some form of shelter for themselves in these circumstances is an interference with security of the person.

Chaoulli, *supra*, at paras. 119-124.

E. Liberty

141. In *Morgentaler*, *supra*, Wilson J. held that the right to liberty, "properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance" and "guarantees to every individual a degree of personal autonomy over important decisions intimately affecting their private lives". She found that the liberty interest is grounded in fundamental notions of human dignity, personal autonomy, privacy and choice in decisions regarding an individual's fundamental being:

> Thus, an aspect of the respect for human dignity on which the *Charter* is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty. Liberty, as was noted in *Singh*, is a phrase capable of a broad range of meaning. In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance.

***Morgentaler*, supra at page 166.**

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

142. In *Blencoe, supra*, Bastarache J., speaking for a majority of the Supreme Court of Canada

stated at para 49:

> The liberty interest protected by s. 7 of the *Charter* is no longer restricted to mere freedom from physical restraint. Members of this Court have found that "liberty" is engaged where state compulsions or prohibitions affect important and fundamental life choices. This applies for example where persons are compelled to appear at a particular time and place for fingerprinting (*Beare, supra*); to produce documents or testify *(Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425); and not to loiter in particular areas (*R. v. Heywood,* [1994] 3 S.C.R. 761). In our free and democratic society, individuals are entitled to make decisions of fundamental importance free from state interference.

143. In *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, at para. 66, La Forest J., writing for L'Heureux-Dubé J. and McLachlin J. (as she then was), held that the right to liberty in s. 7 protects the individual's right to make inherently private choices and that choosing where to establish one's home is one such inherently personal choice:

> The foregoing discussion serves simply to reiterate my general view that the right to liberty enshrined in s. 7 of the Charter protects within its ambit the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference. I must emphasize here that, as the tenor of my comments in B. (R.) should indicate, I do not by any means regard this sphere of autonomy as being so wide as to encompass any and all decisions that individuals might make in conducting their affairs. Indeed, such a view would run contrary to the basic idea, expressed both at the outset of these reasons and in my reasons in B. (R.), that individuals cannot, in any organized society, be guaranteed an unbridled freedom to do whatever they please. Moreover, I do not even consider that the sphere of autonomy includes within its [page 342] scope every matter that might, however vaguely, be described as "private". Rather, as I see it, the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence. As I have already explained, I took the view in B. (R.) that parental decisions respecting the medical care provided to their children fall within this narrow class of inherently personal matters. In my view, choosing where to establish one's home is, likewise, a quintessentially private decision going to the very heart of personal or individual autonomy.

Referred to by Bastarache J. in *Blencoe*, *supra*.

144. As set out below, in a very real sense, homeless people have no choice but to try to protect themselves from the elements on public property, when there is no place else for them to go. This is not the kind of free choice which LaForest J. associated with choosing one's residence. Nonetheless, we submit that because the act of creating shelter for oneself is so critical to an individual's dignity and independence, it is properly characterized as a liberty interest which deserves protection under s.7. Interference with the ability to act to protect oneself in this manner will cause serious state imposed psychological stress. To interfere with the choice to protect oneself through the enforcement of the Bylaws, is a serious deprivation of liberty.

See also *R. v. Parker, supra*, at 102.-103.

F. Life

145. In *Federated Anti-Poverty Groups of B.C. v. Vancouver (City),* [2002] B.C.J. No. 493, the court considered a restriction on panhandling. Taylor J. held, at para 201-202 :

> Thus, I conclude that the ability to provide for one's self (and at the same time deliver the "message") is an interest that falls within the ambit of the s. 7 provision of the necessity of life. Without the ability to provide for those necessities, the entire ambit of other constitutionally protected rights becomes meaningless.
>
> As noted by Martha Jackman in her article, "The Protection of Welfare Rights Under the Charter" (1988) 20 Ottawa Review 257 at 326:
>
> > ...[A] person who lacks the basic means of subsistence has a tenuous hold on the most basic of constitutionally guaranteed human rights, the right to life, to liberty, and to personal security. Most, if not all, of the rights and freedoms set out in the Charter presuppose a person who has moved beyond the basic

> struggle for existence. The Charter accords rights which can only be fully enjoyed by people who are fed, are clothed, are sheltered, have access to necessary health care, to education, and to a minimum level of income. As the United Church's brief to the Special Joint Committee declared: "Other rights are hollow without these rights".

146. In this case, we submit the ability to provide oneself with shelter, in the face of an absence of alternatives, is a necessity of life, which is interfered with by the Bylaw.

G. The deprivation is not in accordance with the principles of fundamental justice

147. It is not necessary for the Defendants to demonstrate all of the above-noted interferences with life, liberty or security of the person in order to succeed. It is sufficient to demonstrate that there has been one such interference, if that interference is also contrary to the principles of fundamental justice

148. The principles of fundamental justice are (1) legal principles (2) about which there is sufficient consensus that the principle is fundamental to our societal notion of justice, and (3) that are capable of being defined with precision and applied to situations in a manner that yields predictable results.

Canadian Foundation for Children, Youth and the Law v. Attorney General of Canada **[2004] 1 S.C.R. 76 at para 8.**

1. Arbitrariness and Overbreadth

149. In this case, the first relevant principle is that a law must not operate to deprive persons of the interests protected by section 7 in an arbitrary manner. This principle is closely related to the principle that such laws must not be overbroad. In this case, we submit that the prohibition on erecting any form of shelter in a public place is both arbitrary and overbroad and thus contrary to the principles of fundamental justice.

150. In *Chaoulli*, McLachlin C.J. and Major J. state, at para 129- 131:

> It is a well-recognized principle of fundamental justice that laws should not be arbitrary: see, e.g., *Malmo-Levine*, at para. 135; *Rodriguez*, at p. 594. The state is not entitled to arbitrarily limit its citizens' rights to life, liberty and security of the person.
>
> A law is arbitrary where "it bears no relation to, or is inconsistent with, the objective that lies behind [it]". To determine whether this is the case, it is necessary to consider the state interest and societal concerns that the provision is meant to reflect: *Rodriguez*, at pp. 594-95.
>
> In order not to be arbitrary, the limit on life, liberty and security requires not only a theoretical connection between the limit and the legislative goal, but a real connection on the facts. The onus of showing lack of connection in this sense rests with the claimant. The question in every case is whether the measure is arbitrary in the sense of bearing no real relation to the goal and hence being manifestly unfair. The more serious the impingement on the person's liberty and security, the more clear must be the connection. Where the individual's very life may be at stake, the reasonable person would expect a clear connection, in theory and in fact, between the measure that puts life at risk and the legislative goals.
>
> In *Morgentaler*, Beetz J., Estey J. concurring, found that the limits on security of the person caused by rules that endangered health were "manifestly unfair" and did not conform to the principles of fundamental justice, in reasons that invoke arbitrariness. Some of the limitations bore no connection to Parliament's objectives, in his view, while others were unnecessary to assure that those objectives were met (p. 110).
>
> While cloaked in the language of manifest unfairness, this reasoning evokes the principle of fundamental justice that laws must not be arbitrary, and was so read in *Rodriguez*, at p. 594. Beetz J.'s concurring reasons in *Morgentaler* thus serve as an example of how the rule against arbitrariness may be implicated in the particular context of access to health care. The fact that Dickson C.J., Lamer J. concurring, found that the scheme offended a different principle of fundamental justice, namely that defences to criminal charges must not be illusory, does not detract from the proposition adopted by Beetz J. that rules that endanger health arbitrarily do not comply with the principles of fundamental justice.

151. In *Rodriguez*, *supra*, at para. 147, Sopinka J., for a majority of the Supreme Court of Canada, held:

> Where the deprivation of the right in question does little or nothing to enhance the state's interest (whatever it may be), it seems to me that a breach of fundamental justice will be made out, as the individual's rights will have been deprived for no valid purpose.

See also *R. v. Parker*; *supra*; *R. v. McCluskey,* [2005] N.B.J. No. 55 (P.C.)

152. Another, related principle of fundamental justice is that restrictions on liberty and security of the person must not be more broadly framed than necessary to achieve a legislative purpose. In R. v. *Heywood*, [1994] 3 S.C.R. 761, at para 49, the Supreme Court of Canada held:

> Overbreadth analysis looks at the means chosen by the state in relation to its purpose. In considering whether a legislative provision is overbroad, a court must ask the question: are those means necessary to achieve the State objective? If the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.

153. In this case, we submit that the prohibition on erecting shelter does little or nothing to enhance the City's legitimate interests, or at the very least is much broader than is necessary to achieve the City's goals. The City's rationale for prohibiting the erection of shelter is found at paragraph 6 of the Affidavit of Mike McCliggot. That paragraph contains a number of statements which must be examined in order to determined whether the prohibition is arbitrary or overbroad.

154. Mr. McCliggot first notes that sleeping simpliciter is not prohibited by the bylaw. This is not an expression of the state interest in prohibiting the erection of shelter. Mr. McCliggot next states that "While sleeping, persons can protect themselves from the elements and stay warm" by the use of "individual non structural weather repellant covers that are removed once the person is awake." As set out above, the evidence of the wilderness

expert and the medical expert is that this type of non erected "shelter" is insufficient to protect a person from the elements, and that prohibiting the use of simple structural elements, such as a cardboard box, will have negative impact on the health of persons who have no other form of shelter. Again, Mr. McCliggot's statement in this regard is not an expression of the state interest in prohibiting the erection of shelter, although it does speak to the interest of those who say their rights are infringed under s.7.

155. Mr. McCliggot asserts that "In cold or severe weather, the City's severe weather protocol also ensures that there a -[sic] sufficient shelters and beds for all who require them." The evidence of the City's own documents is that even when the maximum number of beds is open, there are still hundreds of homeless people who are left outside. Moreover, the protocol is only triggered under certain extreme conditions, while protection from the elements is necessary in a variety of weather condition. Again, this part of Mr. McCliggot's evidence does not directly address the City's interest in prohibiting the erection of shelter.

156. The City's interests are purportedly set out in the last four items in Mr. McCliggot's statement. First, he refers to "Protecting the park, its natural environment and amenities from damage or harm." There is no reason why a homeless person using, for example, a cardboard box or a freestanding tent to protect themselves from the wind and rain would cause any more damage to the park than a person simply sleeping on the ground with a multitude of wet blankets. The City assures us, however, that the latter conduct is not prohibited, but the former is. This, we submit, is arbitrary.

157. The next identified state interest is "Ensuring that parks and public spaces are available for use and enjoyment to all members of th public generally." Again, there is no reason why prohibiting homeless people from using cardboard boxes, freestanding tents, or erected tarps to protect themselves from weather conditions would interfere with other park users, at least to any greater extent than homeless people sleeping with blankets and tarps laid across their faces. This is especially true if the shelters were only used overnight and required to be removed in the morning, or if they were restricted to certain areas. There is

no benefit to other park users in ensuring that homeless people without other forms of shelter sleep with only sleeping bags and un-erected tarps, rather than under a rudimentary shelter which would actually provide them with warmth, protection from wind snow and rain, and perhaps even a measure of privacy.

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

159. The final interest referred to in the McCliggot affidavit is that of "Respecting the public interest in the purpose ans rationale for the creation of parks and public spaces." The City has, in the affidavit of Lyle Rumpel, provided extensive evidence about the importance of parks. However, it does not appear that anything in the evidence can establish any connection between denying homeless people the ability to create rudimentary overnight shelter in some portion of the City and the ability of the public to enjoy the benefits of parks.

160. There are very brief references in the City's evidence to some people, in San Francisco and Los Angeles, being uncomfortable in certain parks, in part (and only in part) because of homeless people living there. Again, however, that has to do not with the form of shelter which the homeless are allowed to create, but their very existence - a matter which cannot be legislated away. The City's evidence also contains reference to the fundamental importance of parks in providing hope and sanctuary to the homeless.

Affidavit of Lyle Rumpel, Exhibits "V", "K" and "W".

161. As set out above, the rise in homelessness is due to a variety of factors, which are clearly not in the control of either the City or the Defendants. The existence of a significant homeless population is a fact which must be recognized and, to some extent, accommodated. According to the City, the question in this case is not whether the homeless can sleep in public spaces. We agree that because of the number of homeless, and the lack of options available, it is inevitable than many will be sleeping in public space. Instead, the question before the court is whether there is a legitimate state interest in denying to those forced to sleep outside the ability to erect some form of effective shelter which will provide some real protection from the elements as well as, perhaps, some small measure of privacy. We submit that there is no real connection between the societal interests which are purportedly advanced by the bylaw and the prohibition on erecting shelter. As a result, the prohibition is arbitrary or overbroad and thus contrary to the principles of fundamental justice.

162. As set out in *Chaoulli*, the more serious the impingement on the person's liberty and security, the more clear must be the connection. In this case, the impact of the bylaw is felt by some of the City's most vulnerable and disadvantaged citizens and the infringements of liberty and security of the person are serious, and, in some cases, even life threatening. For many aspects of the prohibition, there is no real connection at all to any legitimate societal goals.

2. Moral Involuntariness

163. We submit that it is also a principle of fundamental justice that no law should punish or prohibit conduct when a person has no real choice whether or not to engage in that conduct. This principle is recognized in a number of contexts.

164. As stated by Professor Hogg, "[i]t is a tenet of the criminal law that a person should not be convicted of a criminal offence for an act that is not voluntary." This principle means that physically involuntary acts, including acts done in a state of automatism, cannot attract

liability.

Hogg, *Constitutional Law of Canada (looseleaf) , (1997: Thomson Carswell Ltd), Vol 2* pages 44-37 to 44-39.

165. In *R. v. Ruzic*, a unanimous Supreme Court of Canada held that it would also be a breach of fundamental justice to convict a person of a crime when that person had not acted in a morally voluntary manner. LeBel J., for the Court, reasoned as follows at para 46:

> Punishing a person whose actions are involuntary in the physical sense is unjust because it conflicts with the assumption in criminal law that individuals are autonomous and freely choosing agents: see Shaffer, supra, at pp. 449-50. It is similarly unjust to penalize an individual who acted in a morally involuntary fashion. This is so because his acts cannot realistically be attributed to him, as his will was constrained by some external force.

***R. v. Ruzic*, [2001] 1 S.C.R. 687**

166. The Court held that "[a]lthough moral involuntariness does not negate the actus reus or mens rea of an offence, it is a principle which, similarly to physical involuntariness, deserves protection under s. 7 of the *Charter*." It is fundamentally unjust to punish someone for conduct that is not the product of their autonomous choices. This principle flows from the *Charter*'s emphasis on human dignity, liberty and equality. To adopt the words of the Court in *Ruzic*, to deprive the Defendants of their liberty, and security of the person without affording them a "realistic choice" is offensive to our societal concept of fundamental justice.

***Ruzic*, supra, at para. 47**

167. Numerous U.S. courts have found unconstitutional those statutes which make it a crime for homeless people to engage in life sustaining activities in public, on the basis that they punish homeless for behaviour in which they have no choice but to engage. In *Pottinger v. the U.S.*, a Florida District Court held that laws which prohibited homeless people from engaging in life sustaining activities, such as sleeping, amounted to cruel and unusual punishment:

> Because of the unavailability of low-income housing or alternative shelter, plaintiffs have no choice but to conduct involuntary, life-sustaining activities in public places. The harmless conduct for which they are arrested is inseparable from their involuntary condition of being homeless. Consequently, arresting homeless people for harmless acts they are forced to perform in public effectively punishes them for being homeless.
>
> ***Pottinger, supra*, page 11**

168. The Court found that:

> An individual who loses his home as a result of economic hard times or physical or mental illness exercises no more control over these events than he would over a natural disaster. Furthermore, as was established at trial, the City does not have enough shelter to house Miami's homeless residents. 19 Consequently, the City cannot argue persuasively that the homeless have made a deliberate choice to live in public places or that their decision to sleep in the park as opposed to some other exposed place is a volitional act. As Professor Wright testified, the lack of reasonable alternatives should not be mistaken for choice.
>
> For plaintiffs, resisting the need to eat, sleep or engage in other life-sustaining activities is impossible. Avoiding public places when engaging in this otherwise innocent conduct is also impossible. Moreover, plaintiffs have not argued that the City should not be able to arrest them for public drunkenness or any type of conduct that might be harmful to themselves or to others. To paraphrase Justice White, plaintiffs have no place else to go and no place else to be. *Powell, 392 U.S. at 551*. This is so particularly at night when the public parks are closed. As long as the homeless plaintiffs do not have a single place where they can lawfully be, the challenged ordinances, as applied to them, effectively punish them for something for which they may not be convicted under the eighth amendment-sleeping, eating and other innocent conduct. Accordingly, the court finds that defendant's conduct violates the eighth amendment ban against cruel and usual punishment and therefore that the defendant is liable on this count.

Pottinger, supra*, at page 11. See also *State of Oregon v Norman E., Sr. et al*, Case No. Z711742 and Z711743, September 27, 2000 *("Wicks")

169. A Texas court also found that an ordinance against sleeping in public as applied against homeless persons was unconstitutional:

> The evidence demonstrates that for a number of Dallas homeless at this time homelessness is involuntary and irremediable. They have no place to go other than the public lands they live on. In other words, they must be in public. And it is also clear that they must sleep. Although sleeping is an act rather than a status, the status of being could clearly not be criminalized after Robinson. Because being does not exist without sleeping, criminalizing the latter necessarily punishes the homeless for their status as homeless, a status forcing them to be in public. The Court concludes that is clear, then, that the sleeping in public ordinance as applied against the homeless is unconstitutional.

***Johnson et al v. City of Dallas* 860 F. Supp. 344 (1994) at page 10**

170. Although this decision was later vacated, that was done on the basis of standing and the court did not set out any disagreement with the principles set out above.

***Johnson et al v. City of Dallas* 61 F.3d 442 (1995)**

171. Most recently, in *Jones, supra*, the court held that the City of Los Angeles' blanket prohibition sleeping outside was unconstitutional:

> The City could not expressly criminalize the status of homelessness by making it a crime to be homeless without violating the Eighth Amendment, nor can it criminalize acts that are an integral aspect of that status. Because there is substantial and undisputed evidence that the number of homeless persons in Los Angeles far exceeds the number of available shelter beds at all times, including on the nights of their arrest or citation, Los Angeles has encroached upon Appellants' Eighth Amendment protections by criminalizing the unavoidable act of sitting, lying, or sleeping at night while being involuntarily homeless.

172. Does it matter that the prohibition here is now, at least according to the City, not aimed at prohibiting the act of sleeping but rather the erection of shelter which would make sleeping safe? We submit that it does not. Shelter sufficient to ensure that one can sleep

though the night without putting one's health at risk is a basic human need. The activity of a homeless person in trying to fulfil that need is not properly characterized as avoidable conduct which the state can prohibit.

173. In *State of Oregon v. Wicks*, Case No. Z711742 and Z711743(Oregon Cir. Ct.) Judge Gallagher found that an anti-camping ordinance enacted by the city of Portland was unconstitutional. There ordinance made it unlawful to camp in a public place. Judge Gallagher stated:

> In the light of both Oregon and federal law, the court must determine if PCC 14.08.250 is punishing the Defendants for their status of being homeless or their conduct, distinguishable from the fact that they are homeless.
>
> The court finds it is impossible to separate the fact of being homeless from the necessary acts that go with it, such as sleeping. **The act of sleeping or eating in a shelter away from the elements cannot be considered intentional, avoidable conduct. This conduct is ordinary activity required to sustain life. Due to the fact that they are homeless, persons seek out shelter to perform these daily routines.** Yet the City considers this location to be a campsite if the homeless person maintains any bedding. The homeless are being punished for behaviour indistinguishable from the mere fact that they are homeless. Therefore those without homes are being punished for the status of being homeless. (Emphasis added.)

174. The court held that the anti-camping ordinance constituted cruel and unusual punishment, and violated homeless person's right to travel.

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.

176. The fundamental nature of the principle that one should not be punished for behaviour about which one has no choice is also reflected in the fact that contemporary Canadian law manifests a deep distaste for "status offences." In *R. v. Budreo*, Laskin J.A. accepted, for the purposes of analysis, that status offences are contrary to fundamental justice. Status offences have become increasingly rare in Canadian law. Yet one way of understanding

the bylaws is that they forbid a status – homelessness; the law effectively punishes homelessness and poverty. The ability to keep oneself safe and warm is a fundamental human need. Yet the bylaw punishes homeless people for taking the most basic steps to fulfill that need.

R. v. Budreo **(2000), 183 D.L.R. (4th) 519 at para. 25.**

177. In the *Ref re Motor Vehicle Act*, [1985] 2 S.C.R. 486 Lamer J. (as he then was) noted at para 67:

> It has from time immemorial been part of our system of laws that the innocent not be punished. This principle has long been recognized as an essential element of a system for the administration of which is founded upon a belief in the dignity and worth of the human person and on the rule of law.

Lamer J. held, at para 1, that "A law that has the potential to convict a person who has not really done anything wrong offends the principles of fundamental justice."

178. Not every act which is morally involuntary will be blameless, as the Court recognized in *Ruzic*. The Court was clear that moral involuntariness was a principle of fundamental justice even when the activity which was proscribed was not without blame. However, we submit that homeless people who erect shelters to protect themselves from the elements, when they have no other choice for shelter, have, in the Chief Justice;'s words, not really done anything wrong. A legal system based on recognizing the dignity and worth of each individual, regardless of their economic means, cannot ascribe culpability to the mere act creating shelter for oneself when one has no other realistic choice.

H. Conclusion on section 7

179. We submit that the evidence establishes that a significant amount of people in the City of Victoria have no choice but to sleep outside in the City's parks or streets. The City's bylaws prohibit those homeless person from erecting even the most rudimentary form of shelter to protect them from the elements. The prohibition on erecting shelter is in effect at

all times, in all public places in the City.

180. The evidence also establishes that the effect of the prohibition is to impose upon those homeless, who are among the most vulnerable and marginalized of the City's residents, significant and potentially severe additional health risks. In addition, sleep and shelter are necessary preconditions to any kind of security, liberty, or human flourishing. We submit that there can be no question that the prohibition constitutes an interference with their liberty and security of the person.

181. This interference is not in accordance with the principles of fundamental justice. First, it is overbroad and thus arbitrary. The City's goals of preserving the integrity of the parks system are not furthered by refusing the homeless who may be forced to sleep outside the benefit of the most rudimentary forms of erected shelter. Denying a homeless person the cold comfort of a cardboard box may make all the difference to her ability to withstand a night in the cold. It will make no difference to the park user who seeks to take a walk in the park the next day.

182. U.S. courts have found that punishing homeless people for engaging in acts which they cannot avoid by virtue of their homelessness constitutes cruel and unusual punishment under that country's constitution. We submit that the principles of fundamental justice which underpin the Canadian legal system are at least as sensitive to the manifest unfairness of criminalizing essentially harmless activity in which the homeless, though no fault of their own, must engage. The ability to access shelter is a fundamental and inevitable human need, one which Canada has agreed to recognize and address in its international obligations. To criminalize the ability of the homeless to take simple steps to fulfill that need is inconsistent with the fundamental tenets of the Canadian legal system, including the principle that respect for human dignity and individual self worth requires that acts which attract state sanction must be voluntary.

I. Section 1

183. It is well-recognized that the burden is on the City to justify any *Charter* infringement

under s.1. As a result, we reserve our rights to make full argument in reply to any section 1 defence raised. However, at this time, we note that many Courts have expressed the view that infringements of s. 7 can only be justified in extreme cases, non of which apply here. Courts have also held that laws which are contrary to s.7 because of overbreadth or arbitrariness will never be able to meet the minimal impairment or proportionality tests under s.1.

***Heywood, supra at* para. 69**.

J. Remedy

184. In their Writ of Summons filed in October of 2005, and in a subsequent letter to counsel dated December 7, 2007, the Plaintiff alleges that should persons camp (or erect shelter) at Cridge Park (or on other City property) they would be in contravention of the following By-Laws:

Parks Regulation Bylaw No. 07-059

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

(a) cut, break, injure, remove, climb, or in any way destroy or damage

(i) a tree, shrub, plant, turf, flower, or seed, or

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

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

(a) behave in a disorderly or offensive manner;

(c) obstruct the free use and enjoyment of the park by another person;

(d) take up a temporary abode over night

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

(a) encumber or obstruct a footpath;

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

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

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

185. While the Defendants are of the view that ss. 13.(1) and (2) and 14.(1)(a) and (c)of the Parks Regulation Bylaw do not prohibit persons from taking shelter, given the City's position that such provisions are, or could be, contravened by homeless people camping in Cridge Park (or elsewhere), we include those provisions in our challenge of the Bylaws.

186. To reiterate, the Defendants' position is that the prohibition on erecting even the most rudimentary shelter in order to be able to sleep unjustifiably violates the rights of homeless people under s. 7 of the *Charter*. As a result, we say that to the extent that the Bylaws have the effect of prohibiting homeless people from erecting shelter, they are of no force and effect. If this court finds the impugned provisions of the Bylaws to be inconsistent with the *Charter*, the court is obliged to strike the law down.

Hogg, *supra*, p. 7-2

187. Accordingly, the Defendants seek a declaration that the foregoing provisions of the Bylaws are unconstitutional and of no force and effect in their entirety, or, alternatively a declaration that the Bylaws are of no force and effect insofar as they apply to prevent

homeless persons from erecting shelter. It would be inappropriate for the court to attempt to define what specific kinds of shelter, or size of tarpaulin, a homeless person might be allowed to erect, or specifically where such a shelter might be erected Either of the declarations sought would leave the Mayor and Council free to deal with the homeless situation in any way it might see fit, consistent with the *Charter.*

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED

MAY 27, 2008

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