IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Saanich (District) v. Brett,*
2018 BCSC 1648

Date: 20180907
Docket: S183248
Registry: Victoria

Between:

District of Saanich

Plaintiffs

And

Christine Brett, Jane Doe, John Doe and Other Unknown Persons

Defendants

-and-

Docket: S183331
Registry: Victoria

Between:

Her Majesty the Queen in Right of British Columbia,
The Attorney General of British Columbia,
Minister of Transportation and Infrastructure,
British Columbia Transportation Financing Authority

Plaintiffs

And

Christine Brett, Jane Doe, John Doe and Other Unknown Persons

Defendants

Before: The Honourable Mr. Justice Branch

Oral Reasons for Judgment

Counsel for the Plaintiff, District of Saanich:	J.W. Locke K. Crawford
Counsel for the Plaintiffs, Her Majesty the Queen in Right of British Columbia, The Attorney General of British Columbia, Minister of Transportation and Infrastructure, British Columbia Transportation Financing Authority:	M. Rankin A. Caron
Counsel for the Defendants, Christine Brett, Terrence W. Boomhower, Ryan Brackenbury, Jessica Cooper, Blair Este, Geoff Green, Lynne Hibak, Robert Imeson, Michael Innes, Lance Larsen, Ryan Mulligan, Sean O'Shea, Peter Salopree, Jason Sheara, Jordan Steinbrenner, Kisja Walker:	J. Heaney
Place and Dates of Hearing:	Victoria, B.C. August 27-31, 2018
Place and Date of Judgment:	Victoria, B.C. September 7, 2018

Table of Contents

[1] Before me are two applications for an interlocutory injunction requiring the clearance of an encampment in the District of Saanich ("Saanich") as well as certain corollary relief. One application is brought by Saanich, the plaintiff in Action No. 183248, which owns the land known as Regina Park. The other is brought by provincial government entities (collectively, the "Province"), the plaintiffs in Action No. 183331, who own land contiguous to Regina Park and the Trans-Canada Highway (the "Provincial Land").

I. BACKGROUND

[2] Christine Brett and each of the other defendants who appeared at the hearing are persons who have been occupying Regina Park and the Provincial Land since late-April 2018 (the "Encampment").

[3] The lands that comprise Regina Park and the Provincial Land consist of open green space, punctuated by pockets of foliage and trees. Regina Park is a municipal park owned and maintained by Saanich. The Provincial Land consists of two types of land: (1) land that is properly defined as a "highway" under the *Transportation Act*, S.B.C. 2004, c. 44 (the "Road Dedication") and (2) certain other provincially-owned property that does not formally qualify as a highway (the "Other Provincial Lands").

[4] Regina Park and the Provincial Land are bounded by the Trans-Canada Highway, Regina Avenue, and Harriet Road. There are residential properties along Regina Avenue and Harriet Road. The park itself is used primarily for dog walking and to access other areas, including a pedestrian overpass above the Trans-Canada Highway.

[5] There is evidence that Ms. Brett encouraged the establishment of the Encampment as part of a broader effort to raise awareness of homelessness issues across the province. Ms. Brett has assumed a leadership role within the Encampment.

[6] The defendants have maintained residence at the Encampment throughout the day and night, not limiting their presence to temporary overnight sheltering. The

population participating in the Encampment is transient and fluctuating but has continuously grown since the Encampment was established. It started with approximately 10 persons and has now grown to approximately 107 persons (the "Residents").

[7] The Residents have brought an increasing amount of materials into the Encampment, including generators, compressed gas, propane tanks, and cooking appliances. The level of complexity of the structures on site has also increased, now including multi-level structures connected by wooden stairs. There are ropes and electrical wires. Large volumes of materials have been deposited on the property, including tents, tarpaulins, furniture, wood pallets, clothing, personal items, and refuse.

[8] Saanich took a number of steps following the establishment of the Encampment, at least partially in response to its establishment:

a) Portable toilets and refuse containers were installed and maintained at Saanich's expense;

b) On July 9, 2018, a new bylaw was passed that would allow persons with no fixed address or predictable safe residence to establish ongoing temporary overnight shelter in Regina Park, as well as 101 other parks throughout Saanich from 7:00 p.m. to 9:00 a.m.: District of Saanich, Bylaw No. 9513, *Amendment Bylaw* (9 July 2018);

c) On July 10, 2018, Saanich established:

    i. a new hygiene station (the "Hygiene Station"), including toilets, wash basins, showers, and potable water that can be used throughout the day;

    ii. a new storage facility (the "Storage Facility") that can be used to individually store and secure personal property in large plastic tubs during the day from 7:00 a.m. to 9:00 p.m. The tubs are 2 feet long, 1.25 feet wide and 1.25 feet high.

> These facilities are located approximately 600 metres from the Encampment. Saanich has contracted with a private security company to staff the Hygiene Facility and Storage Facility between 7:00 a.m. and 11:00 a.m., and between 5:00 p.m. and 9:00 p.m. daily.

[9] The above developments were arguably encouraged by the Residents. However, in spite of the apparent success of their efforts, the Residents have not taken steps to meet the requirements of the newly liberalized bylaw. Rather, the Residents have remained and further expanded the Encampment.

Use of Regina Park and the Provincial Land

[10] Pursuant to the Zoning Bylaw, Regina Park is zoned as "Recreation and Open Space (P-4)" and the permitted uses of Regina Park are limited to those uses described in Schedule 1030 of the Zoning Bylaw: District of Saanich, Bylaw no. 8200, *Zoning Bylaw* (September 2003). The permitted uses of Regina Park do not include camping, lodging or use as a residence.

[11] On June 30, 2018, Saanich delivered a Notice to Vacate and an Order to take certain steps made pursuant to the *Fire Services Act,* R.S.B.C. 1996, c. 144 *[Fire Services Act*].

[12] On July 11, 2018, the Province's engineering staff performed a safety assessment of the Road Dedication and concluded that the Encampment posed highway safety risks to the occupants of the Encampment and to members of the travelling public. On July 12, 2018, Saanich delivered and posted a "Notice to Cease Occupation of Regina Park" to the occupants of the Encampment. Saanich Police additionally informed Residents of the Hygiene Station and the Storage Facility. Residents were provided with maps showing the parks which were now available for temporary overnight sheltering. In response, Ms. Brett stated that she had seized Regina Park land pursuant to a proclamation from the year 1700.

[13] On July 17, 2018, the Province served a Notice of Unauthorized Use and Occupation upon the defendants, notifying them that their continuing occupation of

the Road Dedication was not authorized and directing the defendants to immediately cease occupying the Road Dedication.

[14] The District brought its action on July 23, 2018.

[15] On July 26, 2018, the Province caused a Notice of Trespass to be served on the defendants.

[16] The Encampment remains in place. The evidence is that Regina Park will require substantial rehabilitation in order to restore it to a safe condition should the injunction issue.

Fire Safety

[17] Saanich has a Fire Prevention Bylaw that contains a number of prohibitions and requirements regarding fire safety within District parks. Saanich's Fire Department (the "Fire Department") has concluded that the Encampment raises serous fire safety concerns. Three officers testified in court before me and I was impressed by their sincerity and, of even greater moment, was concerned by their obvious anxiety about conditions at the park. As one of the officers testified, the conditions at the Encampment keep him up at night.

[18] The fire safety hazards arise, *inter alia,* from the following:

a) the hot and dry conditions in the area;

b) smoking cigarettes and/or other substances in areas covered in dry grass and foliage;

c) erecting, using, and maintaining flammable nylon tents and make-shift wooden multi-level shelters in proximity to each other and in areas of dense foliage;

d) placing tents in tight proximity, with inadequate ingress and egress in the event of fire;

e) depositing combustible materials near tents and other flammable shelters;

f) placing large volumes of combustible materials, such as wood pallets, clothing, furniture, and other personal items;

g) using propane barbecues and other unsafe cooking implements near tents and dry foliage; and

h) unsafely storing or using generators, extension cords, propane gas tanks, and other ignition sources and accelerants near or within tents and makeshift shelters.

[19] On June 8, 2018, in response to the increase in fire and life safety hazards present at the Encampment, Deputy Fire Chief Dan Wood, acting as a local assistant to the Provincial Fire Commissioner, issued an order to the Encampment occupants pursuant to s. 22 of the *Fire Services Act*. This order was subsequently served on Ms. Brett and posted at Regina Park (the "June 8 Order").

[20] On June 14, 2018, the Fire Department conducted a fire and life safety inspection at the Encampment for the purpose of assessing the extent to which the occupants had complied with the June 8 Order. The Fire Department observed that there had been minimal progress on the part of the occupants to address the hazards set out in the June 8 Order. Moreover, new and additional hazards were apparent. The Fire Department deemed the risk of fire to be at an unacceptable level.

[21] On June 15, 2018, on the basis of the June 14, 2018 fire and life safety inspection, a second order was issued pursuant to s. 22 of the *Fire Services Act* (the "June 15 Order"). This Order demanded immediate compliance with the remediation of the identified fire hazards at the Encampment. Ms. Brett refused to accept service of the June 15 Order. Assistant Deputy Fire Chief Brock Hanson observed an individual smoking in the Encampment.

[22] On June 28, 2018, the Fire Department attended the Encampment and observed a further escalation of fire and life safety hazards, including:

a) a generator in close proximity to a tent and tarps;

b) charged extension cords;

c) clusters of tents with overlying tarps;

d) numerous wooden pallets being used to enhance tents;

e) a multi-level tent structure bolstered by wooden items;

f) occupants smoking cigarettes;

g) containers of fuel, including cylinders of propane stored near a tent;

h) cooking appliances in tents; and

i) occupants cooking with propane inside tents.

Tarps overhanging multiple tents can contain heat and smoke, and can constitute a bridge between tents, facilitating the rapid spread of fire.

[23] On June 29, 2018, Chief Michael Burgess, in his capacity as a local assistant to the Provincial Fire Commissioner, issued an Order to the Mayor of Saanich pursuant to s. 22 of the *Fire Services Act* (the "June 29 Fire Order") with respect to fire and life safety at the Encampment.

[24] On July 3, 2018, the Saanich Fire Department served the Province, as owner or occupier of the Provincial Land, with an order under s. 22 of the *Fire Services Act,* ordering the Province to take steps to reduce or eliminate the fire hazards resulting from the defendants' occupation of the Provincial Land (the "July 3 Fire Order"). There is evidence that fires on highways are a common occurrence during warm and dry weather. Many fires on highways are caused by cigarette butts thrown from vehicles or broken glass reflecting the sun. Fire Department witnesses testified that such fires can spread extremely quickly, some doubling in size every 30 seconds.

[25] Throughout early July 2018, employees of the Province attempted to reduce or eliminate the fire hazards resulting from the occupation of the Provincial Land but

the defendants refused, failed, or were unwilling to comply or assist in achieving compliance with the July 3 Fire Order.

[26] On August 13, 2018, as part of an adjournment application in relation to the motion now before me, Madam Justice Power ordered that the defendants comply with the terms of the June 29 and July 3 Fire Orders within 72 hours. To date, the terms of this court order have not been complied with, notwithstanding that the Fire Danger Rating for the area including the Encampment has ranged from “high” to “extreme” in recent weeks.

Highway Safety

[27] The Ministry of Transportation and Infrastructure is responsible for administering public highways and related lands throughout British Columbia, including the Road Dedication. The British Columbia Transportation Financing Authority (“BCTFA”) owns certain parcels of land located within or adjacent to the Road Dedication.

[28] The segment of the Trans-Canada Highway adjacent to the Road Dedication is a major point of entry and exit to and from Victoria. Tens of thousands of vehicles travel on this stretch of highway each day.

[29] Approximately 22% of serious collisions (i.e., those resulting in fatality or injury) on provincial public highways in British Columbia result from roadway departures from the right side of the roadway, where the Encampment is located.

[30] The Province says that the presence of the Encampment in proximity to the Trans-Canada Highway poses a number of significant traffic safety concerns, including:

a) as noted, the presence of campers in proximity to a highway is hazardous because vehicles can leave the roadway and encroach onto the roadside;

b) the presence of the Encampment can cause pedestrians to cross in non-designated crossings, which can lead to serious injuries to both pedestrians and motorists;

c) the presence of the Encampment upon the Road Dedication may distract drivers and thereby increase the risk of motor vehicle accidents on the highway;

d) tents cannot withstand the impact of a motor vehicle regardless of the speed it is travelling; and

e) the Encampment results in a large number of people engaging in unpredictable activities, which exacerbates highway safety dangers.

[31] On July 11, 2018, members of the Province's highway safety engineering staff undertook a safety assessment and concluded that there were highway safety risks associated with the Encampment.

[32] On July 17, 2018, the Province served a Notice of Unauthorized Use and Occupation upon the defendants.

[33] On July 26, 2018, the Province served a Notice of Trespass on the persons maintaining the Encampment.

Other Issues

[34] The plaintiffs say that there have been other disruptive activities, including:

a) impeding and preventing members of the public from using Regina Park or traversing the Provincial Land;

b) depositing garbage, refuse and debris in the neighbourhood around the Encampment, including biohazardous materials such as needles and syringes; and

c) engaging in criminal activity in the neighbourhood surrounding the Encampment.

The Housing Situation

[35] The parties agree that the Capital Regional District has a significant homeless population. Saanich admits that it has sought provincial assistance to make sufficient and suitable housing available, including for homeless people like those residing at the Encampment.

[36] The Province also says that it has made, and is making, efforts to meet housing needs and address homelessness in British Columbia, including through: the Homelessness Modular Housing Program, the Homeless Prevention Program, the Extreme Weather Response Program, the Community Housing Fund, and the development of the Homeless Action Plan. The Province says that it is also making investments in prevention and rehabilitation opportunities for people at risk of experiencing homelessness in the Capital Region, including: funding grants to “Our Place” Society’s Therapeutic Recovery Community program and the purchasing of Woodwyn Farms to provide therapeutic day programs for people in supportive housing throughout the Capital Region.

[37] More specifically relating to Saanich and the Encampment:

a) There are several recently completed housing projects in Saanich, and several more completed and announced in the Capital Region.

b) BC Housing and its partners in Southern Vancouver Island have developed the Housing Action Response Team (“HART”). HART is an integrated outreach team that offers support and information to homeless individuals within the community who are not in shelters and who are staying in parks and on the street.

c) HART members have attended the Encampment on a weekly basis. Members of HART have focused on the immediate needs of the campers and on assisting campers in applying for housing and other social

> services. These efforts have resulted in one person being placed into housing; four individuals being identified for subsidized housing; two individuals being triaged into supportive housing; and four people being identified as good candidates for rent supplements.

[38] The defendants say that many Residents have sought to access shelter options in the Capital Regional District but have been unable to do so either because the facility was full or the resident did not meet eligibility criteria.

[39] While this evidence is certainly of concern, it is important to recall, as noted earlier, that Saanich has already amended its bylaw to allow temporary shelter overnight in this particular park, as well as many other parks.

II. LEGAL FRAMEWORK

[40] The parties agree that, given that the constitutional validity of the enactments underlying the legal right to seek an injunction is being challenged, the appropriate test to be applied on this request for an interlocutory injunction is the *RJR-MacDonald* test.

[41] In *RJR-MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311, the Supreme Court of Canada established a comprehensive approach to injunctive relief of all kinds and specifically discussed applications for relief in the context of *Charter* applications, building on the framework established in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd*., [1987] 1 S.C.R. 110. The Court affirmed the following three-part test for considering an application for an interlocutory injunction at p. 334:

> 1. Is there a serious question to be tried?
>
> 2. Will the applicant suffer irreparable harm if an application is not granted?
>
> 3. Does the balance of convenience favour the granting of the remedy?

[42] The Supreme Court also concluded that “the same principles would apply when a government authority is the applicant in a motion for interlocutory relief” (p.

349). The Court went on to summarize how the public interest should be considered at p. 349:

> … the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

[43] There have been a series of what have been called “tent city cases” in British Columbia in recent years. It is useful to briefly review the key cases in this series in order to extract the various factors that should be considered in the instant case.

***Vancouver Board of Parks and Recreation v. Mickelson*, 2003 BCSC 1271**

[44] The plaintiff made an application for an interlocutory mandatory injunction restraining the erection of tents and requiring removal of tents in Thornton Park. The residents of the tent city were homeless and stated that they had no other place to live. The plaintiff based its claim for the injunction on the respondent’s contravention of a municipal bylaw. The bylaw prohibited the erection of any tents in parks without the Board’s permission.

[45] The plaintiff argued that it was statutorily entitled to an injunction. The defendant argued that the court should consider its allegations of violations of the group's rights to free expression, free association, fundamental justice and equality in considering whether there was a triable issue upon which to base the injunction.

[46] The court allowed the application in part. The Board did have the right to seek an injunction to prevent the continuance of an offence against the parks bylaw.

[47] The defendant’s claim that the bylaw offended his freedom of expression or association did not raise a serious question to be tried. The strength of the constitutional claims were considered in determining whether the balance of convenience favoured granting the injunction.

[48] The court held that even if claims under ss. 7 and 15 of the *Charter* were engaged, this did not tip the balance of convenience in the defendant's favour. In these circumstances, the public interest was afforded precedence. The court did note that an interim injunction did not amount to a final disposition of the defendant's claims.

***Vancouver Board of Parks and Recreation v. Sterritt,* 2003 BCSC 1421**

[49] The court granted an interlocutory injunction against the defendants residing in Portside Park. The court accepted that the encampment was orderly and clean, and that a sense of community had developed. The court also noted the increased security created by such communities. Nonetheless, the court concluded that "the public interest in enforcement of laws existing and enacted for the public good generally outweighs the interest of individuals who challenge the law on the basis of the constitution or other bases" (para 5). The court did allow the residents 48 hours to collect and remove their possessions.

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

[50] The City of Victoria made an application for an injunction to remove a "tent city" at Cridge Park, relying on its Parks Regulation Bylaw and Streets and Traffic Bylaw, which prohibited loitering and taking up a temporary abode overnight.

[51] An interim injunction was granted, but with an end date 10 months hence in order to ensure that the city had sufficient incentive to move forward with its application for a permanent injunction with dispatch.

[52] At trial, the court declined to grant a permanent injunction: 2008 BCSC 1363.

[53] On appeal, the Court of Appeal agreed that the bylaws violated s. 7 of the *Charter* "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 the provisions were not saved by s. 1 of the *Charter* (para. 42). The Court of Appeal declared that the bylaw sections were inoperative insofar and only insofar as they applied to prevent homeless people from erecting temporary overnight shelter

in parks when the number of homeless people in need of shelter in the City of Victoria exceeded the number of available shelter beds.

[54] The Court of Appeal confirmed the trial judge's conclusions that the bylaw was overbroad, stating at para. 116 that:

> … 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.

[55] The Court of Appeal did allow the appeal to the extent of varying the order to allow the City to apply to the Supreme Court for a termination of the declaration if it could demonstrate that the conditions that made the Parks Regulation Bylaw unconstitutional ceased to exist.

***Johnston v. Victoria (City)*, 2011 BCCA 400**

[56] A tent city was erected during daytime hours and the appellants had ignored written warnings issued by the City of Victoria. The City issued Offence Notices to each of the appellants. After their convictions (and the Court of Appeal decision in *Adams)*, the City amended its bylaw to allow persons to erect temporary shelters at night.

[57] In the trial court decision (2010 BCSC 1707), the appellants applied to set aside their convictions, arguing that the *Adams* decision did not allow for their s. 7 rights to be limited by restricting the right to night-time hours. The trial judge found that the amended bylaw imposed a reasonable limit upon the rights of homeless people in Victoria within the ambit of s. 1 of the *Charter* and the appeal was dismissed (paras. 63-65).

[58] On appeal, the Court of Appeal stated at para. 13:

> [13] In my view, the effect of *Adams* was to prevent interference with the efforts of the homeless in sheltering themselves at night on City property. That does not set up a presumed s. 7 breach for daytime regulation.

[59] The Court of Appeal found that *Adams* was "confined to the night-time problem" and that "[c]onsequently, the appellant failed to establish a breach of s. 7" (para. 16). The Court of Appeal dismissed the appeal based on the fact that the appellant did not advance a viable *Charter* defence (para. 18).

***Vancouver (City) v. O'Flynn-Magee*, 2011 BCSC 1647**

[60] The court granted the interlocutory injunction in this case involving the occupation of the Vancouver Art Gallery lands by the "Occupy Movement". The court found:

> [65] I agree the balance of convenience favours the City. The City has a right to regulate the use of its land, including the type and length of use of public lands. The defendants have chosen to protest at the Art Gallery Lands, but it is in the public interest to allow a variety of users access to public lands. Although Occupy Vancouver may not intend to exclude other groups, the very nature of its protest by the positioning of tents throughout the entire north plaza prevents others from using this public space.
>
> [66] The City has an obligation to regulate city lands to maintain safety. It is liable for the activities which occur on city lands. Therefore, it must have control over those lands. There are significant health and safety concerns at the site. There have been drug overdoses, an assault of a police officer and other concerns.
>
> [67] I cannot accept the defendants' argument that it is clear from *Adams* that the by-law at issue here is "evidently unconstitutional" or "constitutionally suspect". In *Adams*, the court did not strike down the by-law; rather it crafted an order that rendered certain provisions of the by-law inoperable in specific circumstances to allow for temporary shelter during the night hours only (*Adams* at para. 166).

***The Corporation of the City of Victoria v. Thompson*, 2011 BCSC 1810**

[61] This was an application by the City of Victoria for an interlocutory injunction requiring protesters to remove tents that they had set up in Centennial Square. The City submitted that the encampment contravened the provisions of its Parks Regulations Bylaw, which required prior authorization to hold rallies and demonstrations in public parks and prohibited overnight camping in parks, except for time-limited camping by homeless persons. The City further claimed that the encampment posed health and safety hazards. The protesters argued that the

injunction should not be granted because the bylaw violated their *Charter* right to freedom of expression.

[62] The application for an injunction was allowed. It was not open to the application judge to declare the bylaw invalid at this stage as the required notices under the *Constitutional Question Act* had not been given. While some of the protesters were homeless persons, both the ongoing presence of the tents and their location in areas that had been designated for other civic activities removed them from the exemption allowing overnight camping by homeless persons, provided by s. 16(a) of the relevant bylaw.

[63] The court found that there was a serious question to be tried and the City would have suffered irreparable harm if the injunction were not granted. There was no amount of damages that could compensate the City for its inability to use the square for the general public good for as long as the encampment continued. The square was used for a variety of other activities such as an outdoor ice rink and a holiday display. The manner of the protest unjustly gave the protesters the sole decision about how significant portions of public space were to be utilized. The benefit to the public of the City being able to allocate the use of its space according to its broad mandate substantially outweighed whatever benefits might accrue to the public from the ongoing dialogue and engagement with it that the protesters made possible. The balance of convenience dictated that the City was to be free to come to the conclusion that any encampment, wherever and however situated in the square, was not in keeping with the best public use of that space under its delegated legislative powers.

> ***Abbotsford (City) v. Shantz,* 2013 BCSC 2426 [*Shantz #1*];**
> **Abbotsford (City) v. *Shantz*, 2013 BCSC 2612 [*Shantz #2*];**
> **2014 BCSC 2385 [*Shantz #3*]; 2015 BCSC 1909 [*Shantz #4*]**

[64] In this case, the court first heard an application by the City of Abbotsford for an interim injunction requiring the defendants to remove themselves and their encampment from a city park.

[65] The court acknowledged the case raised difficult issues as the defendants were marginalized members of the community with drug and alcohol as well as mental health issues. However, after applying the *RJR-MacDonald* test, the court granted the interim injunction (*Shantz #1*). The injunction was then extended a week later (*Shantz #2*). An application to set aside the injunction based on a concern about the timeliness of getting the matter to trial was dismissed (*Shantz #3)*. Finally, the matter was fully considered on a request for a permanent injunction (*Shantz #4*). This decision also considered a separate claim by a homeless advocacy society for a declaration that portions of the City's bylaws should be found unconstitutional.

[66] The court concluded that the bylaws were not arbitrary because the “City has at least a reasonable apprehension that harm will flow from the unregulated use of public property” (*Shantz #4* at para. 199). However, the court found that the bylaws were overbroad because they “deny the City's homeless overnight access to public spaces without permits and prevent them from erecting temporary shelters without permits” (para. 203). The court also found that the bylaws were grossly disproportionate because:

> [224] … the effect of denying the City's homeless access to public spaces without permits and not permitting them to erect temporary shelters without permits is grossly disproportionate to any benefit that the City might derive from furthering its objectives and breaches the s. 7 *Charter* rights of the City's homeless.

[67] While the court accepted that the bylaws had a pressing and substantial objective and that the means of regulation were rationally connected to that objective, the court found that the bylaws failed to minimally impair the homeless society members’ s. 7 rights and lacked proportionality between the benefits and the burdens of the effects of those regulations as they “do almost nothing to accommodate the City’s homeless’ s. 7 freedoms and rights” (*Shantz #4* at para. 247). Therefore, the City failed to justify the infringement of the s. 7 rights of the City’s homeless and the court declined to order the permanent injunctive relief sought by the City (para. 258). The court also concluded that a permanent injunction would be overly vague as its “language means that it could apply to an overly broad,

unspecific group of people and an equally wide ranging spectrum of activity" (para. 259).

[68] However, the court was not prepared to make the broad declarations sought by the homeless society:

> [270] In my view, the broad declaration sought by DWS with respect to the right to the "basic necessities of life" would be to effectively read in substantive rights under the *Charter* and thus usurp the role of legislative branch.
>
> [271] The obligation to provide housing for the homeless, if it exists, is not a burden that the City must discharge in these proceedings. I therefore decline to make a declaration that the rights of the City's homeless to exist and obtain basic necessities of life, and dismiss the application for such a declaration. As I have explained above, I am unable to accept that an infringement of any of DWS' members' s. 15 Charter rights has been made out. I therefore decline as well to make the s. 24(1) declaration sought that Impugned Bylaws and/or the actions of the City in enforcing the Impugned Bylaws and in engaging in the Displacement Tactics, constitute discrimination under s. 15 of the *Charter*, based on mental disability, physical disability, race, national original, ethnic origin, colour and/or homelessness.
>
> …
>
> [276] I conclude that allowing the City's homeless to set up shelters overnight while taking them down during the day would reasonably balance the needs of the homeless and the rights of other residents of the City. The evidence shows, however, that there is a legitimate need for people to shelter and rest during the day and no indoor shelter in which to do so. A minimally impairing response to balancing that need with the interests of other users of developed parks would be to allow overnight shelters to be erected in public spaces between 7:00 p.m. and 9:00 a.m. the following day.

***Vancouver Board of Parks and Recreation v. Williams*, 2014 BCSC 1926**

[69] Justice Duncan heard an application by the Park Board for an interlocutory injunction requiring the defendants to comply with a by-law regulating access to public parks. The Park Board wanted all tents and other structures removed from Oppenheimer Park. The court noted that a number of public events had to be cancelled because of the presence of structures in the park. The court also found at para. 9 that the encampment was replete with fire hazards, including:

a) candles inside tents;

b) smoking inside tents or temporary structures;

c) ceremonial fires in the vicinity of flammable objects;

d) other instances of open flames; and

e) a volume of combustible materials near possible ignition sources.

[70] The court granted an interim injunction requiring the defendants to remove all tents and other structures from the park on certain terms.

***British Columbia v. Adamson*, 2016 BCSC 584 [*Adamson #1*] and 2016 BCSC 1245 [*Adamson #2*]**

[71] This was an application by the Province for an interlocutory injunction restraining defendant residents of a homeless encampment from trespassing on the Victoria courthouse green space.

[72] The Province based its claim for an interlocutory injunction on the alleged interference with court access, the effects of the tent city that amounted to public nuisance and breaches of the public law, or in the alternative, the Province's rights as landowner. Notably, on the first application, the court concluded that the evidence of the conditions at the encampment did not show that the residents were at an increased health risk (*Adamson* #2 at para. 26). The court found that it could not resolve the differences in the evidence as to the extent of the fire safety risks and that there was evidence that the residents were taking steps to address the fire risk concerns (*Adamson #2* at para. 30).

[73] On the first application, the court concluded that the balance of convenience did not favour the granting of the injunction:

> [183] Ultimately, in determining whether or not to grant an interim injunction at this time, I find that the balance of convenience is overwhelmingly in favour of the defendants, who simply have nowhere to move to, if the injunction were to issue, other than shelters that are incapable of meeting the needs of some of them, or will result in their constant disruption and a perpetuation of a relentless series of daily moves to the streets, doorways, and parks of the City of Victoria.
>
> [184] … [M]any of the homeless cannot access those spaces which do exist for variety of reasons. While the new options provided by the Province

> address some of the identified barriers, they do not make the spaces available to everyone. …
>
> [185] Further, I am not satisfied on the evidence before me that many of the problems alleged by the plaintiffs are the unique result of the existence of the Encampment, and are not simply part of the reality of homelessness. If I were to issue the injunction at this point, I am concerned that the problems would simply migrate to other areas in the City of Victoria.
>
> [186] An injunction at this juncture may well cause greater disruption to the public and greater expense to the City of Victoria than the disruption and expense presently endured by the Province.

[74] Later, the Province made a second application for interim injunctive relief ("*Adamson #2*"). There was new evidence of deterioration of conditions at the encampment as well as evidence of a commitment by the Province to make housing available for those presently living at the tent city.

[75] The court re-analyzed the balance of convenience and found that an injunction was now supported:

> [83] I have come to the conclusion that the Encampment is unsafe for those living there…. The residents of the Encampment can no longer remain where they are pending the trial of the plaintiffs' action against them, and the Encampment must be closed. That said, I accept that I must still address the balance of convenience. To accommodate that balance, the residents of the Encampment must leave the Encampment as soon as the housing being made available by the Province is available.

[76] The court made an order at paras. 85-86, requiring the encampment to be cleared but with occupants being allowed to stay until housing was made available to them.

***Vancouver (City) v. Wallstam*, 2017 BCSC 937**

[77] This was an application by the City of Vancouver for an interlocutory injunction requiring occupants of a tent city to vacate and remove all tents and other structures from the site. Justice Sharma noted at paras. 45-47:

> [45] … [T]he application before me differs from other cases where a court has granted an injunction to remove a tent city. Here, the applicant (the City) is not seeking the injunction because of concerns about the health or safety of any of the occupants, or members of the public. … Instead, the tent city is set up on a vacant lot owned by the City. …

> [46] The test requires that the *applicant* prove *it will suffer irreparable harm* if the injunction is not granted…When I asked counsel what harm the *City* would suffer if the injunction was not granted, he answered that not granting the injunction would mean that a "vital social housing project won't go ahead" and that interferes with the public good. He also points out the timeline for development of the project requires the injunction urgently.
>
> [47] <u>While everyone can agree that more social housing is an important goal, I must balance that general concern against the position of the occupants that the tent city, as it currently exists, is now providing shelter and safe living space for the occupants</u>. …
>
> [Italic emphasis in original; underline emphasis added.]

[78] After reviewing the City's evidence, and remarking on its weaknesses, the court found that the City failed to meet the second and third branches of the *RJR-MacDonald* test and dismissed the City's application but without prejudice to bring it forward again on a more complete factual record (para. 64).

***Duncan (City) v. Brett* (18 April 2017), Duncan 17664 (B.C.S.C.)**

[79] This case involved an unauthorized tent encampment in a park in the City of Duncan. By an order made on April 18, 2017, Mr. Justice MacKenzie declared that Ms. Brett and others were breaching Duncan's Parks Bylaw and issued an injunction prohibiting any encampment within Duncan except in accordance with Duncan's bylaws. There are no published reasons.

III. ANALYSIS

[80] Guided by the legal framework yielded by this review, we can now apply the three-part *RJR MacDonald* test to the facts in this case:

Serious Question to be Tried

[81] The plaintiffs support their right to an injunction by relying on:

a) the breach of the Saanich bylaw preventing daytime residence in public parks;

b) the breach of s. 62(1) of the *Transportation Act*;

c) the breach of the statutory orders issued under s. 22 of the *Fire Services Act*; and

d) the interference in their ability to comply with their duty to maintain a safe environment pursuant to s. 3 of the *Occupiers Liability Act*, R.S.B.C. 1996, c. 337.

[82] The Province also relies on the *Trespass Act,* R.S.B.C. 1996, c. 462, and public and private nuisance.

[83] The requirement that there be a serious issue to be tried does not set a high bar. Courts are not required to engage in an extensive review of the merits of the action.

[84] The defendants do not contest that this aspect of the test is met, although they say they have strong defences to each of these claims. The defendants accept that the strength of their defences is more appropriately considered as part of the balance of convenience test below. I note that this would seem to be the proper approach pursuant to the comments of McLachlin J.A., as she then was, in *British Columbia (Attorney General) v. Wale* (1986), 9 B.C.L.R. (2d) 333 (C.A.) at p. 346:

> One factor which may assist the court in assessing where the balance of convenience lies when the parties' interests are relatively evenly balanced is the fact that one side bases his claim on existing rights, while enforcement of the other's rights would change the *status quo.* To put it another way, where the only effect of an injunction is to postpone the date upon which a person is able to embark on a course of action not previously open to him, it is a counsel of prudence to preserve the status quo *Pac. Northwest Ent. Inc.. v. Downs & Assoc. Ltd.* (1982), 42 B.C.L.R. 126, 73 C.P.R. (2d) 159 (C.A.). Another factor which may be considered at this stage is the strength of the applicant's case. Finally, there may be special factors to be considered in the particular circumstances of the case.
>
> [Emphasis added.]

Irreparable Harm

[85] Irreparable harm was described in *RJR-MacDonald* at p. 341 as:

> It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.

[86] This requirement is not contested. On this requirement, the Province submits:

a) The Attorney General of British Columbia, as protector of public rights and custodian of the public interest, does not have to show that irreparable harm will result if the injunction is not granted: *Ontario (Attorney-General) v. Bear Island Foundation* (1989), 70 O.R. (2d) 758 (S.C.)..

b) Interferences with public highways and individuals travelling upon them causes irreparable harm that cannot be compensated through damages. Damages are not an adequate or appropriate remedy when dealing with a public right: *B.C. (Attorney General of) v. Mount Currie Indian Band* (1990), 50 B.C.L.R. (2d) 145 (S.C.).

c) The public nuisance caused by the defendants cannot be later remedied by damages. The quiet use and enjoyment of the surrounding neighbourhood has been disrupted. The defendants' activities are not a mere inconvenience to the surrounding neighbourhood but pose a fire hazard and risk to property, persons, and public health.

[87] The defendants say that the Province cannot rely on *Bear Island* for the proposition that the Attorney General is immune from having to show that irreparable harm will result, given that such a principle is inconsistent with what the court has required the government to show in the cases discussed above.

[88] I agree that the case law in B.C. has not given an exemption from establishing irreparable harm in cases where the government is pursuing a statutory breach. That said, where public rights are involved, it will often be far simpler to establish that this test is met.

[89] In *Thompson*, the court concluded:

> [66] I find Mr. Justice Pitfield's analysis of this question in *Mickelson*, in the context of the use of public space, to be most apt. Leaving aside the practical ability of members of the respondent group to pay meaningful damages, there is no amount of damages that can compensate the petitioner for its inability to use the square for the general public good, as it is required to determine that goal under its mandate, for as long as the encampment continues.
>
> [67] The manner of the protest arrogates to the respondents the sole decision about how significant portions of this public space is to be utilized and no matter how much they may cooperate with individual requests, there is no compensation possible for that loss. This ground, on balance, also favours the granting of the injunction.

[90] Applying the approach in *Thompson* and *Adamson #1*, I conclude that this aspect of the test has been made out. At a minimum, the plaintiffs have shown the following irreparable interferences with public rights:

a) prevention of the ability to use the park for dog walking and public passage; and

b) interference with the natural green belt views of the neighbouring residential properties.

Balance of Convenience

[91] This is the key aspect of the test and is hotly contested.

Factors Weighing in Favour of the Injunction

[92] I find that the following factors weigh in favour of the injunction, although in varying degrees. I discuss each of these further below:

a) the relative strength of the parties' positions;

b) the restrictions on use of the park;

c) the serious and unremediated fire risks;

d) the breach of the *Transportation Act*;

e) other health concerns;

f) the substantial costs that are being incurred to monitor safety and security conditions at the Encampment; and

g) the security risks posed to neighbouring properties and persons.

Relative Strength of the Arguments

[93] Although the court's role in assessing the underlying merits of the case on an interlocutory application is extremely limited, the court is entitled to consider whether the suspension of the applicable legislation could be expected to provide a public benefit (*Thompson* at paras. 47-49). This assessment is guided, at least in part, by the strength of the defendants' *Charter* defence, given the extent to which the *Charter* reflects an appropriate balancing of the public's varying interests.

[94] Here, there is doubt as to the strength of the proposed *Charter* defence. I emphasize that this present review is limited, given the early stage of the proceeding and the limited array of evidence available on this application.

[95] However, a review of the case law provides some guidance. To begin, the court stated in *Mickelson* that:

> [28] The defendants say that s. 11 of the Parks Control By-Law offends their freedom of expression under s. 2(b) and their freedom of association under s. 2(d) of the *Charter*. In my opinion, neither claim raises a serious question to be tried.
>
> [29] Section 11 is directed at tents and structures. It does not prohibit the assembly of individuals in the park. It does not infringe the rights of the defendants to associate with one another in the park. The prohibition against the erection of tents and structures in the park does not impinge on anyone's freedom of expression. It cannot be said that tents and structures are necessary, in any manner whatever, to the defendants' freedom to associate in the park for whatever lawful purpose they consider appropriate nor to express their views, in the park, on any issue of concern to them.
>
> [30] The defendants also claim that s. 11 deprives them of their right to security of their person otherwise than in accordance with the principles of fundamental justice and therefore contravenes s. 7 of the *Charter of Rights and Freedoms*. The claim is based on the fact that the defendants, Messrs. Mickelson and Zimmerman, and Messrs. Li and Fiddler who are not named personally as defendants, depose that they are homeless with no place to reside other than on land managed and controlled by the Parks Board. Their claim to a violation of their s. 7 right is advanced in conjunction with the claim that the by-law is discriminatory because it affects the homeless and therefore violates equality rights under s. 15 of the *Charter*.

> [31] I observe that the evidence before me on this application indicates that persons other than those in respect of whom the term "homeless" might be apt [sic] have erected tents or other structures in apparent contravention of s. 11 of the Parks Control By-Law. The by-law applies to those individuals as much as it does to those who resort to the park because they have nowhere else to live. There is nothing to suggest that s. 11 of the by-law is directed at any particular individual, homeless or otherwise, rather than being directed to regulating the erection of structures including tents by anyone on park land. There is no evidence that the Parks Board has any responsibility to provide shelter for the homeless or anyone else or that it should in any way be constrained in its ability to manage and control parks for the benefit of all citizens.
>
> [32] I have considerable doubt that constitutional rights conferred by ss. 7 and 15 of the *Charter of Rights and Freedoms* are engaged in the present circumstances, but I am prepared to assume, without deciding, that such rights might be engaged in their defence. I will take the assertion of those rights into account in the assessment of the balance of convenience.
>
> [33] Absent the suggestion that constitutional defences might be available to the defendants, the balance of convenience very much favours the Parks Board. …
>
> [Emphasis added.]

[96] From *Adams*, we receive the following guidance:

> [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.
>
> …
>
> [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.
>
> [Emphasis added.]

[97] In *Thompson*, the court stated:

> [57] With respect to the first test, whether there is a serious question to be tried, I must apply, as *RJR - MacDonald* directs, common sense and an

extremely limited view of the case on its merits. As I have said earlier, the breach of the bylaw by the respondents is self-evident. …

[62] Keeping in mind the difficulty of predicting outcomes in *Charter* litigation, I think that notwithstanding the inventive arguments advanced on behalf of the respondents, the petitioner has presented, at the very least, a serious question to be tried. It must be kept in mind that in striking down the bylaw in *Zhang*, the court specifically stated that the City was not precluded from prohibiting the kind of structures erected by the appellants if it saw fit to do so in a manner that is constitutionally sound.

[63] Such inquiries are, by their very nature, extremely fact specific. A vigil by a single person in a meditation hut next to a sidewalk regulated by a traffic bylaw raises very different concerns than those posed by a significant, ongoing tent encampment in a public square that is regulated by a park use bylaw. It seems likely that this ground will be resolved as Mr. Justice Pitfield did in *Mickelson*, but even giving the respondents' argument its maximum potential weight, it is not, in my view, viable enough at this stage to displace the clear merits of the petitioner's case.

[Emphasis added.]

[98] In *Johnston*, the Court of Appeal stated:

[13] In my view, the effect of Adams was to prevent interference with the efforts of the homeless in sheltering themselves at night on City property. That does not set up a presumed s. 7 breach for daytime regulation.

[14] The appellant says that he did not have to prove either the need for daytime shelters or their lack of availability; the onus was on the respondent to justify its breach and it failed to do so. When asked how s. 7 is engaged by the daytime problem, he advanced a proposition based on human dignity. According to this theory, restricting homeless persons from erecting their own dwellings inflicts an indignity upon them and implicates life, liberty and security of the person.

[15] With respect, I am unable to give effect to either of these points.

[16] On the facts, this case never got beyond the breach stage. *Adams* is confined to the night-time problem. What little evidence there is about daytime shelter beds will not support the appellant's claim of necessity. Consequently the appellant failed to establish a breach of s. 7.

[17] As to the alleged affront to human dignity, more than a bare statement of the theory is required to take it seriously. Such a submission should be supported by social science and proof of facts demonstrating the harm alleged. There is nothing like that in this case.

[18] Since the appellant advanced no viable *Charter* defence there is no basis on which to disturb the convictions and I would accordingly dismiss the appeal.

[Emphasis added.]

[99] In *Shantz #4*, Chief Justice Hinkson considered and declined to identify a right to daytime shelter on public land, concluding as follows:

> [274] The evidence about the Gladys Avenue Camp satisfies me that it is unsafe for the homeless and other residents of the City to permit any sustained occupation of a particular space by the homeless. The sustained presence of the homeless at the Gladys Avenue Camp has resulted in the accumulation of between 100 and 500 used syringes in a matter of days, human feces and rotting garbage left throughout the encampment, the presence of rats, and violence and criminal activity following the establishment of the encampment.
>
> …
>
> [276] I conclude that allowing the City's homeless to set up shelters overnight while taking them down during the day would reasonably balance the needs of the homeless and the rights of other residents of the City. The evidence shows, however, that there is a legitimate need for people to shelter and rest during the day and no indoor shelter in which to do so. A minimally impairing response to balancing that need with the interests of other users of developed parks would be to allow overnight shelters to be erected in public spaces between 7:00 p.m. and 9:00 a.m. the following day.
>
> [Emphasis added.]

[100] In this case, Saanich's amended bylaw now in place precisely matches the timeframes recommended by the Chief Justice in *Shantz #4*. The new bylaw allows the use of Regina Park for shelter in the evenings, as well as the option of using 101 other parks for this purpose.

[101] Sleeping in parks is obviously not an ideal solution to the homelessness problem. The community, service access and safety benefits of the Encampment could presumably be better achieved within more permanent housing. The plaintiffs do not claim that they could presently provide a suitable bed for each Resident. That said, the plaintiffs do provide evidence that they are taking material steps towards the provision of better housing and services for the homeless in the Capital Region. Much more needs to be done, but more is being done. Specifically:

a) As of 2017 there was supportive housing in Saanich in the form of 2,849 BC Housing Social Housing Units and 351 Baseline Units. There were also 2,481 affordable student and family housing units in Saanich at the University of Victoria.

b) Saanich has three “first stage” housing facilities offering 99 supportive housing units.

c) There are “second-stage” resource providers in Saanich, offering assistance such as advances of funds to cover residential rental payments in order to mitigate some of the factors associated with homelessness. This resource relates to an additional 2,310 housing units.

d) HART has been making regular visits to the Encampment to work with certain individuals to help locate better housing options. HART is designed to provide a friendly, informed, supportive, and nonjudgmental approach to homeless individuals. Currently, there are approximately 12 people at the Encampment receiving services from the HART team.

e) BC Housing anticipates that approximately 20-25 new units will be made available at Mt. Edwards Court for persons who are 55 years of age and older and who meet other applicable criteria. BC Housing is also facilitating 21 new modular units on its property for Indigenous women, which are anticipated to open in the spring of 2019.

f) There is a Southern Island Outreach Services (“SIOS”) team attending at the Encampment in an effort to ensure that Residents are aware of all the other government services available to them.

[102] Some Residents have advised BC Housing officials that they prefer camping outdoors in the summer. Saanich’s bylaw is such that Residents will be welcome to use Regina Park during the day, even as a single community, so long as its bylaws or orders are otherwise respected. Saanich has provided storage and hygiene facilities that can be used during the day.

[103] The defendants certainly raise legitimate policy concerns:

a) the health, mental illness, addiction, isolation and trauma challenges facing the homeless;

b) the negative effects of constant displacement;

c) the lack of access to private spaces;

d) the challenges in accessing justice;

e) the benefits of the sense of community that can be built living in closer proximity with others facing similar challenges; and

f) the greater security gained by living in a community that can share responsibility for guarding each other's property.

[104] However, these challenges and benefits were also extant in most of the other cases discussed above.

[105] The defendants did raise a factual basis on which they intend to argue that this situation is distinguishable from the case law discussed above, that being the nature of this particular park. The defendants note the plaintiffs' concession that this is not a high intensity use park. There are no scheduled events that occur in the park. There are no facilities. Its use is limited. It is described as "an undeveloped neighbourhood park consisting of an open grassy field, bordered and spotted with trees and shrubs, which does not contain any permanent buildings or structures." As such, the defendants suggest that a new court considering these unique facts might draw the line required for s. 7 or s. 1 compliance in a different place than in *Shantz #4*.

[106] The defendants note that in *Shantz #4*, the court referred to its recommended timeframe being appropriate for a "developed park". They argue that a different legal regime may be appropriate for an "undeveloped park" such as this one. They say there is potential support for this argument at para. 278, where the court stated:

> [278] Distinguishing non-developed parks and other public spaces from developed parks may allow the City to legislate areas where more than overnight camping is permitted. A balanced and minimally impairing approach would take into consideration the proximity of such spaces to services for the City's homeless and whether certain areas should be designated as environmentally sensitive, while ensuring that space exists in which the City's

> homeless can sleep, rest, shelter, stay warm, eat, wash and attend to personal hygiene. Whether such areas may be occupied on a consistent or rotating basis must be determined after consideration of each unique area.
>
> [Emphasis added.]

[107] The defendants also note that in *Adamson #1*, the court declined to order an injunction preventing daytime shelter even though the Province had committed to allowing use of the courthouse area for sleeping between the hours of 7:00 p.m. and 7:00 a.m., at least until the safety situation deteriorated to such an extent that an injunction was justified in *Adamson #2*. As such, the defendants say that the door has been left open by *Adamson #1* and *Shantz #4* to a finding that banning daytime shelter is not a minimally impairing restriction in the present circumstances.

[108] I note as well the comments of Madam Justice Sharma in *Wallstam*, where she stated:

> [61] I also acknowledge the City's argument that the cases thus far have been decided on the basis of a potential or real violation to s. 7 of the *Charter* when people are prohibited from having overnight shelter. The occupants here are speaking about more than shelter: they are relying on what they say is their safety and survival, which they submit can only come from having a stable place to sleep and live.
>
> [62] This may be an expanded notion of what is protected by s. 7 that has not yet been litigated, but I am unable to say that it is an issue unworthy of consideration. …

[109] I cannot say at this early stage that the defendants' factual and legal arguments are completely lacking in merit. Further, they have enough legal coherency to prevent a conclusion that the existing case law is formally binding on the outcome under principles of *stare decisis*.

[110] However, it is nonetheless clear that the defendants face a serious uphill battle, as the courts have generally applied a different approach to nighttime and daytime shelter. As such, on balance, the relative strength of the parties' arguments favours the granting of the injunction. The defendants' effort to prevent any ban on daytime shelter is sufficiently novel that it is more appropriate to keep the park free

of such shelters pending the effort to establish such a new minimally impairing standard under the *Charter*.

Impeding Public Use

[111] The Residents are not the only persons whose interests must be considered in this analysis. Access to the park by the general public has clearly been impeded (*Adamson #2* at para. 58), although this factor carries a lower weight given that the park has generally only been used for walking dogs and traversing to other areas.

Fire Safety

[112] There is evidence that the Residents and neighbours are exposed to a material risk of fire as a result of the condition of the Encampment, particularly in light of the ongoing violations of Fire Code orders (*Adams; Shantz; Williams* at paras. 9-17*; Adamson #1* at para. 108). The orders raise significant issues, including the improper use of propane tanks, the flammability of the tents and tarps, smoking, and the construction of complex wooden structures. There is already evidence of small fires having started in the Encampment as a result of smoking, which apparently had to be extinguished by Residents (*Williams* at para.11*; Adamson #2* at paras. 65-71). The risk is heightened by the amount of wooden and other flammable material piled up on the site. For example, on July 5, 2018 alone, two three-tonne truckloads of wood-based materials and two three-quarter tonne truckloads of dry grass were removed from the Encampment. As the court concluded in *Adamson #2*:

> [71] I find, as determined by the Fire Commissioner, that the residents of the Encampment and their supporters have demonstrated that they are unable to maintain appropriate fire safety standards at the Encampment, and for that reason conclude that the Encampment poses a fire safety risk to both its residents and the residents and businesses in the area of the Encampment.

[113] The defendants rely on the fact that leadership at the Encampment requested fire extinguishers, fire resistant tarps, and fire safety training, but none of these were provided. They note that fire extinguishers were available at the Encampment at issue in *Adamson #2*. They suggest that Saanich has not done all it can to reduce

the fire risk so hence cannot be seen to raise fire risk concerns as a basis for the requested injunction.

[114] There are several flaws in this argument:

a) The fire department is under no legal obligation to provide fire extinguishers or fire resistant tarps to any member of the community.

b) It is not clear whether the fire extinguishers appeared on site after the court in *Adamson #1* refused the injunction, in which case, their provision could have been viewed, at least by authorities, as making the best of a challenging situation (Adams #2 at para. 70).

c) Even with the presence of fire extinguishers, the court in *Adamson #2* found that the fire risks were a material factor in support of granting the injunction.

d) There is no evidence that fire safety training or fire resistant tarps were provided in *Adamson*. Further, in *Shantz #4*, the court stated:

> [84] The City has not enforced its bylaws for most of the last year with respect to the Gladys Avenue Camp, and indeed has provided fire safety education and garbage collection services.
>
> [85] Despite this, the evidence does not establish that the circumstances of the people at the Gladys Avenue Camp are materially better than they were at Jubilee Park. …

e) There is evidence that there was at least one fire extinguisher at the Regina Park Encampment in any event.

f) The Fire Department witnesses gave evidence that had a specific individual requested training on the proper use of fire extinguishers, it would have been provided.

g) The Fire Department's evidence is essentially that "an ounce of prevention is worth a pound of cure". In other words, their top priority was to avoid the risk of fire development, rather than trying to train the Residents on fire

suppression. Specifically, they expressed the view, which I find reasonable based on the evidence presented to me, that satisfaction of the orders would have reduced the fire risk to a level that would have been acceptable, even absent suppression training.

h) The Fire Department witnesses' evidence was that the presence of the Residents on site was sporadic and some were in very poor physical condition. As such, it would have been difficult to coordinate an effective meeting of all Residents to provide fire suppression training in any event.

[115] I find that this alleged failing on the part of the Fire Department does not materially decrease the weight that should be attributed to the fire safety concerns.

[116] At the end of the day, Residents have had months to bring the Encampment into compliance with the fire safety requirements. The items in the fire orders are measures that could have been undertaken at little or no financial cost to Residents. I am gravely concerned that a high risk of fire exists, but that the Residents collectively do not appear to be taking this risk as seriously as they should, if only for their own safety, let alone the safety of others. In particular, I am very concerned that the parties accepted that the Encampment remains in non-compliance with the fire orders notwithstanding Madam Justice Powers' own court order. This distinguishes the present facts from those in *Adamson #1*, where the court found that residents were taking steps to address fire risks (*Adamson #2* at para. 30).

Highway Risks

[117] It is not disputed that part of the Encampment rests on land reserved for highways. Given the safety concerns underlying this restriction, there is a risk to both Residents and drivers. The highway engineering evidence is that highways are designed to provide a "clear zone" beyond the travelled portion of a highway that is free of obstacles that would otherwise cause serious injuries in the event of driver errors which result in departures from the roadway. It is notable that the defendants indicated that if the broader injunction were not otherwise granted, they would at

least be prepared to consent to an injunction preventing them from occupying the area within the Road Dedication.

Other Health Risks

[118] There is some evidence of rats, garbage, urine, feces, and needles at the Encampment (*Williams* at para. 12; *Adamson #1* at paras. 100-101; *Adamson #2* at paras. 55-64). These have been partially mitigated by Saanich's provision of portable toilets and refuse cans.

Costs to the Plaintiffs

[119] There is evidence of additional and substantial municipal costs being incurred to support the Encampment, up to approximately $950,000 for the 2018 year (*Williams* at para.17; *Adamson #1* at para.112).

Safety Concerns and Criminal Activity

[120] There is some evidence of threats to local residents and plaintiff contractors from persons who appear to reside in the Encampment as well as some evidence of criminal activity being carried out by Residents (*Adamson #1* at paras. 110 and 124; *Adamson #2* at paras. 51 and 72-81). Ms. Brett acknowledged early on in the Encampment's establishment that it may attract Residents who would create an increase in drug and property crime in the area. There are known dangerous individuals with prior criminal convictions at the Encampment. There is evidence of a bicycle "chop shop" being operated out of the Encampment. There is evidence of an increase in calls to police, although this particular evidence carries restricted weight for the reasons expressed in the evidence of the defendants' witness, Dr. Jeffrey Shantz. There is evidence of drug dealing within the Encampment. There is evidence of thefts by Residents.

The Effect of the New Bylaw

[121] The defendants sought to argue that any assessment of the balance of convenience has to consider the projected marginal change in the degree of harm that would be caused by allowing daytime shelter, given that Saanich is now prepared to allow the Residents to take up nighttime shelter. With respect, this

argument rests too precariously on the head of a theoretical pin, and also smacks of engaging the maxim “no good deed goes unpunished”. I find that I am entitled to consider the state of the Encampment as is and assess the harm presently being caused, without having to engage in the near-impossible causation exercise of pulling apart what harms would nonetheless exist with nighttime shelter alone, and which harms would remain with daytime shelter. Simply put, there is evidence of harm or risk of harm, and any injunction request needs to consider this harm.

Factors Weighing Against the Granting of an Injunction

[122] The limits placed on the weight of certain factors discussed above can equally be treated as factors weighing against the granting of the injunction. Other distinct factors weighing against the requested injunction include:

a) The Residents include homeless people requiring shelter, not simply protesters (*O’Flynn-Magee; Thompson*).

b) Residents obtain greater privacy through the ability to reside within their tents at the park throughout the day.

c) Residents gain greater stability from not having to move around their possessions each day (*Shantz #4* at para. 209).

d) The Residents do have a leadership and organizational structure in place which would normally give the court some confidence that adverse impacts can be reduced (*Adamson #1* at para. 180). However, there are apparent limits to its effectiveness, which reduces the weight of this factor (*Adamson #2* at paras. 42-43).

e) There is only mild to moderate levels of evidence of public intoxication or physical fights occurring at the Encampment (*Williams*).

f) The congregation of homeless individuals allows for easier access for service providers and to drug harm mitigation facilities.

g) The Residents have developed a sense of community, and generally feel safer and more supported in proximity to one another (*Wallstam* at para. 60).

Conclusion on Balance of Convenience

[123] I conclude that the weight of the factors discussed above supports the granting of an interlocutory injunction, placing particular weight on the presence of a serious fire risk, as well as the fact that the defendants are seeking to advance the law in a new direction by directly challenging the legality of restricting daytime shelter. In this context, the most convenient and appropriate interim outcome is for:

a) the park to be restored to a safe state;

b) Residents to be allowed to use Regina Park or other parks for nighttime shelter and daytime use consistent with current bylaws; and

c) the court to be able to carefully consider the proposed advancement of the law in relation to whether daytime shelter can be restricted, with the benefit of a more complete trial record.

IV. ORDER

[124] Beyond the basic injunction, there are other particular terms that need to be addressed.

[125] This is not a case where it is appropriate to require an undertaking as to damages: *Wale* at para 61.

[126] The plaintiffs seek an order authorizing the police to enforce this Court's order. They say that the inclusion of such a clause enhances fairness by ensuring that members of the public are given clear notice of the consequences of non-compliance: *MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048 at para. 41.

[127] The defendants say that if an injunction does issue, enforcement provisions are not appropriate in this case, given that no order from the Court has been previously disregarded and no enforcement efforts have been undertaken.

[128] In *Williams*, the court declined to make such an order, stating:

> [63] The Park Board seeks enforcement clauses in the order to specifically empower the police to act on resistance or obstruction in relation to this order. The police have the authority to act on this order without such clauses. If the Park Board is of the view that enforcement clauses are necessary, counsel is at liberty to apply to appear again before this Court after 10:00 p.m. on October 15, 2014.

[129] In *Thompson*, the court also declined to issue an enforcement clause, stating:

> [74] I decline to order an enforcement clause at this time. The respondents have shown a praiseworthy degree of responsiveness to the concerns of the City and have conducted themselves in the hearing of this matter in a manner that shows a high degree of respect for the law, even when they passionately disagree with the manner in which it is sought to be applied. I am also not satisfied on the evidence that the point has been reached at which the planned public events cannot be salvaged if there is not immediate compliance. I would not grant an enforcement clause solely on that basis, in any event, without evidence in detail of a likely failure to comply.
>
> [75] If these orders are not complied with by the deadline, the petitioners may make an immediate application for an enforcement clause.

[130] Here, unfortunately the same "high degree of respect" has not been present at all times. Rather, there is evidence that:

a) Ms. Brett confirmed that the enforcement of Saanich bylaws at the Encampment would be met with resistance from occupants and indicated that Saanich would need to physically remove the occupants from the Encampment if it wished to enforce its bylaws. She is alleged to have declared that "it will not end well".

b) After being advised that smoking was not allowed at the Encampment on one particular occasion, Ms. Brett picked up a cigarette put out by another resident and lit it again.

c) Ms. Brett has spoken to Saanich Police regarding her belief that Regina Park is a traditional Aboriginal territory and that she will therefore not recognize the authority of the Police or Fire Departments with respect to the Encampment.

d) Ms. Brett has periodically declared that the Police and Fire Department may not attend the Encampment.

e) Ms. Brett refused to accept service of the June 15 Order, stating that she refused to recognize the authority of the Fire Department over fire and life safety at the Encampment and insisting that the Fire Department serve the June 15 Order on another identified Encampment occupant.

f) Residents have informed the Fire Department that they believe the Fire Department is being unreasonable with respect to their expectations regarding compliance.

g) When the issue of smoking at Regina Park was raised with Ms. Brett, she asserted that Regina Park is located on First Nations land and that the occupants were permitted to smoke for ceremonial purposes.

h) In response to Saanich's Notice to Vacate of June 8, 2018, Ms. Brett indicated that Saanich should expect a response and listed several options, including commencing a "cultural hunger strike", starting a "spirit fire", calling in support from the Elders, calling in support from "Gustafsen Lake warriors", or serving Saanich with a notice claiming Regina Park as historical Aboriginal lands. She has also threatened to bring in "warriors" in order to engage in what she referred to as a "Sun Peaks" or "Oka" scenario should the Saanich attempt to enforce its bylaws.

i) The earlier August 13, 2018 court order requiring compliance with certain fire orders has not been respected.

[131] Given this evidence, I find that an enforcement clause is justified.

[132] I have also concluded that a sunset clause is appropriate in relation to the aspect of the injunction preventing continuous occupation. These are the plaintiffs' actions and they made the strategic decision to only seek an interim injunction at this time, which carries a more forgiving test than that applicable to a permanent

injunction. The plaintiffs should not be able to short circuit a full and proper application of the test for a permanent injunction by placing a burden on the defendants to move the plaintiffs' own actions forward. An interim or interlocutory injunction has to be interim or interlocutory to something, that something being the actual hearing of the merits. The plaintiffs had the option to seek to fast-track the hearing for a permanent injunction if that was their true objective. The issues raised are sufficiently important that a full consideration should not be allowed to drift.

[133] The court has the discretion to take steps to ensure that the application for a permanent injunction is brought on a timely basis (*Mickelson* at para. 36; *Victoria (City) v. Adams,* 2008 BCSC 1363 at para. 11). Given the challenges facing our courts in terms of scheduling and the guidance provided by the *Adams* court, I set the expiry date at 10 months from today, or any other date established by further order of this Court.

[134] I also confirm that I am seized of this matter and that the parties should make best efforts to secure a trial date before me at the earliest available opportunity. The parties should also arrange at least one case planning conference before the hearing on the merits at which the following issues should be discussed:

a) whether all of the testimony and affidavit evidence admitted on this application can be used at the trial;

b) the provision of further evidence by affidavit rather than through in-court witnesses;

c) the timing of the provision of any additional expert reports;

d) the scheduling of any out-of-court examinations;

e) the use of such affidavits and examinations at trial;

f) the use of admissions and agreed statements of fact;

g) the extent to which further oral evidence at trial is necessary; and

h) the narrowing of any legal issues. In particular, the parties should consider whether it is only the minimal impairment aspect of s.1 that is in dispute or whether there will be other legal aspects that must be considered.

[135] To assist the parties, my assessment is that with a reasonable level of cooperation on the above points in terms of minimizing the extent of oral testimony required, a trial would take in the range of five to eight days. The parties may be able to prepare a more precise estimate upon formulating a “trial brief” type schedule. Obviously, if the relief sought is no longer opposed or the parties arrive at some other consent resolution, they may appear to settle the terms of the required order without the need for a trial.

[136] I also find that it is appropriate to include a “best efforts” clause in relation to Saanich’s efforts to restore Regina Park to a condition such that its new bylaw allowing overnight shelter may operate within the Park’s confines. This is particularly necessary given that I have relied heavily on the benefits of this new bylaw in my analysis of the balance of convenience. Saanich agreed during oral argument that such a term was appropriate.

[137] I note as well that the Province agreed during argument that the Other Provincial Lands outside of the Road Dedication should be treated the same as Regina Park for the purposes of allowing overnight shelter. This agreement should be incorporated into the form of order.

[138] Beyond these specific terms, all parties asked for the opportunity to discuss whether they could work out any other detailed terms driven by my reasons and I give them that opportunity. Obviously, if the parties require direction from the court on the final form of order, a case planning conference can be arranged in short order outside standard court hours.

[139] If any party is seeking costs of this application, they should be addressed at the next case planning conference as well.

DISCUSSION

[140] MR. LOCKE: That's right, My Lord. And if I could, for the record, address Saanich's plan in terms of an orderly evacuation of the property and it would give my friend, Mr. Heaney, an opportunity to remark upon that? The general concept, if agreeable to, Your Lordship, is for Saanich Police to take a soft approach with the occupants from this time forward until the September 11th at 7:00 p.m. time, to ensure that all the occupants are aware of the order and the impending time for its imposition and to encourage individuals to pack up their belongings.

[141] Saanich is going to -- by the time of the imposition of the injunction, Saanich will put construction fencing around the remainder of the unenclosed areas of Regina Park and the provincial lands to ensure that it is entirely closed off as it will shortly become a construction/remediation area.

[142] The concept is that by the time of the imposition of the injunction, individuals will be allowed out through the fence with exit points on Harriet and Regina, and not allowed back in.

[143] In terms of the material that's in the park, in thinking through the logistics of this, the concept for Saanich is to provide prepaid storage lockers from a local company called U-Pak, which will be prepaid for 30 days. And individuals in the encampment can either take with them – physically take with them out of the park, those things they want to take out of the park, and if it's too much to carry, they can use these storage lockers to put materials into.

[144] Individuals will be allowed to reclaim their possessions from U-Pak for 30 days, and after the 30 days, if the materials that are in these lockers are not claimed, they will be disposed of by U-Pak.

[145] And so what we arrive at is either individuals have taken their possessions out of the park, or they have put the – their possessions into these storage lockers. Anything left remaining in the park will then be moved out by Saanich and disposed

of, and I'm thinking it will likely consist of things like wooden pallets, furniture, empty propane tanks, these kinds of things.

[146] In terms of the remediation of the park, My Lord, we've learned a few things since last Friday. There have been discussions with the Province and specifically the Provincial person who was primarily responsible for the remediation of the courthouse property. And what Saanich has learned is that the remediation of the courthouse property required a significant amount of topsoil to be removed because it was toxic and hazardous. And additionally that there may be some WCB requirements in – that need to be met in terms of safety protocol given that in the Regina Park property, there have been sharps and other hazardous materials.

[147] So the plan as it is right now is – the thinking is that it's not likely going to be necessary to remove topsoil from Regina Park, at least on a widespread basis. So the plan right now is to move quickly with soils testing to ensure that that's done and favourable results are obtained, or a remediation program is addressed on that issue, and then move ahead exactly as Your Lordship has directed and as Saanich has committed with a – with completing the remediation as quickly as possible.

[148] THE COURT: Yes, I think that all gets at your "best efforts" term.

[149] MR. LOCKE: Understood.

[150] THE COURT: Mr. Heaney, anything you need to say in response to that? It sounds like a reasonable approach, but if you've got any concerns, let me know.

[151] MR. HEANEY: Just a couple, Your Lordship. With respect to the soft approach, I mean, I respectfully suggest to Your Lordship and my friends that in order to gain that, I see the need for the space to be delimited at the time that actual construction begins, however, I don't know that it's consistent with the approach that Saanich wants to take to say, "We must immediately surround you with snow fences or other barriers or temporary fencing at the time we're trying to gain your soft, you know, cooperation." I just don't know that that – those two are consistent. And, you know, a fencing, or delimiting of it, or, you know, a process that requires people to

go out certain areas just doesn't seem to fit their stated plan. As well, you know, it could wait until they have, you know, repossession of the site by the order, is my respectful submission so –

[152] MR. LOCKE: My Lord. There's no problem. There's no concern with that. The timing of the establishment of the fence can match up with the timing of the imposition of the injunction.

[153] MR. HEANEY: Further, My Lord, and we heard the – my friend's representations. I would say it doesn't go too far with respect to Saanich's likely disposition towards additional cans for portable storage, that it is not the practice to preclude cooking in comparable parks. And in as much as I understand Your Lordship to be attracted to this – the existence of these opportunities, or as I call it, this offer, I don't know whether Your Lordship has any direction as to best efforts to get wood chips in place, and I appreciate the comment from Your Lordship. And then even with the soil testing, I didn't hear a revised timetable by – versus two to three weeks. I think that was presented last Friday from my friend as to something that the court – Your Lordship would leave knowing the outside date.

[154] THE COURT: On the first point, I think I was relying on the defendant's ability to invoke the bylaw on its terms and I'll be available if you think they're not complying, or they're being stricter than their bylaw allows them to be during this interim period. You've got access to me to make that stop. So rather than prejudge that, the fact that I'm seized of it will hopefully serve as the control mechanism.

[155] MR. LOCKE: My Lord, on the two to three weeks, that was the ballpark estimate. I believe I qualify it on that basis, a ballpark estimate without being in the park and seeing what's on the ground, but –

[156] THE COURT: Right. And on the soils remediation, I did take you to be saying it was more of a caution i.e., "We might have to do this, but we're hoping we don't have to do this."

[157] MR. LOCKE: Precisely.

[158] THE COURT: Okay. And we won't know the outcome until the testing's done. So if you could just make sure that you keep Mr. Heaney apprised of that process, that would be helpful.

[159] MR. LOCKE: I will do so, My Lord.

[160] THE COURT: Okay.

[161] MR. RANKIN: My Lord, I'll just chime in and say that I've had some communications with Mr. Locke, and, of course, I've now heard your order and certainly the Province will be cooperating with Saanich's efforts towards remediation and demarcation of the property and so forth.

[162] THE COURT: Thank you. All right. Thank you, counsel. Again, your submissions were extremely helpful, and I look forward to working with you to take this the rest of the way to conclusion.

[163] MR. LOCKE: Thank you, My Lord.

[164] THE COURT: Thank you.

[165] MR. HEANEY: Thank you, My Lord.

[166] THE CLERK: Thank you, My Lord.

"Branch J."

_____

The Honourable Mr. Justice Branch