

No.: 05 4999
Victoria Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

THE CORPORATION OF THE CITY OF VICTORIA

PLAINTIFF

AND:

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

DEFENDANTS

AND:

THE ATTORNEY GENERAL OF BRITISH COLUMBIA

INTERVENOR

PLAINTIFF'S SUBMISSIONS

This argument is divided into the following parts:

A. INTRODUCTION

B. SUMMARY OF CITY'S POSITION

C. FACTS

(i) **The Bylaws;**

(ii) **The Occupation of Cridge Park in October, 2005;**

- (iii) The Effects of Urban Park Camping;
- (iv) City of Victoria Efforts to Address Homelessness Issues;
- (v) City Policy Regarding Urban Camping.

D. LAW AND ARGUMENT

- (i) Issue: Do the City’s Bylaw Provisions Infringe the *Charter* and are the Bylaws Justifiable?
- (ii) No *Charter* Infringement;
- (iii) Section 1 of the *Charter*:
 - (a) A Sufficiently Important Objective: The Law Must Pursue an Objective that is Sufficiently Important to Justify Limiting the *Charter* Right;
 - (b) Rational Connection: The Law Must be Rationally Connected to the Objective;
 - (c) Least Drastic Means: The Law Impair the Right No More Than is Necessary to Accomplish the Objective;
 - (d) Proportionate Affect: The Law Must Not Have a Disproportionately Severe Affect on the Persons to Whom it Applies.

E. CONCLUSION

A. INTRODUCTION

1. The City agrees with and adopts the submissions of the Intervenor, Attorney General of British Columbia (“AGBC”), with respect to the *Charter* and the answers to the questions asked in the *Constitutional Questions Act* notice. The City says that the Defendants’ summary trial application ought to be dismissed for those reasons alone.

2. In the event that it is necessary for the Court to consider Section 1 of the *Charter*, the City sets out in the submissions below its position that its bylaw limitations are reasonable and demonstrably justified.

B. SUMMARY OF THE CITY’S POSITION

3. The City accepts that homelessness is a serious social issue which it and other governmental and non-governmental agencies are attempting to address.

4. The City accepts that people must be able to sleep. The City does not prohibit people from sleeping in parks and public open spaces.

5. The City also accepts that people must be able to protect themselves from

the elements if they are sleeping outside. The City does not prohibit individuals from covering themselves to stay warm and dry while they sleep.

6. However, this litigation arose in a context very different from those issues. This litigation was commenced by the City only when the occupation of one of its parks by campers as a “tent city” became intolerable. While the Defendants now assert the right for anyone seeking shelter to do so in a public park, this context suggests that the Defendants are in effect seeking the right to create tent cities in public parks. Their argument would give them the constitutional right to take over public spaces indefinitely for their own collective and personal use to the exclusion of other members of the community – a defacto expropriation.

7. The City says the Defendants’ assertion of right is not protected by the *Charter* and ought to be rejected by the Court.

8. The City also says that the Defendants’ position in reality amounts to a public policy argument that seeks to have the Court direct how different levels of government ought to allocate their resources to deal with homelessness. The argument posits that if the seemingly intractable issue of homelessness, and all its attendant causes and effects, is not addressed to the undefined standard of the Defendants, then the City must suspend its regulatory control over its parks.

9. The City says that the limits it places on the erection of a temporary abode and the creation of tent cities in public spaces are reasonable and demonstrably justified in a free and democratic society.

C. FACTS

(i) The Bylaws

10. This civil injunction action to enforce municipal bylaws respecting parks and public spaces was commenced by the City of Victoria on October 19, 2005. The action was commenced in order to end the around the clock occupation of Cridge Park by a group of campers that began 11 days prior.

11. The Plaintiff has established and maintains a public park located at the corner of Blanshard and Belleville Streets in the City of Victoria known as Cridge Park. Cridge Park is a park within the meaning of the Plaintiff's Parks Regulation Bylaw and is under the care and management of the Director of Parks and Recreation of the Plaintiff.

12. The Plaintiff is authorized to regulate, prohibit and impose requirements in relation to public places pursuant to Sections 8(3)(b) and 62 of the *Community Charter*, S.B.C: 2003, Chapter 26.

13. The Plaintiff exercised its authority described above at the time of the

occupation of Cridge Park in October, 2005 by way of its Parks Regulation Bylaw, which has since been repealed and replaced, and its Streets and Traffic Bylaw.

14. The Plaintiff is authorized to enforce, prevent or restrain the contraventions of its bylaws by way of a proceeding brought in Supreme Court pursuant to Section 274(1)(a) of the *Community Charter*.

15. Under the Parks Regulation Bylaw as it existed in October, 2005, no person could, without permission, obstruct the free use and enjoyment of any park.

16. Under the Parks Regulation Bylaw, as it existed in October, 2005, no person could cut, break, injure or in any way destroy or damage any tree, shrub, plant, turf or flower, or any building, structure, fence, sign, seat, bench or ornament of any kind, or in any way foul or pollute any fountain, lake, stream, pool, pond in any park, or damage, deface, or destroy any notices, rules or regulations lawfully posted or affixed in any park within the City of Victoria.

17. Under the Parks Regulation Bylaw, as it existed in October, 2005, no person could sell, or expose for sale or gift, any refreshments or any article or thing or conduct any business in any park except with the express permission of Council of the Plaintiff.

18. Performances or concerts, gatherings, meetings or other special events were also not permitted under the Parks Regulation Bylaw, as it existed in October, 2005, without the express prior permission of Council of the Plaintiff.

19. Under the Parks Regulation Bylaw, as it existed in October, 2005, no person without permission could encumber or obstruct in any manner whatsoever any road or footpath in any park, or loiter or take up a temporary abode overnight on any portion of any park or obstruct the free use and enjoyment of any park or violate any bylaw or notice concerning any park within the City of Victoria.

20. The Parks Regulation Bylaw was repealed and replaced on August 9, 2007 by a new Parks Regulation Bylaw (the "Parks Regulation Bylaw 2007").

21. Under the Parks Regulation Bylaw 2007, a person must not do, among other things, any of the following activities in a park:

- (a) Cut, break, injure, remove, climb, or in any way destroy or damage a tree, shrub, plant, turf, flower, or seed ...;
- (b) Behave in a disorderly or offensive manner;
- (c) Molest or injure another person;

- (d) Obstruct the free use and enjoyment of the park by another person;
- (e) Take up temporary abode overnight.

22. Pursuant to the Plaintiff's Streets and Traffic Bylaw, no person shall cause a nuisance in, upon, over, under, or above any street or other public place, or encumber, obstruct, injure, foul, or damage any portion of a street or other public place without a permit from the Council of the Plaintiff.

(ii) The Occupation of Cridge Park in October, 2005

23. Cridge Park was occupied by a group of up to 70 people beginning on October 8, 2005.

Affidavit of Gordon Smith #1
paragraphs 10 and 17

24. During the occupation of Cridge Park by these people, there were more than 20 tents set up within the park.

Affidavit of Gordon Smith #1
paragraph 11

25. During the occupation of Cridge Park by these people, there were vacant shelter beds available within the City of Victoria.

Affidavit of Karen Ramsay #1

26. Two large kitchen areas were built in Cridge Park by the occupiers using tables and an electrical cord running from this cooking area to an outdoor electrical outlet in the Church building located adjacent to the north side of the park.

Affidavit of Gordon Smith #1
paragraph 16

27. There are no public washrooms located in or near Cridge Park. The people occupying the park in October, 2005, were urinating and defecating within the park and outside nearby businesses.

Affidavit of Gordon Smith #1
paragraph 18

Affidavit of Dan Scoones #1

28. The turf in Cridge Park had been in good condition prior to the occupation of the park commencing on October 8, 2005 and was damaged or destroyed over the 20 days following that the park was occupied.

Affidavit of Gordon Smith #1
paragraphs 17 and 19

Affidavit of A. Cunningham #1
paragraph 8

29. During the occupation of Cridge Park in October, 2005, garbage was

strewn throughout the park.

Affidavit of Gordon Smith #1
paragraph 23

30. After the occupation of Cridge Park ended on October 28, 2005, a City work crew of nine employees worked approximately 26 man-hours in order to clean up the mess left behind in the park by the occupiers.

Affidavit of A. Cunningham #1
paragraphs 3 and 4

31. As part of the clean up of Cridge Park, City employees removed ropes, wires, fort-like structures, nails and spikes from trees in Cridge Park.

Affidavit of A. Cunningham #1
paragraph 5

32. During the clean up of Cridge Park on October 28, 2005, City employees removed from the ground in Cridge Park items including hypodermic needles and tent spikes.

Affidavit of A. Cunningham #1
paragraph 6

33. During the clean up of Cridge Park on October 28, 2005, City crews removed garbage which filled three large trucks and one large metal container-type garbage bin.

Affidavit of A. Cunningham #1
paragraph 7

34. During the occupation of Cridge Park, there was violence and illicit drug use within the park and stolen property was recovered there.

Affidavit of James Simpson #1

35. During the occupation of Cridge Park, dangerous items including a machete, knives and firearms were seized from the occupiers of the park.

Affidavit of Graeme Leblanc #1

36. Complaints to the City from local businesses related to this small park occupation included:

- (a) Major problems with regard to the safety of customers and employees;
- (b) Security issues;
- (c) The potential for fire;
- (d) Property theft and damage;
- (e) Health issues due to human waste;
- (f) Noise;
- (g) Trespass;
- (h) Smoke;
- (i) Guests leaving.

Affidavit of Dan Scoones #1

(iii) The Effects of Urban Park Camping

37. The City of Victoria has undertaken a parks master planning process. As part of this process, the City retained a firm to conduct a random survey to determine the attitudes of City residents towards City parks issues. Among the findings of the consulting firm were:

- (a) Parks are very heavily used by the public in Victoria;
- (b) Concerns about social issues and safety issues in parks were cited by the public as a barrier to using the parks;
- (c) Improving the sense of safety in parks, and addressing the issues of homelessness, drug use, etc. would increase park usage.

Affidavit of Gary Darrah #1

38. It is the experience of those tasked with caring for the parks of the City of Victoria that significant damage is being done to the natural areas of City parks as a result of people camping overnight in those parks.

Affidavit of Fred Hook #1

39. Most of the natural areas within the City of Victoria's parks are part of an ecosystem that is among British Columbia's most valuable and most threatened.

Affidavit of Fred Hook #1

40. In Beacon Hill Park, endangered plant species have been damaged by people frequenting areas for the purpose of camping.

Affidavit of Fred Hook #1

41. Campers also compact soil which is a detriment to trees and shrubs in the area.

Affidavit of Fred Hook #1

42. Places where people take up a temporary abode within City of Victoria parks are often strewn with large quantities of debris including plastic, metal and organic materials. Items such as used hypodermic needles and condoms have been found at such sites.

Affidavit of Fred Hook #1

Affidavit of Al Cunningham #2

43. Camping in parks has an adverse effect upon the bird population.

Affidavit of Fred Hook #1

44. Waterfront bluffs within the City of Victoria are suffering significant damage as a result of campers excavating into the bluffs in order to create shelter.

Affidavit of Fred Hook #1

(iv) City of Victoria Efforts to Address Homelessness Issues

45. City of Victoria Mayor Alan Lowe established a Task Force On Breaking the Cycle of Homelessness, Addiction and Mental Health in May, 2007 (the "Task Force"). The Task Force issued its comprehensive report entitled "A Victoria Model" on October 19, 2007. Among the findings of the Task Force were the following:

- (a) The homeless problem is the result of societal changes and years of policy shifts that have created a perfect storm of unprecedented social challenges;
- (b) Homeless people with severe mental illnesses and/or substance use problems are generating significant public disorder complaints in the Victoria downtown core;
- (c) Significant City and police resources are being spent managing and cleaning up after the downtown street population – at the cost of providing services elsewhere in the community.

Affidavit of Stan Schopp #1

46. The Finance Department of the City of Victoria takes into account an estimate of the annual costs to the City for dealing with all matters relating to

homelessness, except for policing costs, when determining the City's budget.

Affidavit of Sheryl Masters #1

47. As part of its response to the issue of homelessness within the City of Victoria, City staff have been in contact with other jurisdictions regarding their approaches to the problem. As an example, materials obtained from the City of Edmonton describes the lengths that Edmonton had to go in ensuring its employees were safe when dealing with homeless encampments including warnings about the dangers of skin infections, HIV, hepatitis, tuberculosis exposure and hantavirus.

Affidavit of Rob Woodland #1

48. There is a coordinated effort between the City of Victoria and various shelter providers within the City to address the need for extra shelter spaces during the winter months called the Extreme Weather Protocol.

Affidavit of Rob Woodland #1

49. The Extreme Weather Protocol was in effect over the 2007-2008 winter for 81 nights.

Affidavit of Rob Woodland #1

50. The best information available to the City is that shelter capacity during the Extreme Weather Protocol was nearly reached on several nights but the capacity was never exceeded.

Affidavit of Rob Woodland #1

51. 205 new and upgraded housing units are planned for completion by 2010 within the City of Victoria.

Affidavit of Nancy Taylor #1

52. Approximately 177 homeless people were housed between November 1, 2007 and April 30, 2008. Of those people, 89 are believed to be high risk, high needs clients.

Affidavit of Nancy Taylor #1

53. Three specialized teams seeking to provide support to homeless people being placed into supportive housing are now either operational or staffed.

Affidavit of Nancy Taylor #1

54. Detox accommodation in Victoria is anticipated to increase from 7 to 17 beds beginning in May, 2008.

Affidavit of Nancy Taylor #1

55. The Greater Victoria Commission To End Homelessness was established in February, 2008. Victoria is the first community in British Columbia to create a community commission to implement long term plans to end homelessness.

Affidavit of John Ducker #1

56. The City of Victoria is also involved, through its Police Department, with the Victoria Integrated Committee Outreach Team which was formed to respond to the needs of a population of people in Victoria with significant needs related to severe

mental health and addiction disorders, cognitive impairment, low impulse control and a lack of housing.

Affidavit of John Ducker #1

(v) City Policy Regarding Urban Camping

57. With the adoption of Parks Regulation Bylaw 2007, on August 9, 2007, sleeping *simpliciter* in either parks or public spaces is not prohibited by either the Streets and Traffic Bylaw No. 92-84 or the Parks Regulation Bylaw 2007.

Affidavit of Mike McCliggott #1

58. The Parks Regulation Bylaw 2007 prohibits the taking up of a temporary abode overnight. Accordingly, tents, tarps which are attached to trees or otherwise erected, boxes or other structures are prohibited. The rationale for this policy includes:

- (a) In cold or severe weather, the Extreme Weather Protocol ensures that there are sufficient shelters and beds for all who require them;
- (b) Parks and their natural environment and amenities need protection from damage or harm;
- (c) Parks and public spaces are kept available for the use and enjoyment to all members of the public generally;

- (d) Public health and safety considerations arise when people take up abode in parks;
- (e) Respect for the public interest in the purpose and rationale for the creation of parks and public spaces is maintained.

Affidavit of Mike McCliggott #1

59. It is the practice of the Victoria Police Department to adhere to a policy that when homeless persons are encountered sleeping in public places between the hours of 11:00 p.m. and 7:00 a.m., they are not awakened if they are not obstructing a sidewalk, street or other right of way, or interfering with the use of a public amenity such as a bus shelter.

Affidavit of Jamie Pearce #1

60. The City submits that its bylaws do not constitute an interference with the security of the person and liberty interests of homeless people such that Section 7 of the *Canadian Charter of Rights and Freedoms* is engaged. The City says that the Defendants are in reality advocating for a right to housing. The City says further that Canadian Courts have not accepted that a positive obligation to provide housing is mandated by the *Charter* and, further, Courts have found that Judges do not have the mandate to place positive obligations on government in general.

61. When people are encountered sleeping in a City park during the daytime, and there is no evidence of those persons taking up temporary abode in the park, it is the practice of the Victoria Police Department not to awaken those persons. However, if there is a concern with respect to a person's welfare, police may awake a sleeping person in order to assess their health condition.

Affidavit of Jamie Pearce #1

LAW AND ARGUMENT

(i) Issue: Do the City's Bylaw Provisions Infringe the *Charter* and are the Bylaws Justifiable?

62. The City says that the limits it places on the erecting of a temporary abode or the creation of tent cities in its parks and public spaces are reasonable and demonstrably justified in a free and democratic society.

(ii) No *Charter* Infringement

63. The City submits that the evidence shows that some homeless people may prefer to live in "tent cities" rather than in shelters or rather than actively participating in efforts to find them housing. The City therefore submits that it is not established on the evidence that the City's bylaws have an adverse impact on the life, liberty and/or security of a person merely by limiting the nature of the abode which persons may construct in public places. The City submits that its bylaw limits the creation of a critical mass of squalor that leads to public health and safety problems.

Without the bylaw limitations that would prevent people from living in encampments in public spaces, the City, and the Court, risk becoming enablers that promote drug abuse, crime, self-destruction, disease, and death. Homeless encampments will also lead to a reallocation of resources to controlling the problems created by encampments from efforts that would eliminate the demand for real housing. In this regard, the City also relies upon its argument below that the bylaw limitations are the least drastic means of achieving the City's reasonable objective.

(iii) Section 1 of the *Charter*

64. In *R. v. Oakes*, [1986] 1 S.C.R. 103, the Supreme Court of Canada laid down the criteria that must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. There are four criteria to be satisfied:

- (a) A sufficiently important objective: the law must pursue an objective that is sufficiently important to justify limiting the *Charter* right;
- (b) A rational connection: the law must be rationally connected to the objective;
- (c) The least drastic means: the law should impair the right no more than is

necessary to accomplish the objective;

(d) A proportionate effect: the law must not have a disproportionately severe effect on the persons to whom it applies.

(a) A Sufficiently Important Objective: The Law Must Pursue an Objective that is Sufficiently Important to Justify Limiting the *Charter* Right

65. The literature describing the purpose and importance of urban parks is voluminous and compelling. It is clear that parks have a positive impact upon urban society. Benefits of urban public parks and green spaces include:

(a) Environmental (e.g. cooling; reduce use of energy for cooling or heating purposes; reduce soil erosion; reduce air pollutants; protects wildlife; protects ecosystems and variety of);

(b) Recreational (support physical health and fitness);

(c) Social (e.g. support community socialization and stability; reduce demand for health care; decrease mental fatigue; reduce children's attention deficit disorder; reduce noise; positive effect on well-being even though passive enjoyment of view of green space from distance);

- (d) Economic (e.g. residential and commercial property values rise near parks, including low income areas; revitalizes area by attracting businesses and residents; increased tourism and job creation).

66. Parks and public spaces positively affect the quality of urban life, contributing tangible and intangible benefits to the community. If these spaces are not protected and maintained for all, and these benefits are lost, the vitality of a community's commercial and residential life is weakened, as is its desirability as a place to live, work, or visit.

(b) Rational Connection: The Law Must be Rationally Connected to the Objective

67. The requirement of rational connection calls for an assessment of how well the legislative garment has been tailored to suit its purpose (*R. v. Edwards Books & Art*, [1986] 2 S.C.R. 713 at 770). The law must be carefully designed to achieve the objective in question; it should not be arbitrary, unfair, or based on irrational considerations (*R. v. Oakes* (supra)).

68. The potential impact of urban camping, and the subsequent inevitable colonization of public spaces, upon the economic vitality of adjacent areas could be devastating. The City received compelling requests for help from businesses directly affected by the occupation of just one small park in October, 2005 which described the

impact of that microcosm. Complaints related to this small park occupation included:

- (a) Major problems with regard to the safety of customers and employees;
- (b) Security issues;
- (c) The potential for fire;
- (d) Property theft and damage;
- (e) Health issues due to human waste;
- (f) Noise;
- (g) Trespass;
- (h) Smoke;
- (i) Guests leaving.

69. The City submits that the impact of the loss of use of a park will be most keenly felt by the poor and middle class members of the community. The affluent can be presumed to have access to safe and comfortable green spaces when they want it. In urban areas, it is the rest of the community that uses, and benefits, from public parks.

70. The Affidavits filed by those that were occupying Cridge Park in 2005 indicated that they preferred camping together to staying in a shelter. The evidence indicates that urban camping creates a viable option to seeking help through shelters operating within the City for many people. It seems clear that, if permitted, many urban campers would chose to congregate in one area thereby recreating the situation arising

in Cridge Park in 2005 on at least that scale.

71. The evidence also clearly reveals that many homeless people have mental health issues and/or addictions. The City submits that permitting seriously troubled people to camp and live in parks amounts to a public provision of free but unsafe shelter. The lack of a limit will compound the problems that arise in public parks when people live in them and use them as their bedrooms, kitchens and bathrooms. Campers will arguably be unnecessarily exposed to a greater degree of unsafe and unsanitary conditions than exist with the limits in place.

72. The bylaw measures prohibiting taking up abode in parks are aimed at conditions that will likely overwhelm public spaces if the limit on taking up abode is eliminated. The evidence clearly shows that urban camping creates an unhealthy mess in places meant to foster health and well-being, causes damage to parks that may be irreparable, and prevents public spaces from being used for the purposes for which they were created.

73. The City's bylaws are rationally related to the legitimate and reasonable interests of preserving parks and other public places for the uses for which they were intended as well as protecting the safety and economic vitality of the City. These measures address real urban problems that come with homeless encampments, including drug use and sales, public elimination of bodily waste, vandalism, litter, and

crimes by and against homeless people.

(c) Least Drastic Means: The Law Impair the Right No More Than is Necessary to Accomplish the Objective

74. The City submits that it is entitled to deference with respect to its choice of means:

“The means must not only be rationally connected to the objective; they must be shown to be ‘minimally impairing’ of the right. The means must be carefully tailored to be objective. Parliament is entitled to pursue its objective, but in doing so, it must impair the rights of Canadians as little as possible.

Again, a certain measure of deference may be appropriate, where the problem Parliament is tackling is a complex social problem. There may be many ways to approach a particular problem, and no certainty as to which will be the most effective. It may, in the calm of the Courtroom, be possible to imagine a solution that impairs the rights at stake less than the solution Parliament has adopted. But one must also ask whether the alternative would be reasonable effective when weighed against the means chosen by Parliament. To complicate matters, a particular legislative regime may have a number of goals, and impairing a right minimally in the furtherance of one particular goal may inhibit achieving another goal. Crafting legislative solutions to complex problems is necessarily a complex task. It is a task that requires weighing and balancing. For this reason, this Court has held that on complex social issues, the minimal impairment requirement is met if Parliament has chosen one of several reasonable alternatives ...”.

Canada (Attorney General) v. JTI – MacDonald Corp.
2007 SCC 30 at paragraphs 42 and 43

75. This approach is consistent with the approach of an American Court examining similar bylaw regulations:

“Counsel for Plaintiff proposed at the hearing that this Court should be the first to recognize as a fundamental right the ‘right to sleep’. ... This is an invitation the Court, in its exercise of judicial restraint, must decline. Despite the seeming innocence of a right so defined, the natural corollary to a recognition of a right is an obligation to enforce it. The discovery of a right to sleep concomitantly requires prohibition of the government’s interference with that right. This endeavour, aside from creating a jurisprudential morass, would involve this unelected branch of government in a legislative role for which it is neither fit, nor easily divested one established.”

Joyce v. City & County of San Francisco
846 F. Supp. 843

76. Judicial restraint is appropriate when the impugned legislation involves a balancing of claims by competing groups as opposed to the situation where government is acting as a more singular antagonist of an individual (eg. the criminal context). In situations such as this, where there are competing claims for scarce resources, the City submits that it is better suited to such policy choices and is entitled to a considerable amount of deference with respect to its means of addressing the issue of homelessness within the City, including its parks and public spaces.

77. The Defendants characterize the prohibition against taking up temporary abode over night in a park, and the attendant policy, variously as:

- (a) An absolute ban on the ability of homeless people to erect shelter for themselves;
- (b) Prohibiting people from erecting any form of overnight shelter;
- (c) Prohibiting sleeping outside and providing oneself with shelter;
- (d) A complete prohibition on sleeping outside;
- (e) Denying homeless people the ability to create rudimentary overnight shelter.

78. None of these characterizations is accurate. The Affidavit of Mike McCliggott sets out the City's position that the prohibition against taking up temporary abode does not prohibit sleeping or the use of non-structural shelter for that purpose.

79. The Affidavit of Brooks Hogya submitted by the Defendants provides his opinion that the following equipment is sufficient for survival outdoors:

"With respect to equipment, when sleeping outdoors, at a minimum one should have extra clothing, a sleeping bag, a ground insulator in the form of a Thermarest or closed cell foam pad, and overhead protection in the form of a tent, or a bivy sack and tarp. A bivy sack is a waterproof fabric shell designed to slip over a sleeping bag, providing additional insulation and forming an effective barrier against wind and rain. A tarp is then strung over the bivy sack forming a tent-

like protection. ...”

80. The only item described above that is excluded by the City’s interpretation of “taking up temporary abode” is a string. There is no evidence that the lack of a string equates to a real threat to security or liberty.

81. Under the City’s bylaws, homeless people remain free to use public property on the same terms as all other members of the community. The bylaws do not prevent anyone from entering public property or from merely falling asleep.

82. Tents or strung-up tarps are structures that provide for a degree of permanency that the bylaws seek to avoid. These structures provide an increased possibility or opportunity for an extended stay in one spot. Such structures also expand of the size of the “footprint” of such a stay. The bylaws are focused narrowly on reducing these outcomes. Reducing these outcomes has the corresponding effect of limiting the possibility of lingering and congregation by campers from night to day to night to day that both concentrates and expands the impact of the deleterious effects of urban camping at the same time. The bylaws therefore foster an opportunity for the natural park environment to recover from the presence of someone sleeping there. Finally, the bylaws also allow a better opportunity for sharing of the public space by all members of the community.

83. The City’s bylaws seek to strike a balance between competing interests of

its citizens and while they may not perfectly achieve this goal, they are within the realm of reasonable alternatives.

84. The City submits that it is instructive to examine the alternative resulting from the position taken by the Defendants in response to this complex social issue. If the limitation on taking up abode in public is struck out, where are the limits to be drawn? The Defendants are not surprisingly silent on this important issue because the questions overwhelm. If the homeless can camp in public places, can anyone? How is the City to differentiate? Are the truly homeless to be issued free passes? What is to prevent a family camping trip stopping at a park near you? What is to stop the overnight grad party or the prostitute's tent? Are all our beaches to be open to addicts who may pass out in the sand where their syringes will fall? Is public land to be allocated and partitioned as so many campsites? Where will businesses go and who will pay taxes when the tourists willing to pay for accommodation are gone? What happens when the public land is all parceled out? If camping is permitted, are foundations and generators and fireplaces far behind? Who will be responsible for safety when danger is courted by such conduct? Who will be liable if unsafe accommodation in a City park results in a fire causing personal injury and property damage? How will the spread of bacterial or viral diseases due to poor sanitation and hygiene be prevented? Are City of Victoria taxpayers to pay for the provision of tents and amenities? What will the City need to spend to protect its parks when they are colonized? What if money must be diverted from the City's efforts to address homelessness? How much is enough?

85. Finally, the necessity for tent cities is not apparent where none has existed anywhere in the City since October 2005. The bylaws therefore do not impair a necessary activity.

(d) Proportionate Effect: The Law Must Not Have a Disproportionately Severe Effect on the Persons to Whom it Applies

86. The City accepts that a breach of a right protected by Section 7 of the *Charter* is not easily justified:

“The rights protected by Section 7 – life, liberty, and security of the person – are basic to our conception of a free and democratic society, and hence are not easily overridden by competing social interests. ... Nevertheless, the task may not be impossible, particularly in extraordinary circumstances where concerns are grave and the challenges complex.”

Charkaoui v. Canada (Citizenship Immigration)
[2007] S.C.J. No. 9 at paragraph 66

87. The City submits that there is proportionality between the effects of its bylaw measures and its objectives for the same reasons that the measures meet the minimum impairment test. The salutary effects of the camping limitations, as outlined above, are attained at the cost of a minimal difference between the type of shelter permitted by the bylaws and that advocated for by the Defendants. But for a string, each position appears to overlap at the City’s interpretation of temporary abode.

88. The bylaws affect all citizens in that none may take up temporary abode in public. Those who are homeless do not suffer a disproportionately severe result where they are not prevented from sleeping and protecting themselves from the elements. Being homeless can be a severe condition but it has not been shown that the bylaws, in and of themselves, contribute to that condition. Limiting the “permanency” of the non-residential use of public spaces is not a disproportionate response where a temporary use is not prohibited. Further, the evidence suggests that a lack of such a limit will likely concentrate and exacerbate many ill effects of homelessness and interfere with efforts to shelter and/or house people. The resulting tent cities will provide no better answers to the problems of homelessness at the expense of public spaces and parks.

89. The City submits that given the coordinated efforts it is leading to address the problems of homelessness, a limitation on activities that will likely hinder those efforts to provide adequate permanent shelter does not represent a disproportionately severe effect on homeless people.

E. CONCLUSION

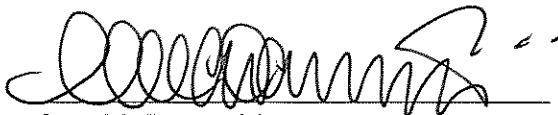
90. Significant resources are being directed at getting people into housing with the necessary supports. All levels of government are involved as are a myriad of service providers. Scarce resources are being marshaled to meet this social crisis and the City is, if anything, carrying a disproportionate burden in this regard. In such

circumstances, where real and lasting solutions to the seemingly intractable and severe social ill of homelessness are being actively pursued by the local community, led by the City, the community should not be told that it must sacrifice its parks and public spaces until the problem is eliminated.

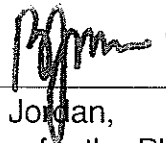
91. The City says that the limits it places on the erection of a temporary abode and the creation of tent cities in public spaces are reasonable and demonstrably justified in a free and democratic society.

92. For all of the above reasons, the City submits that the Defendants' application should be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Guy McDannold,
Solicitor for the Plaintiff



Bruce Jordan,
Solicitor for the Plaintiff

June 11, 2008
Victoria, B.C.