COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Victoria (City) v. Adams,*
2009 BCCA 563

Date: 20091209
Docket: CA036551

Between:

The Corporation of the City of Victoria

Appellant
(Plaintiff)
And

Natalie Adams, Yann Chartier, Amber Overall, Alymanda Wawai, Conrad Fletcher, Sebastien Matte, Simon Ralph, Heather Turnquist and David Arthur Johnston

Respondents
(Defendants)
And

The Attorney General of British Columbia

Intervenor

And

British Columbia Civil Liberties Association
Intervenor
And

The Poverty and Human Rights Centre
Intervenor
And

Pivot Legal Society
Intervenor
And

The Union of British Columbia Municipalities
Intervenor

Before: The Honourable Madam Justice Levine
The Honourable Madam Justice Neilson
The Honourable Mr. Justice Groberman

On appeal from the Supreme Court of British Columbia
Victoria Registry,October 14, 2008,

Victoria (City) v. Adams,
2008 BCSC 1363 and 2009 BCSC 1043, Docket 05 4999

Counsel for the Appellant:	G. McDannold
Counsel for the Respondents:	C.J. Boise Parker I. Faulkner
Counsel for the Intervenor, The Attorney General of British Columbia	J. Penner V.L. Jackson
Counsel for the Intervenor, British Columbia Civil Liberties Association	R.A. Skolrood M.S. Jones
Counsel for the Intervenor, The Poverty and Human Rights Centre	G. Brodsky M. Buckley K. Brooks
Counsel for the Intervenor, Pivot Legal Society	B. Elwood
Counsel for the Intervenor, The Union of British Columbia Municipalities	R.E. Young
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Written Reasons of the Court

Reasons for Judgment of the Court:

Introduction

[1] This appeal addresses a narrow issue: when homeless people are not prohibited from sleeping in public parks, and the number of homeless people exceeds the number of available shelter beds, does a bylaw that prohibits homeless people from erecting any form of temporary overhead shelter at night - including tents, tarps attached to trees, boxes or other structure - violate their constitutional rights to life, liberty and security of the person under s. 7 of the *Canadian Charter of Rights and Freedoms*?

[2] This was the question ultimately adjudicated by a Supreme Court justice, following protracted proceedings, after 70 homeless people set up a "tent city" in a public park in the City of Victoria known as Cridge Park. She declared unconstitutional those portions of the City's parks and streets bylaws that prohibited homeless people who were legally sleeping in parks from erecting temporary overhead shelter in the form of tents, tarps attached to trees, and cardboard boxes. This is the City's appeal from that order.

[3] The trial judge described the litigation, quoting Senior District Judge Atkins in *Pottinger v. City of Miami*, 810 F. Supp. 1551 at 1554 (S.D. Fla. 1992), as:

> ... an inevitable conflict between the need of homeless individuals to perform essential, life-sustaining acts in public and the responsibility of the government to maintain orderly, aesthetically pleasing public parks and streets.

[4] The conflict between "essential, life-sustaining acts" and the "responsibility of the government" aptly focuses the issues in this case. The claims of the homeless people recognized by the trial judge have a narrow compass in absolute terms - they are the right to cover themselves with the most rudimentary form of shelter while sleeping overnight in a public place, when there are not enough shelter spaces available to accommodate all of the City's homeless. The City, on the other hand, bears the responsibility to the public to preserve public places for the use of all, and of necessity focuses on the wide public impact of any use of public places for living accommodation. The constitutional context applies the most lofty of guaranteed human rights - the rights to life, liberty and security of the person to the needs of some of the most vulnerable members of our society for one of the most basic of human needs, shelter. Thus, though the trial judge's decision in this case is narrow in scope, it takes on wide meaning and implications for all.

[5] The trial judge declared that the City's parks and streets bylaws that prohibit homeless people from erecting temporary shelter violate s. 7 and are not "saved" by s. 1 of the *Charter*,

and are "of no force and effect insofar and only insofar as they apply to prevent homeless people from erecting temporary shelter" (at para. 239). The effect of the order is to allow homeless persons to erect temporary overhead shelter while sleeping outside in City parks and streets.

[6] The City claims the trial judge erred in her conclusions that the bylaw provisions violate s. 7 and are not "saved" by s. 1 of the *Charter*. Its principal argument, however, is that by declaring the bylaw provisions of no force or effect, the trial judge improperly intruded into the City's legislative jurisdiction to make complex policy decisions concerning the allocation of scarce parkland and other public resources. It argues that the effect of the decision is to require the City to regulate the use of parks for camping or other living accommodation, which elected officials have not chosen to include in the initiatives undertaken to deal with the City's admittedly serious problem of homelessness.

[7] The Attorney General of British Columbia (the "AGBC") and the Union of British Columbia Municipalities (the "UBCM") intervene in support of the City.

[8] The respondents are Natalie Adams, Yann Chartier, Amber Overall, Alymanda Wawai, Conrad Fletcher, Sebastien Matte, Simon Ralph, Heather Turnquist, and David Arthur Johnston. They are homeless persons living in Victoria.

[9] The intervenors, the British Columbia Civil Liberties Association (the "BCCLA"), Pivot Legal Society ("PLS"), and the Poverty and Human Rights Centre (the "PHRC"), support the respondents in this appeal.

[10] For the reasons that follow, we find no legal basis to interfere with the trial judge's conclusion, on the uncontradicted evidence before her, that the prohibition in the bylaws on the erection of temporary shelter violates the rights of homeless people to life, liberty and security of the person under s. 7, and the violation is not justified under s. 1 of the *Charter*. Nor did the trial judge improperly intrude into the policy decisions of elected officials in finding the bylaw provisions to be of no force or effect insofar as they prohibit homeless persons from erecting temporary shelter. She left it to the City to consider the alternative solutions to the identified problem, and to determine the best manner in which to deal with it in the context of the City's legislative policies.

[11] On all but one of the substantive legal issues, we do not accede to the appellant's arguments, including the appeal from the trial judge's award of special costs to the respondents. We disagree with the trial judge that the prohibition in the bylaws was arbitrary, but that does not affect the outcome of the appeal. We order that the appeal is allowed only to the extent of varying the wording of the order, as set out in para. 165 of these reasons, to

more accurately reflect the issue considered at trial and the trial judge's reasons for judgment.

Background

History of the Litigation

[12] The litigation began with the City's application for an injunction to remove the tent city from Cridge Park. The City relied on its *Parks Regulation Bylaw* and *Streets and Traffic Bylaw* (the "Bylaws"), which at the time prohibited, among other things, loitering and taking up a temporary abode overnight. The injunction was granted by Stewart J. on October 26, 2005, with an expiry date of August 31, 2006. He dismissed the respondents' application for an order requiring the City to "designate a suitable area near the downtown core where the [respondents] and others can sleep overnight and create suitable shelter until the constitutional issues in this action are determined." The tent city was cleared on October 28, 2005.

[13] The City filed its statement of claim on November 29, 2005. A statement of defence was filed on July 21, 2006, asserting that the provisions of the Bylaws that prohibit sleeping overnight in any public space in Victoria violated the respondents' rights under the *Charter* (at para. 13).

[14] On July 5, 2007, the City applied for a declaration and a permanent injunction by means of a summary trial. The City sought a declaration that the respondents' use and occupation of Cridge Park contravened the Bylaws by: injuring or destroying turf and trees in the park; depositing waste or debris into or upon or otherwise fouling the park; selling or exposing for sale or gift refreshments in the park without the express permission of counsel for the City; carrying a firearm or weapon of any description; and obstructing the free use and enjoyment of the park by any other person (at para. 15).

[15] The respondents served a notice of motion on July 25, 2007, proposing that the entire matter, including the City's application and the constitutional question, be determined by summary trial (at para. 16).

[16] On August 9, 2007, the City repealed and replaced the *Parks Regulation Bylaw* so that it no longer prohibited loitering in public places. The City's application for a permanent injunction came before Johnston J. on August 13, 2007. The Court was not informed of the changes to the bylaw. Mr. Justice Johnston determined that the matter was not suitable for summary determination (at paras. 17-18).

[17] On August 29, 2007, the City filed a notice of discontinuance. The respondents applied to have it set aside. On September 7, 2007, Master Keighley set aside the notice of discontinuance on the basis that the City had ceased to be master of its own suit at least since the dominant issue became the constitutionality of the Bylaws (at para. 21).

[18] On October 3, 2007, the AGBC brought a motion to have the respondents' summary trial application dismissed pursuant to R. 19(24) of the *Rules of Court*. That application was dismissed. However, Gray J. required the respondents to file a counterclaim, since they sought a declaration that the Bylaws were of no force or effect (at paras. 24 and 28).

[19] That counterclaim was filed, and was the basis for the hearing before Ross J., in which the respondents sought the following relief (at para. 29):

> (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 [City] pay to the [respondents] the costs of this proceeding on a full indemnity basis.

[20] At trial, the constitutional argument was restricted to ss. 7 and 12 of the *Charter* (at paras. 23 and 28); however, the trial judge did not find it necessary to address s. 12 (at para. 240).

The Bylaws

[21] The parties agreed to proceed before Ross J. on the basis that the current state of the law was reflected in the combination of the Bylaws and the City's operational policy for enforcement (at para. 36).

[22] The relevant provisions of *Parks Regulation Bylaw* No. 07-059 were:

> **Damage to environment, structures**
> **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
>
> (ii) a building or structure, including a fence, sign, seat, bench, or ornament of any kind;

(b) foul or pollute a fountain or natural body of water; (c) paint, smear, or otherwise deface or mutilate a rock in a park; (d) damage, deface or destroy a notice or sign that is lawfully posted; (e) transport household, yard, or commercial waste into a park for the purpose of disposal;

(f) dispose of household, yard, or commercial waste in a park.

(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 receptacles provided for that purpose.

Nuisances, obstructions

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

(a) behave in a disorderly or offensive manner;
(b) molest or injure another person;

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

~~(d) take up a temporary abode over night;~~
(e) paint advertisements;

(f) distribute handbills for commercial purposes;

(g) place posters;
(h) disturb, injure, or catch a bird, animal, or fish;

(i) throw or deposit injurious or offensive matter, or any matter that may cause a nuisance, into an enclosure used for keeping animals or birds;

(j) consume liquor, as defined in the *Liquor Control and Licensing Act*, except in compliance with a licence issued under the *Liquor Control and Licensing Act*.

(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;

…

Construction

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 as a tent, in a park only as permitted under this Bylaw, or with the express prior permission of the Council,

…

Offence

18 A person who contravenes a provision of this Bylaw is guilty of an offence and is liable on conviction to the penalties imposed by this Bylaw and the *Offence Act*.

[Emphasis added.]

[23] The provisions of *Streets and Traffic Bylaw* No. 92-84 at issue were:

73(1) Except the agents, servants or employees of the City acting in the course of their

> employment, no person shall excavate in, disturb the surface of, 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, who may impose the terms and conditions it deems proper.
>
> **74**(1) Without restricting the generality of the preceding section or of section 75, no person shall place, deposit or leave upon, above, or in any street, sidewalk or other public place any chattel, obstruction, or other thing which is or 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.

[24] The City's operational policy was that the Bylaws did not prohibit people from sleeping, or from protecting themselves from the elements while they are sleeping through simple, individual, non-structural, weather repellent covers that are removed once the person is awake, such as sleeping bags, blankets, and tarps covering their faces (at para. 172). The Bylaws prohibited the taking up of a temporary abode overnight and accordingly no overhead protection in the form of tents, tarps that are attached to trees or otherwise erected, boxes or other structures were permitted (at para. 35).

The Constitutional Question

[25] Thus, by the time of trial, the constitutional issue was narrowly defined. The City did not prohibit sleeping in public places using personal protection from the elements. The question was whether the prohibition in the Bylaws from taking up temporary abode overnight, which the City defined in its operational policy as prohibiting the erection of overhead protection such as tents, tarps attached to trees, boxes or other structures, violated the rights of homeless people under ss. 7 or 12 of the *Charter*.

Reasons for Judgment

The Facts

[26] The trial judge reviewed evidence submitted by both parties concerning the circumstances of the homeless in the City, and expert evidence on the effects of homelessness on the physical and mental health of homeless people, including the health risks of sleeping outdoors.

[27] The evidence of homelessness in Victoria included the report of the Mayor's Task Force on Breaking the Cycle of Mental Illness, Addictions and Homelessness entitled "A Victoria Model", issued on October 19, 2007; the report of the Victoria Cool Aid Society on the Homeless Count - 2005 - Victoria, BC, revised August 15, 2005; and the report of the Victoria Cool Aid Society entitled "Housing First - Plus Supports", summarizing the results of

the Homeless Needs Survey conducted from February 5-9, 2007 in the Capital Regional District of BC. In addition, the respondents submitted affidavits describing their personal circumstances of homelessness in Victoria.

[28] On this evidentiary record, the trial judge made the following findings of fact (at paras. 4 and 69):

> (a) There are at present more than 1,000 homeless people living in the City.
>
> (b) The City has at present 141 shelter beds, expanding to 326 in extreme conditions. Thus hundreds of the homeless have no option but to sleep outside in the public spaces of the City.
>
> (c) The Bylaws do not prohibit sleeping in public spaces. They do prohibit taking up a temporary abode. In practical terms this means that the City prohibits the homeless from erecting any form of overhead protection including, for example, a tent, a tarp strung up to create a shelter or a cardboard box, even on a temporary basis.
>
> (d) The expert evidence establishes that exposure to the elements without adequate protection is associated with a number of significant risks to health including the risk of hypothermia, a potentially fatal condition.
>
> (e) The expert evidence also establishes that some form of overhead protection is part of what is necessary for adequate protection from the elements.

[29] On appeal, none of the City or its supporters argue that the trial judge made any palpable and overriding error in these findings of fact.

The Law

Justiciability

[30] The trial judge dealt first with the preliminary objection by the AGBC to the respondents' constitutional challenge to the Bylaws in the absence of an enforcement action by the City. She determined that the challenge arose from the respondents' counterclaim to the City's action in respect of the Cridge Park tent city, although it did not address those circumstances but more narrowly challenged the prohibition in the Bylaws against the erection of temporary shelter. She found a sufficient factual matrix in the evidence submitted by the parties (at paras. 72-73).

[31] As will be seen, the City and the AGBC also raise justiciability issues on appeal.

International Instruments

[32] The trial judge then turned to the analysis of s. 7 of the *Charter*.

[33] In that context, she referred to international human rights instruments to which Canada is a signatory which recognize adequate housing as a fundamental right (at paras. 85-100). Three of those international instruments to which she made reference are the *Habitat Agenda*, UN Doc. A/Conf. 165/14 (1996), the *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71, and the *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46, 6 I.L.M. 360. She concluded her review stating (at para. 100):

> I conclude that while the various international instruments do not form part of the domestic law of Canada, they should inform the interpretation of the *Charter* and in this case, the scope and content of s. 7.

[34] She also referred to international human rights instruments as informing "a court's understanding of the principles of fundamental justice" (at paras. 161-162).

[35] There is no issue raised on the appeal with respect to the trial judge's reference to international instruments as an aid to interpreting the *Charter*. Nor could there be. The use of international instruments to aid in the interpretation of the meaning and scope of rights under the *Charter*, and in particular the rights protected under s. 7 and the principles of fundamental justice, is well-established in Canadian jurisprudence. In support of referring to international human rights instruments as an interpretative aid, the trial judge cited, among other authorities, *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para 70; *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283 at para. 80; and *Suresh v. Canada (Minister of Citizenship and Immigration*, 2002 SCC 1, [2002] 1 S.C.R. 3 at para. 46; see also *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391 at para 69.

Application of Section 7

[36] The trial judge then dealt with the issues raised by the City and the AGBC with respect to the application of s. 7, many of which are also raised on appeal.

[37] The trial judge found that the Bylaws constituted state action directly engaging the justice system (at para. 104), and impaired the ability of the homeless to address their need for adequate shelter, satisfying the need for the deprivation to have been caused by state action (at para. 108). The respondents were not seeking a positive benefit. Their claim was that it was a breach of s. 7 for the City to use its Bylaws to prohibit homeless people from taking steps to provide themselves with adequate shelter (at para. 119).

[38] This case was not about the allocation of scarce resources, but about "the

constitutionality of a prohibition contained in particular Bylaws" (at para. 123). The respondents were not asserting a property right over the parks, "[t]hey are simply saying that the City cannot manage its own property in a manner that interferes with their ability to keep themselves safe and warm" (at para. 132).

[39] The trial judge found, based on the expert evidence, that there was a risk of serious harm to the health of the homeless, and that the harm flowed from the state action in prohibiting the erection of shelter (at para. 142). The Bylaws violated the rights of the homeless to life by prohibiting the erection of overhead shelter, leading to a risk of a number of serious and life threatening conditions (at para. 145); to liberty, by interfering with the ability of the homeless to choose to protect themselves from the elements, a matter of dignity and independence (at para. 148); and to security of the person, by depriving homeless persons of access to shelter, and thereby exposing them to a risk of significant health problems or even death (at paras. 153-154).

[40] The deprivation was not in accordance with the principles of fundamental justice, as the Bylaws were overbroad and arbitrary (at paras. 169-193). The Bylaws were overbroad in both time and geographical ambit because "there are any number of less restrictive alternatives that would further the City's concerns; for example, requiring the overhead protection to be taken down every morning, and creating certain zones in sensitive park regions where sleeping was not permitted" (at para. 185). Further, "to the extent to which the purpose of the Bylaws is to prohibit tent cities, they are clearly overbroad" (at para. 189). The Bylaws were arbitrary because the damage to the parks that the Bylaws are meant to prevent was not related to the prohibited conduct, namely the erection of temporary shelter (at para. 193).

[41] The s. 7 breach was not saved by s. 1. The preservation of parks was an important objective (at para. 200) and the Bylaws were rationally connected to the objective in one respect (at para. 204), however the Bylaws were not minimally impairing (at para. 207) and the deleterious effects of the prohibition on the homeless outweighed the salutary effects on the problems of homelessness (at para. 208-217).

Order

[42] The order declares that:

> (a) Sections 13(1) and (2), 14(1) and (2), and 16(1) of the *Parks Regulation Bylaw* No. 07-059 and ss. 73(1) and 74(1) of the *Streets and Traffic Bylaw* No. 92-84 violate s. 7 of the *Canadian Charter of Rights and Freedoms* in that they deprive homeless people of life, liberty and security of the person in a manner not in accordance with the principles of fundamental justice, and are not saved by s. 1

of the *Charter*.

(b) Sections 13(1) and (2), 14(1) and (2), and 16(1) of the *Parks Regulation Bylaw* No. 07-59 and ss. 73(1) and 74(1) of the *Streets and Traffic Bylaw* No. 92-84 are of no force and effect insofar and only insofar as they apply to prevent homeless people from erecting temporary shelter.

Positions on Appeal

The City

[43] The City says the matters at issue in this case, properly considered, are non-justiciable. Accordingly, the City argues that the decision below is an improper intrusion by the courts into the area of complex policy decisions that are to be made by democratically elected officials acting as community representatives in determining how best to allocate scarce parkland and other public resources.

[44] The City also maintains that the trial judge erred in finding a s. 7 violation. Principally, the City says there is no state action sufficient to engage s. 7 of the *Charter* because the Bylaw provisions are not the cause of the respondents' state of homelessness. It says that *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429 at para. 213, introduced a requirement that the state action "in and of itself" deprive the claimant of the right to life, liberty or security of the person.

[45] Further, the City says there is no violation of the principles of fundamental justice. The City submits that the trial judge applied the wrong test for overbreadth, and erred in her application of the principle of arbitrariness.

[46] In the alternative, if there is a s. 7 violation, the City says it is justified pursuant to s. 1 of the *Charter*.

The AGBC

[47] The AGBC agrees with the City that the trial judge erred in finding that the Bylaws violate s. 7 of the *Charter*. In particular, the AGBC argues the trial judge erred in determining there was sufficient state action to trigger the application of s.7; concluding the liberty interest in s.7 protects the erection of shelter; and interpreting and applying the principles of arbitrariness and overbreadth. The AGBC also submits that the trial judge erred in ordering the remedy she did. According to the AGBC, a claim anchored to, and contingent on, individual specific circumstances and specific climatic triggers, in the context of a specific factual matrix, is more appropriately considered on a case-by-case basis.

The UBCM

[48] The UBCM agrees with the City and the AGBC that the trial judge erred in finding that the Bylaws violate s. 7. The UBCM argues that an analogy should be drawn to the analysis of the exercise of the right to free expression under s. 2(b) of the *Charter*, which focuses on the "method and location" of the exercise. The location - government property - and its suitability for the exercise of free expression turns on its historical and functional uses. The UBCM argues that parks historically were not used as places of temporary abode for homeless people, and that this use is incompatible with other accepted park uses. Consequently, public parks are not the appropriate place for homeless people to shelter themselves, and the court should be hesitant to afford constitutional protection to this activity.

[49] The UBCM also argues that the use of parks for temporary abode or shelter falls outside the jurisdiction of the City, and that a court ought not to compel a municipality to act in an *ultra vires* manner.

The Respondents

[50] The respondents maintain that the Bylaws clearly engage the interests raised by interaction with the justice system and its administration, and there can be no doubt that it is the Bylaws which deprive the respondents from erecting shelter. In the absence of the Bylaws, the respondents would be able to protect themselves by erecting shelter. The Bylaws are thus the direct cause of the harm which flows from that prohibition on shelter and, consequently, s. 7 of the *Charter* is engaged.

[51] The respondents say forcing a homeless person to sleep without shelter, instead of under rudimentary protection such as a strung up tarp or cardboard box, is a significant interference with that individual's life, liberty and security of the person.

[52] The respondents further argue that this interference is not in accordance with the principles of fundamental justice. They say that there is simply no evidence that there is a real connection between the societal interests purportedly addressed by the Bylaws and the prohibition on erecting shelters, and thus the Bylaws are arbitrary. Additionally, they say many of the concerns put forward as justification for the prohibition relate not to individual shelters but to semi-permanent tent cities, and therefore the Bylaws are also overbroad. The respondents submit the Bylaws are also not consistent with the principle of fundamental justice that the law not punish an individual for engaging in an activity when there is no real choice but to do so.

[53] Finally, the respondents say that the violation of their rights cannot be justified under s. 1 of the *Charter*.

The BCCLA

[54] The BCCLA endorses the submissions of the respondents with respect to s. 7 of the *Charter*. In addition, the BCCLA submits that the respondents' liberty interests are engaged in two additional ways. First, public spaces are held in trust by government for the use of its citizens. The homeless, like all citizens, have a right to access and use those spaces, subject only to reasonable regulation. Regulation of public spaces is not reasonable where it prevents the homeless, who have no access to private spaces, from engaging in necessary life sustaining activities. In those circumstances, the regulation, as reflected in the Bylaws, is not only unreasonable, it violates the liberty of homeless individuals.

[55] Second, the effect of the Bylaws is to exclude the homeless from both the benefits and the responsibilities of citizenship - to in effect render the homeless non-citizens. This exclusion is an attack on their freedom and, correspondingly, their liberty.

PLS

[56] PLS makes three principal submissions: that state action which deprives a person of the capacity to satisfy basic human needs triggers the protection of s. 7 of the *Charter*; that it is a principle of fundamental justice that no law should punish a person for a choice compelled by basic human needs, when there is no reasonable alternative and the harm avoided is greater than the harm caused; and that the AGBC's suggestion that the constitutionality of the Bylaws should be left to a case-by-case determination should be firmly rejected.

The PHRC

[57] The PHRC submits that this Court should recognize that access to adequate housing is an interest protected by the s. 7 right to life, liberty and security of the person. The PHRC says s. 7 must be interpreted and applied in a manner that is consistent with equality rights norms, including s. 28 of the *Charter* which, it argues, requires this Court to pay particular attention to the situation of homeless women. In addition, s. 7 must be interpreted and applied in a manner consistent with the broad range of government obligations related to the right to adequate housing under international law. Finally, the PHRC says that effective and meaningful rights protection depends on an interpretation of s. 7 that recognizes there is no bright line distinguishing negative and positive rights.

Issues on Appeal

[58] Based on all of these submissions, the issues in this appeal may be summarized as

follows:

(a) Is the decision of the trial judge an improper intrusion into the policy decisions of elected officials?

(b) Did the trial judge err in finding that the Bylaw provisions in question violate s. 7 of the *Charter*?

(i) Is there sufficient state action to engage s. 7 of the *Charter*?

(ii) (iii) Is the state action the cause of the deprivation? Does the order grant a positive benefit to the respondents?

(iv) (v) (vi) Is the claim about property rights?

(c) Is there an interference with life, liberty and security of the person? Did the trial judge err in the interpretation and application of the principles of arbitrariness and overbreadth?

(d) Did the trial judge err by failing to hold that the Bylaws are saved by s. 1 as they are a reasonable limit that is demonstrably justified in a free and democratic society? Did the trial judge err in ordering the remedy she did?

Analysis

Fresh Evidence

[59] The City applied to adduce further evidence on appeal regarding the City's efforts to address homelessness in Victoria.

[60] The criteria for the admission of fresh evidence are set out in *Palmer v. The Queen* (1979), [1980] 1 S.C.R. 759 at 775: (a) the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial; (b) the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial; (c) the evidence must be credible in the sense that it is reasonably capable of belief; and (d) the evidence must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[61] Some of the evidence sought to be admitted by the City was available before trial, and does not meet the due diligence requirement. Moreover, to the extent that the evidence relates to the City's efforts after the time of trial, it is not relevant to the issue before the trial judge, namely the constitutionality of the Bylaws. Furthermore, the evidence would not change one of the principal findings of fact on which the trial judge's decision was based: that the number of homeless people in the City exceeds the number of available shelter

beds.

[62] Thus, the fresh evidence is not admitted.

Justiciability

[63] The City and the AGBC challenge the justiciability of the respondents' claim. They argue that the issue is political, and the decision of the trial judge is an improper intrusion into the policy decisions of elected officials.

[64] This argument requires the Court to consider the question it is being asked to decide and, in light of its institutional role, whether it is an appropriate question for a court to answer: *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525 at 545:

> … In exercising its discretion whether to determine a matter that is alleged to be non-justiciable, the Court's primary concern is to retain its proper role within the constitutional framework of our democratic form of government. See *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49, at pp. 90-91, and *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at p. 362. In considering its appropriate role the Court must determine whether the question is purely political in nature and should, therefore, be determined in another forum or whether it has a sufficient legal component to warrant the intervention of the judicial branch.

[65] The trial judge (at paras. 122-125) recognized that homelessness is a serious social issue, "with many causes and no clear or simple solution." She also recognized that "it is the role of government to determine how best to allocate scarce resources." However, after considering comments of McLachlin C.J.C. in *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350 at para. 1, Wilson J. in *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 164, and Iacobucci J. in *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at paras. 134-135, 138 and 142, she concluded that "the fact that the matter engages complex policy decisions does not immunize the legislation from review by the courts pursuant to the *Charter*." In the result, she held that this case "is not about the allocation of scarce resources", but rather "is about the constitutionality of a prohibition contained in particular Bylaws" the determination of which "falls squarely within the role and responsibility of the courts."

[66] The authorities cited by the trial judge support her conclusion, as do the comments of Binnie and LeBel JJ. in *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791 at paras. 183-185 (dissenting in the result but not on this issue):

> The Attorneys General of Canada and Quebec argue that the claims advanced by the appellants are inherently political and, therefore, not properly justiciable by the courts. We do not agree. Section 52 of the *Constitution Act, 1982* affirms the constitutional power and

> *obligation* of courts to declare laws of no force or effect to the extent of their inconsistency with the Constitution. Where a violation stems from a *Canadian Charter* breach, the court may also order whatever remedy is "appropriate and just" in the circumstances under s. 24. There is nothing in our constitutional arrangement to exclude "political questions" from judicial review where the Constitution itself is alleged to be violated.
>
> Nevertheless, a correct balance must be struck between the judiciary and the other branches of government. Each branch must respect the limits of its institutional role. As stated in *Vriend v. Alberta*, [1998] 1 S.C.R. 493, "the courts are to uphold the Constitution and have been expressly invited to perform that role by the Constitution itself. But respect by the courts for the legislature and executive role is as important as ensuring that the other branches respect each others' role and the role of the courts" (para. 136).
>
> In the present case, the appellants are challenging the legality of Quebec's prohibition against private health insurance. While the issue raises "political questions" of a high order, the alleged *Canadian Charter* violation framed by the appellants is in its nature justiciable, and the Court should deal with it.
>
> [Emphasis in original.]

[67] From these comments it is clear that the fact that a legal issue raises political concerns does not render it non-justiciable.

[68] The respondents were not asking the court to adjudicate on the wisdom of policy decisions of elected officials on how to best allocate public resources to address the problem of homelessness. The question before the court was whether the provisions of the Bylaws that prohibit the erection of temporary overhead shelter violate the respondents' rights under s. 7 of the *Charter*, in circumstances in which there are insufficient alternative shelter opportunities for the City's homeless.

[69] There is no doubt this is a proper question for a court to address. We do not accede to this ground of appeal.

Section 7 of the Charter

[70] Section 7 of the *Charter* provides that:

> 7. 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.

The Scope of the Trial Judge's Decision

[71] Before addressing the specific arguments raised in relation to s. 7, it is important to set them in context.

[72] First, the trial judge's decision was based on five critical findings of fact (at paras. 4

and 69 of her reasons for judgment, and set out above at para. 28). These findings established the shortage of shelter beds in the City, and thus the need for homeless people to sleep outside in public places. They also established the harm resulting from sleeping while exposed to the elements without any form of overhead protection.

[73] Second, the trial judge's decision is narrow in scope. It is premised on her finding of fact that there were not enough shelter spaces to accommodate all of the City's homeless, from which she drew the obvious inferences that some people will be sleeping outside, and that those people require some shelter. She summarized her reasons (at para. 191):

> There are not enough shelter spaces available to accommodate all of the City's homeless; some people will be sleeping outside. Those people need to be able to create some shelter. If there were sufficient spaces in shelters for the City's homeless, and the homeless chose not to utilize them, the case would be different and more difficult. The court would then have to examine the reasons why homeless people chose not to use those shelters. If the shelters were truly unsafe, it might be that it would still be an infringement of s. 7 to require the homeless to attend at shelters or sleep outside without their own shelter. However, if the shelters were safe alternatives, it may not be a breach of s. 7 for the homeless to be required to make that choice. That, however, is not the case here, where there is a significant shortfall of shelter spaces. [Emphasis added.]

[74] Thus, the decision did not grant the homeless a freestanding constitutional right to erect shelter in public parks. The finding of unconstitutionality is expressly linked to the factual finding that the number of homeless people exceeds the number of available shelter beds. If there were sufficient shelter spaces to accommodate the homeless population in Victoria, a blanket prohibition on the erection of overhead protection in public parks might be constitutional. That question is yet to be determined.

[75] Third, the homeless represent some of the most vulnerable and marginalized members of our society, and the allegation of the respondents in this case, namely that the Bylaws impair their ability to provide themselves with shelter that affords adequate protection from the elements, in circumstances where there is no practicable shelter alternative, invokes one of the most basic and fundamental human rights guaranteed by our Constitution - the right to life, liberty and security of the person. The significance of this was noted by the trial judge (at para. 143), where she quoted the following excerpt from Martha Jackman, "The Protection of Welfare Rights Under the Charter" (1988) 20 Ottawa L. Rev. 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".

[76] We will consider the specific errors alleged on appeal in this context.

The UBCM's Argument

[77] The UBCM did not intervene before the trial judge, so these arguments were not made at trial and this Court does not have the benefit of her consideration of them.

[78] The first argument of the UBCM is that the historical and functional uses analysis from s. 2(b) of the *Charter* should be imported into the s. 7 analysis in this case. The historical and functional uses inquiry is part of the threshold test in a freedom of expression claim to determine whether the location of the expression attracts protection under s. 2(b). The historical and actual function of the location is looked at as a means of assessing the principal question of whether free expression in that location would undermine the values underlying s. 2(b): *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141 at paras. 56-81; see also *Greater Vancouver Transportation Authority v. Canadian Federation of Students - British Columbia Component*, 2009 SCC 31 at paras. 37-44 (released subsequent to the hearing of this appeal).

[79] This analysis is not helpful here. The historical and actual function of a location is examined in a s. 2(b) claim when the claim is for a constitutional right to express oneself in a certain location; that is, when the location of the expression is a fundamental piece of the right asserted. In this case, the essence of the respondents' constitutional argument is not that the homeless have a right to shelter themselves in public parks in particular, but that they are entitled to the most basic form of shelter while sleeping outside in some public place.

[80] The UBCM's second argument must also fail. There is nothing in the order of the trial judge that compels the City to act in an *ultra vires* manner.

[81] We will now examine the substantive arguments regarding the application of s. 7 of the *Charter*.

Is there Sufficient State Action to Engage Section 7?

[82] The City and the AGBC argue that there is insufficient state action to engage s. 7 of the *Charter*.

[83] The trial judge held that "[i]t is now clear that the scope of s. 7 is not limited to purely criminal or penal matters" (at para. 102). This is a correct statement of the law. The

Supreme Court of Canada has interpreted s. 7 as extending beyond the sphere of criminal law, to "state action which directly engages the justice system and its administration": *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307 at paras. 45-46, citing *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46 at para. 66. "The justice system and its administration" refers to "the state's conduct in the course of enforcing and securing compliance with the law": *Gosselin* at para. 77, citing *G.(J.)* at para. 65.

[84] The trial judge concluded that the Bylaws "constitute state action that directly engages the justice system" (at para. 104):

> The Bylaws at issue prohibit certain conduct. Section 18 of the *Parks Regulation Bylaw* provides that a person who contravenes the provisions commits an offence and is liable to penalties imposed by the Bylaw and the *Offence Act*, R.S.B.C. 1996, c. 338. In my view, the Bylaws at issue in this proceeding constitute state action that directly engages the justice system and is sufficient in order to fall within the scope of s. 7.

[85] No error has been shown on the part of the trial judge in reaching this conclusion, and we do not accede to this ground of appeal.

Is the State Action the Cause of the Deprivation?

[86] Both the City and the AGBC argue that the requirement that the state action cause the deprivation of life, liberty or security of the person is not met in this case because the prohibition on the erection of shelter is not the cause of the respondents' state of homelessness or insecurity. They say s. 7 is not engaged where, as a result of the state action, the claimants merely remain in a state of insecurity. In claiming that the state action must be the sole cause of the deprivation, they rely on the comment of Justice Bastarache in his dissenting reasons in *Gosselin* (at para. 213) that "state action … in and of itself" must deprive the claimant of her life, liberty or security of the person.

[87] There are a number of problems with this argument. First, the passage relied on from *Gosselin* does not form part of the analysis of the majority. Further, Bastarache J.'s comments are made in the context of a positive rights claim, and in my view, are more an expression of his concern about the absence of state action in that case, rather than an attempt to formulate a general test for causation. Moreover, an "in and of itself" causation requirement is incompatible with other Supreme Court of Canada jurisprudence. In *Morgentaler* and *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, the impugned state action was not the sole cause of the deprivations at issue, yet the Court held that the causation requirement was met.

[88] The trial judge found the Bylaws were the direct cause of the deprivations of life, liberty and security of the person that flow from the prohibition on shelter. The respondents do not argue, and the trial judge did not find, that the Bylaws are the cause, or even a contributor to, the respondents' state of being homeless. The deprivations of life, liberty or security of the person which may arise as a result of being homeless, without any interaction with the state, are not at issue. This is clear throughout the reasons for judgment (in particular at para. 108):

> Homeless people are exposed to a number of risks to their lives, health and security of the person because of their homeless condition. Those risks that are associated with the state of being homeless are not at issue in this litigation. In the present case, the allegation is that the Bylaws at issue impair the ability of the homeless to address their need for adequate shelter. This is a particular state action that is alleged to create a particular deprivation. In my view, this satisfies the need for the deprivation to have been caused by state action.

[89] We do not accede to this ground of appeal. Does the

Order Grant a Positive Benefit to the Respondents?

[90] The City claims that because the decision of the trial judge is founded on the failure of the government to provide sufficient shelter beds, the order effectively grants a right to adequate alternatives to sleeping in public spaces. The City says that the decision imposes a positive obligation on the City to either provide shelter spaces or to make available parkland and other public spaces for camping.

[91] The City and the AGBC note in support of their argument that in dismissing the respondents' application for an order requiring the City to designate an area where the respondents and others could sleep overnight pending the resolution of this litigation, Stewart J. commented (citing *Gosselin*) that the application was based on the premise that "*Charter* s. 7 includes positive obligations ... grounded in economics and the allocation of resources by the state … [which is] not grounded on the law of Canada as it stands now." That application would have required the City to take positive action, but it was not before the trial judge, and is not in issue on the appeal.

[92] The argument in *Gosselin* was that security of the person includes the right to receive a particular level of social assistance from the state adequate to meet basic needs. Like the respondents' application before Stewart J., the claim was for a positive benefit from the state.

[93] The Chief Justice, for the majority, noted (at para. 81) that under the existing jurisprudence, s. 7 has been interpreted as restricting the state's ability to deprive people of life, liberty or security of the person, but has not placed a positive obligation on the state to

ensure that each person enjoys these rights. While she left open the possibility that "[o]ne day, s. 7 may be interpreted to include positive obligations", she found that the evidence in that case did not support that interpretation (at paras. 82-83).

[94] The trial judge considered these arguments, concluding (at para. 119) that the respondents were not seeking positive benefits and it was therefore not necessary to decide for the purposes of this case whether s. 7 protects positive rights. She said:

> In my view, the [respondents] do not seek positive benefits in this action and it is therefore not necessary for the Court to consider whether s. 7 includes a positive right to the provision of shelter. The [respondents] are not seeking to have the City compelled to provide the homeless with adequate shelter. Rather, the claim is that in the present circumstances, in which the number of homeless people exceeds available shelter space, it is a breach of s. 7 for the City to use its Bylaws to prohibit homeless people from taking steps to provide themselves with adequate shelter.

[95] Nor does the trial judge's decision that the Bylaws violated the rights of homeless people under s. 7 impose positive obligations on the City to provide adequate alternative shelter, or to take any positive steps to address the issue of homelessness. The decision only requires the City to refrain from legislating in a manner that interferes with the s. 7 rights of the homeless. While the factual finding of insufficient shelter alternatives formed an important part of the analysis of the trial judge, this does not transform either the respondents' claim or the trial judge's order into a claim or right to shelter.

[96] That is not to say the decision will not, from a practical point of view, require the City to take some action in response. That will likely take the form (as we were advised it already has) of some regulation of the overnight use of public parks, and perhaps the creation of additional shelters or alternative housing, which is consistent with the City's evidence about the initiatives it has undertaken to deal with the homeless. Such responsive action could be said to be a feature of all *Charter* cases; governments generally have to take some action to comply with the requirements of the *Charter*, which can involve some expenditures of public funds or legislative action, or both. That kind of responsive action to a finding that a law violates s. 7 does not involve the court in adjudicating positive rights.

[97] We do not accede to this ground of appeal. Nor is there any need to address the PHRC's argument that s. 7 grants a positive right to the provision of adequate shelter.

Is the Claim about Property Rights?

[98] The trial judge concluded that the respondents were not asserting a property right (at para. 132):

> I conclude that the [respondents] are not asserting a property right. They do not claim that

> the homeless can exclude anyone from any City property, or determine the use of any City property. They do not seek to have public property allocated to their exclusive use. What they are seeking does not amount to an appropriation of public property. They are simply saying that the City cannot manage its own property in a manner that interferes with their ability to keep themselves safe and warm.

[99] On appeal, the City argues that the trial judge's order gives the respondents a "right to camp on public property", and this makes their claim one about property rights. This argument was advanced at trial and properly rejected by the trial judge (at paras. 126-128):

> The AGBC and the City contend that the [respondents] claim the right to camp on public property and that this makes the claim in essence about property rights. They submit further that property rights do not fall within the scope of s. 7 [citations omitted]. In their submission, the [respondents'] claim is tantamount to an appropriation of public property for private use.
>
> In my view, this objection rests upon a mischaracterization of the matters at issue in this summary trial. The litigation had its origins in the Tent City erected in Cridge Park. It is also the case that many of the [respondents] deposed that they wanted to be able to set up and maintain a camp in a park and that for a variety of reasons they preferred the camp in Cridge Park to accommodation in shelters. However, in this summary trial application, the relief sought by the [respondents] is not what the AGBC and the City contend is the right to camp on public property. In other words, the issue of the right to camp in public spaces in the sense of a right to set up a semi-permanent camp, like the one established in Cridge Park, is not before the Court.
>
> Rather, the issue is the prohibition on erecting even a temporary shelter taken down each morning in the form of a tent, tarp or cardboard box that is manifested in the current Bylaws and operational policy of the City. In my view, the issue before the Court on this summary trial application is not an assertion by the [respondents] of a right to property as contended by the AGBC and the City.
>
> [Emphasis added.]

[100] The right asserted by the respondents and recognized by the trial judge is the right to provide oneself with rudimentary shelter on a temporary basis in areas where the City acknowledges that people can, and must, sleep. This is not a property right, but a right to be free of a state-imposed prohibition on the activity of creating or utilizing shelter, a prohibition which was found to impose significant and potentially severe health risks on one of the City's most vulnerable and marginalized populations.

[101] We do not accede to this ground of appeal.

Is there an Interference with Life, Liberty and Security of the Person?

[102] Based on uncontradicted and unopposed expert evidence, the trial judge found that compliance with the Bylaws exposes homeless people to a risk of serious harm, including death from hypothermia (at para. 142). This finding is not challenged on appeal. However, it

is argued that the trial judge erred in finding that this risk of harm constituted an interference with the respondents' rights to life, liberty and security of the person.

[103] The City says that the Bylaws do not deprive the respondents of life, liberty or security of the person because the City permits homeless people to sleep in parks and to adequately protect themselves from the elements short of erecting shelter. With respect, this argument simply amounts to a collateral attack on the findings of fact of the trial judge. The trial judge found that the City prohibits the homeless from erecting any form of overhead protection, and that some form of overhead protection is part of what is necessary for adequate protection from the elements (at paras. 4 and 69). The City does not argue that these findings constitute overriding and palpable error. The City's argument on this ground of appeal appears to be an attempt to re-argue the case at trial, which is not the purpose of an appeal.

[104] The AGBC argues that the trial judge misinterpreted the nature of the liberty interest protected by s. 7 of the *Charter*. The trial judge summarized her conclusion on the deprivation of liberty (at para. 148):

> The majority of homeless people in Victoria have no choice but to sleep on public property. There is no other place for them to go. I agree with the submission of the [respondents] that creating shelter to protect oneself from the elements is a matter critical to an individual's dignity and independence. The state's intrusion in this process interferes with the individuals' choice to protect themselves and is a deprivation of liberty within the scope of s. 7.

[105] The AGBC says the trial judge's analysis is internally inconsistent because she found that the respondents have "no choice" but to sleep outside and that the erection of shelter is a necessary response to this situation, but then characterized the creation of shelter as a fundamental personal "choice". Alternatively, the AGBC says that the choice to erect shelter is not a fundamental personal decision falling within the narrow sphere of protection afforded by s. 7.

[106] The Ontario Court of Appeal considered a similar argument in *R. v. Parker* (2000), 49 O.R. (3d) 481, where it held that the prohibition against the possession of marijuana for the treatment of epilepsy violated s. 7 of the *Charter* and was not saved by s. 1. Mr. Justice Rosenberg, for the Court, found that the choice of medication to alleviate the effects of an illness with life-threatening consequences is a decision of fundamental personal importance, and that to intrude into that decision-making process through the threat of criminal prosecution is a serious deprivation of liberty (at paras. 102-103).

[107] Clearly, the claimant in *Parker* did not "choose" to have epilepsy. This, however, did not prevent his decision with respect to treatment from being protected under s. 7. Similarly,

the fact that homelessness is not a choice does not mean that a homeless person's decision to provide him or herself with some form of shelter is not protected under s. 7. Treatment is as much a "necessary response" to illness as sheltering oneself is to the state of being homeless. The fact that a claimant has not chosen their underlying situation does not mean that a decision taken in response to it is not protected by the s. 7 liberty interest.

[108] The AGBC's first argument under this ground of appeal is not supported in law.

[109] We also reject the alternative argument that the choice to erect shelter to protect oneself from the elements is not a decision of "fundamental personal importance". In *Morgentaler*, Wilson J. held that the liberty interest is grounded in fundamental notions of human dignity, personal autonomy, and privacy (at 164-166). We agree with the trial judge that prohibiting the homeless from taking simple measures to protect themselves through the creation or utilization of rudimentary forms of overhead protection, in circumstances where there is no practicable shelter alternative, is a significant interference with their dignity and independence. The choice to shelter oneself in this context is properly included in the right to liberty under s. 7.

[110] We therefore conclude that the trial judge did not err in finding an interference with life, liberty and security of the person. In light of this conclusion, we do not find it necessary to address the two additional liberty arguments raised by the BCCLA.

Principles of Fundamental Justice - Overbreadth and Arbitrariness

[111] Having concluded that the prohibition against temporary shelter deprived the respondents of their rights to life, liberty and security, the trial judge turned to the question of whether the deprivation was in accordance with the principles of fundamental justice. She considered two principles of fundamental justice: overbreadth and arbitrariness.

Overbreadth

[112] The trial judge described the principle of overbreadth (at para. 169): "restrictions on life, liberty and security of the person must not be more broadly framed than necessary to achieve a legislative purpose". She applied the test for overbreadth from *R. v. Heywood*, [1994] 3 S.C.R. 761 at 792-793:

> 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 because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some

applications the law is arbitrary or disproportionate.

[113] The City argues this is the wrong test. According to the City, the Supreme Court of Canada narrowed the test for overbreadth in *R. v. Clay*, 2003 SCC 75, [2003] 3 S.C.R. 735 at paras. 38-39, to one of "gross disproportionality".

[114] The respondents say the trial judge applied the correct test. They submit that although the Supreme Court referred to a grossly disproportionate test for overbreadth in *Clay*, the Court returned to the principles enunciated in *Heywood* in *R. v. Demers*, 2004 SCC 46, [2004] 2 S.C.R. 489 at paras. 37-43, making no mention of *Clay*.

[115] We agree with the submissions of the respondents, and find no error in the trial judge's interpretation of the principle of overbreadth.

[116] We also find no error in her application of the principle (at para. 185). The prohibition on shelter contained in the Bylaws is overbroad because it is in effect at all times, in all public places in the City. There are a number of less restrictive alternatives that would further the City's concerns regarding the preservation of urban parks. The City could require the overhead protection to be taken down every morning, as well as prohibit sleeping in sensitive park regions.

Arbitrariness

[117] Turning to arbitrariness, the trial judge said (at para. 170): "a law must not operate to limit the rights protected by s. 7 in an arbitrary manner." She relied on the following statements concerning the meaning of that concept in *Chaoulli* (at paras. 129-131):

> It is a well-recognized principle of fundamental justice that laws should not be arbitrary: see, e.g., *Malmo-Levine* [2003 SCC 74, [2003] 3 S.C.R. 571], 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. [Emphasis added.]

[118] There is no dispute that this is the correct test for arbitrariness; however, the trial judge erred in the application of this test to the facts before her.

[119] The City and the AGBC identified the objective of the Bylaws and the operational policy as "the maintenance of the environmental, recreational and social benefits of urban parks." The City claimed that "absent the Bylaws, there will be an inevitable colonization of public spaces with a devastating impact to the economic viability of adjacent areas" (at para. 173). It supported its argument that people would congregate in parks by reference to the evidence surrounding the events at Cridge Park, statements made in the affidavits of homeless people regarding a general desire to live communally, and evidence of urban camping generally within Victoria. The City also detailed the damage to the parks that flows from "urban camping".

[120] The respondents' arguments did not deny any of the concerns raised by the City arising from the prospect of homeless people living or camping in public parks. Their point was that none of these concerns was specifically connected to the prohibition against the use of temporary overhead shelter in the form of tents, tarps, or cardboard boxes by homeless people sleeping in parks.

[121] The trial judge focused her analysis on the City's evidence of the specific harm caused by "urban camping", and concluded there was no "real connection on the facts" between the identified harm and the prohibition on temporary overnight shelter. She said: "There is simply no evidence that people would flock to sleep in the parks once they were allowed to cover themselves at night with cardboard boxes or tarps", and concluded that the damage described by the City from people sleeping overnight, making their way to a site to sleep, or digging holes in bluffs around the parks, occurs whether or not those people use temporary overhead shelter. She did not accept that the damage would be increased if people were allowed to shelter themselves while they slept (at paras. 192-193).

[122] With respect, the trial judge approached this issue too narrowly. The City and the AGBC described the objective of the Bylaws more broadly, as "maintaining the environmental, recreational and social benefits of urban parks". The evidence it offered of the harm caused by the possible overuse of parks was tendered in support of its claim that a restriction on their use was connected to that objective. In that sense, it cannot be said that the prohibition on the erection of shelter "bears no relation to" the legislative goal, or that the connection between the restrictions and the legislative objectives is only theoretical. The City's evidence of the events and damage caused at Cridge Park, the expressed preference of some homeless persons to live communally, and the evidence of urban camping generally provided some evidence that people would congregate in parks if the absolute prohibition on

the erection of overhead shelter was lifted.

[123] The respondents did not meet their onus of showing a lack of connection between the limit and the legislative goal (*Chaoulli* at para. 131). Although the City overshot this goal by enacting an absolute ban on the erection of temporary overhead shelter, and this overbreadth results in the Bylaws being arbitrary in some applications, the Bylaws are not arbitrary in the sense described in *Chaoulli*.

Conclusion on Principles of Fundamental Justice

[124] In the result, while the trial judge erred in concluding that the Bylaws were arbitrary, she did not err in finding that the deprivation of the respondents' rights to life, liberty and security of the person was not in accordance with the principles of fundamental justice, as the Bylaws were overbroad. Therefore, there is a breach of s. 7, and we do not accede to this ground of appeal. We do not find it necessary to consider the alternative principles of fundamental justice advanced by the respondents and PLS, namely voluntariness and necessity.

Section 1

[125] The final question with respect to the application of s. 7 is whether the infringement of the respondents' s. 7 rights can be saved pursuant to s. 1 of the *Charter.*

[126] Section 1 of the *Charter* provides:

> **1.** The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[127] The criteria that must be established to justify the infringement of a right or freedom guaranteed by the *Charter* are well known: (1) a sufficiently important legislative objective; (2) a rational connection between the impugned provisions and the objective; (3) minimal impairment of the right or freedom in question; and (4) proportionality between the deleterious effects of the limitation and its purpose: *R. v. Oakes*, [1986] 1 S.C.R. 103 at 138-140.

[128] The trial judge accepted (at para. 200) that the preservation of urban parks was a sufficiently important objective, as parks provide "significant environmental, recreational, social and economic benefits to the community." The respondents do not dispute this, but say the City cannot meet any of the other requirements of the *Oakes* test.

[129] The trial judge also accepted (at para. 204) that "the question of what sort of shelter

homeless people will be permitted to erect is encompassed in the issue of urban encampments and, in that sense," the absolute prohibition on the erection of temporary shelter was rationally connected to the objective of protecting urban parks. She concluded, however, and we agree, that the prohibition goes further than is necessary in pursuit of this legislative goal, and is therefore not minimally impairing, and that the benefits of the prohibition do not outweigh the deleterious effects. The serious health risks that homeless people face as a result of the absolute ban on shelter outweigh any benefit that may flow from the blanket prohibition.

[130] Thus, the trial judge made no error in concluding that the violation of the respondents' s. 7 rights is not justified as a reasonable limit pursuant to s. 1 of the *Charter*.

[131] We do not accede to this ground of appeal.

Remedy

[132] There are unique factors in this case that make the issue of remedy particularly difficult. The respondents have not demonstrated that the Bylaws, in and of themselves, are unconstitutional. The violation is a result of the combination of the two Bylaws, the City's operational policy that defines "temporary abode", and the fact that there is a shortage of adequate shelter in the City for homeless persons. Put simply, the homeless have no place to sleep at night without severe risk to their health, caused, at least in part, by the prohibition against the use of temporary overhead shelter.

[133] There are two types of remedy for a violation of the *Charter*: s. 24(1) of the *Charter,* and s. 52(1) of the *Constitution Act, 1982*, Part VII (of which the *Charter* is Part I).

[134] Section 24(1) of the *Charter* provides:

> Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy, as the court considers appropriate and just in the circumstances.

[135] Section 52(1) of the *Constitution Act, 1982* provides:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

[136] The trial judge applied s. 52(1) of the *Constitution Act, 1982*, and ordered that the impugned parts of the Bylaws "are of no force and effect insofar and only insofar as they apply to prevent homeless people from erecting temporary shelter" (at para. 239; emphasis

added).

[137] As s. 52(1) uses “or” rather than “and”, in “no force or effect”, we use “or” in these reasons for judgment except when quoting the trial judge’s reasons for judgment or order, or other cases that have used “and”.

[138] The AGBC argues that the appropriate remedy is an individual remedy under s. 24 of the *Charter*, rather than a finding that the Bylaws are of no force and effect under s. 52 of the *Constitution Act, 1982*. He says that what is really at issue in this case is not the validity of the Bylaws themselves, but rather the application of them to individual respondents. As such, the AGBC says it is not appropriate for the court to grant a remedy in the form of a declaration, but instead the courts should assess the respondents’ positions on a case-by-case basis, if and when they are prosecuted, and should grant constitutional exemptions in appropriate cases.

[139] The issue of whether a remedy lies under s. 24 of the *Charter* or s. 52 of the *Constitution Act, 1982* has been considered by the Supreme Court of Canada in two recent cases: *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, and *Greater Vancouver Transportation Authority*.

[140] In *Ferguson*, the Court considered whether a minimum sentence for manslaughter with a firearm violated s. 12 of the *Charter*. The trial judge found that it did, and purported to give the accused a constitutional exemption from the minimum sentence provision, relying on s. 24 of the *Charter*. The Supreme Court found there was no violation of the *Charter*, but went on, nonetheless, to consider the appropriateness of a s. 24 remedy. It held that such a remedy was inappropriate.

[141] In her reasons for the unanimous Court, the Chief Justice discussed the Court’s jurisprudence considering the two remedies, and distinguished them on the basis of their different purposes (at paras. 61 and 64):

> It thus becomes apparent that ss. 52(1) and 24(1) serve different remedial purposes. Section 52(1) provides a remedy for *laws* that violate *Charter* rights either in purpose or in effect. Section 24(1), by contrast, provides a remedy for *government acts* that violate *Charter* rights. It provides a personal remedy against unconstitutional government action and so, unlike s. 52(1), can be invoked only by a party alleging a violation of that party’s own constitutional rights: *Big M* [*R. v. Big M. Drug Mart Ltd.,* [1985] 1 S.C.R. 295]; *R. v. Edwards*, [1996] 1 S.C.R. 128. Thus this Court has repeatedly affirmed that the validity of laws is determined by s. 52 of the *Constitution Act, 1982*, while the validity of government action falls to be determined under s. 24 of the *Charter*: *Schachter* [*Schachter v. Canada*, [1992] 2 S.C.R. 679]; *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, 2001 SCC 81.

> The highly discretionary language in s. 24(1), "such remedy as the court considers appropriate and just in the circumstances", is appropriate for control of unconstitutional acts. By contrast, s. 52(1) targets the unconstitutionality of laws in a direct non discretionary way: laws are of no force or effect to the extent that they are unconstitutional.
>
> [Italic emphasis in original; underline emphasis added.]

[142] The Chief Justice then turned to the effect of the two remedies, pointing out that where laws are found to be inconsistent with the *Charter*, the wording of s. 52(1) suggests that they should not be left on the books subject to discretionary case-by-case remedies under s. 24(1) (at para. 65):

> The presence of s. 52(1) with its mandatory wording suggests an intention of the framers of the *Charter* that unconstitutional laws are deprived of effect to the extent of their inconsistency, not left on the books subject to discretionary case by case remedies: see *Osborne* [*Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69], *per* Wilson J. In cases where the requirements for severance or reading in are met, it may be possible to remedy the inconsistency judicially instead of striking down the impugned legislation as a whole: *Vriend* [*Vriend v. Alberta*, [1998] 1 S.C.R. 493; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2]. Where this is not possible - as in the case of an unconstitutional mandatory minimum sentence - the unconstitutional provision must be struck down. The ball is thrown back into Parliament's court, to revise the law, should it choose to do so, so that it no longer produces unconstitutional effects. In either case, the remedy is a s. 52 remedy that renders the unconstitutional provision of no force or effect to the extent of its inconsistency. To the extent that the law is unconstitutional, it is not merely inapplicable for the purposes of the case at hand. It is null and void, and is effectively removed from the statute books. [Emphasis added.]

[143] The Court emphasized (at para. 71) that constitutional exemptions "leave the law uncertain and unpredictable," by leaving it to judges to decide, without guidance from the *Charter*, "whether the law stands or falls." The resulting uncertainty presents a serious challenge to the rule of law, and should be granted in very limited situations (at para. 72):

> The divergence between the law on the books and the law as applied - and the uncertainty and unpredictability that result - exacts a price paid in the coin of injustice. First, it impairs the right of citizens to know what the law is in advance and govern their conduct accordingly - a fundamental tenet of the rule of law. Second, it risks over-application of the law; as Le Dain J. noted in *Smith* [*R. v. Smith*, [1987] 1 S.C.R. 1045], the assumed validity of the law may prejudice convicted persons when judges must decide whether to apply it in particular cases. Third, it invites duplication of effort. The matter of constitutionality would not be resolved once and for all as under s. 52(1); in every case where a violation is suspected, the accused would be obliged to seek a constitutional exemption. In so doing, it creates an unnecessary barrier to the effective exercise of the convicted offender's constitutional rights, thereby encouraging uneven and unequal application of the law. [Emphasis added.]

[144] Similar concerns were raised In *R. v. Seaboyer*, [1991] 2 S.C.R. 577, where the

Supreme Court of Canada considered an argument that the constitutionality of a “rape shield law” - which absolutely prohibited the defence from cross-examining the complainant in a sexual assault case on her or his sexual conduct on other occasions - should be determined on a case-by-case basis through the granting of constitutional exemptions. The majority rejected the proposition for a number of reasons, including the fact that no clear standard could be articulated for when the law would apply and when it would not, and the fact that it would be inappropriate to require the accused to deal with the issue in every case.

[145] Those same concerns with the uncertainty and unpredictability of case-by-case remedies arise in this case.

[146] We agree with the trial judge that it would place an undue burden on the respondents to require them to deal with this issue on a case-by-case basis. The factual issues that were canvassed before the trial judge were complex. Given the extremely limited means of the respondents, it cannot be anticipated that they would be in a position to adequately defend multiple prosecutions.

[147] Further, leaving the Bylaws in place and relying on the mechanism of constitutional exemptions to secure the rights of the respondents would put them in an invidious position. The City could effectively enforce the Bylaws without ever bringing prosecutions. For example, homeless persons could be harassed as they attempt to sleep, and have their makeshift shelters torn down by authorities acting under colour of right given by the Bylaws. A public authority may do what it can to ensure compliance with its rules, using prosecutions in quasi criminal proceedings to punish contraventions as a last resort. An absence of prosecutions should not prevent the respondents from the protection of their constitutional rights.

[148] Furthermore, the respondents do not challenge only government action taken under laws whose constitutional validity is accepted. They allege that the laws themselves - the combination of the two Bylaws and the City’s operational policy - are contrary to the *Charter*.

[149] In *Greater Vancouver Transportation Authority*, the Supreme Court of Canada considered whether binding policies of general application adopted by a government entity can be characterized as “law” for the purposes of s. 52(1).

[150] The Supreme Court found that the Transportation Authority’s policies for accepting advertising on transit vehicles violated s. 2 of the *Charter*. The Transportation Authority argued that no remedy ought to be given under s. 52, because no “law” was found to be unconstitutional. In her reasons for the majority, Justice Deschamps rejected that argument

(at para. 87):

> The question ... is whether binding policies of general application adopted by a government entity can be characterized as "law" for the purposes of s. 52(1). While the broad wording of s. 24(1) would appear to permit a declaration with an effect similar to that of one made under s. 52(1), it is more appropriate to deal with rules made by government entities under s. 52(1). There are two reasons for this. First, as this Court emphasized in *Ferguson*, it is important to deal with invalid "laws" under s. 52(1) and thereby ensure that inconsistent provisions are "not left on the books" ...
>
> Second, because the public law requirements for jurisdiction and standing under s. 52(1) are less strict, the possibility of someone seeking a declaration of constitutional invalidity of a law is stronger in terms both of the number of potential claimants and of the number of possible fora. A binding rule of general application is not an individualized form of government action like an adjudicator's decision or a decision by a government agency concerning a particular individual or a particular set of circumstances. Rules of general application can have wide-ranging effects, which means that the broader remedy is more appropriate than an individual remedy under s. 24(1).
>
> [Emphasis added.]

[151] On this basis, the combination of the Bylaws and the operational policy, as they apply where there is insufficient shelter in the City for homeless people, is properly characterized as "law" for the purpose of s. 52.

[152] For all of these reasons, we agree with the trial judge that a remedy under s. 24, in the form of constitutional exemptions or otherwise, was not appropriate to protect the respondents' *Charter* rights in this case.

[153] In determining a remedy under s. 52, the trial judge rejected the possibility of refashioning the Bylaws to make them constitutional, considering that such a course of action was inadvisable and inconsistent with the need to defer to the legislative authorities (at para. 237):

> In the present case I am mindful of the fact that there are many different ways in which the City could approach the reconciliation of the rights of the homeless with the objectives of preservation of parks. In these circumstances I have concluded that the course that is most appropriate is to grant a declaration that the Bylaws are of no force and effect insofar as they apply to prevent homeless people from erecting temporary shelter.

[154] Thus, the trial judge made the following declarations (at para. 239):

> (a) Sections 13(1) and (2),14(1) and (2), and 16(1) of the *Parks Regulation Bylaw* No. 07-059 and ss. 73(1) and 74(1) of the *Streets and Traffic Bylaw* No. 92-84 violate s. 7 of the *Canadian Charter of Rights and Freedoms* in that they deprive homeless people of life, liberty and security of the person in a manner not in accordance with the

principles of fundamental justice, and are not saved by s. 1 of the *Charter*.

(b) Sections 13(1) and (2),14(1) and (2), and 16(1) of the *Parks Regulation Bylaw* No. 07-059 and ss. 73(1) and 74(1) of the *Streets and Traffic Bylaw* No. 92-84 are of no force and effect insofar and only insofar as they apply to prevent homeless people from erecting temporary shelter.

[155] We agree that the Court should not attempt to re-draft the Bylaws to make them constitutional, and that the declarations the trial judge made were intended to be narrow in scope. Nonetheless, we are not satisfied that the declarations granted accurately reflect the law, or her findings and reasons for judgment.

[156] In fashioning a remedy under s. 52(1) of the *Constitution Act, 1982*, care must be taken to ensure that laws are declared of no force or effect only to the extent of the inconsistency with the *Constitution of Canada* (in this case, the *Charter*). This case provides an unusual situation, in that the Bylaws violate the *Charter* only because, read together with the City's operational policy, they prohibit the erection of temporary overhead night-time shelters, and because there are insufficient alternative resources available to shelter the homeless.

[157] For convenience, we set out again the sections of the Bylaws that were struck down by the trial judge:

Parks Regulation Bylaw

Damage to environment, structures

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

(ii) a building or structure, including a fence, sign, seat, bench, or ornament of any kind;

(b) foul or pollute a fountain or natural body of water; (c) paint, smear, or otherwise deface or mutilate a rock in a park; (d) damage, deface or destroy a notice or sign that is lawfully posted; (e) transport household, yard, or commercial waste into a park for the purpose of disposal;

(f) dispose of household, yard, or commercial waste in a park.

(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 receptacles provided for that purpose.

Nuisances, obstructions

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

(a) behave in a disorderly or offensive manner;

(b) molest or injure another person;

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

(d) take up a temporary abode over night;
(e) paint advertisements;

(f) distribute handbills for commercial purposes;

(g) place posters;
(h) disturb, injure, or catch a bird, animal, or fish;

(i) throw or deposit injurious or offensive matter, or any matter that may cause a nuisance, into an enclosure used for keeping animals or birds;

(j) consume liquor, as defined in the *Liquor Control and Licensing Act*, except in compliance with a licence issued under the *Liquor Control and Licensing Act*.

(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;

Construction

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 as a tent, in a park only as permitted under this Bylaw, or with the express prior permission of the Council,

Streets and Traffic Bylaw

73(1) Except the agents, servants or employees of the City acting in the course of their employment, no person shall excavate in, disturb the surface of, 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, who may impose the terms and conditions it deems proper.

74(1) Without restricting the generality of the preceding section or of section 75, no person shall place, deposit or leave upon, above, or in any street, sidewalk or other public place any chattel, obstruction, or other thing which is or 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.

[158] As a general proposition, the Court ought not to strike down portions of legislation which are neither unconstitutional nor so intimately connected to unconstitutional provisions as to be inseparable from them. In *Schachter v. Canada*, [1992] 2 S.C.R. 679 at 697, Lamer C.J. for the majority said:

> Where the offending portion of a statute can be defined in a limited manner it is consistent with legal principles to declare inoperative only that limited portion. In that way, as much of the legislative purpose as possible may be realized. However, there are some cases in which to sever the offending portion would actually be more intrusive to the legislative purpose than the alternate course of striking down provisions which are not themselves offensive but which are closely connected with those that

> are. This concern is reflected in the classic statement of the test for severance in *Attorney-General for Alberta v. Attorney-General for Canada*, [1947] A.C. 503, at p. 518:
>
> > The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all.
>
> This test recognizes that the seemingly laudable purpose of retaining the parts of the legislative scheme which do not offend the Constitution rests on an assumption that the legislature would have passed the constitutionally sound part of the scheme without the unsound part. In some cases this assumption will not be a safe one. In those cases it will be necessary to go further and declare inoperative portions of the legislation which are not themselves unsound.
>
> [Emphasis added.]

[159] The respondents' pleadings challenged all of the quoted sections, but the evidence at trial was more narrowly directed. Most parts of the Bylaws were not impugned. It was not suggested, for example, that the respondents have a constitutional right to destroy buildings, injure other persons, or catch birds in parks. Indeed, in the final analysis, the only provisions of the Bylaws that were shown to be unconstitutional in the circumstances were ss. 14(1)(d) and 16(1) of the *Parks Regulation Bylaw*. The other provisions of the *Parks Regulation Bylaw* need not have been mentioned in the declaration, nor should any provisions of the *Streets and Traffic Bylaw*. The declarations ought to have been limited to ss. 14(1)(d) and 16(1) of the *Parks Regulation Bylaw*.

[160] There are some other difficulties with the order. We are told that the phrase "temporary shelter" has been a source of dispute. There has been disagreement as to whether "temporary" refers to the nature of the shelter's construction, or to the length of time that it is able to remain in place. The evidence in this case was directed at the need for homeless persons to erect temporary overnight shelter, in order to be able to sleep outside. The declaration granted should, therefore, refer to "temporary overnight shelter" rather than simply to "temporary shelter". This should clarify the intention that the City is required to allow shelters to remain in place only for the overnight period.

[161] It was suggested at the hearing that there may also be some difficulty in determining who is a "homeless person" for the purposes of the order. The trial judge did not define the term, so there is no decision for this Court to review. Further, we did not receive full submissions on the question on the appeal. One possible description offered was that a homeless person is "a person who has neither a fixed address nor a predictable safe residence to return to on a daily basis". Without endorsing that particular formulation as definitive, we find it to be a good working description of what is meant by a "homeless

person" for the purposes of the order.

[162] The final issue with respect to the declaration arises out of the fact that the impugned provisions of the Bylaw are only unconstitutional because there are insufficient resources in the City of Victoria to shelter the homeless. If there were adequate shelter beds or appropriate designated areas outside of parks to accommodate the homeless, the Bylaw provisions that we are concerned with might well be valid.

[163] Section 52(1) of the *Constitution Act, 1982* provides sufficient flexibility to deal with this last issue. In *Schachter*, the Supreme Court of Canada established that there are various tools available to a court when it finds a law to be "of no force or effect" in order to craft a remedy that covers the "extent of the inconsistency". These include severance of portions of the impugned legislation, and "reading in" provisions as required. *Schachter* does not suggest that these are the only tools available for tailoring declarations to the extent of inconsistency with the *Constitution*.

[164] A law may be found to be "of no force or effect" in at least two ways. First, the law may be struck down; this is the remedy that is applied to *ultra vires* laws, and is also, typically, the remedy applied when a law contravenes the *Charter*. In appropriate cases, however, a court may, instead, declare a law to be "inoperative". This remedy is typically applied to provincial laws where paramount federal laws are in place. The provincial laws are not "struck down", in the sense that they are, effectively, repealed; rather, they are made dormant for so long as paramount federal legislation remains in place, and automatically "revive" if and when the paramount legislation is repealed (see Peter Hogg, *Constitutional Law of Canada*, 5th ed., Supp., vol. 1, looseleaf [Toronto: Thomson Carswell, 2007] §16.6, at 16-19).

[165] A declaration that a provincial law is "inoperative" while a paramount federal law subsists is not problematic. It is a simple matter to determine the status of the federal law. The situation in the case at bar is not so simple. There is no "bright line" test to determine whether resources to shelter the homeless in Victoria are sufficient to render the provisions of the *Parks Regulation Bylaw* once again constitutional. We consider that the appropriate manner of dealing with this problem is to allow the City to apply to the Supreme Court for a termination of the declaration if it can demonstrate that the conditions that make the *Parks Regulation Bylaw* unconstitutional have ceased to exist.

[166] In the result, we order that the declaration be varied to read as follows:

> (a) Sections 14(1)(d) and 16(1) of the *Parks Regulation Bylaw* No. 07-059 violate s. 7 of the *Canadian Charter of Rights and Freedoms* in that they deprive homeless people of life, liberty and security of the person in a manner not in

accordance with the principles of fundamental justice, and are not saved by s. 1 of the *Charter*.

(b) Sections 14(1)(d) and 16(1) of the *Parks Regulation Bylaw* No. 07-059 are inoperative insofar and only insofar as they apply to prevent homeless people from erecting temporary overnight shelter in parks when the number of homeless people exceeds the number of available shelter beds in the City of Victoria.

(c) The Supreme Court of British Columbia may terminate this declaration on the application of the City of Victoria, upon being satisfied that sections 14(1)(d) and 16(1) no longer violate s. 7 of the *Canadian Charter of Rights and Freedoms*.

Costs

[167] The trial judge found that the respondents are entitled to special costs of the trial on the basis of the principles applicable to "public interest litigation".

[168] The trial judge heard submissions with respect to the costs of the trial before this appeal was heard. On the appeal, all of the parties agreed that the issues of costs of the trial and the appeal should be adjourned, pending receipt of the trial judge's decision on costs. The trial judge released her reasons for judgment on that issue after the hearing, on July 30, 2009. This Court received written submissions from the City and the respondents on the issues of the costs of the trial and the appeal.

[169] The City challenges generally the trial judge's determination that special costs were appropriate in this case, and raises some specific objections to her decision. In responding to the City's general challenge to the award of special costs, we will set out some guidelines for consideration in awarding special costs to successful litigants in public interest litigation, relying on the jurisprudence to date concerning the circumstances in which costs awards may vary from the normal rule that costs follow the event and are awarded on a party and party basis. First, however, we will deal with the City's specific objections to the trial judge's award.

[170] The City claims that it was an error of law to award public interest litigation special costs against the City, because it is not a Crown entity. There is no merit to this argument.

[171] The power to award special costs is exercised under the court's inherent jurisdiction with respect to costs and R. 57(1) of the *Rules of Court*: F.M. Irvine, McLachlin & Taylor: *British Columbia Practice*, 3d ed., vol. 3, looseleaf (Markham: LexisNexis, 2006) at 57-4. The Rules refer to "parties", and there is nothing in them that distinguishes between Crown and non-Crown entities.

[172] In *Finney v. Barreau du Québec*, 2004 SCC 36, [2004] 2 S.C.R. 17, the Supreme Court of Canada awarded the successful respondent solicitor and client costs (the equivalent of special costs in British Columbia), pursuant to s. 47 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, against the *Barreau du Québec*, a self-regulatory body akin to our Law Society. The Court did so on what are fairly characterized as public interest grounds. At para. 48 the court stated:

> Given the circumstances of this case, I would award the respondent her costs in this Court on a solicitor and client basis. Costs are awarded on this basis only in exceptional cases, under s. 47 of the *Supreme Court Act*, R.S.C. 1985, c. S 26 (see *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405, 2002 SCC 13, at paras. 86-87; *Roberge v. Bolduc*, [1991] 1 S.C.R. 374, at pp. 445-46). In this case, the respondent represented herself until the case came before this Court, where a lawyer agreed to represent her. The appellant's appeal raised issues of general importance concerning the application of the legislation governing the professions in Quebec, the implications of which go beyond her particular case. Given the situation, this Court is justified in awarding the respondent costs on a solicitor and client basis. [Emphasis added.]

[173] The fact that there was no *Charter* issue is irrelevant to the point that the entity against which public interest litigation special costs were awarded was not a Crown entity.

[174] Nor is there any policy reason why municipalities should be immune from an award of public interest litigation special costs. Municipalities are subject to the *Charter*, as is evident from this case, because they perform "quintessentially governmental function[s]": see *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844 at para. 51. There is no good reason to distinguish municipalities from other government entitles governed by the *Charter* in considering whether, in a particular case, public interest litigation special costs are appropriate.

[175] The City argues that the trial judge improperly considered economic issues - by looking to the City's "deep pockets" and the economics and profitability of the law firm which represented the respondents on a *pro bono* basis - in deciding to award the respondents special costs. This argument also lacks merit.

[176] The capacity of a party to bear the costs of the proceedings is a relevant factor for the court to consider: see *British Columbia (Minister of Water, Land & Air Protection) v. British Columbia (Information & Privacy Commissioner)*, 2005 BCCA 368 (indexed as *Guide Outfitters Assoc. v. British Columbia (Information and Privacy Commissioner)*), 50 B.C.L.R. (4th) 19 at para. 8.

[177] There was no evidence before the trial judge concerning the economics and profitability of the law firm that represented the respondents, and she made no reference to

any such considerations. The point made by the trial judge was that if the law firm had not represented the respondents on a *pro bono* basis, it was unlikely that the respondents would have been able to prosecute their claim (at para. 18). This is a finding of fact, which the City does not challenge. In addition, as the trial judge noted, citing the majority of the Ontario Superior Court of Justice in *Broomer (Litigation Guardian of) v. Ontario (Attorney General)* (2004), 187 O.A.C. 192, 121 C.R.R. (2d) 163 at para. 20: "[t]here is public interest in encouraging experienced counsel to undertake *Charter* litigation of broad concern on a *pro bono* basis."

[178] We now turn to the principles applicable to the consideration of an award of public interest litigation special costs to a successful applicant.

[179] The City argues the trial judge erred in awarding such costs because this case does not meet the "rare and exceptional circumstances" that would justify granting such an award on the basis of public interest considerations. It submits she erred by incorrectly relying on the factors originally set out by the Ontario Law Reform Commission in its *Report on the Law of Standing* (Toronto: Ministry of the Attorney General, 1989), cited in *MacDonald v. University of British Columbia*, 2004 BCSC 412, 26 B.C.L.R. (4th) 190 at para. 13, and referred to by this Court in *Minister of Water, Land & Air Protection* at para. 8. The City argues that these factors are relevant only to a departure from the rule that costs follow the event, rather than "the very different question" of whether special costs should be granted in completed public interest litigation.

[180] The general rule with respect to costs is that they follow the event and are assessed on a party and party basis unless the court otherwise orders: Rules 57(9) and 57(1) of the *Rules of Court*. Courts retain the discretion to depart from the general rule where the circumstances justify a different approach: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371 at para. 22. It is a broad discretion, and this Court will only interfere "if there is misdirection or the decision is so clearly wrong as to amount to an injustice": *Agar v. Morgan*, 2005 BCCA 579 at para. 26.

[181] It has been recognized, in this jurisdiction and others, that litigation involving the public interest raises unique policy considerations that may, in exceptional cases, justify a departure from the ordinary cost rules: *Okanagan Indian Band*; *Barclay (Guardian ad litem of) v. British Columbia (Attorney General),* 2006 BCCA 434 at para. 16.

[182] Such considerations have led courts to depart from ordinary cost awards in three ways. First, there are cases where interim costs have been awarded to fund a public interest litigant through the course of litigation. Second, there are cases where an unsuccessful

public interest litigant has been relieved from an adverse cost award, or has even been awarded costs. Finally, there are cases where, notwithstanding the absence of reprehensible conduct (the usual basis for such an award), special costs are awarded as an instrument of policy to encourage access to justice.

[183] Although clear and virtually identical principles have been articulated to assist courts in determining whether to exercise their discretion in the first two categories, comparatively little guidance has emerged to assist courts in regard to whether special costs are appropriate for successful litigants in completed public interest litigation. As a result, courts addressing the issue in this province, including the trial judge in the present case, have made reference to the principles originally developed in relation to interim costs and departures from the rule that costs follow the event to guide their discretion.

[184] The criteria for an award of interim costs in public interest litigation were set out by the Supreme Court of Canada in *Okanagan Indian Band* at para. 40:

> 1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial - in short, the litigation would be unable to proceed if the order were not made.
>
> 2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.
>
> 3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

[185] Similar factors were proposed by the Ontario Law Reform Commission to assist in determining whether an unsuccessful public interest litigant should be insulated from an adverse cost award. They were approved by this Court in *Minister of Water, Land & Air Protection* at para. 8:

> (a) The proceeding involves issues the importance of which extends beyond the immediate interests of the parties involved;
>
> (b) The person has no personal, proprietary or pecuniary interest in the outcome of the proceeding, or, if he or she has an interest, it clearly does not justify the proceeding economically;
>
> (c) The issues have not been previously determined by a court in a proceeding against the same defendant;
>
> (d) The defendant has a clearly superior capacity to bear the costs of the proceeding; and
>
> (e) The plaintiff has not engaged in vexatious, frivolous or abusive conduct.

[186] Mr. Justice Hall, writing for the Court, emphasized that these factors do not constitute a test fettering what is inherently an exercise of principled discretion (at para. 8):

> Although I consider these factors as useful ones to guide the Court in the exercise of its discretion as to costs, the overarching question is still whether the normal rule is unsuitable on the facts of this case. As Smith J. (as he then was) said in *Sierra Club of Western Canada v. British Columbia (Chief Forester)* (1994), 94 B.C.L.R. (2d) 331 at paras. 49-50, 117 D.L.R. (4th) 395 (S.C.), aff'd (1995), 7 B.C.L.R. (3d) 375, 60 B.C.A.C. 230:
>
> > I do not think it would be wise to establish a principle that any person bringing a proceeding out of a *bona fide* concern to vindicate his or her perception of the public interest should be insulated from an award of costs in all cases. Such a motive will always be a relevant and important factor, but it should not be considered to the exclusion of all other relevant and important factors. The Court must retain the flexibility to do justice in each case.
> >
> > In my view, the authorities cited do not set out any rule which must guide the exercise of my discretion. Rather, they set out examples of the relevant factors to be taken into account and illustrate that the factors ... will be given more or less weight depending on their relationship to other pertinent considerations. In the result, whether to depart from the ordinary rule that costs follow the event is a matter within my discretion. The exercise of that discretion must be informed by proper principles, but it is nonetheless a decision to be made with regard to the particular facts before me.
> >
> > [Emphasis added.]

[187] These comments are applicable to all cases where, as Hall J.A. stated: "the overarching question is ... whether the normal rule is unsuitable on the facts of this case." The applicability of any factor, including those from *Okanagan Indian Band* or *Minister of Water, Land & Air Protection*, is determined not by the category of derogation from the normal costs rule, but by its relevance to the facts of the particular case.

[188] Having said that, the following may be identified as the most relevant factors to determining whether special costs should be awarded to a successful public interest litigant:

(a) The case involves matters of public importance that transcend the interests of the named parties, and which have not been previously resolved;

(b) The successful party has no personal, proprietary or pecuniary interest in the outcome of the litigation that would justify the proceeding;

(c) As between the parties, the unsuccessful party has a superior ability to bear the costs of the proceeding; and

(d) The successful party has not conducted the litigation in an abusive, vexatious or frivolous manner.

[189] The basic question underlying these factors is whether the public interest in resolving

a legal issue of broad importance, which would otherwise not be resolved, justifies the exceptional measure of awarding special costs to a successful litigant.

[190] While similar, or even identical, factors may apply to various forms of departure from the normal rule, that is not to suggest that all forms of departure are of equal magnitude. The justification necessary to grant an exceptional cost award is, in part, related to the magnitude of derogation from the usual cost structure of the award being considered. An award of interim costs requires one party to incur liability for the other's costs before the case has been heard and irrespective of the outcome. These are truly exceptional orders. Likewise, as this Court observed in *Barclay* at para. 37, an award of costs to an unsuccessful party represents a more significant departure than an order that each side bear their own costs. In terms of this spectrum, an award of special costs to a successful public interest litigant involves only the level of costs. As a result, such an award, albeit financially very significant, would be less of a departure from the normal rule than orders awarding interim costs or costs to an unsuccessful party.

[191] Nor should we be taken to suggest that a successful public interest litigant will automatically be entitled to special costs. On the contrary, just as the discretion to award interim costs or costs to an unsuccessful public interest litigant is limited to cases involving matters of public importance that are highly exceptional, special costs (even for successful public interest litigants) must be the exception rather than the norm: see *Finney* at para. 48. Each case must be considered on its merits, and access to justice considerations must be balanced against other important factors: see *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 S.C.R. 38 at para. 35.

[192] In this case, the trial judge considered all of these four factors, and others that apply more directly to other forms of derogation from the normal rule. There is no basis for this Court to interfere with the exercise of her discretion: she applied the proper principles, made no errors of law, and did not misconceive the facts. In short, there is no basis to say that she was "clearly wrong".

[193] It follows that we do not accede to the City's appeal against the award of special costs of the trial.

Conclusion

[194] The order is not an improper intrusion into the policy decisions of elected officials.

[195] The trial judge did not err in finding that the absolute prohibition on the erection of

temporary overnight shelter contained in the Bylaws violates s. 7 of the *Charter*, nor in finding that the violation is not justified as a reasonable limit pursuant to s. 1.

[196] The trial judge did not err in ordering that the respondents are entitled to special costs of the trial.

[197] The appeal is allowed only to the extent of varying the order as set out above in para. 166.

Costs of the Appeal

[198] For the reasons given with respect to the order that the respondents are entitled to special costs of the trial, we order the respondents are also entitled to special costs of the appeal.

"The Honourable Madam Justice Levine"

"The Honourable Madam Justice Neilson"

"The Honourable Mr. Justice Groberman"